

Memorandum 83-23

Subject: Study D-301 - Creditors' Remedies (Assembly Bill No. 99)

Assembly Bill No. 99 was introduced to effectuate the Commission's recommendation for revision of the Enforcement of Judgments Law and the Attachment Law. The bill passed the Assembly in amended form and a copy of the amended bill as amended February 16 is attached.

Additional amendments are needed to make additional technical and substantive revisions in the Enforcement of Judgments Law or the Attachment Law. Attached as Exhibit 1 are staff suggested amendments. Attached as Exhibit 2 is a report prepared for adoption by the Senate Judiciary Committee that contains new and revised Comments.

Many of the amendments are not substantive. The following are amendments that we believe you should specially note.

(1) Undertaking when deposit account standing in name of third person is levied upon. The Enforcement of Judgments Law and the revisions to the Attachment Law enacted in 1982 made a significant change in the provision relating to the levy of attachment or execution on a deposit account standing in the name of a third person. Prior law required an undertaking by an authorized corporate surety or by two or more sufficient individual sureties. The 1982 enactments eliminated authority for individual sureties. The California Association of Collectors is greatly concerned about this change, especially since they were unaware of the change and the change was not discussed by the legislative committees that considered the bill. Assemblyman McAlister has asked that I restore the authority for individual sureties by appropriate amendments in AB 99. He does not want to impose the cost of corporate sureties on judgment creditors and judgment debtors (since such cost is recoverable from the judgment debtor). For this reason, the amendments attached as Exhibit 1 include Amendment 7 and Amendment 9.

(2) No liability for including information in garnishee's memorandum. Financial institutions have expressed concern about possible liability for disclosing information as to rights of a third person against a person whose deposit account is garnished. They fear they might be held liable for violation of the right of privacy of the third person. Existing provisions provide that a financial institution is not liable

for the performance of duties of garnishee in the case of attachment or execution. See Code Civ. Proc. §§ 488.455(d)(1) and 488.460(e)(1) (attachment) and 700.140(d)(1) and 700.150(e)(1) (execution). See also letter from Rick Schwartz, Senior Counsel, Bank of America (attached as Exhibit 3). To deal with this concern, Amendment 7 adds Section 488.620 and Amendment 14.6 adds Section 701.035 to provide an express immunity for disclosure of information in a garnishee's memorandum. The new provisions apply to any garnishee, not just a financial institution.

(3) Effect of temporary absence from principal dwelling as affecting homestead exemption. Various provisions of the Enforcement of Judgments Law require that the homestead exemption claimant or person filing a homestead declaration "actually" reside or have "actually" resided in the principal dwelling in order for it to be a homestead. The question has been raised whether the requirement of "actual" residence precludes the principal dwelling from being a homestead while the person is temporarily absent, such as on a vacation or being in the hospital. See Exhibit 2 attached. Assemblyman McAlister wants to delete the word "actually" so that the statute will require that the dwelling be the principal dwelling and that the claimant reside in the dwelling. Amendment 16 amends Sections 704.710 and 704.930 to delete the word "actually."

In addition to the amendments attached as Exhibit 1, the Debtor/Creditor Relations and Bankruptcy Subcommittee ("Subcommittee") of the Business Law Section of the State Bar of California suggests other amendments. See Exhibit 5 attached. The additional amendments are discussed below:

(1) Execution sale of homestead. When a homestead is sold on execution the minimum bid must include an additional amount to satisfy "all liens and encumbrances on the property, including but not limited to any attachment or execution lien" The Subcommittee recommends that the word "superior" or a similar phrase be added before the words "liens and encumbrances" in the above provision and in other comparable provisions. See the discussion on pages 1 and 2 of the Subcommittee report set out in Exhibit 5 attached.

The Commission originally took the position that the language quoted above as it appeared in prior law meant superior liens and encumbrances. However, the matter is one that is not entirely clear and it can be argued that "all liens and encumbrances" includes both superior and inferior liens. An amendment to include the word "superior" would avoid the need for litigation to determine the meaning of the provision.

However, there is no assurance that the amendment would not give rise to objections from organizations that represent debtors.

(2) Judicial foreclosure. The Subcommittee also proposes that Section 726 (relating to judicial foreclosure) be revised. The staff is reluctant to revise this section at this time in view of the complexity of the law relating to foreclosure. We need to obtain enactment of AB 99 (which is an "urgency bill") as soon as possible so that it will become operative on July 1, 1983. If the Commission wishes, the staff will give this suggestion further study. However, in view of the limited staff resources and other matters of great priority, we would prefer not to give the suggestion further study at this time. If the State Bar Subcommittee strongly urges that we devote our limited resources to a study of this suggestion, we would again bring this suggestion to the Commission for further consideration.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

AMENDMENTS TO ASSEMBLY BILL NO. 99 AS AMENDED IN
ASSEMBLY FEBRUARY 16, 1983

Amendment 1

In line 2 of the title of the printed bill as amended in
Assembly February 16, 1983, after "488.455," insert:
488.465,

Amendment 2

In line 3 of the title, after "695.020," insert:
697.640, 697.650,

Amendment 3

In line 3 of the title, after "704.120," insert:
704.710, 704.930

Amendment 4

In line 4 of the title, after "715.040," insert:
724.060,

Amendment 5

In line 4 of the title, strike out "700.165 and 700.167" and
insert:
488.620, 700.165, 700.167, 701.035, and 703.115

Amendment 6

On page 4, line 27, after "cross-complaint" insert:
filed

Amendment 7

On page 13, between lines 36 and 37, insert:
SEC. 8.2. Section 488.465 of the Code of Civil Procedure is
amended to read:

488.465. (a) The provisions of this section apply in
addition to the provisions of Sections 488.455 and 488.460
if any of the following property is attached:

(1) A deposit account standing in the name of a third person or in the names of both the defendant and a third person.

