

First Supplement to Memorandum 80-61

Subject: Study D-300 - Enforcement of Judgments (Methods of Levy)

The staff has made a further study of the problem of (1) levy on property (tangible or intangible) that is the subject of a pending action or special proceeding and (2) levy on a judgment after the judgment becomes final.

Levy on Property that is the Subject of a Pending Action or Proceeding

Attached is a revised version of Section 700.180 (relating to levy on property that is the subject of a pending action or proceeding). The revised section permits a levy on real property and tangible personal property that is in the possession of the judgment debtor. The levy on real property is made by recording with the county recorder and this gives constructive notice of the execution lien. The levy on tangible personal property in the possession of the judgment debtor is made by the levying officer taking possession of the property. In cases where a levy of execution is permitted on property that is the subject of a pending action or proceeding, the judgment creditor can also obtain a lien in the pending action or proceeding if so desired.

In the case of intangible personal property and tangible personal property that is in the possession of a third party, a levy is not permitted if the property is the subject of a pending action or proceeding. Instead, the judgment creditor can obtain a lien on the rights of the judgment debtor by filing a notice of lien in the pending action or proceeding. See First Supplement to Memorandum 80-67 and attached draft statute. This scheme permits a third party who has possession of tangible property or is obligated to the debtor to await the outcome of the litigation before becoming liable for failing to deliver the property or pay the obligation.

Levy on Final Money Judgment

The Attachment Law permits attachment of a "final judgment" but we assume that this means a final money judgment. If the judgment affects a property right, the attachment should be made by attaching the defendant's interest in the property. Conforming changes to the Attachment

Law should make clear this limitation on attachment of judgments. We will propose a comprehensive, conforming revision of the Attachment Law to the 1982 Legislature. The task of preparing such a revision now would be beyond our resources.

Although revision of the Attachment Law will need to be deferred, we should provide the procedure for levy of execution on a final money judgment in our proposed Enforcement of Judgments Law. By levy on the judgment, the judgment creditor obtains not only the right to payment but also the right to enforce the judgment by the means provided in the Enforcement of Judgments Law. (The judgment is to be collected rather than sold unless the judgment creditor takes the required steps to permit sale. If sold, the purchaser can enforce the judgment under the Enforcement of Judgments Law.) Attached is a draft of Section 700.190 which provides for the levy on a final money judgment. (The section of the proposed draft now numbered "Section 700.190" will be renumbered as "Section 700.200.")

Respectfully submitted,

John H. DeMouilly
Executive Secretary

Methods of Levy on Particular Types of Property

Property that is subject of pending action or proceeding. The effect of a levy of execution on property that is the subject of a pending action or special proceeding is unclear under existing law.⁵⁵ The proposed law contains provisions that make clear the extent to which such property is subject to levy.

Levy on real property. A levy of execution on real property that is the subject of a pending action or proceeding is permitted by the proposed law. The levy is made in the same manner as it would be made if the action or proceeding were not pending. Hence, the levy on real property is made by recording with the county recorder a copy of the writ of execution and a notice of levy. This recording provides constructive notice of the execution lien to subsequent purchasers or encumbrancers and establishes the judgment creditor's priority with respect to other creditors. The proposed law also allows the judgment creditor to obtain a lien in the pending action or proceeding.^{55.1}

Levy on tangible personal property in possession of judgment debtor. The proposed law permits a levy on tangible personal property in possession of the judgment debtor that is the subject of a pending action or proceeding. Here again, the levy is made in the same manner as any other levy on such property. The levying officer takes custody of the property, and this deprives the judgment debtor of the ability to dispose of the property. The judgment creditor may also obtain a lien in the pending action or proceeding.

55. Existing law precludes levy upon or sale of a cause of action or judgment "as such." See Section 688(f). There is no provision dealing with the levy on real property or tangible personal property when the property is the subject of a pending action or proceeding. See also discussion under "Final Money Judgment," infra.

