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**Source:** Business Law/Debt Collection Practice in California/Preface

Preface

Most lawyers are called on at some time to represent or advise creditors, debtors, or third parties in debt collection matters. Debt collections problems may arise out of commercial, business, or consumer transactions or collection of money judgments recovered in other types of cases.

Since 1957, when it published California Remedies for Unsecured Creditors, CEB has published and maintained books on debt collection. This material was written by some of California's leading attorneys in the field of creditor-debtor relationships, debt collection, and enforcement of judgments. This edition of Debt Collection Practice in California is a concise guide for use in collecting debts and, if necessary, reducing them to judgments. Some of the material from previous CEB publications on debt collection has been retained, reexamined, and updated. The book also addresses issues not covered in previous issues or other books on debt collection in California. Among the subjects discussed in this edition are the following:

- Office procedures for a successful debt collection practice;
- State and federal fair debt collection laws;
- Privacy laws applicable to debt collectors;
- Basic civil procedures for initiating and responding to debt collection actions;
- Discovery as a tool to aid in collection efforts;
- Obtaining judgments;
- Locating the debtor's assets; and
- Enforcement procedures.

The practitioners who served as authors of chapters of this book have given unstintingly of their time and effort. They are listed on the contents pages and in brief biographies in the "About the Authors" section. CEB wishes to express its gratitude for the many contributions to the project by the late Richard L. Enkelis. We would also like to thank the firm of Severson & Werson, which supplied many attorneys for this project, and Scott H. McNutt, for his help in coordinating them. CEB would also like to extend special thanks to Victor Waid, Sacramento, for acting as a consultant on chapters 1 and 3, and Roger Rubin, of San Francisco, for acting as a consultant on chapter 4.

Jane H. Fabian planned this book and did the recruiting for this project. Donald R. Briggs supervised the project after the initial phase and was assisted by Wendy L. Brown and David Peyerwold.

CEB senior editor Cinda Ely was responsible for copyediting and production of these volumes. Legal research analysts were Alan Arnaudy, Maria Borje-Bonkowski, Mary Carlson, Elliot Cohen, Robert Denham, Alan Flatt, Ken Marr, Ping-Fai David Ng, Wendy S. Tien, Richard Weese, and Tova Zeff. The index was written by Robert W. Burke, Jr. Composition was performed by CEB's Electronic Publishing staff. The cover was designed by Grier Thornburg.

**December 2009 Update**

The authors of this update were Richard K. Diamond, of Danning, Gill, Diamond & Kollitz, LLP, Los Angeles; Raymond R. Goldstein, of the Center for Enforcement of Family Support, Culver City; Scott J. Hyman, of Severson & Werson, Irvine; Roger R. Rubin, of the Law Offices of Roger R. Rubin, San Francisco; and Brian N. Winn of Winn Law Group, APC, Fullerton.

CEB Attorney Editor Jean Magistrale and Legal Editors Sally St. Lawrence and Mary Claugus contributed to this title. Administrative support was provided by Kenya Denman and Nila Kanzaria. Linda Marousek handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

**In Memoriam**

CEB sadly notes the passing of Mr. Richard L. Enkelis (1943- 2008), author and long-time update author of much of this book. His contributions to CEB and to the field of creditor/debtor relations were many and invaluable, and his expertise and unstinting efforts to further substantive knowledge, legal scholarship, and education in the field will be greatly missed.

Michael Fenger

*Practice Group Manager*
*Business Law*

Pamela J. Jester
*Director*

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**Source:** Business Law/Debt Collection Practice in California/About the Authors

About the Authors

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**RICHARD L. ENKELIS** (1943-2008) was a sole practitioner in Pasadena, specializing in creditor/debtor relations and enforcement of judgments. He received his B.A. in 1965 from the University of Michigan and his J.D. in 1968 from the University of Southern California Law Center. He spoke at numerous legal education courses and published many articles in the areas of creditor/debtor relations, enforcement of judgments, and litigation. Mr. Enkelis was an author of chapters 1, 2A, 7, 8, 10, 11, and 13 of this book and a long-time update author of chapters 2A, 3, 5, 7, 8, 9, 10, and 11.

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**ROGER R. RUBIN,** of the Law Offices of Roger R. Rubin, San Francisco, received his B.A. from San Francisco State University, and his J.D. from the University of California, Hastings College of the Law. Mr. Rubin has lectured extensively and presented numerous legal education programs in the areas of enforcement of judgments, debtors' rights, and creditors' remedies. He acted as pro tem judge for the San Francisco Small Claims Court from 1982 to 1993, and currently acts as settlement conference pro tem judge. Mr. Rubin is the Update Author for chapter 4.

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**Source:** Business Law/Debt Collection Practice in California/Selected Developments

Selected Developments

**December 2009 Update**

The California Supreme Court has approved a new Rule of Professional Conduct requiring attorneys who do not carry professional liability insurance to inform their clients in writing of this fact. Cal Rules of Prof Cond 1-234. See §§1.36-1.37.

A federal district court in California has held that if 40-50 percent of an attorney's total work is concerned with the collection of consumer debts, the attorney is subject to the federal Fair Debt Collection Practices Act (FDCPA). *Riley v Giguiere* (ED Cal, June 19, 2009, No. CIV S-06-2126 LKK/KJM) 2009 US Dist Lexis 51887. See §§2.3, 2.25.

A new discussion of third party standing in the context of the federal FDCPA and California's Rosenthal Act has been added to chap 2. See §2.11A.

A California federal district court has explained that a "statement of account" is one whose purpose is to keep the debtor informed of the status of the account or any activity related to the account; it is not one whose purpose is to facilitate collection on a closed account. *Moya v Chase Cardmember Servs. Inc.* (ND Cal, Jan. 8, 2009, No. C 08-4097 BZ) 2009 US Dist Lexis 2109. See §2.16.

An informal staff opinion of the Federal Trade Commission has noted that a debt collector may comply with the investigation reporting requirements of the Fair Credit Reporting Act of 1970 (FCRA) without violating a consumer's "cessation" request under the FDCPA. *Clark*, FTC Informal Staff Opinion (June 23, 2009). See §2.17.

Although a debt collector may not use false, deceptive, or misleading representations in collecting a debt, the Seventh Circuit has held that the false statement must be material. *Hahn v Triumph Partnerships LLC* (7th Cir 2009) 557 F3d 755. See §2.20.

The California Supreme Court held that a debt collector is not entitled to collect both a bad check service charge and prejudgment interest. *Imperial Merchant Servs. v Hunt* (2009) 47 C4th 381, 97 CR3d 464. See §§2.20-2.21.

The seemingly contradictory recent Ninth Circuit and California decisions on the issue of FCRA preemption of any statutory private right of action under California's Consumer Credit Reporting Agencies Act are discussed in chap 2. *Gorman v Wolpoff & Abramson, LLP* (9th Cir 2009) 552 F3d 1008 (no preemption); *Sanai v Saltz* (2009) 170 CA4th 746, 88 CR3d 673, modified at 2009 Cal App Lexis 177 (no preemption); *Liceaga v Debt Recovery Solutions, LLC* (ordered not published Apr. 29, 2009; former opinion at 169 CA4th 901, 86 CR3d 876) (federal preemption). See §2.20.

A California federal district court held that restitution is not a proper remedy under the FDCPA. *Gerber v CitiCorp, Inc.* (ED Cal, Jan. 29, 2009, No. CIV S-07-0785 WBS JFM PS) 2009 US Dist Lexis 248094. See §2.25.

Two decisions from the Northern District of California held that corroborating medical evidence may not be necessary in a claim for recovery for emotional distress when the conduct is egregious or when the circumstances make it obvious that a reasonable person would suffer significant emotional harm. *Basinger-Lopez v Tracy Paul & Assocs., Inc.* (ND Cal, July 6, 2009, No. C 08-5192-SBA) 2009 US Dist Lexis 62805; *Fausto v Credigy Servs. Corp.* (ND Cal 2009) 598 F Supp 2d 1049. See §2.25.

To resolve a split among the circuit courts, the United States Supreme Court granted review in a case concerning the applicability of the bona fide error rule to errors of law. *Jerman v Carlisle, McNeille, Rini, Kramer, & Ullrich LPA* (6th Cir 2008) 538 F3d 469 (cert granted 2009) __ US __, 174 L Ed 2d 575, 129 S Ct 2863 (cert granted 2009) 174 L Ed 2d 575, 129 S Ct 2863. See §2.31A.

The discussion of responsibilities of consumer reporting agencies in chap 2A has been expanded to include their responsibility to reinvestigate disputed items in consumer credit files. 15 USC §1681i. See §2A.14.

The Fair Credit Reporting Act of 1970 requires that credit reporting agencies—and debt collection agencies and creditors by extension as "furnishers of information" to credit reporting agencies—implement measures to ensure the accuracy and confidentiality of consumer credit information. Regulations implementing that requirement have been promulgated in 16 CFR §§660.1-660.4 and Appendix A to pt 660; they are discussed at length in chap 2A. See §2A.16A.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936), discussed in chap 2A, was significantly modified by the Health Information Technology for Economic and Clinical Health Act (HITECH Act), part of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub L 111-5, 123 Stat 115). See §§2A.23, 2A.26.

Venue provisions of CCP §395 specifying where a creditor may file an action for a consumer obligation "arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family, or household use" also apply to

an action brought by a consumer plaintiff under §395(b). *Fontaine v Superior Court* (2009) 175 CA4th 830, 96 CR3d 607. See §3.40.

The master checklist for analyzing the client's debt problems and how to address them in chap 4 has been updated and expanded to include more important considerations in evaluating the debtor's case. See §4.2.

Discussion has been added to chap 4 of various defensive strategies, including contract of adhesion, unconscionability, that an essential element of the contract is reserved or uncertain, and void and voidable contracts. See §§4.32-4.35.

An extensive discussion of interest and finance charges, including computing and quoting finance charges, California consumer loan regulation, methods of calculation of finance charges in retail installment contracts, and prejudgment and postjudgment interest, has been added to chap 4. See §§4.37-4.50.

An extensive discussion of relief from default has been added to chap 4. See §§4.132-4.165.

The Electronic Discovery Act (Stats 2009, ch 5), effective June 29, 2009, amended discovery provisions of the Code of Civil Procedure to address discovery of electronically stored information and to permit discovery by means of copying, testing, or sampling in addition to inspection of documents, tangible things, and other property. The discussion of discovery and sample forms in chap 5 has been revised accordingly. See §§5.22-5.29.

California Rules of Court 8.751-8.752, concerning the last day to file an appeal, have been repealed effective January 1, 2009, and references to them have been deleted from the book. See §7.5.

California Rules of Court 3.1385 has been amended to provide that if a party who has already filed a notice of settlement determines that a case cannot be dismissed within 45 days, the party must serve and file a notice and a supporting declaration advising the court of the party's inability to dismiss the case within 45 days, showing good cause for its inability to do so, and proposing an alternative date for dismissal. Cal Rules of Ct 3.1385(e). See §7.14.

The California Court of Appeal held that postjudgment fees and costs permitted by California law were recoverable even after dismissal of the bankruptcy case and expiration of the automatic stay. *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 88 CR3d 250. See §§7.38, 12.42.

California provisions concerning judgment liens have been amended to remove the requirement that a lien on certain property may only be created if a security interest could be perfected at the same time and to provide that the specified property must be located within California. CCP §§697.530, 697.590. See §§7.52, 13.29.

The Ninth Circuit has held that annuities do not qualify as life insurance policies so as to qualify for exemption from execution. *Simpson v Burkart (In re Simpson)* (9th Cir 2009) 557 F3d 1010. See §§8.35, 12.28.

Code of Civil Procedure §699.040 does not authorize an order that requires a judgment debtor to turn over domain name directly to a judgment creditor. *Palacio Del Mar Homeowners Ass'n, Inc. v McMahon* (2009) 174 CA4th 1386, 95 CR3d 445. See §§8.43, 9.18.

Each time a judgment is renewed, accrued postjudgment interest is incorporated into the principal of the renewed judgment, and the entire amount then bears interest at the legal rate. *OCM Principal Opportunities Fund, LP v CIBC World Mkts. Corp.* (2008) 168 CA4th 185, 192, 85 CR3d 350. See §9.3.

A judgment creditor may not avoid the statutory homestead exemption procedures by having a residential property sale conducted by a receiver. *Wells Fargo Fin. Leasing, Inc. v D & M Cabinets* (2009) 177 CA4th 59, 99 CR3d 97. See §9.37.

A third party with a security interest that claims losses due to the creditor's enforcement action is not limited to recovering the amount of an undertaking given by the creditor, but may recover actual damages beyond that amount. *Franke v BAM Bldg. Co.* (2009) 172 CA4th 224, 91 CR3d 212. See §9.49C.

A quitclaim deed does not convey after-acquired title. *Johnson v E-Z Ins. Brokerage, Inc.* (2009) 175 CA4th 86, 95 CR3d 782. See §9.79.

Transferring title of one's home to a corporation makes the home ineligible for a homestead exemption. *California Coastal Comm'n v Allen* (2008) 167 CA4th 322, 83 CR3d 906. See §9.82.

A lien for attorney fees in a commercial tort action had priority over a judgment lien asserted by a bank in the same action when the security interest underlying the bank's lien did not extend to the tort causes of action. *Waltrip v Kimberlin* (2008) 164 CA4th 517, 79 CR3d 460. See §11.12.

A noticed motion to recover supplemental attorney fees and costs incurred in enforcing a judgment must be served on all judgment debtors, including default judgment debtors. *Karton v Dougherty* (2009) 171 CA4th 133, 147, 89 CR3d 506. See §11.49.

Deadlines in the Bankruptcy Rules of fewer than 30 days have been amended and are now substituted with deadlines that are multiples of 7 days. See §12.3.

An order imposing sanctions in the main bankruptcy case may be treated as a final order. *In re Stasz* (BAP 9th Cir 2008) 387 BR 271. See §12.7.

The right to dismiss a Chapter 13 case is subject to an exception for requests made in bad faith. *In re Rosson* (9th Cir 2008) 545 F3d 764. See §12.14.

The Ninth Circuit has held that current monthly income for purposes of the Chapter 7 means test is not equivalent to gross income as defined by tax code. *Blausey v United States Trustee (In re Blausey)* (9th Cir 2009) 552 F3d 1124. See §12.14B.

The Ninth Circuit has determined that a Chapter 13 debtor may not deduct vehicle ownership expenses for a vehicle owned free and clear. *Ransom v MBNA Am. Bank (In re Ransom)* (9th Cir, Aug. 14, 2009, No. 08-15066) 2009 US App Lexis 18179. See §12.14B.

A loan from a debtor's 401(k) plan is not a secured debt within the meaning of the Bankruptcy Code and, therefore, repayments of the loan cannot be deducted. *Egebjerg v Anderson (In re Egebjerg)* (9th Cir 2009) 574 F3d 1045. See §12.14C.

A bankruptcy court has the power to deny a dismissal request by a debtor for failure to comply with pre-filing credit counseling requirements and financial reporting requirements. *Wirum v Warren (In re Warren)* (9th Cir 2009) 568 F3d 1113. See §12.14D.

A plan confirmation order has a binding effect and may not be modified to address issues that were or could have been decided at the time the plan was originally confirmed. *Storey v Pees (In re Storey)* (BAP 6th Cir 2008) 392 BR 266. See §12.17.

In exercising its broad discretion under 11 USC §303(i) to award costs and fees, the court must consider the totality of the circumstances, including the relative culpability and the motives of the individual petitioners. *Michael N. Sofris, APC v Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.)* (9th Cir 2009) 556 F3d 742. See §12.52.

The Ninth Circuit Court of Appeals held that a judgment of dissolution of a marriage that follows from a regularly conducted, contested divorce proceeding conclusively establishes "reasonably equivalent value" for property. *Batlan v Bledsoe (In re Bledsoe)* (9th Cir 2009) 569 F3d 1106. See §12.66A.

The presumption that title to property is held by one spouse as reflected by the deeds in question can only be overcome by clear and convincing evidence and not solely by tracing the funds used to purchase the property. *In re Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 86 CR3d 624. See §13.12.

A short discussion of the status of married same-sex couples in California has been added to chap 13. See §13.47.

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Cutoff Dates and CEB Citation

Cutoff Dates

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# 1

# Representing the Creditor

**Richard L. Enkelis**
**Irwin J. Eskanos**
**Brian N. Winn**

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# I. BRIEF OVERVIEW OF DEBT COLLECTION PRACTICE

## §1.1 A. Nature of Law Practice

The two basic types of collection claims: consumer (also called retail) claims and commercial claims. A retail claim is based on an extension of credit primarily for home or personal use; everything else is a commercial claim. Either type of claim may be secured or unsecured.

Many firms handle a high-volume collection practice with the understanding that some cases will be collectable and others will not. A firm that only occasionally takes collection matters may be unwilling to take a case that does not at first seem collectable. Much of the following discussion is aimed at high-volume collection law practices, but it is also relevant for offices that take collection matters only occasionally, because the substantive issues are the same.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.1A B. Nature of Volume Collection Practice

## §1.1A B. Nature of Volume Collection Practice

In the last ten to 15 years, the nature of the volume collection law office, both in California and nationwide, has substantially evolved. The most active areas for new business are attorney networks, debt buyers, and direct placement credit grantors. All three of these avenues for placements come with their own challenges; all have the same stringent requirements that a collection law office be organized for a volume practice, computerized, and able to interface with computer connectivity requirements of clients or their networks.

These three avenues for placements also have similar requirements that their offices be adequately staffed to handle clients' individual needs. Many networks and clients now have strict security requirements that offices be secure and have the ability to monitor all entrances, exits, accounting, and mail sorting areas by camera with images digitally recorded and saved.

Various attorney networks handle the placement of claims for originating creditors, debt buyers, and collection agencies on a nationwide basis, distributing files on a state or regional basis. Networks have replaced collection agencies and law lists as the principal source of new retail collection business. The fastest growing area for new collection business is placements from debt buyers. Debt buyers are companies who purchased debt that has been charged off by the original credit grantor and then sold (and sometimes resold several times). Another excellent source of new business is from the original credit grantors themselves: the credit card company or automobile finance company who initially extended credit on a debt that has now been charged off. Other areas of debt where retail collection attorneys can obtain new business includes utilities, medical debt, and leasing obligations.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.1B 1. Retail Claims: National Association of Retail Collection Attorneys (NARCA)

## §1.1B 1. Retail Claims: National Association of Retail Collection Attorneys (NARCA)

There are several specialized bar associations in the collection field. The National Association of Retail Collection Attorneys (NARCA) is the primary association in the retail claims field. (For NARCA's address, phone number, e-mail address, and website, see the Directory.) NARCA's members are practicing attorneys and law firms that specialize in consumer or retail collections. In-house counsel for credit grantors/clients and compliance law firms are allowed to be non-voting members. NARCA's code of ethics requires their members to act as professionals, exercising sensitive professional and moral judgments in all their activities; to act in a way that serves the public interest, to honor the public trust, and to demonstrate commitment to the profession; to perform their professional responsibilities with integrity; and to perform services to the best of a member's ability consistent with the client's best interest and the profession's responsibility to the public. Its members also agree to follow certain rules, including the following:

- Refrain from operating in a manner that implies affiliation with a government or law enforcement agency.
- Delegate tasks only to qualified personnel.
- Refrain from discriminating on the basis of race, creed, color, sex, or national origin.
- Follow the client's instructions or promptly explain any inability to do so.
- Compete only in a fair and honorable manner without publicly attacking a competitor's reputation.
- Confirm or acknowledge all claims promptly.
- Reply to a client's request with reasonable promptness.
- Keep the client informed of the status of his or her claim.
- Secure and segregate collected assets from those of the law firm.
- Disburse all collected assets to the client on a timely and regular basis.

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## 2. Commercial Claims: Where Commercial Collection Cases Come From

### §1.2 a. Collection Agencies

Many firms with a high-volume debt commercial collection practice do not deal directly with creditors. Their cases come from collection agencies, law lists, or commercial attorney networks. Some agencies handle only particular types of claims or industries, such as transportation charges or the furniture industry. Others are full service agencies that handle all types of creditors in all industries. Typically, the law firm receives the case from the collection agency and corresponds with the underlying creditor through the agency acting as the creditor's agent. Firms with a high-volume commission collection practice generally work with a fairly small number of agencies.

Many creditors rely on the collection agency's ability to find competent counsel throughout the country instead of searching for a firm with the requisite expertise.

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### §1.3 b. Commercial Law League of America (CLLA)

The Commercial Law League of America (CLLA) is the primary specialized bar association in the commercial collections field. (For CLLA's contact information and website address, see the Directory.) Its members include collection agencies that handle commercial claims and forward them to law firms and attorneys involved in commercial collection practice. The collection agency is known as a "forwarder" and the attorney is known as a "receiver."

Members of the CLLA operate under their Operative Guides, which control the general relationships among the various groups involved, including rules on compensation, interest, costs, and attorney fees. For a description of the obligations and rights of forwarders, see §1.5.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.4 (1) Receivers' Duties and Restrictions [Deleted]

## §1.4 (1) Receivers' Duties and Restrictions [Deleted]

[This section has been deleted as no longer necessary. On the collection attorneys' code of ethics, see §1.1B.]

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.5 (2) Forwarders' Duties and Restrictions

## §1.5 (2) Forwarders' Duties and Restrictions

The CLLA Operative Guides, Part VI, §10 and Part VII, §12 (Jan. 6, 2004) specify the duties and restrictions of the forwarder (the collection agency), including the following:

- Claims should be accompanied by information necessary for the receiver to act on the client's behalf, documentation relating to the claim, and the debtor's credit information.
- A forwarder should disclose to the creditor the receiver's contingent fee requirements.
- A forwarder should provide information on the claim, *e.g.,* if the claim is other than a commercial claim, if there is any dispute on the claim, and if the forwarder knows that the creditor will not authorize suit or provide witnesses or has other restrictions on suit.
- A forwarder may not withdraw a claim from a receiver in the absence of the receiver's fault without properly compensating the receiver.
- A forwarder may not send a claim to a receiver on the condition that it be handled without charge.
- A forwarder may not induce a receiver to accept a lower contingent fee by falsely representing that the total percentage charged the creditor will be reduced by at least that percent.
- A forwarder may not use an attorney's name in asserting rights against a third party, nor may a forwarder send to a debtor letters purporting to be written to an attorney to deceive a debtor into thinking that the attorney has been instructed to take action against the debtor.
- A forwarder may not use a document that purports to be a summons or other court document to deceive a debtor into believing that the document is a court notice or that legal action has been commenced.
- If the claim at issue was previously worked on by another receiver, a forwarder must disclose that fact to the receiver.
- A forwarder may not request that an attorney incur the cost of litigation without an express agreement for reimbursement by the creditor.
- If a debtor is involved in insolvency proceedings, a forwarder may not reserve the right to withdraw a claim without paying compensation.
- A forwarder may not file claims in bankruptcy or other insolvency proceedings and send one or more claims to a receiver in order to obtain status reports from the receiver on the progress of the proceeding.
- A forwarder may not discourage a receiver from requesting a higher commission than stated in the forwarding contract.

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## §1.6 c. Law Lists

A "law list" is a published directory of attorneys in various communities in the United States and around the world. See CLLA Operative Guides, Part I, §1.5 (Jan. 6, 2004) (definition of law list). Martindale-Hubbell is a general purpose directory, or law list, that includes lawyers in many fields. Many specialized law lists identify collection attorneys and bankruptcy attorneys. Law lists can be, and usually are, members of CLLA.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.6A d. California Creditors Bar Association

### §1.6A d. California Creditors Bar Association

An extremely useful source of information for California collection law firms is the California Creditors Bar Association (CalCBA), an organization comprised primarily of creditor law firms across California. Among member benefits are semi-annual educational meetings, inexpensive dues, a website with useful links to relevant law and other related sites, and an e-mail discussion list that includes many collection law firms in California, both large and small.

For CalCBA contact information and website address, see the Directory.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.7 e. Other Sources of Claims

## §1.7 e. Other Sources of Claims

One source of potential claims is the California Association of Judgment Professionals (CAJP). This is a group primarily consisting of lay individuals who take assignments of judgments or purchase judgments at a discount and then attempt to collect them. Generally they operate by representing themselves, but as they branch out from primarily small claims court judgments to larger cases many of the individual members begin to seek representation, if not in court, then as consultants. For information about this group, see the Directory.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/ II. INITIAL CONSIDERATIONS/§1.8 A. Checklist: Should Counsel Take Case?

## II. INITIAL CONSIDERATIONS

### §1.8 A. Checklist: Should Counsel Take Case?

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Before agreeing to represent a creditor in a debt collection action, the creditor's attorney must decide whether it is practicable, economical, and ethical for the attorney to do so. The following checklist should enable the attorney to collect sufficient information to make this preliminary decision.

A. Nature of debt

1. Type of transaction (consumer purchase, consumer loan, credit card account, commercial transaction, etc.):

   _____

   _____

   _____

2. Amount of original debt: $_____
3. Amount of outstanding debt: $_____
4. Security for debt, if any:_____

   _____

   _____

5. Interest and finance charges: _____

   _____

   _____

6. Warranties:_____
7. Is case within statute? _____
8. Is the defendant collectable now or will he or she be collectable in the future?

B. Collection efforts

1. What demands for payment have been made, and what negotiations have occurred? (Include dates, times, content):

   _____

   _____

   _____

2. Was transaction documented properly?_____

   (Obtain copies of all relevant documents)

   a. Problems with documents:_____

   _____

   b. Do documents provide for attorney fees?_____

   c. Can client provide documents to establish complete chain of title from originating creditor to client?

   3. Why has debtor not paid? _____

   _____

   If debt is disputed, what is the nature of the dispute?

_____

_____

4. Why has creditor's collection method been unsuccessful?

_____

_____

_____

C. Status of collector client

1. Is client authorized to do business in California? _____
2. Is client original creditor or assignee?_____
3. Is creditor a regular client?_____

If so, what is client's record as collector?

_____

4. What is client's status with applicable state regulatory agency?___

_____

5. What is creditor's record in dealing with this debtor?

_____

_____

D. Potential conflicts

1._____

2._____

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## B. Ethical Considerations

### §1.9 1. Viability of Claim

The creditor may believe that the debtor owes the creditor money, but sometimes the creditor's belief is based more on wishful thinking than facts. The attorney has an independent obligation to review the facts and confirm whether the claim is viable. See Cal Rules of Prof Cond 3-200; Bus & P C §6068(c). See also 15 USC §§1692-1692p (Fair Debt Collection Practices Act (FDCPA), discussed in chap 2). The attorney must understand the basis for the creditor's claim that money is owed. First-hand observation of the relevant documents is essential to understanding whether the case can actually be proved. For example, a consulting company may ask the attorney to collect a debt based on a contract calling for consulting work, even though the contract was canceled before any work was done. If the contract does not provide for a cancellation fee, there is no collectable claim and the creditor will find it difficult to prove any damages. Such a claim is not viable.

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## §1.10 2. Creditor's Motives Proper

The attorney has an ethical obligation to ensure that the action is being brought only to enforce the contract or collect the money that is due and not as a collateral action to gain an unfair advantage on some unrelated transaction. See Cal Rules of Prof Cond 3-700(B), 5-100.

This is a matter of both proper ethics and good practice. An abuse of process claim may arise against the creditor if it uses lawful process for an improper purpose (*e.g*., obtaining an injunction on the basis of false affidavits) or for an ulterior purpose (*e.g.*, compelling payment of money not due). See *Spellens v Spellens* (1957) 49 C2d 210, 233, 317 P2d 613. An abuse of process claim differs from a claim for malicious prosecution, which requires that the underlying case be terminated in favor of the defendant and that the defendant show a lack of probable cause. *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 1169, 232 CR 567.

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## §1.11 3. Conflicts of Interest

The attorney must initially ascertain whether he or she has a conflict of interest in the case. There are many types of conflicts of interest, including failure to establish who the client is, representing coparties who have potential conflicts with each other, failure to disclose and obtain consents concerning potential conflicts, side-switching, and improper ex parte contacts with parties or the court. These conflicts are common to all types of practices. See California Civil Procedure Before Trial, chap 2 (4th ed Cal CEB 2004) for further discussion of such conflicts of interest.