(2) Property in a safe deposit box standing in the name of a third person or in the names of both the defendant and a third person.

(b) The plaintiff shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking ~~given by a corporate surety authorized to execute the undertaking by Section 4956.~~ ~~The undertaking shall be~~ for not less than twice the amount of the attachment or, if a lesser amount in a deposit account is sought to be levied upon, not less than twice the lesser amount. The undertaking shall indemnify any third person rightfully entitled to the property against actual damage by reason of the attachment of the property and shall assure to the third person the return of the property upon proof of the person's right thereto. The undertaking need not name the third person specifically but may refer to the third person generally in the same manner as in this subdivision. If the provisions of this subdivision are not satisfied, the attachment is ineffective and the financial institution shall not comply with the requirements of this section or with the attachment.

(c) Upon delivery of the undertaking to the financial institution, the financial institution shall immediately mail or deliver a notice of the delivery of the undertaking to the third person in whose name the deposit account or safe deposit box stands. If mailed, the notice shall be sent by registered or certified mail addressed to the person's last address known to the financial institution. The financial institution shall deliver the undertaking as directed by the third person.

(d) Notwithstanding Article 4 (commencing with Section 488.600), from the time of levy and delivery of the undertaking to the financial institution until 15 days after the notice is mailed or delivered under subdivision (c) if no objection to the undertaking is made or, if such

objection is made, until the court determines that the undertaking is sufficient, the financial institution shall not do any of the following:

(1) Honor a check or other order for the payment of money drawn against, or pay a withdrawal from, the deposit account that would reduce the deposit account to less than the amount attached. For the purposes of this paragraph, in determining the amount of the deposit account, the financial institution shall not include the amount of items deposited to the credit of the deposit account that are in the process of being collected.

(2) Permit the removal of any of the contents of the safe deposit box except pursuant to the writ.

(e) The financial institution is not liable to any person for any of the following during the period prescribed in subdivision (d):

(1) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where the nonpayment is pursuant to the requirements of subdivision (d).

(2) Refusal to pay a withdrawal from the deposit account where the refusal is pursuant to the requirements of subdivision (d).

(3) Refusal to permit access to the safe deposit box by the person in whose name it stands.

(4) Removal of any of the contents of the safe deposit box pursuant to the attachment.

~~(f) An objection to the undertaking may be made by any person claiming to be rightfully entitled to the property attached. The objection shall be made in the manner provided by Article 1 (commencing with Section 489.010) of Chapter 9.~~

~~(g)~~ (f) Upon the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the attachment and Sections 488.455 and 488.460 apply.

SEC. 8.3. Section 488.620 is added to the Code of Civil Procedure, to read:

488.620. A third person who gives a garnishee's memorandum pursuant to this title is not liable to any person for the disclosure in the garnishee's memorandum of any information contained in the garnishee's memorandum.

Amendment 8

On page 16, between lines 21 and 22, insert:

SEC. 12.1. Section 697.640 of the Code of Civil Procedure is amended to read:

697.640. (a) The judgment creditor, judgment debtor, owner of property subject to a judgment lien on personal property created under the judgment, or a person having a security interest in or a lien on the property subject to the judgment lien, may file in the office of the Secretary of State an acknowledgment of satisfaction of judgment executed as provided in Section 724.060 or a court clerk's certificate of satisfaction of judgment issued pursuant to Section 724.100, together with a statement containing the name of the judgment creditor, the name and address of the judgment debtor, and the file number of the notice of judgment lien. Upon such filing, the judgment lien created under the judgment that has been satisfied is extinguished as a matter of record. The fee for filing the acknowledgment or certificate is the same as the fee for filing a termination statement under Section 9404 of the Commercial Code.

(b) The filing officer shall treat an acknowledgment of satisfaction of judgment, or court clerk's certificate of satisfaction of judgment, and statement filed pursuant to this section in the same manner as a termination statement filed pursuant to Section 9404 of the Commercial Code.

SEC. 12.2. Section 697.650 of the Code of Civil Procedure is amended to read:

697.650. (a) The judgment creditor may by a writing do either of the following:

(1) Release the judgment lien on all or a part of the personal property subject to the lien.

(2) Subordinate to a security interest or other lien or encumbrance the judgment lien on all or a part of the personal property subject to the judgment lien.

(b) A statement of release or subordination is sufficient if it is signed by the judgment creditor and contains a description of the property being released or on which the lien is being subordinated, the name and address of the judgment debtor, and the file number of the notice of judgment lien, and, in the case of a statement of subordination, a description of the security interest or other lien or encumbrance to which the judgment lien is being subordinated.

(c) The filing officer shall treat a statement of release or subordination filed pursuant to this section in the same manner as a statement of release filed pursuant to Section 9405 of the Commercial Code. The fee for filing the statement is the same as that provided in Section 9405 of the Commercial Code.

Amendment 9

On page 20, lines 26 and 27, strike out "given an admitted surety insurer. The undertaking shall be"

Amendment 10

On page 23, between lines 34 and 35, insert:

SEC. 14.6. Section 701.035 is added to the Code of Civil Procedure, to read:

701.035. A third person who gives a garnishee's memorandum pursuant to this title is not liable to any person for the disclosure in the garnishee's memorandum of any information contained in the garnishee's memorandum.

