#D-302 12/27/83

Memorandum 84-6

Subject: Study D-302 - Creditors' Remedies

This memorandum discusses several questions arising in the area of creditors' remedies. A copy of the relevant parts of the Recommendation Relating to Creditors' Remedies that is to be considered by the Legislature this year (AB 2295) are attached to this memorandum. (See Exhibit 3.)

Manner of Service After Levy on Final Money Judgment

The rights of a debtor under a final money judgment in the debtor's favor may be levied upon by filing a copy of a writ of attachment or execution and a notice of levy or attachment with the court clerk where the judgment is entered. See Code Civ. Proc. §§ 488.480, 700.190. The debtor's judgment debtor is also given notice in order to prevent a voluntary satisfaction of the judgment by payment to the debtor instead of the levying officer. Both Sections 488.480 and 700.190 require personal service on the debtor's judgment debtor. As a rule, the levy procedures require personal service only where the levy is accomplished by service. See, e.g., Code Civ. Proc. §§ 700.040 (tangible personal property in possesion of third person), 700.170 (accounts receivable and general intangibles). Where a nonlevy service is made in conjunction with a levy, it is permitted to be made by mail. See, e.g., Code Civ. Proc. §§ 700.100(b) (Service on account debtor under chattel paper), 700.110(b) (service on obligor on instrument). In the case of a final money judgment, the requirement of personal service on the judgment debtor under that judgment is anomalous and the staff proposes to permit service by mail. This will make the law more consistent and eliminate some expenses and difficulty of service.

This change would be accomplished in the Attachment Law by amending Section 488.480 as follows:

> 488.480. (a) As used in this section, "final money judgment" means a money judgment after the time for appeal from the judgment has expired or, if an appeal is filed, after the appeal has been finally determined.
>
> (b) To attach a final money judgment, the levying officer shall file a copy of the writ of attachment and a notice of attachment with the clerk of the court that entered the final money judgment. The court clerk shall endorse upon the judgment a state-

ment of the existence of the attachment lien and the time it was created. If an abstract of the judgment is issued, it shall include a statement of the attachment lien in favor of the plaintiff.

(c) At the time of levy or promptly thereafter, the levying officer shall ~~personally~~ serve a copy of the writ of attachment and a notice of attachment on the judgment debtor obligated to pay the final money judgment attached. The filing with the court clerk pursuant to subdivision (b) is not, of itself, notice to the judgment debtor obligated to pay the attached judgment so as to invalidate any payments made by him or her that would otherwise be applied to the satisfaction of the attached judgment.

Comment. Subdivision (c) of Section 488.480 is amended to permit notice of attachement to be served on the defendant's judgment debtor by mail. See Section 482.070 (manner of service).

The relevant section in the Enforcement of Judgments Law would be amended as follows:

700.190. (a) As used in this section, "final money judgment" means a money judgment after the time for appeal from the judgment has expired or, if an appeal is filed, after the appeal has been finally determined.

(b) To levy upon a final money judgment, the levying officer shall file a copy of the writ of execution and a notice of levy with the clerk of the court that entered the final money judgment. The court clerk shall endorse upon the judgment a statement of the existence of the execution lien and the time it was created. If an abstract of the judgment is issued, it shall include a statment of the execution lien in favor of the judgment creditor.

(c) At the time of levy or promptly thereafter, the levying officer shall ~~personally~~ serve a copy of the writ of execution and a notice of levy on the judgment debtor obligated to pay the final money judgment levied upon. Service shall be made personally or by mail. The filing with the court clerk pursuant to subdivision (b) is not, of itself, notice to the judgment debtor obligated to pay the judgment levied upon so as to invalidate any payments made by him or her that would otherwise be applied to the satisfaction of the judgment levied upon.

Comment. Section 700.190 is amended to permit notice of levy to be served on the debtor's judgment debtor by mail.

Creditor's Undertaking for Levying on Deposit Accounts and Safe Deposit Boxes

The recommended legislation would repeal the requirement that the creditor give an undertaking as a prerequisite to levying on a deposit account or safe deposit box that stands in the name of the debtor and another person or solely in the name of a third person. (See the discussion in the recommendation attached as Exhibit 3.) Mr. Rick Schwartz of the Bank of America has forwarded a letter from Ms. Carole Helfert Harmon reporting the concerns of the Bank Operations Counsel Group regarding this recommendation. (A copy of this letter is attached as

Exhibit 1.) Ms. Harmon's letter raises three issues: (1) the effect of the elimination of the undertaking requirement on the rights of third persons, (2) the liability of banks to third persons, and (3) the duty to give notice to third persons having an interest in an account or box levied upon. Ms. Harmon indicates that the bank attorneys were favorable toward the Commission's recommendation, assuming that their concerns could be adequately dealt with.

The major difficulty involves the rights of a third person who has an interest in a deposit account that is levied upon. (The following discussion will deal mainly with deposit accounts; application of the staff's conclusions to safe deposit box levies will be considered later.) This may occur where the account stands in the names of both the judgment debtor and the third person or where the account stands solely in the name of the third person. Consideration of this problem involves constitutional issues that have engaged the Commission's attention for many years. A background memorandum on the constitutional ramifications of levies that affect property of third persons is attached to this memorandum as Exhibit 2. The banks are also concerned about this issue from the standpoint of customer relations.

