

Second Supplement to Memorandum 81-71

Subject: Study D-300 - Enforcement of Judgments (AB 707 and 798)

Attached to this supplement as Exhibit 1 (yellow) is a copy of amendments to Assembly Bill 707 (the proposed Enforcement of Judgments Law) proposed by the staff in response to the report of the Debtor-Creditor Committee of the State Bar Business Law Section. The Debtor-Creditor Committee report is attached as Exhibit 2. We are informed that the Committee report has been approved in this form by the Business Law Section. For the most part, the Committee approves AB 707; the following discussion primarily concerns the matters upon which there is disagreement.

§§ 697.510-697.670. Judgment lien on personal property

The Committee recommends that Section 697.530 be revised to eliminate the list of property subject to the judgment lien on personal property and instead provide that the lien attaches to property in which a security interest could be perfected by filing with the Secretary of State. (Exhibit 2, pp. 4-5.) This alternative was considered in earlier drafts, but the present scheme was adopted because it will be more informative, particularly to those who are unfamiliar with the details of the Commercial Code. The staff recommends no change in Section 697.530. It should be noted that the coverage of the judgment lien on personal property is the same as recommended by the Committee with two exceptions: (1) vehicles and vessels consisting of inventory and in which a security interest could be perfected by filing with the Secretary of State are not covered by the judgment lien (Section 697.530)(d)(1)), and (2) the judgment lien is extinguished if the property subject to the lien becomes a fixture (Section 697.530 (e)) even though in certain cases (e.g., readily removable factory or office machines as provided in Commercial Code Section 9313(4)(c)) a security interest filed with the Secretary of State would have priority over certain competing interests. It should be noted that the UCC Committee of the Business Law Section that reviewed the provisions relating to a judgment lien on personal property had no problem with the form in which Section 697.530 is drafted. See Exhibit 3 attached to the First Supplement to Memorandum 81-71.

§§ 699.510, 699.530, 699.560. Leviability of writ

The Committee suggests that a writ of execution be made leviable for a period of one year after its issuance instead of 90 days. (See Exhibit 2, p. 7.) In response to an earlier suggestion, the Commission increased this period from 90 days to 180 days. The staff believes this is sufficient and recommends no change.

§ 701.680. Repeal of statutory redemption from judicial sales

The Committee opposes the repeal of statutory redemption from judicial foreclosure sales although they approve the repeal of redemption from execution sales. (See Exhibit 2, pp. 9-16.) The essence of the Committee's argument is that the protection of the anti-deficiency statutes would be jeopardized by the repeal of the right of redemption after a judicial foreclosure sale. This is because creditors will be less inhibited in seeking deficiency judgments if the burden of waiting through a one year post-sale redemption period is removed. Under Code of Civil Procedure Section 580d, a deficiency judgment is not available after a private sale. The Committee suggests that with the removal of the inhibition of redemption, creditors will bid a lower price and get a deficiency judgment for the difference. (See Exhibit 2, p. 14.) The Commission has previously considered this argument. It was outlined in a memorandum from then Professor William D. Warren in 1974. The argument was reconsidered when comments to the Tentative Recommendation Relating to Redemption from Execution and Foreclosure Sales of Real Property (January 1978) were reviewed. At that time, Professor Edward H. Rabin raised this question. The staff recommends no change. The repeal of redemption leaves the anti-deficiency statutes in place. Code of Civil Procedure Section 726 will still provide that the amount of the deficiency judgment may not exceed the difference between the fair value of the property as of the date of sale and the amount of the indebtedness with interest and costs. It should also be remembered that AB 707 provides a delay of at least 120 days between service of the writ of sale and giving notice of sale. The burden and delay of bringing a judicial foreclosure action can also be a significant deterrent in itself. Finally, if elimination of the right of redemption after sale will have the desired effect of achieving higher prices at judicial sales, there will be fewer situations in which there is a deficiency to be collected.

At this stage, arguments for or against the repeal of statutory redemption are rather speculative. As a philosophical matter, the staff finds it disagreeable to preserve an archaic redemption procedure as an albatross around the neck of deficiency judgments, a purpose unrelated to its historical purposes. However, recognizing that reasonable people may disagree on this point, the staff suggests that if the Commission wants to retain statutory redemption in this area, consideration should be given to limiting redemption to those cases where a deficiency judgment is sought. There appears to be no compelling reason for making all foreclosing creditors suffer even the three-month redemption period applicable under Code of Civil Procedure Section 725a to cases where the sale price equals the judgment price. If the Commission decides to resurrect statutory redemption in foreclosure sales in AB 707, the staff will prepare a draft for consideration at the December meeting.

§ 699.720. Property not subject to execution

The Committee notes that no reference is made in Sections 699.710 and 699.720 (property subject to execution) to Section 700.180 (levy on property that is subject of pending action). (See Exhibit 2, p. 17.) The staff proposes to add a reference to Section 700.180 in the Comments to Section 699.710 and 699.720.

§ 700.180. Levy on property that is the subject of pending action or proceeding

The Committee "expressed concern regarding the interplay of this provision and the Uniform Fraudulent Conveyances Act." The staff does not believe that the Commission should attempt to deal with the Uniform Fraudulent Conveyances Act in this legislation. We do believe, however, that there is great need for a study of that act and will propose at a future time that the Commission undertake such a study.

§ 703.010. Application of exemptions

The Committee recommends that the Commission retain the provision of existing Section 690.52 that property is not exempt where the judgment being enforced is for the purchase price of the property. (See Exhibit 2, pp. 21-22.) The Committee suggests that the reason for this exception is to prevent fraud such as in the case where a person buys an item of furniture on time without the intent to pay and then claims an exemption for the property. The Committee also asserts that deleting this exception in a lengthy piece of legislation lays a trap for the unwary. The

staff remains unconvinced that this is a very useful provision. We suspect that this provision is not widely known; there do not appear to be any reported cases dealing with it. How is the court ruling on the exemption claim to determine that the judgment was for nonpayment of the amount due on the property levied upon. The court will have to go behind the judgment to determine this fact. Is the provision worth the additional judicial time that will be required to determine the exemption claim? The Commission should decide whether this provision should be retained.

§ 704.050. Health aids exemption

The Committee recommends that health aids be made "exempt without making a claim." (See Exhibit 2, p. 23.) Under Section 704.050, an exemption claim must be made. The only real significance under AB 707 of describing property as exempt without making a claim is that it may not then be applied to the satisfaction of a support judgment as provided in Section 703.070. If it is levied upon, it may be released by the exemption procedure as provided in Section 703.510(b). It should be noted, however, that under existing Section 690.5, prosthetic and orthopedic appliances are classed as exempt, not exempt without making a claim. Since Section 704.050 provides a much broader exemption, the argument for retaining the existing classification is all the stronger. The staff recommends no change, but if the Commission is inclined to revise this section, you might consider making prosthetic and orthopedic appliances exempt without making a claim but retaining the existing structure as to other "health aids reasonably necessary to enable the judgment debtor or the spouse or a dependent of the judgment debtor to work or sustain health."

§ 703.100. Time for determinations of exemptions

The Committee recommends that language from the Comment to Section 703.100 pertaining to the application of an exemption in changed circumstances be substituted for the more specific language in the statute. (See Exhibit 2, pp. 23-24.) Under Section 703.100, the general rule is that exemptions are to be determined under the circumstances existing at the time a lien is created on the property. The grant of authority to the court under subdivision (b) of Section 703.100 to vary this rule in the light of certain changed circumstances is an intentionally limited exception. This limitation is in line with the Commission's general

policy of avoiding granting courts unlimited discretion to alter statutory rules. Accordingly, the staff recommends no change.

§§ 703.520, 703.530. Claim of exemption and financial statement

The Committee recommends that forms for the claim of exemption under Section 703.520 and the financial statement under Section 703.530 be made available free of charge at the office of the levying officer or be included with the notice of levy served on the judgment debtor. (See Exhibit 2, p. 25.) The statute merely specifies the information to be included in the claim of exemption and financial statement. There is no statutory requirement that a "form" be used. The staff is reluctant to attempt drafting such forms at this point in the process. The Judicial Council is, however, authorized to provide such forms. We are also concerned about the costs involved in providing additional forms free of charge. The cost of the forms would be a cost imposed on the county and the state would be required to reimburse the county for this cost. The few statutory forms we do provide in Sections 693.010-693.060 have consumed an inordinate amount of staff time. Every time a change is made in a relevant statute, the statutory form has to be amended--a more difficult task than amending the text of a statute, as the latest printing of AB 707 well illustrates. (See pp. A-1 to A-27 in AB 707.) The staff recommends no change.

The Committee also recommends the deletion of Section 703.520(b)(5) which requires the judgment debtor to cite the statute upon which the exemption claim is based. (See Exhibit 2, p. 25.) This requirement continues existing law. It is useful to know which exemption is being claimed, since certain types of property may qualify for an exemption under different provisions. For example, heirlooms may be exempt under Section 704.020 (personal effects, furniture) or 704.040 (heirlooms); a motor vehicle may be exempt under Section 704.010 (motor vehicles), 704.060 (tool of trade), or 704.710 (mobilehome); and a deposit account may be exempt under a number of sections through tracing. In other cases, the creditor may not be informed as to the basis for the claimed exemption, as where, for example, the property is claimed to be exempt as a health aid. Although the staff does not have very strong feelings about this suggestion, on balance we would make no change. However, if the Commission is inclined toward the Committee's suggestion, you should consider whether the requirement of citing a statute should apply only to judgment debtors who are represented by attorneys.

§ 704.010. Motor vehicle exemption

The Committee recommends that the motor vehicle exemption be increased from \$1,000 to \$1,200. (See Exhibit 2, p. 26.) The bill was amended on August 25 to accomplish this. The Committee also suggests some other revisions in Section 704.010, but the version of the section to which these suggestions relate has been superseded in the amended bill.

§ 704.020. Household furnishings and personal effects

The Committee prefers the station-in-life test for household furnishings to the average household test set forth in Section 704.020. (See Exhibit 2, pp. 27-28.) The staff recommends no change. This exemption has been considered by the Commission in many forms over the years during which this study has been in progress. The Committee has not made any new arguments or offered any new proposals.

§ 704.040. Jewelry, heirlooms, and works of art

The Committee objects to the exemption for jewelry, heirlooms, and works of art as set forth in AB 707 as introduced. (See Exhibit 2, pp. 28-29.) The amended version of the bill replaces the aspect of Section 704.040 to which the Committee objects with a flat \$2,500 exemption. We assume that the Committee would not object to this section as amended.

§ 704.060. Tools of trade

The Committee recommends that the amount of the tools of a trade exemption be increased from \$2,500 or that the value limit be eliminated altogether. (See Exhibit 2, p. 29.) AB 707 makes clear that each spouse may claim a separate \$2,500 exemption if each has a separate trade, business, or profession and allows a \$5,000 exemption if both are actively engaged in the same trade, business, or profession. The staff recommends no change. Section 704.060 has been considered at length and was revised when the bill was amended. We do not think an increase in this exemption is politically feasible.

§ 704.070. [Deposit account exemption]

The Committee recommends a deposit account exemption in the amount of \$2,500. (See Exhibit 2, p. 30.) After lengthy consideration, the Commission approved an amendment to this section to eliminate the deposit account exemption in favor of an exemption for paid earnings. See Section 704.070 in AB 707 as amended August 25 (copy attached to Memorandum

81-71). The Commission decided that since it was politically infeasible to increase or broaden the deposit account exemption, the protection of earnings in deposit accounts as set forth in Section 704.070 offers a more equitable and useful exemption. It should be remembered that AB 707 makes clear that exempt funds that can be traced into a deposit account are exempt as well. See Section 703.080. The bill also retains the automatic exemption of directly deposited Social Security benefits. See Section 704.080. The staff recommends no change.