A typical conflict of interest, common in the collection context, arises when the attorney has multiple claims against the same debtor. When a debtor's business starts to have collection problems, the first few claims usually come in fairly slowly. If the business continues to have financial problems, claims come more rapidly as other creditors begin to realize that the debtor is in trouble. At that point, the race begins. When suit is filed on the first claim, the defendant obtains an attorney and mounts a defense. The same may be true of the second and even the third claim, but eventually the debtor becomes financially pressed and can no longer afford to hire counsel. The debtor may resort to self-representation, but eventually even that stops and default judgments begin to appear. Thus, the first client in the door may still have a claim in a litigation posture while the 10th through 20th clients are obtaining default judgments and trying to enforce them.

The attorney should make the collection agency or creditor aware of such conflicts of interest by giving them notice if the attorney has other claims against the debtor. This notice allows the creditor or forwarder to consider the possibility of removing the claim and send it on to a new attorney. An attorney who continues to represent more than one creditor against the debtor is treated as having acknowledged that he or she will continue to handle the claims in the order in which they were received for nonjudgment cases and in the order in which judgments were obtained for judgment cases.

**NOTE:** In such representation, knowledge gained from any one creditor may be used on behalf of all creditors.

Another potential conflict of interest occurs when the attorney obtains a judgment against one debtor, who then hires the attorney to collect an amount owed to it from another debtor. If the amount of the judgment owed to the original creditor is less than the amount owed from the second debtor to the first debtor, the attorney must have a conflict release letter from the first debtor, expressly stating that the first moneys collected from the second debtor will go to the judgment already obtained. The attorney should treat an agreement to collect or attempt to collect the debt from the second debtor as another enforcement method of dealing with the debt owed to the original creditor.

**PRACTICE TIP:** Merely accepting the second claim for collection should never release the underlying judgment, because if the second judgment is uncollectible, the first judgment would have already been released without having been collected.

These ethical considerations apply to both commercial and consumer claims. Retail claims present additional, unique considerations involving the Fair Debt Collection Practices Act (15 USC §§1692-1692p) and other related privacy laws. See chaps 2-2A.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.12 4. Attorney Competence

## §1.12 4. Attorney Competence

An attorney may not accept cases that he or she is not competent to handle. Cal Rules of Prof Cond 3-110. Even for attorneys who regularly handle debt collection matters, there are cases in which a competency issue may arise. Attorneys who generally handle only commercial matters may not be competent to handle retail matters and vice versa. Retail collection attorneys may be competent to take credit card cases, but may need to decline to take automobile deficiency cases because of their complexity. In the commercial area, many attorneys do not regularly handle freight collection cases or tariff-based cases such as long distance telephone charge cases.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.13 5. Identifying the Client

## §1.13 5. Identifying the Client

For most legal engagements, the question of who is the client is not a problem. In the collection industry, in which claims are often received from third party agents, including networks and debt buyers, it can be a serious issue. There are several specialized bar associations in the collection field. See §§1.1B, 1.3. The actual creditor is considered to be the client, at least as between the creditor and its local attorney networks or collection agency who may be acting as a forwarder and the attorney.

A creditor may sell its accounts receivable to a third party for financing. This type of sale of an account receivable for financing is called "factoring," and the person or entity that lends the money and acquires the right to the receivable is called a "factor." In such situations, the factor is the client rather than the original creditor. If the factor cannot collect the account, it may return or resell it to the creditor, who them becomes the entity entitled to the collection proceeds and would therefore be the client.

Note that debt-buying clients may have difficulty in providing a complete chain of title through several stages.

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## C. Economic Considerations

### §1.14 1. Fee Agreements

The attorney must ascertain whether it is financially profitable to accept the case. Attorney fees are generally based on an hourly rate, a negotiated contingency, or a combination of the two. Blended notes and fee schedules are also being used by some attorneys. If a combination fee is adopted, the noncontingent portion, referred to as a "suit fee" (see CLLA Operative Guides, Part I, §1.8 (Jan. 6, 2004)), is often requested at the time a suit is to be filed. The attorney could also establish a step contingency fee that provides a standard fee in the lower dollar range, with a smaller fee for recoveries that exceed a set plateau.

The contingency fee structure is used most often. The contingency fee in commercial cases may be as low as 15 percent and as high as 35 percent. In consumer or retail cases, the fee structure tends to range from 20 percent to 30 percent. These fees are generally lower than contingency fees in other areas of the law.

The client's fee expectation should be settled at the beginning of the attorney's representation. Often the client wants to know how long it will take to prosecute a case so that he or she can decide whether to ask the attorney to handle it on a contingency or an hourly basis. The client may want hourly billing because he or she is convinced that it will take only a simple phone call or a letter from the attorney to resolve the issue, but in fact it is a rare case that can be resolved in this manner. The attorney should not try to predict how long a particular case will take. Although the vast majority of debt collection cases proceed quickly and do not involve a great deal of attorney time, it is impossible to know at the outset which cases will take hours of attorney time. A good rule of thumb is that larger cases are more likely to be defended. See §1.15.

For an attorney in a high-volume practice, the rare claim handled on a contingency fee basis that is collected with nothing more than a demand letter or phone call does not create an out-of-proportion or unconscionably high fee.

The client typically negotiates a fee agreement with the client, whether debt buyer, collection agency, legal network, or forwarder. The attorney fees come from the client's portion. For business reasons, many collection attorneys have different fee schedules and charge a direct client essentially the same fee that the client would have paid to a collection agency.

In negotiating a fee agreement, four major factors should be considered:

(1) The size of the claim (see §1.15);

(2) The age of the claim (see §1.16);

(3) Whether the claim is disputed (see §1.17); and

(4) The debtor's assets (see §§1.18-1.20).

See §1.37 for a form fee agreement for hourly fee cases; see §1.36 for a form fee agreement for contingent fee cases with suit fees included.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.15 a. How Large Is the Claim?

## §1.15 a. How Large Is the Claim?

The size of the claim is a major factor in setting the fee. As the claim gets larger (*e.g.,* over $100,000), the creditor will want a lower contingency fee or will want the attorney to charge an hourly fee. A larger claim may be less collectable, however. A large claim makes it more feasible, and more likely, for the debtor to defend. It is also more likely that there will be more secured creditors with claims against the debtor's assets than there are with smaller claims.

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### §1.16 b. How Old Is the Claim?

A commercial claim might be considered old after 2 or 3 years; a consumer claim might be considered old if it is over 3 years old counting from the date of last payment. The age of a claim is more important than almost any other element because it offers a clue as to how collectable the claim may be. The probability of recovery of a claim generally decreases with age for several reasons. First, the client probably has already done a good job trying to collect the money, which may be uncollectible for a variety of reasons. Second, it may be harder to locate a defendant who hasn't been contacted for several years. Third, the age of the claim may affect counsel's ability to prove it in a trial because witnesses may have disappeared or documents may have been destroyed as part of a business's routine file destruction policy.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.17 c. Does Claim Appear to Be Disputed?

## §1.17 c. Does Claim Appear to Be Disputed?

Claims often come to the attorney with only a summary of what has happened. The attorney must evaluate the history of the dispute by analyzing the creditor's complete file, estimate the dispute's possible resolution, and decide whether it can be effectively handled for the amount of the expected recovery. Conducting a trial when $2500 or less is involved is not economically feasible.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.18 d. Does Debtor Appear to Have Assets?

## §1.18 d. Does Debtor Appear to Have Assets?

There is little point in seeking a judgment if no assets are available to satisfy it. Because debtors rarely owe only one creditor, however, a collection practice is in part a race to judgment and it is frequently more advisable to obtain a judgment quickly than to conduct an expensive and time-consuming background check to learn whether the debtor has assets.

The attorney should distinguish between a debtor with no apparent ability to pay and a debtor who is apparently able to pay but refuses to cooperate. The debt of the uncooperative debtor may be less collectable than the debt of the debtor with no apparent ability to pay. The uncooperative debtor generally requires a great deal more attorney time, which affects the profitability of the case.

To ascertain up front whether the debtor may have assets, the attorney should quickly investigate whether the debtor is collectable, has assets, or will have the ability to pay the debt over time.

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## §1.19 (1) Is Debtor Still in Business?

Most commercial collection law offices assume that, if the debtor is still in business, collecting for a commercial claim remains possible. The attorney can call the business to ask about its business hours and verify its address to see whether it is still in business. If the telephone has been disconnected, the next step is to call a nearby business and inquire. Many services provide "reverse" telephone directories indexed by street address rather than by name, which can help the attorney find neighboring businesses.

If the debtor business is located in an office building, a call to the neighboring businesses can yield the name of the building manager or rental agent, who can provide information on whether the business is still at that location, has moved, or has gone out of business.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.20 (2) What Is Nature of Debtor Entity?

## §1.20 (2) What Is Nature of Debtor Entity?

The attorney should verify the nature of the debtor entity. See §3.2. If the debtor is a corporation, the attorney should verify that it is still an active corporation. A check of real estate records can reveal whether the individuals or other entities involved own real property in California.

Counsel can generally search public records through on-line services or by subscription to companies that provide CD-ROM disks for use in the attorney's office. They are a relatively inexpensive way to help establish the nature of the debtor and the potential collectability of the claim.

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## §1.21 2. Expenses

Some law offices request that the new clients pay estimated court costs before the action is filed. Most volume collection clients expect a law firm to advance all costs with reimbursement, usually within 30 days. Court costs include costs of bringing suit, service of process, discovery motions, motions for summary judgment or summary adjudication, court reporter fees for trial, and judgment enforcement. Unless the creditor fully understands at the outset what the costs will be, it can be awkward to ask for additional costs to enforce a judgment.

Litigation is expensive. In a typical limited civil case, if the amount demanded is $10,000 or less, the filing fee is $205. Govt C §70613(b). If the amount demanded is $10,000 to $25,000 (see CCP §86), the filing fee is $330. Govt C §70613(a). In a case involving amounts of $25,000 or more, the filing fee is $355. Govt C §70611. In addition, many courts have surcharges; it is best to verify the actual filing fee with each court involved. The average cost for process servers is $50 to $75 for each defendant, assuming that the addresses are accurate. If the debtor is a partnership consisting of two partners, three entities must be served (*i.e.,* the partnership and each of the partners). Additional costs include fees for any motions that must be filed, costs of any depositions, costs of producing documents, and other routine costs. After judgment is obtained, there are enforcement costs, such as deposits for the levying officers and fees to registered process servers when they must be used. The client is often faced with a $500 deposit for court costs for a single defendant, and an additional $50-$75 for each additional defendant who must be served.

**NOTE:** Because of fee surcharges for construction of courthouses for limited civil cases, it is often more expensive to file a limited civil case for a single plaintiff than to file an unlimited civil case.

As the cost of pursuing the claim increases, the creditor may feel that it is not worth throwing good money after bad. The attorney must explain that the only choices are to proceed with the litigation or write off the loss.

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### 3. Documenting Fee and Cost Agreements

## §1.22 a. Forwarded Claims

Contingent fee agreements must be in writing. Bus & P C §6147. For a high-volume practice, it is fairly simple to create a standard fee agreement between the law firm and the client. Attorney networks and most large clients, whether they are debt buyers or credit grantors, have their own contracts.

The attorney may be exempt from the written agreement requirement if the parties adopt a specified set of fees (Bus & P C §6147.5):

> (a) Sections 6147 and 6148 [requiring a writing] shall not apply to contingency fee contracts for the recovery of claims between merchants as defined in Section 2104 of the Commercial Code, arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals.
>
> (b) (1) In the instances in which no written contract for legal services exists as permitted by subdivision (a), an attorney shall not contract for or collect a contingency fee in excess of the following limits:
>
> (A) Twenty percent of the first three hundred dollars ($300) collected.
>
> (B) Eighteen percent of the next one thousand seven hundred dollars ($1,700) collected.
>
> (C) Thirteen percent of sums collected in excess of two thousand dollars ($2,000).
>
> (2) However, the following minimum charges may be charged and collected:
>
> (A) Twenty-five dollars ($25) in collections of seventy-five dollars ($75) to one hundred twenty-five dollars ($125).
>
> (B) Thirty-three and one-third percent of collections less than seventy-five dollars ($75).

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.23 b. Direct Claims

### §1.23 b. Direct Claims

Contingency fee contracts with "direct" clients, *i.e.,* those who do not come through a legal network or collection agency or other third party, must comply with Bus & P C §6147. Many issues other than contingency percentages should be addressed in the fee agreement, including:

- The circumstances in which the attorney may withdraw;
- What happens if the client terminates the attorney-client relationship;
- Who is responsible for costs (particularly if costs exceed the sum initially advanced); and
- How the attorney's contingency fee interest may be protected by a lien on the recovery.

It is also helpful to include an authorization for the attorney to endorse checks made payable to the creditor, because debtors often remit payment payable to the creditor and the bank may require an endorsement guaranty.

NARCA and CLLA (see §§1.1B, 1.3) also provide examples of matters that may be included in fee agreements. A number of clients have adopted the "NARCA Standard" for law firms nationwide. On NARCA ethical standards, see §1.1B.

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## III. OFFICE MANAGEMENT FOR EFFECTIVE DEBT COLLECTION

### §1.24 A. Need for Effective Office Management

The larger the collection practice, the greater the need for effective office management systems to maintain timely and effective follow-up. Essential to a successful practice are the judicious use of standardized forms (see §1.25) and well-trained support staff (see §§1.26-1.28).

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.25 1. Using Standardized Forms

## §1.25 1. Using Standardized Forms

Preparing the forms necessary for the litigation process and for client reporting is more efficient when they are standardized. Many collection attorneys use standardized forms to great advantage. Demand letters are usually computer-generated and entered into the computer system when the account is received. A computer can also generate standardized forms acknowledging the claim and advising the client that the attorney has made a written demand on the debtor, to be followed by an oral demand. See §1.33 for discussion of using computer software to increase efficiency.

Office staff members should be trained to use these forms without variation to avoid potential difficulties between counsel and client. See §§1.26-1.28 for discussion of support staff.

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## §1.26 2. Using Support Staff

Properly trained support staff are essential to maintain client records effectively and to enforce judgments. Support personnel should be trained in each function required to move the collection process forward, such as preparing and filing forms, recording abstracts and judgment liens, and communicating with the judgment debtor or its attorney.

Support personnel must understand the laws applicable to lawyers and their staffs in the process of consumer debt collection, including the following:

- The federal Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692p);
- The Gramm-Leach-Bliley Act (GLBA) (Pub L 106-102, 113 Stat 1338);
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936);
- The Servicemembers Civil Relief Act of 2003 (50 USC App §§501-596);
- California's Rosenthal Fair Debt Collection Practices Act (CC §§1788-1788.33);
- The Consumer Collection Notice (CC §§1812.700-1812.702); and
- The California Rules of Professional Conduct.

Violation of these laws can result in substantial liability for client and counsel.

Training should include informing support staff of the content and significance of new decisions involving and interpreting these acts and testing personnel to assess their knowledge of and ability to apply the acts. The attorney should keep a training record to ensure continuing compliance. All staff members performing collection functions should be given a memorandum outlining their continuing obligations, by which they acknowledge their willingness to comply with, and avoid violating, either the letter or spirit of the laws. See sample memorandum in §1.28. See chap 2 for detailed discussion of the acts.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.27 a. Support Staff Tasks

## §1.27 a. Support Staff Tasks

The need to be efficient and operate at an effective cost level requires that most standardized procedures be handled by support personnel instead of attorneys. Support staff can trace assets and locate individuals who have moved without notifying creditors of their new address by checking the following sources:

- Change of address forms filed with the Post Office,
- The Department of Motor Vehicles,
- Friends or relatives listed on credit applications,
- The Internet,
- Voter registration records,
- Assessor's offices,
- Utility providers,
- Reverse telephone directories, if phone numbers were changed,
- Credit bureau reports, and
- Company personnel, who may be personally knowledgeable about locations of people who formerly did business with the creditor.

Support staff can also prepare pleadings, from the initial complaint through enforcement of judgment. Various directories, such as that published by the California Court Association, list the sheriffs and marshals throughout California and describe the fees each particular court requires for filing and for subsequent enforcement procedures.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.28 b. Form: Memorandum to Support Staff re Fair Debt Collection Practices

## §1.28 b. Form: Memorandum to Support Staff re Fair Debt Collection Practices

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1.28-1 Memorandum to support staff re fair debt collection practices

**MEMORANDUM TO SUPPORT STAFF**
**RE FAIR DEBT COLLECTION PRACTICES**

**1. *Communications With Debtor.* Every employee shall stop communicating with the debtor when:**

**(A) The debtor provides this office with written notification that the debtor refuses to pay a debt; or**

**(B) The debtor wishes this office to cease further communications with the debtor; or**

**(C) This office has been put on notice that a debtor is represented by legal counsel.**

**2. *Identification of Debt Collector.***

**(A) Every employee contacting a consumer debtor or another person about a consumer debt shall identify himself or herself, for whom he or she works, and his or her title or job capacity. For example:**

**"I am _ _[*name*]_ _, a _ _[*state position, e.g., paralegal*]_ _ employed by the law offices of _ _[*name of firm*]_ _."**

**(B) No employee shall falsely represent that a person (including the employee) is an attorney. If someone indicates that he or she has misunderstood your title or job capacity and erroneously refers to you as an attorney, you shall immediately correct that impression so that the person is fully advised of your true position: that you are employed by this law office and that you are not an attorney.**

**3. *Employment Verification.***

**(A) The only permitted communication with a debtor's employer in regard to debt collection is to verify the debtor's employment. No employee shall communicate information to the debtor's employer regarding the debt.**

**(B) Only one communication solely for the purpose of verifying the debtor's employment may be made orally. After that, you may not further communicate orally with the employer but you may send one written employment verification letter to the employer. If no response is received to the written employment verification request within 15 days, you may contact the employer, strictly for purposes of employment verification, but the contact must be limited to only as many times as necessary to verify employment.**

**4. *Harassment Prohibited.* No employee shall collect or attempt to collect a debt by means of any of the following practices:**

**(A) Using obscene or profane language;**

**(B) Placing telephone calls without disclosing the caller's identity in accordance with 2(A) above;**

**(C) Causing expense to any person for long distance telephone calls, telegrams, or other communications by misrepresenting to such person the purpose of such telephone call, telegram, or other communication;**

**(D) Causing a telephone to ring repeatedly or continually annoying the person called;**

**(E) Communicating, by telephone or in person, with the debtor at such frequency as to be unreasonable and constitute harassment to the debtor under the circumstances; or**

**(F) Engaging in any type of name calling, slang, or derogatory comments to the debtor, except for the fact that the debtor has incurred an obligation that he or she has failed to pay.**

**5. *Prohibited Communication With Third Parties.* No employee shall communicate information about the debt to any member of the debtor's family, other than the debtor's spouse, or parent (if the debtor is a minor) who resides in the same household with the debtor, except to locate the debtor. In such case, you shall not communicate that the debtor failed to pay the obligation to the creditor.**

**6. *Threats Prohibited.* No employee shall attempt to collect a debt by any of the following conduct:**

**(A) Using or threatening to use physical force or violence or any criminal means to cause harm to the person, his or her reputation, or his or her property;**

**(B) Threatening that failure to pay the consumer debt will result in an accusation that the debtor committed a crime if that accusation would be false;**

**(C) Communicating, or threatening to communicate, to any person that the debtor engaged in conduct, other than failure to pay the consumer debt, if the debt collector knows or has reason to believe that such communication would defame the debtor; or**

**(D) Threatening that failure to pay the debt will result in the debtor's arrest.**

**7. *Identity Theft.***

**(A) Every employee shall stop collection activities on receipt of the following:**

**(1) A copy of a police report or a Department of Motor Vehicles investigative report filed by the debtor alleging that the debtor is the victim of an identity theft crime, and**

**(2) The debtor's written statement that the debtor claims to be the victim of identity theft with respect to the specific debt being collected by this office.**

**(B) The debtor's written statement that the debtor is the victim of identity theft may consist of any of these:**

**(1) A Federal Trade Commission Affidavit of Identity Theft;**

**(2) A written statement containing the same information as the California Office of Privacy Protection's Identity Theft Victim's Fraudulent Account Information Request; or**

**(3) A written statement certifying that, to the best knowledge and belief of the debtor, the representations are true and correct and contain no material omissions.**

**(C) If a debtor notifies an employee orally that the debtor is the victim of identity theft, the employee shall notify the debtor that the debtor's claim must be in writing. If a debtor notifies an employee in writing that the debtor is the victim of identity theft but omits information required in paragraph (A), above, the employee must stop collection activities, give written notice to the debtor of the additional information required, or send the debtor a copy of the Federal Trade Commission's Affidavit of Identity Theft.**

**(D) Once the debtor's complete statement and information about the identity theft is received, the office will conduct a review and make a determination of whether the information establishes that the debtor is not responsible for the debt.**

**8. *Fair Debt Collection Practices Act.* Attached to this memorandum are excerpts from the Fair Debt Collection Practices Act. Review each section. If you have any questions, go over them immediately with** _ _[*name of contact person*]_ _**.**

**I HAVE READ THE FOREGOING MEMORANDUM, AND I FULLY UNDERSTAND AND WILL COMPLY WITH IT.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

*Comment:* The information for employees in this memorandum is based on the federal Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692p), as well as California's Rosenthal Fair Debt Collection Practices Act (CC §§1788-1788.33). The attorney should attach a copy of both acts to the memorandum for employees to review.

When a debtor claims to be the victim of identity theft, specific requirements that the debtor must follow to stop further collection efforts are set forth in CC §1788.18(b). See §2.24B. Counsel should ensure that training of support staff includes a review of these requirements.

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## B. File Management

### §1.29 1. Filing Systems

The practitioner should establish a general file for each individual creditor doing business with the firm and place in this file the standard fee agreement, general correspondence, and other documents and records regarding the creditor that do not relate to a specific debt referred to the law office for collection.

The practitioner should maintain separate files for records concerning individual claims or debtors. These files should be organized numerically or alphabetically under the debtor's last name. A numerical filing system should have an alphabetical cross-reference, supported by a computer program that allows the practitioner to locate the file in the numerical system when that file number is unavailable. With multiple defendants, each defendant's name should be put into the computer data bank so that the file can also be accessed by name.

While a "paperless office" still remains a theory for practitioners, many offices incorporate to some degree paperless procedures such as scanning documents, pleadings, and correspondence.

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## §1.30 2. Continuing File Review

Because judgments are valid for 10 years and are subject to indefinite renewal, maintenance and retrieval of files in a collection practice is of greater concern than they are in other practices. The practitioner must decide how long to maintain files on the premises and when to transfer them to a secondary location or else to scan the file and shred the document. This decision should coincide with the firm's overall plan for periodic review of uncollected judgments. Many collection firms have a standard 6-month review for judgments not previously collected; others review them more often. At a minimum the file must be reviewed before being closed. Debtors may regain their financial ability to satisfy a judgment over time; therefore judgments may be collected after a long passage of time. For firms that have built up a large inventory of past judgments on their clients' behalf, substantial revenue can be forthcoming from the initial investment of work product into contingency collections and recoveries made long after the initial judgment.

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## 3. Calendaring Systems

### §1.31 a. Importance of Effective Calendaring Systems

A collection practice lends itself to routine, standardized procedures that require efficient follow-up methods at each step of the process. The lawyer or paralegal assigned to manage a file should regularly review and advance the file. For example, to ensure that the court received and processed documents filed in court, such as requests for default or default judgment, the file should be reviewed 10 or 15 days after all paperwork was sent to the court for processing.

The calendaring process begins with the initial demand letter to the debtor and acknowledgment of the claim to the client. Thereafter, the file should come up on a docket control system at each step in the process. Although calendaring can be greatly assisted by computer software, it can also be accomplished manually.

In addition to the collection process, the attorney should calendar and comply with whatever undertakings have been agreed to with the client to avoid the client's disappointment when promised reports are not received. See §§1.34-1.35. At the initial consultation, a clear understanding of what reporting will take place is essential. Under Cal Rules of Prof Cond 4-100, the attorney is required to notify the client when funds are received on the client's behalf. To make sure this is done, the attorney should establish a compliance procedure; *e.g.,* an office might fulfill this requirement by issuing standard notices or monthly remittance statements.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.32 b. Events to Be Calendared

### §1.32 b. Events to Be Calendared

Each step throughout the life of the case, even the most routine, requires a review date and should be calendared. These steps include the following:

- After sending out the complaint for filing in the court, a follow-up date should be set to ensure that the complaint was not lost en route or by the court.
- After the complaint is filed, other follow-up dates should be set to ensure that the docket is advanced, service is effected, and all fast-track or collection track dates are met.
- When service is accomplished and proof of service is filed with the court, the matter should be docketed for answer or default.
- After obtaining a judgment, the matter should be docketed for (1) completion of the collection process and (2) review of the judgment if it is not collected before expiration of the 10-year period of enforceability of the judgment (see CCP §683.020) so that it can be renewed in time to protect the judgment from expiring and any liens from becoming invalid.

The office should also calendar periodic or agreed-on client reports and periodic asset reviews in cases for which the judgment remains uncollected. Whenever a document is sent that requires further action, the matter should be calendared for follow up to be sure the document is returned. For example, when seeking the issuance of a writ of execution by the court, sending the document to the court and failing to calendar a follow up to be sure the writ is issued and returned can, in a volume practice, cause a matter to be disregarded for a long period of time.

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## §1.33 4. Using Computer Technology

Almost all high-volume collection practices use computer technology for retail and commercial collections; a collection practice of a substantial size cannot be effectively managed without computers. Most major credit granters throughout the United States will not even do business with a firm that cannot provide computer-generated reports, accounting statements, and collection results. Computer technology is also a primary source of material on each individual claim and on the debtors of those claims.

Numerous computer programs are available for managing the workflow of a volume collection practice. New legal collection software packages are being introduced regularly to compete with the older, more established software vendors.

**PRACTICE TIP:** The veteran software vendors are Hubbard Systems' Collection Partners; CLS's Collection Master; JST's Collect-Max; and Columbia Ultimate's Collector Express. Additional software packages include BS Solutions' product Cogent; Hubbard Systems' Collipso; Ontario Systems' Artivia; and several other competitive products.

The hallmark of any of these systems is their ability to account for future follow-up steps and processing. The programs generally provide support for all aspects of the practice, including trust accounting and individual debtor account balances with interest accrued.

Membership and participation in a collection network, such as the National Attorney Network, NCO Network, or Trak America may provide an opportunity to receive a substantial volume of business that would not otherwise be available to individual law firms. Using a computer program is essential for effective participation in these networks because the collection process must be continually updated through the network. Most of the applicable computer software programs interface with the major collection networks.

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## C. Maintaining Positive Client Relations

### §1.34 1. Exchange of Information Between Client and Counsel

Most clients want to be kept informed of progress on their files. The lawyer should adhere to agreed-on obligations to report to the client at subsequent dates under established reporting procedures. Many clients are satisfied with computer-generated monthly reports that use action codes describing the status of each case. Some clients with larger claims may want to receive more detailed reports.

Counsel should provide each new client with a roster of office employees so that specific inquiries can be directed to the individual in the firm best able to answer them.

New clients should be requested to give the firm all its information on the status of the debt.

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## §1.35 2. Financial Accounting

Accounting for moneys received and disbursed to the client is crucial. Computer programs are available to generate monthly statements to send to the client.

As a rule, a client is billed monthly for expenses, or the client advances funds at the beginning of the case to be held in trust for that purpose. Expenses include sheriff's fees, recording fees, and clerk's fees. If the agreement between the client and the firm provides that the first moneys recovered will pay court costs, the application of those funds must reflect that agreement. This obligation continues throughout the collection process as costs are incurred. See §§1.14-1.20 on fee agreements.

Accurate records of the costs incurred, the billing of costs to the client, the receipt of payments by the client for those billings, and the application of recoveries is essential. The records must also include the application of funds toward the debt due. Detailed accounting records, reflecting the correct outstanding balance, are an essential part of every collection process. The debt may consist of a principal balance, pre- and postjudgment interest, incurred costs awarded by the court, and attorney fees awarded as part of the judgment. The specifics of how to apply the recoveries on a judgment are set forth in CCP §695.220.

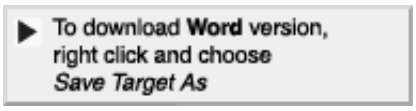
**NOTE:** Judgments bear interest at the rate of 10 percent per annum. CCP §685.010. Attorney fees and costs incurred after judgment may be added to the judgment. CCP §§685.040, 1033.5(a)(10)(A).