The staff thinks that it is a defensible and desirable policy to permit a levy that freezes joint accounts, leaving the third person to pursue its remedies by way of the third-party claims procedure as in the case of other joint ownership situations. Persons who hold accounts jointly with another may be viewed as having assumed the risk that the other account holder's creditors may freeze the account by levy without a prior hearing or notice.

The staff is concerned, however, that permitting a levy on an account standing solely in the name of a person other than the judgment debtor may not satisfy due process requirements. This is true whether or not the judgment creditor is required to furnish an undertaking indemnifying the third person for damages suffered by the taking. Determining constitutionality in this area of the law can be somewhat of a guessing game because different procedures built from a variety of elements may satisfy the applicable standards. (See the discussion of the U.S. Supreme Court cases in Exhibit 2.) Constitutionality depends upon elements such as the seriousness of the taking, the requirements of notice, the opportunity for a prompt hearing either before or after the taking, review of the need for the taking by an independent judicial

officer, the nature of the creditor's allegations supporting the taking, and the necessity for the taking in the circumstances of the case. The former, existing, and proposed law are all subject to question since levies on third person accounts are not limited to extraordinary circumstances and there is no judicial determination of the third person's rights before the taking. The taking may have serious consequences since the account is frozen and outstanding checks will be dishonored. In favor of the existing scheme is the opportunity for an early review by way of a third-party claim and the requirement that notice be given the third person.

The staff recommends that the statutes be revised to prevent levies of attachment or execution on accounts standing solely in the name of third persons, unless the levy is made pursuant to court order. This general rule would be subject to two exceptions: levy would be permitted without a court order where the account stands in the name of the debtor's spouse or where the account stands in a fictitious business name of the debtor. The spouse exception follows from the fact that community property is liable for the satisfaction of one spouse's debts in most situations. See Code Civ. Proc. § 695.020.

Levies on accounts standing in the name of persons other than debtors are most certainly very rare. Accordingly, a change in this area is not likely to cause any serious disruption of existing practice. The staff assumes that when such cases arise, there has probably been a fraudulent conveyance. Hence, one way to obtain the necessary court order under the staff proposal would be to proceed under Civil Code Section 3439.09 or 3439.10 and have the conveyance set aside. Whether or not a fraudulent conveyance is involved, the judgment creditor would have a speedy remedy by way of an ex parte order for examination of the third person pursuant to Code of Civil Procedure Section 708.120 on the grounds that the third person has control of property in which the debtor has an interest. Service of the notice of an examination on the third person creates a lien on the account described in the creditor's affidavit. A copy of the order could also be served on the bank where the account is held, although we may need to specifically provide that upon notice to the bank the account is frozen. The third person's rights in the account can be determined in the examination proceedings or in a creditor's suit. See Code Civ. Proc. §§ 708.180, 708.280.

The staff's proposal would be implemented by enacting a new Section 700.160 to read substantially as follows:

Code of Civil Procedure § 700.160 (added). Limitations on levy on deposit accounts and safe-deposit boxes

700.160. (a) Except as provided in subdivision (b), a deposit account or safe-deposit box not standing in the name of the judgment debtor, either alone or together with third persons, is not subject to levy under Section 700.140 or 700.150 unless the levy is authorized by court order.

(b) A court order is not required as a prerequisite to levy on a deposit account or safe-deposit box standing in the name of either of the following:

(1) The judgment debtor's spouse, whether alone or together with other third persons. An affidavit showing that the person in whose name the account stands is the judgment debtor's spouse shall be delivered to the financial institution at the time of levy. The affidavit may be based on the affiant's information and belief.

(2) A fictitious business name, if an unexpired fictitious business name statement filed pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code lists as the persons doing business under the fictitious business name either the judgment debtor or the judgment debtor and the judgment debtor's spouse but does not list any other person. A copy of a fictitious business name statement that satisfies these requirements shall be delivered to the financial institution at the time of levy.

Comment. Section 700.160 supersedes the undertaking requirement provided by former Section 700.160 which applied where deposit accounts or safe-deposit boxes were held in the name of a third person, either alone or jointly with the judgment debtor. Under the general rule provided in subdivision (a), a court order is required before the judgment creditor may cause a levy on an account or box not in the name of the judgment debtor. Accordingly, a levy is permissible without a prior court order whenever the judgment debtor's name appears on the account or box, regardless of whether the account or box is held jointly with another person. Subdivision (b) also specified situations where a levy is permitted without prior court authorization even though the judgment debtor's name does not appear on the account or box.

A court order permitting a levy as provided under subdivision (a) may be obtained in a number of ways, depending on the facts of the case and the preference of the judgment creditor. The procedure for examining a third person provided by Section 708.120 should be appropriate in most cases. This procedure provides for a summary determination of any adverse claim made by the third person. See Section 708.180. The judgment creditor may also choose to proceed by way of a creditor's suit. See Sections 708.210-708.290. If the presence of the judgment debtor's money in a deposit account or property in a safe-deposit box involves a fraudulent conveyance, the judgment creditor may wish to proceed under the Uniform Fraudulent Conveyance Act. See Civil Code § 3439.09. In an appropriate case involving a partnership, a charging order may be necessary. See Sections 708.310-708.320. Other remedies may be available in appropriate circumstances.

A similar provision should be added to the Attachment Law in place of Section 488.465. The four provisions governing levy on deposit accounts and safe deposit boxes should be prefaced by a clause making clear that they are subject to the requirements of these new provisions. See Sections 488.455, 488.460, 700.140, 700.150.