§ 704.140. Damages for personal injury

The Committee raises a question concerning the relation between bankruptcy law and Section 704.140(c) which makes the personal injury award exemption inapplicable as against a provider of health care for the injury. (See Exhibit 2, p. 31.) Under 11 U.S.C. Section 544(b) the trustee in bankruptcy may be able to assert the rights of the health care provider on behalf of all creditors, thereby totally disallowing the exemption. The Committee suggests that the Commission consider drafting around this problem by giving the health care provider a lien on the award. The staff does not know whether or not a bankruptcy court would reach the conclusion suggested by the Committee. It appears that the point is not settled in bankruptcy law. Professor Riesenfeld states that the doctrine of Moore v. Bay, 284 U.S. 4 (1931), "does not operate to defeat rights . . . of the bankrupt. . . . [I]f assets of the bankrupt can be reached only by some creditors having provable claims, but not by others, the trustee may assert rights against those assets only to the extent that existing creditors could have subjected them to their claims, although he must distribute that amount ratably among all creditors." S. Riesenfeld, Creditors' Remedies and Debtors' Protection 602 (2d ed. 1975). In view of the doubt concerning the result in bankruptcy, the staff recommends no change in Section 704.140(c). The situation outlined by the Committee is not likely to occur in a large number of cases. It also appears that the debtor can avoid the problem by making sure that the health care provider is paid out of the proceeds. However, if the Commission is inclined to avoid the possibility of the problem arising, Section 704.140(c) could be revised to provide that a health care provider has the status of a foreclosing lien creditor under Section 703.010(b). The staff thinks there may be other problems with this approach, however, which may outweigh the possible problems in bankruptcy.

§ 704.840. Costs in homestead proceedings

Though generally approving the homestead exemption provisions, the Committee suggests that Section 704.840 be amended to make the award of attorney's fees discretionary rather than mandatory in a case where the minimum bid is not received at an attempted sale of a homestead. (See Exhibit 2, p. 35.) The provision relating to attorney's fees was deleted in its entirety when AB 707 was amended in August.

§ 706.051. Hardship exemption in wage garnishment

The Committee objects to the provision in Section 706.051 of the bill as introduced which provided a special hardship exemption that restricted the scope of the common necessities exception in wage garnishment. (See Exhibit 2, pp. 36-38.) This material was deleted when AB 707 was amended in August.

§ 708.020. Written interrogatories to judgment debtor

The Committee recommends that Section 708.020(b) be revised to make interrogatories unavailable only if prior interrogatories have been answered within the previous 120 days. (See Exhibit 2, p. 40.) Under Section 708.020(b) as it now stands, interrogatories are also unavailable if the debtor has been examined in the previous 120 days. The Committee notes that an examination may be held within 120 days after interrogatories and considers it to be a discrepancy that interrogatories may not be used within 120 days after an examination. The staff recommends no change; the Committee argument seems to be based on a desire for drafting parallelism. The relationship between the remedies of interrogatories and examinations was fully considered by the Commission when this material was prepared. The 120-day limitations are intended in general to prevent harrassment of the judgment debtor. An examination is available regardless of whether interrogatories have recently been served since interrogatories are merely informational whereas examination proceedings provide a remedy by way of a court order to apply the property to the satisfaction of the judgment. It should also be noted that a second examination within 120 days after an earlier examination is not barred by statute; rather the judgment creditor must make a special showing of need for the order of examination. See Section 708.110(b)-(c). In summary, as a general rule the statute provides a 120-day period between information gathering procedures and permits more frequent resort to remedial procedures though perhaps requiring a special showing of need. It should

also be remembered that AB 707 makes interrogatories more available than under existing law by eliminating the limitation that permits interrogatories to be served only on judgment debtors represented by counsel.

§ 708.170. Failure to appear for examination

The Committee believes that the new provision in Section 708.170 which makes a person who fails to appear at an examination without good cause liable for attorney's fees will not be effective. The Committee argues that courts will be lenient to the judgment debtor and require several court appearances before the judgment creditor can obtain an award of attorney's fees. (See Exhibit 2, pp. 40-41.) The Committee suggests that the bill be revised to provide an automatic award of attorney's fees that may be set aside if the judgment debtor (or third person?) later shows good cause for the failure to appear. The Committee also suggests that attorney's fees be set at a flat amount although they do not suggest any particular amount. The staff recommends no change. We are somewhat sympathetic to the suggestion, but we think that the proposed solution puts too great a burden on the judgment debtor or third person. If courts are likely to be lenient under the section as drafted, they might also be expected to find a way around the proposed revision.

§ 708.440. Dismissal or settlement of cause of action subject to lien

The Committee suggests that Section 708.440(b) needs to be revised to make clear that a court order approving the dismissal or settlement of a cause of action that is subject to a lien may be granted only on motion after notice to the judgment creditor. (See Exhibit 2, p. 41.) The staff believes this is the intent of Section 708.440, but to make it clear the staff recommends that Section 708.440 be amended as set forth in Amendments 1-3.

§ 720.130. Contents of third-party claim of ownership or right to possession

The Committee suggests that a third person making a claim of ownership or right to possession should be required to include with the claim a copy of any writing upon which the claim is based and that the court considering the claim be given discretion to exclude from evidence any writing not attached to the claim. (See Exhibit 2, pp. 46-48.) The staff agrees with these suggestions and proposes Amendments 4-9 to accomplish them. The Committee notes that a secured party must include

a copy of the security agreement and financing statement, if any, when making a third-party claim. The Committee did not note that a third-party claim by a lienholder other than a secured party is not required to be supported by any such writings. Consistent with the approach recommended here, the staff also proposes Amendments 10-16 to make Section 720.230 consistent with Section 720.130.

§ 720.280. Statement concerning security interest

The Committee recommends that Section 720.280 be amended to require the statement of the creditor in opposition to the third-party claim of a secured party to be served on the debtor as well as the secured party. (See Exhibit 2, pp. 47-48.) The staff agrees with this recommendation and proposes Amendments 17 and 18 to accomplish it.

§ 720.330. Papers filed with levying officer

The Committee suggests some technical additions to Section 720.330 concerning papers to be filed with the court by the levying officer. (See Exhibit 2, pp. 47-48.) The staff agrees with this suggestion and proposes Amendment 19 to implement it.

§ 720.370. Dismissal of hearing on third-party claim

The Committee suggests that dismissal of a hearing on a third-party claim should require the consent of the third person as well as the creditor. (See Exhibit 2, pp. 47-48.) Section 720.370 continues an existing provision (the sixth sentence of the eighth paragraph of Code of Civil Procedure Section 689) which was enacted in 1961 on recommendation of the State Bar. See 36 Cal. St. B. J. 714-15 (1961). The purpose of the provision is to prevent the third person from dismissing his petition after the expiration of the time during which the creditor could file a petition for a hearing. It reverses the holding in Michael v. Burge, 176 Cal. App.2d 128, 1 Cal. Rptr. 183 (1959). However, the staff has no objection to accepting the Committee's suggestion and has drafted Amendment 20 to implement it.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

STAFF DRAFT

AMENDMENTS TO ASSEMBLY BILL NO. 707

Amendment 1

On page 171, line 10, strike out "The" and insert:
Upon application by the judgment debtor, the

Amendment 2

On page 171, line 15, strike out "judgment debtor may apply"
and insert:
application

Amendment 3

On page 171, line 16, after "subdivision" insert:
shall be made

Amendment 4

On page 192, line 10, after "720.130." insert:
(a)

Amendment 5

On page 192, line 12, strike out "(a)" and insert:
(1)

Amendment 6

On page 192, line 15, strike out "(b)" and insert:
(2)

Amendment 7

On page 192, line 17, strike out "(c)" and insert:
(3)

Amendment 8

On page 192, line 19, strike out "(d)" and insert:

(4)

Amendment 9

On page 192, between lines 20 and 21, insert:

(b) A copy of any writing upon which the claim is based shall be attached to the third-party claim. At a hearing on the third-party claim, the court in its discretion may exclude from evidence any writing a copy of which was not attached to the third-party claim.

Amendment 10

On page 195, line 32, after "720.230." insert:

(a)

Amendment 11

On page 195, line 34, strike out "(a)" and insert:

(1)

Amendment 12

On page 195, line 37, strike out "(b)" and insert:

(2)

Amendment 13

On page 195, line 39, strike out "(c)" and insert:

(3)

Amendment 14

On page 196, strike out lines 1 to 3, inclusive, and insert:
which it is based.

Amendment 15

On page 196, line 4, strike out "(d)" and insert:

(4)

Amendment 16

On page 196, between lines 6 and 7, insert:

(b) In the case of a security interest, a copy of the security agreement and any financing statement shall be attached to the third-party claim. In the case of a lien, a copy of any writing upon which the claim is based shall be attached to the third-party claim. At a hearing on the third-party claim, the court in its discretion may exclude from evidence any writing a copy of which was not attached to the third-party claim.

Amendment 17

On page 199, line 6, strike out "both" and insert:

all

Amendment 18

On page 199, between lines 15 and 16, insert:

(c) Serve a copy of the statement on the debtor. Service shall be made personally or by mail.

Amendment 19

On page 200, between lines 31 and 32, insert:

(d) Any undertaking to release filed by a third person pursuant to Chapter 6 (commencing with Section 720.610).

(e) Any notice filed by a public entity pursuant to Section 720.160 or 720.260.

Amendment 20

On page 201, line 24, after the period, insert:

If the petition for a hearing was made by the creditor, neither the petition nor the proceedings pursuant thereto may be dismissed without the consent of the third person.

Exhibit 2

Report of State Bar Debtor/Creditor Subcommittee on
Enforcement of JudgmentsA. DIVISION 1 (DEFINITIONS AND GENERAL PROVISIONS)
AND DIVISION 2, CHAPTERS 1 AND 2 (PROPERTY SUBJECT
TO LEVY; LIENS) PROPOSED C.C.P. §§ 680.010-697.920Definitions

The definitions under the Enforcement of Judgments Law ("new law"), C.C.P. §§ 680.010 through 680.380, are taken for the most part from the California Uniform Commercial Code. While some of the words defined are not used in the present law (C.C.P. §§ 681-724(e)), these definitions have been a part of the statutory law of California for at least the last 15 years, and their incorporation should be useful in aiding the consistent application of the new law from its inception. The Section recommends the adoption of the Definition provisions.

Renewal of Judgments

Section 683.150 of the new law provides that upon the timely filing of a proper application by a judgment creditor to extend the enforceability of a judgment beyond the initial 10-year period, the "clerk shall enter the renewal of the judgment." The comment to § 683.150 makes it clear that the entry of the renewal is a ministerial act. The requirement of present law that the creditor establish that he has exercised reasonable diligence in enforcing the judgment during the initial period (C.C.P. § 685) is omitted. The omission appears to be worthwhile because the creditor's failure to exercise reasonable diligence is generally beneficial rather than detrimental to the debtor, because the debtor has it within his power to pay the judgment out of his assets if he chooses. Furthermore, it is difficult to determine what constitutes reasonable diligence. The Section recommends the adoption of the Renewal of Judgment provisions.

Costs

Sections 685.070 and 685.080 of the new law provide for the taxation of costs by the memorandum procedure or by noticed motion. Both sections require that the Memorandum of Costs be filed before the judgment is fully satisfied "but not later than six months after the costs have been incurred." This cut-off period seems unnecessarily short since there logically would be no reason to tax costs unless there appears to be a reasonable probability of recovering them, and the filing of successive motions to tax

costs would constitute a waste of judicial resources, without a corresponding benefit. The Section recommends that the six month period for filing a Memorandum of Costs be extended to two years to give the creditor time to determine whether recovery of such costs is likely.