Amendment 11

On page 24, strike out lines 15 to 22, inclusive

Amendment 12

On page 24, line 23, strike out "(c)" and insert:

(b)

Amendment 13

On page 24, line 30, strike out "(d)" and insert:

(c)

Amendment 14

On page 24, between lines 36 and 37, insert:

SEC. 15. Section 703.115 is added to the Code of Civil Procedure, to read:

703.115. In determining an exemption based upon the needs of the judgment debtor and the spouse and dependents of the judgment debtor or an exemption based upon the needs of the judgment debtor and the family of the judgment debtor, the court shall take into account all property of the judgment debtor and, to the extent the judgment debtor has a spouse and dependents or family, all property of such spouse and dependents or family, including community property and separate property

of the spouse, whether or not such property is subject to enforcement of the money judgment.

Amendment 15

On page 24, line 37, strike out "SEC. 14.8." and insert:
SEC. 16.

Amendment 16

On page 26, between lines 19 and 20, insert:
SEC. 17. Section 704.710 of the Code of Civil Procedure is amended to read:

704.710. As used in this article:

(a) "Dwelling" means a place where a person ~~actually~~ resides and may include but is not limited to the following:

(1) A house together with the outbuildings and the land upon which they are situated.

(2) A mobilehome together with the outbuildings and the land upon which they are situated.

(3) A boat or other waterborne vessel.

(4) A condominium, as defined in Section 783 of the Civil Code.

(5) A planned development, as defined in Section 11003 of the Business and Professions Code.

(6) A stock cooperative, as defined in Section 11003 2 of the Business and Professions Code.

(7) A community apartment project, as defined in Section 11004 of the Business and Professions Code.

(b) "Family unit" means any of the following:

(1) The judgment debtor and the judgment debtor's spouse if the spouses reside together in the homestead.

(2) The judgment debtor and at least one of the following persons who the judgment debtor cares for or maintains in the homestead:

(A) The minor child or minor grandchild of the judgment debtor or the judgment debtor's spouse or the minor child or grandchild of a deceased spouse or former spouse.

(B) The minor brother or sister of the judgment debtor or judgment debtor's spouse or the minor child of a deceased brother or sister of either spouse.

(C) The father, mother, grandfather, or grandmother of the judgment debtor or the judgment debtor's spouse or the father, mother, grandfather, or grandmother of a deceased spouse.

(D) An unmarried relative described in this paragraph who has attained the age of majority and is unable to take care of or support himself or herself.

(3) The judgment debtor's spouse and at least one of the persons listed in paragraph (2) who the judgment debtor's spouse cares for or maintains in the homestead.

(c) "Homestead" means the principal dwelling (1) in which the judgment debtor or the judgment debtor's spouse ~~actually~~ resided on the date the judgment creditor's lien attached to the dwelling, and (2) in which the judgment debtor or the judgment debtor's spouse ~~actually~~ resided continuously thereafter until the date of the court determination that the dwelling is a homestead. Where exempt proceeds from the sale or damage or destruction of a homestead are used toward the acquisition of a dwelling within the six-month period provided by Section 704.720, "homestead" also means the dwelling so acquired if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse ~~actually~~ resided continuously from the date of acquisition until the date of the court determination that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired.

(d) "Spouse" does not include a married person following entry of a judgment decreeing legal separation of the parties, or an interlocutory judgment of dissolution of the marriage, unless such married persons reside together in the same dwelling.

SEC. 18. Section 704.930 of the Code of Civil Procedure is amended to read:

704.930. (a) A homestead declaration recorded pursuant to this article shall contain all of the following:

(1) The name of the declared homestead owner. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead.

(2) A description of the declared homestead.

(3) A statement that the declared homestead is the principal dwelling of the declared homestead owner or such person's spouse, and that the declared homestead owner or such person's spouse ~~actually~~ resides in the declared homestead on the date the homestead declaration is recorded.

(b) The homestead declaration shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by at least one of the following persons:

(1) The declared homestead owner.

(2) The spouse of the declared homestead owner.

(3) The guardian or conservator of the person or estate of either of the persons listed in paragraph (1) or (2). The guardian or conservator may execute, acknowledge, and record a homestead declaration without the need to obtain court authorization.

(4) A person acting under a power of attorney or otherwise authorized to act on behalf of a person listed in paragraph (1) or (2).

(c) The homestead declaration shall include a statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the homestead declaration. If the homestead declaration is executed and acknowledged by a person listed in paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the person has authority to so act on behalf of the declared homestead owner or the spouse of the declared homestead owner and the source of the person's authority.

Amendment 17

On page 26, line 20, strike out "SEC. 14.9." and insert:
SEC. 19.

Amendment 18

On page 27, line 8, strike out "SEC. 15." and insert:
SEC. 20.

Amendment 19

On page 27, between lines 38 and 39, insert:

SEC. 21. Section 724.060 of the Code of Civil Procedure is amended to read:

724.060. (a) An acknowledgment of satisfaction of judgment shall contain the following information:

- (1) The title of the court.
- (2) The cause and number of the action.
- (3) The names and addresses of the judgment creditor, the judgment debtor, and the assignee of record if any. If an abstract of the judgment has been recorded in any county, the judgment debtor's name shall appear on the acknowledgment of satisfaction of judgment as it appears on the abstract of judgment.
- (4) The date of entry of judgment and of any renewals of the judgment and where entered in the records of the court.
- (5) A statement either that the judgment is satisfied in full or that the judgment creditor has accepted payment or performance other than that specified in the judgment in full satisfaction of the judgment.
- (6) A statement whether an abstract of the judgment has been recorded in any county and, if so, a statement of each county where the abstract has been recorded and the book and page of the county records where the abstract has been recorded, and a notice that the acknowledgment of satisfaction of judgment (or a court clerk's certificate of satisfaction of judgment) will have to be recorded with the county recorder of each county where the abstract of judgment has been recorded in order to release the judgment lien on real property in that county.

