

## Memorandum 84-82

Subject: Study D-303 - Creditors' Remedies (Follow-up Legislation)

We have received a letter from Mr. Donald B. Day of the Judicial Council in which he suggests some amendments to the Enforcement of Judgments Law. (See Exhibit 1, attached hereto.) The staff concludes that there is a need to make several of these amendments; even though they are technical, these amendments will avoid some confusion. Accordingly we ask that the Commission approve introduction of a bill on creditors' remedies in the upcoming legislative session. A draft is attached hereto as Exhibit 2.

Code Civ. Proc. §§ 683.160, 704.770, 704.790. References to statutory forms in these sections need to be revised since the statutory forms have been repealed.

Code Civ. Proc. § 693.060(b). Mr. Day requests that the substance of this provision be preserved. Section 693.060(b) reads: "Timely completion and return of the Spanish language form has the same force and effect as timely completion and return of the English language form." This provision applied only to the Declaration for Rehearing on Homestead Exemption which is returned to the court to give the judgment debtor a second chance to claim a homestead exemption. Out of an excess of caution we would preserve the substance of Section 693.060(b) by general language added to Section 681.030.

Code Civ. Proc. § 708.310. The reference in this section on charging orders to Section 15573 of the Corporations Code should be revised to refer to Section 15673. Since the Enforcement of Judgments Law was enacted, the Limited Partnership Act has been replaced by the California Revised Limited Partnership Act, operative July 1, 1984. The language of the two sections is identical.

Code Civ. Proc. §§ 720.160, 720.260, 720.660. These sections need amendment to reflect the enactment of the Bond and Undertaking Law as explained in the comments to the sections.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel



## JUDICIAL COUNCIL OF CALIFORNIA

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September 11, 1984

Mr. John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94306

Dear Mr. DeMouilly:

In reviewing Assembly Bill No. 2295, we note that section 16 of the bill repeals chapter 19 (§ 693.010 et seq.) of division 1 of title 9 of part 2 of the Code of Civil Procedure. Chapter 19 prescribes the form for several writs, notices, and the like until the forms are superseded by Judicial Council forms. Most of the chapter 19 forms have been approved by the Judicial Council, and we expect the remaining ones to be approved effective January 1, 1985, namely, the form Notice to Homeowner and Resident of Right to Exemption (§ 693.050) and the form Notice for Rehearing on Homestead Exemption (§ 693.060).

Several code sections, however, still refer to provisions of the repealed chapter. For example, sections 683.160, 704.770, and 704.790 all require service of notices prescribed by specific sections in the repealed chapter. These notices will all probably be available by January 1, but the practitioner may not know what they are. Perhaps these sections should have a reference to the Judicial Council form or its equivalent.

A potentially more serious problem exists with section 693.060. As with the other sections of chapter 19, section 693.060(a) depicts a suggested form, but subdivision (b) contains substantive law. Subdivision (b) provides that use of the Spanish language form has the same effect as use of the English language form. This provision will be removed with the repeal of chapter 19. We had planned to include on the form a notice box containing the substance of subdivision (b), but now

question whether that would be appropriate. Does any other provision of the law create the same result as former subdivision (b)?

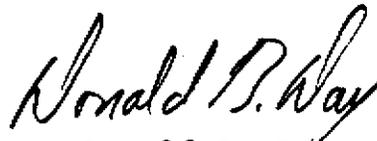
The amendment to section 681.030 raises another problem. The bill deletes the full second sentence of subdivision (b) when only the removal of the final nine words is required by the repeal of chapter 19. As a result, the following language was deleted: "A form prescribed by the Judicial Council under this section is deemed to comply with this title. . . ." The Legislature has used similar language on several occasions when it has authorized or required the Judicial Council to prepare forms (see, for example, Code Civ. Proc., §§ 412.20, 415.30; Prob. Code, § 1456). These provisions protect the users of the forms from objections in court over inconsequential differences between the forms and the literal wording of statutes. They also allow use of nontechnical language on the forms. Litigants are protected from outright errors affecting substantive issues by the words "deemed to comply." Moreover, these saving provisions encourage use of the forms with the consequent benefits to courts and litigants alike.

We would appreciate your thoughts on these issues. We would be willing to help in obtaining any needed corrective legislation.

Very truly yours,

Ralph J. Gampell, Director

By



Donald B. Day  
Assistant Director  
Legal

DBD/vm

EXHIBIT 2

Staff Draft

CREDITORS' REMEDIES CLEAN-UP BILL

An act to amend Sections 681.030, 683.160, 704.770, 704.790, and 708.310 of the Code of Civil Procedure, relating to creditors' remedies.