Judgment Lien on Real Property

Under the present law, a judgment lien does not reach certain valuable interests in real property such as estates for years, equitable interests, and contingent interests. Section 697.-340(a) of the new law expands the coverage of judgment liens to leasehold interests with an unexpired term of two years or more at the time of the creation of the lien, equitable interests (other than the interests of a beneficiary in real property held in trust) and contingent interests. The Section favors this provision since it will make available assets which have been very difficult to levy and collect upon in the past.

Priority of Judgment Liens

A quirk in the present law provides that if there are two or more judgment liens in existence at the time the judgment debtor acquires property, the judgment liens rank equally in priority as to the after-acquired property, and the judgment creditor who first levies upon the after-acquired property is permitted to sell it free of the other liens. The new law changes this to provide that priority in after-acquired property is determined on the basis of the priority established by the time of the creation of the judgment liens. § 697.380. This eliminates the race to execute on after-acquired property and appears to be a most beneficial provision. The Section recommends its adoption.

Judgment Liens on Personal Property

Section 697.510 of the new law provides for a judgment lien on personal property. This lien would be created by the filing of a document similar to a Uniform Commercial Code financing statement with the Secretary of State and would create a lien on accounts receivable ("accounts" as defined in the Uniform Commercial Code), chattel paper, equipment, farm products, inventory and negotiable documents of title. See C.C.P. § 697.530. The judgment lien would be enforceable for five years, the same period as a California Commercial Code financing statement, and the filed notice would be reported (along with security inter-

ests, state and federal tax liens and attachment liens) on a certificate issued by the Secretary of State pursuant to the request of an interested person. See C.C.P. § 697.580.

The Section recommends that this provision be modified to eliminate the list of property subject to the judgment lien and to provide that the judgment lien on personal property would extend to all of those categories of personal property as to which a security interest may be perfected by filing a financing statement with the Secretary of State and also to the inventory of a retail merchant. A dissenting minority is of the opinion that the judgment lien should not extend to a nonpossessory, non-purchase money security interest in the inventory of a retail merchant.

The purpose of the judgment lien on personal property is to provide an inexpensive means for an unsecured creditor to force payment of its judgment. If not allowed a judgment lien, the creditor would be required to levy execution on the inventory. This will probably be necessary in many cases even if the lien extends to inventory, but in many cases the filing of the lien (particularly when reported by the credit reporting services) may be enough to force payment of the judgment.

Execution Procedures

The procedures for levying execution are presently incorporated into the statute by reference to the attachment procedures. The new law would have separate execution provisions (See C.C.P. §§ 699.010 et seq.), thus avoiding some of the confusion which results under the present law from conflicts in terminology between the attachment provisions and the execution provisions.

Under the present law, a judgment creditor who has attached property must levy on the property before levying execution on other property. This requirement would be abolished by the new law, but the debtor would be protected from excessive levies by a requirement that the attached property be released before levy is made on other property. See C.C.P. § 699.050.

Under the present law, a registered process server may levy upon property where the property is not in the possession of the judgment debtor and is not to be sold by, delivered to, or taken into custody by, the levying officer. The new law expands this by allowing a registered process server to levy on real property, growing crops, and timber to be cut where the method of levy is by recording a copy

of the writ and a notice of levy with the county recorder. Registered process servers are also permitted to levy on personal property used as a dwelling, such as a mobile home or a vessel, where the method of levy is by posting or by serving an occupant. See C.C.P. § 699.080. The Section favors these provisions because they will allow creditors to expedite levies, which have been much slower of late, presumably because of Proposition 13 cutbacks. The actual sale of the property and the receipt of any monies under garnishment would continue to be the function of the sheriff or marshal.

Levy on Property in a Private Place

Section 699.030(b) of the new law makes it easier to levy on property in the possession of the judgment debtor by allowing the judgment creditor to apply to the court ex parte, or on a noticed motion if the court so directs, for an order directing the levying officer to enter a private place to seize property. To obtain the order, the creditor must describe the property with particularity and show that there is probable cause to believe it is located in the place described. The Section supports this provision.

Turnover Orders

Section 699.040 of the new law would make available a turnover remedy derived from the laws pertaining to claim and delivery and attachment. The judgment creditor would be able to obtain an order on ex parte application, or on noticed motion if the court so directs, requiring the judgment debtor to transfer possession of properties sought to be levied upon or documentary evidence of title to the property or debt sought to be levied upon. The order would be enforceable by the power of the court to punish for contempt. This would be similar to the procedure presently available in connection with a judgment debtor examination. The Section supports this provision.

Writs of Execution

To allow more time for locating and levying on property, section 699.530 of the new law provides that a writ of execution may be levied at any time during the first 90 days after its issuance. This is a change from the present law which made the writ effective for 60 days after its delivery to the levying officer. If property is levied upon during the 90-day period, the levying officer would

retain the writ for the purpose of selling property of collection proceeds during the life of the writ (one year after its issuance). § 699.560. This will avoid the need for redelivery of the writ and an alias return as are required under existing law.

The Section recommends that the new law be amended to go even further and provide that the writ may be levied at any time during its one year life. In some counties, the sheriffs and marshals are very slow in processing writs of execution, and there seems to be no substantial justification for requiring the issuance of a new writ of execution every 60 or 90 days.

B. DIVISION 2, CHAPTER 3 (EXECUTION) PROPOSED C.C.P.
§§ 690.010-701.830

Chapter 3, dealing, in general, with the subject of "execution" consists of Article 1 (General Provisions); Article 2 (Writ of Execution and Notice of Levy); Article 3 (Property Subject to Execution); Article 4 (Methods of Levy); Article 5 (Duties and Liabilities of Third Persons After Levy); Article 6 (Sale and Collection); and Article 7 (Distribution of Proceeds of Sale or Collection). A table of contents for Chapter 3 is attached at the end of this section.

Summary of Changes

Under present law, California's execution on judgment provisions are codified in the Code of Civil Procedure, Part II (Civil Actions), Title 9 (Execution of Judgment in Civil Actions), Sections 681 through 724e. That portion of the enforcement of judgments legislation under consideration in this Report is limited to the subject matter of a portion of Division 2, Chapter 3 (Execution).

The first observation that should be made concerning the proposed legislation is that it offers reorganizes many of the provisions of existing law without changes in substance. The Section believes that this is not an insubstantial contribution in and of itself. An examination of the table of contents for Chapter 3 at the end of this section suggests that the proposed legislation offers a better organized and easier to use statute than the present law. The Section, therefore, endorses the statutory reorganization format embodied in the proposed legislation.

Discussion

General Comments

By and large the execution provisions of the proposed enforcement of judgments revisions are procedural, not substantive. It appears that, on balance, the procedural aspects of the proposed legislation represent a considerable improvement over existing law. Creditors' attorneys will seemingly endorse the legislation because the new law would simplify and clarify many procedural requirements of existing law.

Furthermore, the proposed procedural changes are in many respects beneficial to the interests of judgment debtors, would improve the quality of notice to judgment debtors (see, e.g., proposed C.C.P. § 669.540 prescribing a form of notice of levy similar to the notice of attachment under the Attachment law, where existing law provides no official form of notice), and add opportunities for a judgment debtor to be heard in opposition to certain stages of execution (see, e.g., proposed C.C.P. § 700.080(d) which recognizes the right of an occupant of a dwelling to have a judicial determination of the occupant's right of possession, as opposed to present practice under C.C.P. § 688(c) which requires a keeper to take exclusive custody of such property at the end of two days). The procedural revisions contained in the proposed legislation are, therefore, also likely to receive the endorsement of practitioners representing debtors.

The most significant revision proposed in the legislation under review here, however, is substantive: the proposed law would repeal the presently existing statutory right of a judgment debtor or mortgagor to redeem property sold in execution on a judgment or pursuant to judicial foreclosure proceedings. The legislation provides that all sales of the debtor's property pursuant to this chapter, whether by way of execution or foreclosure are "absolute and may not be set aside for any reason." (§ 701.680 of the proposed statute). The Section opposes this change in the case of judicial foreclosures of mortgages and deeds of trust. A discussion of this subject follows.

Repeal of the Statutory Right of Redemption (§ 701.680)

Existing California Law

Under present California law, an execution sale of real property, where the estate therein is more than a leasehold of two years' unexpired term, is not absolute; rather, the property sold is sold subject to a right of statutory redemption by the judgment debtor, or his successor in interest, in the whole or any part of the property, or by certain creditors called redemptioners. See C.C.P. §§ 700a-707. Generally, redemption may take place at any time within 12 months after sale (C.C.P. § 702) by the debtor, or within 60 days after a redemption by a prior redemptioner (C.C.P. § 703). Redemption is accomplished by paying the execution sale purchaser or prior redemptioner the amount paid to purchase or redeem the property plus the amount of a prior redemptioner's lien and specified amounts of interest and other expenses. (See C.C.P. §§ 702, 703). Redemp-

tion by the judgment debtor or a successor in interest terminates the effect of the sale so that the judgment debtor or his successor in interest is restored to his estate. However, liens which have not been paid off in the process of redemption reattach, and a judgment lien under which the property is sold reattaches to the extent it has not been satisfied when the debtor redeems the subject property.

Redemption by a junior lienholder has the effect of satisfying the prior lien which constitutes a part of the redemption price, and of preserving the junior lienholder's security in the property which would otherwise be lost at the conclusion of the redemption period as a result of the sale under a superior lien.

These provisions of existing law apply to judicial foreclosure sales under a mortgage or deed of trust as well as execution sales by a judgment creditor. There is, however, no existing statutory right of redemption after a private sale under a power of sale in a deed of trust.

Other States

The statutory scheme providing for a right of redemption for judgment debtors is an old one, dating in the United States from the Field Code proposed for New York in 1850, and first enacted in California in 1851. About half of the states have adopted such a scheme. The length of the redemption period varies from six months (Colorado and Minnesota) to twenty-four months (Tennessee), although the majority of states that provide for a right of redemption have adopted a twelve-month redemption period. As noted by the Law Review Commission, there do not appear to be any studies comparing the results in redemption states to those in non-redemption states. It is certain that very few redemptions take place, and there is no data available which shows any quantitative relationship between the existence of the right of redemption and prices bid for property sold at execution or pursuant to judicial foreclosure.

The Proposed Legislation

The proposed legislation provides that the existing statutory right of redemption be abolished. Section 701.680 ("Sales Absolute") of the proposed legislation provides as follows:

- (a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this

article is absolute and may not be set aside for any reason.

(b) If the judgment is discharged, because it is reversed or for any other reason, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the discharged judgment with interest at the rate on money judgments to the extent the proceeds were improperly applied to the satisfaction of the judgment.

(c) If the sale was improper, because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason:

(1) An action may be commenced within six months after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor.

(2) The judgment debtor may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied.

Section 701.680 does not permit the sale to be set aside unless the sale was made to the judgment creditor and an action is brought within six months after the date of sale. Under proposed § 701.820, the proceeds of sale will be held 30 days before distribution, during which time the judgment debtor may raise objections to the distribution schedule as prepared by the levying officer. Sales of interests in real property (except leasehold estates with less than two years' unexpired term at the time of levy), are delayed under the proposed statute at least 140 days, in order to provide an opportunity for the judgment debtor to redeem the property from the judgment creditor's lien before sale, to advertise the sale and give notice to potential buyers, or to make settlement with the judgment debtor. See proposed C.C.P. §§ 701.540(b), 701.545.

In addition § 701.680 supersedes the first sentence of CCP § 700a(a) which presently renders absolute only sales of personal property and of leasehold estates with

unexpired terms of less than two years. Section 701.680 reflects the proposed repeal of the statutory right redemption.