(7) A statement whether a notice of judgment lien has been filed in the office of the Secretary of State and, if such a notice has been filed, a statement of the file number of such notice, and a notice that the acknowledgment of satisfaction of judgment (or a ~~termination statement or a~~ court clerk's certificate of satisfaction of judgment) will have to be filed in that office in order to terminate the judgment lien on personal property.

(b) The acknowledgment of satisfaction of judgment shall be made in the manner of an acknowledgment of a conveyance of real property.

(c) The acknowledgment of satisfaction of judgment shall be executed and acknowledged by one of the following:

(1) The judgment creditor.

(2) The assignee of record.

(3) The attorney for the judgment creditor or assignee of record unless a revocation of the attorney's authority is filed.

Amendment 20

On page 27, line 39, strike out "SEC. 16." and insert:
SEC. 22.

Amendment 21

On page 30, line 16, strike out "SEC. 16.5." and insert:
SEC. 23.

Amendment 22

On page 32, line 40, strike out "SEC. 17." and insert:
SEC. 24.

Amendment 23

On page 36, line 11, strike out "SEC. 18." and insert:
SEC. 25.

Amendment 24

On page 39, line 31, strike out "SEC. 19." and insert:
SEC. 26.

Amendment 25

On page 41, line 23, strike out "SEC. 20." and insert:
SEC. 27.

Amendment 26

On page 42, line 1, strike out "SEC. 21." and insert:
SEC. 28.

Amendment 27

On page 42, line 26, strike out "SEC. 22." and insert:
SEC. 29.

Amendment 28

On page 42, line 32, strike out "SEC. 23." and insert:
SEC. 30.

Amendment 29

On page 43, line 8, strike out "SEC. 24." and insert:
SEC. 31.

Amendment 30

On page 43, line 18, strike out "SEC. 25." and insert:
SEC. 32.

Amendment 31

On page 43, line 29, strike out "SEC. 26." and insert:
SEC. 33.

Amendment 32

On page 43, line 38, strike out "SEC. 27." and insert:
SEC. 34.

EXHIBIT 2

REPORT OF SENATE COMMITTEE ON JUDICIARY
ON ASSEMBLY BILL NO. 99

In order to indicate more fully its intent with respect to Assembly Bill No. 99, the Senate Committee on Judiciary makes the following report.

Assembly Bill 99 was introduced to effectuate the California Law Revision Commission's Recommendation Relating to Creditors' Remedies, 16 Cal. L. Revision Comm'n Reports 2175 (1982). Except for the new and revised comments set out below, the Law Revision Commission comments to the provisions of Assembly Bill No. 99 reflect the intent of the Senate Committee on Judiciary in approving Assembly Bill No. 99.

Code of Civil Procedure § 488.465 (amended). Deposit accounts and safe deposit boxes not exclusively in name of defendant

Comment. Subdivision (b) of Section 488.465 is amended to delete the portion that required the undertaking to be executed by a corporate surety. This deletion permits the undertaking to be executed by two or more sufficient personal sureties as well as a corporate surety. See Section 995.310. Prior to the enactment of Section 488.465, the undertaking in case of attachment of deposit accounts and safe deposit boxes not exclusively in the name of the defendant could be executed by two or more individual sureties as well as by a corporate surety. See former Sections 489.040 and 489.240. Thus, the deletion in subdivision (b) restores prior law.

Subdivision (f) is deleted. The substance of former subdivision (f) is continued in Sections 995.910-995.960 (objections to undertakings).

Code of Civil Procedure § 488.620 (added). No liability for including information in garnishee's memorandum

Comment. Section 488.620 is added to make clear that a garnishee is not liable for disclosing information in the garnishee's memorandum even though the information may relate to a person other than the defendant. See also Sections 488.455(d)(1) and 488.460(e)(1) (no liability for performance of duties of garnishee under the attachment in case of levy on deposit account or safe deposit box). For a comparable provision relating to execution, see Section 701.035.

Code of Civil Procedure § 697.640 (technical amendment). Recording of documents extinguishing judgment lien on personal property

Comment. Section 697.640 is amended to make clear that the person making the filing must include information showing the file number of the notice of judgment lien. Nothing in this section authorizes the

filing of an acknowledgment of partial satisfaction of judgment or an acknowledgment of satisfaction of matured installments under installment judgment; only an acknowledgment of full satisfaction (Section 724.060) or a clerk's certificate of satisfaction of judgment may be filed under this section.

Code of Civil Procedure § 697.650 (technical amendment). Release or subordination of judgment lien on personal property

Comment. Section 697.650 is amended to make clear that a statement of subordination must include a description of the security interest or other lien or encumbrance to which the judgment lien is being subordinated.

Code of Civil Procedure § 700.140 (amended). Levy on deposit account

Comment. Subdivision (c) of Section 700.140 is amended to supply a cross-reference to new Sections 700.165 and 700.167. Subdivision (f) is added to make clear that no bond is required to levy on an account described in subdivision (f).

