

February 20, 1973

Time

Place

March 1 - 7:00 p.m. - 10:00 p.m.
March 2 - 9:00 a.m. - 5:00 p.m.
March 3 - 9:00 a.m. - 4:30 p.m.

State Bar Building
601 McAllister Street
San Francisco 94102

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

March 1-3, 1973

March 1

1. Minutes of January 19-20, 1973, Meeting (sent 1/26/73)

2. Administrative Matters

Memorandum 73-21 (enclosed)

3. Approval of Recommendations for Printing and Submission to Legislature

Study 26 - Escheat (Unclaimed Property Law)

Memorandum 73-15 (sent 1/31/73)

Draft of Recommendation (attached to Memorandum)
First Supplement Memorandum 73-15

Study 72 - Liquidated Damages

Memorandum 73-16 (sent 2/15/73)

Draft of Recommendation (attached to Memorandum)
First Supplement 73-16

4. Review of Comments on Recommendations to 1973 Legislative Session

Study 39.30 - Wage Garnishment and Related Matters

Memorandum 73-17 (sent 2/15/73)

First Supplement to Memorandum 73-17 (enclosed)
AB No. 101, 102

Study 39.90 - Claim and Delivery Statute

Memorandum 73-24 (to be sent)

Printed Recommendation and AB 103

Study 39.80 - Civil Arrest

Memorandum 73-19 (to be sent)

March 2

Completion of work on items listed under March 1 above

Brief discussion of Brooks v. Small Claims Court (8 Cal.3d 661)(copy sent
to Commissioners 2/15/73)

February 20, 1973

5. Study 39.70 - Prejudgment Attachment

Enforcement of Foreign Judgments

Memorandum 73-23 (sent 2/5/73)
Recommendation (attached to Memorandum)

Nonresident Attachment

Memorandum 73-20 (sent 2/9/73)
Memorandum from Professor Riesenfeld

Tentative Recommendation

Memorandum 73-5 (sent 12/29/72)
Revised Tentative Recommendation (attached to Memorandum 73-5,
sent 12/29/73)
First Supplement to Memorandum 73-5 (sent 2/5/73)
Memorandum from Professor Riesenfeld

March 3

Completion of work on items listed under March 2 above

6. Study 36 - Condemnation

Study 36.150 - Compensation for Divided Interests

Memorandum 73-9 (enclosed)

Study 36.175 - Compensation for Loss of Goodwill

Memorandum 73-22 (sent 2/5/73)

Study 36.50 - Just Compensation and Measure of Damages

Memorandum 73-18 (sent 2/5/73)
Draft of Compensation Chapter (attached to Memorandum)
First Supplement to Memorandum 73-18 (enclosed)

MINUTES OF MEETING
of
CALIFORNIA LAW REVISION COMMISSION

MARCH 1, 2, AND 3, 1973

San Francisco

A meeting of the California Law Revision Commission was held in San Francisco on March 1, 2, and 3, 1973.

Present: John D. Miller, Chairman
Marc W. Sandstrom, Vice Chairman, Thursday and Friday
Alister McAlister, Member of Assembly, Friday
John J. Balluff
Noble K. Gregory
John N. McLaurin
Thomas E. Stanton, Jr., Thursday and Friday
Howard R. Williams

Absent: George H. Murphy, ex officio

Messrs. John H. DeMouilly, Jack I. Horton, Nathaniel Sterling, and Stan G. Ulrich, members of the Commission's staff, also were present. Professor Stefan A. Riesenfeld, Commission consultant on creditors' remedies, was present on Friday and Saturday. Professor William D. Warren, Commission consultant on creditors' remedies, was present on Thursday and Friday.

The following persons were present as observers on days indicated:

Thursday, March 1

John E. Balluff, California Bankers Ass'n, Sacramento
Mark Jordan, Attorney General, Los Angeles
Richard D. Peters, Franchise Tax Board, Sacramento
James T. Philbin, Franchise Tax Board, Sacramento

Friday, March 2

John E. Balluff, California Bankers Ass'n, Sacramento

Saturday, March 3

Norval Fairman, State Dept. of Public Works, San Francisco
Charles E. Spencer, State Dept. of Public Works, Los Angeles

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ADMINISTRATIVE MATTERS

Approval of Minutes of January 19 and 20 Meeting

The Minutes of the January 19 and 20, 1973, meeting of the Law Revision Commission were approved as submitted by the staff.