Reason for the Proposal

The Law Revision Commission has concluded that the repeal of the statutory right of redemption in California is necessary because statutory redemption from execution and foreclosure sales has failed to achieve its purposes, main among them, to force the purchaser at the foreclosure sale (almost always, according to the Law Review Commission, the judgment creditor or mortgagee) to bid an amount near the property's fair value. In the Commission's view another purpose of the existing redemption scheme, also not served, is to give a debtor an opportunity to save the property by refinancing it, selling at private sale at a higher price, or otherwise finding assets sufficient to pay off the debt.

However, the Commission's own discussion of its proposal admits that it is difficult to assess the actual effect of statutory redemption, and the Section has been advised by the Commission staff that it has no quantitative data to substantiate its conclusions as to the ineffectiveness of the existing statutory scheme. Nonetheless, there is a certain logical appeal to criticism of existing law suggesting that the mere existence of a judgment debtor's right of redemption would tend to depress sale prices.

Recommendation and Discussion

The Section disapproves the Commission's proposal to repeal the statutory right of redemption with respect to judicial foreclosure sales under a mortgage or deed of trust. The Section, however, endorses the Commission's proposal to abolish the statutory right of redemption with respect to execution sales.

A. Foreclosure Sales

The Section's conclusion is based in part on the fact that there has not been a sufficient showing either that the existing system requires change, or that the proposed scheme will better serve the rights and interests of debtors. The burden of demonstrating the need for such a change falls on the advocate -- i.e., the Commission. Con-

versely, the Section believes that there is sufficient reason to retain the prevailing system intact with respect to foreclosure sales.

Even assuming that statistical evidence would support the conclusion that the right of redemption depresses prices at judicial foreclosure sales, the Commission's own findings admit that there are very few such sales that take place, and the Commission recognizes in its own commentary to its proposal that a hurried, forced sale of real property, such as under its proposed statutory scheme, may itself result in a depressed price even where the sale is absolute.

In response to this last criticism of the proposal, the proposed statute provides a 120-day grace period between the time when notice of a levy on the property is given and the time when notice of sale is first given. (In addition, at least 20 days' notice of sales of real property is required by subdivision 3 of Section 692, which would be preserved under the proposal; thus, the proposed legislation would mean that property could not be sold sooner than 140 days after the notice of levy is given to the judgment debtor). The Commission suggests that during this time, the judgment debtor may refinance the property in order to pay off the lien under which it would otherwise be sold, sell the property privately subject to valid liens in order to realize a higher price than would be obtained at a forced sale, or acquiesce in the judicial sale but seek potential buyers by advertising and personal contact.

The Section believes that a 140-day period before sale is inadequate to accomplish the purposes which the Commission feels must be served if statutory redemption is abolished. The interest rate fluctuations and generally depressed real estate markets of recent years suggest that considerable difficulty and delay might be encountered by a judgment debtor attempting to refinance even modestly priced property. Similarly, closing a private sale to realize a higher price than bid in connection with the foreclosure could result in considerable difficulty and confusion if it must be accomplished in the short statutory period allowed under the proposal. Furthermore, if a benefit of any redemption scheme is that junior lienholders might also redeem, thus enabling the property to satisfy as many claims as possible, any shortening of the redemption period may reduce the likelihood that junior lienholders themselves would be in a position to redeem.

Perhaps most importantly, the Section believes that the prevailing scheme which includes the statutory right of redemption in California has a salutary effect on

the actions of the parties in the context of trust deed and mortgage foreclosure. Although not empirically verified by the Section, it can reasonably be assumed that the mortgagor's ability to redeem property within one year after a judicial foreclosure sale has resulted in a greater utilization by secured creditors of private sale foreclosure under a power of sale. Under the latter alternative, no right of redemption exists, but the creditor must forego the possibility of a deficiency judgment. CCP § 580d. The secured creditor is thus presented with an option beyond the control of the debtor: the creditor may resort to a speedy disposition of the real property collateral under a private power of sale foreclosure, but in so doing must forego a deficiency judgment; or, if the creditor believes that the value of the collateral is substantially less than the amount of the indebtedness secured thereby, the creditor may choose to foreclosure judicially thereby preserving his right to seek a judgment for any deficiency. CCP §26; see, e.g., Cornelison v. Kornbluth, 15 Cal.3d 590 (1975); Roseleaf Corp. v. Chierighino, 59 Cal.2d 38 (1963).

In Union Bank v. Wendland, 54 Cal.App.3d 393, 409 (1976), for example, Judge Elkington noted in his concurring opinion that CCP § 580d permits a deficiency judgment after a judicial foreclosure sale because the right of redemption after such sale provides protection substantially equivalent to that otherwise afforded by statute. If the existing system is altered by eliminating the statutory right of redemption without some form of compensation protection for the debtor, the substantial protection afforded by the anti-deficiency legislation is jeopardized. Moreover, one may assume that creditors will more frequently resort to judicial foreclosure, credit-bidding at a lower price, and thereafter seek a deficiency judgment so as to avoid the strictures of CCP § 580d. One can only speculate as to the impact that the proposed legislation might have since lenders would not be influenced in a transaction not encompassed within CCP § 580b to limit loan funds to the security value of the real property collateral.

Finally, another aspect of the repeal of statutory redemption is its impact on proceedings under the federal Bankruptcy Code. The Commission's comments on its proposal do not reflect that any consideration was given to the impact in a bankruptcy setting. However, the Section speculates that the proposed repeal, combined with the relatively streamlined procedures available in cases filed under the Bankruptcy Code, may lead a creditor whose private foreclosure under present law is stayed by the filing of a bankruptcy petition, to seek judicial foreclosure in the bankruptcy court, in addition to relief from the automatic stay.

Outside bankruptcy, a creditor today is not usually well advised to proceed by way of judicial foreclosure, unless compelled to do so for considerations having to do with the one form of action rule (C.C.P. § 726), because judicial foreclosure can take considerable time, and because the debtor will have a right to redeem after judicial foreclosure -- a right not available after private sale. Thus, under prevailing law, a debtor has considerable leverage in dealing with a creditor wishing to realize on real property assets. Combining the broad jurisdiction and simpler procedures available under the Bankruptcy Code with the proposed repeal of the right of redemption, however, would take much of the "sting" from a threat of bankruptcy by a beleaguered debtor. Moreover, if a deficiency judgment is obtained, the interest of general unsecured creditors in the balance of the debtor's estate is diluted. The Section, therefore, recommends that the proposed repeal of the statutory right of redemption be disapproved on this additional ground pending a thorough consideration as to the impact of its proposal in insolvency situations.

For the foregoing reasons, the Section does not approve the proposed repeal of the statutory right of redemption with respect to judicial foreclosure sales.

B. Execution Sales

The Section acknowledges that all of the reasons for its rejection of the Commission's proposal with respect to foreclosure sales, save the interplay with the anti-deficiency legislation of C.C.P. § 580d, apply as well to execution sales. Nonetheless, with respect to execution sales of real property the absence of the anti-deficiency legislation consideration is sufficient to swing the balance in favor of the proposed legislation. Although no empirical evidence has been presented, the Section regards the logic of the proposal as persuasive. Absent considerations peculiar to trust deed and mortgage foreclosure, the debtor's right of redemption may logically be assumed to depress prices bid at execution sale. The Section believes that there is a sufficient basis, therefore, to support the proposed repeal of the statutory right of redemption limited to the context of execution sales.

Alternate Proposals

The Commission points out in its comments that it has considered several alternatives to statutory redemption -- the most important being: requiring court confirmation of sale, fixing an upset price, allowing advance bidding, and extending anti-deficiency legislation to cover execution sales. Because each alternative would require a court hearing, thereby increasing the expenditure of time and resources by the parties in the judicial system, the Commission has chosen to propose none of them. The Section concurs in the Commission's analysis in this respect.

An alternative not discussed by the Commission is to extend the period before sale from 120 days to a longer period of time, perhaps even a year. Such a modification of the proposed statute would give rise to no additional court involvement or cost. The longer the extension of time before sale becomes absolute, however, the closer the effect of the proposed statute would be to that under existing law and the need for revising this aspect of existing law becomes less apparent, particularly in view of the anti-deficiency legislation concerns.

Finally, any of the alternative proposals would be subject to the Section's earlier observation that the Commission (and, to be fair, apparently no one else) has compiled quantitative data tying perceived weaknesses in the statutory redemption scheme to the actual results of execution sales. Unless such information is available, the Section believes that it should not endorse an alternative scheme to that proposed by the Commission, but should recommend retaining the right of redemption as part of the proposed reorganization of the execution statute.

Other Issues

The Section believes that at least two other facets of the Execution portion of the proposed litigation warrant special mention:

1. Levy on Other Property Not Permitted
(§ 700.180(b))

If tangible personal property (not in the possession of the judgment debtor) is the subject of a pending action, the proposed legislation does not permit the judgment creditor to levy on such property; the judgment credi-

tor must be content to obtain a lien in the pending proceeding and thus establish his priority. (But see § 699.720 which fails to include this category of property among the categories of property which are not subject to levy.

The Section is simply unaware of the intent with respect to the foregoing but expressed concern regarding the interplay of this provision and the Uniform Fraudulent Conveyances Act. Without additional information the Section can neither endorse nor oppose the proposal.

2. Execution re Equipment/
Inventory of Going Business
(§ 700.070)

Under proposed § 700.070, a judgment creditor is entitled to sell at execution, as a matter of right, the equipment and inventory of a going business. At the creditor's election, a keeper may be utilized as an alternative means of collecting the outstanding judgment.

The Section endorses the provisions of Section 700.070.

California Law Revision Commission

Enforcement of Judgments Law

CHAPTER 3. EXECUTION

Article 1: General Provisions

- 699.010 Application of Chapter
- .020 Payment by debtor or judgment debtor
- .030 Levy on property in private place
- .040 Turnover order in aid of execution
- .050 Satisfaction from or release of attached property
- .060 Release of property from lien and custody
- .070 Appointment of receiver, sale, or other action to preserve value of property
- .080 Levy by registered process server
- .090 Liability for levy based on record ownership

Article 2: Writ of Execution and Notice of Levy

- 699.510 Issuance of writ of execution
- .520 Contents of writ of execution
- .530 Delivery and execution of writ; limitation on time for levy
- .540 Contents of notice of levy
- .550 Effect of failure to give notice of levy
- .560 Return of writ of execution

Article 3: Property Subject to Execution

- 699.710 Property subject to execution
- .720 Property not subject to execution

Article 4: Methods of Levy

- 700.010 Service of writ and notice of levy on judgment debtor
- .015 Real Property
- .020 Growing crops, timber to be cut, minerals to be extracted
- .030 Tangible personal property in possession of judgment debtor
- .040 Tangible personal property in possession of third person
- .050 Personal property in custody of levying officer
- .060 Bailed goods not covered by negotiable document of title
- .070 Tangible personal property of going business
- .080 Personal property used as dwelling

- .090 Vehicle, boat, mobilehome, or commercial coach
for which certificate of ownership is issued
- .100 Chattel paper
- .110 Instruments
- .120 Negotiable documents of title
- .130 Securities
- .140 Deposit accounts
- .150 Safe deposit boxes
- .160 Deposit accounts and safe deposit boxes not
exclusively in name of judgment debtor
- .170 Accounts receivable and general intangibles
- .180 Levy on property that is subject of pending action
or proceeding
- .190 Final money judgment
- .200 Interest in personal property of estate of decedent

Article 5: Duties and Liabilities of Third Persons

After Levy

- 701.010 Duty of garnishee
- .020 Liability of third person for noncompliance with levy
- .030 Garnishee's memorandum
- .040 Rights and duties of secured party
- .050 Duty of account debtor
- .060 Duty of obligor under instrument