Code of Civil Procedure § 700.160 (amended). Deposit accounts and safe deposit boxes not exclusively in name of judgment debtor

Comment. Subdivision (b) of Section 700.160 is amended to delete the portion that required the undertaking to be executed by a corporate surety. This deletion permits the undertaking to be executed by two or more sufficient personal sureties as well as a corporate surety. See Section 995.310. Prior to the enactment of Section 700.160, the undertaking in case of a levy of execution on deposit accounts and safe deposit boxes not exclusively in the name of the judgment debtor could be executed by two or more individual sureties as well as by a corporate surety. See former Section 682a. Thus, the deletion in subdivision (b) restores prior law.

Subdivision (f) is deleted. The substance of former subdivision (f) is continued in Sections 995.910-995.960 (objections to undertakings).

A new subdivision (g) is added to clarify the relation of this section to the special provisions of Sections 700.165 and 700.167 applicable to certain joint accounts.

Code of Civil Procedure § 700.165 (added). Deposit account in name of judgment debtor and spouse

Comment. Section 700.165 is a new provision permitting the judgment creditor to cause a levy on a deposit account standing only in the names of both the judgment debtor and the judgment debtor's spouse without the need to provide a bond as is normally required where an account not standing only in the name of the judgment debtor is levied upon. See Section 700.160(g).

Code of Civil Procedure § 700.167 (added). Deposit account under fictitious business name

Comment. Section 700.167 is a new provision permitting the judgment creditor to cause a levy on a deposit account without providing a bond under Section 700.160 where the deposit account stands in a fictitious business name and the fictitious business name statement lists only the judgment debtor or only the judgment debtor and his or her spouse. See Section 700.160(g).

Code of Civil Procedure § 701.035 (added). No liability for including information in garnishee's memorandum

Comment. Section 701.035 is added to make clear that a garnishee is not liable for disclosing information in the garnishee's memorandum even though the information may relate to a person other than the judgment debtor. See also Sections 700.140(d)(1) and 700.150(e)(1) (no liability for performance of duties of garnishee in case of levy on deposit account or safe deposit box).

Code of Civil Procedure § 703.110 (amended). Application of exemptions to marital property

Comment. Section 703.110 is amended to add the third sentence to subdivision (a). This new sentence makes clear how the exemption scheme works with respect to married persons. Some exemption provisions specifically provide for a separate exemption for each spouse or provide for an exemption in a greater amount for a married couple. See, e.g., Sections 704.030 (materials for repair or improvement of dwelling), 704.060 (personal property used in trade, business, or profession), 704.080 (deposit account in which social security payments are directly deposited), 704.090 (inmate's trust fund), 704.100 (life insurance, endowment, annuity policies). See also Section 704.730(b) (maximum combined homestead exemptions of married couple). Other exemption provisions provide a maximum dollar amount for an exemption applicable to the spouses as a marital unit. For example, under subdivision (a), the maximum exemption for motor vehicles allowed the marital unit under Section 704.010 is an aggregate equity of \$1,200, whether one or both spouses are judgment debtors and whether the vehicle or vehicles are community or separate property. The exemption is not doubled where each spouse owns an interest in the motor vehicle. Likewise, the maximum exemption allowed under Section 704.040 for jewelry, heirlooms, and works of art is \$2,500 for the marital unit.

Former subdivision (c) of Section 703.110 is deleted and its substance is continued in new Section 703.115. See the Comment to Section 703.115.

Code of Civil Procedure § 703.115 (added). Determining exemption based on need

Comment. Section 703.115 continues the substance of former subdivision (b) of Section 703.110 but, unlike Section 703.110, Section 703.115 is applicable whether or not the judgment debtor is married. Section 703.115 also recognizes that an exemption based upon the needs of the

judgment debtor and the spouse and dependents of the judgment debtor or upon the needs of the judgment debtor and the family of the judgment debtor is applicable even though the judgment debtor does not have a spouse or dependents or a family. Thus, in determining whether to allow the exemption and the extent to which it is to be allowed, the court takes into account the needs and property of the judgment debtor if the judgment debtor has no spouse or dependents or family and, in other cases, the needs of the judgment debtor and the spouse (if any), dependents (if any), or family (if any).

Code of Civil Procedure § 704.120 (amended). Unemployment benefits and contributions; strike benefits

Comment. Subdivisions (e) and (f) have been added to Section 704.120 to preserve the substance of Chapter 1072 of the Statutes of 1982 and subdivision (d)(2) of Section 704.120 has been revised to conform to Section 11350.5 added to the Welfare and Institutions Code by that chapter.

Code of Civil Procedure § 704.710 (amended). Definitions

Comment. Sections 704.710 and 704.930 are amended to delete "actually" which appeared before "resides" or "resided" in various provisions of the sections. The word "actually" is deleted to avoid a possible construction that a person temporarily absent (such as a person on vacation or in the hospital) could not have as a homestead his or her principal dwelling merely because the person is temporarily absent so long as the dwelling remains the person's principal dwelling and residence.

Code of Civil Procedure § 704.930 (amended). Homestead declaration

Comment. See the Comment to Section 704.710.

Code of Civil Procedure § 724.060 (technical amendment). Contents of acknowledgment of satisfaction of judgment

Comment. Subdivision (a)(7) is amended to delete the reference to a "termination statement" since no provision is made in the law for filing a "termination statement" in order to terminate a judgment lien on personal property.

