

First Supplement to Memorandum 79-5

Subject: Study D-500 - Confessions of Judgment

Since Memorandum 79-5 was written, we have received two additional comments concerning confessions of judgment. The Orange County Counsel indicates that prior to Isbell they used confessions occasionally in welfare/general relief collections. They feel that an advice of attorney requirement would preserve the usefulness of the confession and that it would satisfy constitutional requirements. They feel that a notice of rights to the debtor would probably not be constitutional. They feel that a postjudgment review procedure would still be useful, but would likewise not be constitutional.

Michael E. Barber, supervising deputy of the domestic relations division of the Sacramento County District Attorney, has also sent us a letter with comments on confessions. See Exhibit 1. The first paragraph of the letter is concerned with wage garnishment and the remainder with confessions. Mr. Barber suggests an alternative we have not previously considered--he suggests a summary appearance by the debtor in court in which the debtor waives constitutional rights before a judicial officer. This proposal has some attraction for the staff but it is subject to the drawbacks that it would be inconvenient for the parties, would consume judicial time, and would be subject to delay in the case of crowded calendars. Nonetheless, it is an idea the Commission should consider.

Respectfully submitted,

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January 25, 1979

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Gentlemen:

These comments are based on an article in the Weekly Law Digest of December 29, 1978.

First, as to your proposal for wage garnishment procedure, while I would have no problem proceeding with service by first-class mail, I feel that the elimination of an independent, neutral stake-holder in the form of a sheriff or marshal would be a mistake. The availability of neutral testimony by the sheriff or marshal, and, for that matter their availability for personal service as an alternative to service by first-class mail, protects, I think, the rights of the debtor and the garnishor to a much greater extent than your suggestion would. There is no system in our society with the possible exception of the traffic lights that can function on a totally automated basis. In something as important as wage garnishment, we need intervening human beings to adjust the system.

As to confessions of judgment, the Isbell decision does not affect confession of judgment for consumer cases, what it did was throw out the judgments for all other types of actions including tort actions. The only viable alternative I can see to this statute, without mandating that everyone get a lawyer, is to permit judgments to be entered without a summons and complaint by an appearance before a court by the judgment debtor in which he waives, on record, his rights. The broad scope of the Isbell language, for all practical purposes, invalidates any procedure where a judgment is obtained, unless there is prior service of the summons and a reasonable period of time or reflection by the judgment debtor. My personal opinion is Isbell was an outrageous attack on the rights of people to do business with their government without an attorney at their elbow. Be that as it may, it now mandates that people either unnecessarily spend sums to hire an attorney, or that a party who attempts to enforce their rights to an undisputed settlement of a claim go through the charade of obtaining a summons, serving same, and serving a complaint.

In my opinion, the judiciary should bear the brunt of the time involved. Neither party should be put to the expense of resolving the problems that Isbell has created. Indeed, were I able to make the rule, I would personally require that the four supreme court judges who voted for the Isbell decision now be mandated to, at least once a week, enter judgments according to the procedure I have outlined above. In any event, traditionally, in our society, protection of the rights of the parties is a function of the judiciary under the adversary system. As a consequence, I believe it is entirely appropriate to mandate that, in lieu of a summons and complaint, a court must entertain hearings for judgments at the request of both plaintiff and defendant.

One additional point, Isbell flies directly in the face of the recently passed statute allowing a divorce to be entered under certain limited circumstances without the appearance of either party. I do not believe that this new statute can be given effect, given the principles of Isbell, without requiring both parties to appear before a court and waive their rights, since they have not been served with a summons.

Very truly yours

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MEB/ksm

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