The people of the State of California do enact as follows:

35079

Code of Civil Procedure § 681.030 (amended). Rules for practice and procedure; forms

SECTION 1. Section 681.030 of the Code of Civil Procedure is amended to read:

681.030. (a) The Judicial Council may provide by rule for the practice and procedure in proceedings under this title.

(b) The Judicial Council may prescribe the form of the applications, notices, orders, writs, and other papers to be used under this title. The Judicial Council may prescribe forms in languages other than English. Timely completion and return of a form in a language other than English has the same force and effect as timely completion and return of an English language form.

(c) The Judicial Council shall prepare a form containing both of the following:

(1) A list of each of the federal and this state's exemptions from enforcement of a money judgment against a natural person.

(2) A citation to the relevant statute of the United States or this state which creates each of the exemptions.

Comment. Subdivision (b) of Section 681.030 is amended to provide a rule on the effect of use of an official form in a language other than English. This rule is drawn from former Section 693.060(b).

Code of Civil Procedure § 683.160 (technical amendment). Service of notice of renewal

SEC. 2. Section 683.160 of the Code of Civil Procedure is amended to read:

683.160. (a) The judgment creditor shall serve a notice of renewal of the judgment on the judgment debtor. Service shall be made personally and proof of service shall be filed with the court clerk. The notice shall be in a form prescribed by ~~section 693.040~~ the Judicial Council and shall inform the judgment debtor that the judgment debtor has 30 days within which to make a motion to vacate or modify the renewal.

(b) Until proof of service is filed pursuant to subdivision (a), no writ may be issued, nor may any enforcement proceedings be commenced to enforce the judgment, except to the extent that the judgment would be enforceable had it not been renewed.

Comment. Subdivision (a) of Section 683.160 is amended to delete the reference to a repealed statutory form and substitute a reference to the form prepared by the Judicial Council. See Section 681.030 (Judicial Council authority).

36235

Code of Civil Procedure § 704.770 (technical amendment). Notice of hearing on homestead exemption

SEC. 3. Section 704.770 of the Code of Civil Procedure is amended to read:

704.770. (a) Upon the filing of the application by the judgment creditor, the court shall set a time and place for hearing and order the judgment debtor to show cause why an order for sale should not be made in accordance with the application. The time set for hearing shall be not later than 45 days after the application is filed or such later time as the court orders upon a showing of good cause.

(b) Not later than 30 days before the time set for hearing, the judgment creditor shall do both of the following:

(1) 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 the hearing in the form prescribed ~~in section 693.050~~ by the Judicial Council. Service shall be made personally or by mail.

(2) Personally serve a copy of each document listed in paragraph (1) on an occupant of the dwelling or, if there is no occupant present

at the time service is attempted, post a copy of each document in a conspicuous place at the dwelling.

Comment. Subdivision (b)(1) of Section 704.770 is amended to delete the reference to a repealed statutory form and substitute a reference to the form prepared by the Judicial Council. See Section 681.030 (Judicial Council authority).

36245

Code of Civil Procedure § 704.790 (technical amendment). Procedure after order of sale of dwelling upon default

SEC. 4. Section 704.790 of the Code of Civil Procedure is amended to read:

704.790. (a) This section applies in any case where the court makes an order for sale of the dwelling upon a hearing at which none of the following appeared:

- (1) The judgment debtor.
- (2) The judgment debtor's spouse.
- (3) The attorney for the judgment debtor.
- (4) The attorney for the judgment debtor's spouse.

(b) Not later than 10 days after the date of the order for sale, the judgment creditor shall serve a copy of the order and a notice of the order in the form prescribed ~~in Section 693-060~~ by the Judicial Council:

(1) Personally or by mail on the judgment debtor and the judgment debtor's spouse.

(2) Personally on an occupant of the dwelling or, if there is no occupant present at the time service is attempted, post a copy of the order and notice in a conspicuous place at the dwelling.

(c) Proof of service and of any posting shall be filed with the court and with the levying officer. If the judgment creditor fails to comply with this subdivision and with subdivision (b) in any case where this section applies, the dwelling may not be sold under the order for sale.

(d) If, within 10 days after service of notice of the order, the judgment debtor or the judgment debtor's spouse files with the levying officer a declaration that the absence of the judgment debtor and the judgment debtor's spouse or the attorney for the judgment debtor or the

judgment debtor's spouse from the hearing was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment debtor or spouse of the judgment debtor wishes to assert the homestead exemption, the levying officer shall transmit the declaration forthwith to the court. Upon receipt of the declaration, the court shall set a time and place for hearing to determine whether the determinations of the court should be modified. The time set for hearing shall be not later than 20 days after receipt of the declaration. The court clerk shall cause notice of the hearing promptly to be given to the parties.