Code of Civil Procedure § 1801 (technical amendment). Exempt property where assignment for benefit of creditors

Comment. Section 1801 is amended to add references to Section 1255.7 of the Unemployment Insurance Code to preserve the substance of amendments made to its predecessor section (former Section 690.60) by Chapter 1072 of the Statutes of 1982.



SOUTHERN CALIFORNIA HEADQUARTERS

January 28, 1983

RICK SCHWARTZ
Senior Counsel

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

RE: Enforcement of Judgments Legislation and AB 99

Dear John:

I wish to belatedly thank you for sending me, with your letter of December 31st, a copy of the special CEB publication setting forth the revised comments and discussion of the Commission regarding the Enforcement of Judgments Law and the revised Attachment Law.

I have now completed all of the CEB programs and the Rutter Group programs covering the Enforcement of Judgments Law. I will be doing new programs for the California Bankers Association in March and April of this year as well as internal programs for various departments of Bank of America regarding the impact of the new law on operations, lending and recovery of charged-off loans.

I have just finished writing the report of the Debtor/Creditor Relations and Bankruptcy Subcommittee of the State Bar Business Law Section on AB 99 and the additional recommended changes in your Study D-301. For your information, I enclose a copy of this draft report which will be sent to the Executive Committee of the State Bar Business Law Section and through channels of the State Bar. Since this process may take two months and I thought you would like to know our recommendations prior to the time that this report works through channels, I enclose a copy of the first draft which could be revised. Please note that this is not yet an official recommendation of the State Bar.

Prof. John H. DeMouilly
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Page 2

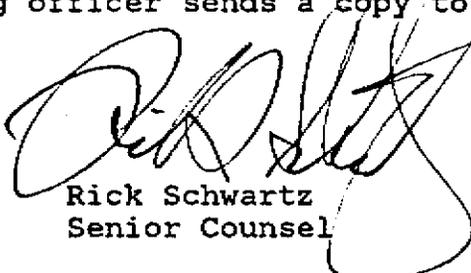
I have read Lane P. Brennan's letter of January 20th regarding §700.140 (c). It appears clear to me upon rereading subdivision (c) that the last sentence of said subdivision covers only that subdivision and is intended to prohibit financial institutions from counting within the amount that they they hold under the levy (solely for purposes of releasing the excess deposits) deposits which are in the process of being collected. §700.140(c) appears to me to be intended to protect the levying creditor by not allowing the financial institution to honor a check or other order for payment which would reduce the deposit account to an amount less than the amount levied upon. The financial institution could not count in the amount held the amount of items deposited to the credit of the deposit account that are in the process of being collected. Therefore, if the levy is for \$10,000 and the amount on deposit is \$25,000, the financial institution should hold \$10,000 in good funds releasing to its customer only good funds in excess of \$10,000. They would be required to hold all funds on deposit at the time of the levy up to the full amount of the levy. It may be desirable to clarify §700.140(c) so no one will think it applies anywhere else in the E.J.L.

I have frankly been surprised by the reaction of attorneys within and without Bank of America to the new Garnishee's Memorandum. However, after discussing the new memorandum with various attorneys, it seems that the primary concern is justified and real and relates to the right of privacy. The right of privacy is a new right and has been construed by only a few state courts. Since the right of privacy concept, as set forth in one initiative and subsequent legislation, is a concept that it is unclear and uncertain, there is a strong concern on the part of financial institutions to the disclosure of possibly private facts and information pursuant to a Garnishee's Memorandum without protection. Perhaps protective language (such as in §687.020(c)) for disclosure of information could be enacted so that compliance with the requirements of a Garnishee's Memorandum would not give any person a cause of action against the person complying with the legal requirements of the E.J.L. This could be accomplished by adding to 700.140(d)(1) or other sections.

It seems clear to me that financial institutions prefer that AB 99 clearly address the privacy issue by immunizing financial institutions from reasonable disclosure of private information required to comply with the six detailed questions asked in the new Garnishee's Memorandum form [§693.030]. Should any other persons identified in the

Prof. John H. DeMouilly
January 28, 1983
Page 3

Garnishee's Memorandum be served by the levying officer with a copy of the Garnishee's Memorandum at the time the financial institution returns the memorandum to the levying officer and before the levying officer sends a copy to the judgment creditor?



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February 3, 1983

Assemblyman Alister McAlister
State Capitol, Room 3112
Sacramento, California 95814

Re: Enforcement of Judgments Act.

Dear Alister:

The panelists at the C.E.B. program on the Enforcement of Judgments Act at McGeorge Law School on January 22, 1983 suggested the need for an amendment to the Act to clarify that the homeowner will not lose his or her homestead exemption merely by moving into another home.

In view of the February 4 legislative deadline, I am taking the liberty of sharing their concerns with you, so that you can introduce an amendment to the Act if appropriate. Needless to say, our Department does not have a position on this issue at the present time.

Although I have not had an opportunity to thoroughly research the issue, it appears that the source of the problem is section 704.710(c), which seems to require that the homeowner must "actually reside" on the premises in order for the homestead to remain effective. ~~The panelists~~ (in particular, Robert L. Ward) indicated that perhaps sections 704.980 and/or 704.990 should be amended to make it clear that a declared homestead will not be deemed to be abandoned merely by the removal of the homeowner from the premises.

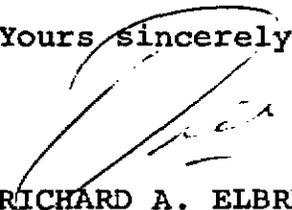
Such a situation is likely to occur when, for example, an elderly homeowner is transferred into a nursing home, whether volitionally or otherwise. If a judgment were outstanding against the homeowner in that kind of a situation and the panelists' interpretation of the Act were to prevail, the homeowner's entire life savings (in the form of the home) could be lost to the judgment creditor, notwithstanding the presence of a declared homestead.

