

First Supplement to Memorandum 81-24

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

This supplement discusses primarily the suggestions of the California Association of Collectors (CAC) concerning Assembly Bill 707. See the letter attached as Exhibit 1 (yellow). You will discover upon reading the CAC letter that CAC has taken a constructive view of the proposed new comprehensive enforcement of judgments law (AB 707) but has also raised a number of important policy issues for consideration by the Commission.

This supplement first discusses the CAC letter in the order these matters are presented in that letter.

CAC SUGGESTIONS

A. The Reviewability of Costs of Enforcement (pages 1-2 of CAC letter)

CAC objects to proposed Section 685.060. This section is deleted by the staff recommended amendments attached to Memorandum 81-24.

B. Community Property Subject to Community Debt (page 2 of CAC letter)

The provisions of AB 707 refer to the existing Civil Code provisions that determine the extent to which community property can be applied to satisfy a judgment. CAC questions the effect this reference has. The Commission had anticipated when these provisions were drafted that the separately prepared Tentative Recommendation on the liability of community property would be perfected and legislation would be submitted to the 1982 session at the latest. However, because Professor Bruch has not completed her study, which the contract required be completed by January 1981, we have been unable to complete our recommendation on the liability of community property. For this reason, we are unable to clarify this aspect of the law at this time. We believe that the proposed provisions in AB 707 will need to be reviewed when the separate recommendation on the liability of community property is prepared. We may, if we receive the Bruch study soon, be able to submit the separate recommendation to the 1983 session.

The CAC also raises the question as to whether the name of the nondebtor spouse can be included on the writ of execution aimed at

community property. This is not permitted under existing law. The staff has dealt with this problem in the context where it most often occurs--wage garnishment. One of the staff amendments attached to Memorandum 81-24 permits the garnishment of the earnings of a nondebtor spouse if the requirements set out in the amendment are satisfied. The amendment follows the lines suggested by CAC. We do not believe that we can go further at this time in attempting to deal with this difficult problem.

C. Levy Under Writ of Execution After Attachment (pages 2-3 of CAC letter)

CAC asks how AB 707 changes existing law where property has been attached and a judgment is entered. The significant change is that the judgment creditor who has attached real property can levy on personal property if a judgment lien has been obtained on the attached real property. The real property need not be released. The priority of the judgment lien dates back to the attachment lien.

D. The Keeper (page 3 of CAC letter)

CAC objects to the provision (continued from existing law) that precludes to the use of a keeper as a means of levying under a writ of execution if the judgment debtor objects to the use of the keeper. The staff believes that there is merit to this objection. The creditor must pay for the cost of the keeper initially and should be permitted to use a keeper if the judgment creditor chooses to do so. The debtor can always avoid the problem by paying the judgment. We recommend the following amendment to AB 707:

(b) The levying officer shall take the tangible personal property into exclusive custody at the earliest of the following times:

~~(1) At any time the judgment debtor objects to placement of a keeper in charge of the business.~~

~~(2) (1) At any time when requested by the judgment creditor.~~

(2) At the end of 10 days from the time the keeper is placed in charge of the business.

The new paragraph (2) is one added by the staff recommended amendments set out in Memorandum 81-24.

E. Deposit Accounts (pages 3-4 of CAC letter)

CAC is concerned that the financial institution will release funds that appear to be "excess" in view of the amount of the levy, but that there will not be sufficient funds because an item deposited to the account which is in the process of collection is not collected when presented for payment. The staff recommended amendments set out in Memorandum 81-24 deal adequately with this problem.

F. Manner of Payment on Execution Sales (page 4 of CAC letter)

CAC objects to credit sales on the ground that they will cause delay and may result in a time consuming, expensive second sale. The deposit by the credit bidder must be \$5,000 or 10 percent of the price bid, whichever is the greater amount. Section 701.580(c). The defaulting bidder also is liable for any costs, interest, and reduced sale price on the resale. Balancing the advantage of obtaining the best price for the property at the sale (which is greatly benefited by allowing credit bids) against the possible loss to the judgment creditor, the staff believes the benefits far outweigh the possible loss.

CAC also suggests that the 20-day period allowed for payment by the credit bidder be reduced to 10 days. The staff recommended amendments attached to Memorandum 81-24 make this change.

G. Distribution of Execution Sale Proceeds (pages 4-5 of CAC letter)

CAC objects to the requirement of preparation of a proposed schedule of distribution and the delay in distribution of proceeds that results because of the time allowed to object to the proposed schedule. The staff recommended amendments attached to Memorandum 81-24 delete this provision and substitute a provision that, where there are conflicting claims to all or a portion of the proceeds, the levying officer may pay the portion of the proceeds in dispute into court and the court may determine the conflict and order payment to the person entitled thereto.

H. Order of Examination (page 5 of CAC letter)

CAC objects to the requirement of personal service of an order of examination on a third person holding property of the judgment debtor or indebted to the judgment debtor. We do not understand how a person who was not a party to the action in which the judgment was obtained can be required to attend a court proceeding without being personally served.

Moreover, absent personal service, how can a contempt sanction be applied to the third person? The judgment debtor cannot evade service in such a situation since mail service is authorized, and there is nothing that requires that the judgment debtor actually receive the mail service. This provision does not deal with examination of the judgment debtor; it deals with examination of a third person.

Section 708.110 does require personal service on the judgment debtor of an order for examination of the judgment debtor not less than 10 days before the examination. Since contempt is the sanction for nonappearance we believe that personal service is appropriate. Also, we believe that 10-days notice of the examination is not an unreasonable provision.

