

Memorandum 78-38

Subject: Study D-39.200 - Enforcement of Judgments (Comprehensive Statute--Exemptions)

This memorandum discusses the more significant changes made in the draft of Chapter 7 (Property Subject to Enforcement of Money Judgments and Exemptions) of the Enforcement of Judgments Law at the May meeting. After consideration of these revisions, we will prepare a complete revised draft of this chapter.

§ 707.180. Tracing exempt funds

Subdivision (c) has been added to implement a decision made at the May meeting:

707.180. (a) A fund for which an exemption may be claimed remains exempt to the extent that it may be traced through deposit accounts and in the form of cash and the equivalent of cash.

(b) The claimant has the burden of tracing an exempt fund.

(c) The tracing of exempt funds in deposit accounts shall be accomplished by application of the lowest intermediate balance principle unless the judgment debtor or the judgment creditor shows that some other method of tracing would be more appropriate under the circumstances of the case.

Comment. Section 707.180 provides the general rule concerning the duration of an exemption for payments to the judgment debtor through deposit accounts and in the form of cash and its equivalents, including cashier's checks, certified checks, and money orders. Subdivision (a) is consistent with decisions under prior law. See, e.g., *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 367, 521 P.2d 441, ___, 113 Cal. Rptr. 449, ___ (1974) (unemployment benefits in checking account); *Holmes v. Marshall*, 145 Cal. 777, 782-83, 79 P. 534, ___ (1905) (life insurance benefits deposited in bank account); *Bowman v. Wilkinson*, 153 Cal. App.2d 391, 395-96, 314 P.2d 574, ___ (1957) (life insurance check converted to cashier's check and deposited in attorney's trust account). See also former Sections 690.18(a) (pension benefits exempt in debtor's possession and when deposited), 690.30 (direct deposit of social security payments); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416-17 (1973) (disability benefits in bank account); *Porter v. Aetna Cas. & Sur. Co.*, 370 U.S. 159, 162 (1962) (veterans' benefits in savings and loan account). This section applies to any fund which is exempt as provided in this chapter. See Sections [707.510 (proceeds from homestead),] 707.530 (proceeds from motor vehicle), 707.570 (proceeds from tools of trade), 707.580 (deposit accounts and money), 707.590 (deposit account into which Social Security benefits are paid), 707.600 (life insurance benefits), 707.610

(retirement benefits), 707.620 (unemployment benefits), 707.630 (disability and health benefits), 707.640 (damages for personal injury), 707.650 (damages for wrongful death), 707.660 (worker's compensation), 707.670 (aid), and 707.680 (relocation benefits). Proceeds from a dwelling, motor vehicle, or tools may be traced only during the applicable period. See Sections [707.510 (six months in case of dwelling),] 707.530 (90 days in case of motor vehicle), and 707.570 (90 days in case of tools).

Subdivision (b) states the rule under former law concerning the burden of tracing exempt funds. This is consistent with the general burden on the claimant in exemption proceedings. See Section 707.380(b).

Subdivision (c) prescribes the general rule for tracing exempt funds in deposit accounts. Under the lowest intermediate balance rule, the exempt fund may not exceed the lowest balance occurring at any time between the deposit of the exempt amount of money and the time of levy. New deposits do not replenish the original exempt fund although the new deposits may themselves be exempt.

In the majority of jurisdictions, the lowest intermediate balance rule is applied where a trustee dips into the trust account and then deposits personal funds--the question being whether the later deposit is subject to the trust. This rule is subject to certain exceptions such as where there is an intent to replenish the trust funds. In California, however, the general rule was rejected in *Church v. Bailey*, 90 Cal. App.2d 501, 504, 203 P.2d 547 (1949), which held that the new deposit becomes a part of the trust fund and that it is unnecessary for the beneficiary to show an express intent on the part of the trustee to replace the depleted trust funds. The rejection of the majority rule in regard to trust funds does not bear upon the adoption of this rule in exemption cases, however, because the issues in the two areas are distinct.

There was some discussion at the May meeting concerning the manner of determining the lowest intermediate balance. The consensus was that this matter should be left to the courts. Since the general rule has been rejected in California, the courts probably have not developed rules for determining the lowest intermediate balance, at least insofar as trust cases are concerned. It appears to be a rather complex problem. Consider the following theories for determining the lowest intermediate balance offered to the court in *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375, 379 (9th Cir. 1935):

1. The daily closing balance, after crediting the opening balance and all deposits during the day and charging all withdrawals for the day, without regard to the order in point of time in which deposits and withdrawals were made.

2. The balance shown during the day as a result of periodical posting of deposits and withdrawals, after crediting the opening balance, with or without regard to the order in point of time of the transactions, observing or neglecting to observe the true balance, according to the arbitrary inclination of the posting clerk.