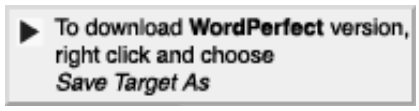
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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/ IV. SAMPLE FEE AGREEMENTS/§1.36 A. Form: Contingent Fee Agreement With Noncontingent Retainer

## IV. SAMPLE FEE AGREEMENTS

### §1.36 A. Form: Contingent Fee Agreement With Noncontingent Retainer




1.36-1 Contingent fee agreement with noncontingent retainer

_ _[*Letterhead*]_ _

_ _[*Date*]_ _

_ _[*Name of client*]_ _
_ _[*Address*]_ _

**Dear _ _[*name of agent for client*]_ _:**

**The fees this office will charge to handle a collection item are partially noncontingent retainers and partially contingent fees. The contingency percentages change depending on whether a lawsuit has been filed and, if so, whether it has been assigned to trial or arbitration, regardless of whether it actually goes to trial or arbitration. Fees for retail transactions, defined as purchases primarily for home or personal use, are different from fees for commercial transactions, which cover everything that is not retail.**

**Typical retail transactions include credit card transactions, professional services bills from doctors or other health professionals, lawyers' or accountants' bills when services rendered were for an individual's personal use, and insurance premiums for personal insurance. Commercial transactions typically include the sale of goods or services to a business or by a business to anyone using the product in another business. They include legal and accounting fees rendered to a business for business purposes as well as business insurance premiums.**

**For a retail transaction, this office charges a noncontingent retainer of _ _[*number*]_ _ percent of the amount of the receivable against a total contingent fee of _ _[*number*]_ _ percent before suit is filed. If suit is filed, an additional _ _[*number*]_ _ percent noncontingent retainer plus a deposit for court costs is required and the total contingent fee rises to _ _[*number*]_ _ percent. If the matter is set for trial or arbitration (regardless of whether it actually goes to trial or arbitration), the total contingent fee increases to _ _[*number*]_ _ percent, but there is no additional retainer.**

**For a commercial transaction, this office charges a noncontingent retainer of _ _[*number*]_ _ percent of the amount of the receivable, which is applied against a total contingent fee of _ _[*number*]_ _ percent before suit is filed. If a lawsuit becomes necessary, an additional _ _[*number*]_ _ percent noncontingent retainer plus a deposit for court costs is charged and the total contingent fee increases to _ _[*number*]_ _ percent. If the case is assigned to trial or arbitration (regardless of whether it actually goes to trial or arbitration), the total contingent fee increases to _ _[*number*]_ _ percent, but no additional retainer is required.**

**If you have already obtained a judgment, it is irrelevant whether the underlying transaction was commercial or retail, or whether the judgment is from a California court or a court of another jurisdiction. The noncontingent retainer to collect a judgment is _ _[*number*]_ _ percent of the unsatisfied balance of the judgment against a total contingent fee of _ _[*number*]_ _ percent. In addition, you shall advance necessary costs for enforcement proceedings and for any registration proceedings.**

**These contingent percentages are not set by law but are negotiable between us. You are responsible for costs, even if they exceed the amount requested as an advance.**

**In some situations, it is possible to obtain extraordinary prejudgment relief by a writ of attachment or a writ**

**of possession. Either remedy requires further legal work not generally performed in a collection lawsuit. If an extraordinary remedy is requested, a separate fee will be negotiated on a case-by-case basis.**

**These quoted fees apply only to the collection of a receivable. If a cross complaint is filed against you, or if an attack is made on the validity of the underlying judgment being enforced, a separate fee must be negotiated before any appearance is made. This fee may be based on a flat fee or an hourly fee. In certain circumstances, this office may decline to quote any fee for cross-complaints that are outside our field of expertise and for which you need to hire counsel with that expertise. If during our representation on a collection action you ask this office to perform other legal work for you, or work for a different legal entity, this office will make a separate fee agreement for that additional work. The separate fee agreement may be based on an hourly fee, a flat fee, a contingent fee, or any other arrangement we mutually agree on.**

**You may have insurance coverage that will be obligated to pay for your representation on a cross-complaint. Such coverage gives you the right of reimbursement from the insurance carrier, subject to whatever limitations the policy may have, but it does not relieve you of the responsibility of paying our fees. If the carrier has the right to name counsel of its choice to represent you, this office will cooperate with them. If the cross-complaint is based on a cause of action outside the scope of our practice, this office may request that you obtain other counsel. If, in this situation, you do not retain other counsel, this office may be forced to ask the court to allow us to be relieved as attorneys of record. If this action must be taken, it will be done in a way that does not jeopardize your rights.**

**If the debtor files for bankruptcy, this office will file a proof of claim on your behalf, but we will not attend bankruptcy court hearings. If a debtor in bankruptcy objects to your claim or lien, the matter will be handled on a case-by-case basis with a decision made depending on the facts as to whether this office will represent you in the bankruptcy court and whether an additional fee will be charged.**

**Often, debtors make partial payments on account. When a debtor makes a payment, we calculate the current fee due on that payment. We credit half of that fee against the amount of money you have paid as a retainer to that point, and we remit the other half to you. If only partial collections are made, this procedure sometimes results in the overall fee being higher than the quoted percentages. Naturally, if no money is collected, the fees will also be higher than the quoted contingent percentages because the retainers are noncontingent. No contingent fee is taken on the recovery of costs advanced by you. When collections are made by levy or other enforcement mechanism provided for by law, the enforcement costs are deducted from the amount collected, and the fee is then calculated on the net balance. At the final collection, all other costs are deducted from the amount collected and the fee is calculated on the net balance. The advanced costs are also returned to you at that time if they have been collected from the debtor. If the costs expended exceed the amount advanced, the excess is deducted from the total before the fee is calculated.**

**Some claims are based on written agreements stating that the prevailing party is entitled to an award of attorney fees. Some courts have an approved schedule of attorney fees and some courts award "reasonable" attorney fees. In either event, our contingency is calculated on the total of principal, interest, and attorney fees actually collected.**

**When a debtor makes payments on account by noncertified funds, this office deposits the debtor's check in our client trust account and allow 21 days for it to clear through the banking system. After that, this office automatically deducts our share of the fees and remits the balance to you. If the debtor pays in certified funds, we remit as soon as possible. Often, because the debtor makes checks payable directly to you, we will need to endorse the check in your name for deposit into our trust account. You grant us the authority to do so for all claims submitted to us under this fee agreement.**

**This office will have grounds to ask you to obtain other counsel if you or the creditor have misrepresented, or failed to disclose, material facts, or if you or the creditor fail to follow our advice in this matter. If this office asks you to obtain other counsel, you agree to do so and to execute a substitution of attorneys. You further agree to pay all outstanding fees and costs. If, in this situation, you do not retain other counsel, this office may be forced to ask the court to allow us to be relieved as attorney of record. If this must be done, it will be done in a way that does not jeopardize your rights.**

**By agreeing to the terms of this agreement, you grant this office a lien on the claim or cause of action, on any sum recovered by settlement, and on any judgment that may be recovered, for the fees and costs mentioned above. You further agree that we shall have all general, possessory, or retaining liens, and all**

**special or charging liens known to the common law. If you have a judgment against any third party as a result of work performed by this office, we shall be considered to be an Assignee of Record under Code of Civil Procedure §673 and shall have the right to enforce the judgment as Assignee of Record to the extent necessary to satisfy any unpaid fees and costs. Any suit by this office against you to recover attorney fees or costs shall give rise to the right of the prevailing party to collect reasonable attorney fees and costs incurred in any such action, including postjudgment attorney fees incurred in the enforcement process.**

**You have the right to seek arbitration of any and all fee disputes through the _ _[*name of county*]_ _ County Bar Association or the State Bar of California. This agreement shall be construed under the laws of the State of California and is considered to have been entered into in _ _[*name of county*]_ _ County, California.**

**You understand that no one at this office has made any representations about the successful termination of this action or the favorable outcome of any legal action that may be filed, and no one at this office has guaranteed that we will obtain reimbursement to you of any of the fees, costs, or expenses resulting from the prosecution or defense of this action. You further understand that we have made no representations about the collectability of the debt. You further expressly acknowledge that all our statements on these matters are statements of opinion only.**

**For claims that are within the geographic region where I maintain my office, currently _ _[*name of region*]_ _, which includes the counties of _ _[*names of counties*]_ _, I handle the claims directly. For claims elsewhere in California I reserve the right to forward the claim to other collection attorneys in the area where the debtor is located. For claims outside of California I will forward the claims to other collection attorneys in the area where the debtor is located. In any case, the fees to you remain the same; there is no additional fee for the other attorneys involved.**

**This is the complete agreement between this office and you. No change may be made and no waiver of any provision shall be valid or binding unless the change or waiver is in writing and signed by this office and you.**

**If any provision of this agreement is found by a court or an arbitrator of competent jurisdiction to be invalid and unenforceable, the other provisions of this agreement shall be valid and binding on the parties to this agreement.**

**Date:** _ _ _ _ _ _ _ _[*Name of law office*]_ _,
**By:** __[*Signature*]__
**Name:** _ _[*Typed name*]_ _
**Its:** _ _[*Title*]_ _

**I acknowledge receiving a copy of this fee agreement and agree to its terms. I understand that this agreement will remain in effect for all matters submitted to your office until notified by your office that a new fee agreement will be necessary. Based on these terms and conditions, I retain The Law Office of _ _[*name of law office*]_ _. I warrant that I have the requisite authority to sign on behalf of the client.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

**Legal name of client:**_____

**Name of person signing (please print):**_____

**Address of client:**_____

**If outside United States, country and postal codes:**_____

_____

**Telephone number of client:**_____

**Facsimile number of client:**_____

**E-mail address of client:**_____

**Legal entity of client:**_____

**If corporation, in good standing?**_____

**If fictitious business name, is FBN statement current?**_____

**Are you licensed by any government agency?**_____

**If yes, is your license current?**_____

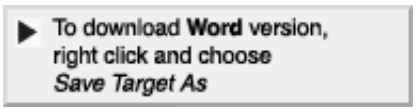
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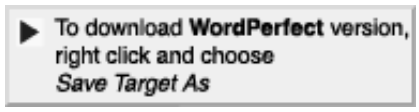
*Comment:* Attorneys who do not carry professional liability insurance must inform their clients in writing of that fact. Cal Rules of Prof Cond 3-410. If necessary, a provision to that effect should be added to this agreement.

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**Source:** Business Law/Debt Collection Practice in California/1 Representing the Creditor/§1.37 B. Form: Hourly Fee Agreement

## §1.37 B. Form: Hourly Fee Agreement




1.37-1 Hourly fee agreement

_ _[*Letterhead*]_ _

_ _[*Date*]_ _

_ _[*Name of client*]_ _
_ _[*Address*]_ _

**Dear _ _[*name of client*]_ _:**

**You have requested that this office provide you with legal representation. The general nature of the legal services to be provided is _ _[*specify*]_ _.**

**Our fees to handle this matter will be based on hourly charges of $_ _[*amount*]_ _ per hour. We will request a retainer of $_ _[*amount*]_ _, against which the hourly fee will be charged. In addition to this retainer, we will also request a deposit of $_ _[*amount*]_ _ for costs. It is reasonably foreseeable that the total expense to you, including attorney fees, will exceed $1000.**

**This office bills in increments of _ _[*specify*]_ _ of an hour, with a _ _[*specify*]_ _-hour minimum. For court appearances and other matters that take us out of the office, our time charges run from the time we leave the office until the time we return. This office does not charge a different rate for travel time or for waiting time at courthouses. This office occasionally performs legal research on computer databases that have charges. This research time will be billed at regular rates, and the costs will be billed as charged with no markup. If the costs exceed the amount advanced, the excess will be added to the total on the statement. You are responsible for the total costs expended as well as fees charged.**

**If it becomes necessary to hire consultants or experts, their employment will be cleared with you before they are hired. This office will request retainers or cost advancements for their services.**

**If during the course of representation as described in the first paragraph of this letter you ask this office to perform other legal work for you or to work for any different legal entity, a separate fee agreement must be made for this additional work. This separate agreement may be based on an hourly fee, a flat fee, a contingent fee, or any other arrangement we mutually agree on.**

**If the debtor files for bankruptcy, this office will file a proof of claim on your behalf but we will not attend bankruptcy court hearings. If a debtor in bankruptcy objects to your claim or lien, the matter will be handled on a case-by-case basis with a decision made depending on the facts as to whether this office will represent you in the bankruptcy court and whether an additional fee will be charged.**

**This office periodically examines our hourly rates. If the rate changes, you will be given 60 days' notice of the change. If you do not wish to continue to retain our services at the new rates, you will have the opportunity during that 60-day period to so notify us and to obtain new counsel. If you do not notify us of your objection to the new rates or do not obtain new counsel, the new rates will be effective at the end of the 60-day period for all work performed after the effective date of the new rates.**

**If a matter is to be assigned to trial or arbitration, we will request an additional retainer equal to the estimated charges for the actual time of the trial or arbitration. This retainer must be received by us at least 45 days before the trial date; it will be due immediately if the total notice of time for trial is less than 45 days.**

**You may have insurance coverage that will be obligated to pay for your representation. Such coverage gives you the right of reimbursement from the insurance carrier, subject to whatever limitations the insurance policy may have, but it does not relieve you of the responsibility of paying our fees. If the carrier has the right to name counsel of its own choice to represent you, this office will cooperate with them.**

**Statements are sent monthly, around the _ _[*number*]_ _ day of each month. Statements are due on receipt. You agree that the balance as stated on the billing is correct, conclusive, and binding on you, unless, within 20 days after the date the statement was mailed you notify us in writing of the item that you believe is incorrect. When you have a retainer balance that has not been used, the statement will reflect a negative balance due. Once the retainer has been used and other charges added, the statement will reflect a positive balance due. This office reserves the right to request an additional retainer in the same amount as the original retainer at any time. Statements are not mailed in any month in which there is no activity on the account unless there is a balance due.**

**An account is considered delinquent if it is not paid in full within 30 days. If an account becomes delinquent for legal fees, this office will have grounds to ask you to obtain other counsel. This office will also have grounds to ask you to obtain other counsel if you or the creditor have misrepresented, or failed to disclose, material facts, or if you or the creditor fail to follow our advice in this matter. If this office asks you to obtain other counsel, you agree to do so and to execute a substitution of attorneys. You further agree to pay all outstanding fees and costs. If, in this situation, you do not retain other counsel, this office may be forced to ask the court to allow us to be relieved as attorney of record. If this must be done, it will be done in a way that does not jeopardize your rights.**

**This office may retain any accrued fees and costs advanced from the amount finally collected by suit, settlement, or judgment. When a debtor makes payments on account by noncertified funds, this office deposits the debtor's check in our client trust account and allows 21 days for it to clear through the banking system. After that, this office automatically deducts our share of the fees and remits the balance to you. If the debtor pays in certified funds, we remit as soon as possible. Often, because the debtor makes the check payable directly to you, we will need to endorse the check in your name for deposit into our trust account. You grant us the authority to do so for all claims submitted to us under this fee agreement.**

**By agreeing to the terms of this agreement, you grant this office a lien on the claim or cause of action, on any sum recovered by settlement, and on any judgment that may be recovered, for the fees and costs mentioned above. You further agree that we shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law. If you have a judgment against any third party as a result of work performed by this office, we shall be considered to be an Assignee of Record under Code of Civil Procedure §673, and shall have the right to enforce the judgment as Assignee of Record to the extent necessary to satisfy any unpaid fees and costs. Any suit by this office against you to recover any attorney fees or costs shall give rise to the right of the prevailing party to collect reasonable attorney fees and costs incurred in such action, including any postjudgment attorney fees incurred in the enforcement process.**

**You have the right to seek arbitration of any and all fee disputes through the _ _[*name of county*]_ _ County Bar Association or the State Bar of California. This agreement shall be construed under the laws of the State of California and is considered to have been entered into in _ _[*name of county*]_ _ County, California.**

**You understand that no one at this office has made any representations about the successful termination of this action or the favorable outcome of any legal action that may be filed, and no one at this office has guaranteed that this office will obtain reimbursement to you of any of the fees, costs, or expenses resulting from the prosecution or defense of this action. You further understand that we have made no representations about the collectability of the debt. You further expressly acknowledge that all our statements on these matters are statements of opinion only.**

**For claims that are within the geographic region where I maintain my office, currently _ _[*name of region*]_ _, which includes the counties of _ _[*names of counties*]_ _, I handle the claims directly. For claims elsewhere in California I reserve the right to forward the claim to other collection attorneys in the area where the debtor is located. For claims outside of California I will forward the claims to other collection attorneys in the area where the debtor is located. In any case, the fees to you remain the same; there is no additional fee for the other attorneys involved.**

**This is the complete agreement between this office and you. No change may be made and no waiver of any**

**provision shall be valid or binding unless the change or waiver is put in writing and signed by this office and you.**

**If any provision of this agreement is found by a court or an arbitrator of competent jurisdiction to be invalid and unenforceable, the other provisions of this agreement shall be valid and binding on the parties to this agreement.**

**Date:** _ _ _ _ _ _ _ _ _[*Name of law office*]_ _,
**By:** __[*Signature*]__
**Name:** _ _[*Typed name*]_ _
**Its:** _ _[*Title*]_ _

**I acknowledge receiving a copy of this fee agreement and agree to its terms. I understand that this fee agreement will remain in effect for all matters submitted to your office until notified by your office that a new fee agreement will be necessary. Based on these terms and conditions, I retain The Law Office of _ _[*name of law office*]_ _. I warrant that I have the requisite authority to sign on behalf of the client.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

**Legal name of client:**_____

**Name of person signing (please print):**_____

**Address of client:**_____

**If outside United States, country and postal codes:**_____

_____

**Telephone number of client:**_____

**Facsimile number of client:**_____

**E-mail address of client:**_____

**Nature of legal entity of client:**_____

**If corporation, in good standing?**_____

**If fictitious business name, is FBN statement current?**_____

**Are you licensed by any government agency?**_____

**If yes, is your license current?**_____

**Agency name:**_____

*Comment:* Attorneys who do not carry professional liability insurance must inform their clients in writing of that fact. Cal Rules of Prof Cond 3-410. If necessary, a provision to that effect should be added to this agreement.

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# 2

# The Fair Debt Collection Practices Acts

**Scott J. Hyman**

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# I. STATUTORY BACKGROUND AND PREEMPTION

## §2.1 A. Purposes of the State and Federal Acts

Whether pursuing or defending consumer debt collection claims, practitioners must beware of the federal and state laws governing the collection of consumer debts.

Debt collection practices in California are governed by the federal Fair Debt Collection Practices Act (15 USC §§1692-1692p) and the California Rosenthal Fair Debt Collection Practices Act (CC §§1788-1788.33) (Rosenthal Act), both enacted in 1977. These two Acts (usually known together as the FDCPA) are the primary means by which the collection of consumer debts is regulated. They define prohibited conduct and give debtors statutory causes of action against collectors who engage in prohibited conduct.

The Federal Trade Commission (FTC) website contains reprints of FTC Staff Opinion Letters from April 1988 to May 2002, as well as the FTC Staff Commentary and annual report on the FDCPA (see the Directory). Although neither the Commentary nor the Opinion Letters are binding on a court, they represent the FTC staff's current enforcement position except in unusual circumstances. See 16 CFR §§1.1-1.4; FTC Staff Commentary, §813(4).

Congress enacted the federal FDCPA because it found abundant abusive, deceptive, and unfair debt collection practices that contributed to bankruptcies, familial instability, job loss, and invasion of privacy; inadequate existing laws to protect consumers or to provide redress for these injuries; and the need to regulate the collection of consumer debts and provide uniform laws to protect against unethical debt collection practices. 15 USC §1692. California's legislature responded similarly by enacting the Rosenthal Act to ensure that debt collectors and debtors exercise their responsibilities to each other with fairness, honesty, and due regard for the rights of the other. CC §1788.1(a)(2).

This chapter examines the scope of prohibited and regulated conduct under the federal and state acts.

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### §2.1A B. Statutory Preemption

The federal Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692p) supplants California law only to the extent of any inconsistency. 15 USC §1692n. A state law is not inconsistent if "the protection the law affords any consumer is greater than the protection provided" by the FDCPA. But the FTC must exempt by regulation any class of collection practices regulated by a state law that is "substantially similar" to the FDCPA if there is adequate enforcement under state law. 15 USC §1692o. Thus, a state law may govern a particular case even if the FDCPA is more stringent. Federal law does not supplant California's right to regulate the conduct of persons otherwise excluded from coverage by the FDCPA. *Pirouzian v SLM Corp.* (SD Cal 2005) 396 F Supp 2d 1124; *Alkan v Citimortgage, Inc.* (ND Cal 2004) 336 F Supp 2d 1061, 1064 (Rosenthal Act regulation of bank's debt collection practices did not constitute lending regulation subject to federal preemption).

**NOTE:** Neither the Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692p) nor the Rosenthal Act (CC §§1788-1788.33) usually displaces common law debt collection torts. 15 USC §1692n; CC §1788.32. *Albright v Allied Int'l Credit Corp.* (CD Cal, Aug. 25, 2003, No. CV034828CAS(RZX)) 2003 WL 22350928; *Joseph v J.J. Mac Intyre Cos., LLC* (ND Cal 2002) 238 F Supp 2d 1158.

Regulation of debt collection activities may be preempted or supplanted to the extent such regulation interferes with other federal statutory schemes. *Pirouzian v SLM Corp.* (SD Cal 2005) 396 F Supp 2d 1124 (Higher Education Act and Fair Credit Reporting Act preempted state Rosenthal Act). State law may not, however, be applied extraterritorially. *Pollock v Bay Area Credit Serv., LLC* (SD Fla, Aug. 13, 2009, No. 08-61101-Civ) 2009 US Dist Lexis 71169; *Yu v Signet Bank/Virginia* (1999) 69 CA4th 1377, 82 CR2d 304.

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### §2.1B C. Relationship Between State and Federal FDCPA and Federal Bankruptcy Code

The relationship between the FDCPA and the federal Bankruptcy Code is not well settled, and practitioners should proceed with caution. Post-petition or post-discharge inclusion of the "mini-*Miranda*" warnings (see §2.22) or sending of the 30-day validation letter (see §2.23) could run afoul of the automatic stay or discharge injunction. (11 USC §§362, 524). Hence, at least one court has held that a debt collector faced with such a "Hobson's choice" should follow the federal bankruptcy laws. *Mallory v Phillips* (MD Ga 1996) 197 BR 721.

When the FDCPA claim itself arises post-petition or post-discharge, or when the FDCPA claim is grounded in a violation of federal bankruptcy laws, jurisdictional and preemption rules remain unsettled. For FDCPA claims grounded in a violation of the Bankruptcy Code, the circuit courts split on whether the debt collector must have knowledge of the debtor's bankruptcy to violate the FDCPA. Compare *Hubbard v National Bond & Collection Assocs.* (D Del 1991) 126 BR 422, aff'd (3d Cir 1991) 947 F2d 935 (only knowing violation is actionable), with *Turner v J.V.D.B. & Assocs., Inc.* (7th Cir 2003) 330 F3d 991 (knowledge not dispositive). Creditor knowledge of the bankruptcy will not necessarily be imputed to the debt collector. *Faust v Texaco Ref. & Mktg., Inc. (In re Faust)* (MD Ga 1998) 270 BR 310). But the debt collector must cease collection once notified of the bankruptcy. *Wagner v Ocwen Fed. Bank* (ND Ill, Aug. 28, 2000, No. 99 C 5404) 2000 US Dist Lexis 12463. See *Hyman v Tate* (7th Cir 2004) 362 F3d 965 (bona fide error defense available to collector who sent letter to debtor after debtor filed for bankruptcy, because collector had reasonable procedures in place to avoid sending such erroneous letters).

Some courts have found no impediment to maintaining such FDCPA claims outside the bankruptcy court. See *Peeples v Blatt* (ND Ill, Aug. 14th, 2001, No. 00 C 7028) 2001 US Dist Lexis 11869. Other courts require the FDCPA claim to be maintained in the bankruptcy court. See *Gray-Mapp v Sherman* (ND Ill 1999) 100 F Supp 2d 810. Still others find that the Bankruptcy Code preempts the FDCPA claim altogether. See *Bessette v Avco Fin. Servs., Inc.* (1st Cir 2000) 230 F3d 439, 448; *Walls v Wells Fargo Bank* (ED Cal 2000) 255 BR 38, aff'd (9th Cir 2002) 276 F3d 502. See also *Wan v Discover Fin. Servs., Inc.* (ND Cal 2005) 324 BR 124 (communication between debtor's and creditor's counsel in bankruptcy proceeding regulated by Bankruptcy Code, not FDCPA); *In re Lasky* (Bankr CD Cal 2007) 364 BR 385. For an attempted reconciliation of conflicting approaches, see *Randolph v IMBS, Inc.* (7th Cir 2004) 368 F3d 726.

To the extent an FDCPA claim may be maintained outside the bankruptcy court, a Chapter 7 debtor may assert a prepetition cause of action in state court only if the Chapter 7 trustee has abandoned it. See, *e.g.*, *Billingham v Wynn & Wynn (In re Rothwell)* (Bankr D Mass 1993) 159 BR 374, 377; *Harris v St. Louis Univ.* (ED Mo 1990) 114 BR 647. Absent abandonment of the asset, the trustee remains the sole representative of the estate and the only person with the authority to pursue prepetition causes of action. *Harris v St. Louis Univ., supra*. See 11 USC §323. This is true even when the debtor-plaintiff fails to properly schedule the cause of action as an asset in the bankruptcy schedules. An unscheduled cause of action remains property of the bankruptcy estate, even after a bankruptcy case is closed, until the asset is administered or formally abandoned by the trustee. 11 USC §554(d). The debtor-plaintiff's failure to properly schedule a cause of action as an asset may also give rise to a defense of judicial estoppel. See *Hamilton v State Farm Fire & Cas. Co.* (9th Cir 2001) 270 F3d 778.

California courts recognize under the Supremacy Clause that causes of action accruing before the filing of the bankruptcy petition remain property of the bankruptcy estate absent abandonment by the trustee. The debtor-plaintiff is divested of standing to bring such claims in state court. *Haley v Dow Lewis Motors, Inc.* (1999) 72 CA4th 497, 506, 85 CR2d 352; *Cloud v Northrop Grumman Corp.* (1998) 67 CA4th 995, 1001, 79 CR2d 544; *Bostanian v Liberty Savings Bank* (1997) 52 CA4th 1075, 61 CR2d 68.

The standing rules for Chapter 13 debtors are less clear. Chapter 7 debtors may be distinguishable from Chapter 13 debtors for purposes of determining whether they possess standing to prosecute pre-petition claims. *Kelsey v Waste Mgmt. of Alameda County* (1999) 76 CA4th 590, 90 CR2d 510; see *Mejia v Marauder Corp.* (ND Cal, Mar. 15, 2007, No. C06-00520 HRL) 2007 US Dist Lexis 21313. However, a strong argument exists that *Kelsey* was wrongly decided and that claims arising before confirmation of the plan are barred under the doctrine of collateral estoppel or res judicata. Numerous courts have held in a Chapter 11 reorganization context that a confirmed plan has res judicata effect, precluding the debtor from asserting claims arising before confirmation. See *Conrad v Bank of America* (1996) 45 CA4th 133, 53 CR2d 336, disapproved on other grounds in *Lovejoy v AT&T Corp.* (2001) 92 CA4th 85, 95, 111 CR2d 711; *Heritage Hotel Ltd. Partnership I v Valley Bank of Nevada (In re Heritage Hotel Partnership I)* (BAP 9th Cir 1993) 160 BR 374, 378.

In contrast, although the lower court decisions apparently are split on the issue (see *Mejia v Marauder Corp., supra*) at least three circuits have concluded that Chapter 13 debtors have standing in their own right to pursue pre-petition claims even when those claims belong to the bankruptcy estate. The Second Circuit has held that, based on the legislative history of 11 USC §1303, "certainly it is intended that the debtor has the power to sue and be sued." *Olick v Parker & Parsley Petroleum Co.* (2d Cir 1998) 145 F3d 513, 516. The *Olick* court further reasoned:

> It is also the case that in Chapter 13 proceedings (unlike Chapter 7 proceedings) the creditors' recovery is drawn from the debtor's earnings, not from the assets of the bankruptcy estate; it is only the Chapter 13 debtor who stands to gain or lose from efforts to pursue a cause of action that is an asset of the bankruptcy estate. Accordingly, the trustee's participation in such an action is generally not needed to protect the Chapter 13 creditors' rights.