Schedule for Future Meetings

The schedule for future meetings was revised. Future meetings are now scheduled as follows:

April 12	7:00 p.m. - 10:00 p.m.	Los Angeles
April 13	9:00 a.m. - 5:00 p.m.	
April 14	9:00 a.m. - 12:00 noon	
May 4	10:00 a.m. - 5:00 p.m.	San Francisco
May 5	9:00 a.m. - 1:00 p.m.	
June 8	10:00 a.m. - 5:00 p.m.	Los Angeles
June 9	9:00 a.m. - 1:00 p.m.	
July 12	7:00 p.m. - 10:00 p.m.	San Francisco
July 13	9:00 a.m. - 5:00 p.m.	
July 14	9:00 a.m. - 12:00 noon	

August--no meeting

Research Contracts

The Executive Secretary reported that the contract with Professor Warren will not be necessary. (This contract is discussed on pages 3-5 of the Minutes of the January 19 and 20, 1973, meeting.) The research that would have been performed under this contract will be performed by the staff.

Annual Report

The Commission considered Memorandum 73-21, which reported a suggestion that the Annual Report report not only Supreme Court but also court of appeal

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cases holding statutes unconstitutional. The Commission determined that it would not be desirable to report court of appeal cases holding statutes unconstitutional, primarily because the resources available to the Commission are limited and should be devoted to preparing recommendations to the Legislature rather than to preparing listings of court of appeal cases holding statutes unconstitutional.

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STUDY 26 - ESCHEAT (UNCLAIMED PROPERTY LAW)

The Commission considered Memorandum 73-15 and the attached draft of a recommendation and the First Supplement to Memorandum 73-15.

The recommendation was approved for printing and submission to the Legislature. Several editorial changes suggested by the staff and by members of the Commission were approved; editorial changes indicated on drafts handed in by the Commissioners are to be considered in preparing the copy for printing. The following revisions are to be made in the proposed legislation:

(1) Subdivision (b)(1) of Section 1581 was revised to read:

(1) Make and maintain a record indicating all instruments that are sold in this state on or after January 1, 1974, and with respect to such instruments ask each purchaser whether his address is in this state and make and maintain a record of those instruments sold in this state to persons whose address is not in this state; and

Conforming changes in the text of the recommendation and in the proposed legislation are to be made to reflect the revision in subdivision (b)(1) of Section 1581. The significant revision made in Section 1581(b)(1) is to substitute "address" for "residence." The Commission considered that this revision would conform the language used in the statute to the language used in Pennsylvania v. New York.

(2) A presumption should be added to the statute to provide in substance the following: "With respect to the record of instruments sold in this state on or after January 1, 1974, proof of the absence of an entry showing that the purchaser's address was not in this state establishes a rebuttable presumption that the purchaser's address was in this state. This presumption is a presumption affecting the burden of proof."

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STUDY 36.150 - CONDEMNATION (COMPENSATION
FOR DIVIDED INTERESTS)

The Commission considered Memorandum 73-9 relating to the basic approach to valuing property subject to divided interests. After extended discussion of the undivided fee rule, the separate valuation of interests rule, and the Lynbar rule, the Commission approved the draft statute attached to the memorandum as Exhibit IV, with the following changes:

§ 1250.010. Procedure for compensating divided interests. The option of the condemnor to separately value the interests in property should be restored, as in existing law.

§ 1250.020. Amount of compensation for divided interests. This section was approved in substance. The Comment should be adjusted to reflect the fact that the condemnor has the option of separate valuation.

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STUDY 36.175 - CONDEMNATION (COMPENSATION
FOR LOSS OF GOODWILL)

The Commission considered Memorandum 73-22 relating to compensation for loss of goodwill. The Commission requested that the staff prepare a statute that generally authorizes compensation for business losses in eminent domain proceedings along the lines of the Vermont statute attached as Exhibit I to the memorandum. The staff may, when it produces such a statute, point out any defects in the approach of authorizing compensation for business losses generally and leaving it to the courts to work out the details.