55.1. The levy of execution may not be a sufficient remedy where the property levied upon is the subject of a pending action or proceeding. The judgment creditor may need to restrict the ability of the judgment debtor to settle the pending action or proceeding and to collect on the judgment procured therein. The judgment creditor may wish to intervene in the pending action or proceeding to protect the rights obtained by the levy of execution. For this reason, the judgment creditor may choose, as permitted by the

Levy on other property not permitted. The proposed law does not permit a levy of execution on tangible personal property not in the possession of the judgment debtor or on intangible personal property where the tangible or intangible property is the subject of a pending action or proceeding. This prohibition protects the party in possession of the property claimed to belong to the judgment debtor or the party claimed to owe the debt or other obligation to the judgment debtor. It permits the party to await the outcome of the litigation before being required to deliver the property or pay the debt or other obligation. Although levy of execution is not permitted, the judgment creditor may obtain a lien in the pending action or proceeding and thus establish a priority and protect his or her interests in the property. Obtaining a lien in a pending action or proceeding also permits the judgment creditor to obtain a lien on the judgment debtor's recovery on a cause of action that is itself exempt from enforcement of a judgment, such as a cause of action for personal injury or wrongful death.^{55.2}

Final money judgment. It is unclear under existing law whether levy of execution can be made on a final money judgment obtained by the judgment debtor.^{55.3} The proposed law permits a levy of execution on a final money judgment and prescribes the manner and effect of the levy. The levy is made by filing a copy of the writ of execution and a notice of levy with the clerk of the court that entered the judgment.^{55.4}

proposed law, both to levy on the property and to obtain a lien on the pending action or proceeding. Such a lien will provide the further protections mentioned above to the judgment creditor.

55.2. The proposed law continues the existing rule that a cause of action for personal injury or wrongful death is not subject to the enforcement of a judgment. The proposed law also includes a claimed exemption for a settlement or recovery in a personal injury or wrongful death case, and this exemption may protect some or all of the amount recovered by the judgment debtor in the pending action when the judgment creditor enforces the lien.

55.3. Existing law precludes levy upon or sale of a judgment "as such." See Section 688(f). However, Section 688(f) provides that the manner of levy of execution is the same as in attachment, and the Attachment Law (Section 488.420) provides for the attachment of a final judgment.

55.4. Section 488.420 requires the filing of a copy of the writ and notice of levy in the court that rendered the judgment in order to

Notice of levy must also be served on the judgment debtor obligated to pay the judgment levied upon and on the judgment debtor having the judgment levied upon. But this service is not an essential element of the levy, and a judgment debtor who makes a payment on the judgment levied upon without notice of the levy is protected against having to pay twice. This scheme is consistent with provisions of the proposed law relating to the manner and effect of filing an acknowledgment of assignment of judgment.^{55.5}

attach a judgment. Section 488.420 also requires a service of the copy of the writ and notice of levy upon the judgment debtor obligated to pay the judgment attached in order to attach the judgment. The proposed law does not require such service as an essential element of a levy of execution, but (as mentioned in the text) does require the levying officer to make such service.

55.5. The conforming amendments to the proposed law provide a procedure for filing an acknowledgment of assignment of judgment with the court clerk of the court where the judgment is entered.

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

700.180. (a) Real property or tangible personal property in possession of the judgment debtor may be levied upon pursuant to this article notwithstanding that the property levied upon is the subject of a pending action or special proceeding.

(b) A levy on property that is the subject of an action or special proceeding pending at the time of the levy is not effective if the property is any of the following:

(1) Tangible personal property not in the possession of the judgment debtor.

(2) Intangible personal property.

(c) If a levy is attempted but is ineffective under subdivision (b) and the levying officer has requested a garnishee's memorandum under Section 701.030 in connection with the ineffective levy, the garnishee's memorandum shall include the following information in addition to that required by Section 701.030:

(1) A statement that the levy on the property is not effective because the property is the subject of a pending action or special proceeding.

(2) The title of the court, cause, and number of the pending action or proceeding.

(d) Nothing in this section affects or limits the right of the judgment creditor to obtain a lien pursuant to Article 5 (commencing with Section 708.410) of Chapter 6.

Comment. Section 700.180 deals with the effect of a levy on property that is the subject of a pending action or special proceeding.

Subdivision (a) makes clear that tangible personal property in the possession of the judgment debtor and real property may be levied upon regardless whether the property is the subject of a pending action or proceeding. The property is levied upon just as if there were no pending action or proceeding, and the levying officer serves the notice of levy upon the same persons and in the same manner as is required in connection with any other levy on such property. Subdivision (d) makes clear that the judgment creditor may also secure a lien in the pending action or proceeding under Article 5 (commencing with Section 708.410) of Chapter 6 (procedure for obtaining lien on judgment debtor's rights in pending action or proceedings). If a lien is obtained by the judgment creditor under Article 5, the judgment debtor cannot settle the

action or proceeding without either satisfying the judgment of the judgment creditor or obtaining the written consent of the judgment creditor or authorization by order of the court. See Section 708.440. See also Section 708.470 (enforcement of judgment creditor's lien after final judgment in action or proceeding). In addition, if a lien under Article 5 is obtained, the judgment debtor's right to enforce the judgment obtained in the action or proceeding is subject to the same limitations as the judgment debtor's right to settle the action or proceedings. See Section 708.440.