I. Bonding Requirement on Third-Party Claims (pages 5-6 of CAC letter)

CAC is concerned about the amount of the undertaking required when a third-party claim is made under the following type of case: A creditor has a \$500 judgment and levies on property worth \$300. The undertaking under AB 707 must be in the amount of \$2,500. CAC proposes that the provision be modified to permit a bond in double the amount of the lien if that is a lesser amount. Presumably the amount of the lien would be the amount sought to be recovered on the writ of execution (amount of judgment, including costs added to judgment, and accrued interest).

The staff recommends that subdivision (b) of Section 720.150 be revised to read:

(b) Subject to Section 720.770, 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) ~~Seven thousand five hundred dollars (\$7,500)~~ if 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) ~~Two thousand five hundred dollars (\$2,500)~~ if 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.

It should be noted that the third-party claimant has a right to have the undertaking increased upon a showing that the amount is inadequate and

also can obtain a release of the property upon providing an undertaking in the amount provided by the creditor.

II. Automatic Periodic Review of Exemptions (page 8 of CAC letter)

CAC suggests revisions of Section 703.120 which are made in the staff recommended amendments attached to Memorandum 81-24.

III. Determination Date of Amount of Exemption (page 8 of CAC letter)

CAC objects to the date of determination of the amount of exemptions being the date the attachment lien or execution lien was created. CAC proposes that the date be the date the debt was incurred. This matter has been discussed at length by the Commission, and the staff does not recommend any change in the provision of AB 707.

IV. The Homestead Exemption (pages 8-9 of CAC letter)

CAC objects to the increase of the amount of the exemption from \$45,000 to \$60,000 for family units and persons over 64 years of age. It is suggested that the exemption be retained at \$45,000 and that the exemption for single persons be set at \$22,500. The same suggestion was made by the Chairman of the State Bar Subcommittee and by the representative of banks. See also the letter attached as Exhibit 9 (blue) to Memorandum 81-24. In that letter a private attorney gives a practical view of the general considerations in enforcement of judgments and concludes that the dwelling exemption is the only unfair exemption in that it exempts an excess amount. The staff recommends that the exemption amount be continued at the amount under existing law (\$45,000) for married persons and persons over 64 years and that the exemption for nonmarried persons be set at one-half of this amount (\$22,500).

CAC objects to the extension of the period for protection of proceeds from six months to 18 months. Others make the same objection. The staff recommends that the period be set at six months as under existing law.

CAC objects to the penalty imposed on the judgment creditor who secures a court ordered sale of a dwelling at which the minimum bid is not received. The penalty is that costs of the proceeding to obtain the order and attempted sale are not recoverable by the judgment creditor and the judgment creditor must pay the judgment debtor reasonable attorney's fees incurred in the proceeding to sell the dwelling. The

staff does not believe that this penalty is inappropriate. It is an alternative to having the court value the house before the possible sale to determine that the house is likely to bring an amount in excess of the minimum bid. It is better to let the sale determine this issue. Unless the judgment creditor is willing to bid the minimum bid, the judgment creditor should obtain an order for sale only if sure that the minimum bid will be received. The staff recommended amendments deal with this problem to some extent. The staff recommended amendments provide that the proceeds exemption continues only in case of an execution sale or other involuntary sale. The amendments permit the judgment debtor to make a demand on the judgment creditor either to release the lien on the property or to levy execution on the property. If the creditor levies execution in response to the demand, no sanction is imposed on the judgment creditor if the minimum bid is not received. Hence, the judgment creditor who voluntarily levies execution should be required to pay the penalty if he has costs and imposes attorney fees on the judgment debtor but the minimum bid is not received.

J. Hearings on Third-Party Claims (page 6 of CAC letter)

CAC objects to this provision as drafted. The staff recommended amendments attached to Memorandum 81-24 satisfy the CAC objection.

K. Satisfaction of Judgments (page 6 of CAC letter)

CAC suggests that it be made clear that a judgment is not satisfied for the purposes of Division 5 until the creditor is actually paid--when the levying officer has returned to the creditor the full amount of the judgment or, where payment is made to the judgment creditor in a form other than cash, when that form has "cleared" or actually been collected upon.

The staff recommends that Section 724.010 on page 194 of AB 707 be revised to read:

724.010. (a) A money judgment may be satisfied by payment of the full amount required to satisfy the judgment or by acceptance by the judgment creditor of a lesser sum in full satisfaction of the judgment.

(b) Where a money judgment is satisfied by levy, the obligation of the judgment creditor to give or file an acknowledgment of satisfaction arises only when the judgment creditor has received the full amount required to satisfy the judgment from the levying officer.

(c) When a money judgment is satisfied by payment to the judgment creditor by check or other form of noncash payment immediately payable that is to be honored upon presentation by the judgment creditor for payment, the obligation of the judgment creditor to give or file an acknowledgment of satisfaction of judgment arises only when the check or other form of noncash payment has actually been honored upon presentation for payment by the judgment creditor.

L. Exemptions

1. Claiming Exemptions After Levy (pages 6-7 of CAC letter)

CAC objects to enlarging the period in which the hearing of the claim of exemption must be held from 15 to 20 days after the notice of motion was filed. The judgment creditor is the one who sets the matter for hearing and the 20-day period is the latest--not the earliest--when the hearing may be held. The staff is not persuaded that the possible delay of an additional five days is critical.

CAC also is concerned about the manner of service. The manner of service is covered in great detail in the general provisions relating to service. These general provisions cover when the attorney rather than the party is to be served, how service by mail is made, and other matters. The general provisions are adequate and need not be duplicated here.

The major objection CAC has is that the time within which the judgment creditor must object to the claim of exemption is too short. The time provided in the bill is five days. CAC proposes that it be increased to 10 days. The staff proposed amendments attached to Memorandum 81-24 increase the period to 10 days.