The staff recommends that the proposed rules governing levy on deposit accounts be applied to safe-deposit boxes, even though there is significantly less harm involved in the taking. This recommendation is made because there is still force in the argument that a creditor should not seize property standing in the name of a third person without some judicial review of the need to do so and because it is desirable to make the rules for levying on boxes as nearly consistent with the rules for levying on accounts as is possible.

Bank Liability

The problem of liability on the part of financial institutions should be largely avoided if a court order is required as suggested above. The levy provisions contain provisions for immunity of financial institutions to the extent they comply with the law. The staff believes these provisions are adequate, although we note a potential ambiguity in the phrasing. For example, Section 700.140(d) provides:

> (d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:
> (1) Performance of the duties of a garnishee under the levy.
> (2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account where such nonpayment is pursuant to the requirements of subdivision (c).
> (3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

The ambiguity results from the introductory clause which, read literally, may be taken to say that when the lien ceases--i.e., when the bank pays the money over to the levying officer--the statutory protection from liability suddenly ends. The staff concludes that this language ("During the time the execution lien is in effect . . .") is unnecessary and should be deleted from Sections 488.455(d), 488.460(e), 700.140(d), and 700.150(e). The other language is sufficiently broad to answer the concerns of the bank attorneys as expressed in the letter from Ms. Harmon. (See Exhibit 1.)

Notice to Third Person

Ms. Harmon's letter also asks who would be responsible for giving notice to the third person. The staff finds the proposal clear and

adequate. The levying officer is required to give notice to a third person who holds the account or box jointly with the debtor. See Sections 488.455(b), 448.460(b), 700.140(b), 700.150(b). Under the staff proposal to require a court order before levying on accounts or boxes solely in the name of third persons, the same notice requirement would apply, and in most situations the third person would have one or more other notices of proceedings against the account or box. While the proposed statute does not place any duty on the bank to notify third persons, we understand that banks may wish to give notice on their own initiative in the interest of good customer relations. The existing requirement that the bank send notice of the filing of an undertaking to a third person would disappear with the abandonment of the undertaking requirement. See Sections 488.465, 700.160.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

Lloyds Bank California

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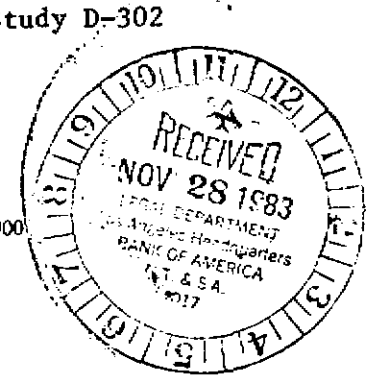
Law Department



November 17, 1983

Rick Schwartz
Senior Counsel
Bank of America
Legal Department
555 South Flower Street, 9th Floor
Los Angeles, California 90071

Re: Repeal of Bond Requirements

Dear Rick:

I am sorry you were unable to attend our November 16, 1983 meeting of the Bank Operations Counsel Group. Our next meeting is scheduled for January 18, 1984; I hope you will be able to attend that. You will be receiving a notice sometime before the meeting.

With respect to your request that the Bank Operations Counsel Group give you its input regarding the CLRC study to repeal the third person bond provisions for levies on deposit accounts and safe deposit boxes, the Group raised the following questions (assume for purposes of this letter that "account" also includes safe deposit boxes):

1. Will the repeal of the bond requirements be for joint accounts only or for those accounts which are standing in the name of third persons as well? In this regard, the concensus of opinions seems to be that there could be certain problems with respect to third person accounts that are not joint accounts. For example, what if the subpoena requests funds by account number only and hits an account where the depositor has no relationship with or to the judgment debtor; or, what if the judgment debtor only has a limited or future interest in the third person account--will the innocent third person be required to use the legal process in order to access his or her own funds? How do we

explain the "law" to this customer and still preserve the banking relationship? And, what exposure and/or liability of the Bank?

2. With regard to the purported bond repeal itself, is anyone presenting to the CLRC the position of the joint account holder or third person in order to protect their interest? The general feeling is that a bond repeal measure to benefit or assist financial institutions would certainly draw lawsuits from the "injured" joint account holders or third parties for whom the bond requirement was originally designed to protect (in the absence of an evenly-balanced evaluation of the proposed change).

3. Does the proposed (or current) law protect the Bank from liability for releasing or holding funds which stand in the name of a joint account holder or a third person? We reviewed the Code sections cited as footnote 8 to the October 7, 1983 "Recommendation" which you sent to me with your letter. It did not seem to us that any of the code sections adequately protect the Bank from liability: read broadly, the Bank may be protected but the feeling is that the Code should be more specific in stating that the Bank will not incur any liability to joint account holders or third persons.

4. Finally, what about notice to the joint account holder or the third person? Will that be handled by the levying officer in the same manner as is now in effect? Or, notwithstanding the Code, will the bank have a "duty" to inform the depositor?

Overall, the concern is if the bond requirements are repealed, who protects the interest of the third persons or joint account holders, how is this accomplished, and what, if any, is the bank's exposure by complying with the law?

If the above questions can be answered satisfactorily, the opinion is unanimous that, operationally, it would be wonderful not to have to deal with bond requirements. It is the transition period which concerns everyone and potential bank liability for complying with changes in a law which, currently, is so firmly entrenched.

I look forward to your response to the above questions and hope that you are able to satisfy our concerns so that the proposed change by the California Law Revision Commission may be adopted without opposition.