Article 6: Sale and Collection

- 701.510 Sale of property levied upon
- .520 Collection; sale of collectible property
- .530 Notice of sale of personal property
- .540 Notice of sale of real property
- .545 Period that must elapse before giving notice of sale
- .550 Notice of sale to persons requesting notice
- .560 Effect of sale without giving required notice
- .570 Place, time and manner of sale
- .580 Postponement of sale
- .590 Manner of payment
- .600 Defaulting bidder
- .610 Persons ineligible to purchase
- .620 Minimum bid
- .630 Extinction of liens upon sale
- .640 Interest acquired by purchaser
- .650 Delivery of possession or of certificate of sale
of personal property
- .660 Deed of sale of real property
- .670 Contents of certificate or deed of sale
- .680 Sales absolute; liability

Article 7: Distribution of Proceeds of Sales or
Collection

701.810 Distribution of proceeds of sale or collection
.820 Schedule of proposed distribution of proceeds
.830 Hearing on exceptions

C. DIVISION 2, CHAPTER 4, ARTICLES 1-3 (NON-HOMESTEAD
RELATED EXEMPTIONS) PROPOSED C.C.P. §§ 703.010-
704.210

Article 1; General Provisions

Article 1 consists of twelve sections. The Section has no comment on those sections which describe the persons who are entitled to claim exemptions (703.020), invalidate purported waivers of exemptions (703.040), describe the application of exemptions to judgments for child or spousal support (703.070), provide for the tracing of exempt funds into deposit accounts or in the form of cash (703.080), or prohibit, in certain circumstances, the recovery of costs by a judgment creditor in the case of a second or subsequent levy on exempt property (703.090). The Section discerns no significant policy issue or any technical error in any of these sections and therefore supports enactment of these provisions.

The Section makes the following recommendations or comments concerning other provisions of Article 1.

Application of Exemptions

Section 703.010(b) provides as follows:

"The exemptions provided by this chapter or by any other statute do not apply if the judgment to be enforced is for the foreclosure of a mortgage or other lien on the property other than a lien created pursuant to this division."

This provision continues present law that exemptions do not apply to property subject to consensual or statutory liens in favor of a judgment creditor. However, as noted in the Commission's comment to a draft of this section, the language of 703.010(b) is intended to eliminate a portion of existing C.C.P. § 690.52 which makes exemptions inapplicable in the case of a judgment for the purchase price of the property on which execution is sought. Thus, for example, under present law, were an individual to purchase a sofa from a department store on an unsecured basis and then fail to make payments for the item purchased, the department store would be permitted to levy execution on the sofa following judgment notwithstanding the exemption for necessary household goods and furnishings. Presumably, the major purpose of the current exception is to prevent a person from defrauding a seller of property by purchasing without intent to pay and then claiming an exemption

in the property purchased following a judgment for the purchase price. (An analagous rationale appears to underly the decision of Congress not to extend the avoiding power of 11 U.S.C. section 522(f)(2) to purchase money liens.) Were the avoidance of fraud not the purpose of the current exception, there would appear to be no good reason to distinguish sellers from any other potential judgment creditor.

The legislation proposes to eliminate this purchase money exception to the exemptions because, according to the Commission's comment, "it was unenforceable in practice and because a security interest may be obtained in such a case." Apparently the Commission believes that levying officers are reluctant to levy on items such as household goods simply because the levying officer in most cases believes that such items will be exempt. The Section notes that the conclusion is somewhat inconsistent with the Commission's decision that several kinds of property, including household goods, can be exempted only by the making of a claim of exemption. That decision presupposes that levying officers will levy on such property.

While true that a seller may protect itself by retaining a security interest in the item sold, that will necessitate a good deal of paperwork in the most common case in which an exemption might otherwise be claimed -- the consumer purchase of household goods. In such cases, many creditors would have to rewrite existing revolving charge agreements and make new Truth-in-Lending disclosures. And many of those creditors would not easily learn of this new reason to take security because the change in the law would occur through the deletion of a somewhat obscure phrase from present law in a voluminous new piece of legislation. In that respect, the change would be a trap for the unwary.

The Section believes that the purpose of the purchase money exception to the exemptions (currently found in C.C.P. § 690.52) serves the important purpose of preventing the type of fraud described above and that there are insufficient countervailing reasons to eliminate the exception. Accordingly, the Section recommends that § 703.010 be amended to carry forward the purchase money exception under existing law.

703.030. Manner of Claiming Exemptions

In this section, the proposed legislation distinguishes between property exempt without making a claim, and property which may be exempted only through the exemption claiming procedure described in Article 2. The reasons for

the distinction appear to be largely historical, although there are some types of property for which the distinction appears to be functional. The Section is not prepared to recommend any change in the Commission's choice of designation of any kind of property except to urge, for obvious reasons, that the legislature consider treating health aids as either exempt without making a claim or at least not subject to levy until after hearing.

703.050 and 703.060. (Retroactive Application of Exemptions)

The Commission has concluded that the retroactive application of a new exemption statute, or of increases in the amounts of exempt property, to judgment creditors whose claim (whether in tort or contract) predates the change, does not violate Article 1, section 10 of the United States Constitution which prohibits a state from impairing the obligation of contract. The Section believes that the Commission's argument to this effect is persuasive. Because these sections are likely to be fairly controversial, the Section wishes to note its endorsement of the Commission's position.

703.100. Time for Determination of Exemptions

This section provides that a determination of whether or not property is exempt shall be made in view of circumstances existing at the time of the levy of property, the time of the commencement of court proceedings for the application of the property to satisfaction of the money judgment, or the time an attachment lien is created, whichever is earliest. However, the court is given discretion to consider changes in circumstances between the earliest of such times and the date of the hearing on the claim of exemption.

Section 703.100(b) specifies the kinds of changes in circumstances which the court may consider. The Section believes that the drafting of 703.100(b) is a bit cumbersome and recommends that the legislature substitute the more concise (albeit less specific) language adapted from the Commission's comment to this section.

Accordingly, the Section recommends that § 703.100 (b) be amended to read:

"The court, in its discretion, may adjust the rule of subdivision (a) in cases where to do so appears appropriate in light of the purposes of the exemption."

703.120. Continuing Review of Exemptions

This section provides for continuing review of exempt amounts by the Commission with a view to making recommendations to the Governor and Legislature which would accommodate the impact of inflation. The provision is analogous to 11 U.S.C. § 104. The Commission apparently gave some thought to including an automatic cost of living escalator in the exemption provisions but has concluded that political opposition to such a provision makes it unwise to include an automatic escalator in the proposed legislation. The Section defers to the Commission's judgment on that issue.

Exemptions in Bankruptcy

The Commission recommends that California decline to exercise its option under 11 U.S.C. § 522(b) to prohibit a debtor from claiming § 522(d) exemptions in a proceeding under the Bankruptcy Code. Quite a few other states have exercised that option. Because the Commission's recommendation may be somewhat controversial, the Section wishes to note its endorsement of the Commission's position.

Article 2; Procedure for Claiming Exemptions after Levy

The provisions of Article 2 detail the method by which a judgment debtor may claim property exempt after the levy at the behest of the judgment creditor. As stated previously, the provisions of this Article continue (for the most part) and expand upon the procedure for claiming exemptions currently provided in C.C.P. § 690.50.

The Section suspects that in most cases judgment debtors who might be entitled to claim exemptions are not knowledgeable about their legal rights, including the rights to claim exemptions, are not functionally literate, and are not able to afford an attorney to adequately inform them of and protect their rights. Accordingly, the Section approves of the requirement of the proposed legislation that a notice of levy informing the judgment debtor of the right to claim an exemption be served on the judgment debtor at the time of

the levy (sections 700.010, 699.540). The Section also approves generally of the language suggested in item 3b of the form of notice of levy (section 693.020), and recognizes the broad authority given to the Judicial Council to modify that form (section 681.030).

Nevertheless, it may be desirable to instruct the Judicial Council in the legislation that the form of notice to the judgment debtor concerning the right to claim an exemption be drafted in in language and accompanied by explanations similar in nature to the language and explanations found in the Judicial Council's form for Employee Instructions (Wage Garnishment).

In addition, the Section recommends that forms for the claim of exemption and financial statement (sections 703.520 and 703.530) be made available free of charge from the office of the levying officer (if not included with the notice of levy) and that the notice of levy so inform the judgment debtor. Finally, the Section recommends that the Commission consider deleting the requirement of provision 703.520(b)(5) (which requires the judgment debtor to cite to the statute on which a claim of exemption is based in preparing the claim of exemption), because many judgment debtors who cannot afford the expense of attorney assistance may be unable to comply with that requirement. Moreover, most judgment creditors will be sufficiently sophisticated to understand the grounds for the claim of exemption absent such information in the claim of exemption form.

The steps recommended here will go further than the proposed legislation in assuring that judgment debtors entitled to claim exemptions will be given reasonable opportunities to do so. The steps recommended do not appear to impose any significant burdens on judgment creditors, the courts, or the office of the levying officer. Accordingly, the Section urges the Commission to consider amendments to the proposed legislation consistent with these recommendations.

Article 3; Exempt Property

The Law Revision Commission proposes to exempt the following types of property from execution: motor vehicle and proceeds (704.010); household furnishings, wearing apparel and personal effects (704.020); materials for repair or improvement of dwelling (704.030); jewelry, heirlooms, and works of art (704.040); health aids (704.050); tools of the trade and proceeds (704.060); certain amounts in deposit

accounts and money (704.070); deposit account in which Social Security payments are directly deposited (704.080); funds in an inmate's trust account (704.090); life insurance, endowment, and annuity policies (704.100); public retirement and related benefits and contributions (704.110); public employee vacation credits (704.113); private retirement and related benefits and contributions (704.115); unemployment benefits and contributions and strike benefits (704.12); disability and health benefits and contributions (704.130); damages for personal injury (704.140); damages for wrongful death (704.150); worker's compensation (704.-160); welfare (704.170); relocation benefits (704. 180); certain licenses issued by a public entity (704.190); cemetery plots (704.200). A homestead is exempted in the manner and to the extent described in Article 4, discussed in section D below.

In substantial measure, these proposed exemptions preserve the exemptions now specified in the Code of Civil Procedure (§§ 690.1 et seq.). We know that the proposed exemption for funds in a deposit account (including a credit union) is intended to supersede the present analogous exemption in the Financial Code; we do not know, however, whether these proposed exemptions are intended to supersede other miscellaneous exemptions currently codified elsewhere than in the Code of Civil Procedure (e.g., certain items aboard waterborne vessels, Harbors and Navigation Code section 495.5). Of course, non-bankruptcy federal exemptions are unaffected by the proposed legislation. We comment here only on the sections which we believe raise important issues of policy or in which we perceive room for technical amendment.

704.010. Motor Vehicle; Proceeds

The Section concurs with the Commission's view that a \$1,000 exemption in a motor vehicle, or in two motor vehicles where necessary to enable the judgment debtor and judgment debtor's spouse to earn a livelihood, and in proceeds, is a necessary and appropriate increase from the current \$500 protection for only one vehicle. The Section recommends, however, that the amount of the exemption for any motor vehicle be increased to \$1,200 to correspond with the comparable provision of the Bankruptcy Code.

The Section also recommends some amendments to the language of this section to more clearly express what it assumes to be the intent of the drafters. The Section proposes that the language read:

"(a) One motor vehicle is exempt if the equity in motor vehicle does not exceed one thousand dollars (\$1,000). A second motor vehicle is exempt if (1) the judgment debtor is married, (2) both motor vehicles are necessary to enable both the judgment debtor and the spouse of the judgment debtor to earn a livelihood, and (3) the equity in the second motor vehicle does not exceed one thousand dollars (\$1,000). For the purpose of determining the equity, the fair market value of the motor vehicle shall be determined by reference to used car price guides customarily used by California automobile dealers unless the motor vehicle is not listed in such price guides."