Assemblyman Alister McAlister
February 3, 1983
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I hope that you will have an opportunity to discuss this issue with the principal drafters of the Act and determine whether, in fact, the panelists' critique is valid and, if so, what action ought to be taken to resolve the problem.

My best personal regards.

Yours sincerely,



RICHARD A. ELBRECHT
Supervising Attorney

RAE:vc



THE STATE BAR OF CALIFORNIA

Office of the Legislative Representative

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February 7, 1983

Assemblyman Alister McAlister
State Capitol, Room 3112
Sacramento, CA 95814

Dear Assemblyman McAlister:

Enclosed for your consideration are some comments by the Debtor/Creditor Relations and Bankruptcy Subcommittee of the Business Law Section of the State Bar on Assembly Bill 99. I hope that you will find their analysis helpful and can amend the bill to meet some of their concerns.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter Jensen".

Peter Jensen
Legislative Representative

PJ/jm
Enclosure

January 31, 1983

M E M O R A N D U M

TO: Executive Committee of The Business Law Section of
the State Bar of California

FROM: Debtor/Creditor Relations and Bankruptcy
Subcommittee ("Subcommittee")

SUBJECT: Enforcement of Judgments Law Clean-up Legislation
[AB 99] introduced December 10, 1982, Subcommittee
Recommendations and California Law Revision
Recommendations

The cleanup bill for the revised Attachment and Enforcement of Judgments Laws was introduced on December 10, 1982 as AB 99. The proposed changes in AB 99, specific additional recommendations of the Subcommittee and California Law Revision Commission ("Commission") are discussed in this memorandum.

AB 99 will be the vehicle used by the Commission to amend the revised Attachment and Enforcement of Judgment Laws and will have an urgency clause added so it will be effective July 1, 1983.

The Subcommittee recommends support of AB 99 as presently constituted by the State Bar with the additional changes and amendments proposed in this memorandum.

I. Additional Recommendations.

A. Execution Sale of Homestead.

Section 704.800(a) of The Enforcement of Judgments Law ("EJL") provides that a homestead cannot be sold at an execution sale unless the bid at the execution sale " . . . exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien . . ."

This language appears to require that an acceptable bid include amounts necessary to satisfy liens junior to the

lien of the selling judgment creditor as well as the judgment, execution or attachment lien of the levying judgment creditor.

Section 704.950(c) provides that a judgment lien attaches to a declared homestead and the "surplus over" "all liens and encumbrances on the declared homestead at the time the abstract of judgment . . . is recorded . . ." plus the homestead exemption amount.

Section 487.025(b) of the revised Attachment Law states "An attachment lien attaches to a homestead in the amount of any surplus over the total of the following:

"(1) All liens and encumbrances on the homestead at the time the attachment lien is created.

(2) The homestead exemption set forth in Section 704.730."

X
←
The Subcommittee recommends that the execution sale of homestead provisions be amended by adding the word "superior" or a similar phrase before the words "liens and encumbrances" or "lien and encumbrance" in Sections 704.800(a), 704.760(c), 704.780(b), and 704.850(a)(1).

This amendment would ~~require~~ require payment of only those liens and encumbrances superior to the lien of the judgment creditor plus the homestead exemption (\$30,000 or \$45,000) at an execution sale of a homestead.

As currently enacted junior liens as well as the lien of the levying judgment creditor may have to be paid in cash at the execution sale. The lien of the levying creditor would be discharged by payment of the cash proceeds under §704.850 to the levying creditor.

If the levying creditor were the successful bidder, the funds to discharge the levying creditor's lien would be paid to the levying officer at the sale by the levying creditor and later paid back to the levying creditor by the levying officer. This circular process is not necessary or desirable.

II. AB 99 and Commission Study D-301 of January 3, 1983.

A. Attachment and Registered Process Servicer Changes.

1. Amendment to limit defendant's ability to reduce amount of writ of attachment.

CCP §483.015, 484.050 and other Attachment Law sections would be amended so that a defendant could reduce the amount of a writ of attachment only if the defendant's cross-complaint was based upon a claim upon which a writ of attachment could be issued. This amendment would prevent causes of action based upon tort cross-complaints from reducing the amount of a plaintiff's writ of attachment.

The Subcommittee believes proposed amendment should be adopted but that §484.050(c) should be amended by adding the word "filed" before "cross-complaint" to make it clear that a reduction is possible only as to "filed" cross-complaints.

2. Amendment requiring filing a copy of the writ with levying officer before levy when levy is to be by registered process server.

Section 488.080 of the revised Attachment Law and §699.080 of the EJL would be amended by adding a provision requiring that a copy of the writ be filed with the levying officer and applicable fees paid prior to any levy by a registered process server.

This change was made at the request of the California Sheriff's Association which was concerned that they might receive claims of exemption, third party claims and garnishee's memorandums before the registered process server filed with the levying officer copies of the writ and notice of levy and paid applicable fees.

By requiring the registered process server to file a copy of the writ with the levying officer before levy, a file will be opened at the office of the levying officer so that if claims or other documents are received a file will exist and the papers will be processed efficiently.

As currently enacted the law requires a copy of the writ and applicable fees to be delivered to the levying officer not later than five days after the levy. This creates a gap period which could cause confusion under the law as enacted.