V. Deposit Account Exemption (pages 9-10 of CAC letter)

CAC objects strenuously to the allowance for the exemption for checking accounts and bank deposit accounts. CAC points out that exempt proceeds that have been deposited in a checking account continue to be exempt, and that this includes earnings. The staff recommended amendments to AB 707 would make clear the extent to which earnings continue to be exempt when deposited in a checking or other deposit account. This provision, together with the recognition now given in AB 707 that there are other exemptions for proceeds in checking accounts, motivates the staff to recommend that Section 704.070 be revised to provide an exception

only for deposit accounts in federal and state savings and loan associations and credit unions. We would provide one exemption for any combination of such deposit accounts in the amount of \$750 if one person and \$1,500 if a married couple and not continue the present separate exemption for savings and loan associations and the present separate exemption for credit unions as provided in Section 704.070. We make this recommendation because we believe that this is a major area of controversy and the proposal to exempt checking accounts could be enough in itself to jeopardize passage of the entire bill. However, we would propose the above only if the provision making clear the exemption of earnings in deposit accounts is added to the bill.

CAC also objects to including checking accounts provided by savings and loan associations and credit unions within the deposit account exemption. This is existing law, and the staff does not recommend any change in this aspect of existing law. If CAC wishes to propose the change to the Legislature, they can sponsor their own bill.

CAC also objects to doubling the exemption amounts if a judgment debtor is married. However, we are cutting the existing exemption amounts in half; by doubling them for the married judgment debtor we are not giving the married debtor anything that he or she does not now have. If this is a good objection, we should retain the existing level of exemptions, not cut them by one-half.

VI. Personal Injury and Wrongful Death Award Exemptions (pages 10-11 of CAC letter)

CAC recommends that personal injury and wrongful death award installment payments be protected to the same extent as earnings. There is merit to this suggestion and the staff recommends its adoption. We would provide something along the following lines as a part of Section 704.140:

Where an award of damages or a settlement arising out of personal injury is payable in periodic installments, the amount of such a periodic payment that may be applied to the satisfaction of a money judgment is that amount that may be withheld from a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law).

We would adapt this provision to cover wrongful death awards in Section 704.150.

CAC also suggests that if the payments are received in one lump sum then there should be no exemption covering them at all. CAC believes that this is necessary to prevent individuals whose sole support is payments of these kinds from incurring debts without any creditor recourse against them.

VII. Wage Garnishment (page 11 of CAC letter)

As CAC recognizes, the proposed modification of the existing wage garnishment exemption (see Section 706.051(b)(2) on page 124 of AB 707) would eliminate the common necessities exception to the hardship exemption in the usual case where there is a wage garnishment. However, the provision was drafted in an attempt to equalize the position of debtors who are renters; the provision recognizes that those who are dwelling owners can take advantage of the generous California dwelling exemption. The staff has a strong emotional attachment to the Commission recommended provision. However, as the creditors have pointed out, the provision will make a substantial change in the existing law and may operate to preclude creditors who furnish necessities from recovering anything at all. Over a period of more than 10 years, the Commission has made an effort to eliminate the common necessities exception without success. The question is whether we should revise AB 707 to continue existing law or should this issue be presented for legislative determination.

Several persons have suggested that the hardship exemption exception common necessities of life be replaced by an exception for involuntary creditors. See Exhibit 9 to Memorandum 81-24. The reasoning is that if the creditor involuntarily advanced credit to the debtor, the hardship exemption should not be applicable. For example, persons furnishing emergency medical aid or housing after default in payment of rent and personal injury plaintiffs and the like could enforce their judgments by wage garnishment and the hardship exemption would not be available. However, in view of the lack of success in reforming the hardship exemption over the past 10 years, the staff recommends against any attempt to change the nature of the common necessities exception to the exemption.

The writer of Exhibits 9 to Memorandum 81-24 also suggests that the judgment debtor should be allowed the hardship exemption only once for a period of 90 days on any judgment. This would give the debtor sufficient

time to enter into a voluntary payment arrangement, file a Chapter 13 proceeding, or straight bankruptcy. There is merit to this suggestion. However, here again, the lack of past success in reforming the hardship exemption causes the staff to recommend against this suggestion.

CAC objects that the provision making clear that the judgment creditor has the burden of proving that the debt was incurred for the common necessities of life in order to eliminate the hardship exemption. This is existing law and practice. See discussion in J.J. MacIntyre Co. v. Duren, 118 Cal. App.3d Supp. 16 (1981). We recommend no change in the bill insofar as it makes clear that the creditor has this burden.

VIII. Jewellery Exemption (page 11-12 of CAC letter)

CAC suggests that a limit of \$500 be placed on the exemption provided by Section 704.040. Others have suggested that some of the exemption provisions--including this one--set a dollar limit on the amount of the exemption. We suggest that the following sentence be added at the end of Section 704.040: "The fair market value of the property exempt under this section shall not exceed \$2,500." Will this amount be sufficient to exempt the average wedding ring?

IX. Motor Vehicles Exemption (page 12 of CAC letter)

CAC objects to the provisions that would double the amount of the present exemption (from \$500 equity to \$1,000 equity) for a motor vehicle, would exempt two cars if both are needed so that a married couple can continue to work, and would exempt proceeds for 90 days after sale of a vehicle.

The one and only position actually taken by the State Bar on creditor's remedies (as far as we know) is that the vehicle exemption should be raised to \$1,000. The staff does not recommend any change in this amount.

We also believe that two vehicles should be exempt if both are necessary to permit both spouses to continue to work. The creditor will not benefit if one spouse is unable to work because another creditor has taken the car necessary to permit that spouse to work. We have proposed to tighten up the standard for the exemption of the second car in the staff recommended amendments attached to Memorandum 81-24 and, as revised, we recommend that the second vehicle be exempt if the stringent requirements of the statute as revised are met.