Best regards. Hope to see you in January.

Very truly yours,

Carole Helfert Harmon
Counsel

CHH1:lp

cc: members of Bank Operations Counsel Group

EXHIBIT 2

DUE PROCESS AND THIRD-PARTY RIGHTS

Common Law

Under the common law, the levying officer was liable to the third person for conversion or replevin and was not protected by the fact that he was operating on the authority of a writ in the favor of the creditor and against the debtor. If the officer released the property to the third person, he would be liable to the creditor if it turned out that he was in error. In California Section 689 was enacted originally to protect the levying officers from these conflicting liabilities.

Solving the levying officer's liability problems obviously does not guarantee the fairness or constitutionality of the procedure as it has developed through the years, particularly in view of the courts' greater sensitivity to due process claims in creditors' remedies after Sniadach and Randone. A review of these decisions will aid in determining their applicability to the third-party situation.

U.S. Supreme Court Decisions

In Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the United States Supreme Court held unconstitutional the prejudgment garnishment of wages without notice and an opportunity for a hearing prior to the taking. The unconstitutional taking in Sniadach was the deprivation of the "enjoyment of the earned wages" which the court referred to as a "specialized form of property." Justice Harlan's concurring opinion spoke of the need for notice and hearing "which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use."

In Fuentes v. Shevin, 407 U.S. 67 (1972), the court held Florida's and Pennsylvania's ex parte prejudgment replevin procedures unconstitutional. The court made clear that the force of Sniadach was not to be restricted to wages, despite the contrary indications in Sniadach itself. The property interest found to be entitled to the protection of the Fourteenth Amendment was the possession and use of the household goods even though the debtors lacked full title to the goods and their

claim to continued possession was in dispute. The court stated that "it is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." The court also held that the opportunity for a later hearing and damage award could not "undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. In its statement of the holding, the court said that the procedures were unconstitutional because they "work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." (Emphasis added.)

Suspicions about the force of Fuentes (decided by a 4-3 vote, with Justices Powell and Rehnquist not participating) seemed to be confirmed in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), which upheld the Louisiana sequestration (replevin) procedure permitting prejudgment seizure of the property on the ex parte application of the seller. The court emphasized the fact that both the buyer and the seller had an interest in the property and stated that the property interests of both parties should be considered when deciding on the validity of the challenged procedure. The court found that the seller would be most likely to protect the value of the property. It also noted that a judicial officer determined whether the ex parte writ should issue and that the debtor had an immediate opportunity to seek the dissolution of the writ whereupon the creditor would have to prove the grounds for issuance. The debtor could also file a bond to release the property. The court rejected the notion that the debtor was entitled to the use and possession of the property until all issues in the case were judicially resolved at a full adversary hearing. Furthermore, the court noted that the creditor had to file a bond to cover any damage or cost incurred by the debtor because of the taking. The court found that the nature of the issues at stake and the probabiltiy of being able to use documentary evidence minimized the risk of abuse. Finally, the court said that it was unconvinced that the impact on the debtor of the deprivation overrode the interest of the creditor in protecting the value of the property and that even assuming a "real impact" the basic source of the debtor's income remained unimpaired. Mitchell said that Sniadach and Fuentes

merely stand for the proposition that a hearing must be had before one is finally deprived of his property and do not deal at all with the need for a pretermination hearing where a full and immediate post-termination hearing is provided. The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' [Quoting from Phillips v. Commissioner, 283 U.S. 589 (1931).]

The court seemed to retreat from Mitchell and take several steps back toward Sniadach and Fuentes in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), which declared unconstitutional the prejudgment garnishment of a corporation's bank account based on the affidavit of the creditor. This Georgia procedure, like the procedure in Mitchell, required the filing of a bond to protect the debtor from loss or damage and permitted the debtor to obtain the release of the property by filing a bond. However, the Supreme Court disapproved the procedure because the writ was issuable by a court clerk rather than a judge on conclusory allegations of the plaintiff without the opportunity for an 'early hearing.' The court did not say that a hearing had to be held before the writ was issued: it merely noted that a major defect was the lack of the opportunity for an early hearing. However, the court did make clear that, for the purposes of the Due Process Clause, it was not going to distinguish between types of property--in particular the wages in Sniadach, household goods in Fuentes, and a corporation bank account in North Georgia Finishing--since the 'probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard agains the risk of initial error. (Emphasis added.) (See also Justice Powell's concurring opinion, stating that the most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing.')

California Decisions

In Randone v. Appellate Department, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), the California Supreme Court declared unconstitutional the basic prejudgment attachment procedure since it did not provide for notice and an opportunity for a hearing before property was attached, did not strictly limit summary procedures to extraordinary

circumstances, and did not adequately exempt necessities from attachment. Decided between Sniadach and Fuentes, the California decision seems to set a stricter due process standard than Mitchell and North Georgia Finishing. Randone and Blair v. Pitchess, 5 Cal.3d 158, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971), decided a month earlier, anticipated Fuentes by reading Sniadach broadly to apply to the loss of use of the debtor's property. In the normal case, absent extraordinary circumstances, the creditor's interest in preserving a fund for the eventual collection of the judgment was found not to be sufficient to uphold the ex parte procedure. However, in footnote 20, the court indicated some willingness to balance the interests of the parties on a case by case basis:

> We recognize, of course, that bank deposits, by their very nature, are highly mobile and thus that a general risk may arise that such assets will be removed to avoid future execution. We do not believe, however, that the mere potential mobility of an asset suffices, in itself, to justify depriving all owners of the use of such property on a general basis. Instead, in balancing the competing interests of all parties, we believe a more particularized showing of an actual danger of absconding or concealing in the individual case must be required.