Comment. Subdivision (b) of Section 704.790 is amended to delete the reference to a repealed statutory form and substitute a reference to the form prepared by the Judicial Council. See Section 681.030 (Judicial Council authority).

36246

Code of Civil Procedure § 708.310 (technical amendment). Enforcement by charging order

SEC. 5. Section 708.310 of the Code of Civil Procedure is amended to read:

708.310. If a money judgment is rendered against a partner but not against the partnership, the judgment debtor's interest in the partnership may be applied toward the satisfaction of the judgment by an order charging the judgment debtor's interest pursuant to Section 15028 or ~~15573~~ 15673 of the Corporations Code.

Comment. Section 708.310 is amended to delete the reference to former Corporations Code Section 15573 and substitute a reference to Corporations Code Section 15673 which supersedes the former statute. See 1983 Cal. Stats. ch. 1223, §§ 9-10.

37014

Code of Civil Procedure § 720.160 (technical amendment). Effect, amount, and contents of creditor's undertaking

SEC. 6. Section 720.160 of the Code of Civil Procedure is amended to read:

720.160. (a) If the creditor files with the levying officer an undertaking that satisfies the requirements of this section within the time allowed under subdivision (b) of Section 720.140:

(1) The levying officer shall execute the writ in the manner provided by law unless the third person files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims of third person for which the creditor has given the undertaking.

(b) Subject to ~~Section~~ Sections 720.770 and 996.010, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be in the amount of:

(1) If the action is pending or the judgment was entered in the superior court, seven thousand five hundred dollars (\$7,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(2) If the action is pending or the judgment was entered in a municipal or justice court, two thousand five hundred dollars (\$2,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(c) An undertaking given by the creditor under this chapter shall:

(1) Be made in favor of the third person.

(2) Indemnify the third person against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

(3) Be conditioned on a final judgment that the third person owns or has the right of possession of the property.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

Comment. Subdivision (b) of Section 720.160 is amended to refer to Section 996.010 in the Bond and Undertaking Law which supersedes material formerly included in Section 720.770.

Code of Civil Procedure § 720.260 (technical amendment). Effect, amount,  
and contents of undertaking

SEC. 7. Section 720.260 of the Code of Civil Procedure is amended to read:

720.260. (a) If the creditor within the time allowed under subdivision (b) of Section 720.240 either files with the levying officer an undertaking that satisfies the requirements of this section and a statement that satisfies the requirements of Section 720.280 or makes a deposit with the levying officer of the amount claimed under Section 720.230:

(1) The levying officer shall execute the writ in the manner provided by law unless, in a case where the creditor has filed an undertaking, the secured party or lienholder files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims or liens of the secured party or lienholder for which the creditor has given the undertaking or made the deposit.

(b) Subject to ~~Section~~ Sections 720.770 and 996.010, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be in the amount of:

(1) If the action is pending or the judgment was entered in the superior court, seven thousand five hundred dollars (\$7,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(2) If the action is pending or the judgment was entered in a municipal or justice court, two thousand five hundred dollars (\$2,500), or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount.

(c) An undertaking given by the creditor under this chapter shall:

(1) Be made in favor of the secured party or lienholder.

(2) Indemnify the secured party or lienholder against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

(3) Be conditioned on a final judgment that the security interest or lien of the third person is entitled to priority over the creditor's lien.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

Comment. Subdivision (b) of Section 720.260 is amended to refer to Section 996.010 in the Bond and Undertaking Law which supersedes material formerly included in Section 720.770.

37961

Code of Civil Procedure § 720.660 (technical amendment). Release of property pursuant to undertaking

SEC. 8. Section 720.660 of the Code of Civil Procedure is amended to read:

720.660. The levying officer shall release the property described in the third person's undertaking in the manner provided by Section 720.170 promptly after the expiration of the time allowed ~~under subdivision (b) of Section 720.760~~ for objecting to the undertaking, unless the creditor has objected to the undertaking, and filed with the levying officer a copy of the notice of motion as required by ~~subdivision (b) of Section 720.760~~, prior to the expiration of that time.

Comment. Section 720.660 is amended to delete a reference to former subdivision (b) of Section 720.660 which is superseded by a provision of the Bond and Undertaking Law. See Section 995.930(b) (time for objecting to undertaking).