CAC also recommends that the 90-day period during which proceeds of sale of a car are protected be reduced to 20 days on the ground that is a sufficient time to purchase a new car. CAC also recommends that the proceeds exemption apply only to execution sale proceeds and not the proceeds of a voluntary sale. The staff recommends both of these changes in the bill.

X. Tools of the Trade Exemption (page 13 of CAC letter)

CAC objects to permitting an exemption of a motor vehicle under the tool of the trade on the ground that another vehicle can also be exempt under the motor vehicle exemption. Since the limit on the tools of the trade exemption is higher, the staff recommends we continue existing law which permits a motor vehicle to be exempt but that we add to the bill the substance of the existing requirement that the exempt vehicle be a "commercial vehicle reasonably necessary to and actually used in a commercial activity."

CAC objects to doubling the exemption in the case of married persons operating the same business. The staff recommends no change in the bill in this respect. There is some feeling that the amount of this exemption (\$2,500) is grossly inadequate.

CAC recommends that the 90-day period during which proceeds are exempt be reduced to 20 days and that it apply only to execution sales. The staff recommends this change.

XI. Trading Exempt Funds From Motor Vehicle and Tools of the Trade Sales (pages 13-14 of CAC letter)

CAC objects to tracing and exemption of the proceeds of voluntary sales of tools of the trade and motor vehicles. The staff has recommended above that the bill be amended to restrict the exemption of these proceeds to the proceeds of an execution sale.

OTHER SUGGESTIONS AND COMMENTS

Compensation of Garnishee for Paperwork

Exhibit 9 of Memorandum 81-24 suggests that the creditor should be required to pay to the garnishee a fee to cover paperwork costs--such as \$10 or \$15. This is an appealing suggestion. When the Commission proposed the reform of the wage garnishment law, the bill as introduced included a provision for compensation to the employer for the paperwork

cost of the wage garnishment. However, the provision was objected to by the debtors and there was no great employer support for the provision. For this reason it was dropped from the bill. This experience in the lack of support for such a provision and in recognition that the debtor is the one who ultimately must pay the extra fee causes the staff to recommend against the suggestion. On the other hand, the employer-employee relationship in the case of a wage garnishment may be a distinguishing factor that would cause the experience on the wage garnishment proposal not to be generally applicable to garnishments.

Collection of Judgment Creditor's Costs in Advertising Sale

The Marshal of the San Diego Municipal Court (Exhibit 2 to this supplement) raises procedural problems in connection with the right of the judgment creditor to recover the cost of advertising a sale of property levied upon. Section 701.555 on page 83 of AB 707 gives the judgment creditor the right to recover such costs.

The costs could not be recovered by a memorandum of costs, since they are not costs listed in Section 685.070. Section 685.070 includes only costs where the amount is set by statute, statutory costs of the levying officer, and certain costs previously approved as to amount, reasonableness, and necessity by the judge or a referee. Section 685.080 (page 23 of AB 707) provides for the recovery of other costs (which would include advertising costs under Section 701.555) by noticed motion.

The problem identified by the Marshal is that since judgments are frequently satisfied at the time of sale and the judgment creditor's advertising cost may be incurred just before the sale, sufficient time to make and determine a motion for the costs may not be available. This is a practical problem. We have no ready solution to the problem. It would appear that, where the judgment is fully satisfied by the levy and sale, the judgment creditor as a practical matter may not be able to recover the costs. Nevertheless, we would continue Section 701.555 because the section will work as a practical matter in those cases where the judgment is not fully satisfied at the time of sale. Also, there is the possibility that a motion could be determined before the sale proceeds are distributed.

The Marshal also identifies another problem. A writ of execution sets out the amount of the judgment to be satisfied on the date the writ is issued, the accrued interest, and the daily interest. The levying officer adds the levying officer's costs in executing the writ to this amount. But there is no procedure provided for adding the other costs allowed after the writ was issued to the amount to be collected pursuant to the writ. This may not be a significant problem. If it is, the following new subdivisions might be added to Section 685.090 to deal with the problem:

(c) If a writ is outstanding at the time the costs are added to the judgment pursuant to this section, the levying officer shall add the amount of such costs to the amount to be collected pursuant to the writ if the levying officer receives either of the following before the writ is returned:

(1) A certified copy of the court order allowing the costs.

(2) A certificate from the clerk of the court that the costs have been added to the judgment where the costs have been added to the judgment after a memorandum of costs has been filed pursuant to Section 685.070 and no motion to tax has been made within the time allowed for making the motion.

(d) The levying officer shall include the costs described in subdivision (c) in the amount of the sale or collection distributed to the judgment creditor only if the levying officer receives the certified copy of the court order or the clerk's certificate before the distribution is made.

Property Subject to Enforcement of Money Judgment (Leasehold Subject to Provision Precluding Assignment or Transfer)

Section 695.030(b)(1) provides that a leasehold subject to a provision precluding assignment or transfer is nevertheless subject to enforcement of a money judgment. The question has been raised what the purchaser gets when he or she purchases at an execution sale or takes assignment of a lease that includes a provision precluding voluntary or involuntary transfer or assignment. We plan to prepare a separate supplement dealing with this problem.

Effect of Sale Without Notice in Foreclosure Proceeding

The question has been raised what effect a sale without the required notice has in a foreclosure proceeding. We plan to deal with this problem in a separate supplement.