Subdivision (b) makes ineffective a levy upon tangible personal property not in the possession of the judgment debtor or a levy upon intangible personal property (such as a debt owed the judgment debtor) if the property is the subject of a pending action or proceeding. In such case, subdivision (d) makes clear that the judgment debtor can obtain a lien on the property that is the subject of the pending action or proceeding by filing as required under Article 5 (commencing with Section 708.410) of Chapter 6. This protects the rights of the judgment creditor and, at the same time, permits the third party to await the outcome of the pending litigation before making a decision concerning whether to deliver the property or to pay the debt or other obligation that is the subject of the litigation.

Subdivision (c) requires that the garnishee's memorandum contain the information necessary so that a judgment creditor who has made an ineffective levy upon property that is the subject of pending action or proceeding (see subdivision (b) of this section) may file the necessary documents in the pending action or proceeding to obtain a lien under Article 5. The fact that the levy is ineffective does not avoid the duty to provide a garnishee's memorandum if requested by the levying officer. See Section 701.030(e).

CROSS-REFERENCES

Definitions

Judgment creditor § ____
 Judgment debtor § ____
 Levying officer § ____

34728

§ 700.190. Final money judgment

700.190. (a) As used in this section, "final money judgment" means a judgment requiring the payment of money which has been entered as a final judgment and the time for appeal from the judgment has expired or, if an appeal is filed, the appeal has been finally determined.

(b) To levy upon a final money judgment, the levying officer shall file a copy of the writ of execution and a notice of levy with the clerk of the court that entered the judgment. The court clerk shall endorse upon the judgment a statement of the existence of the execution lien and

the time it was created. Any abstract issued on the judgment shall include a statement of the execution lien in favor of the judgment creditor.

(c) At the time of levy or promptly thereafter, the levying officer shall serve personally a copy of the writ of execution and a notice of levy on the judgment debtor obligated to pay the judgment levied upon. The filing with the court clerk under subdivision (b) is not, of itself, notice to the judgment debtor obligated to pay the judgment levied upon so as to invalidate any payments made by the judgment debtor to the judgment creditor under that judgment or to a prior assignee of record of that judgment.

(d) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on the judgment debtor obligated to pay the judgment pursuant to which the levy is made. Service shall be made personally or by mail.

Comment. Section 700.190, which establishes the manner and effect of a levy upon a final money judgment, is drawn in part from Section 488.420 (prejudgment attachment). Section 700.190 applies only to levy on a final money judgment. See the definition in subdivision (a). Where a final judgment is not a money judgment, Section 700.190 has no effect on the manner of levy. A levy is made on tangible property just as if there were no final judgment relating to that property. The effect of the final judgment in such a case is its relevance to the ownership by the judgment debtor of the property. As to levy on property that is the subject of a pending action or proceeding, see Section 700.180 and Comment thereto. See also Article 5 (commencing with Section 708.410) of Chapter 6 (lien on judgment debtor's rights in a pending action or proceeding).

Subdivision (b) of former Section 688 provided that the manner of levy of execution was the same as in the attachment, and the Attachment Law (Section 488.420) provides for the attachment of a final judgment. Section 700.190, like Section 488.420, requires the filing of a copy of the writ and notice of levy in the court in which the judgment levied upon was entered. However, unlike Section 488.420, Section 700.190 does not require service of a copy of the writ and notice on the judgment debtor obligated to pay the judgment levied upon as an essential element of the levy. Hence, although Section 700.190 requires the levying officer to serve a copy of the writ and notice on that judgment debtor, compliance with this requirement is not a requisite for a valid levy under Section 700.190. See Section 699.550. However, subdivision (c) protects the judgment debtor obligated to pay the judgment levied upon who pays the judgment creditor under that judgment without notice of the levy. In this respect, Section 700.190 is consistent with Civil Code Section 954.5 (payment where acknowledgment of assignment of judgment is filed).