This amendment is desirable and is recommended by the Subcommittee.

B. Fixtures.

Section 488.375 would have a new subsection (e) added which would provide that an attachment lien obtained in the same manner as a judgment lien on personal property by filing with the Secretary of State would cease if the property becomes a fixture as defined in Commercial Code Section 9313.

This conforms the rule in §488.375 (Attachment Law) to the rule regarding judgment liens on personal property contained in §697.530(e) of the E JL. The change is not controversial and is recommended.

C. Deposit account Levies and bonds to third persons.

The new law and existing law requires that if the deposit account levied upon "stands in the name" of the judgment debtor and a third person, a bond to the third person for twice the amount of the judgment or twice the amount of the writ is required and the bond is delivered by the levying officer to the financial institution and sent to the third person. [Current CCP §682a and new §700.160(b)].

Section 488.455 of the revised Attachment Law and Section 700.140 of the E JL would be amended to make it clear that a bond to third person's is not required where a deposit account "third person" "is only a person named as the beneficiary of a Totten trust account" or "a payee designated in a pay-on-death provision" in accordance with applicable law.

This change does not adjudicate the rights of the third person to the funds and merely requires the financial institution to honor the levy without a third person bond. The third person could file a third party claim under §720.110 to §720.170 which would require the levying creditor to post a bond or the levy would be released.

This change will make it clear when an account "stands in the name of a third person," will reduce the necessity for third person bonds and reduce creditor's costs which would normally be taxed to the judgment debtor. The Subcommittee recommends this amendment.

D. Setoff Changes.

Financial Code Section 864 governs bank setoffs and Section 7609.5 governs savings and loan setoffs. These

sections would be amended by adding to the official set-off form "financial aid paid by an institution of higher education to a student for expenses while attending school".

The student aid exemption was lobbied for and obtained as part of the EJA by the University of California Associated Students. The addition of student aid exemption in the Notice of Setoff is not significant, is merely a conforming amendment, but will require reprinting of forms after July 1, 1983. The Subcommittee Recommends this Amendment.

E. Other Changes.

1. CCP Section 726 - One form of action.

A number of technical changes are made to CCP §726 which do not appear to change the substance of the section in any manner except that it is explicitly provided that the sale of the encumbered property does not affect the interest of a person whose conveyance or lien appears of record at the time of the commencement of the judicial foreclosure action when that person is not joined as a party to the action.

Since under the new law junior lien holders may not redeem and they are wiped out because they cannot reattach even if the debtor does redeem, the amendment is necessary and appears to follow existing case law regarding omitted junior lien creditors.

The amendment requires that those persons having a record interest in the property at the commencement of the judicial foreclosure be joined as parties to the action. This does not change current practice.

However, since judicial foreclosure may take several years and other liens may be created on the real property subsequent to commencement of the judicial foreclosure action, the Subcommittee recommends that the plaintiff in any judicial foreclosure action be required to record a Notice of Pendency of Judicial Foreclosure Action in all counties where the real property being foreclosed is located. This would be similar to a Lis Pendens Notice. This probably should be done within 30 days after commencement of the judicial foreclosure action. However, failure to record the notice should not

affect the validity of any judgment or decree of foreclosure. The notice would give constructive notice of the pending judicial foreclosure action.

New section 729.010(b)(3) covering judicial foreclosure actions states that notice of sale "may" be given to all persons having liens on the property at the time of entry of judgment in the judicial foreclosure action. Perhaps this "may" should be a "shall" similar to §701.540(h) which governs execution sales of real property.

2. The only other change in AB 99 as introduced December 10, 1983, is a provision amending Section 7170 of the Government Code to make clear that a state tax lien attaches to a dwelling notwithstanding the prior recording of a homestead declaration. This is probably the law as it now exists, but no harm occurs by clarifying this section for the State of California.

F. Study D-301 (1-3-83) Recommendations of the Commission.

1. Joint bank account levy.

The Subcommittee recommends adoption of the concept in proposed §700.165 dealing with levies on deposit accounts standing in the name of a judgment debtor and spouse of a judgment debtor. §700.165 would eliminate the need for a bond to third persons when the account stands in the name of the judgment debtor and spouse of the judgment debtor.

2. Fictitious business name account levy.

The Subcommittee recommends adoption of proposed §700.167 which would not require a bond to third persons for a levy on a dba account if the filed fictitious name statement lists as persons doing business under the fictitious business name either only the judgment debtor, spouse of the judgment debtor or both.

3. Exemptions as applied to marital property.

The proposed amendment to §703.110(a) is clarifying and not substantive and is recommended by the Subcommittee.

The amendment would add additional language providing that, unless the exemption provision specifically otherwise provides, the two spouses together are entitled to only one exemption limited to the specified maximum dollar amount in the exemption. This makes it clear that exemptions are not increased for the marital unit unless the exemption specifically so provides.

III. Summary and Recommendation.

It is the Subcommittee's belief that substantially all of the proposed changes in AB 99 and Commission Study D-301 (January 3, 1983) either clarify existing law, conform the revised Attachment Law to the Enforcement of Judgments Law, or amend the laws in a manner that will eliminate loopholes or operating problems and that the proposed changes including the recommendations of the Subcommittee be recommended to the Executive Committee of the Business Law Section of the State Bar of California and to the California Law Revision Commission and the California Legislature.

The Subcommittee will closely follow all amendments to AB99 and comment upon any proposals which the Subcommittee believes warrant a State Bar position.

RS:eg