Additional Matters

We expect to receive additional comments on the tentative recommendation and will deal with those in a separate supplement.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

1st Supp Memo 81-24 Exhibit 1

LAW OFFICES OF
HEFNER, STARK & MAROIS
FOURTEENTH FLOOR-PLAZA TOWERS
555 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

ARCHIE HEFNER, INC.
ROBERT N. STARK
THEODORE M. MAROIS, JR.
JAMES M. WOODSIDE
JOHN D. BESSEY
C. AFTON MOORE III
ROBERT W. BELL
RICHARD A. PARK
KENNETH R. STONE
TIMOTHY D. TARON
JUDY R. CAMPOS
JAMES S. CRAWFORD
JOHN E. STEFANKI
MARK W. SNAUFFER
TIMOTHY M. CRONAN
RAY C. THOMPSON
CAROLE B. HOGAN

HUGH B. BRADFORD (1876-1955)
S. W. CROSS (1881-1956)

AREA CODE 916
TELEPHONE 444-6620

June 2, 1981

OF COUNSEL
WILLIAM M. GALLAGHER

Beatrice P. Lawson
Chairperson
The California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: California Association of Collectors' Response
to the Commission's "Tentative Recommendation
Proposing The Enforcement of Judgments Law"
Embodied in Assembly Bill 707 by Assemblyman
McAlister which would add Title 9 to Part 2 of
the Code of Civil Procedure (§§680.010-724.260)

Dear Ms. Lawson:

By this letter, the California Association of Collectors (CAC) is providing the Commission with its initial response in the above-referenced matter. CAC has studied the Commission's proposal and the assembly bill which would effectuate it. Assuredly, many aspects of this proposal would serve to ease inequities and eliminate unnecessarily burdensome features of the current law. Those aspects may be discussed in future communications.

In addition to the laudable aspects of the proposal, however, there are several areas with which CAC must take serious exception and other areas which it must seriously question. The remainder of this letter will be devoted to outlining those areas of the proposal on a topical basis for the Commission's consideration.

A. THE REVIEWABILITY OF THE COSTS OF ENFORCEMENT.

Reference: §685.060*

*All references are to provisions of Assembly Bill 707 unless otherwise indicated.

Beatrice P. Lawson
June 2, 1981
Page 2

Response: Objection

Reasons: (1) CAC is unaware of any problems in the current law which would necessitate a change;

(2) Any fear of claims for unreasonable costs is unfounded since the judgment creditor must advance costs without any assurance of collection;

(3) The provision exposes the judgment creditor to possible harassment suits by the judgment debtor which could cost more money to defend than was received by the judgment;

(4) Regarding collection services in particular, the provision creates a hardship since it exposes them to reassessed costs long after the judgment has been satisfied and the account with the client has been settled.

B. COMMUNITY PROPERTY SUBJECT TO COMMUNITY DEBT.

Reference: §§695.010 and 695.020

Response: Question re meaning

Reasons: (1) In what way do these provisions alter current law in the Commission's opinion?

(2) Do these provisions permit the inclusion of the name of the non-debtor spouse on the writ of execution aimed at community property;

(3) Current law precludes a writ of execution being levied upon a non-debtor spouse's property unless he was named as a party in the action; the bill's provisions need more specific authorization language in order to change current law, i.e., language in the provisions should direct the clerk who issues the writ, upon supporting affidavit, to note on the writ that the property which is sought is community property.

C. LEVY UNDER WRIT OF EXECUTION AFTER ATTACHMENT.

Reference: §699.050

Response: Question re meaning

Beatrice P. Lawson
June 2, 1981
Page 3

Reasons: (1) Current law requires that attached property be levied upon first--in what way, if any, does the provision change that requirement;

(2) Regarding attached real property, if a judgment lien is recorded on that property pending the levying of the writ of execution on the other property, will the priority afforded by the attachment lien be lost since the attachment has been "released" or does the judgment lien relate back to the recording of the attachment lien even though it has been "released".

D. THE KEEPER.

Reference: §700.070

Response: Objection, in part

Reasons: Although this portion of the provision is but a continuation of current law, CAC opposes the right given the judgment debtor thereunder to object to the placement of a keeper as a means of levying under a writ of execution. Levying via a keeper, in many instances, is significantly less costly than taking possession of the property and then selling it. Further, use of a keeper can be far less cumbersome and far more expeditious to all parties concerned.

E. DEPOSIT ACCOUNTS.

Reference: §700.140

Response: Objection

Reasons: (1) The provision permits the financial institution, immediately upon levy, to release from the account all moneys in excess of the amount of the levy; the provision does not expressly state where liability falls in the event that the financial institution, through inadvertence or otherwise, had credited the account with funds not yet collected (i.e., with a check which had not yet cleared) which ultimately could not be collected upon (i.e., the check was drawn on insufficient funds) but which fact was not discovered until the "excess" funds had been released.

(2) The foregoing circumstance would render the balance in the account insufficient to meet the amount of the levy through no fault of the judgment creditor, judgment debtor,

Beatrice P. Lawson
June 2, 1981
Page 4

court or levying officer. Language should be included in the provision which expressly renders the financial institution liable for any deficiency in the account after levy by virtue of its own conduct or they should freeze the entire account until the levy is satisfied as provided under present law.

F. MANNER OF PAYMENT ON EXECUTION SALES.

Reference: Unknown

Response: Objection, in part

Reasons: (1) The provision permits the purchase price to be paid with 10% down and the balance due in 30 days.

(2) CAC objects to the payment of the purchase price by credit rather than by cash since such an arrangement simply permits the possibility of an unpaid debt, which is what gave rise to the execution sale in the first place, and the delay and expense attendant thereon. Also a defaulting successful bidder will only give rise to a time consuming, expensive second sale.

(3) Regarding the credit terms themselves, CAC objects to the length of time (i.e., 30 days) which is permitted to the buyer before the balance is due and suggests that a 10-day period is more than sufficient time under the circumstances, particularly in view of the risks involved in delaying payment at all.