The Seventh Circuit has similarly held that it would "frustrate the essential purpose of §1306 to grant the debtor possession of the chose in action yet prohibit him from pursuing it for the benefit [of] the estate." *Cable v Ivy Tech State College* (7th Cir 1999) 200 F3d 467, 472. The Third Circuit has concluded that Chapter 13 debtors are empowered to maintain suit even after a bankruptcy trustee has been appointed in their case, observing that an essential feature of a Chapter 13 case is that the debtor retains possession of, and may use, all the property of his or her estate, including prepetition causes of action pending confirmation of the debtor's plan. *Maritime Elec. Co., Inc. v United Jersey Bank* (3d Cir 1991) 959 F2d 1194, 1209 n2, reinstated at (3d Cir Mar. 24, 1992, No. 90-6057) 1992 US App Lexis 5144.

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### §2.1C D. California's Partial Adoption of Federal FDCPA

Civil Code §1788.17 requires debt collectors to comply with the federal FDCPA, but not, with certain exceptions, the mini-*Miranda* and debt validation procedures required by 15 USC §§1692e and 1692g. See §2.22A. Under CC §1788.17:

> [N]otwithstanding any other provision of this title, every debt collector collecting or attempting to collect a consumer debt shall comply with the provisions of Sections 1692b to 1692j, inclusive, of, and shall be subject to the remedies in section 1692k of Title 15 of the United States Code. However, subsection (11) of section 1692e and section 1692g shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of section 1692a of Title 15 of the United States Code or that person's principal.… The reference to federal codes in this section refer to those codes as they read January 1, 2001.

The primary purpose for enactment of CC §1788.17 was to provide for remedies consistent with 15 USC §1692k, which includes the class action remedy. *Abels v JBC Legal Group, PC* (ND Cal 2005) 227 FRD 541, 548.

Little authority addresses the complicated interplay among incorporated federal law, FTC interpretations, and existing state law. When conflicts exist, California courts generally attempt to reconcile them, if reasonably possible. *Walters v Weed* (1988) 45 C3d 1, 9, 246 CR 5. If two statutes conflict, courts generally give effect to the most recently enacted law. *Bledstein v Superior Court* (1984) 162 CA3d 152, 208 CR 428. However, the California Attorney General has opined that the term "notwithstanding any other provisions of this title" declares the legislative intent for the specific statute (CC §1788.17) to control. 85 Ops Cal Atty Gen 215 (2002).

The federal FDCPA did not prevent the enactment of CC §1788.17. *Alkan v Citimortgage, Inc.* (ND Cal 2004) 336 F Supp 2d 1061. Rosenthal Act claims may be lodged independently of federal FDCPA claims. *Hancock v Receivables Mgmt. Solutions, Inc.* (ND Cal, May 30, 2006, No. C 06-1365 CW) 2006 US Dist Lexis 38639; *Hapin v Arrow Fin. Servs., Inc.* (ND Cal 2006) 428 F Supp 2d 1057. While violations of the FDCPA may constitute a violation of the Rosenthal Act; the converse is not true. *Wade v Regional Credit Ass'n* (9th Cir 1996) 87 F3d 1098; *Luna v Alliance One Receivables Mgmt., Inc.* (ND Cal, Feb. 16, 2006, No. C-05-04751 JF) 2006 US Dist Lexis 25187; *Johnson v Phillips & Cohen Assocs., Ltd.* (ND Cal, Aug. 15, 2006, No. C 05-05176 JW) 2006 US Dist Lexis 60697.

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## II. PERSONS TO WHOM THE FDCPA APPLY

### §2.2 A. Federal Act

The federal FDCPA regulates the conduct of debt collectors and applies to collection agencies. A "debt collector" is any person who uses any instrumentality of interstate commerce or the mails (15 USC §1692a(6)):

- In any business whose principal purpose is debt collection;
- To regularly collect or attempt to collect, directly or indirectly, debts owed or asserted to be owed another, including any creditor who, in the process of collecting his or her own debts, uses a name other than his or her own, which would indicate that a third person is collecting or attempting to collect such debts (*Romine v Diversified Collection Servs., Inc.* (9th Cir 1998) 155 F3d 1142 (Western Union "indirectly" collected debts by sending telegram-like letters to debtors to obtain unlisted telephone numbers); *Roybal v Equifax* (ED Cal, May 18, 2006, No. 2:05-cv-1207-MCE-KLM) 2006 US Dist Lexis 31709 (credit reporting agency not a "debt collector"); *Pflueger v Auto Fin. Group, Inc.* (CD Cal, Apr. 23, 1999, No. CV-97-9499) 1999 US Dist Lexis 16701 (repossession companies)); or
- In any business of which the principal purpose is the enforcement of security interests.

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### §2.3 1. Attorneys May Be "Debt Collectors"

Attorneys who regularly collect debts on their clients' behalf generally are "debt collectors" under the federal FDCPA. *Heintz v Jenkins* (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489. The factual inquiry centers on whether the attorney's principal business is the collection of consumer debts. See *Garrett v Derbes* (5th Cir 1997) 110 F3d 317 (attorney collecting debts from over 600 individuals in nine months was debt collector); *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507 (attorney with 80 percent of practice in debt collection was debt collector); *Scott v Jones* (4th Cir 1992) 964 F2d 314 (attorney with 70-80 percent of fees in debt collection was debt collector); *Crossley v Lieberman* (3d Cir 1989) 868 F2d 566 (attorney who filed nearly 200 lawsuits in 18 months and had 10-year relationship with client was debt collector); *Riley v Giguiere* (ED Cal, June 19, 2009, No. CIV S-06-2126 LKK/KJM) 2009 US Dist Lexis 51887 (40-50 percent of total work renders attorney subject to FDCPA); *Newman v Checkrite Cal., Inc.* (ED Cal 1995) 912 F Supp 1354 (attorneys subject to FDCPA even if acting in their capacity as litigators).

**PRACTICE NOTE:** In-house counsel should be careful not to suggest that they are anything but corporate counsel; in-house counsel who meet the criteria of debt collectors can be held subject to the FDCPA. See, *e.g., Laws v Cheslock* (ND Ill, Mar. 8, 1999, No. 98 C 6403) 1999 US Dist Lexis 3416; *Dorsey v Morgan* (D Md 1991) 760 F Supp 509. See also §2.20.

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### §2.4 2. Creditors Are Not "Debt Collectors"

The federal FDCPA specifically excludes creditors collecting their own consumer debts and the creditor's officers or employees collecting debts on the creditor's behalf. 15 USC §1692a(6); *Barbera v WMC Mortgage Corp* (ND Cal, Jan. 19, 2006, No. C 04-3738 SBA) 2006 WL 167632; *Showalter v Chase Manhattan/Providian* (ND Cal, Aug. 19, 2005, No. C 05-00548 WHA) 2005 US Dist Lexis 45465. See also 85 Ops Cal Atty Gen 215 (2002). Generally, the creditor exemption should be resolvable on a motion to dismiss. *Showalter v Chase Manhattan/Providian* (ND Cal, Aug. 19, 2005, No. C 05-00548 WHA) 2005 WL 2000943; *Peterson v Wells Fargo Bank* (ED Cal Aug. 17, 2000, No. CV-99-6389 REC/SMS) 2000 US Dist Lexis 18372. But see *Denkers v United Compucred Collections, Inc.* (ND Cal, Nov. 27, 1996, No. C-96-2946 MHP) 1996 US Dist Lexis 22332 (further discovery allowed on Fed R Civ P 56(f) motion to determine relationship between collector and creditor PG&E). A creditor collecting under a name other than the creditor itself, however, can be subject to the federal act. 15 USC §1692a(6). *Thomas v AmeriCredit Fin. Corp.* (ND Cal, July 6, 2007, No. C 07-02324 SI) 2007 US Dist Lexis 53136. But, a creditor clearly collecting "from the collection unit of the (creditor's name)" is not collecting in the name of another since the creditor is not using "a name other than his own in that instance." FTC Staff Commentary §803(6), note 3.

The term "creditor" includes any person who offers or extends credit creating a debt or to whom a debt is owed, but it does not include a person who receives an assignment or transfer of a debt solely for the purpose of facilitating collection. 15 USC §1692a(4). See §2.5 on debt assignees. The mere fact that an entity purchases a debt for collection from the original creditor does not allow that entity to insulate itself from the FDCPA. *Ballard v Equifax Check Servs., Inc.* (ED Cal 1998) 27 F Supp 2d 1201.

Debt collectors subject to the federal or state FDCPA (as opposed to creditors) may be vicariously liable for the intentional conduct of their employees, agents and, in some instances, their independent contractors. *Myers v Bennett Law Offices* (9th Cir 2001) 238 F3d 1068; *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507; *Irwin v Mascott* (ND Cal 2000) 112 F Supp 2d 937. Creditors not otherwise subject to the Act, however, may not be brought within its parameters through the doctrine of vicarious liability. See, *e.g., Randolph v IMBS, Inc.* (7th Cir 2004) 368 F3d 726; *Wadlington v Credit Acceptance Corp.* (6th Cir 1996) 76 F3d 103. But see *Baker v Citibank* (SD Cal 1998) 13 F Supp 2d 1037.

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### §2.5 3. Debt Assignees

An "assignee for collection" qualifies as a debt collector under the federal FDCPA if it otherwise qualifies as a debt collector. *Volden v Innovative Fin. Sys., Inc* (9th Cir 2006) 440 F3d 947 (check authorization services); *Kimber v Federal Fin. Corp.* (MD Ala 1987) 668 F Supp 1480 (assignee corporation formed solely to collect debts subject to the Act). Assignment of debts already in default suggests an "assignee for collection." See *Wadlington v Credit Acceptance Corp*. (6th Cir 1996) 76 F3d 103 (contract not in default when assigned; assignee not debt collector); *Perry v Stewart Title Co.* (5th Cir 1985) 756 F2d 1197, 1208 (loans not in default when assigned; assignee not debt collector). See also *Hambrick v Wells Fargo Bank, N.A.* (ND Miss, June 2, 2009, No. 1:07CV258-P-D) 2009 US Dist Lexis 46359 (Fed R Civ P 1266 motion granted, discovery request disallowed under *Bell Atlantic Corp. v Twombly* (2007) 550 US 544, 167 L Ed 2d 929, 127 S Ct 1955).

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### §2.6 4. Subsidiaries and Loan Servicers

The federal FDCPA excludes from coverage corporate subsidiaries or persons collecting on behalf of another person if (a) both are related by common ownership or affiliated by corporate control, (b) the collector collects only for persons to whom it is so related or affiliated, and (c) the collector's principal business is not debt collection. 15 USC §1692a(6)(B); *Fedele,* FTC Staff Opinion Letter (Aug. 30, 1996). Compare *Phillips v Periodical Publishers Serv. Bureau* (SC 1989) 388 SE2d 787 (subsidiary's use of envelopes with return address listing only collection agency vitiated subsidiary exemption) with *Beck v Alliance Funding Co.* (D Conn 2000) 113 F Supp 2d 274; *Meads v Citicorp Credit Servs.* (SD Ga 1988) 686 F Supp 330 (bank's subsidiary service company exempt from definition of debt collector as long as debt collection not "primary function"); *Pavone v Citicorp Credit Servs., Inc.* (SD Cal 1997) 60 F Supp 2d 1040 (consumer bears burden of proof).

Consequently, wholly owned mortgage loan servicers and student loan servicers generally are not subject to the federal Act because their principal business is not debt collection and because the loans do not concern "a debt which was originated by such person; [or] a debt which was not in default at the time it was obtained by such person." 15 USC §1692a(6)(F)(ii)-(iii). The congressional history of 15 USC §1692a(6) indicates that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned:

> the committee does not intend the definition [of debt collector] to cover … the collection of debts, such as mortgages and student loans, by persons who originated such loans; [or] *mortgage service companies and others who service outstanding debts for others*, so long as the debts were not in default when taken for servicing. [Emphasis added.]

S Rep 95-382, 95th Cong, 1st Sess (1977), reprinted in 1977 US Code Cong & Ad News 1695, 1698. See also *Caballero v Ocwen Loan Servicing, Inc.* (ND Cal, May 29, 2009, No. C-09091921 RMW) 2009 US Dist Lexis 45213; *Pineda v Saxon Mortgage Servs., Inc.* (CD Cal, Dec. 10, 2008, No. SACV 08-1187 JVS (ANx)) 2008 WL 5187813 (unpublished); *Bailey v Security Nat'l Servicing Corp.* (7th Cir 1998) 154 F3d 384; *Whitaker v Ameritech Corp.* (7th Cir 1997) 129 F3d 952, 958; *Perry v Stewart Title Co.* (5th Cir 1985) 756 F2d 1197, 1208, rehearing granted in part on different issue (5th Cir 1985) 761 F2d 237; *Barber v National Bank* (Alaska 1991) 815 P2d 857, 860. On debt assignees, see §2.5.

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### §2.7 5. Other Excluded Persons

The federal FDCPA also excludes the following from its coverage:

- United States or state employees acting in their official capacity (15 USC §1692a(6)(C); *Heredia v Green* (ED Pa 1980) 504 F Supp 896, aff'd (3d Cir 1981) 667 F2d 392);
- Process servers (15 USC §1692a(6)(D));
- Nonprofit consumer credit counseling services (15 USC §1692a(6)(E); *Yang v DTS Fin. Group* (SD Cal 2008) 570 F Supp 2d 1257; and
- Persons collecting debts (a) incidental to a bona fide fiduciary obligation or escrow arrangement, (b) originated by such person, (c) not in default at the time it was obtained by such person, or (d) obtained by such person as a secured party in a commercial credit transaction (15 USC §1692a(6)(F); *Rowe v Educational Credit Mgmt. Corp.* (9th Cir 2009) 559 F3d 1028; *Gruen v EdFund* (ND Cal, July 15, 2009, No. C 09000644 JSW) 2009 US Dist Lexis 60396; *Virgen v Sallie Mae* (ED Cal, May 23, 2007, No. Civ S-06-0431 FCD DAD PS) 2007 US Dist Lexis 37509; *Del Campo v American Corrective Counseling Servs.* (ND Cal, Feb. 8, 2007, No. C 01-21151 JW) 2007 US Dist Lexis 12387).

The determination of whether an account is in default at the time of assignment turns on the language of the instrument creating the obligation and, in the absence of any controlling language, on the creditor's reasonable, written guidelines. *De Mayo,* FTC Staff Opinion Letter (May 1, 2000, revised May 23, 2002). See also *McKinney v Cadleway Prop., Inc.* (7th Cir 2008) 548 F3d 496 (terms of instrument control default determination); *Alibrandi v Financial Outsourcing Servs., Inc.* (2d Cir 2003) 333 F3d 82, 88 (rejecting due date approach for default, leaving parties to contractually define default); *Hartman v Meridian Fin. Servs., Inc.* (WD Wis 2002) 191 F Supp 2d 1031; but see *Magee v AllianceOne, Ltd.* (SD Ind 2007) 487 F Supp 2d 1024 (disagreeing with *Alibrandi* when agreement leaves it solely to creditor's discretion whether to declare default; allowing creditors to unilaterally determine when and if account is in default would contravene express purpose of FDCPA). The FTC cautioned that it would not find guidelines "reasonable" that contain one set of criteria for accelerating the balance, but another set of criteria for determining whether the collector is subject to the FDCPA. *De Mayo,* FTC Staff Opinion Letter (May 1, 2000, revised May 23, 2002). Entities purchasing defaulted loans as part of a pool or portfolio become subject to the Act only for those defaulted loans (*Albon,* FTC Staff Opinion Letter (Dec. 5, 1990)).

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### B. California Act

### §2.8 1. Comparison With Federal Act

Under the Rosenthal Act, a debt collector is "any person who, in the ordinary course of business, regularly, and on behalf of himself or herself or others, engages in debt collection." CC §1788.2(c); *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 114 CR2d 558. See *Arikat v JP Morgan Chase & Co.* (ND Cal 2006) 430 F Supp 2d 1013 (plaintiff must plead within statutory definition). The Rosenthal Act differs from the federal FDCPA as to who is covered (see §§2.2-2.7) in three primary ways:

- California law applies to persons collecting their own consumer debts and their employees.
- California law requires only that the person be *regularly* engaged in debt collection, which is a looser standard than the federal requirement that the person be *primarily* engaged in debt collection.
- California law exempts attorneys from coverage under the Rosenthal Act (CC §1788.2(c); *Lutge v Eskanos Adler, P.C.* (ND Cal May 24, 2007, No. C 06-07128 JSW) 2007 US Dist Lexis 40570); *Carney v Rotkin, Schmerin & McIntyre* (1988) 206 CA3d 1513, 254 CR 478, overruled on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638. But see *Abels v JBC Legal Group, PC* (ND Cal 2005) 227 FRD 541, 548 (attorneys, but not law firms, exempt from Rosenthal Act; no analysis of *Carney* decision exempting law firms). On attorneys under the federal Act, see §2.3.

**PRACTICE NOTE:** Civil Code §1788.17 does *not* incorporate the definitions section of 15 USC §1692a. Hence, whether an individual or entity is a "debt collector" under state law will be determined by the definitions applicable under CC §1788.2. *Aquino v Capital One Fin. Corp.* (ND Cal, Apr. 14, 2008, No. 08-0479) 2008 US Dist Lexis 80328.

The loan servicer exemption under federal law (see 15 USC §1692a(6); see also §2.6) apparently is not incorporated by CC §1788.17. The legislature's partial incorporation of federal law makes it unclear whether a loan servicer servicing accounts that were not in default at the time of the assignment, or are not yet in default, should now be considered a "debt collector" under the state law. Nothing in the legislative history of CC §1788.17 suggests that the California legislature meant to regulate as "debts" the mere servicing of accounts that are not in default, or that were not in default at the time of the assignment. See 85 Ops Cal Atty Gen 215 (2002) (Rosenthal Act applies only to debts which have become delinquent). Even for accounts in default, a loan servicer may remain exempt under California law from the "mini-*Miranda*" and debt validation requirements of federal law. See §§2.22-2.23.

The California Attorney General has concluded that the Rosenthal Act conforms to federal law. 85 Ops Cal Atty Gen 215 (2002).

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### §2.9 2. California's Regulation of Attorney Practices

Although attorneys enjoy an exemption from liability under the Rosenthal Act, the federal Act in large part applies to attorneys under Bus & P C §6077.5, which imposes ethical obligations on attorneys and their employees. For example:

- The attorney's employees must identify themselves, their employer, and their title or capacity. Bus & P C §6077.5(b).
- Attorneys and their employees must comply with the time, place, and manner restrictions of the federal Act. Bus & P C §6077.5(c). See §2.15.
- If the debtor notifies the attorney or the attorney's employee in writing that it refuses to pay a debt or wishes the attorney to cease communicating with the debtor, neither the attorney nor the attorney's employee may communicate further with the debtor regarding the debt, except to notify the debtor that efforts are being terminated, that specified remedies may be invoked, or that it intends to invoke specified remedies. Bus & P C §6077.5(d).
- Attorneys and their employees must not threaten to take nonjudicial action to dispose of or disable property if there is no present right to possession of the property claimed as collateral through an enforceable security interest, there is no present intention to take possession of the property, or the property is exempt by law from such disposition or disablement. Bus & P C §6077.5(e).
- Attorneys and their employees must not cause charges to be made to any person for any communication by concealing the true purposes of the communication. Bus & P C §6077.5(f).
- Attorneys and their employees must comply with the federal Act's 5-day validation requirement and rules on multiple debts. Bus & P C §6077.5(g)-(h).

A willful breach of the Business and Professions Code by the attorney or his or her employee can be grounds for attorney discipline but not for civil liability. Bus & P C §6077.5(i). But violation of the FDCPA's strict liability provisions cannot, by itself, create a violation of Bus & P C §6068(a).

**PRACTICE NOTE:** The exemption enjoyed by attorneys under state law is not affected by the incorporation of the federal FDCPA by CC §1788.17 because that section does not incorporate the federal Act's definition of "debt collector." Attorneys, however, remain regulated by the federal Act to the extent that they qualify as "debt collectors" under federal law.

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## III. DEBTS TO WHICH THE FDCPA APPLY

### A. Federal Act

### §2.10 1. Definition of "Debt"

The federal FDCPA applies to consumer obligations only, governing (15 USC §1692a(5))

> any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

See generally Anno, *What Constitutes "Debt" and "Debt Collector" For Purposes of Fair Debt Collection Practice Act,* 62 ALR Fed 552 (2001), 159 ALR Fed 121 (2000).

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### §2.10A 2. "Consumer" Requirement

To determine whether a debt is "personal" under the federal FDCPA, the court examines its intended use. *Bloom v I.C. Sys.* (9th Cir 1992) 972 F2d 1067. See also *Bush v Loanstar Mortgagee Servs., LLC* (ND Cal 2003) 286 F Supp 2d 1210 (prior characterization of loan as business obligation does not judicially estop plaintiff from arguing consumer purpose of debt). A loan is not personal merely because it is informal or may have been made for personal reasons. 972 F2d at 1068. The transaction must be examined as a whole, and neither the lender's motives nor the manner in which the loan is documented controls. 972 F2d at 1068. In *Slenk v Transworld Sys. Inc.* (9th Cir 2001) 236 F3d 1072, the court of appeals examined both point-of-sale conduct as well as the buyer's use of the collateral after purchase. The court of appeals also rejected the rule that a sole proprietor's purchase necessarily constitutes "personal" use under the FDCPA. 236 F2d at 1076. See also *Yee v Ventus Capital Services, Inc.* (ND Cal, May 12, 2006, No. C 05-03097 RS) 2006 US Dist Lexis 32180; *Ballard v Equifax Check Servs., Inc.* (ED Cal 2001) 158 F Supp 2d 1163 (placing burden on debt collector to demonstrate that transactions by members of class were "not consumer in nature"). However, in *Martin v Wells Fargo Bank* (2001) 91 CA4th 489, 499, 110 CR2d 653, the court of appeal recognized in other contexts that "[t]he uncertainty caused by the potentially shifting status of the goods is not desirable in the commercial world." Hence, the court of appeal adopted the rule that it is the parties' intent at the time they enter into the contract, rather than the purpose for which the credit is used, that controls. The intended use is determined at the time the debt is incurred, not at the time of collection. See also *Miller v McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC* (7th Cir 2000) 214 F3d 872.

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### §2.10B 3. Examples

Courts have applied the FDCPA to the following:

- Debts arising from a vacation timeshare (*Herbert v Monterey Fin. Servs.* (D Conn 1994) 863 F Supp 76);
- Medical bills (*Savino v Computer Credit, Inc.* (2d Cir 1998) 164 F3d 81); and
- Dishonored checks, the corpus of which was for a consumer debt (*Charles v Lundgren & Assocs.* (9th Cir 1997) 119 F3d 739; *Schwarm v Craighead* (ED Cal 2008) 552 F Supp 2d 1056, 1070 n10; see *Irwin v Mascott* (ND Cal 1999) 96 F Supp 2d 968 (personal check is prima facie evidence that check was for consumer purposes and therefore subject to Act)).

The following obligations are not consumer debts and therefore not subject to the federal FDCPA:

- Child support (*Mabe v G.C. Servs. Ltd. Partnership* (4th Cir 1994) 32 F3d 86; *Brown v Child Support Advocates* (D Utah 1994) 878 F Supp 1451);
- Loans between friends for investment purposes (*Bloom v I.C. Sys., supra*);
- A private road assessment (*Nance v Petty, Livingston, Dawson, & Devening* (WD Va 1994) 881 F Supp 223);
- Commercial debts (*Bank of Boston Int'l v Arguello Tefel* (ED NY 1986) 644 F Supp 1423); and
- Obligations or judgments arising from damages awarded in a state court tort judgment (*Fleming v Pickard* (9th Cir, Sept. 9, 2009, No. 07-35979) 2009 US App Lexis 20129; *Turner v Cook* (9th Cir 2004) 362 F3d 1219).

A split of authority exists about whether condominium association fees are consumer debts. Some courts have found condominium association fees outside the parameters of the federal Act. *Nance v Petty, Livingston, Dawson, & Devening, supra*; *Azar v Hayter* (ND Fla 1995) 874 F Supp 1314, 1318, aff'd (11th Cir 1995) 66 F3d 342. More recent decisions appear to require debt collectors collecting condominium association fees to comply with the federal Act. See, *e.g., Ladick v Van Gemert* (10th Cir 1998) 146 F3d 1205; *Newman v Boehm, Pearlstein & Bright, Ltd.* (7th Cir 1997) 119 F3d 477. See also *Vosatka v Wolin-Levin, Inc.* (ND Ill, July 20, 1995, No. C-94-4129) 1995 US Dist Lexis 10415 (FTC submitted letter stating that homeowner association fees are debts under Act, which court did not follow).

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### §2.10C 4. In Rem Proceedings

The FDCPA defines "debt" as, in part, an obligation to pay money. At least one court has held that if the debtor obtained a discharge of the obligation, in rem proceedings against the collateral or an attempt to foreclose on a security interest do not trigger the Act. Federal district courts in California have consistently held that trustees and mortgage foreclosure are outside the FDCPA. *Hepler v Washington Mut. Bank* (SD Cal, Apr. 17, 2009, No. CV 07-4804 CAS (Ex)) 2009 WL 1045470; *Figuero v Citibank* (SD Cal, Apr. 15, 2009, No. 08cv2214 L(AJB)) 2009 US Dist Lexis 32287; *Izenberg v ETS Servs., LLC* (CD Cal 2008) 589 F Supp 2d 1193; *Tina v Countrywide Home Loans* (SD Cal, Oct. 30, 2008, No. 08 CV 1233 JM (NLS)) 2008 WL 4790906. See *Arruda v Sears, Roebuck & Co.* (1st Cir 2002) 310 F3d 13.

In *Arruda v Sears, Roebuck & Co.,* the court concluded that a secured creditor's demand to repossess collateral or require the debtor to sign a redemption agreement for the value of the collateral was not an attempt to "collect" a "debt" within the meaning of the FDCPA because the debt had been discharged in bankruptcy, extinguishing the debtor's personal obligation to pay money. The idea of a debt changing character into an in rem obligation after discharge was rejected, however, in *Molloy v Primus Automotive Fin. Servs.* (CD Cal 2000) 247 BR 804—a decision whose other holdings subsequently have been criticized by many circuit courts. Nevertheless, courts have held that proceedings against collateral, or notices required by state law before such proceedings, do not trigger the FDCPA. See *Hulse v Ocwen Fed. Bank* (D Ore 2002) 195 F Supp 2d 1188; *Heinemann v Jim Walter Homes, Inc.* (ND W Va 1998) 47 F Supp 2d 716.

Other courts have reached different conclusions on different facts. See, *e.g., Romea v Heiherger & Assocs.* (2d Cir 1998) 163 F3d 111 (3-day cure-or-quit letter as prerequisite to in rem proceedings to evict consumer tenant was communication in connection with collection of debt); *Piper v Portnoff Law Assocs.* (ED Pa 2003) 262 F Supp 2d 520 (FDCPA would be undermined by debt collector's decision to proceed in rem rather than in personam); *Walker v Gallegos* (D Ariz, Dec. 19, 2002, No. CV 00-1231 PCT PGR) 2002 US Dist Lexis 25682 (in rem petition for repossession was collection on debt when collateral to underlying consumer retail installment contract). Still other courts recognize that an entity engaged primarily in the enforcement of security interests is a "debt collector" under 15 USC §1692a(6), but the entity need comply only with §1692a(6) and not the remaining provisions of the FDCPA. *Jordan v Kent* (D Del 1990) 731 F Supp 652. See generally Younger & McIntyre, *When Repossession, Foreclosure, and Other Acts Are Not "Debt Collection" Under Debt Collection Practices Statutes*, 59 Consumer Fin LQ Rep 169 (Spring-Summer 2005).