This, of course, would still require an ex parte hearing before levy. It is not clear what Randone means by a "significant interest" since it focuses on the potential duration of the prejudgment taking (three years); the decision does not discuss the constitutional effect of the defendant's opportunity to quash the writ in this connection as does the U.S. Supreme Court in Mitchell and North Georgia Finishing. The California court did invalidate the postattachment exemption procedure which placed the burden on the debtor to seek exemption of "necessities" (even though the Randones' bank account would appear not to have been exempt).

In Adams v. Department of Motor Vehicles, 11 Cal.3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), the court invalidated the sale provisions of the garageman's lien law, but upheld the possessory lien itself on the grounds that the garageman had added his labor or materials to the car and therefore had an interest in it. "To strike down the garageman's possessory lien would be to alter the status quo in favor of an opposing claimant; the garageman would be deprived of his possessory interest precisely as were the debtors in Shevin [Fuentes] and Blair."

In footnote 15, the court noted: "Implicit in Shevin and Blair is the policy of honoring that possessory right actually vested in possession, at least until conflicting claims of possession have been judicially resolved. That policy is consistent with the general policy of the law."

In Empfield v. Superior Court, 33 Cal. App.3d 105, 108 Cal. Rptr. 375 (1973), the court of appeal upheld the lis pendens statute (Code Civ. Proc. § 409 et seq.) against the argument that it deprived the property owner of a significant property interest without due process. In rejecting this challenge, the court stated:

> The notice of lis pendens does not deprive petitioners of "necessities of life" or any significant property interest. They may still use the property and enjoy the profits from it. [Citing Randone at 544, fn.4.] Concededly, the marketability of the property may be impaired to some degree, but the countervailing interest of the state in an orderly recording and notice system for transactions in real property makes imperative notice to buyers of property of the pending cause of action concerning that property.

In Raigoza v. Sperl, 34 Cal. App.3d 560, 110 Cal. Rptr. 296 (1973), the court of appeal upheld the procedure for the postjudgment garnishment of wages against the claim that notice and hearing on the amount of the exemption was required before levy. The court continued:

> To characterize levies of execution as a 'taking' is nonproductive. Without doubt, a levy of execution involves a 'taking' in the sense that the debtor is deprived of an interest in something of value against his will. The focus, however, must be on the 'process' and here the question is simple: Is it consistent with due process to require the judgment debtor to apply for and prove the right to an exemption after seizure, rather than to insist that the creditor prove in a pre-seizure hearing that arguably exempt property is subject to levy?

The court concluded that the former procedure is consistent with due process since wage exemptions are a matter of "legislative choice" rather than constitutionally protected rights such as freedeom of speech and "that [i]t is eminently reasonable to place the burden of applying for and proving that wages are exempt on the debtor, who knows best what is 'necessary for the use' of his family . . . Surely he is in a better position to prove his need for the garnished wages, than the creditor is to disprove it." It should be noted, however, that this logic would not apply to exemptions which by statute are automatically exempt; apparently the court believes that it is for the Legislature to

determine which exemptions are automatic and which must be claimed. The California Supreme Court denied a hearing in Raigoza (Dec. 5, 1973).

Similarly, in Phillips v. Bartholomie, 46 Cal. App.3d 346, 121 Cal. Rptr. 56 (1975), the court of appeal rejected the contention that the judgment debtor was entitled to a hearing to determine whether the debtor's checking account was exempt before it was levied upon. In this case the money was derived from Social Security, AFDC, county welfare, and veteran's benefits--all of which are not subject to execution. The court followed Raigoza by holding that it is reasonable to require the debtor to claim the exemptions.

In In re Marriage of Crookshanks, 41 Cal. App.3d 475, 16 Cal. Rptr. 10 (1974), the court of appeal answered a constitutional challenge to the issuance of a writ of execution to enforce court-ordered child support by stating broadly that the

> Sniadach-Randone rationale is inapplicable to a California writ of execution.
>
> Sniadach and Randone, relying upon the proposition that no person may be deprived of a substantial property right, including the right of immediate possession, without due process of law, require notice to the debtor and a hearing as a prerequisite to the issuance of a writ of attachment or garnishment except in special circumstances. The hearing must prima facie establish an obligation and its nonpayment. In the situation of a writ of execution, the judgment upon which it issued establishes the obligation of the debtor. The judgment itself was rendered in a proceeding in which the debtor had an opportunity to be heard. In the situation of a writ of execution, the debtor is afforded ample legal protection on the issue of payment since Code of Civil Procedure Section 675 gives him the right to insist upon a satisfaction of judgment being filed and recorded on the register of actions as he makes his payment. . . . No writ of execution can issue on a satisfied judgment.
>
> Appellant seeks to avoid the inevitable consequences of the California statutory scheme by arguing that in some circumstances equitable considerations may prevent the enforcement of a valid unpaid judgment. The argument fails since the Sniadach-Randone rule requires only a prima facie and not conclusive showing as a prerequisite to the issuance of a writ. While equitable considerations may be pertinent in a motion to quash a writ of execution, the possibility that they may exist does not detract from the requisite prima facie case.