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STUDY 39.30 - WAGE GARNISHMENT AND RELATED MATTERS

The Commission considered Memorandum 73-17 and the First Supplement to Memorandum 73-17. The Commission decided that the bills introduced to effectuate the wage garnishment and related matters recommendation (AB 101 and AB 102) should not be set for hearing until Professor Warren has prepared, and the Commission has considered, a memorandum indicating the extent to which the federal statute might give rise to an action against an employer who withholds from earnings on the basis of the Commission recommended legislation. Assuming that the federal agency would not enforce the federal law with respect to garnishment of earnings of employees in California if the recommended legislation were enacted, the question is whether a class action could be brought to enforce the federal law. Consideration should be given to prohibition of a class action under state law to enforce the federal statute. At the time Professor Warren's memorandum is considered, the Commission will give further consideration to the suggestions contained in Exhibit II to Memorandum 73-17.

The Commission considered suggestions by a representative from the Office of the Attorney General. The following matters were considered:

(1) A problem might arise if the proposed legislation is not enacted in time to become effective on January 1, 1974. Section 18 makes the act operative on July 1, 1974, but the act must be passed before the final recess in 1973 if it is to become operative on this date. This matter was noted by the Commission's staff.

(2) On page 28, line 23 of the printed bill, before "withholding" the word "a" should be inserted. This will correct a typographical omission.

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(3) It was suggested that a hearing not be required before a "withholding order for taxes" is issued. The Commission, noting that this suggestion had been considered on numerous prior occasions, indicated that the requirement for a hearing is a basic due process right and that a hearing is essential. The representative of the Office of the Attorney General expressed the view that a hearing is not required by constitutional due process where there is to be a summary seizure of property for delinquent taxes.

(4) It is not clear the extent to which Section 723.027 applies to an earnings withholding order for taxes. Such section should be reviewed and its application to earnings withholding orders for taxes made clear.

(5) Section 723.075(b) is unclear as to the extent to which the notice is to advise the taxpayer of hearings that may not be applicable under the particular withholding order. This matter could probably be clarified in the Comment to the section.

(6) The standard for review under Section 723.075(d) is a de novo hearing. The Comment to the section should make this clear.

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STUDY 39.70 - PREJUDGMENT ATTACHMENT

Nonresident Attachment

The Commission considered Memorandum 73-20 and an unnumbered memorandum prepared by Professor Riesenfeld (dated 2/20/73) relating to nonresident attachment. The Commission directed the staff to incorporate into the tentative recommendation relating to prejudgment attachment provisions which permit attachment in any type of action against a nonresident individual or foreign corporation or partnership not qualified to do business in California. Ex parte issuance of the writ should be available on a showing of probable validity and nonresidency. Procedures should be provided to discharge an attachment where the defendant in the action makes a general appearance except where an attachment would be authorized against a resident defendant. All nonexempt property should be subject to levy.

Prejudgment Attachment Statute

The Commission considered Memorandum 73-5, the First Supplement to Memorandum 73-5, and an unnumbered memorandum prepared by Professor Riesenfeld (dated 2/21/73). The following action was taken with respect to the sections listed:

Civil Code Section 1812. The Comment to this section should be revised to state that this section was designed to protect consumers but, with the changes made in the attachment statute, it is no longer necessary.

Code of Civil Procedure Section 481.130. The definition of "judicial officer" should be deleted and the term "court" used where appropriate. The following provision should be added in an appropriate place.

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000.000. The judicial duties to be performed under this title are "subordinate judicial duties" within the meaning of Section 22 of Article 6 of the California Constitution and may be performed by appointed officers such as court commissioners.

Code of Civil Procedure Section 482.020. The staff was directed to add a new Section 482.020 as set out in Exhibit II to Memorandum 73-5 and to combine the substance of present Section 482.020 with Section 482.030.

Code of Civil Procedure Section 482.040. The second sentence of this section should be revised as follows:

482.040. . . . Except where matters are specifically permitted by this title to be shown by information and belief, each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. . . .