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## §2.11 B. California Act

Debts subject to the Rosenthal Act are "money, property or their equivalent which is due or owing or alleged to be due or owing from a natural person to another person." CC §1788.2(d). The Act applies only to consumer debts. See CC §§1788.2(b) (defining "debt collection"), 1788.2(e) (defining "consumer credit transaction"), 1788.2(f) (defining "consumer debt" and "consumer credit"). Debts that are not delinquent, but are merely being serviced, are not subject to the Rosenthal Act. 15 Ops Cal Atty Gen 215 (2002). Debts that do not arise from a "credit transaction" are not subject to regulation by the Rosenthal Act. *Abels v JBC Legal Group, PC* (ND Cal 2005) 428 F Supp 2d 1023 (dishonored checks); *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 114 CR2d 558. See also *Bescos v Bank of America* (2003) 105 CA4th 378, 393, 129 CR2d 423 (vehicle lease not "consumer credit transaction"). California's incorporation of federal law creates a conundrum of statutory construction regarding "debts" to which the Act applies. Federal law, as incorporated by CC §1788.17, often uses the term "debt" and "debt collector" in its various guidelines and prohibitions. For example, 15 USC §1692e prohibits false, deceptive, or misleading representations or means in connection with the collection of any "debt." But, CC §1788.17 specifically does *not* incorporate the federal definitions section set forth at section 1692a, including the definition of "debt" contained at 15 USC §1692a(5). Hence, in interpreting federal statutes incorporated into §1788.17, the question arises whether the state law definition of "debt" or the unincorporated federal law definition of "debt" should be used.

The statutory construction could be outcome determinative in a particular case. See Hyman, *Does California's Rosenthal Fair Debt Collection Practices Act Protect Non-Debtors From Abusive Debt Collection Practices?,* 14 Con Fin Servs L Rep 5 (2009). State law and federal law define both consumer debt and debt collector quite differently, while each Act uses the term throughout its respective statutory scheme.

**NOTE:** California also applies the Rosenthal Act to "rent-to-own" property. CC §1812.639.

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## IV. COMMUNICATIONS WITH THIRD PARTIES

### §2.11A A. Third Party Standing

Communications with third parties must be evaluated within the context of whether the FDCPA and Rosenthal Act protect, and afford remedies to, third parties who become involved—voluntarily or not—with debt collectors who might engage in tactics that such nondebtors find unfair, misleading, or harassing.

**FDCPA.** Some protection might be afforded under the federal FDCPA. Whether the FDCPA protects third parties and gives them standing turns on whether the specific provision protects either "persons" or "consumers." See, *e.g., Bank v Pentagroup Fin., LLC* (ED NY, June 9, 2009, No. 08-CV-5293 (JG)(RML)) 2009 US Dist Lexis 47985 ("various courts have found that only a 'consumer' has standing to sue under particular sections of the FDCPA that specifically regulate communications 'with the consumer.'") For example, the FDCPA requires a debt collector to include the "mini-*Miranda*" in the initial communication with a "consumer" (15 USC §1692e(11)); a consumer is defined for these purposes as a person who is "obligated or allegedly obligated to pay the debt" (15 USC §1692a(3)).

Third parties are not "consumers," but may be worthy of protection under some provisions of the FDCPA that protect "persons" rather than "consumers." For example, 15 USC §1692d(1) provides that

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse *any person* in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) the use or threat of violence or other criminal means to harm the physical person, reputation, or property of any person. [Emphasis added.]

**Rosenthal Act.** Even with its incorporations of federal law, California's Rosenthal Act would not draw in similar protections for third parties because the Act retains its own definitions and does not incorporate the federal definitions. See CC §1788.17. For example, the Rosenthal Act interprets "debt collector" using its own definition found in CC §1788.2(c).

The Rosenthal Act is not a panacea for all collection-related torts. In order to trigger the Act, the creditor or debt collector allegedly must be collecting a "consumer debt," the definition of which also includes and requires a "consumer credit transaction." See CC §§1788.1(c), 1788.2(f). This analysis "depends on the interplay of several definitions found in §1788.2." *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 114 CR2d 558. Thus, a "consumer debt" is defined as "money, property or their equivalent, due or owing or alleged to be due or owing *from a natural person by reason of a consumer credit transaction*." (Emphasis added.) CC §1788.2(f). A "consumer credit transaction" is a "transaction between a natural person and another person in which property, services or money is acquired on credit *by that natural person* from such other person primarily for personal, family, or household purposes." (Emphasis added.) CC §1788.2(e).

The absence of a "consumer credit transaction" is fatal to a Rosenthal Act claim. *Abels v JBC Legal Group, PC* (ND Cal 2005) 428 F Supp 2d 1023 (dishonored checks did not arise by reason of consumer credit transaction; no FDCPA claim); *Gouskos v Aptos Village Garage, Inc.* (2001) 94 CA4th 754, 114 CR2d 558 (automobile repair expenses not subject to Rosenthal Act because Act requires transaction in which person acquires property or services on credit). The remedies available under the Rosenthal Act confirm this point. Civil Code §1788.30(a) imposes liability on the debt collector "to that debtor;" provides a $1000 penalty for willful violations "with respect to any debtor," and requires that attorney fees and costs "be awarded to a prevailing debtor." The Rosenthal Act defines "debtor" as "a natural person from whom a debt collector seeks to collect a consumer debt which is due and owing or alleged to be due and owing from such person." CC §1788.2(h).

Section 1788.17, which incorporates portions of federal law, does not change the inquiry. That section does not incorporate the federal law's definitions, but does retain all of the Rosenthal Act's definitions; section 1788.17 merely incorporates 15 USC §§1692b-1692j and subjects a "debt collector collecting or attempting to collect a consumer debt" to the remedies in 15 USC §1692k. As stated above, without a "consumer debt," or "consumer credit transaction," the Rosenthal Act is not triggered. See generally Hyman, *Does California's Rosenthal Fair Debt Collection Practices Act Protect Non-Debtors From Abusive Debt Collection Practices?,* 14 Con Fin Servs L Rep 5 (2009).

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### §2.12 B. Communications Regarding Location Information

A debt collector must avoid disclosures regarding the debt to nondebtors, because the financial affairs of the debtor are inherently private. See, *e.g., Valley Bank v Superior Court* (1975) 15 C3d 652, 125 CR 553. But see *Timperley v Chase Collection Serv.* (1969) 272 CA2d 697, 77 CR 782 (limited right to disclose debt information in collecting debt). These obligations include the following (15 USC §1692b):

- The debt collector must identify himself or herself, state that he or she is confirming or correcting location information, and, if expressly requested, identify his or her employer. Location information is a consumer's place of abode, telephone number, and place of employment. It does not cover work telephone numbers, supervisor names, salaries, or dates of paydays. FTC Staff Commentary, §803(7).

**NOTE:** "Confirming or correcting location information" means that a debt collector cannot call third parties under the pretense of gaining information already in the debt collector's possession. FTC Staff Commentary, §805(b) Comment 2; Atteberry, FTC Staff Opinion Letter (Feb 22, 1990); *Kwait*, FTC Staff Opinion Letter (Jan. 24, 1989).

- The debt collector may not state that the consumer owes any debt.
- The debt collector may not communicate with any person more than once unless requested to do so by that person or unless the debt collector reasonably believes that that person's earlier response was erroneous or incomplete and that the person now has correct or complete location information.
- The debt collector may not communicate by postcard.
- The debt collector may not use any language or symbol on any envelope or in the contents of any communication by the mail or telegram that indicates that the debtor is in the debt collection business or that the communication relates to the collection of a debt. CC §1788.12(d).
- The debt collector must communicate with the consumer's attorney if the debt collector knows that the consumer is represented by legal counsel and if the debt collector can obtain the attorney's address, unless the attorney fails to respond to the debt collector within a reasonable time. CC §1788.14(c).

  **NOTE:** Communications between the debt collector and the consumer's attorney are not subject to the FDCPA. *Guerrero v RJM Acquistitions* (9th Cir 2007) 499 F3d 926, 934.

- The debt collector may not request that neighbors convey messages about the obligation to the debtor. *West v Nationwide Credit, Inc.* (WD NC 1998) 998 F Supp 642; FTC Staff Commentary §806(2); *Atteberry,* FTC Staff Opinion Letter (Feb. 22, 1990).

The Rosenthal Act permits communications with the debtor's family in order to locate the debtor (CC §1788.12(b)) and communications with the debtor's employer necessary for the debt collection or consented to in writing by the debtor or debtor's attorney (CC §1788.12(a)). A communication is "necessary" if it is made to verify the debtor's employment, locate the debtor, or effect garnishment after judgment. These communications may not contain language that would be improper if made to the debtor. The debt collector must communicate with the employer in writing unless there is no response to the writing within 15 days. Only one communication to verify the debtor's employment may be oral without prior written contact. CC §1788.12(a).

California's adoption of the federal FDCPA creates conflicting standards governing third party contacts. The Rosenthal Act permits communications with the debtor's family to obtain location information, or with the debtor's employer if "necessary" for the debt collection. CC §1788.12(a). Employer communication must be in writing, unless the employer fails to respond within 15 days, or unless the creditor solely sought to verify employment. CC §1788.12(a). The incorporated federal FDCPA, however, requires only that the debt collector identify himself, state that he is confirming or correcting location information, and, if expressly requested, identify his or her employer. 15 USC §1692b. The federal FDCPA also limits the inquiry to obtaining the consumer's place of abode, telephone number, and place of employment, and does not cover work telephone numbers, supervisor names, salaries, or dates of paydays. 15 USC §1692a(7).

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### C. Communications Regarding Debt

### §2.13 1. Federal Act

The federal FDCPA allows the debt collector to communicate with consumer reporting agencies; with the debtor's attorney; and with the debtor's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. 15 USC §1692c(b), (d). Communication with close relatives in intestacy situations may be appropriate. *Fisher,* FTC Staff Opinion Letter (Aug. 19, 1992). For other third parties, the federal Act prohibits communications regarding the debt unless (15 USC §1692c(b)):

- The debt collector obtains prior consent from the consumer (*Austin v Great Lakes Collection Bureau, Inc.* (D Conn 1993) 834 F Supp 557 (communication with debtor's secretary regarding garnishment violated Act); *Pearce v Rapid Check Collection, Inc.* (D SD 1990) 738 F Supp 334 (letter to debtor's credit union who was payor bank on debt and had knowledge of default did not violate Act));
- The debt collector obtains express permission from a court of competent jurisdiction; or
- The communication is reasonably necessary to effect a postjudgment remedy.

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### §2.14 2. California Act

The Rosenthal Act permits other specific communications, such as communications with the debtor's spouse, the parents or guardians of a minor debtor (CC §1788.12(b)), or the debtor's attorney once the attorney has notified the debt collector of representation by counsel (CC §1788.14(c)) and communications to parties having a legitimate business need for such information, such as credit reporting agencies (CC §1788.12(e)). Other contact with third parties regarding the debt is prohibited. CC §1788.12(d).

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## V. COMMUNICATION WITH DEBTOR

### §2.15 A. Time, Place, and Manner Restrictions

The federal FDCPA prohibits communications with the debtor at unusual or inconvenient times or places. The debt collector can assume that times between 8 a.m. and 9 p.m. local time at the consumer's location are usual and convenient. 15 USC §1692c(a)(1). The Act also prohibits contact with the consumer at the consumer's place of employment if the debt collector has reason to know that the employer prohibits the consumer from receiving such communications. 15 USC §1692c(a)(3). The Rosenthal Act now incorporates the same "time, place, and manner" restrictions applicable under federal law. Bus & P C §6077.5(c); CC §1788.17.

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### B. Cessation of Communications With Debtor

### §2.16 1. Notification That Consumer Is Represented by Counsel

Under federal law, a debt collector who knows that the consumer is represented by counsel regarding the subject debt and has knowledge of or can readily ascertain the attorney's name and address may not communicate with anyone other than that attorney, unless the attorney fails to respond to the debt collector's communication within a reasonable period of time. 15 USC §§1692b(6), 1692c(a)(2); *Harvey v United Adjusters* (D Or 1981) 509 F Supp 1218. The FTC Commentary opines that this prohibition applies only to the debt at issue, not "other" debts. FTC Commentary, §805.

California law is in conflict, both by incorporating federal law (CC §1788.17) and by requiring that the debtor's attorney notify the debt collector *in writing* of legal representation before exclusive contact with the attorney is required. Once so notified, the debt collector may not initiate communications with the debtor about a consumer debt, other than to provide a "statement of account." CC §1788.14(c). A "statement of account" is one whose purpose is to keep the debtor informed of the status of the account or any activity related to the account, such as the accrual of finance charges; it is not one whose purpose is to facilitate collection on a closed account. *Moya v Chase Cardmember Servs. Inc.* (ND Cal, Jan. 8, 2009, No. C 08-4097 BZ) 2009 US Dist Lexis 2109.

**PRACTICE TIP:** Creditors and collectors alike should be careful to recode accounts to reflect that communications, other than statements of account, should be forwarded to counsel instead of the consumer. Although under both federal and state law, a debt collector must cease communications if the consumer informs the debt collector of such representation (15 USC §§1692b(6), 1692c(a)(2); CC §1788.14(c)), the Rosenthal Act requires that the notification be "in writing." A creditor may continue to send statements of account—*e.g.*, monthly billing statements—under state law, but the federal Act is silent on allowing such continued communications. The better practice is to ask for the information required by the federal Act in writing. There is no indication in the legislative history of CC §1788.17 that the legislature meant to eliminate the practice of continued mailing of statement of accounts following notification of representation by counsel. Although it is not required, before reinstating communications directly with the debtor, the debt collector should send a letter to counsel informing counsel that because the attorney has failed to respond, the debt collector assumes that the attorney no longer represents the debtor and direct contact will recommence.

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### §2.16A 2. Imputed Knowledge

The law is unsettled about whether notice of representation by counsel to a creditor, debt collector's client, or prior debt collector automatically is imputed to the current debt collector or collecting attorney. The majority rule appears to be that knowledge of representation by counsel will not be imputed to the debt collector or collecting attorney. FTC Staff Commentary, §805(a), Comment 3. Compare *Offril v J.C. Penney Co., Inc.* (ND Cal, Jan. 9, 2009, No. C 08-5050 PJH) 2009 WL 69344, *Schmitt v FMA Alliance* (8th Cir 2005) 398 F3d 995 (creditor's knowledge of debtor's representation not imputed to debt collector), *Jones v Weiss, Neuren & Neuren* (ND NY 2000) 95 F Supp 2d 105, *Degonzague v Weiss, Neuren & Neuren* (ND NY 2000) 89 F Supp 2d 282, 284, *Raimondi v McAllister & Assocs., Inc.* (ND Ill 1999) 50 F Supp 2d 825, 827, and *Hubbard v National Bond & Collection Assocs.* (D Del 1991) 126 BR 422, 426, aff'd (3d Cir 1991) 947 F2d 935, with *Micare v Foster & Garbus* (ND NY 2001) 132 F Supp 2d 77, 80, *Powers v Professional Credit Servs., Inc.* (ND NY 2000) 107 F Supp 2d 166, and *Burger v Risk Mgmt. Alternatives, Inc.* (ND NY 2000) 94 F Supp 2d 291.

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### §2.16B 3. Disbarred Lawyers and Nonlawyers Claiming Legal Powers

The FTC Staff opines that a debt collector need not communicate solely with a nonlawyer who holds a power of attorney granted by the debtor. *Edwards*, FTC Staff Opinion Letter (Feb. 7, 1991). This permission should extend to debtors "represented" by attorneys who are not in good standing with the State Bar. Attorneys who are debt collectors are ethically obligated to inform the debtor that their purported counsel are not members in good standing. CCP §286.

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### §2.17 4. Consumer Requests to Cease Communications

Under the FDCPA, the debt collector must cease communications with the consumer if

- The consumer notifies the debt collector in writing that the consumer refuses to pay the debt (15 USC §1692c(c));
- The consumer notifies the debt collector in writing that the consumer wishes the debt collector to cease further communications with the consumer (15 USC §1692c(c));
- The debt collector knows that the consumer is represented by counsel with regard to the debt and the debt collector can obtain the attorney's address, unless the attorney fails to respond to the debt collector within a reasonable time or the attorney consents to the debt collector's contacting the consumer directly (15 USC §1692c(a)(2)).

Despite a request by the consumer to cease communications, the debt collector may notify the consumer that (a) collection efforts are being terminated (15 USC §1692c(c)(1)), (b) the debt collector or creditor may invoke specified remedies that are ordinarily invoked by the debt collector or creditor (15 USC §1692c(c)(2)), or (c) the debt collector or creditor intends to invoke a specified remedy (15 USC §1692c(c)(3)). A debt collector may even make a "noncoercive settlement offer" after a demand in writing to cease collection activities but does so at risk of violating the Act. *Lewis v ACB Bus. Servs.* (6th Cir 1998) 135 F3d 389, 399. Except for the federal guidelines applicable to attorneys and their employees under the Rules of Professional Conduct (see Bus & P C §6077.5), California law was silent on this issue until the adoption of CC §1788.17. A debt collector must now follow federal law and cease communications if the consumer notifies it in writing of a refusal to pay or of a wish to cease communications. CC §1788.17. See 15 USC §1692c(c).

A debtor may waive the cease communication directive if, for example, the debtor requests more information, and the debt collector returns a phone call merely to supply the information requested. *Clark v Capital Credit & Collection Servs., Inc.* (9th Cir 2006) 460 F3d 1162. A debt collector also may comply with the investigation reporting requirements of the FCRA without violating a consumer's "cessation" request under the FDCPA. *Clark*, FTC Informal Staff Opinion (June 23, 2009).

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### §2.18 C. "Least Sophisticated Consumer" Test

Federal law applies the "least sophisticated consumer" or "least sophisticated debtor" test to govern communications with debtors: If the least sophisticated consumer would construe statements made by the collector as a threat to take action that cannot legally be taken, the debt collector has violated the statute regardless of whether any threat was intended. *Dunlap v Credit Protection Ass'n* (9th Cir 2005) 419 F3d 1011; *Cruz v MRC Receivables Corp.* (ND Cal 2008) 563 F Supp 2d 1092; *Gonzales v Arrow Fin. Servs. LLC* (SD Cal 2007) 489 F Supp 2d 1140, 1146 (Ninth Circuit measures FDCPA violations by objective standard, the "least sophisticated debtor" standard). Although the "least sophisticated consumer" test favors consumers, certain conduct has been found defensible. A violation of the FDCPA's harassment prohibition, for example, should require a showing of outrageous behavior, because some inconvenience or embarrassment necessarily results from debt collection. *Bieber v Associated Collection Servs.* (D Kan 1986) 631 F Supp 1410. A reserved, respectful tone in a letter, even when suit was threatened, provides a defense to an alleged violation of the federal Act. *Pearce v Rapid Check Collection, Inc.* (D SD 1990) 738 F Supp 334. But see *Beattie v D.M. Collections, Inc.* (D Del 1991) 754 F Supp 383 (attempting to balance "least sophisticated consumer" standard with "oppressive and outrageous" requirement).

**NOTE:** The court, not the jury, determines whether a collection letter violates the FDCPA by applying this "least sophisticated debtor" standard. *Gonzales v Arrow Fin. Servs. LLC* (SD Cal 2007) 489 F Supp 2d 1140, 1146.

The least sophisticated consumer standard purportedly protects consumers from abusive practices and protects debt collectors from "bizarre or idiosyncratic" interpretations of collection notices. *Bartlett v Heibl* (7th Cir 1997) 128 F3d 497; *Clomon v Jackson* (2d Cir 1993) 988 F2d 1314; *Swanson v Southern Oregon Credit Serv., supra*; *Teng v Metropolitan Retail Recovery, Inc.* (ED NY 1994) 851 F Supp 61; *Beattie v D.M. Collections, Inc., supra*. Although most courts bring in an element of objectivity to the test (see *Hapin v Arrow Fin. Servs., Inc.* (ND Cal 2006) 428 F Supp 2d 1057; *Anderson v Credit Collection Servs., Inc.* (SD Cal 2004) 322 F Supp 2d 1094), it is error to apply a higher, "reasonable consumer" standard (*U.S. v National Fin. Servs.* (4th Cir 1996) 98 F3d 131; *Jeter v Credit Bureau, Inc.* (11th Cir 1985) 760 F2d 1168).

The Rosenthal Act's standard is less ascertainable, requiring a finding of "unreasonableness" based on frequency of contacts and effect on the debtor, under the circumstances. CC §1788.11(e). California law recognizes as a matter of common law that a certain amount of distress is necessarily associated with the process of collection itself. *Symonds v Mercury Sav. & Loan Ass'n* (1990) 225 CA3d 1458, 1468, 275 CR 871; *Accounts Adjustment Bureau v Cooperman* (1984) 158 CA3d 844, 847, 204 CR 881; *Bundren v Superior Court* (1983) 145 CA3d 784, 789, 193 CR 671.

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### §2.19 D. Harassment, Abuse, and Threats

The state and federal FDCPA provide lists of prohibited conduct, which the federal Act specifically states is nonexclusive, and each of these prohibitions now apply to debt collectors and creditors under state law as well:

- Using threats, violence, or other criminal means to harm the physical person, reputation, or property of any person. 15 USC §1692d(1); CC §§1788.10(a), 1788.17. An "implied" threat may be enough. FTC Staff Commentary, §806(1).
- Using obscene or profane language or language the natural consequence of which is to abuse the hearer or reader. 15 USC §1692d(2); CC §§1788.11(a), 1788.17; *Harvey v United Adjusters* (D Or 1981) 509 F Supp 1218 (letter critical of ability to run financial affairs).
- Publishing a "deadbeat" list. 15 USC §1692d(3); CC §1788.12(c).
- Advertising a debt for sale to coerce payment. 15 USC §1692d(4); CC §§1788.12(c), 1788.17.
- Causing a telephone to ring or engaging anyone in telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass anyone at the called number. 15 USC §1692d(5); *Bingham v Collection Bureau, Inc.* (D ND 1981) 505 F Supp 864 (immediate redial); CC §§1788.11(d), 1788.17. "Continuously" means a series of telephone calls one right after another. "Repeatedly" means calling with excessive frequency under the circumstances. FTC Staff Commentary, §806(5). See *Pavone v Citicorp Credit Servs., Inc.* (SD Cal 1997) 60 F Supp 2d 1040, 1043; *Kuhn v Account Control Technol.* (D Nev 1994) 865 F Supp 1443, 1453.
- Placing telephone calls without meaningful disclosure of the caller's identity. 15 USC §1692d(6); CC §§1788.11(b), 1788.17.
- Communicating by telephone or in person with the debtor with such frequency as to be unreasonable and to constitute harassment to the debtor under the circumstances. 15 USC §1692d(5); CC §§1788.11(e), 1788.17. Whether there is actionable harassment turns not only on the volume of the calls made, but also on the pattern of calls. *Hosseinzadeh v M.R.S. Assocs.* (CD Cal 2005) 387 F Supp 2d 1104; *Joseph v J.J. Mac Intyre Cos., LLC* (ND Cal 2002) 238 F Supp 2d 1158.

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### §2.20 E. False or Misleading Representations

The debt collector may not use false, deceptive, or misleading representations or means in collecting a debt. 15 USC §1692e; CC §§1788.13, 1788.17. The false statement must be material. *Hahn v Triumph Partnerships LLC* (7th Cir 2009) 557 F3d 755. Both the federal FDCPA and the Rosenthal Act contain a nonexclusive list of prohibited false or misleading conduct. See *Tsenes v Transcontinental Credit & Collection Corp.* (ED NY 1995) 892 F Supp 461; FTC Staff Commentary, §807. Such conduct includes the following:

- **Affiliation with government.** Falsely implying that the debt collector is vouched for, bonded by, or affiliated with the United States or any state, including the use of any such badge, uniform, or facsimile. 15 USC §1692e(1); CC §§1788.13(d), 1788.17. See *Dorner v Commercial Trade Bureau of Cal. (*ED Cal, Apr. 10, 2008, No. CIV-F-08-0083 AWI SMS 2008) 2008 US Dist Lexis 70425 (defendant's motion to dismiss for failure to state claim denied in lawsuit alleging that defendant violated 15 USC §1692e(1) by using name "Commercial Trade Bureau of California"). See also CC §1788.16 (misdemeanor to simulate authorization by governmental agency).
- **Legal status of debt or amount of charges.** Falsely representing the character, amount, or legal status of the debt or any services rendered or compensation that the debt collector may lawfully receive for collecting the debt. 15 USC §1692e(2); CC §§1788.14(b), 1788.17. See *Imperial Merchant Servs. v Hunt* (2009) 47 C4th 381, 97 CR3d 464 (debt collector not entitled to bad check service charge plus prejudgment interest). But see *Dunlap v Credit Protection Ass'n* (9th Cir 2005) 419 F3d 1011 (neither defendant's name nor its implication that plaintiff was required to pay bills to protect credit falsely represented character, amount, or legal status of debt); *Anderson v Credit Collection Servs., Inc.* (SD Cal 2004) 322 F Supp 2d 1094 (inclusion of statutory language required by FDCPA does not falsely represent character, amount, or legal status of debt, nor did Western Union logo create false sense of urgency). The FDCPA prohibits attempts to collect amounts incidental to the principal obligation unless the amount is expressly authorized by the agreement or otherwise permitted by law (see §2.21). 15 USC §1692f(1). Absent express agreement, therefore, collection letters that demand charges in excess of those permitted by CC §1719, which creates a mandatory and exclusive recovery scheme, violate the FDCPA. *Hunt v Check Recovery Sys., Inc.* (ND Cal 2007) 478 F Supp 2d 1157.
- **False suggestion that debt collector is attorney.** Falsely representing that the debt collector is an attorney or that a communication is from an attorney. 15 USC §1692e(3); CC §§1788.13(b)-(c), 1788.17. See also CC §1788.16 (misdemeanor to simulate authorization by attorney). The federal FDCPA prohibits both computer-generated form letters from an attorney (see *Wright v Credit Bureau* (ND Ga 1982) 548 F Supp 591) and form letters signed by an attorney who has not conferred with the debt collector or had "meaningful involvement" (*Gonzales v Kay* (5th Cir 2009) 577 F3d 600 (reconciling split among circuits on "meaningful involvement"); *Clomon v Jackson* (2d Cir 1993) 988 F2d 1314; *Uyeda v J.A. Cambece Law Office* (ND Cal, May 16, 2005, No. C 04-04312) 2005 US Dist Lexis 9271; *Masuda v Thomas Richards & Co.* (CD Cal 1991) 759 F Supp 1456). In *Boyd v Wexler* (7th Cir 2001) 275 F3d 642, 646, cert denied (2002) 537 US 883, 154 L Ed 2d 141, 123 S Ct 106, Judge Posner sets forth guidelines on the measure of attorney review necessary to pass muster under the FDCPA. See also *Nielsen v Dickerson* (7th Cir 2002) 307 F3d 623 (summary judgment under 15 USC §1692e(3) granted to plaintiff class representing thousands of debtors who had received letter from attorney about their past-due credit card accounts; letter suggested that attorney had become involved in collection, but in reality attorney had done little more than lend his name and firm letterhead to debt collection effort).
- **Possibility of criminal action.** Falsely representing or implying that nonpayment will result in criminal action, garnishment, attachment, or sale, unless such action is lawful and intended. 15 USC §1692e(4); CC §§1788.10(e), 1788.17. See *Savage v NIC, Inc.* (D Ariz, July 28, 2009, No. CV 08-1780-PHX-JAT) 2009 US Dist Lexis 65071, *11 (threatening wage garnishment requires that debt collector has current legal right to do so). Thus, attachment of real estate or a checkbook, or a threat to foreclose on real estate within 1 week when such dispossession is not physically possible, are not lawful. *Crossley v Lieberman* (3d Cir 1989) 868 F2d 566; *Cacace v Lucas* (D Conn 1990) 775 F Supp 502.
- **Threats of unintended or illegal action.** Threatening to take any action not intended or not lawful. 15 USC §1692e(5); CC §§1788.10(f), 1788.17. See *Dunlap v Credit Protection Ass'n* (9th Cir 2005) 419 F3d 1011 (debt collector's name did not falsely imply debtor should make payment to protect credit, even though debt collector rarely reported accounts to credit bureaus); *Gonzales v Arrow Fin. Servs. LLC* (SD Cal 2007) 489 F Supp 2d 1140 (unlawful to falsely threaten to make credit reports); *Irwin v Mascott* (ND Cal 1999) 96 F Supp 2d 968

(defendant's rare filing of lawsuits may be evidence of lack of interest to sue in particular case; defendant's argument that each class member must show lack of interest insufficient to defeat class action); *Baker v Citibank* (SD Cal 1998) 13 F Supp 2d 1037 (collection letter not misleading when customer could have been sued within 30-day stay); see also *Pipiles v Credit Bureau of Lockport, Inc.* (2d Cir 1989) 886 F2d 22 (unlawful to threaten to file suit that is not intended because of small amount of debt); *Juras v Aman Collection Servs.* (9th Cir 1987) 829 F2d 739 (unlawful to threaten to involve California counsel if such action not intended). The creditor's lack of intention is not automatically imputed to the debt collector. FTC Staff Commentary, §807(5), ¶1.