One court has hinted at the unconstitutionality under the principles set forth in Randone of using a levy to assert a fraudulent conveyance. In Lauer v. Rose, 60 Cal. App.3d 493, 131 Cal. Rptr. 697 (1976), a former wife caused a writ of execution to be levied on real property which her former husband had quitclaimed to his second wife on the ground that it was a fraudulent conveyance. The opinion concludes with the following discussion:

> Assuming that a bidder could be obtained and a sale consummated, recordation of the deed evidencing the sale creates a cloud upon the title which can only be removed by a judicial determination of the interest purchased. In this respect the result is not unlike the prior law which permitted prejudgment attachments depriving a debtor of property before notice or hearing and which was declared invalid by the Supreme Court in Randone v. Appellate Department . . . . Although no question of due process arises as to sale under writ of execution of [the former husband's] property since he is the judgment debtor, we conclude that the rationale of Randone authorizes judicial interference with an indiscriminate sale affecting [the second wife's] property without due process of law. Not being a party to the action between [the former wife and husband, the second wife] has had no opportunity to establish that the property was her sole and separate property.

The court also states, however, that no question of lack of due process arises in this case because the former husband (apparently upon receiving notice of sale) moved to quash the writ and restrain the sale, which motion was granted after a noticed hearing.

EXHIBIT 3

Excerpts from Recommendation Relating to Creditors' Remedies (November 1983)

RECOMMENDATION

relating to

CREDITORS' REMEDIES

Introduction

The Law Revision Commission has reviewed the experience under the Enforcement of Judgments Law[1] and the related changes in the Attachment Law,[2] both of which were recently enacted upon recommendation of the Commission.[3] As a result of this review, the Commission proposes a number of substantive and technical changes. The more important substantive changes are discussed below; recommended technical changes are explained in the comments to the provisions in the proposed legislation.

Creditor's Undertaking for Levying on Deposit Accounts and Safe Deposit Boxes

The Attachment Law and Enforcement of Judgments Law continue in modified form a provision of former law that required the creditor to furnish an undertaking as a prerequisite to levy on a deposit account or safe deposit box if the account or box stands in the names of both the debtor and a third person or in the name of a third person.[4] This is the only situation where a prelevy undertaking is required to protect a third person. In all other situations the third person protects his or her rights in the property by making a third-party claim.[5]

[1] 1982 Cal. Stats. ch. 1364 (operative July 1, 1983). See also 1982 Cal. Stats. ch. 497 (conforming changes); 1983 Cal. Stats. ch. 155 (technical revisions).

[2] 1982 Cal. Stats. ch. 1198 (operative July 1, 1983). See also 1983 Cal. Stats. ch. 155 (technical revisions).

[3] See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001 (1980); *Recommendation Relating to Attachment*, 16 Cal. L. Revision Comm'n Reports 701 (1982); *Recommendation Relating to Creditors' Remedies*, 16 Cal. L. Revision Comm'n Reports 2175 (1982).

[4] Code Civ. Proc. §§ 488.465 (attachment), 700.160 (execution). Exceptions to this requirement are provided where the judgment creditor seeks to levy execution on a deposit account in the name of the judgment debtor and his or her spouse (Section 700.165) or under a fictitious business name (Section 700.167).

[5] See Code Civ. Proc. §§ 488.110 (third-party claims in attachment), 720.010-720.800 (general third-party claims procedure).

The special undertaking requirement results in a confusing and cumbersome procedure. Consider, for example, a case where the creditor seeks to levy on the debtor's bank accounts. At the outset, if the creditor does not furnish an undertaking, the attempted levy will not reach the debtor's interest in joint accounts. Consequently, a second levy may be required, this time accompanied by an undertaking, or the creditor will have to give an undertaking in the first instance even though it may be unnecessary where the debtor has no joint accounts. If the undertaking has been delivered to the bank at the time of levy, the bank must immediately mail or deliver a notice to the third person stating that the undertaking has been received. The bank holds the undertaking unless instructed by the third person to deliver it somewhere else. Meanwhile, the account is frozen for the amount of the levy until 15 days after the bank gives notice to the third person, or until any objection to the undertaking is determined, whichever is the later time. When the time for objection to the undertaking or for determining the objection has expired, the bank is required to pay over the amount levied upon when notified to do so by the levying officer. This aspect of the procedure results in confusion since the levying officer does not know when the bank gave the required notice to the third person to start the 15-day objection period running. Neither the bank nor the levying officer may know if the third person has made an objection to the undertaking. The bank can not confidently pay over to the levying officer at the end of 15 days from notice to the third person because of the possibility that an objection has been made. Hence, the statute was amended in 1983 to require the levying officer to notify the bank when the holding period has expired.[6] Just as the bank may not know when the period ends, the levying officer does not know when it begins, since it begins when the bank gives notice to the third person. In some counties, the levying officer requires the creditor to determine the requisite information and instruct the levying officer when to give the second notice to the bank.[7]

[6] 1983 Cal. Stats. ch. 155, § 14.3, amending Code Civ. Proc. § 700.160.

[7] See, *e.g.*, "Notice to Judgment Creditor: Third Party Accounts" (Office of the Sheriff, Santa Clara County) (copy available in Commission's office).