The Comment to Section 482.040 should refer to those sections which authorize showings on the basis of information and belief

Code of Civil Procedure Section 482.000. The staff was directed to add the following section in an appropriate place in Chapter 2:

482.000. If the person to be served has not appeared in the action, service under this title shall be accomplished in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part. If the person to be served has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part.

Code of Civil Procedure Section 483.010. The Comment to this section should indicate that the term "contract" used in this section includes all those situations listed in paragraphs (1) through (4) of subdivision (a) of present Section 537.1.

Code of Civil Procedure Section 485.010. The staff was directed to consider providing notice of an attachment to any person who has filed a bulk sales notice or, in appropriate circumstances, an auctioneer (where such a person is not a party to the action or a person in possession of the property).

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Code of Civil Procedure Section 485.210. Paragraph (1) of subdivision (c) should be revised to read:

(1) The plaintiff on the facts presented would be entitled to a judgment on the claim upon which the attachment is based;

Paragraph (3) of subdivision (c) should be deleted.

Code of Civil Procedure Section 485.220. The brackets should be deleted around the material in subdivision (c).

Code of Civil Procedure Section 486.060. The material in brackets in subdivision (c) should be deleted.

Code of Civil Procedure Section 486.090. Subdivision (a) should be revised to provide substantially as follows:

(a) The fortieth day after the issuance of the order, or such earlier date prescribed by the court in the order.

Code of Civil Procedure Section 486.110. Subdivision (c) should be deleted unless further review by the staff discloses some need for this provision.

Code of Civil Procedure Section 487.010. The first portion of this section should be revised as follows:

487.010. The following property shall be subject to attachment:

(a) Where the defendant is a corporation, all corporate property for which a method of levy is provided by Article 2 (commencing with Section 488.310) of Chapter 8 of this title.

(b) Where the defendant is a partnership, all partnership property for which a method of levy is provided by Article 2 (commencing with Section 488.310) of Chapter 8 of this title.

Code of Civil Procedure Section 488.310. This section should be revised to restore the substance of existing law, i.e., posting and service on the occupant of real property in appropriate circumstances should be retained.

Code of Civil Procedure Section 488.330. This section should be reviewed in the light of the Commercial Code. Subidivision (d) should be revised to provide substantially as follows:

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(d) Notwithstanding subdivision (a), where goods are subject to a negotiable document such goods may not be attached but the negotiable document may be attached in the manner provided by Section 488.400.

In connection with this section, the staff was directed to determine what are the rules governing the liability of third persons who have been served with a writ of attachment and to bring any inadequacies in these rules to the attention of the Commission. See also Section 488.550.

Code of Civil Procedure Section 488.400. The word "liable" in subdivision (c) should be changed to "obligated."

Code of Civil Procedure Section 488.410. Subdivision (c) should be revised to provide substantially as follows:

(c) In those cases not provided for by subdivisions (a) and (b), the plaintiff's relief shall be governed by subdivision (2) of Section 8317 of the Commercial Code

The Comment to this subdivision should also refer to Section 482.020.

Code of Civil Procedure Section 488.420. This section should be revised to refer to a final judgment in the same manner as does Section 489.120.

Code of Civil Procedure Section 488.550. The material in brackets in subdivision (b) should be deleted. The extent of the liability of a third person who does not turn over property should be further explained in the Comment. Such liability should be limited to the damage caused by delay in turning the property over.

Code of Civil Procedure Section 491.010. The Comment to this section should refer to the equitable powers of the court preserved by Section 482.020.

Code of Civil Procedure Section 688. The clause beginning with "provided that" should be placed after the two sentences added to this section.

Code of Civil Procedure Section 690.6. This section should be revised to provide a general exemption of earnings from execution as provided under

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existing law and an exemption of the earnings of an employee only from attachment.

The remainder of the tentative recommendation was approved, subject to conforming changes, for printing as a tentative recommendation. If possible, the statutory material should be put into bill form to be introduced at this legislative session.