G. DISTRIBUTION OF EXECUTION SALE PROCEEDS.

Reference: Unknown

Response: Objection, in part

Reasons: (1) The provision requires that the judgment debtor be given notice of the intended distribution of the proceeds and an opportunity to object thereto.

(2) CAC objects to the above aspect of the provision since it delays payments while costs accrue, burdens already over-crowded court calendars, places unnecessary responsibilities upon the levying officer, could force the judgment creditor into an interpleader position and serves no useful

Beatrice P. Lawson
June 2, 1981
Page 5

purpose. CAC is aware of no problems with the present system.

H. ORDER OF EXAMINATION.

Reference: §708.120

Response: Objection, in part

Reasons: (1) The provision requires that the "third person" be served personally with a copy of the order of examination; furthermore it requires a 10-day minimum service time prior to the scheduled examination.

(2) CAC objects to the requirement of personal service upon the "third party" and suggests that the alternative of service by mail as with a judgment debtor be added to the provision. The 10-day minimum service time on a judgment debtor is totally unrealistic. A judgment debtor often evades service and is finally served just prior to the appointed time for the examination.

I. BONDING REQUIREMENT ON THIRD PARTY CLAIMS.

Reference: §720.160

Response: Proposal

Reasons: (1) The provision requires the judgment creditor to post a \$7,500 bond in a superior court action and a \$2,500 bond in a justice court or municipal court case.

(2) CAC suggests that the provision be modified as follows:

(a) the amount of the bond in a superior court action be either double the amount of the lien or \$7,500, whichever is less, and

(b) the amount of the bond in a justice court or municipal court action be either double the amount of the lien or \$2,500, whichever is less.

(3) The modification would prevent the payment of a bond premium which is greater than the amount of the lien in cases where the lien is for a relatively small amount.

Beatrice P. Lawson
June 2, 1981
Page 6

J. HEARINGS ON THIRD PARTY CLAIMS.

Reference: §720.360

Response: Objection, in part

Reasons: (1) The provision places the burden of proof regarding the third party's claim of ownership, etc., on the judgment creditor where the third party's claimed interest is secured.

(2) CAC objects to this placement of the burden of proof as being unfair and unreasonable and suggests that the burden of proof be placed on the secured third party since he necessarily would be in possession of the documentation and other information required to establish the validity of his claim whereas the judgment creditor would not be, and possibly could not be within the time constraints set forth for the hearings.

K. SATISFACTION OF JUDGMENTS.

Reference: Unknown

Response: Proposal

Reasons: (1) The provision alters current law by reducing the time period between payment of the amount owing to the judgment creditor and his filing the notice of satisfaction.

(2) CAC proposes that in light of this reduction, the term "satisfaction" be deemed in the provision to occur only when the levying officer has returned to the judgment creditor the full amount of the judgment or, where payment is made to the judgment creditor in a form other than cash, when that form has "cleared" or actually been collected upon.

(3) Without such a definition, the judgment creditor will be forced to file the notice of satisfaction before satisfaction has in fact occurred.

L. EXEMPTIONS.

I. Claiming Exemptions After Levy.

Reference: §703.510, et seq.

Beatrice P. Lawson
June 2, 1981
Page 7

Response: Proposal

Reasons: (1) The provision alters current law by enlarging the period in which the hearing on the claim must be heard after the notice thereof is filed from 15 days to 20 days. This enlargement is made to ensure that the judgment debtor receives 10-day notice of the hearing.

(2) CAC objects to the enlargement as wholly unnecessary to serve its stated purpose since, as a matter of practice, no court will accept the notice for filing unless there is attached to it an affidavit that the debtor has already been served, either personally or by mail.

(3) The provision should expressly state that service to all parties concerned of all documents required therein can be accomplished either by mail or by personal service. This would obviate any possible ambiguity with respect to how the various parties are to be served.

(4) With respect to service of the judgment debtor by mail, the provision should expressly state that service may be made to his last known address.

(5) With respect to the other details of accomplishing service by mail, the provision should expressly refer to §684.120.

(6) Regarding §703.550, CAC proposes that the time period contained therein be expanded from 5 days to 10 days for the following reasons:

(a) With respect to filing the notice with the court, although merely a continuation of current law, 5 days has proved too short a time within which the judgment creditor must file the notice of opposition. As required by §703.560, the notice must contain information, under penalty of perjury, which is not necessarily within the possession of the creditor and which will take time to investigate and uncover. Further, the judgment debtor, who is in possession of the information, is given 10 days within which to file the claim of exemption. §703.520. Fairness dictates affording the creditor at least an equal time period to respond.

(b) With respect to filing the notice of opposition with the levying officer, §703.550 reduces the current time period from 10 days to 5 days after service of the notice of

Beatrice P. Lawson
June 2, 1981
Page 8

the claim of exemption. There is no apparent need for this reduction and certainly none which would justify giving the creditor, upon pain of having the levying officer release the property, less than 5 days to investigate the claim, prepare the necessary documents and serve the levying officer with same.

II. Automatic Periodic Review of Exemptions.

Reference: §703.120

Response: Proposal

Reasons: (1) The provision requires the Commission to examine the exempt amounts every five years and recommend any changes thereof as may appear proper.

(2) CAC suggests that the review period be lengthened to every 10 years and that there be deleted from the provision reference to the Consumer Price Index and comparison to any other economic measure. Ten years is ample time in view of the history of exemptions. Regarding economic measures, there is no need to single out any one or group of so-called "economic indicators".

III. Determination Date of Amount of Exemption.

Reference: §703.100

Response: Objection

Reasons: (1) The provision requires that the amount of the exemption be determined as of the date the lien attaches rather than the date the debt was incurred.