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"(d) If a motor vehicle (including a second motor vehicle deemed necessary, under subdivision (a) of this section, to enable the judgment debtor and the spouse of the judgment debtor to earn a livelihood) is sold other than on an execution sale, or if a motor vehicle has been lost, damaged or destroyed, the proceeds of sale or of insurance or other indemnification are exempt in the amount of one thousand dollars (\$1,000)."

704.020. Household Furnishings,
Wearing Apparel, Personal Effects

This section continues the substance of C.C.P. § 690.1. The existing exemption which, with specified exceptions (e.g., one piano), protects furnishings, appliances and wearing apparel only insofar as they are ordinarily and reasonably necessary to and personally used by the debtor and the debtor's resident family, has been interpreted to allow to the judgment debtor such of those items which are appropriate to the debtor's "station-in-life". The Commission proposes to eliminate the station-in-life standard by allowing to the judgment debtor only such of those items as are "ordinarily and reasonably necessary for an average household" (emphasis added).

While the Section concurs with the Commission's conclusion that the station-in-life test is, at least theoretically, unfair, it believes that the proposed substitution of a standard which refers to "an average household" brings with it more problems than it solves. The Section doesn't know what an "average household" is and doubts whether a judge will know any better. Accordingly, the Section disapproves of this Commission proposal.

The Section recommends that the station-in-life test be retained because there does not seem to be much actual abuse of the exemption. Moreover, the Section notes that the Commission proposed, in its wage garnishment legislation, the elimination of a station-in-life test in connection with the debtor's claim that all of his or her wages were necessary to the support of the debtor or the debtor's family. That proposal did not survive the legislative process and the Section sees no reason why it should survive the legislative process in this different context. Moreover, it would seem incongruous to preserve the station-in-life test in the wage garnishment context but eliminate it in the context of the claim of exemption for household furnishings, wearing apparel and personal effects.

A minority position recommends that the station-in-life test be replaced by an exemption provision for household furnishings, wearing apparel and personal effects similar to section 8 of the Uniform Exemptions Law (promulgated by the National Commissioners on Uniform on Uniform State Laws) or to 11 U.S.C. § 522(d)(3). Section 8 of the Uniform Exemptions Act provides, in part:

- "(a) An individual is entitled to exemption of the the following property to the extent of a value not exceeding \$500 in any item of property:
- (1) furnishings and appliances reasonably necessary for one household;
 - (2) if reasonably held for personal use of the individual or a dependent, wearing apparel, animals, books, and musical instruments; . . ."

See also 11 U.S.C. § 522(d)(3) which limits the unit value of an item to \$200 but does not require that the item be reasonably necessary for the judgment debtor's use.

704.040. Jewelry, Heirlooms, Works of Art

This section provides, in full, as follows:

"An item of jewelry, an heirloom, a work of art, or other personal effect is exempt if the court determines that its reasonable sentimental or psychological value to the judgment debtor or the spouse or a dependent of the judgment debtor outweighs the right of the judgment creditor

to enforce the money judgment to such an extent that it would be inequitable to subject the property to enforcement."

This section is intended to segregate the exemption for jewelry, heirlooms and works of art from the exemption for household furnishings and wearing apparel. Currently, all of these types of exempt property are covered to some extent under C.C.P. § 690.1. The Section harbors serious doubts about the ability of the judge to meaningfully interpret the standard for exemption under proposed section 704.040. The standard is susceptible to too much self-serving declaration by judgment debtors and judgment creditors. The Section does not understand how a judge would "weigh" the "right of a judgment creditor" to enforce a money judgment. Would the weight of that right depend upon the amount of the judgment, or the availability of other property on which to levy, or the period of time which has elapsed from the entry of the judgment, or the economic necessity of the judgment creditor, or the demographic or other characteristics of the judgment creditor? Neither the section nor its comment suggests any answer to these questions. For these reasons, the Section disapproves of the Commission's proposed standard for exempting jewelry, heirlooms and works of art.

The Section recommends, therefore, that the legislature preserve present law concerning exemptions of these types of property.

The Section notes that "personal effects" are exempted both by § 704.020 and by § 704.040 and wonders whether the Commission intended that a judgment debtor be able to exempt a personal effect (other than a household furnishing, a piece of wearing apparel, jewelry, heirloom, or work of art) under the standard of either section.

704.060. Tools, etc., Used in Trade,
Business, or Profession; Proceeds

This exemption continues the substance of C.C.P. § 690.4. The Section believes that \$2,50 in value in exempt items of this description does not protect the ability of judgment debtors to earn a livelihood. Accordingly, the Section recommends that the amount be increased, or consideration given to entirely eliminate the value limitation.

704.070. Deposit Accounts and Money

This section proposes that any combination of deposit accounts (other than savings deposits or funds in a credit union) and money be exempt in the amount of \$250, that any combination of savings deposits or shares in a state or federal savings and loan association be exempt in the additional amount of \$500, and that shares or certificates for funds deposited in a credit union be exempt in the additional amount of \$750. This section constitutes the Commission's proposed consolidation of and amendment to current law which exempts \$1,000 in a savings and loan and \$1,500 in a credit union. The distinction between the amounts that could be exempted in a person's pocket, a bank checking account, a savings account, or a credit union, perhaps reflect the Commission's perception of political pressures likely to emerge concerning this exemption. The Section nevertheless recommends that the Commission support an undeniably more rational scheme which would exempt deposit accounts in any form, and money, in the total amount of \$2,500. The Section believes that judgment creditors will be adequately protected against abuse of this exemption by the requirements of § 703.520 that a judgment debtor claiming this exemption disclose to the court the existence of other funds not subject to levy and by the requirement in § 704.070 that the exemption be applied first to amounts not before the court and then, if not exhausted, to amounts before the court.

Section 704.070(e) provides that the amount of funds exempted are to be reduced by the amount of any funds in any deposit accounts which are traceable to amounts that are exempt under any other provision of Chapter 4 or any other exemption law. The Section disapproves of this subdivision. Apparently the Commission believes that the debtor should not be able to cumulate the exemption under § 704.070 with the traceable proceeds of disposition of any other property which is exempt under another section of the exemption provisions. For example, § 704.070 as drafted would reduce the amount of the deposit account exemption (\$2,500 under our proposed amendment) by \$1,000 proceeds from the sale of a motor vehicle which would be exempt under proposed § 704.010. The Section believes, on the contrary, that the exemption under § 704.070 should be cumulative to other exemptions because it is intended to provide the debtor with a small cushion of liquid assets available for any purpose, whereas the purpose of other exemptions is to provide items or funds for a specific purpose. The Section believes that this small cushion is necessary to fulfill the purpose of exemption laws to preserve minimum human dignity and avoid making a judgment debtor a charge

of the state. Accordingly, the Section recommends that the Commission redraft § 704.070(e) to make clear that the exemption of § 704.070 shall be cumulative to proceeds traceable to the disposition of other exempt property.

704.140. Damages for Personal Injury,

704.150. Damages for Wrongful Death

The legislation proposes to exempt an award of damages or a settlement arising out of personal injury, or arising out of the wrongful death of the judgment debtor's spouse or wrongful death of a person of whom the judgment debtor or the spouse of the judgment debtor was a dependent. The amount protected is, in the case of wrongful death, the amount reasonably necessary for support of the judgment debtor and the spouse and dependents of the judgment debtor. In the case of personal injury, the same amount, without the requirement that the necessity be reasonable (perhaps an inadvertent omission) is exempt, unless the judgment creditor is a provider of health care whose claim arises out of the provision of health care for the personal injury for which the award or settlement was made.

The Section approves these new exemptions but notes that § 704.140(c), which excepts from the personal injury exemption the judgment creditor who provided health care in connection with the personal injury, may be troublesome in a bankruptcy context. Suppose a debtor chooses to claim California exemptions in a proceeding under Chapter 7 of the Bankruptcy Code, that one exemption claimed is an amount arising out of personal injury, and that one of the debtor's creditors is a relevant provider of health care. May the trustee invoke 11 U.S.C. § 544(b), including its historical baggage (Moore v. Bay), to assert the rights of the health provider on behalf of all creditors and disallow the entire personal injury exemption? The legislature may wish to consider whether that potential problem could be avoided by eliminating subdivision 704.140(c) and substituting, by amendment to the Civil Code, a limited statutory lien in favor of health care providers.

D. DIVISION 2, CHAPTER 4, ARTICLE 4 (HOMESTEADS)
PROPOSED C.C.P. §§ 704.710-704.840

Present Law

There is a dual system for perfecting an exemption in a person's principal residence under California law. The declared homestead system is set forth in Civil Code §§ 1237-1261.1. The declared homestead exemption requires the recording of a homestead declaration and allows a head of household to protect up to \$45,000 in equity in property that is the person's principal residence at the time the declaration of homestead was recorded. A person other than a head of household may protect up to \$30,000 in equity.

The present procedures for levying upon the surplus over the homestead amount were changed effective January 1, 1980, and those procedures are identical to the procedures set forth in the so called dwelling house exemption of CCP § 690.31. CCP § 690.31 creates an exemption equal to the declared homestead exemption but does not protect against judgment liens. See C.C.P. § 674(c). The present law requires a court hearing and testimony of qualified appraisers before a writ of execution can be issued and the real property levied upon. Since the levy cannot occur until after the court authorizes the issuance of a writ, a creditor has no way of perfecting its priority by obtaining a lien on the property. Under existing law, the proceeds of sale continue to be exempt for 6 months thereafter and the debtor has a right to redeem the property if it is sold at a judicial sale.

Proposed Law

The proposed homestead exemption is intended to supersede the declared homestead and dwelling house exemptions. The declared homestead is eliminated. "Homestead" is generally defined to mean the principal dwelling in which the judgment debtor or the debtor's spouse actually resided on the date the judgment creditor's lien attached to the dwelling and in which the judgment debtor or his spouse actually resided continuously thereafter until the date the court determines the dwelling is a homestead. Thus, there is a requirement of actual residency before a homestead exemption would be allowed. Each family unit, which is similar to the head of household concept used in the current law, and a person 65 or over, is entitled to an exemption of \$60,000. All other persons are entitled to an exemption of

\$30,000, provided that the total exemptions on the homestead do not exceed \$60,000. The homestead is very broadly defined to include not only a house and land, but also a mobile home, a waterborne vessel, a condominium, planned development, stock cooperative and community apartment project. If the judgment debtor and the judgment debtor's spouse reside in separate dwellings, the spouses may select which dwelling will be the exempt homestead; if they are unable to do so, the court will determine which is the exempt homestead. Only the proceeds of the sale of the exempt homestead will be exempt.

The proceeds exemption is extended to 18 months to take into account present tax laws which allow non-recognition of capital gains if a new dwelling is acquired within 18 months. Also, insurance for destruction of the homestead is included in exempt proceeds.

The procedure for levying upon property subject to the homestead exemption is that the creditor obtains a writ of execution and levies upon the real property. This levy establishes the creditor's priority unless there is a relation back because of an attachment or judgment lien. There must be at least a 120-day wait between the time notice of levy is served on the judgment debtor and the time notice of sale of the real property is given. This period is designed to give the judgment debtor an opportunity to redeem the property before the sale or to seek potential purchasers.