The Commission recommends that the special undertaking requirement be repealed. The debtor will be better off without the undertaking requirement since the debtor ultimately must pay the cost of the undertaking premium.[8] The financial institution is protected since the new laws provide explicitly that the financial institution is not liable for complying with the levy.[9] The nondebtor joint account holder is protected since the levying officer gives the nondebtor notice of the levy so that the nondebtor may make a third-party claim.[10] In any event, the nondebtor does not forfeit his or her interest in the account by failure to make a third-party claim.[11] Elimination of the undertaking requirement will also simplify and streamline the levy process. No longer will there be a need for the minimum 15-day delay built into the existing system.[12] Nor will the levying officer be required to give two notices to the financial institution before the levy is complete.[13] The financial institution will no longer be required to furnish the levying officer and the creditor with information concerning the time when the institution gave notice to the third person and to hold the undertaking or deliver it pursuant to the third person's instructions.

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[8] See Code Civ. Proc. § 685.040.

[9] Code Civ. Proc. §§ 488.455(d)(1), 448.460(e)(1), 700.140(d)(1), 700.150(e)(1).

[10] Code Civ. Proc. §§ 488.455(b) (notice of attachment to third person), 700.140(b) (notice of execution levy to third person), 720.120 (time for making third-party claim).

[11] Code Civ. Proc. § 720.150(b).

[12] An execution levy is made by serving the financial institution with a writ of execution and notice of levy. Code Civ. Proc. § 700.140. The financial institution is not required to pay the levying officer in the case of a deposit account involving a nondebtor, however, until receiving notice to do so from the levying officer. Code Civ. Proc. § 700.160(f). The levying officer may not direct the financial institution to pay until expiration of the 15-day period afforded the nondebtor account holder to object to the creditor's undertaking or until completion of proceedings determining the objection. There is some uncertainty concerning how the levying officer is to know when to give this second notice. See *supra* text accompanying note 7.

[13] See Code Civ. Proc. §§ 488.465(d), 700.160(d).

Code of Civil Procedure § 488.455 (technical amendment).
Attachment of deposit accounts

SEC. 4. Section 488.455 of the Code of Civil Procedure is amended to read:

488.455. (a) To attach a deposit account, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the deposit account is maintained. The attachment lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the processs of being collected unless the item is returned unpaid to the financial institution).

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the deposit account stands.

(c) ~~Subject to Section 488.465, during~~ *During* the time the attachment lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount attached. For the purposes of this subdivision, 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.

(d) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the attachment.

(2) 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 (c).

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

(e) When the amount attached pursuant to this section is paid to the levying officer, the attachment lien on the attached deposit account terminates.

(f) For the purposes of this section ~~and Section 488.465~~, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, ~~7601.5~~, ~~11203.5~~, *6854*, 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 488.455 are amended to reflect the repeal of Section 488.465 and the substitution of Section 6854 of the Financial Code for the sections deleted from subdivision (f) (2).

Code of Civil Procedure § 488.460 (technical amendment). Attachment of safe-deposit boxes

SEC. 5. Section 488.460 of the Code of Civil Procedure is amended to read:

488.460. (a) To attach property in a safe-deposit box, the levying officer shall personally serve a copy of the writ of attachment and a notice of attachment on the financial institution with which the safe-deposit box is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of attachment and a notice of attachment on any third person in whose name the safe-deposit box stands.

(c) ~~Subject to Section 488.465, during~~ *During* the time the attachment lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe-deposit box except pursuant to the attachment.

(d) The levying officer may first give the person in whose name the safe-deposit box stands an opportunity to open the safe-deposit box to permit the removal pursuant to the attachment of the attached property. The financial institution may refuse to permit the forcible opening of the safe-deposit box to permit the removal of the attached property unless the plaintiff pays in advance the cost of

forcibly opening the safe-deposit box and of repairing any damage caused thereby.

(e) During the time the attachment lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnisheee under the attachment.

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

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

Comment. Subdivision (c) of Section 488.460 is amended to reflect the repeal of Section 488.465.

Code of Civil Procedure § 488.465 (repealed). Attachment of deposit accounts and safe-deposit boxes not exclusively in name of defendant

SEC. 6. Section 488.465 of the Code of Civil Procedure is repealed.

~~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 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) 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.~~

Comment. The requirement of providing an undertaking as a prerequisite for attachment of a deposit account or safe-deposit box not exclusively in the name of the defendant provided in Section 488.465 is repealed. See Sections 488.455(d), 488.460(c) (nonliability of financial institution for complying with levy). The nondefendant holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Section 488.110.

Code of Civil Procedure § 700.140 (technical amendment). Levy on deposit accounts

SEC. 21. Section 700.140 of the Code of Civil Procedure is amended to read:

700.140. (a) To levy upon a deposit account, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the deposit account is maintained. The execution lien reaches only amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution).

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands. Service shall be made personally or by mail.

(c) ~~Subject to Sections 700.160, 700.165, and 700.167, during~~ *During* the time the execution lien is in effect, the financial institution shall not honor a check or other order for the payment of money drawn against, and shall not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount less than the amount levied upon. For the purposes of this subdivision, 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.

(d) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

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

(3) Refusal to pay a withdrawal from the deposit account where such refusal is pursuant to the requirements of subdivision (c).

(e) When the amount levied upon pursuant to this section is paid to the levying officer, the execution lien on the deposit account levied upon terminates.

(f) For the purposes of this section ~~and Section 700.160~~, neither of the following is a third person in whose name the deposit account stands:

(1) A person who is only a person named as the beneficiary of a Totten trust account.

(2) A person who is only a payee designated in a pay-on-death provision in an account pursuant to Section 852.5, ~~7604.5, 11203.5,~~ *6854,* 14854.5, or 18318.5 of the Financial Code or other similar provision.

