

Memorandum 83-69

Subject: Study D-302 - Creditors' Remedies

Mr. Rick Schwartz has written the Commission about several problems he sees in the newly enacted Enforcement of Judgments Law. A copy of his letter is attached to this memorandum as Exhibit 1. (The issues concerning the Bond and Undertaking Law are separately considered in Memorandum 83-52). This memorandum also discusses an additional issue that has come to our attention concerning enforcement of judgments.

Lien in Proceedings for Examination of Judgment Debtor

Mr. Schwartz is concerned with what he terms a "secret lien" arising on the judgment debtor's personal property upon service of a copy of the order to appear for an examination. (See Code Civ. Proc. § 708.110; Exhibit 1, pp.2-3). He is concerned that there is no practical means by which a person dealing with a judgment debtor would know of the lien, and suggests consideration of a central filing system with the Secretary of State.

The effect of a lien under Section 708.110 is governed by Section 697.920. This section provides in effect that the lien continues on property notwithstanding its transfer or encumbrance unless the transfer or encumbrance is made to a person who would take property free of an execution lien. Hence, a person who acquires an interest for fair consideration and without knowledge of the lien takes free of the lien. (Other categories of protected persons are listed in Code of Civil Procedure Section 697.740). The lack of a system for giving notice, constructive or actual, does not work against persons who deal with the judgment debtor but will tend to protect them.

The staff does not believe that any revision of this lien is needed. It is intended to give the judgment creditor a priority in the judgment debtor's personal property, dating from the time of service of the order for an examination, over any person who knows of the lien, i.e., who knows of the examination proceedings. We would not want to attempt formalizing this lien by providing for filing with the Secretary of State.

It may be that some of the concern comes from the duration of the lien. This lien lasts during the period of enforceability of the judg-

ment which runs for ten years from date of entry. See Code of Civ. Proc. §§ 697.030, 683.020. Nothing would be lost if the lien were restricted to a period such as one year from the date of the order for examination, subject to extension or termination by the court. This would make the duration of the lien under Section 708.110 the same as the lien under Section 708.120 in examinations of third persons.

Priorities Between Judgment Lien on Personal Property and Security Interests

Mr. Schwartz suggests that a first-to-file or first-to-perfect rule be adopted to govern priorities between judgment liens on personal property under the Enforcement of Judgments Law and security interests. (See Exhibit 1, pp. 3-4, and letter from Eldon Parr attached thereto). This subject is fully considered in Memorandum 83-53 on the agenda for the September meeting.

Fee for Renewal of Judgment

It has come to our attention that there is no provision for a fee for the filing an application for renewal of judgment under the Enforcement of Judgments Law. See Code Civ. Proc. §§ 683.110-683.220. It is unclear whether courts may charge a first paper fee, a motion fee, or no fee at all. The staff proposes to amend Government Code Section 26830 to provide a \$14 fee for filing an application for renewal. This is the general fee for filing a notice of motion.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1



SOUTHERN CALIFORNIA HEADQUARTERS

July 7, 1983

RICK SCHWARTZ
Senior Counsel

(213) 228-2522

Nathaniel Sterling
Assistant Executive Secretary
The California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

RE: Bond and Undertaking and Enforcement of Judgment
Law changes

Dear Nat:

I am writing you this letter in response to our telephone conversation on June 16th. As I indicated, I believe the 10 day period specified in CCP §995.930(b) and similar sections is too short in many instances. We had a case where an injunction was issued on a \$5,000 bond. Although the bond was properly served upon Bank of America as specified in the CCP, it did not get to the appropriate litigation department attorney until after the time within which a motion objecting to the amount of the bond, sufficiency of the sureties, etc. could be made under §995.930(b). Since there was no change in circumstances, I believe that any motion we make regarding the bond amount now would probably not be successful.

I feel creditors and any other persons who may be affected by the issuance of a bond should have a greater period of time within which to review the sufficiency of the bond because no person would be harmed by a greater period of time within which to object to the sufficiency of a bond. Only the person against whom the bond is posted is the person who would have cause to object and who would be harmed by delays, therefore any legitimate objection should not be foreclosed by too short a time period. I suggest that the time period be reviewed and extended to 30 days where no one

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would be prejudiced by an extension of time within which to object to a bond. I believe the greater period of time will result in more due process rights for all affected persons. I fully understand that the current ten day period is extendable if service is by mail, however, if service is by personal service on Bank of America then 10 days is generally too short a period within which a proper response can be made.

The other section which I mentioned in our telephone conversation was CCP §515.020 which provides for the redelivery of property to the defendant if the defendant provides an undertaking "in an amount equal to the amount of the plaintiff's undertaking required by Section 515.010." The problem here is that if the plaintiff provides a minimum undertaking because the defendant has no interest in the property, the defendant could obtain redelivery of the property by providing an equal undertaking.