Within 20 days after service of the Notice of Levy upon the debtor, the judgment creditor must apply to the court for an order of sale. The application must describe the dwelling and state whether or not the records of the county tax assessor indicate there is a current homeowner's or disabled veteran's exemption for the dwelling and the person(s) who claimed any such exemption. It also must state whether the dwelling is a homestead and the amount of the homestead exemption. If the judgment debtor or his spouse has claimed a current homeowner's or disabled veteran's exemption for the dwelling, the judgment creditor will have the burden of proof at the hearing that the dwelling is not a homestead. On the other hand, if the application states the amount of the homestead exemption, the judgment debtor or his spouse will have the burden of proving that the exempt amount is other than the amount shown in the application.

The court is required to set a time and place for hearing and issue an order to show cause to the judgment debtor why a sale should not be made in accordance with the

application. The proposed legislation requires the hearing to be set "not later than 45 days after the application is filed or such later time as the court orders for good cause." Not later than 30 days before the time set for hearing, the judgment creditor must serve on the judgment debtor a copy of the order to show cause, a copy of the application of the judgment creditor, and a copy of the notice of hearing which is in the prescribed form. Within this time period, the judgment creditor must also serve copies of each document on the occupant of the dwelling or, if no occupant is present at the time service is attempted, copies of each document must be posted in a conspicuous place at the dwelling. No sale will be held unless the court enters an order authorizing the sale.

If the court makes an order for sale of the dwelling and neither the judgment debtor nor his spouse, nor an attorney for either appeared at the hearing, not later than 10 days after the date of the order, the judgment creditor must serve a copy of the order and a notice of the order in the same manner as the application and its accompanying documents. The judgment debtor or his spouse then has 10 days after service in which to file a declaration seeking to obtain relief from default. The court must then set a time for hearing on this question, which may not be later than 20 days after receipt of the declaration. The clerk must "promptly" give notice of this hearing on relief from default to all parties.

If the homestead is sold pursuant to court order, a prior lien or encumbrance cannot be accelerated for this reason alone. The sale will only transfer the debtor's right, title and interest in the real property and the purchaser will buy subject to all superior liens and encumbrances on the property. No bid can be accepted at the sale unless it equals or exceeds the amount of the homestead exemption determined by the court. If a creditor levies upon real property subject to a homestead and thereafter no bid is received at the sale in an amount equal to or exceeding the homestead exemption, the homestead is not subject thereafter to a further order of sale by the same judgment creditor for a period of one year and the judgment creditor is liable to pay the judgment debtor's reasonable attorney's fees.

Recommendation

The proposed homestead legislation would be a substantial improvement over existing law. Unlike the previous draft of this legislation, the problem concerning the time

periods governing sale of the property has been corrected. Debtors would benefit from an increased exemption and from the fact that sale would not permit acceleration of obligations obtained at favorable rates secured by superior liens. Creditors would benefit from being able to levy before the court authorizes sale of the homestead, and thereby establish priority. Costs, expenses and court time would be minimized since appraisers would not be used. The fact that the property cannot be sold unless a bid is received sufficient to pay the debtor's homestead amount insures that the market will be the final determinant of value, not the testimony of an appraiser. Also, unlike the present declared homestead, the proposed homestead would only be available to those who actually reside on the property.

Except as noted below, serious consideration should be given to adopting the proposed homestead legislation. First, the provision which awards the judgment debtor reasonable attorney's fees if an adequate bid is not received at the sale should be made discretionary, not mandatory. The creditor that seeks sale of the homestead does not know for certain that an adequate bid will be obtained. If no such bid is made, the court should have the authority (but should not be required) to award the judgment debtor his attorney's fees, only if the facts and circumstances so warrant. Second, inasmuch as the legislation increases the homestead amount by \$15,000 and the Section has resolved to take no position as to what this amount ought to be, it makes no recommendation concerning this aspect of the proposed homestead legislation.

E. DIVISION 2, CHAPTER 5 (WAGE GARNISHMENT) PROPOSED
C.C.P. §§ 706.010-706.154

Under A.B. 707, sections 706.050 and 706.051 would replace existing sections 723.050 and 723.051 of the Code of Civil Procedure. These provisions, existing and proposed, describe the amount of earnings exempt from the levy of an earnings withholding order.

Under existing law, a judgment debtor may claim an exemption for earnings beyond the exemption allowed by federal law to the extent that he or she can prove the additional earnings necessary for the support of the judgment debtor or the judgment debtor's family (hereafter "the hardship exemption"). The hardship exemption is not presently available, however, if the judgment is for a debt incurred for the common necessities of life (food, clothing, medical services, housing).

In the past the Commission has proposed legislation which would entirely eliminate the "common necessities exception" to the hardship exemption, but the legislature has declined to follow the Commission's recommendation.

In proposed § 706.051, the Commission proposes to restrict but not eliminate the common necessities exception. There, the Commission proposes to eliminate the common necessities exception to the hardship exemption if the debtor rents living accommodations (unless the judgment is for a debt incurred for rent) but preserves the common necessities exception in all other cases, i.e., in all cases where the judgment debtor owns an interest in real or personal property used as a principal dwelling.

Concerning this proposal the Commission comments:

(1) "The proposed law provides some additional relief to wage earning renters who are unable to take advantage of the generous homestead exemption available under California law"; and

(2) "The special hardship exemption affords hardpressed wage earners who do not own homes an alternative to declaring bankruptcy in order to take advantage of the \$7,500 blanket exemption permitted by federal law for property not otherwise exempt."

The Commission's idea, apparently, is to help equalize the position of renter and homeowner in the non-insolvency context in a manner consistent with the equality sought through section 522 of the bankruptcy code (exemptions), and thus reduce the necessity for some renters to file bankruptcy. While the Section believes there is some merit to this idea and recognize that it compromises the Commission's previous desire to totally eliminate the common necessities exception, it nevertheless sees several problems with the proposed solution.

First, the proposal discriminates against homeowners. The common necessities exception is not even an issue unless the judgment debtor, whether renter or homeowner, can show that all earnings are necessary for support. Thus, if a hardship exemption is claimed, the only difference between a renter-claimant and a homeowner-claimant is that the homeowner has some equity in the home which might be used to satisfy the debt. The implicit consequence of the proposal therefore is to offer the homeowner three choices: (1) borrow against the equity to pay off the debt -- a silly choice because the debtor of which we are speaking a fortiori needs all earnings for support and his none to pay off a new loan; (2) sell the house -- a choice inconsistent with the policy of the homestead and claimed residential exemptions; or (3) file bankruptcy to discharge the debt -- the choice which the Commission wishes to make less necessary for renters.

The discrimination against homeowners might be justified on the ground that homeowners are no worse off under the proposal than under existing law and that the proposal would at least help renters. But the proposal may disserve renters. The supposed justification for the common necessities exception to the hardship exemption is that it encourages the extension of common necessities credit. While there may be little or no empirical support for that supposition, if it is true then the proposal would presumably constrict or dry up common necessities credit for renters. If that is true, the proposal might result in net social loss to renters.

Finally, the proposal makes the wage garnishment exemption more complex. Most debtors entitled to claim exemption from wage garnishment can't afford attorneys to help them. The existing Judicial Council form of Employee Instructions (Wage Garnishment) is already difficult enough for the average person to understand. By refining even further the common necessities exception, the Commission proposal makes the exemption more difficult to understand.

That may discourage or prevent necessitous debtors from claiming their exemption. At some point a beneficial motive is not worth the price in additional complexity.

For these reasons, the Section opposes the proposals discussed above.

F. DIVISION 2, CHAPTER 6 (MISCELLANEOUS CREDITORS' REMEDIES) PROPOSED C.C.P. §§ 708.010-709.030

The Panel on Miscellaneous Creditors' Remedies reviewed the Law Revision Commission's proposed statute covering the following subjects (section references are to the proposed statute):

1. Wage garnishment -- C.C.P. sections 706.010-706.154
2. Written interrogatories to judgment debtors -- C.C.P. sections 708.010-708.020
3. Post-judgment examinations -- C.C.P. sections 708.110-708.205
4. Creditors' suits -- C.C.P. sections 708.210-708.290
5. Charging orders -- C.C.P. sections 708.310-708.320
6. Judgment creditor's lien in pending action of judgment debtor -- C.C.P. sections 708.410-708.480
7. Assignment orders -- C.C.P. sections 708.510-708.560
8. Receivers in aid of enforcement of judgment -- C.C.P. sections 708.610-708.630
9. Collection of judgment from public entities which are debtors of judgment debtor -- C.C.P. sections 708.710-708.795
10. Enforcement of judgments against government franchises -- C.C.P. sections 708.910-708.930
11. Enforcement of judgments against trusts, estates, and contingent interest -- C.C.P. sections 709.010-709.030

In general, the Section believes the proposed legislation either represents an improvement over existing law, or makes no material change in existing law with respect to the subjects covered. Subject to the following comments, the Section recommends that the proposals be supported.

Interrogatories to Judgment Debtor

The proposed legislation broadens the availability of post-judgment interrogatories by eliminating the limitation in current law that makes them available only where the judgment debtor is represented by an attorney after judgment. While in practice this expansion of the availability of post-judgment interrogatories may only rarely be useful, the Section believes this is a desirable change. However, there remains a discrepancy under the Law Revision Commission proposal between written interrogatories and oral post-judgment examination with respect to the frequency with which the two forms of post-judgment discovery may be employed. Under the proposed legislation, interrogatories to a judgment debtor may not be served within 120 days after the judgment debtor has either (1) been examined orally or (2) responded to a prior set of post-judgment interrogatories. [C.C.P. § 708.020(b)]. Oral examination, however, is unavailable only if there has been a prior oral examination within the preceding 120 days. [C.C.P. § 708.110(b)]. The effect of these dissimilar limitations is to dictate the sequence in which a judgment creditor may pursue the two forms of post-judgment discovery, since the creditor could use an oral examination to follow up on responses to written interrogatories, but not vice versa. The Section sees no reason for this discrepancy, believes the limitations should be parallel, and recommends that this be accomplished by altering C.C.P. § 708.010(b) [applicable to interrogatories] so as to make interrogatories unavailable only if there have been prior interrogatories answered within 120 days.

Award of Attorneys' Fees on Account of Judgment Debtor's Failure To Appear Without Good Cause for Post-Judgment Examination

Law Revision Commission proposed C.C.P. § 708.-170(a) states that attorneys' fees "shall" be awarded if the judgment debtor fails, without good cause, to appear for his post-judgment examination. However, the Section believes that many courts are likely to continue their present approach, lenient to the judgment debtor and burdensome to the judgment creditor, of requiring several court appearances by the judgment creditor's attorney in order to obtain an award of attorneys' fees. This has the practical effect of rendering the remedy illusory in most cases. The Section recommends that the availability of attorneys' fees in case of the judgment debtor's failure to appear without good cause be enhanced by:

(a) The adoption of a rebuttable presumption that the failure of the judgment debtor to appear is without good cause and results in an automatic award of attorneys' fees which may thereafter be set aside on the judgment debtor's initiative, provided he makes the appropriate showing of good cause;

(b) The adoption of a flat fee for attorneys' fees for a non-appearance which will be taxable as a cost; and

(c) Clear notice to the judgment debtor in the order for his examination that the failure to appear without good cause is ground for an award of attorneys' fees, that such fees will be awarded automatically if he does not appear, and that, if they are so awarded, the judgment debtor has the right to attempt to prove that his failure to appear was for good cause. [See C.C.P. § 708.110(e).]

Lien on Cause of Action

The Law Revision Commission proposals make a significant improvement over existing law, by eliminating the notice and motion procedure to which a judgment creditor must now resort in order to obtain a lien on a pending cause of action of the judgment debtor. The Law Revision Commission proposal also changes existing law by providing that the judgment debtor can settle or dismiss the cause of action on which the lien has been taken without the judgment creditor's consent, but only after obtaining an order of the court in which the judgment debtor's action is pending allowing him to do so. The Section recommends a change in the language of the second sentence of C.C.P. § 708.440(b), to make it clear that such an order may be granted only after motion on notice to the judgment creditor. This, the Section believes, could be accomplished by altering the final sentence of that section so that it reads "an order under this subdivision may be obtained only on motion after notice to the judgment creditor."