Comment. Subdivisions (c) and (f) of Section 700.140 are amended to reflect the repeal of Sections 700.160, 700.165, and 700.167 and the substitution of Section 6854 of the Financial Code for the sections deleted from subdivision (f)(2).

Code of Civil Procedure § 700.150 (technical amendment). Levy on safe deposit boxes

SEC. 22. Section 700.150 of the Code of Civil Procedure is amended to read:

700.150. (a) To levy upon property in a safe deposit box, the levying officer shall personally serve a copy of the writ of execution and a notice of levy on the financial institution with which the safe deposit box is maintained.

(b) At the time of levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on any third person in whose name the safe deposit box stands. Service shall be made personally or by mail.

(c) ~~Subject to Section 700.160, during~~ *During* the time the execution lien is in effect, the financial institution shall not permit the removal of any of the contents of the safe deposit box except pursuant to the levy.

(d) The levying officer may first give the person in whose name the safe deposit box stands an opportunity to open the safe deposit box to permit the removal pursuant to the levy of the property levied upon. The financial institution may refuse to permit the forcible opening of the safe deposit box to permit the removal of the property levied upon unless the judgment creditor pays in advance the cost of forcibly opening the safe deposit box and of repairing any damage caused thereby.

(e) During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following:

(1) Performance of the duties of a garnishee under the levy.

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

(3) Removal of any of the contents of the safe deposit box pursuant to the levy.

Comment. Subdivision (c) of Section 700.150 is amended to reflect the repeal of Section 700.160.

Code of Civil Procedure § 700.160 (repealed). Levy on deposit accounts and safe-deposit boxes not exclusively in name of judgment debtor

SEC. 23. Section 700.160 of the Code of Civil Procedure is repealed.

~~700.160. (a) The provisions of this section apply in addition to the provisions of Sections 700.140 and 700.150 if any of the following property is levied upon:~~

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

~~(b) The judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, an undertaking for not less than twice the amount of the judgment 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 levy on 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 levy is ineffective and the financial institution shall not comply with the requirements of this section or with the levy.~~

~~(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 5 (commencing with Section 701.010), from the time of levy and the 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 levied upon. 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.~~

~~(c) 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 such nonpayment is pursuant to the requirements of subdivision (d).~~

~~(2) Refusal to pay a withdrawal from the deposit account where such 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 levy.~~

~~(f) Upon being notified by the levying officer of the expiration of the period prescribed in subdivision (d), the financial institution shall comply with the levy and Sections 700.140 and 700.150 apply.~~

~~(g) This section does not apply in any case where the procedure provided in Section 700.165 or 700.167 is used.~~

Comment. Section 700.160, which required an undertaking as a prerequisite to levy on a deposit account or safe-deposit box not exclusively in the name of the defendant is repealed. See Sections 700.140(d), 700.150(e) (nonliability of financial institution for complying with levy). The nondebtor who is the holder of the deposit account or safe-deposit box may assert rights by way of a third-party claim. See Sections 720.110 *et seq.*

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

SEC. 24. Section 700.165 of the Code of Civil Procedure is repealed.

~~700.165. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands only in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.~~

~~(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, a notice that the judgment creditor has elected to use the procedure provided in Section 700.165 of the Code of Civil Procedure and that the levy reaches any deposit account that stands in the names of both the judgment debtor and the spouse of the judgment debtor and not in the name of any other person and specifying the name of the spouse of the judgment debtor.~~

~~(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy on the spouse of the judgment debtor. Service shall be made personally or by mail.~~

~~(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (a) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).~~

Comment. Section 700.165 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.

Code of Civil Procedure § 700.167 (repealed). Deposit account in fictitious business name

SEC. 25. Section 700.167 of the Code of Civil Procedure is repealed.

~~700.167. (a) This section provides an alternative procedure to the provisions of Section 700.160 in a case where the deposit account levied upon stands in a fictitious business name and the fictitious business name statement filed pursuant to Chapter 5 (commencing with Section 17900) of Part 3 of Division 7 of the Business and Professions Code lists as the persons doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but does not list any other person as doing business under the fictitious business name. This section applies only if the judgment creditor instructs the levying officer to proceed under this section rather than under Section 700.160.~~

~~(b) If the judgment creditor instructs the levying officer to proceed under this section, the judgment creditor shall provide, and the levying officer shall deliver to the financial institution at the time of levy, both of the following:~~

~~(1) A notice that the judgment creditor has elected to use the procedure provided in Section 700.167 of the Code of Civil Procedure.~~

~~(2) A copy of an unexpired fictitious business name statement, certified as provided in Section 17926 of the Business and Professions Code, listing as the person doing business under the fictitious business name either the judgment debtor or the judgment debtor and the spouse of the judgment debtor but not listing any other person as doing business under the fictitious business name.~~

~~(c) At the time of the levy or promptly thereafter, the levying officer shall serve a copy of the writ of execution and a notice of levy upon each of the persons listed in the fictitious business name statement. Service shall be made personally or by mail.~~

~~(d) If the judgment creditor elects to use the procedure provided in this section and the requirements of subdivision (b) are satisfied, the financial institution shall comply with the levy and Section 700.140 applies. The financial institution is not liable to any person for performing its duties as a garnishee under the levy in good faith reliance upon the information delivered to the financial institution pursuant to subdivision (b).~~

Comment. Section 700.167 is repealed because it was an exception to the requirements of Section 700.160 which has been repealed.