3. The balance shown by deducting all withdrawals posted during the day from the opening balance without crediting deposits for the day; disregarding the true order of transactions and assuming an order in point of time which would produce the lowest possible balance during the day.

The trial court had applied the third theory; the appellate court in Republic Supply reversed and applied the first. The staff does not propose to specify the manner of determining the lowest intermediate balance in the statute.

§ 707.380. Hearing and order

The second sentence in subdivision (d) has been added to overrule the Grodzins case as explained in the Comment:

707.380. (a) The claim of exemption and notice of opposition to the claim of exemption filed with the court constitute the pleadings, subject to the power of the court to permit amendments in the interest of justice. The claim of exemption shall be deemed controverted by the notice of opposition to the claim of exemption.

(b) At a hearing under this section, the claimant has the burden of proof.

(c) If the court is not satisfied that sufficient facts are shown by the claim of exemption, the notice of opposition to the claim of exemption, or other evidence, the court shall order the hearing continued for the production of other evidence, oral or documentary. No findings are required in a proceeding under this section.

(d) At the conclusion of the hearing, the court by order shall determine whether or not the property is exempt, in whole or in part. The determination of whether property is exempt shall be made under the circumstances existing at the time of the hearing. The order is determinative of the right of the judgment creditor to apply the property toward the satisfaction of the judgment. Where some, but not all, of the funds of the type for which an exemption may be claimed pursuant to Section 707.580 or subdivision (b) of Section 707.600 have been levied upon, the court shall first apply the exemption to the funds which have not been levied upon.

(e) The clerk shall immediately transmit a copy of the order entered in the court to the levying officer. The levying officer shall release the property in the manner provided by Section 703.290, or apply the property toward the satisfaction of the judgment, in compliance with the order.

Comment. Subdivisions (a)-(d) of Section 707.380 continue the substance of a portion of subdivision (i) of former Section 690.50.

The second sentence of subdivision (d) is new. This provision is intended to reject the holding in California United States Bond & Mort. Corp. v. Grodzins, 139 Cal. App. 240, 242-43, 34 P.2d 193, ___ (1934) (portion of life insurance benefits which exceeded exempt amount when received was earmarked for creditors even though benefits remaining at time of levy were below exempt amount). It adopts the principle that the question of exemptions does not arise until the creditor has sought to apply the debtor's property toward the satisfaction of the judgment. See Medical Fin. Ass'n v. Rambo, 33 Cal. App.2d Supp. 756, 758-60, 86 P.2d 159, ___ (1939).

Subdivision (e) continues the substance of the first sentence of subdivision (j) of former Section 690.50.

See also Section 707.110 ("claimant" defined).

§ 707.390. Extension of time

This section has been revised to provide for notice to the opposing party:

707.390. If the court extends the time allowed for an act to be done under this article, written notice of the extension shall be given promptly to the opposing party, unless notice is waived, and to the levying officer.

Comment. Section 707.390 continues the substance of former Section 690.50(1).

§ 707.590. Deposit account in which social security payments are directly deposited

This section has been revised to eliminate the necessity of filing a counteraffidavit to protect excess amounts of social security benefits in direct deposit accounts and to reconcile this procedure with the general procedure for claiming exemptions in accordance with a decision made at the May meeting. Subdivisions (e)(2) and (f) are new material; subdivisions (e)(3) and (e)(4) have been revised.

707.590. (a) For the purposes of this section, "payments authorized by the Social Security Administration" means regular retirement and survivors' benefits, supplemental security income benefits, coal miners' health benefits, and disability insurance benefits.

(b) A deposit account in which payments authorized by the Social Security Administration are directly deposited by the United States government is not subject to the enforcement of a money judgment:

(1) Where one depositor is the designated payee of the directly deposited payments, in the amount of five hundred dollars (\$500).

(2) Where two or more depositors are the designated payees of the directly deposited payments, in the amount of seven hundred fifty dollars (\$750) unless such depositors are joint payees of directly deposited payments which represent a benefit to only one of the depositors in which case only five hundred dollars (\$500) is not subject to the enforcement of a money judgment.

(c) The amount of the deposit account in excess of the amount not subject to the enforcement of a money judgment pursuant to subdivision (b) is exempt to the extent that it consists of payments authorized by the Social Security Administration.

(d) Notwithstanding Section 703.240, the financial institution shall either place the excess amount in a suspense account or otherwise prohibit withdrawal of the excess amount pending notification of the judicial determination of the exempt status of the excess amount and shall notify the levying officer in writing that the deposit account is one described in subdivision (b) and state the balance of the deposit account within 10 business days after the levy. Promptly upon receipt of the notice, the levying officer shall mail notice of the nature and balance of the deposit account to the judgment creditor.