**NOTE:** The debtor bears the burden of proving the collector's intent or lack of intent. *Weiner v Bloomfield* (SD NY 1995) 901 F Supp 771, 777. A debt collector litigating this issue could seek discovery on other transactions at issue, subject to privacy rights of other debtors, to ascertain whether a particular action was intended. The FTC Staff Commentary states that an examination of intent looks to whether, when the statement was made, the debt collector ordinarily took the action in similar circumstances. FTC Staff Commentary, §807(5), ¶1.

- **Loss of claim or defense.** Falsely representing or implying that the sale, referral, or transfer of interest in the debt would cause the consumer to lose any claim or defense or become subject to any practice prohibited by the Act. 15 USC §1692e(6); CC §§1788.10(d), 1788.17.
- **Embarrassing or false suggestions.** Falsely representing or implying that the consumer committed a crime or other improper conduct, so as to embarrass the consumer (15 USC §1692e(7)), CC §1788.17, or threatening that failure to pay a debt will result in an accusation that the consumer committed a crime when such an accusation would be false (CC §1788.10(b)). See *West v Costen* (WD Va 1983) 558 F Supp 564 (false representation that warrant was pending violates Act).
- **Threats to falsify credit report.** Communicating or threatening to disparage the consumer's credit report with information that is known or should be known to be false, including failing to communicate that a debt is disputed. 15 USC §1692e(8); CC §§1788.13(f), 1788.17. See *Mitchell v Surety Acceptance Corp.* (D Colo 1993) 838 F Supp 497 (agency failed to correct information supplied to credit bureau). See also *Perez v Telecheck Servs., Inc.* (D Nev 2002) 208 F Supp 2d 1153, 1156 (false report to credit bureau is "communication" within meaning of Act). But see *Dunlap v Credit Protection Ass'n* (9th Cir 2005) 419 F3d 1011 (collection agency's use of name "Credit Protection Agency" did not imply that debtor's credit rating would be damaged by failure to pay minimal debt); *Wade v Regional Credit Ass'n* (9th Cir 1996) 87 F3d 1098 (truthful statement that failure to pay may adversely affect credit was defensible). California law requires that a disputed account be reported as such. CC §1788.25(c). Thus, a false threat to report credit adversely when the collector knows that the account is disputed can create liability under the California Act. CC §1788.13(f). See also FTC Staff Commentary, §807(8), ¶¶1-2. However, providing notices of adverse credit reporting required by state and federal law cannot give rise to liability under the FDCDA. *Cruz v MRC Receivables Corp.* (ND Cal 2008) 563 F Supp 2d 1092.

**PRACTICE TIP:** Only governmental agencies can enforce a violation of the federal Fair Credit Reporting Act (FCRA) (15 USC §§1681-1681x) (see §§2A.13-2A.18) when a furnisher of information supplies inaccurate credit reporting (15 USC §1681s-2(a)). A number of cases have addressed whether the FCRA preempts any statutory private right of action provided by California's Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1-1785.36), discussed in §§2A.19-2A.21. The California Court of Appeal for the First District found federal preemption. *Liceaga v Debt Recovery Solutions, LLC* (ordered not published Apr. 29, 2009; former opinion at 169 CA4th 901, 86 CR3d 876). Then, the Ninth Circuit Court of Appeals held that there was no preemption. *Gorman v Wolpoff & Abramson, LLP* (9th Cir 2009) 552 F3d 1008. Then, the California Court of Appeal for the Second District followed *Gorman* and not *Liceaga*. *Sanai v Saltz* (2009) 170 CA4th 746, 88 CR3d 673, modified at 2009 Cal App Lexis 177. See generally Hyman, *Can the Law Be That Unclear? 9th Circuit and California Courts Reach Opposite Conclusions on FCRA Preemption of CCRAA,* 12 Con Fin Servs L Rep 5 (2009).

**PRACTICE TIP:** The Rosenthal Act itself does not regulate credit reporting, except by incorporating 15 USC §1692e(8) by way of CC §1788.17. However, Rosenthal Act claims, to the extent they regulate credit reporting, are preempted by the FCRA. See §2.1A. Section 1692e(8), unlike the FCRA and CCRAA, imposes no duty to inform credit bureaus that the consumer disputes the account *after* a debt collector learns it is disputed. The FDCPA requires the following sequence of events: a "dispute" of credit information by the consumer communicated to the debt collector, and then either a "threat" to the consumer once the debt collector learns of the dispute, or a "subsequent" communication to the credit bureaus. See FTC Staff Commentary, §807(8) ("*Disputed debt*. If a debt collector knows that a debt is disputed by the consumer, either from the receipt of written notice (§809) or other means, and reports it to a credit bureau, he must report it as disputed. *Post-report dispute*. When a debt collector learns of a dispute *after* reporting the debt to a credit bureau, *the dispute need not also be reported*" (emphasis

added)). See also *Black v Asset Acceptance LLC* (ND Ga, Dec. 9, 2005, No. 1:05-cv-1588-BBM) 2005 US Dist Lexis 43264; *Hoffman v Partners in Collections, Inc*. (ND Ill, Sept. 12, 1994, No. 93 C 4182) 1994 US Dist Lexis 12884 (district court required plaintiff under 15 USC §1692e(8) to establish that (1) he had called defendant (2) to dispute his debt and (3) defendant subsequently sent reports to credit bureaus).

- **False impressions in source of communication.** Using a written communication that creates a false impression of the source of the communication. 15 USC §1692e(9); CC §§1788.13(c)-(d), (h), 1788.17. See *Gammon v GC Servs. Ltd. Partnership* (7th Cir 1994) 27 F3d 1254 (statement that collector had developed governmental systems for debt collections implied government authority). But see *Cruz v MRC Receivables Corp.* (ND Cal 2008) 563 F Supp 2d 1092 (use of high ranking employee's name on form letters was acceptable when he read and approved letters). Similarly, it is a misdemeanor to simulate authorization by a governmental agency. CC §1788.16.
- **Any false or deceptive practices.** Using any false representation or deceptive means to collect or attempt to collect a debt or to obtain information about a consumer. 15 USC §1692e(10), CC §1788.17.

**NOTE:** This is a catch-all provision designed to bring within the Act claims of false or deceptive practices that arise from conduct not specified in the Act. See, *e.g., Tsenes v TransContinental Credit & Collections Corp., supra*.

**PRACTICE TIP:** Practitioners should be careful about communicating settlement offers that contain false deadlines or statements of intention. "A particular communication with settlement option information could be deceptive or a violation of Section 807 if it contains a false or misleading representation or omission of material fact." *Sinsley,* FTC Staff Opinion Letter (Mar. 19, 2008). Compare *Goswami v American Collections Enters., Inc.* (5th Cir 2004) 377 F3d 488 (collection agency's practice of making misleading statements regarding its authority from creditor to offer settlement discount and time within which debtor could respond to offer was actionable under FDCPA) with *Hancock v Receivables Mgmt. Solutions, Inc.* (ND Cal, May 30, 2006, No. C 06-1365 CW) 2006 US Dist Lexis 38639; *Sarder v Academy Collection Servs., Inc.* (ED NY, Mar. 3, 2005, No. CV 02-2486 NG VVP) 2005 US Dist Lexis 11932 (public policy encouraging settlement offers for compromising debt is unencumbered by FDCPA), and *Kahen-Kashani v National Action Fin. Servs., Inc.* (WD NY, Sept. 21, 2004, No. 03-CV-828A) 2004 US Dist Lexis 27836 (debtor's action against debt collection agency dismissed when no evidence agency misled debtor about length of time that settlement offer would stay open or amount of discount it was authorized to offer).

- **Suggestion that accounts have been sold.** Falsely representing or implying that accounts have been turned over to innocent purchasers for value. 15 USC §1692e(12); CC §1788.10(d) (falsely representing that threatened assignment might result in loss of any defense), CC §1788.17.
- **Suggestion that nonlegal documents are legal process.** Falsely representing that documents are legal process. 15 USC §1692e(13); CC §1788.16 (misdemeanor to simulate legal or judicial process), CC §1788.17. See *Tolentino v Friedman* (ND Ill 1993) 833 F Supp 697, aff'd in part, rev'd in part, and remanded (7th Cir 1995) 46 F3d 645 (letter to debtor had appearance and language of legal process).
- **Suggestion that debtor need not respond to legal documents.** Falsely representing that legal process documents are not legal process forms and do not require any action by the consumer. 15 USC §1692e(15), CC §1788.17.
- **Use of incorrect business name.** Using any business name other than the debt collector's business name. 15 USC §1692e(14); CC §§1788.13(a), 1788.17. The use of a desk name or "dunning name," however, is allowable under both federal and state law. *Wright v Credit Bureau* (ND Ga 1982) 548 F Supp 591; *Kleczy v First Fed. Credit Control* (Ohio App 1984) 486 NE2d 204; CC §1788.11(b). It may also be permissible to use a pseudonym designed to signal the status of the account to the collection agency. *Lewis v ACB Bus. Servs.* (6th Cir 1998) 135 F3d 389, 400. While using the name of the creditor for the purpose of avoiding FDCPA regulations may trigger the Act, a creditor's in-house or salaried attorney, or a collection agency employee who works at a creditor's office as a de facto employee, is neither a "debt collector" nor collecting under another business name. FTC Staff Commentary, §803(6), ¶4. The crucial inquiry to trigger the creditor exemption is whether the creditor controls the collector employee sufficiently to render him or her a de facto employee. *Zager,* FTC Staff Opinion Letter (Nov. 10, 1992); *de Mayo,* FTC Staff Opinion Letter (May 1, 2000, revised May 23, 2002).
- **Falsely representing or implying that the debt collector is employed by or operates a consumer reporting agency.** 15 USC §1692e(16); CC §§1788.13(g), 1788.17. See *Anthes v Transworld Sys.* (D Del 1991) 765 F Supp 162 (use of term "credit bureau" violates Act).
- **Threats to defame debtor.** Communicating or threatening to communicate to anyone that the debtor has engaged in conduct, other than failure to pay a consumer debt, that the debt collector has reason to believe will defame the debtor. CC §1788.10(c) (no similar provision in federal Act).

- **Misrepresentations of collector's business.** Falsely representing the true nature of the business or service being rendered by the debt collector. CC §1788.13(i) (no similar provision in federal Act).
- **False suggestion that lawsuit will be filed.** Falsely representing that a legal proceeding has been or will be instituted unless payment is made. 15 USC §1692e(5); CC §§1788.13(j), 1788.17. The debt collector may threaten to institute litigation only if it actually intends to do so. *Irwin v Mascott* (ND Cal 2000) 112 F Supp 2d 937; *Baker v Citibank* (SD Cal 1998) 13 F Supp 2d 1037.
- **False suggestion that debt has been assigned to collection.** Falsely representing that a consumer debt has been or is about to be sold, assigned, or referred to a debt collector for collection. CC §1788.13(k) (no similar provision in federal Act).
- **Demand for money without valid assignment.** Any communication by a licensed collection agency to a debtor demanding money unless the claim is actually assigned to the agency. CC §1788.13(l) (no similar provision in federal Act); *Reyes v Kenosian & Miele, LLP* (ND Cal, Jan. 17, 2008, No. CO7-00253 MJJ) 2008 US Dist Lexis 4120. This provision requires a valid assignment of the claim to a debt collector and prohibits "pre-collection" letters; *i.e.,* letters on debt collection letterhead sent before actual assignment (Opinion of the Office of the Legislative Counsel, Clay Fuller, Dec. 29, 1997).

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**Source:** Business Law/Debt Collection Practice in California/2 The Fair Debt Collection Practices Acts/§2.21 F. Unfair Practices

### §2.21 F. Unfair Practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect a debt. 15 USC §1692f; CC §§1788.10(f), 1788.17.

**NOTE:** This provision cannot be used to render every violation of state law a violation of the FDCPA. See §2.1A. For example, failure to give the notice required by CC §1812.700 does not automatically give rise to violation of the federal FDCPA. *Taylor v Quall* (CD Cal 2007) 471 F Supp 2d 1053 (defendant's failure to register fictitious license name not FDCPA violation). See also *Beler v Blatt, Hasenmiller, Leibsker & Moore LLC* (7th Cir 2007) 480 F3d 470 (15 USC §1692f is not enforcement mechanism for all violations of federal and state law).

**NOTE:** The FTC staff defines an action as unfair or unconscionable if it causes injury to the consumer that is (1) substantial, (2) not outweighed by countervailing benefits to consumers or competition, and (3) not reasonably avoidable by the consumer. FTC Staff Commentary, §808, ¶2.

The FDCPA provides a nonexclusive list of unfair practices:

- **Unauthorized collections.** Collecting any amount not authorized by the agreement creating the debt or permitted by law. 15 USC §1692f(1); CC §§1719, 1788.17. See *Imperial Merchant Servs. v Hunt* (2009) 47 C4th 381, 97 CR3d 464 (debt collector not entitled to bad check service charge plus prejudgment interest); *Hunt v Check Recovery Sys., Inc.* (ND Cal 2007) 478 F Supp 2d 1157 (collection letters demanding charges in excess of those permitted by CC §1719 violate 15 USC §§1692e(2)(A), 1692f(1)); 85 Ops Cal Atty Gen 215 (2002). The "amount" includes incidental charges such as collection charges, interest, service charges, late fees, or bad check fees. FTC Staff Commentary, §808(1). For example, attempted collection of unauthorized collateral protection insurance or a "legal notice" fee is prohibited. *Heintz v Jenkins* (7th Cir 1994) 25 F3d 536, aff'd (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489; *Ballard v Equifax Check Servs., Inc.* (ED Cal 1998) 27 F Supp 2d 1201 (service charge for bad check not "authorized" absent evidence of sign posted at store and that customer read it; additionally, holder of check not entitled to enforce fee granted to obligee only under UCC); *Ozkaya v Telecheck Servs.* (ND Ill 1997) 982 F Supp 578 ($25 collection fee); *In re Scrimpsher* (ND NY 1982) 17 BR 999 (service charge for bad checks).
- **Illegal fees.** Collecting or attempting to collect from the debtor the whole or any part of the debt collector's fee or charge for services rendered, or any other expense incurred by the debt collector in collecting the consumer debt except as permitted by law. CC §1788.14(b). Certain charges often added to the principal balance are ripe for FDCPA violations. For example, the creditor cannot collect costs other than those allowed by CCP §§1021-1038 unless a written contract with the debtor so provides. CC §1717. Even when costs are contractually provided, the collector may charge only the actual costs of collection and not a flat percentage of the debt's amount or a fee that adds profit to the collection agency; such fees constitute unlawful liquidated damages. *Bondanza v Peninsula Hosp. & Med. Ctr.* (1979) 23 C3d 260, 152 CR 446 (violates CC §1671 and constitutes unfair and unreasonable practice). In contrast, a California appellate court upheld a liquidated damage clause in a consumer contract under which the service provider had unilaterally set the amount of damages. *Utility Consumers' Action Network, Inc. v AT&T Broadband of S. Cal.,* Inc. (2006) 135 CA4th 1023, 1029, 37 CR3d 827 (distinguishing *Bondanza* holding when court invalidated liquidated damage clause that did not specify amount but allowed recovery of reasonable expenses, and applying two-part test to determine validity of clause). See also *Talbott v GC Servs., Ltd.* (WD Va 1999) 53 F Supp 2d 846 (35-percent collection fee "actually incurred" by creditor was allowable cost). Attorney fees are allowable only by statute or contract (CCP §1021) and only if reasonable (CC §1717). See *Wilson,* FTC Staff Opinion Letter (May 13, 1994); 85 Ops Cal Atty Gen 215 (2002) (service fee permissible if charging fee permitted by agreement creating obligation).

**PRACTICE TIP:** A debtor's failure to dispute the debt in response to a validation letter under 15 USC 1692g(a) may preclude a challenge brought to collection of an unlawful debt. *Richmond v Higgins* (8th Cir 2006) 435 F3d 825; *Palmer v I.C. Sys., Inc.* (ND Cal, Nov. 8, 2005, No. C-04-03237 RMW) 2005 US Dist Lexis 27946.

- **Postdated checks.** Accepting a check postdated more than 5 days, unless the debt collector gives notice in writing of its intent to deposit the check at least 3 and no more than 10 days before deposit; soliciting a postdated check for the purpose of threatening criminal prosecution; or depositing a postdated check before its maturation date. 15 USC §1692f(2)-(4), CC §1788.17.

- **Charges for phone calls or letters.** Causing charges to be made for communications such as collect telephone calls or COD mailings by concealing or misrepresenting the true purpose of the communication. 15 USC §1692f(5); CC §§1788.11(c), 1788.17.
- **Threats of nonjudicial action.** Taking or threatening to take nonjudicial action to cause dispossession of property if there is no present right to possession, no present intention to take possession, or the property is exempt from repossession. 15 USC §1692f(6)(a)-(c); CC §§1788.10(e), 1788.17.
- **Postcards.** Communicating with the debtor by postcard regarding a debt. 15 USC §1692f(7), CC §1788.17.
- **Symbols on envelopes.** Using any symbol on an envelope, other than the debt collector's business name if such name does not indicate the debt collection business. 15 USC §1692f(8); CC §1788.12(d) (no violation under state law unless debt collector intends that the symbol be seen by others and embarrass the debtor); CC §1788.17.
- **Affirmations from bankrupts.** Obtaining an affirmation from a debtor-adjudicated bankrupt without advising the debtor in writing that such affirmation is not required by law. CC §1788.14(a).
- **Misapplication of payments.** Applying payments of the debt to accounts other than as directed by the consumer. 15 USC §1692h, CC §1788.17.
- **Improper venue or abuse of process.** Filing actions in an improper venue, which may be an "unlawful … business practice," as well as stating facts justifying an injunction on the ground of a gross and continuing abuse of process. 15 USC §1692i; CC §1788.15; *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 101 CR 745.
- **Deceptive forms.** Signing, compiling, or furnishing deceptive forms with knowledge that the forms will be used to create a false belief by the consumer that someone other than the creditor is collecting the debt. 15 USC §1692j, CC §1788.17.
- **Stale debts.** Suing on a debt for which the collector knows that the statute of limitations bars a legal action. *Newman v Checkrite Cal., Inc., supra*. See 15 USC §1692c(5); CC §1788.10(e).

**PRACTICE TIP:** Courts distinguish between suing on a stale debt and collecting on it. See FTC Consumer Alert, "Time-Barred Debts," available online at http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt144.shtm. See also *Abels v JBC Legal Group, PC* (ND Cal 2005) 428 F Supp 2d 1023; *Perretta v Capital Acquisitions & Mgmt. Co.* (ND Cal, May 5, 2003, No. C-02-05561 RMW) 2003 US Dist Lexis 10070 (permissible to collect on time-barred debts, but not to make threats that would suggest to least sophisticated consumer that legal actions could or would be taken); *In re Boyajian* (Oct. 2, 2007) State Bar No. 06-TE-15159-RAH ("Given clear California law on the subject, collection of time-barred debts, at least in California, is not a violation of California law and therefore not a violation of the FDCPA").

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### G. Validation of Debt

#### §2.22 1. Required Notices From Debt Collector: State Law Requirement

In addition to other requirements imposed by the Rosenthal Act, third party debt collectors subject to the federal Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692p) must provide a notice to debtors that includes the following description of debtor rights (CC §1812.700(a)):

> The state Rosenthal Fair Debt Collection Practices Act and the federal Fair Debt Collection Practices Act require that, except under unusual circumstances, collectors may not contact you before 8 a.m. or after 9 p.m. They may not harass you by using threats of violence or arrest or by using obscene language. Collectors may not use false or misleading statements or call you at work if they know or have reason to know that you may not receive personal calls at work. For the most part, collectors may not tell another person, other than your attorney or spouse, about your debt. Collectors may contact another person to confirm your location or enforce a judgment. For more information about debt collection activities, you may contact the Federal Trade Commission at 1-877-FTC-HELP or http://www.ftc.gov.

The notice must be included with the first written notice initially sent to a California address of a debtor in connection with collecting the debt by the third-party debt collector. CC §1812.700(b). The required notice may be changed only as necessary to reflect changes under the FDCPA that would otherwise make the disclosure inaccurate. CC §1812.701(a). The type size used in the disclosure must be in at least the same type size as that used to inform the debtor of his or her specific debt, but is not required to be larger than 12-point type. CC §1812.701(b). Any violation of these notice requirements is a violation of the Rosenthal Act. CC §1812.702.

**PRACTICE TIP:** The Rosenthal Act exempts lawyers from its provisions and regulation. See §2.8. However, CC §1812.700 imposes liability under the Rosenthal Act on those meeting the definition of "debt collector" under the federal FDCPA, which can regulate lawyers. See §2.3; CC §1812.702. The statute thus has an inherent conflict when it comes to lawyers: It arguably seeks to impose obligations under the Rosenthal Act against individuals who themselves are exempt from the Rosenthal Act (CC §1788.2(c)).

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**Source:** Business Law/Debt Collection Practice in California/2 The Fair Debt Collection Practices Acts/§2.22A 2. Required Notices From Debt Collector: Federal Law Requirement

### §2.22A 2. Required Notices From Debt Collector: Federal Law Requirement

Federal law requires the debt collector to disclose certain information in all communications with the debtor. 15 USC §1692e(11); *Pipiles v Credit Bureau of Lockport, Inc.* (2d Cir 1989) 886 F2d 22. Such disclosure is commonly referred to as the "mini-*Miranda*" warning.

Initially, the debt collector must disclose that it is attempting to collect a debt and that any information obtained may be used to collect the debt. In subsequent communications, the debt collector must disclose that the communication is from a debt collector. 15 USC §1692e(11). Use of a statutory quotation immunizes debt collectors from idiosyncratic interpretations of the meaning of the communication. *Anderson v Credit Collection Servs., Inc.* (SD Cal 2004) 322 F Supp 2d 1094. These requirements do not apply to formal pleadings. FTC Staff Commentary, §809(a)(6).

**PRACTICE TIP:** Answering machines raise a particular conflict between potential disclosure to unintended hearers and the mini-*Miranda* requirement. Courts and the FTC have opted for meaningful identification of the debt collector and providing the mini-*Miranda.* See *Reed v Global Acceptance-Credit Corp.* (ND Cal, Aug. 11, 2008, No. C-08-01826 RMW) 2008 US Dist Lexis 61738; *Foti v NCO Fin. Sys., Inc.* (SD NY 2006) 424 F Supp 2d 643; *Hosseinzadeh v M.R.S. Assocs.* (CD Cal 2005) 387 F Supp 2d 1104; *Anderson,* FTC Staff Opinion Letter (July 28, 2006).

This notice must be clearly conspicuous. 15 USC §1692g(a); see *Swanson v Southern Oregon Credit Serv.* (9th Cir 1988) 869 F2d 1222, 1225. Courts have found violations on "inconspicuous" grounds when the notice was printed on the reverse side of a communication (*Riveria v MAB Collections, Inc.* (WD NY 1988) 682 F Supp 174, 177; *Baker v Citibank* (SD Cal 1998) 13 F Supp 2d 1037) or on a separate piece of paper enclosed in the same envelope (*Cavallaro v Law Office of Shapiro & Kriesman* (ED NY 1996) 933 F Supp 1148, 1153).

**PRACTICE TIP:** Practitioners who regularly collect contracts subject to CC §1632 should determine whether the "clear and conspicuous" standard requires translation of appropriate notices. See *In re Avco Fin. Servs., Inc.* (1984) 104 FTC 485.

If a language other than English is principally used by the third party debt collector in the initial oral contact with the debtor, a notice must be provided to the debtor in that language within 5 working days. CC §1812.700(c).

Liability may be imposed for failure to give the mini-*Miranda* warning even if the violation is not egregious and there is no harm. *Russey v Rankin* (D NM 1995) 911 F Supp 1449; *Baker v G.C. Servs. Corp.* (9th Cir 1982) 677 F2d 775. Liability may also be imposed even if the debt does not require validation, such as after a judgment is entered against the debtor. *Frey v Gangwish* (6th Cir 1992) 970 F2d 1516.

Within 5 days after the initial communication (on the definition of "initial communication, see §2.22C), the debt collector must send the consumer a notice containing the debt amount, the creditor's name, a statement that the debt is assumed to be valid unless the consumer disputes the validity of all or any part of the debt within 30 days after receiving the notice, and a statement that on written request the debt collector will provide the consumer with the original creditor's name and address. 15 USC §1692g(a); *Camacho v Bridgeport Fin., Inc.* (9th Cir 2005) 430 F3d 1078.

**PRACTICE TIP:** Accurate supplemental language provided to consumers in the validation letter has sometimes withstood court scrutiny. See *Hipolito v Alliance Receivables Mgmt., Inc.* (ND Cal, July 15, 2005, No. C-05-0842 JCS) 2005 WL 1662137 (statement in collection letter that if debt "paid in full … all collection activity will be stopped" does not violate FDCPA); *Wan v Commercial Recovery Sys., Inc.* (ND Cal 2005) 369 F Supp 2d 1158 (recommendation to consult attorney).

A debt collector does not comply with the validation requirement by including validation of the debt with the first communication to the consumer. FTC Staff Commentary, §809(a)(8). A tardy request for validation does not trigger validation or stay requirements. *Mahon v Credit Bureau* (9th Cir 1999) 171 F3d 1197.

The FDCPA's validation of debt notice provision requires only that notice be "sent" by a debt collector; the debt collector need not establish actual receipt by the debtor. *Mahon v Credit Bureau* (9th Cir 1999) 171 F3d 1197. The validation process is vitiated by the automatic stay of a debtor's bankruptcy filing if the validation process itself would violate the automatic stay. *Mallory v Phillips* (MD Ga 1996) 197 BR 721.

**PRACTICE TIP:** Attorneys should instruct their staff regarding the mini-*Miranda* obligations and have procedures in place to ensure that staff give the warnings. Some attorneys use cards posted at desks; others use dedicated

telephone lines with a prerecorded message giving the mini-*Miranda* warning before connection to the attorney or assistant is made.

**NOTE:** Although the California Act previously did not contain the validation procedures of the federal FDCPA (except for the requirement that attorneys and their employees be aware of the extent to which these procedures apply under the Rules of Professional Conduct (Bus & P C §6077.5)), California adopted this requirement in part by enacting CC §1788.17. However, the statute exempts an officer or employee of a creditor (15 USC §1692a(6)(A)), a corporate affiliate (15 USC §1692a(6)(B)) and that person's principal from the "mini-Miranda" (15 USC §1692e(11)) and the 30-day validation notice (15 USC §1692g). See CC §1788.17. See also §2.1C.

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### §2.22B a. Language of Validation Letter

Practitioners should review the nature of the debt to ensure that the language of the validation letter matches the debt itself and whether charges, fees, and costs referenced in the letter are allowed by law or by the instrument creating the debt. When the debt is liquidated, practitioners should list the liquidated amount. When the debt is subject to accruing charges, the notice should so state. For a form of letter concerning a liquidated debt, see §2.24.

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### §2.22C b. Definition of "Initial Communication"

FDCPA reform legislation, enacted in 2006, provides that legal pleadings are not an initial communication as defined by the FDCPA. Financial Services Regulatory Relief Act of 2006, Pub Law 109-351, §§801-802; see 15 USC 1692g(d).

Before this reform legislation, the FTC's position on whether service of process serves as the initial communication triggering the debt validation obligations had not been entirely clear. See *Mezines,* FTC Staff Opinion Letter (Mar. 31, 2000). But see *Goldman v Cohen* (2d Cir 2006) 445 F3d 152 (initiating debt collection proceedings in state court constitutes initial communication).

**NOTE:** The sending or delivery of any form or notice that does not relate to the collection of a debt and is expressly required by the Internal Revenue Code of 1986, the Gramm-Leach-Bliley Act (15 USC §§6801-6809), or any provision of federal or state law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, will not be treated as an initial communication in connection with debt collection. 15 USC 1692g(e).