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STUDY 39.90 - CLAIM AND DELIVERY STATUTE

The Commission considered Memorandum 73-24, the printed recommendation relating to the claim and delivery statute, and the comments of the Judicial Council relating thereto as reported orally by the staff. The Commission directed the staff to have AB 103 (the bill effectuating the recommendation) amended to delete the definition of "judicial officer," to change the term "judicial officer" to "court" where appropriate, and to add the substance of the following section:

516.040. The judicial duties to be performed under this chapter are "subordinate judicial duties" within the meaning of Section 22 of Article 6 of the California Constitution and may be performed by appointed officers such as court commissioners.

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STUDY 39.100 - ENFORCEMENT OF FOREIGN JUDGMENTS

The Commission considered Memorandum 73-23 and the staff draft of a tentative recommendation concerning the enforcement of foreign money judgments attached to the memorandum. The Commission took the following action regarding certain sections of the tentative recommendation:

Preliminary part. The reference to "minor changes" in the last paragraph of the preliminary part of the tentative recommendation should be clarified by noting that the changes are explained in the Comments to the sections.

Section 337.5. The staff noted that this section would not be amended as originally indicated.

Sections 674 and 681. These sections relating to judgment liens and execution should be amended to make clear that registration under the recommended act is equivalent to entry for purposes of beginning the 10-year duration of judgment liens and the 10-year period of availability of writs of execution as a matter of right. These 10-year periods will run from the first entry or registration in the state. The Commission recognized that further problems exist in the present Section 674 but decided to leave them until execution is considered. The Comment to Section 674 should note that the Commission is not stamping its approval on the section as a whole.

Section 1710.20. The Commission concluded that this section and any others in the tentative recommendation should be amended so that federal judgments would not be registrable in the state courts. Instead, the recommended act should apply only to judgments of sister states. The Commission approved the limitation of the registration procedure to money judgments of sister states. The language of this section should be changed to make clear that "that part of" a judgment requiring the payment of money may be filed. The

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Commission indicated that the money judgments of foreign nations should be registrable under the recommended procedure, assuming that the problem mentioned by Professor Riesenfeld regarding a conflict between Section 1915 and Section 1713.3 is not serious.

Section 1710.30. The Commission decided not to prevent reregistration of a foreign judgment nor to prevent the situation where a Washington judgment is registered in California, the California registration is registered in New York, and the New York registration is then registered in California. However, the revival of a California judgment or registration would have to be by an action for that purpose. The Comment should indicate that revival is by an action not by reregistration.

Section 1710.40. The Commission decided that the provision of subdivision (c) that the 30-day period runs from filing of proof of service with the clerk should be changed so that the property could be sold on execution upon filing of proof of 30 days' notice to the debtor with the clerk.

Section 1710.50. The Commission thought it unnecessary to provide explicitly for stay on the court's motion.

The Commission also decided to restore Section 6 of the Uniform Act providing that:

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this Act remains unimpaired.

The Commission decided not to send out the recommendation as altered until it had seen the staff's implementation of the changes and the complete Comments to the sections.

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STUDY 72 - LIQUIDATED DAMAGES

The Commission considered Memorandum 73-16, the attached draft of a recommendation, the First Supplement to Memorandum 73-16, and a letter from the California Real Estate Association which was handed out at the meeting and is attached as Exhibit I to the Minutes.

The Commission approved the distribution for comment of a recommendation on this subject after the draft recommendation has been revised as indicated below.

Section 2954.6

The Comment to Section 2954.6 should indicate that the section limits the use of compounding of interest as a sanction for late payment of an installment and that the compounding of interest as a sanction under such circumstances is subject to the limitation imposed by Section 2954.6 and any other applicable limitations. See Heald v. Friis-Hansen, 52 Cal.2d 834, 345 P.2d 457 (1959).

A late payment charge may be imposed if the borrower fails to make an installment payment in full when due (principal, interest, and funds allocated to impound accounts are included in installment payment for this purpose).

A late payment charge may not exceed 10 percent of the amount of the principal and interest included in the delinquent installment payment except that, where the amount of principal and interest included in the delinquent installment payment is less than fifty dollars (\$50), a charge not to exceed five dollars (\$5) or 20 percent of the amount of principal and interest included in the delinquent installment payment, whichever is the lesser amount, may be made.