(2) CAC objects to the lien attachment date being the reference point rather than the debt incurrence date being the reference point. It is unfair to creditors, who extend credit on the basis of current assets and current exemption amounts, to alter, once the debt has been incurred, the amount recoverable under the debt by virtue of a subsequent change in the law.

IV. The Homestead Exemption.

Reference: §704.710 et seq.

Response: Objection, in part

Beatrice P. Lawson
June 2, 1981
Page 9

Reasons: (1) The provision would increase the amount of the exemption from \$45,000 to \$60,000 for family units and persons over the age of 64 years. §704.730(a)(2).

(2) CAC objects to the \$15,000 increase as described above. California law is already the most liberal in the United States with respect to the amount of the exemption permitted for homesteads. Moreover, if this increase is viewed as necessary in order to avoid penalizing married persons, a more equitable resolution would simply be to reduce the current \$30,000 exemption for nonmarried persons to \$22,500.

(3) The provision would enlarge the period during which proceeds from the sale of a homesteaded residence remains exempt from six months to 18 months. §704.720(b).

(4) CAC objects to this enlargement as wholly unnecessary. In practice, the purchase of new residences generally always coincide with the sale of present residences. When this does not occur and there is some time lag between sale of the old and purchase of the new, six months is more than ample time to afford the judgment debtor to purchase a new residence if he sincerely desires to do so.

(5) The provision would impose severe penalties upon the judgment creditor who secures a court ordered sale of the homesteaded dwelling at which the "minimum bid" is not received. §§704.800 and 704.840(b).

(6) CAC strenuously objects to the imposition of these penalties as unwarranted and unfair. The penalties serve only to deter good-faith judgment creditors from pursuing assets which the law makes available to them.

V. Deposit Account Exemption.

A. Reference: §704.070(c)

Response: Objection

Reasons: (1) The provision would create a new \$250 exemption for any kind of deposit account under described circumstances.

(2) CAC strenuously objects to the allowance of this new exemption. It is wholly unnecessary. It amounts to

Beatrice P. Lawson
June 2, 1981
Page 10

simply a bonus to judgment debtors since tracing exemptions (e.g., wages, welfare, social security, etc.) already afford them more than adequate protection. Additionally, as worded, the provision simply opens the door to exempting checking accounts, which would be unprecedented and unwarranted.

B. Reference: §704.070(a), (b) and (d)

Response: Objection, in part

Reasons: (1) The provisions would exempt any type of deposit account in Savings and Loans and Credit Unions up to a specified amount, including checking accounts. The provisions would also permit the amount of the exemptions to be doubled in the event that the judgment debtor is married.

(2) CAC strongly objects to the inclusion of checking accounts within the parameters of the exemptions. This inclusion is entirely unneeded and directly contrary to the whole spirit and philosophy relating to the enforcement of judgments. The availability of tracing already exempts otherwise exempt funds in these accounts.

(3) CAC likewise objects, for the same reasons, to the doubling of the exemption amounts if the judgment debtor is married, especially since the family unit benefited from the incurrence of the debt.

VI. Personal Injury and Wrongful Death Award Exemptions

References: §§704.140 and 704.150

Response: Objection, in part

Reasons: (1) These provisions provide that all sums received thereunder are exempt to the extent reasonably necessary for support.

(2) CAC objects to these exemptions since they seem to be, in effect, without limit. Moreover, if the payments are received in installments, they are more liberally treated than wages (see infra). CAC suggests that the payments, if of the installment variety, should be exempt only to the same extent as wages.

Beatrice P. Lawson
June 2, 1981
Page 11

(3) CAC suggests that if the payments are received in one lump sum then there should be no exemption covering them at all. CAC believes that the suggested modifications are necessary in order to prevent individuals whose sole support is payments of these kind from incurring debts without any creditor recourse against them.

VII. Wage Garnishment.

Reference: §706.051(c)(2)

Response: Objection, in part

Reasons: (1) This provision would permit sums deemed incurred for "common necessities of life" to be exempt from levy unless the debtor owns an interest in real or personal property used as his principal dwelling.

(2) CAC strenuously objects to this allowance as wholly unnecessary in view of the remaining exemptions applicable to wage garnishments, and therefore it amounts only to a wind-fall to a debtor who has graciously been extended credit on the basic necessities of life but refuses to pay for them. Furthermore the gratuitous allowance of the "common necessities" exception to this exemption if the debtor owns an interest in real or personal property that is used as his primarily dwelling, excluding a leasehold interest of 5-years or less is ludicrous. It is those debtors who rent on a month to month basis that most commonly incur these type of debts and fail to pay them.

(3) CAC also objects to the provision's placement on the judgment creditor of the burden of proving that the debt was incurred for the common necessities of life. It also forces a burden upon the creditor which he may not in a position to meet. In fact, any burden of proof imposed upon the creditor in this area would be unfair since only the debtor is in a position to produce affirmative proof. Moreover, since the exemption runs in the debtor's favor, he should be made to show that he is fully entitled to it.

VIII. Jewelry Exemption.

Reference: §704.040(c)(2)

Response: Objection, in part

Beatrice P. Lawson
June 2, 1981
Page 12

Reasons: (1) This provision would allow the debtor to retain one item of jewelry, heirloom, work of art or other personal effect upon a showing of sufficient sentimental value.

(2) CAC objects to the ethereal, practically-speaking impossible balancing test which the creditors must participate in and the court must weigh in resolving the question of whether an exemption applies in this area.

(3) CAC suggests that, in place of the standard of proof in the provision, a maximum monetary amount for the one exempt item should be inserted. CAC suggests that the monetary maximum be set at \$500, which should be a sufficient amount to protect true sentiment without unduly harming creditors' rights.