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### §2.23 3. Debt Collector's Activities Within 30-Day Period

If, in response to the 30-day validation letter, the consumer disputes the debt or requests the name and address of the original creditor, the debt collector must cease collection efforts until it mails to the consumer a verification of the debt or a copy of the judgment, or the name and address of the original creditor. 15 USC §1692g(a)(4)-(5), (b). The statutory language does not require the disputes to be in writing, and California courts have so held. A district court has opined that a debt may be orally disputed under 15 USC §1692g(a)(3). *Camacho v Bridgeport Fin., Inc.* (9th Cir 2005) 430 F3d 1078; *Sanchez v Robert E. Weiss, Inc. (In re Sanchez)* (ND Cal 2001) 173 F Supp 2d 1029, 1034. A Ninth Circuit case has confirmed that an oral notice is sufficient. Further, the court held that requiring a written notice in the validation letter was itself a violation of the FDCPA. See *Camacho v Bridgeport Fin., Inc*. (9th Cir 2005) 430 F3d 1078, 1080.

**PRACTICE TIP:** Although the consumer's dispute might not need to be in writing, the notice to the consumer still must mirror the statutory language. *Camacho v Bridgeport Fin., Inc.* (9th Cir 2005) 430 F3d 1078; *Sanchez v Weiss* (ND Cal 2001) 173 F Supp 2d 1029.

The FDCPA reform legislation codified a right to pursue collections during the 30-day violation period, in the absence of a consumer dispute. Financial Services Regulatory Relief Act of 2006, Pub Law 109-351, §§801-802; see 15 USC 1692g(b). More specifically, collection activities and communications that do not otherwise violate the FDCPA may continue during the 30-day period unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor. 15 USC 1692g(b). A debt collector may inform the debtor that collection efforts have ceased. *Beato,* FTC Staff Opinion Letter (Oct. 5, 2007).

**PRACTICE TIP:** The 30-day validation letter obligation is not imposed on creditors by virtue of its incorporation by CC §1788.17. See §2.22. Other entities such as loan servicers should review their corporate status and relationship with their principal to determine whether they are subject to the requirement. See *Palmer v Stassinos* (ND Cal 2004) 348 F Supp 2d 1070 (second letter within 30-day period did not overshadow first).

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### §2.23A 4. Statement of the Amount of the Debt

One of the elements of the notice required to be given to the consumer is the "amount of the debt." 15 USC §1692g(a)(1). But often the amount of the debt is not capable of pinpoint accuracy because of charges, interest, or fees accruing daily following the date of the validation letter. The validation notice, including the "amount of the debt," must be effectively conveyed in a manner that is not confusing to the least sophisticated consumer. *Swanson v Southern Oregon Credit Serv.* (9th Cir 1988) 869 F2d 1222. See also *Bush v Loanstar Mortgagee Servs., LLC* (ND Cal 2003) 286 F Supp 2d 1210 (least sophisticated consumer would understand difference between amount required to bring account current and amount required to extinguish obligation).

Conflicting decisions exist regarding whether the amount of the debt must be conveyed as of a "snapshot" in time, or whether debt collectors can refer the debtors to a telephone number or separate document. See, *e.g., Harvey v National Action Fin. Servs.* (ND Ill 1999) 79 F Supp 2d 896; *Taylor v Fink* (ND Ill, Nov. 23, 1994, No. 93 C 4941) 1994 US Dist Lexis 16821; *Rosenberg,* FTC Staff Opinion Letter (Jan. 16, 1991).

The Court of Appeals for the Seventh Circuit attempted to resolve this problem by providing a safe harbor for debt collectors in that circuit collecting on a debt when the final penalties and charges have not been pinpointed at the time of collection, *e.g.,* unpaid interest, late charges, escrow advances. In *Miller v McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC* (7th Cir 2000) 214 F3d 872, Judge Posner found that a validation letter that referred the debtor to an "800" number to obtain the balance of the debt violated the FDCPA. He found that the FDCPA required a statement of the "debt," and provided the following "safe harbor" in cases in which the amount of the debt changes daily.

> As of the date of this letter, you owe $____[the exact amount due]. Because of interest and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write the undersigned or call [phone number].

Judge Posner held that this form will provide a safe harbor in the Seventh Circuit to collectors who use it, as long as it does not obscure other information. 214 F3d at 876; see form in §2.24. In a subsequent case, the Seventh Circuit held that this language is not confusing and passes muster under the FDCPA, even if it actually confuses the debtor in fact. *McKinney v Cadleway Prop., Inc.* (7th Cir 2008) 548 F3d 496. See also *Olson v Risk Mgmt. Servs., Inc.* (7th Cir 2004) 366 F3d 509 (letters that referred to "balance due" and "amount now due" did not violate FDCPA); *Taylor v Cavalry Inv., LLC* (7th Cir 2004) 365 F3d 572 (language in letter to debtor stating that account may be accruing interest did not violate FDCPA). See also *Valdez v Hunt* (ND Cal, Mar. 19, 2002, No. C 01-01712 SC) 2002 US Dist Lexis 4575 ("$3056.08 plus interest" passes muster under FDCPA, although not ideal). But see *Fields v Wilber Law Firm, P.C.* (7th Cir 2004) 383 F3d 562 (adding attorney fees to debt without distinguishing them in letter to debtor violated FDCPA).

**PRACTICE TIP:** The Ninth Circuit has offered no opinion on Judge Posner's attempt to offer safe harbors to debt collectors. But see *Valdez v Hunt* (ND Cal, Mar. 19, 2002, No. C 01-01712 SC) 2002 US Dist Lexis 4575. Hence, the language offered by *Miller* should be used with caution.

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## §2.24 5. Form: 30-Day Validation Notice

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

2.24-1 30-day validation notice

_ _[*Letterhead*]_ _

_ _[*Date*]_ _

_ _[*Name of debtor*]_ _
_ _[*Address of debtor*]_ _

**Re:** _ _[*Identify original creditor and account number; provide account description, amount of the debt*]_ _

**NOTICE: THIS COMMUNICATION IS FROM A DEBT COLLECTOR. THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED FROM YOU WILL BE USED FOR THAT PURPOSE. THE STATE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT AND THE FEDERAL FAIR DEBT COLLECTION PRACTICES ACT REQUIRE THAT, EXCEPT UNDER UNUSUAL CIRCUMSTANCES, COLLECTORS MAY NOT CONTACT YOU BEFORE 8 A.M. OR AFTER 9 P.M. THEY MAY NOT HARASS YOU BY USING THREATS OF VIOLENCE OR ARREST OR BY USING OBSCENE LANGUAGE. COLLECTORS MAY NOT USE FALSE OR MISLEADING STATEMENTS OR CALL YOU AT WORK IF THEY KNOW OR HAVE REASON TO KNOW THAT YOU MAY NOT RECEIVE PERSONAL CALLS AT WORK. FOR THE MOST PART, COLLECTORS MAY NOT TELL ANOTHER PERSON, OTHER THAN YOUR ATTORNEY OR SPOUSE, ABOUT YOUR DEBT. COLLECTORS MAY CONTACT ANOTHER PERSON TO CONFIRM YOUR LOCATION OR ENFORCE A JUDGMENT. FOR MORE INFORMATION ABOUT DEBT COLLECTION ACTIVITIES, YOU MAY CONTACT THE FEDERAL TRADE COMMISSION AT 1-877-FTC-HELP OR HTTP://WWW.FTC.GOV.**

**Dear** _ _[*name of debtor*]_ _**:**

**This office represents** _ _[*name of creditor*]_ _ **for purposes of collection of the above balance that you owe** _ _[*name of creditor*]_ _**. As of the date of this letter, the amount due and owing on this account is $**_ _[*amount*]_ _**, plus accruing charges, attorney fees, and other charges as provided under the terms of the contract. Finance charges continue to accrue on this account to the extent permitted by the contract, federal and/or state laws.**

**I will assume this debt to be valid unless you dispute its validity, or any part of it, within 30 days after receiving this notice. If you notify me in writing within the 30-day period that the debt or any part of it is disputed, I will obtain and mail to you a copy of a writing or verification evidencing the debt. If you request from me in writing within the 30-day period the name and address of the original creditor, I will obtain and mail to you the name and address of the original creditor.**

**If your obligation remains in default, further legal action may be taken against you that could result in a judgment, which may include attorney fees and other litigation costs. If you have any questions, please call me at** _ _[*telephone number*]_ _.

**Sincerely,**

__[*Signature*]__
_ _[*Typed name*]_ _

*Comment:* A notice of debtor rights must be contained in the initial written communication. CC §1812.700(b). See §2.22. A validation letter such as the one set forth above does not necessarily have to be the initial communication, but merely must be sent within 5 days of the initial communication. See §2.22A. As a practical matter, however, because the validation letter typically is, in fact, the initial written communication, the required notice is included in this form.

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### §2.24A 6. Validation Required in Response to Consumer Dispute

When a consumer disputes a debt in response to the debt collector's validation notice, the debt collector can take no further action until he "obtains verification of the debt" and mails it to the consumer. 15 USC §1692g(b). The FDCPA does not define what validation is required. The congressional history suggests, by changing the term "certification" to "validation," a debt collector complies with this obligation by obtaining from the creditor a statement that includes an itemization of the amount of the debt, the name of the consumer, a statement that the debt has not been paid, and a statement that the creditor (to whom the debt was originally owed), in consideration of the consumer's debt, had either delivered a merchantable product or properly rendered a service. H Rep No. 131, 95th Cong, 1st Sess (1977). See also *Xiao-Lin,* FTC Staff Opinion Letter (Aug. 3, 1987) (itemization and response to factual dispute); *Kodner,* FTC Staff Opinion Letter (Mar. 7, 1979). However, nothing in the plain language of the statute or the decisions interpreting it imposes such an onerous validation obligation. *Chaudhry v Gallerizzo* (4th Cir 1999) 174 F3d 394 relied on a different portion of the congressional history to show that verification is only intended to "eliminate the … problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid." (S Rep No. 95-382, 95th Cong, 1st Sess (1977), reprinted in 1977 US Code Cong & Ad News 1695, 1699).

The case law suggests that a debt collector need not investigate the defenses alleged by the consumer, and the debt collector may rely on representations made by the client. *Stonehart v Rosenthal* (SD NY, Aug. 13, 2001, No. 01 Civ. 651 (SAS)) 2001 US Dist Lexis 11566; *Amond v Brincefield, Hartnett & Assocs*. (4th Cir, Mar. 22, 1999, No. 97-2582) 1999 US App Lexis 4815. A debt collector "cannot be held liable for what appears to be an honest dispute regarding the amount of the debt, so long as there exists a colorable factual basis for the higher amount claimed by their client." 1999 US App Lexis 4815 at *6. Attorneys and debt collectors can rely on the information they receive from the client, and they cannot be held strictly liable when they mistakenly attempt to collect amounts in excess of what is due, if they reasonably relied on information provided by their clients. *Cooper v Litton Loan Servicing (In re Cooper)* (Bankr ND Fla. 2000) 253 BR 286, 292. As to lawyers who act as debt collectors, they owe no heightened duty to investigate the validity and amount of the debts they seek to collect. *Amond v Brincefield, Hartnett & Assocs*. (4th Cir, Mar. 22, 1999, No. 97-2582) 1999 US App Lexis 4815, *9.

Thus, the following have withstood scrutiny against failure to validate claims:

- A written statement that "the amount being demanded is what the creditor is claiming is owed." (*Chaudhry v Gallerizzo* (4th Cir 1999) 174 F3d 394, 406);
- A summary containing a running account of the debt amount, a description of every transaction, and the date on which the transaction occurred (174 F3d at 406);
- A computer printout of the account statement, which informed the consumer of the services provided, the dates on which the charges were incurred, and the amounts of her debts (*Graziano v Harrison* (3d Cir 1991) 950 F2d 107, 113); and
- The name of the original creditor, a statement that the creditor has verified the balance to be true, correct, and still owing, and a statement of when the last payment was received. *Rudek v Frederick J. Hanna & Assocs., P.C.* (ED Tenn, Feb. 17, 2009, No. 1:08-CV-288) 2009 US Dist Lexis 11573.

On the other hand, a copy of the original credit contract does not comply with the requirement. *Spears v Brennan* (Ind App 2001) 745 NE 2d 862, 878.

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**Source:** Business Law/Debt Collection Practice in California/2 The Fair Debt Collection Practices Acts/§2.24B H. Identity Theft

### §2.24B H. Identity Theft

When a consumer debtor notifies a debt collector that the consumer is the victim of identity theft, the debt collector must stop collection activities and must follow certain procedures. CC §1788.18. For a memorandum to debt collection staff detailing procedures to follow at this point, see §1.28, Item 7.

Initially, the consumer must conform to specific notice and reporting requirements before the debt collector's obligations are triggered. Thus, to stop collection activities, the consumer debtor must provide (CC §1788.18(a)):

- A copy of a police report filed by the debtor alleging that he or she is the victim of an identity theft crime, and
- A written statement that the debtor claims to be the victim of identity theft with respect to the specific debt being collected by the debt collector.

The debt collector must then stop collection activities until completion of a review. The debtor's written statement can be made on an "Identity Theft Affidavit," which is available online at the website of the California Office of Information Security and Privacy Protection. See the Directory. Alternatively, the debtor can prepare his or her own statement consisting of a written certification containing specified information and documentation. CC §1788.18(b). A person submitting the certification who declares as true any material matter that he or she knows to be false is guilty of a misdemeanor. CC §1788.18(b)(3).

**PRACTICE TIP:** A consumer's technical noncompliance with CC §1788.18 probably will not immunize a debt collector against liability under the anti-harassment provisions of either the FDCPA or the Rosenthal Act.

If a debtor gives oral, rather than written, notice that she or he is a victim of identity theft, debt collectors are not required to cease collection activities. However, they must notify the debtor, either orally or in writing, that the debtor's claim must be in writing, providing all the information required in CC §1788.18(a). CC §1788.18(c). If a debtor gives a written notification that he or she is a victim of identity theft, but omits any of the required information, the debt collector must give written notice to the debtor of the additional information required. CC §1788.18(c).

Once the debt collector receives all of the specified information, the debt collector must review and consider all information provided by the debtor, as well as information available to the debt collector in its file or from the creditor. CC §1788.18(d). Debt collectors may recommence collection activities only on (1) making a good faith determination that the information fails to establish that the debtor is not responsible for the particular debt and (2) notifying the debtor in writing of that determination and the basis for that determination. The debt collector's determination must be made in a manner consistent with the provisions of 15 USC §1692f(1), as incorporated by CC §1788.17. CC §1788.18(d).

**PRACTICE TIP:** The term "good faith" is not defined in the statute. By analogy, the UCC defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Com C §1201(20). This suggests an *objective* investigation and review of the information provided by the statutory sources. The debt collector should not ignore evidence favorable to the debtor, although it may be discounted or found not credible as part of the entire scope of information reviewed in good faith. *Wilson v 21st Century Ins. Co.* (2007) 42 C4th 713, 68 CR3d 746. But a debt collector need not conduct an evaluation or investigation of sources beyond those required by the statute.

The legislative history of CC §1788.18 suggests a confusing standard for determining whether a consumer claiming identity theft remains responsible for the particular debt. As enacted, CC §1788.18(d) requires the determination to "be made in a manner consistent with the provisions of 15 USC §1692f(1), as incorporated by [CC §1788.17]." CC §1788.18(d). Title 15 USC §1692f(1) prohibits the collection of any amount, such as interest, a fee, or a charge, unless the amount is expressly authorized by the agreement creating the debt or permitted by law. The legislative history suggests no explanation how 15 USC §1692f(1) provides any meaningful "standard." One might have expected the investigation standard to be consistent with the validation requirement of 15 USC §1692g. There is support for this in the legislative history:

> *Existing Federal Law*, the Fair Debt Collection Practices Act, regulates the collection practices of third party debt collectors. The Act provides that an alleged debtor may dispute a debt, and that following a dispute the debt collector must cease collection activity until it verifies the debt and provides the alleged debtor with a copy of the verification. [15 USC §1692g.] This restriction can be enforced by a private right of action, but a collector may not be found liable if he can show that the violation was not intentional and resulted from a

bona fide error. (Senate Judiciary Committee Analysis, June 17, 2003, p. 2). See also §§2.22-2.24 (what validation is required).

The legislative history also suggests that the bona fide error provision of 15 USC §1692k applies if the debt collector erroneously determines that the alleged victim remains obligated on the debt. This is consistent with the legislative history of the Rosenthal Act, and contrary to cases such as *Irwin v Mascott* (ND Cal 2000) 112 F Supp 2d 937, 959, suggesting that the bona fide error rule applies only to clerical errors. See §2.31. The legislative history states that a debt collector's erroneous conclusion that the debtor remains liable on the obligation also is protected by the 15-day right to cure. See CC §1788.30(d); §2.31B. The Senate Rules Committee described what the bill does as follows:

> [It] would rely on the existing enforcement provisions of the Rosenthal Act, which provide for a private right action for actual damages. The prevailing party in the action is entitled to attorney's fees. Also, a debt collector may not be found liable if he cures a violation within 15 days of discovering the violation or receiving written notice of the violation. (Senate Rules Committee Analysis, July 15, 2003, p. 2-3.)

A decision that a debtor is responsible for a particular debt does not raise an inference or presumption that the debt is valid or invalid, or that the debtor is liable or not liable for the debt. CC §1788.18(e).

Civil Code §1788.18(f) interacts with other identity theft laws as well. The statement and supporting documents that comply with subsection (a) may also satisfy the notice requirements of CC §1798.93(c). CC §1788.18(f).

Civil Code §1798.93 permits a debtor to file a cross-complaint alleging that he or she has been a victim of identity theft when a claimant has filed an action against that person. A "claimant" is a person who holds or may hold an interest in a disputed debt, not a bank who had an interest in a debt but sold it. *Satey v JP Morgan Chase & Co*. (9th Cir 2008) 521 F3d 1087. The debtor may recover actual damages, attorney fees and costs, and equitable relief as appropriate if he or she provided written notice to the clamant that an identity theft situation might exist. Such notice might include, on written request of the claimant, a copy of the police report or any report filed by the Department of Motor Vehicles when it has conducted an investigation of driver's license identity theft. See CC §1798(c)(5); Pen C §530.5; Veh C §13800. The debtor must have filed notice with the claimant that an identity theft situation might exist at least 30 days before filing such an action. CC §1798(c)(5).

When a debt collector concludes that the consumer is not responsible for the particular debt and does not recommence collection activities, the debt collector must (CC §1788.18(g); see *Arcaro v Silva* (1999) 77 CA4th 152, 91 CR2d 433 (debt collector who ignored evidence that consumer's signature was forged may be subject to malicious prosecution claim):

- Ask the consumer credit reporting agency to delete adverse information, if any, and
- Notify the creditor that debt collection activities have been terminated based on the consumer's claim of identity theft.

For purposes of the remedies provided by CC §1788.18, "debtor" means a natural person, firm, association, organization, partnership, business trust, company, corporation, or limited liability company from which a debt collector is seeking to collect a debt. CC §1788.18(i).

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## VI. LIABILITY

### §2.25 A. Actual Damages

Actual damages are compensable under both the federal and California Acts. 15 USC §1692k(a)(1); CC §§1788.30(a), 1788.17. Restitution typically is not a proper remedy under the FDCPA, or when California's Unfair Competition Law (UCL) (Bus & P C §17200-17210) incorporates the FDCPA. *Gerber v CitiCorp, Inc.* (ED Cal, Jan. 29, 2009, No. CIV S-07-0785 WBS JFM PS) 2009 US Dist Lexis 248094; see also Hyman, *California's Unfair Competition Law Does Not Confer Enhanced Remedies for Unfair Debt Collection Practices,* 8 Cons Fin Servs L Rep 25 (2005).

The debt collector's liability under state law is limited to the amount of any actual damages sustained by the debtor as a result of the violation, including emotional distress damages (*Panahiasl v Gurney* (ND Cal, Mar. 8, 2007, No. 04-04479 JF) 2007 US Dist Lexis 17269) and loss of consortium (*Bingham v Collection Bureau, Inc.* (D ND 1981) 505 F Supp 864).

Civil Code §1788.30(a)'s "by the debtor" requirement arguably precludes a remedy for nondebtors, such as family or friends. Hyman, *Does California's Rosenthal Fair Debt Collection Practices Act Protect Non-Debtors From Abusive Debt Collection Practices?,* 14 Con Fin Servs L Rep 5 (2009). The language "such additional damages as the Court may allow" does not preclude a right to jury trial. *Kobs v Arrow Serv. Bureau* (7th Cir 1998) 134 F3d 893.

**NOTE:** Once a plaintiff proves an FDCPA violation, 15 USC §1692k(a) does not provide a clear standard for proving or recovering emotional distress. Accordingly, some courts borrow the standards from the relevant state law torts of intentional or negligent infliction of emotional distress. See*, e.g., Baker v* G.C. *Servs. Corp.* (9th Cir 1982) 677 F2d 775; *Hartung v J.D. Byrider, Inc.* (ED Cal, June 26, 2009, No. 1:08-cv-00960 AWI GSA) 2009 US Dist Lexis 54415. Applying these state law standards would seem consistent with the public policy to weed out oft-pleaded but seldom proved emotional distress claims, and with the qualified privilege debt collectors have to inflict some measure of distress through the process of debt collection.

Nevertheless, other courts do not require such a stringent standard, holding that emotional distress recovery under the FDCPA is statutory, and independent of any tort claim. See, *e.g., Riley v Giguiere* (ED Cal, June 19, 2009, No. CIV S-06-2126 LKK/KJM) 2009 US Dist Lexis 51887; *Panahiasl v Gurney* (ND Cal, Mar. 8, 2007, No. 04-04479 JF) 2007 US Dist Lexis 17269; *Smith v Law Offices of Mitchell N. Kay* (1991) 124 BR 182, 185. Such courts still require proof of corroborating medical evidence or non-expert testimony establishing manifestations of anguish and significant emotional harm. Corroborating evidence may not be necessary, such courts say, when the conduct is egregious or when the circumstances make it obvious that a reasonable person would suffer significant emotional harm. *Basinger-Lopez v Tracy Paul & Assocs., Inc.* (ND Cal, July 6, 2009, No. C 08-5192-SBA) 2009 US Dist Lexis 62805 (denying default judgment based on insufficient proof of significant emotional distress); *Fausto v Credigy Servs. Corp.* (ND Cal 2009) 598 F Supp 2d 1049. Thus, those courts say, a debtor without sufficient emotional distress to prove claims of either intentional or negligent infliction of emotional distress could still recover for the distress under the "actual damages" provision of 15 USC §1692k(a). Putting the debtor's emotional distress at issue may allow discovery into emotional distress caused by other debt collectors. *Wells v GC Servs., Ltd.* (ND Cal, Apr. 10, 2007, No. C06-03511 RMW HRL) 2007 US Dist Lexis 29447. See *Piontek v I.C. Sys., Inc.* (MD Pa, Apr. 17, 2009, No. 1:08-1207) 2009 WL 1044596.

Proof of actual damages is not a prerequisite to suit. The enforcement provisions of the FDCPA are available whenever the collector violates the FDCPA, even if the debt is owed and no other collection tort has been committed. *Bartlett v Heibl* (7th Cir 1997) 128 F3d 497 (debtor need not show actual receipt of letter that violated Act); *McCartney v First City Bank* (5th Cir 1992) 970 F2d 45; *Baker v G.C. Servs. Corp.* (9th Cir 1982) 677 F2d 775.

The vicarious liability of debt collectors for the conduct of their agents is discussed in §2.29A.

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### §2.26 B. Injunctive Relief

Only the FTC has the right to enjoin practices that violate the FDCPA. 15 USC §1692*l*; *Taylor v Quall* (CD Cal 2007) 471 F Supp 2d 1053, 1059; *Palmer v Stassinos* (ND Cal 2006) 236 FRD 460. The language of the FDCPA and its legislative history support the view that no private action for injunctive relief is available under the statute. *Yasin v Equifax Info. Servs., LLC* (ND Cal, July 16, 2008, No. C-08-1234-MMC) 2008 WL 2782704. Before Prop 64, a private party could seek injunctive relief as a "private attorney general" under Bus & P C §17200. *Palmer v Stassinos* (ND Cal 2004) 348 F Supp 2d 1070, 1086. However, after Prop 64, only consumers who have had money taken from them by reason of the FDCPA violation that they were entitled to keep should have standing to seek such relief. The California Rosenthal Fair Debt Collection Practices Act does not mention injunctive relief as an available remedy.

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### §2.27 C. Penalties and Punitive Damages

Federal law imposes a maximum penalty of $1000 for actions brought by individuals. 15 USC §1692k(a). The penalty award depends on the nature, frequency, and persistence of the noncompliance and the extent to which it was intentional. *U.S. v National Fin. Servs.* (4th Cir 1996) 98 F3d 131. California courts consistently have held that statutory damages are limited to $1000 per action, not per defendant or per claim. See *Wright v Financial Serv. of Norwalk* (6th Cir 1994) 22 F3d 647; *Masuda v Thomas Richards & Co.* (CD Cal 1991) 759 F Supp 1456. See also *Harper v Better Bus. Servs.* (ND Ga 1991) 768 F Supp 817, aff'd (11th Cir 1992) 961 F2d 1561.

California law imposes a penalty of not less than $100 nor more than $1000 for knowing and willful violations. The penalty was "per lawsuit," limiting the debt collector's liability to that debtor to "an individual action." CC §1788.30(b). That remedy is now available on a class basis. See CC §1788.17.

**PRACTICE TIP:** Punitive damages are not available in addition to or in excess of the $1000 penalty. *Catalfamo v Countrywide Home Loan* (ED Cal, Sept. 4, 2008, No. CV F 08-1117 LJO TAG) 2008 US Dist Lexis 84058; *Randolph v IMBS, Inc.* (7th Cir 2004) 368 F3d 726; *Wood v Midland Credit Mgmt., Inc.* (CD Cal, July 29, 2005, No. CVO53881FMCMANX) 2005 US Dist Lexis 31923. Civil Code §1788.30 merely states a debtor is entitled to a "penalty." It is frequently declared that when a new right has been created by statute, and a statutory remedy for its infringement is provided, the statutory remedy is exclusive. See, *e.g., D'Anza Santa Cruz Mobile Estates Homeowners Ass'n v D'Anza Santa Cruz Mobile Estates* (2001) 94 CA4th 890, 912, 114 CR2d 708. The Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) appears to provide the exclusive remedy of actual damages and a statutory penalty up to $1000. The legislative history supports this interpretation. See Enrolled Bill Report, California Dept. of Finance, p. 2, Aug. 26, 1977; Ways and Means Staff Analysis, SB 237, p.1.

**PRACTICE NOTE:** Remedies under the FDCPA and the Rosenthal Act are cumulative, and penalties may be awarded under both Acts. *Basinger-Lopez v Tracy Paul & Assocs., Inc.* (ND Cal, July 6, 2009, No. C 08-5192-SBA) 2009 US Dist Lexis 62805; *Mejia v Marauder Corp.* (ND Cal, Mar. 15, 2007, No. C06-00520 HRL) 2007 US Dist Lexis 21313. Compare CC §1788.32 (remedies intended to be cumulative) with 85 Ops Cal Atty Gen 215 (2002) (evaluating effect of CC §1788.17: "notwithstanding other provisions of law" expresses legislature's intent to have specific statute control despite existence of other law that might govern). But see *Chan v North Am. Collectors, Inc.* (ND Cal, Mar. 24, 2006, No. 06-0016 JL) 2006 US Dist Lexis 13353.

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### §2.28 D. Attorney Fees

The federal Act provides that attorney fees be awarded to the prevailing debtor at reasonable, competitive rates. *Tolentino v Friedman* (7th Cir 1995) 46 F3d 645. The hourly rate is based on the prevailing rate in the district where the action is pending or a comparable community of trial attorneys with skill, experience, and reputation similar to the prevailing parties' lawyers. The court is not limited to evaluating FDCPA fee awards. *Camacho v Bridgeport Fin., Inc.* (9th Cir 2008) 523 F3d 973.

When there has been no complete victory, the court has the discretion to award fees. See *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (interpreting CC §1717). This is particularly so after an offer under Fed R Civ P 68. *Costa v National Action Fin. Servs., Inc.* (ED Cal, Apr. 30, 2008, No. CIV. S-05-2084 FCD/KJM) 2008 US Dist Lexis 35339. Some cases, however, have held that a technical violation of the Act is not enough; actual or additional damages must be proved. *Johnson v Eaton* (5th Cir 1996) 80 F3d 148; *Pietrowksi v Merchants & Med. Credit Corp.* (ED Mich 2008) 256 FRD 544 (no fee award when no actual damage); *Vera v Trans-Continental Credit & Collection Corp.* (SD NY, May 10, 1999, No. 98 Civ 1866 (DC)) 1999 US Dist Lexis 6937 (cutting attorney fee award when debt in question was $8.00 and prosecution of technical violation was attorney driven).