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If the late payment charge is not paid within 40 days from the date the delinquent installment upon which the charge was imposed was due, the late payment charge may, at the discretion of the lender, be added to the principal. The Comment should indicate that the lender has the option of continuing to carry the late payment charge as a default or adding the late payment charge to principal after the 40-day period has expired. If he elects to add the late payment charge to principal, he cannot thereafter treat the failure to pay the late payment charge as a default. Adding the late payment charge to principal does not, of course, affect the lender's right to base a default on the failure to pay the delinquent installment if the delinquent installment has not been paid.

Subdivision (c)(1) was revised as follows: (

(1) Substitute "10 days" for "six days."

(2) In the last sentence, substitute "received by the lender" for "delivered if delivered in person or the date it is postmarked if delivered by mail."

Subdivision (d) was revised to read in substance:

(d) This section limits only the obligation of the borrower to pay a late payment charge. Nothing in this section excuses or defers the borrower's performance of any other obligation incurred in the loan transaction, nor does this section impair or defer the right of the lender to enforce any other obligation including but not limited to the right to recover costs and expenses incurred in any enforcement authorized by law.

Section 3319

The word "manifestly" was deleted.

Section 3320

This section is to be deleted.

Section 3321

The first sentence of subdivision (b) was revised to read: "For the purposes of subdivision (a), the amount specified by the parties as liquidated damages shall be deemed to be reasonable and shall satisfy the requirements of Section 3319 if it does not exceed five percent of the total purchase price in the contract." The Comment should indicate whether the liquidated damages clause affects the seller's right to obtain specific performance.

Section 3358

This section should be revised so that it does not contain an "except as otherwise provided" clause at the beginning and another "except" clause at the end. It was suggested that the "except" clause at the beginning of the section may be all that is needed, but the staff is to revise the section to reflect good drafting technique.

Section 9

This section was revised to read: "This act applies only to contracts executed after January 1, 1975."

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Conforming and Editorial Changes

Changes necessary to conform the recommendation and statute to the above decisions are to be made. Editorial revisions on copies turned in by the Commissioners are to be considered in revising the copy.

APPROVED

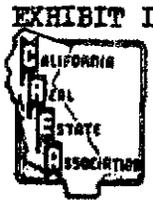
Date

Chairman

Executive Secretary

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*California Real Estate
Association*



Executive Offices:
520 SOUTH GRAND AVENUE · LOS ANGELES, CALIFORNIA 90017
Telephone: AREA CODE 213: 628-0551

DUGALD GILLIES
Legislative Representative

Legislative Office:
1129 10th Street · SACRAMENTO, CALIFORNIA 95814
Telephone: AREA CODE 916: 444-2045

March 1, 1973

SPECIAL DELIVERY

Mr. John H. DeMouilly, Esq.
Executive Secretary
California Law Revision Commission
School of Law, Stanford University
Stanford, California 94305

Dear John:

The California Real Estate Association has reviewed the tentative recommendation of the California Law Revision Commission relating to liquidated damages as revised on February 9, 1973, together with memorandum 73-16 circulated by the staff of the Commission dated February 13 and have the following comments.

As indicated to the Commission previously, we support the Commission's recommendation with respect to the general rule on liquidated damages which would be implemented by the repeal of Sections 1670 and 1671 of the Civil Code and the enactment of Section 3319 establishing the "manifestly unreasonable" test.

Also, as we have previously indicated, we support the recommendation of the Commission for enactment of Section 3321 establishing a rule for liquidated damages on contracts for the sale of real property.