This problem is best illustrated by a situation where the equipment has a fair market value of \$100,000.00 and the debt against the equipment amounts to \$100,000.00. This is not an unusual fact situation. Indeed, the debt frequently exceeds the value. In this hypothetical case the defendant would have no interest or equity in the personal property, but the plaintiff would have \$100,000.00 interest in it. The defendant should not be able to obtain redelivery of the personal property by posting no bond or undertaking, but should be required under §515.020 to post a bond or undertaking at least sufficient to cover the interest of the plaintiff in the property (i.e. \$100,000).

I also enclose a copy of my June 30th letter to The California Judicial Council suggesting that they should create Judicial Council forms for the new debtor examination and debtor of a debtor examination proceedings provided for in the new Enforcement of Judgments Law §§708.110 to 708.205.

After conducting several seminars, programs and speeches on the new Enforcement of Judgments Law, it is readily apparent to me that one of the sleeper issues in the new law is the lien created by §708.110(d) which is a lien "on the personal property of the judgment debtor". Based on the official comment, this lien has a duration of the life of the judgment (i.e., ten years from the entry of judgment). I presume, although it is not clear, that the lien is on all of the personal property of the judgment debtor wherever located.

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The primary objection of most persons who are familiar with this sleeper section is that the lien is a "secret" lien and not readily ascertainable by any public records. Indeed, in order for anyone to determine the existence of the lien, they would have to be advised by the judgment debtor that an ORAP had been served or search the records of all Superior and Municipal courts for the prior ten years showing the debtor as a judgment debtor. This would require a review of records in all 58 counties in the State of California as well as the records of all federal courts, since federal courts also use the new Enforcement of Judgments Law procedures in California. This search burden is almost impossible.

If the California Law Revision Commission can determine some method for public notice by central filing of these personal property debtor exam liens, I believe substantial criticisms would be eliminated. The CLRC may also desire to specify that the lien attaches only to property of the judgment debtor at the time of service of the order and perhaps provide for a specific, shorter duration for the lien than the 10 year life of the judgment.

I believe that the Secretary of State's office would object to a requirement that notice of personal property debtor exam liens be filed with the Secretary of State, however, I believe filing notice with the Secretary of State within a specified period to time after service is the best solution particularly if the judgment debtor is engaged in business. If the staff is considering this problem or if you have any suggestions or thoughts, I would be pleased to hear from you.

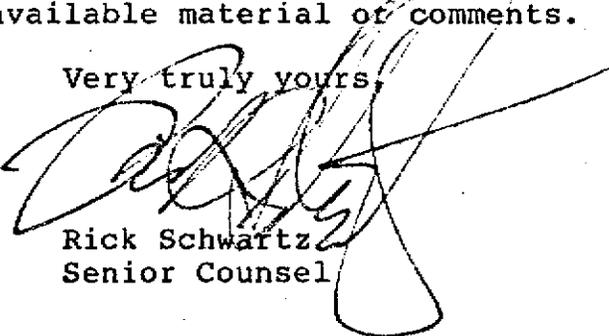
Another area of some concern to commercial lenders relates to the priority of a judgment lien as defined in Commercial Code §9301 as against a consensual security interest. The priority of the judgment lien dates from the creation of the lien by filing of the notice of personal property judgment lien with the Secretary of State. However, the priority of a security interest dates from the later of the UCC-1 filing which perfects a security interest or the attachment of the security interest which requires a security agreement and "value".

I believe that the easiest way to resolve this priority problem would be to provide that priority between a personal property judgment lien and a consensual security interest shall be determined by a first to perfect or file rule except as specified under 9301(4). I enclose a copy of

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Eldon Parr's letter of June 30th on this subject. If the staff is currently dealing with any of these problems, I would be interested in any available material or comments.

Very truly yours,



Rick Schwartz
Senior Counsel

RS:pa

Encl.

cc: John De Moully
Executive Secretary
California Law Revision Commission

File copy

June 30, 1983

(213) 228-2522

John Toker, Esq.
The Judicial Council of California
State Building
350 McAllister Street
San Francisco, California 94102

RE: Uniform Court Order for Appearance of Judgment
Debtor, Debtor of Judgment Debtor and
Application for Appearance of Judgment Debtor or
Debtor of Judgment Debtor.

Dear John:

I have obtained copies of the various forms currently available from the Municipal and Superior Courts of Los Angeles County relating to orders for the appearance of a debtor and debtor of a judgment debtor.

After reviewing these now obsolete forms together with the substantially revised provisions in CCP §708.110, 708.120, 708.150, 708.170 and 708.180, I feel strongly that it is important that a uniform up to date California Judicial Council of California form be created to take into account the substantial changes and effects of the judgment debtor and debtor of the debtor exams.