G.1 DIVISION 3 (ENFORCEMENT OF NON-MONEY JUDGMENTS)
PROPOSED C.C.P. §§ 712.010-717.010

General Provisions

To standardize the terminology involved, the proposed act provides for a "Writ of Possession" (C.C.P. § 714.010) which allows the levying officer to take possession of or sell property. This writ also empowers the levying officer to satisfy any money judgment included in the judgment for sale or possession (C.C.P. § 712.040). The court is specifically empowered to appoint a receiver to enforce a judgment for sale or possession (C.C.P. § 712.060).

Judgments for the Possession of Personal Property

The proposed law provides for the issuance of a "Writ of Possession" (C.C.P. § 714.010) which allows the levying officer to take possession of personal property in the same manner as he would in levying execution. A "Writ of Possession" empowers the levying officer to levy only against property in the judgment debtor's or his agent's possession. The proposed law permits the judgment creditor to avail himself of the usual remedies for the enforcement of a money judgment and to examine the judgment debtor. The judgment creditor may also seek an ex parte (unless otherwise required by rule or court order) order directing the judgment debtor, under pain of contempt, to turnover personal property (C.C.P. § 714.030).

The proposed law makes no provision for the issuance of a "Writ of Possession" against property which is not in the possession of the judgment debtor or an agent of the judgment debtor. Presumably, this omission is to protect the rights of bona fide third party claimants whose rights can be tested through a separate action against the third party.

Judgments for Possession of Real Property

The proposed law provides for the issuance of a writ of possession for real property which empowers the levying officer to execute in the same manner as is authorized in unlawful detainer cases (C.C.P. § 715.030). As with a writ for the possession of personal property, the writ authorizes the levying officer to levy on property to pay for costs, interest and damages both before and after the

entry of judgment. The judgment creditor may sell or dispose of personal property left on the real property as provided in C.C.P. § 1174.

Judgments for the Sale of Real Property

Unlike existing law, a judgment creditor under the proposed law must levy under a writ of sale before real or personal property can be sold (C.C.P. §716.0 0). The proposed law requires that the property be sold in the same manner as under a writ of execution but that the proceeds be distributed under the judgment (C.C.P. § 716.020[c]). Costs, interest and damages may also be obtained when levying under a writ of sale as though the writ is an ordinary Writ of Execution. A judgment creditor may be limited to the proceeds of the property as his security for the judgment.

The proposed law authorizes the appointment of a receiver for the enforcement of judgments against real and personal property and the punishment by contempt for the failure to obey an order of turnover or for the conveyance of documents of title (C.C.P. § 716.030[a]).

Other Non-Money Judgments

The proposed law authorizes other non-money judgments to be enforced by orders under pain of contempt. As under existing law, a certified copy of the judgment must be served on the person required to obey the order before contempt proceedings may be initiated.

Conclusion

The Section recommends support of all of these provisions of the proposed legislation.

G.2 DIVISION 5 (SATISFACTION OF JUDGMENT) PROPOSED
C.C.P. §§ 724.010-724.260

Satisfaction of Judgment

The proposed law continues the present statutory scheme of requiring the levying officer to report the satisfaction of a judgment when a writ is returned. In the event

the satisfaction is obtained without the aid of a writ, the judgment creditor must acknowledge satisfaction with the court (C.C.P. § 724.030).

In the event that an abstract of judgment is recorded against the judgment debtor's real property, existing law requires that within 30 days of the satisfaction of the judgment, the judgment creditor must file with the court and serve upon the judgment debtor, an acknowledgement of satisfaction, listing all the counties in which the abstract of judgment has been recorded. The proposed law shortens this 30-day period to "immediately" upon satisfaction of the judgment (C.C.P. § 724.040). In the event the judgment creditor fails to deliver an acknowledgement of satisfaction, the judgment debtor may demand the delivery of such an acknowledgement and/or demand that it be filed with the court (C.C.P. § 724.050). Under the proposed law, the judgment creditor must deliver the acknowledgement of satisfaction "not later than 15 days after actual receipt of the demand". If the judgment creditor fails to file or deliver the acknowledgement of satisfaction, the judgment debtor or owner of lien property may, upon a Notice of Motion, compel the delivery or filing of such acknowledgement or have the court direct the clerk to enter such satisfaction.

If a judgment creditor "intentionally" conditions the delivery of the acknowledgement on the performance of an act or payment in excess of that to which he is entitled on the judgment, the judgment creditor may be liable for all damages sustained or a minimum of \$250 (C.C.P. § 724.070).

The prevailing party under this Chapter is entitled to attorney's fees (C.C.P. § 724.080).

Partial Satisfaction

The proposed law specifically authorizes the entry of a Partial Satisfaction of Judgment, which the drafters view as a device for testing the amount paid and still owing on a judgment.

Conclusion

The Satisfaction of Judgment provisions of the proposed revisions to the Code of Civil Procedure should be adopted as proposed.

H. DIVISION 4 (THIRD PARTY CLAIMS AND RELATED PROCEDURES) PROPOSED C.C.P. §§ 720.010-720.800

Summary of Changes

The existing law governing the third party claims, i.e., claims of persons whose property rights have been affected by a creditor's attempt to levy on property, are contained primarily in Sections 689, 689.5, 689a, 689b, 689c and 689d of the Code of Civil Procedure. Division 4 of the proposed enforcement of judgments statute would supersede these provisions and make a number of important changes in the rights and procedures accorded to third parties. The most significant of these changes are as follows:

Under existing law only a person claiming title and right to possession of personal property or the rights of a chattel mortgagee or conditional seller in personal property can make a third party claim (C.C.P. § 689b). The proposed law also allows (a) a person claiming a security interest or lien as to personal property superior to the levying creditor's (proposed C.C.P. § 720.210) and (b) a person claiming title or right to possession of real property (proposed C.C.P. § 720.110) to make a third party claim.

2. Under existing law, service of the third party claim is to be made by registered or certified mail (C.C.P. § 689). The proposed law requires personal service or service by first class mail (proposed C.C.P. §§ 720.140 and 720.240). In addition, the proposed law removes an inconsistency in the existing law by making the provisions for extension of time when service is by mail applicable to all third party claims (proposed C.C.P. §§ 720.140(b) and 720.240(b)).

3. Under existing law, the amount of the undertaking required to be filed against the creditor if the creditor wishes to proceed against the property is either (a) twice the value of the property or (b) twice the amount of interest claimed by the chattel mortgagee or conditional seller (C.C.P. §§ 689 and 689(b)(9)). The proposed law eliminates appraisal and other proof problems and conforms the undertaking requirements with attachment law by requiring the undertaking in a flat amount: \$7,500 where the action is pending or judgment was rendered in superior court; \$2,500 where in municipal or justice court (proposed C.C.P. §§ 760.160 and 760.260). A creditor that is a public entity exempt from giving an undertaking may file a notice of opposition to the third party claim instead of an undertaking (proposed C.C.P. §§ 720.140(d) and 720.240(d)).

4. Under existing law, the third person must object to the sufficiency of the undertaking on the ground that it is not twice the value of the property or the third person's interest in the property (C.C.P. §§ 689 and 689(b) (9)). The proposed law replaces this with the more relevant ground that the undertaking is not sufficient to compensate the creditor for the creditor's probable damages if the third party claim is established.

5. The proposed law also gives any third person specified in paragraph 1 above the right to obtain the release of the property by filing an undertaking, whether or not the creditor has done so (proposed C.C.P. § 720.610). If the creditor has filed an undertaking, the third person's undertaking must be in at least an equal amount. If not, it must be at least the lesser of (a) twice the market value of the property (proposed C.C.P. §§ 720.630(c) and (d)). Under existing law this right may be exercised only by a third party claiming ownership or right to possession of personal property levied on to satisfy a money judgment (C.C.P. § 689). Under the proposed law, the third person's undertaking is to be filed with the levying officer rather than the court as under existing law (proposed C.C.P. § 720.620, superseding C.C.P. § 711); the levying officer then files the undertaking with the court when the hearing on the third party claim is held or the writ is returned (proposed C.C.P. § 720.330).

6. The proposed law makes clear that there is no right to a jury trial or a third party claim (proposed C.C.P. § 720.410), and that, when the third person claims a security interest, the burden of proof shifts from the third person to the creditor (proposed C.C.P. § 720.360(b)). The proposed law also requires the debtor to be served with notice of the third party claim and proceedings related to that claim (proposed C.C.P. §§ 720.140(c) and 720.240(c)). Existing law contained no such requirement.

Discussion

Chapter 2 of Division 4 contains provisions governing third party claims of ownership or right to possession. Chapter 3 contains provisions closely parallel to those in Chapter 2 governing third party claims of security interest or lien. Section 720.230 (Chapter 3), however, which describes the required contents of the third party claim, requires that the security agreement and financing statement, if any, be attached. Section 720.130 (Chapter 2) has no comparable requirement despite the fact that the third person's claim of title or right to possession may be

based on one or more documents and the short time before hearing on a third party claim may make discovery difficult or impossible. In addition, the serious interference with a creditor's attempt to levy on property caused by a third party claim, which may be filed without an undertaking, makes it not unreasonable to require the third person, as a preliminary matter, to submit any documentary evidence of the third person's claim. Whether such documentation not submitted with the claim could be introduced at the hearing on the claim should be subject to the court's discretion.

Section 720.280 requires a creditor filing an undertaking in response to a third party claim of security interest or lien on personal property to file a sworn statement and serve it on the secured party stating that the security interest is invalid, that it is not entitled to priority over the creditor's interest or that the amount demanded exceeds the amount to which the secured party is entitled. Consistent with the other provisions of this division, this statement should be served on the debtor as well.

Section 720.330 requires the levying officer, promptly upon receipt of notice of hearing on the third party claim, to file with the court: (a) the third party claim, (b) any statement filed by the creditor as required by Section 720.280 and (c) any undertaking filed by the creditor as required by Section 720.160 or Section 720.260. Section 720.800 requires the levying officer to file with the court any undertaking filed under this division in his possession when the writ is returned. The levying officer should also be required to file any undertaking filed by the debtor as permitted by Section 720.260 (the release undertaking) and any notice of opposition filed by a public entity exempt from filing undertakings pursuant to Section 720.160 and Section 720.260.

In Section 720.370 it is specified that if the third person has filed the petition for hearing on the third party claim, neither the petition nor the proceedings may be dismissed without the consent of the creditor. Although the proceedings pursuant to a third party claim could clearly not be dismissed without the consent of the third person, it seems equally appropriate that, in the event the creditor is the petitioner, the petition not be dismissed without the consent of the third person.

Recommendation

The proposed provisions of the enforcement of judgments statute governing third party claims (Division 4) are supported by the Section with the following exceptions:

1. Section 720.130 should add to the required contents of a third party claim of ownership or right to possession that a copy of any writing upon which the claim is based be attached to the claim and specify that the court shall have the discretion to exclude any writing not so attached from any hearing on the claim.

2. Section 720.280 should require the statement of creditor in opposition to third party claim of security interest and lien to be served on the debtor as well as the secured party.

3. Section 720.330 should require the levying officer to file with the court, promptly upon receipt of notice of hearing on a third party claim, any undertaking filed with him as provided by § 720.620 (third person's release undertaking) any notice of opposition by a public entity filed with him as provided by §§ 720.160 and 720.260.

4. Section 720.370 should specify that, if the creditor has filed a petition for hearing on the third party claim, the petition shall not be dismissed without the third person's consent.

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