IX. Motor Vehicles Exemption.

Reference: §704.010

Response: Objection, in part

Reasons: (1) The provision would double the amount of the present exemption, would double the number of exempt motor vehicles in certain circumstances and would exempt the vehicle sale proceeds for 90 days after the sale.

(2) CAC strongly objects to each of the above changes in current law. Regarding the doubling of the current exemption amount, the current amount is sufficient to protect any legitimate interests of the debtor which may need protection.

(3) Regarding the doubling of the current number of exempt vehicles, this is simply an unjustifiable windfall to the household of the judgment debtor which, presumably, benefited from the incurrence of the debt owing to the judgment creditor. Moreover, the circumstances set forth in the provision which trigger the application of the second exemption are, in practice, easily contrived.

(4) Regarding the 90-day period during which sale proceeds are exempt, CAC suggests eliminating §704.010(d) and (e)(1) from the provision completely. CAC also suggests reducing the 90-day period to 20 days to the extent that it continues to apply after (d) and (e)(1) have been deleted.

Beatrice P. Lawson
June 2, 1981
Page 13

These modifications will prevent debtors from receiving windfalls and will fix the exempt time period within which to purchase a new vehicle in accordance with the length of time it would really take an individual, truly interested in buying a new vehicle, to buy it.

X. Tools of the Trade Exemption.

Reference: §704.060

Response: Objection, in part

Reasons: (1) The provision would include one motor vehicle as a tool of the trade, would double the number of exempt items under certain circumstances and would exempt the tools' sale proceeds for 90 days after the sale.

(2) CAC strongly objects to the inclusion in the provision of the foregoing allowances. Regarding the motor vehicle, in view of §704.010, the provision creates the unseemly possibility of permitting the debtor to exempt three (or four, under the doubling provision of §704.060(a)(3)) vehicles from levy. Further, the provision appears to relax current law which at least requires that the vehicle be a "commercial motor vehicle reasonably necessary to and actually used in a commercial activity."

(3) Regarding the doubling of the current number of exempt items, this is, like the motor vehicle exemption discussed supra, an unjustifiable windfall to the debtor's household which, presumably, benefited from the incurrence of the debt owing to the judgment creditor. Moreover, the circumstances set forth in the provision which trigger the application of the second set of exemptions are, in practice, easily contrived.

(4) Regarding the 90-day period during which sale proceeds are exempt, CAC suggests, as it did with respect to the similar motor vehicle provision and for the same reasons as stated therein, that the period be reduced to 20 days and that it apply only to execution sales.

XI. Tracing Exempt Funds From Motor Vehicle and Tools of the Trade Sales.

Response: Objection, in part

Beatrice P. Lawson
June 2, 1981
Page 14

Reasons: (1) The provision would exempt funds from voluntary sales.

(2) CAC objects to this unprecedented exemption to the extent it applies to funds from voluntary sales, in accordance with its objections, noted supra, to exempting voluntary sales proceeds of motor vehicles and tools of the trade.

Upon more thorough examination of the present Bill and any changes in or amendments thereto, CAC may well have additional objections, questions, proposals and comments to present to the Commission. Until such time, however, CAC will vigorously pursue before the Commission and elsewhere its views as expressed in this letter.

Thank you for your kind attention to the views expressed herein.

Very truly yours,

HEFNER, STARK & MAROIS


Carole B. Hogan

CBH:jg



1st Supp Memo 81-24 Exhibit 2

DEPARTMENT OF THE MARSHAL
MUNICIPAL COURT OF CALIFORNIA
County of San Diego
MICHAEL GOBBA, MARSHAL

June 4, 1981

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Subject: Tentative Recommendation Proposing the Enforcement
of Judgments Law, 15 CAL. L. Revision Commission
Reports 2001 (1980)

Section: 701.555. Judgment creditor and judgment debtor
may advertise sale.

This section provides that the "judgment creditor may advertise
the sale in the classified or other advertising section of a
newspaper of general circulation or other publication and may
recover reasonable costs of such advertising".

The question then arises, who will determine the reasonableness
of the costs and what procedure must be used to recover them?

The levying officer is restricted to what costs may be collected
under the writ by section 685.050. (Costs and interest under
writ). This section makes no reference to advertising by the
judgment creditor. Nor, in our opinion, is it proper for the
levying officer to determine the reasonableness of such costs.

The filing of a memorandum of costs would seem the proper method
for the claiming and determination of the judgment creditor's
advertising costs. Section 675.070. (Memorandum of costs of
enforcing judgment), however, specifies recoverable costs and
makes no mention of reasonable advertising costs by the judgment
creditor.

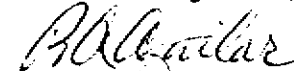
Further, if the costs of such advertising were to be included in
section 685.070., subdivision (b) of that section would create a
unique time problem in the claiming of such costs. Subdivision
(b) provides that the judgment creditor must file the claim
"before the judgment is fully satisfied" and mandates time
periods for service of the memorandum of costs on, and response
by, the judgment debtor. Since judgments are frequently
satisfied at the time of sale and the judgment creditor's
advertising cost may be incurred just preceeding the sale,
sufficient time to file a claim for such costs may not be
available.

June 4, 1981

Assuming these problems could be overcome, there still would exist the procedural problem of amending a writ in the possession of the levying officer to include the newly approved costs. Under present law, a writ recalled by the court for this or any reason leaves the levying officer with no authority to continue to hold property under levy. Provision would have to be made for amendment of the writ while at the same time allowing the levying officer to retain the property under levy.

Thank you, once again, for the opportunity to provide input in your efforts to revise and reform this important area of the law.

Michael Sgobba, Marshal



R. A. Aguilar, Lieutenant