One of the reasons I feel so strongly is that it is clear that the judgment debtor exam will be used more now than it has in the past simply because under the provisions of 708.110(d) "Service of the order creates a lien on the personal property of the judgment debtor." The comments to 708.110 indicates that this lien is good for the duration of the judgment (i.e., 10 years from entry of judgment). Because service of the order creates a lien on all personal property

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of the judgment debtor, I feel it is important that uniform forms exist which will properly notify the judgment debtor and any debtor of the judgment debtor of the effects of the order and their rights.

Upon examining the enclosed forms, you will see that several additions and changes need to be made.

I feel one form could be created as an Application for Order for Appearance of Debtor or Debtor of Judgment Debtor and an additional form could be created as a Court Order for the Appearance of a Debtor or Debtor of Judgment Debtor.

The new law requires specific language in the debtor exam order in 14-point boldface type if printed specifying: "Notice to Judgment Debtor". This language is in 708.110(e). I believe the court order for the appearance of judgment debtor should state that it must be personally served upon the judgment debtor not less than 10 days before the date set for the examination and that service of the order creates a lien on the personal property of the judgment debtor (708.110(d)). I believe any uniform form should contain a box which would be checked if the debtor or the debtor of the debtor was an organization described in Section 708.150. An organization may be required to designate a person familiar with its property and its debts to appear pursuant to the order.

In addition, since the penalties for failure of the debtor or the debtor of the debtor to appear are now more specific [Section 708.170], I believe that the form should emphasize that a warrant may issue, failure to appear may be punished by contempt and that judgment creditor shall be awarded attorney's incurred if failure to appear is without good cause. Some of these things are covered in the required statutory notices [§708.110(e) and §708.120(e)].

Furthermore, Section 708.180 now allows for the court, under certain circumstances, to determine an adverse claim of a third person. This is relevant only as to a debtor of a debtor exam, but, I believe that the form ought to call the debtor of the debtor's attention the fact that adverse claims may be adjudicated pursuant to the provisions in CCP §708.180 since under current law an adverse claim cannot be adjudicated at a debtor of a debtor examination.

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One of the primary problems with the lien created by 708.110(d) is that the lien is not easily ascertainable. In order for a person to determine whether a Section 708.110(d) lien exists, a person would have to search the Municipal and Superior Court records in all 58 counties in the State of California as well as all of the Federal Court records in California since California's Enforcement of Judgments Law procedures govern both state and federal courts in California.

If I can be of any assistance to the Judicial Council of California reviewing any proposed forms, I would be pleased to do so.

Very truly yours,

Rick Schwartz
Senior Counsel

RS:pa

cc: Ullar Vitsut #4017

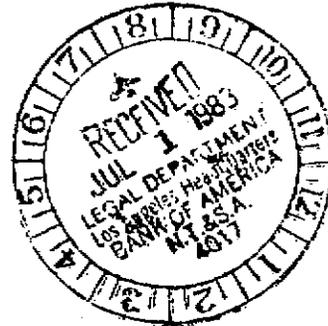
George Duff #3017

John DeMouilly
Executive Secretary
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FROM Legal Department #3017
World Headquarters Building

BANK OF AMERICA

TO Rick Schwartz
Senior Counsel
Legal Department - South #4017



DATE June 30, 1983

SUBJECT Notice of Personal Property Judgment Lien

This is in reply to your letter dated June 28.

A first-to-file priority rule seems desirable insofar as it is feasible among the competing interests. I see no reason why a simple first-to-file rule would not be feasible as between security interests perfected by filing and liens acquired by filing a notice of judgment lien. There is every reason to subject a judgment lien acquired by filing a notice to the same priority rules as security interests perfected by filing. The new procedure essentially provides a method for a judgment creditor to acquire rights identical to the rights of a secured party who has perfected by filing in both existing and after-acquired property.

But even among competing security interests, the first-to-file rule is only one of several rules. Others include security interests perfected by possession and purchase money security interests. The lien creditor who acquires a lien by filing a notice of judgment lien is only one of several categories of lien creditors. The priority of at least some of the other lien creditors

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cannot be controlled by the Uniform Code, e.g., a trustee in bankruptcy. The considerations which resulted in the existing priority provisions for lien creditors will probably prevent any change of priority rules for lien creditors other than with respect to the liens acquired by filing a notice of judgment lien.

While I am fairly confident that a perfected security interest will have priority over lien creditors as to after-acquired property, there may still be some exposure under the "only to the extent that" provision in Section 9301(c)(4). For example, in rolling-over inventory, new inventory is after-acquired property, but does the financing constitute "future advances"? To the extent there is such an exposure, it is not new. As to liens acquired by filing a notice of judgment lien, the notice requirements of Section 9301(c)(5) should enable us to avoid any problems by reason of those liens.



Eldon C. Parr
Vice President and
Senior Counsel

ECP:mem

cc: Carol C. Weisner
Thomas E. Montgomery
Richard C. Herr