The other provision on which a tentative recommendation and memorandum 73-16 deals, which is of concern to us, is the proposed addition of Section 2954.6 dealing with late charges on real property secured loans. Let us make the following points:

1. The maximum permitted late payment charge should be not to exceed 10% of the installment payment as specified in your tentative recommendation. We much disagree with the suggestion of staff in memorandum 73-16 that this be reduced to a lower percentage. (But observe our comment in paragraph 2 below, on restriction of the application of this percentage to that portion of the installment relating to principal and interest only).
2. That late charges are appropriate for treatment as liquidated damages is obvious from the vast volume of transactions, from the



Mr. John H. DeMouilly, Esq. -2-

relatively small amounts represented by late charges and the complexity, if not impossibility, of calculating the actual damages sustained. There are a large host of factors including the costs of preparing notices, of additional bookkeeping transactions, and the like. These will tend to be the same for each loan, regardless of its size, but will vary if more than one notice is required, if multiple inquiries are received about it from the borrower or if some collection effort beyond notices is necessitated. A second factor is the loss of earnings on the amount of the installment which would be paid for the time for which it is late. Accumulatively, obviously, this can be a major factor. And in this particular instance, the damages varies with the size of the installment due. Ancillary damages can be triggered by the cumulative impact of many late payments as described to you in the communication previously received from the California Savings and Loan League. Obviously, if a late receipt of money from one or a thousand borrowers precipitated a need for the lender to go out, discount some of his notes or borrow other funds, then the damage factor is tremendously altered.

From the Commission search in this field, it appears that cost data is not available with any precision. Based on discussions, however, with lender groups and on testimony presented at Legislative Committees, we believe that 10% is an appropriate amount.

3. We believe and recommend that the late payment calculations should be based only on the principal and interest due in the installment. It is inconsistent with the concept of damages to contend that the lender suffers damage from the non receipt of money which he will impound only, and which does not belong to him and on which he has no right to achieve earnings. Since the late payment charge he would be permitted on the principal and interest will cover his physical costs of notice and collection and the loss of earnings on the amounts which are due the lender for his own account, the extension of the late charge to the impound is improper and inappropriate. We understand that the Commission is aware of SB 233 (Nejedly) which would make void a late payment charge on a residential mortgage payment for any purpose other than principal or interest. That measure is similar to SB 74 (Nejedly) of 1972, which passed the Senate but failed of passage in the Assembly.

One other point of significance here: On many second deed of trust notes there are no impound, but the installment on such notes tends to be considerably smaller than that on first deeds of trust which involve impounds. The application of 10% to that smaller installment of principal and interest only is more realistic than permitting the same lender only 5%, as would be the case in your staff suggestion, since your staff suggestion would halve the amount of late payment achievable by that lender in that circumstance who did not require impound.

Mr. John H. DeMouilly, Esq.

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4. Your tentative recommendation calls for a minimum-permitted late payment charge not to exceed \$5 or 20% of the installment payment. In memorandum 73-16 it is indicated that there is no minimum amount specified in AB 105, now under consideration at the Legislature. In my discussions with the author of AB 105, he has indicated that he will amend the bill to include specification of a minimum amount. We believe a minimum is appropriate since there is a cost incurred and, frankly, we believe a minimum of \$10 to be more realistic than \$5 in today's cost situation.

5. Your tentative recommendation indicates that a six-day grace period would be permitted (that is, no late charge unless the payment is more than six days late). We believe this to be too short. While there may exist some few contracts in which a late charge could be imposed if the payment were due after six days, we believe that 10 or even 15 days would be more common. In data which we previously supplied to the Commission, on practices of savings and loan institutions in this state, there is support for this extended time. There is real danger that if only a six-day grace period is specified in the statute, that that will become the standard grace period contained in contracts and enforced by lending institutions.

Section 2954.5 of the Civil Code requires a notice on the first delinquency and six days of grace after sending that notice for payment without charge. The notice would rarely, if ever, be made on the day the delinquency occurs and in fact the data supplied to you by us, from the California Real Estate Magazine, indicates that the notice is frequently not mailed until the delinquency is already 10 days.

Thus we would suggest that at a minimum a ten-day grace period be permitted and that a fifteen-day grace period be considered.

Beyond this, we believe that the determination of appropriate late charges is a legislative, rather than a judicial, function. We therefore urge your Commission to adopt their recommendations and submit them to the Legislature. The subject is before the Legislature and the value of the Commission's studies and recommendations would, I am sure, be appreciated by Legislators in their present considerations.

Sincerely,

Dugald Gillies
Vice President,
Governmental Relations

DG/jw

cc: All Members of Commission