(e) Notwithstanding Article 2 (commencing with Section 707.310), an excess amount exempt under subdivision (c) shall be determined as follows:

(1) Within five days after the levying officer mails notice of the nature and balance of the deposit account to the judgment creditor, a judgment creditor who desires to claim that the excess amount is not exempt shall file with the levying officer an affidavit alleging that the excess amount is not exempt. The affidavit shall be in the form of the notice of opposition provided by Section 707.350, and a hearing shall be set and held, and notice given, as provided by Sections 707.340, 707.360, and 707.380. For the purpose of this paragraph, the "notice of opposition to the claim of exemption" in Sections 707.350, 707.360, and 707.380 means the affidavit under this paragraph.

(2) The judgment debtor is not required to file a counter affidavit regarding an excess amount exempt pursuant to subdivision (c).

(3) If the judgment creditor does not file the affidavit with the levying officer and give notice to the judgment debtor pursuant to Section 707.360 within the time provided, the property shall be released in the manner provided by Section 703.290.

(4) The affidavit shall be filed by the levying officer with the court before the date set for the hearing and constitutes the

pleading of the judgment creditor, subject to the power of the court to permit amendments in the interest of justice. The affidavit is deemed controverted.

(5) At a hearing under this subdivision, the judgment debtor has the burden of proof.

(6) At the conclusion of the hearing, the court by order shall determine whether or not the excess amount of the deposit account is exempt pursuant to subdivision (c), in whole or in part. The order is determinative of the right of the judgment creditor to apply such amount toward the satisfaction of the judgment. No findings are required in a proceeding under this subdivision.

(7) Upon determining that all or part of the excess amount of the deposit account is exempt pursuant to subdivision (c), the clerk shall immediately transmit a copy of the order to the levying officer and the levying officer shall serve the copy of the order on the financial institution. The financial institution shall comply with the order within three business days after its receipt.

(f) If the judgment debtor claims that a portion of the excess amount is exempt other than pursuant to subdivision (c), the claim of exemption shall be made pursuant to Article 2 (commencing with Section 707.310). If the judgment debtor also opposes the judgment creditor's affidavit regarding an excess amount exempt pursuant to subdivision (c), both exemptions shall be determined at the same hearing. If the judgment debtor does not comply with Article 2 (commencing with Section 707.310) as to a claim of exemption other than pursuant to subdivision (c), the exemption is waived and may not be determined at a hearing under subdivision (e) except as provided by Section 707.150.

Comment. Section 707.590 supersedes former Section 690.30. Social Security payments may be directly deposited pursuant to 31 U.S.C. § 492 (1970, Supp. V 1975). Subdivision (a) continues former Section 690.30(c). Subdivision (b) continues the substance of the first paragraph and subdivision (a) of former Section 690.30. Subdivision (c) continues the substance of the introductory paragraph and paragraph (1) of subdivision (b) of former Section 690.30. Subdivision (d) makes explicit what was implicit in a portion of former Section 690.30(b)(2).

Subdivision (e) supersedes paragraphs (2), (3), and (4) of subdivision (b) of former Section 690.30. However, subdivision (e), along with subdivision (f), clarifies the procedure applicable to claiming exemptions for excess amounts in deposit accounts described in this section and the relation between this procedure and the procedure provided by Article 2 (commencing with Section 707.310) (which supersedes former Section 690.50, incorporated by reference in former Section 690.30). Paragraph (6) supersedes former Section 690.30(b)(3). The provision for an order determining priority or dividing the property between several creditors is not continued. Paragraph (7) continues former Section 690.30(b)(4).

Where a deposit account is not one described by subdivision (b) or where an exemption of excess funds in a deposit account

described in subdivision (b) is claimed on other grounds, the procedures provided in Article 2 (commencing with Section 707.310) apply to the determination of the exemption. See Section 707.580 and subdivision (f) of this section.

See also Sections 701.____ ("deposit account" defined), 703.290 (release), 707.200 (adjustment of dollar amounts of exemptions).

§ 707.640. Damages for personal injury

The last sentence has been added to the Comment to this section in response to a suggestion made at the May meeting.

707.640. (a) An award of damages or a settlement arising out of bodily injury of the judgment debtor is exempt to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor.

(b) Subdivision (a) does not apply to a claim by a provider of health care whose claim arises out of the bodily injury for which the award or settlement was made.

Comment. Section 707.640 is new. It should be noted that a cause of action for personal injury or wrongful death is not subject to enforcement of a money judgment (see *Murphy v. Allstate Ins. Co.*, 17 Cal.2d 937, 945-46, 553 P.2d 584, 589-90, 132 Cal. Rptr. 424, 429-30 (1976)) and that a pending cause of action may only be reached by the lien procedure provided by Article 5 (commencing with Section 705.510) of Chapter 5.

Respectfully submitted,

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