Under California law, reasonable attorney fees are awarded to the prevailing debtor based on time necessarily spent to enforce the liability. CC §1788.30(c). In *Akins v Enterprise Rent-a-Car Co. of San Francisco* (2000) 79 CA4th 1127, 94 CR2d 448, the court of appeal determined whether the foregoing language requires a formal apportionment of fees incurred under the Rosenthal Act with fees incurred in connection with common law claims for which fees may not be awarded under the American Rule. The court explained that some apportionment is required, but held that if

> there is a common legal issue … that links a claim on which an attorney fees motion may properly be based with a claim for which no attorney fees may be recovered, that appears to us to be sufficient to link the legal work to the compensable attorney fees claim.

**PRACTICE TIP:** The issue of the proper amount of attorney fees (and the propriety of apportionment) depends on the legislative intent and policies underlying the specific fee-shifting scheme at issue. *Mann v Quality Old Time Serv., Inc.* (2006) 139 CA4th 328, 342, 42 CR3d 607. In the context of a partially successful party, a court may formally apportion attorney fees, or reduce an award to an amount that is reasonable in relation to the results obtained. *Hensley v Eckerhart* (1983) 461 US 424, 429, 76 L Ed 2d 40, 103 S Ct 1933.

The wholesale incorporation of the federal class action remedy by CC §1788.17 creates conflicting standards governing an award of attorney fees. The Rosenthal Act allows for an award of "reasonable attorney's fees, which shall be based on time necessarily expended to enforce the liability." CC §1788.30(c). The federal FDCPA allows for an award for a "reasonable attorney's fee as determined by the Court" (15 USC §1692k(a)(3)), and lacks the "necessarily expended" limitation of state law.

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### §2.29 E. Class Actions

Class actions brought under the federal FDCPA may recover actual damages plus an amount limited to the lesser of $500,000 or 1 percent of the debt collector's net worth. 15 USC §1692k(a). "Net worth" means stockholder equity, not fair market value or good will. *Sanders v Jackson* (ND Ill 1998) 33 F Supp 2d 693, aff'd (7th Cir 2000) 209 F3d 998. See CC §1788.17 (debt collectors in California must comply with federal law; class action remedies permitted). See also 15 USC §1692k.

A debtor cannot carve classes into subclasses to multiply the penalty (*Campos v Western Dental Servs., Inc.* (ND Cal 2005) 404 F Supp 2d 1164, 1172) or to increase attorney fees (*Guevarra v Progressive Fin. Servs., Inc.* (ND Cal, Nov. 30, 2006, No. C-05-3466-VRW) 2006 US Dist Lexis 89193).

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### §2.29A F. Vicarious Liability

Debt collectors subject to the federal or state FDCPA may be vicariously liable for the intentional conduct of their agents and, in some instances, their independent contractors. *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507 (debt collector vicariously liable for attorney filing in wrong venue); *Irwin v Mascott* (ND Cal 2000) 112 F Supp 2d 937; *West v Costen* (WD Va 1983) 558 F Supp 564 (corporation exercising control over independent contractor collection agency vicariously liable). Creditors not otherwise subject to the FDCPA, however, may not be brought within its parameters through the doctrine of vicarious liability. *Wadlington v Credit Acceptance Corp.* (6th Cir 1996) 76 F3d 103.

Although the FDCPA is silent on the issue, in the Ninth Circuit, general principles of agency form the basis for vicarious liability under it. To ascertain general principles of agency, courts consult the Restatement (Second) of Agency. *Clark v Capital Credit & Collection Servs., Inc.* (9th Cir 2006) 460 F3d 1162, 1173; *Oei v N Star Capital Acquisitions, LLC* (CD Cal 2006) 486 F Supp 2d 1089, 1094. Accordingly, under Ninth Circuit precedent, a debt collector may be found vicariously liable for the conduct of its attorney under the FDCPA. *Newman v Checkrite Cal., Inc.* (ED Cal 1995) 912 F Supp 1354; *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507, 1516 (debt collector vicariously liable for attorney's violation of FDCPA venue rule). The fact that an attorney may act as an independent contractor does not require a different result. Under general rules of agency, one who contracts to act on behalf of another and is subject the other's control, may be both an agent and an independent contractor. *Newman v Checkrite, Cal., Inc., supra*; see Restatement (Second) of Agency §§2, 14N (1957). Thus, employers may be liable for the acts of independent contractors when an agency relationship is demonstrated. See *Sugimoto v Exportadora de Sal, S.A. de C.V.* (9th Cir 1994) 19 F3d 1309, 1311, cert denied (1994) 513 US 1018. In general, an attorney may be an agent even if employed for a single transaction and as an independent contractor. *Newman v Checkrite, Cal., Inc., supra*; see Restatement (Second) of Agency §1 (1957).

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## VII. DEFENSES

### A. Collateral Estoppel

### §2.30 1. No Defense to Debt

A violation of the federal or California Act is not an affirmative defense to the debt itself. *Chan v North Am. Collectors, Inc.* (ND Cal, Mar. 24, 2006, No. 06-0016 JL) 2006 US Dist Lexis 13353; *Monogram Credit Card Bank of Ga. v Mata* (NY Civ Ct 2002) 757 NYS2d 676 (FDCPA violation no defense to debt itself). Although some debtors may allege violations of the Act as an affirmative defense to the underlying debt, the better practice is to bring a cross-claim or a counterclaim against the debt collector. See §§4.93-4.96.

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### §2.30A 2. Permissive and Compulsory Counterclaims

Failure to raise violation of the federal Act as a counterclaim may be fatal if the court finds it compulsory; *i.e.,* if it "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." See, *e.g., Green v Ford Motor Credit Co.* (Md App 2003) 828 A2d 821. Fed R Civ P 13(a)(1)(A). However, at least some courts have found that debt collection and FDCPA claims arise from "separate and distinct" circumstances and thus do not give rise to a compulsory counterclaim. See *Peterson v United Accounts, Inc.* (8th Cir 1981) 638 F2d 1134; *Evans v American Credit Sys., Inc.* (D Neb 2004) 222 FRD 388. See also *Whitaker v Ameritech Corp.* (7th Cir 1997) 129 F3d 952, 958 (precluding debt collector's assertion of collateral estoppel after default judgment entered on debt); *Marlin v Chase Cardmember Servs., Inc.* (ED Cal, May 19, 2009, No. 1:09cv0192 AWI DLB) 2009 US Dist Lexis 45189; *Witt v Experian Info. Sys., Inc.* (ED Cal, June 16, 2008, No. CV F 08-0553 LJO DLB) 2008 US Dist Lexis 51380; *Sparrow v Mazda Am. Credit Co.* (ED Cal 2005) 385 F Supp 2d 1063. Under California law, "affirmative relief may not be claimed in the answer." CCP §431.30(c). Matters that tend to defeat or diminish the plaintiff's recovery, such as a claimed violation of the state or federal Act, must be asserted as cross-complaints. See CCP §428.80; *Taliaferro v Taliaferro* (1957) 154 CA2d 495, 316 P2d 393.

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### §2.30B 3. The *Rooker-Feldman* Doctrine

An FDCPA claim may be barred in federal court when the FDCPA claim requires the federal court to review a state court judgment. The United States Supreme Court has held that district courts lack jurisdiction to adjudicate claims seeking review of state court judgments, as well as cases "inevitably intertwined" with a prior state court judgment. *District of Columbia Court of Appeals v Feldman* (1983) 460 US 462, 75 L Ed 2d 206, 103 S Ct 1303; *Rooker v Fidelity Trust Co.* (1923) 263 US 413, 68 L Ed 362, 44 S Ct 149. An FDCPA claim challenging the manner of obtaining such a judgment or the amount of the judgment cannot be brought in federal court under the *Rooker-Feldman* doctrine. *Reusser v Wachovia Bank* (9th Cir 2008) 525 F3d 855. But see *Kougasian v TMSL, Inc.* (9th Cir 2004) 359 F3d 1136 (*Rooker-Feldman* doctrine not applicable when state court judgment secured by extrinsic fraud).

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### B. Statutory Safe Harbor for Bona Fide Errors

### §2.31 1. Standard of Proof

The bona fide error defense protects a debt collector from liability under the federal Act if the violation was unintentional and a bona fide error. This defense must be asserted as an affirmative defense, and the debt collector bears the burden of proof by a preponderance of the evidence. 15 USC §1692k(c); *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507, 1514; *Cacace v Lucas* (D Conn 1990) 775 F Supp 502. For example, in *Beattie v D.M. Collections, Inc.* (D Del 1991) 754 F Supp 383, 389, the debt collector adopted procedures that complied with the notice provisions of the federal Act and trained all its employees in these procedures. The court held that any failure to provide the required 15 USC §1692e(11) disclosure was thus a bona fide error, and the debt collector was not liable. See also *Stojanovski v Strobl & Monoogian* (ED Mich 1992) 783 F Supp 319, 324. But see *Matthews v Government Employees Ins. Co.* (SD Cal 1998) 23 F Supp 2d 1160 (question of fact about whether reasonable procedures existed under Fair Credit Reporting Act (FCRA) (15 USC §§1681-1681x), which has protection similar to FDCPA).

**NOTE:** Asserting an affirmative defense opens up the debt collector's procedures to discovery. See, *e.g.*, *Trevino v ACB Am., Inc.* (2006 ND Cal) 232 FRD 612.

The bona fide error defense is available under the state Act if the debt collector shows by a preponderance of the evidence that the violation was unintentional and resulted despite the maintenance of procedures reasonably adapted to avoid any such violation. CC §1788.30(e). Deciding whether this defense is valid requires analysis of the debt collector's policies and procedures.

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### §2.31A 2. Mistakes of Fact or Law

Recognizing a split among the circuit courts, the United States Supreme Court granted review regarding the applicability of the bona fide error rule to errors of law. *Jerman v Carlisle, McNeille, Rini, Kramer, & Ullrich LPA* (6th Cir 2008) 538 F3d 469 (cert granted 2009) __ US __, 174 L Ed 2d 575, 129 S Ct 2863. In so doing, the United States Supreme Court recognized that the Sixth and Tenth Circuits acknowledge the defense, while the Second, Eighth, and Ninth do not. See, *e.g., Baker v G.C. Servs. Corp.* (9th Cir 1982) 677 F2d 775; *Hunt v Check Recovery Sys., Inc.* (ND Cal 2007) 478 F Supp 2d 1157; *Irwin v Mascott* (ND Cal 2000) 112 F Supp 2d 937. (For an analysis of the split of authority, see *Johnson v Riddle* (10th Cir 2002) 305 F3d 1107.)

Mistake of fact and the debt collector's reasonable reliance on information furnished by the creditor are protected. *Clark v Capital Credit & Collection Servs., Inc.* (9th Cir 2006) 460 F3d 1162. Reliance on the creditor's past submission of accurate information is insufficient in itself to establish reliance. *Reichert v National Credit Sys., Inc.* (9th Cir 2008) 531 F3d 1002. Reliance on an FTC advisory opinion shields the collector from liability in this regard. 15 USC §1692k(e). But reliance on advice of counsel about the collectibility of fees or charges, or the debt itself, may qualify for treatment under the bona fide error defense. Compare *Watkins v Peterson Enters., Inc.* (ED Wash 1999) 57 F Supp 2d 1102 with *Irwin v Mascott* (ND Cal 2000) 112 F Supp 2d 937, 959 (bona fide error defense applicable to clerical errors only). Nor can reliance on a trade association's legal bulletins qualify. *Seeger v AFNI, Inc* (7th Cir 2008) 548 F3d 1107.

Some California cases have allowed the assertion of the bona fide error defense beyond mere clerical errors. See, *e.g.*, *Sigala v Arrow Fin. Servs., LLC* (SD Cal Feb. 22, 2007, No. 05 CV 0074 (WMc)) 2007 US Dist Lexis 12196.

The assertion that the collector was following the orders of the superiors is not a defense to the individual collector's liability. *Newman v Checkrite Cal., Inc.* (ED Cal 1995) 912 F Supp 1354. Failure to discover the consumer's bankruptcy, however, may be a defense. *Hubbard v National Bond & Collection Assocs.* (D Del 1991) 126 BR 422, aff'd (3d Cir 1991) 947 F2d 935.

**PRACTICE TIP:** Counsel should search computerized databases on each account to ensure the debt has not been discharged or require a certification from the client regarding the same.

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### §2.31B 3. 15-Day Right to Cure

The Rosenthal Act provides that a debt collector shall have no civil liability if, within 15 days either after discovering the violation that is able to be cured, or after receipt of a written notice of such violation, the debt collector notifies the debtor of the violation and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor. CC §1788.30(d). This provision has not been interpreted in published decisions, but the policies underlying it suggest it can and should be a strong defense. First, the legislature enacted the defense despite arguments that a debt collector has no incentive to comply with the Act if, despite bad faith intent, the debt collector can take corrective action within 15 days of notification and avoid liability. Second, it suggests a notice prerequisite to a suit by an affected debtor, particularly if the violation is "able to be cured," as well as an informal procedure permitting a debt collector to cure innocent violations of the act to avoid the costs in time and money of litigating alleged FDCPA violations. Finally, even if the violation is not "able to be cured," effective presuit or early settlement offers under CCP §998 or Fed R Civ P 68 can have strategic benefits. Such offers can be used to

- Defeat class certification when they are made and they expire before a class certification motion is filed (see, *e.g., Jones v CBE Group, Inc.* (D Minn 2003) 215 FRD 558; *Wilner v OSI Collection Servs., Inc.* (SD NY 2001) 198 FRD 393);
- Divest a federal court of subject matter jurisdiction (see, *e.g., Ambalu v Rosenblatt* (ED NY 2000) 194 FRD 451; *Wiskur v Short Term Loans, LLC* (ND Ill 2000) 94 F Supp 2d 937); or

**NOTE:** The courts are split on the issue of whether a class action case or controversy continues to exist in a FDCPA case when a defendant makes a Rule 68 offer of judgment to a class representative before class certification. See *Jones,* 215 FRD at 563 (gathering cases); see *Potter v Norwest Mortgage, Inc.* (8th Cir 2003) 329 F3d 608, 611. In *Jancik v Cavalry Portfolio Servs., LLC* (D Minn 2007) 2007 US Dist Lexis 49500, the court held that the Rule 68 offer did not moot the controversy. The court distinguished *Jones v CBE Group, Inc., supra*, because the *Jancik* plaintiff promptly rejected the settlement offer and was more diligent in pursuing class certification, and because the defendant never filed a motion to dismiss.

- Limit a prevailing plaintiff's entitlement to attorney fees.

Concerning the last point, see *Scott Co. v Blount, Inc.* (1999) 20 C4th 1103, 86 CR2d 614 (court can consider fact that party continued to litigate matter after CCP §998 offer and award reverse attorney fees when there is an appropriate legal basis); *Meister v Regents of Univ. of Cal.* (1998) 67 CA4th 437, 78 CR2d 913 (court can consider fact that party continued to litigate matter after reasonable, albeit informal, settlement offer).

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### §2.32 C. Statute of Limitations

Claims under the FDCPA must be brought within 1 year after the date of violation. 15 USC §1692k(d); *Naas v Stolman* (9th Cir 1997) 130 F3d 892 (when violation of Act is filing of lawsuit, time is computed from date of filing). The limitations period is jurisdictional and cannot be tolled. *Mattson v U.S.W. Communications, Inc.* (8th Cir 1992) 967 F2d 259; *Morgovsky v Creditors Collection Serv.* (ND Cal 1995) 1995 US Dist Lexis 7055, aff'd without published opinion (9th Cir 1996) 92 F3d 1193. But, in a fact-specific case, the Ninth Circuit applied the discovery rule to the FDCPA. *Mangum v Action Collection Servs., Inc.* (9th Cir 2009) 575 F3d 935. If the alleged violations began more than 1 year before suit was filed but continued into the limitations period, only the acts within the period remain actionable. The earlier acts are subject to a motion to strike, not a general demurrer or motion to dismiss. *Clark v Transpack Corp.* (ED Cal, Nov. 11, 2005, No. CIV-S-040332DFLPAN) 2005 US Dist Lexis 29958; *Kaplan v Assetcare, Inc.* (SD Fla 2000) 88 F Supp 2d 1355; *Sower v Van Ru Fin. Serv.* (D Minn, Jan. 25, 1995, No. Civ. 3-94-1591) 1995 US Dist Lexis 11746; *Friedman v HHL Fin. Servs., Inc.* (ND Ill, Jan. 25, 1994, No. C-93-1545) 1994 US Dist Lexis 557.

Rosenthal Act claims must be brought within 1 year and are subject to a confirming violation theory. CC §1788.30(f); *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 95 CR3d 880.

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### §2.33 D. Litigation Privilege

The federal FDCPA applies to litigious activities and attorneys regularly engaged in collection practices, even when such practices consist of engaging in litigation. *Heintz v Jenkins* (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489. *Heintz* overruled such cases as *Green v Hocking* (ED Mich 1992) 792 F Supp 1064, aff'd (6th Cir 1993) 9 F3d 18, *Firemen's Ins. Co. v Keating* (SD NY 1990) 753 F Supp 1137, and *National Union Fire Ins. Co. v Hartel* (SD NY 1990) 741 F Supp 1139, and it affirmed such decisions as *Tolentino v Friedman* (7th Cir 1995) 46 F3d 645, *Paulemon v Tobin* (2d Cir 1994) 30 F3d 307, *Fox v Citicorp Credit Servs.* (9th Cir 1994) 15 F3d 1507, and *Scott v Jones* (4th Cir 1992) 964 F2d 314.

California cases split on whether the litigation privilege of CC §47 is a defense to a federal FDCPA violation. See generally Hyman & Whitehair, *Does the Litigation Privilege Protect Against Suits Filed Under California's Rosenthal FDCPA?,* 13 Con Fin Servs L Rep 3 (2009). Compare *e.g., Oei v N Star Capital Acquisitions, LLC* (CD Cal 2006) 486 F Supp 2d 1089 (well-settled that California litigation privilege does not apply to federal causes of action, including those under FDCPA), *Irwin v Mascott* (ND Cal 1999) 96 F Supp 2d 968, 980, and *Newman v Checkrite Cal., Inc.* (ED Cal 1995) 912 F Supp 1354, with *Sengchanthalangsy v Accelerated Recovery Servs., Inc.* (SD Cal 2007) 473 F Supp 2d 1083 (California's litigation privilege applied to affidavit statements in co-signer's common law causes of action and allegations under Bus & P C §17200). See *Sial v Unifund CCR Partners* (SD Cal, Aug. 28, 2008, No. 08 CV 0905 JM (CAB)) 2008 US Dist Lexis 66666 (recognizing split of authority; refusing to allow either litigation privilege or *Noerr-Pennington* doctrine defenses); see also *Gerber v CitiCorp, Inc.* (ED Cal, Jan. 29, 2009, No. CIV S-07-0785 WBS JFM PS) 2009 WL 248094 (accord).

As to the Rosenthal Act, the litigation privilege has been held not applicable. *Komarova v National Credit Acceptance, Inc.* (2009) 175 CA4th 324, 95 CR3d 880; see *Oei v N Star Capital Acquisitions, LLC* (CD Cal 2006) 486 F Supp 2d 1089.

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### §2.34 E. Debtor's Conduct

California imposes certain affirmative obligations on the debtor:

- The debtor may not obtain credit without an intention to pay and may not knowingly submit false or inaccurate information bearing on the debtor's creditworthiness. CC §1788.20(a)-(b).
- The debtor must notify the creditor of any change in name, address, or employment if the responsibility to do so is clearly and conspicuously disclosed in writing to the debtor. CC §1788.21(a)-(b). See generally *Van v Grant & Weber* (9th Cir 2008) 308 Fed Appx 46.
- The debtor may not consummate a credit transaction if it knows that credit privileges have been terminated, and it must promptly notify the creditor if the consumer's credit card or other instrument evidencing an account is lost or stolen, as long as the obligation to do so is clearly and conspicuously disclosed in writing to the debtor. CC §1788.22(a)-(b).

Any intentional violation of the California Act by the debtor may be raised as a defense by the debt collector if the violation is pertinent or relevant to any claim or action brought against the debt collector by or on behalf of the debtor. CC §1788.30(g). Reasonable attorney fees may be awarded to a prevailing debt collector on a finding by the court that the debtor's prosecution or defense of the action was not in good faith. 15 USC §1692k(a)(3); CC §1788.30(c). "Unclean hands" may provide an affirmative defense to the debt collector, but such a defense will be narrowly applied. *Yu v Signet Bank/Virginia* (2002) 103 CA4th 298, 126 CR2d 516. See also *Keele v Wexter* (7th Cir 1998) 149 F3d 589; *Wells v GC Servs., Ltd.* (ND Cal, Apr. 10, 2007, No. C06-03511 RMW HRL) 2007 US Dist Lexis 29447; *Mejia v Marauder Corp.* (ND Cal, Mar. 15, 2007, No. C06-00520 HRL) 2007 US Dist Lexis 21313.

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### §2.35 F. "Reverse" Attorney Fees

On a finding by the court that an action under the FDCPA was brought in bad faith and for the purpose of harassment, the court in its discretion may award the debt collector its reasonable attorney fees and costs. 15 USC §1692k(a)(3); *Johnson v Eaton* (5th Cir 1996) 80 F3d 148. Such fees may be awarded only against the debtor, not the debtor's counsel. *Hyde v Midland Credit Mgmt., Inc.* (9th Cir 2009) 567 F3d 1137. Courts impose a significant burden on debt collectors to recover under the statute. The federal FDCPA focuses on the *initiation* of the lawsuit, requiring that it be initiated in bad faith or for purposes of harassment. See *Degrosiellier v Solomon & Solomon* (ND NY, Sept. 27, 2001, No. 00-CV-1065) 2001 US Dist Lexis 15254, 2001 WL 1217181; *Johnson,* 884 F Supp at 1071. The debt collector must show the entire lawsuit, not just portions of it, was brought in bad faith and for purposes of harassment. *Horkey v J.V.D.B. & Assocs., Inc.* (7th Cir 2003) 333 F3d 769, 775.

Although the FDCPA's language differs substantially from the language of Fed R Civ P 11, the decisions do not clearly distinguish the showing required under the two statutes. For example, a prevailing debt collector can seek attorney fees under 15 USC §1692k(a)(3) as well as sanctions under Rule 11, and many prevailing defendants bring their motions for attorney fees on both grounds. See *Chaudhry v Gallerizzo* (4th Cir 1999) 174 F3d 394; *Argentieri v Fisher Landscapes, Inc.* (D Mass 1998) 15 F Supp 2d 55; *Terran v Kaplan* (D Ariz 1997) 989 F Supp 1025. These decisions recognize the substantively different standards required under the statutory schemes: Rule 11 has been interpreted as applying an objective standard, while 15 USC §1692k(a)(3) has been interpreted as requiring proof that the debtor or its attorney subjectively was motivated by a bad faith desire to harass. See *Johnson v Eaton* (5th Cir 1996) 80 F3d 148; *Friedman v HHL Fin. Servs., Inc.* (ND Ill, Jan. 25, 1994, No. C-93-1545) 1994 US Dist Lexis 557. Other decisions, however, hold that the standard applicable to both schemes is the same, on the purported grounds that 15 USC §1692k(a)(3) "mirrors Federal Rule of Civil Procedure 11, which provides for sanctions whenever a frivolous pleading is filed." *Bezpalko v Gilfillan, Gilpin & Brehman* (ED Pa, June 15, 1998, No. 97-4923) 1998 US Dist Lexis 8859, *22; see also *Chaudhry v Gallerizzo* (4th Cir 1999) 174 F3d 394, 411.

**NOTE:** Defendants may be entitled to argue that a plaintiff's abandonment of claims should result in a proportional abandonment of the plaintiff's attorney fee claim. See *Schueneman v 1st Credit of Am., LLC* (ND Cal July 6, 2007, No. C 05-4505 MHP) 2007 US Dist Lexis 48981, *18. The Ninth Circuit has outlined a two-part test for determining whether a fee should be reduced on the basis of abandoned claims. First, the court determines whether the plaintiff's successful claims are related to plaintiff's unsuccessful claims. If the claims are unrelated, then the court will not include the time spent on the unsuccessful claims in the final award. If the two categories of claims are related, then the court determines the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Full compensation is proper when the plaintiff's counsel has secured excellent results; full compensation is excessive when only partial or limited success was achieved. These decisions are within the district court's discretion. *Schwarz v Secretary of Health & Human Servs.* (9th Cir 1995) 73 F3d 895, 901.

The Rosenthal Act contains its own reverse attorney fee provision. "Reasonable attorney's fees shall be awarded to a prevailing creditor upon a finding by the court that the debtor's prosecution or defense of the action was not in good faith." CC §1788.30(c). See *Corbett v Hayward Dodge, Inc.* (2004) 119 CA4th 915, 14 CR3d 741 (reverse attorney fees under Consumers Legal Remedies Act). This provision differs from the federal FDCPA in four material aspects. First, the federal FDCPA requires "bad faith," while the state provision requires that an action be maintained "not in good faith." Second, the Rosenthal Act allows attorney fees to be awarded to a prevailing "creditor" only, suggesting that third party debt collectors have no right to reverse attorney fees should they prevail. Third, unlike the conjunctive language of the federal FDCPA, a prevailing creditor need not prove harassment to successively obtain its attorney fees under the Rosenthal Act, while it would have to make that showing under the federal FDCPA. Finally, the federal FDCPA provision requires that the actions be *brought* in bad faith, while the Rosenthal Act provides for attorney fees whenever an action is not *maintained* in good faith. CC §1788.30(c). The Rosenthal Act thus allows examination into how the litigation is conducted, while the federal FDCPA appears to allow inquiry only into the initiation of the matter.

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2A

# Privacy Laws Affecting Debtors and Debt Collection

Richard L. Enkelis

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## §2A.1 I. INTRODUCTION

Privacy law and debt collection intersect in various ways. Debt collection practice necessarily entails gathering a considerable amount of personal information about an individual, including his or her Social Security number, financial information, and medical information. Consumer debtors, debt collectors, and debt collection agencies should be aware of the statutory schemes regulating collection and protection of this information. In addition, both federal and state law regulate information collection and dissemination by consumer reporting agencies. Finally, technological advances in recent years have made identity theft and financial privacy subjects of legislative concern.

This chapter discusses some of the major laws that set forth privacy considerations relevant to debt collection. They are listed in §2A.2. On identity theft and the required response by a debt collector to a consumer's claims to be the victim of identity theft, see §2.24B.

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## §2A.2 II. SOURCES OF LAW

An individual's right of privacy is founded on several authorities:

**United States Constitution:** The right of privacy is protected by the United States Constitution. See *Roe v Wade* (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, overruled in part on other grounds in *Planned Parenthood v Casey* (1992) 505 US 833, 875, 120 L Ed 2d 674, 112 S Ct 2791. See also *Fugate v Phoenix Civil Serv. Bd.* (9th Cir 1986) 791 F2d 736.

**Federal statutes.** Numerous federal provisions protect certain information and proscribe specific types of invasions of privacy. See, *e.g.*:

- The Gramm-Leach-Bliley Act (GLBA) (Pub L 106-102, 113 Stat 1338) (see §§2A.2-2A.8);
- The Fair Credit Reporting Act of 1970 (FCRA) (15 USC §§1681-1681x) as amended by FACTA (see §§2A.13-2A.18);
- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) (see §§2A.23-2A.27);
- The federal Telephone Records and Privacy Protection Act of 2006 (TRPPA) (18 USC §1039) (see §2A.31);
- The federal Fair Debt Collection Practices Act (15 USC §§1692-1692p) (see chap 2); and
- The Federal Trade Commission Act (FTC Act) (15 USC §§41-58), which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" and thus prohibits obtaining personal information through the use of deceptive acts or practices (15 USC §45(a)(1)).

**EXAMPLE:** The FTC Act provides a legal basis for prosecuting debt collectors that employ deceptive practices, such as notifying individuals they have won a prize or that a package is being held for them, to acquire complete contact information from them. See, *e.g., Silverman v FTC* (9th Cir 1944) 145 F2d 751, 753. The FTC Act does not provide a private right of action. *Carlson v Coca-Cola Co.* (9th Cir 1973) 483 F2d 279, 280.

**California Constitution:** Article I, §1 of the California Constitution provides that everyone has certain inalienable rights, one of which is pursuing and obtaining privacy. The right of privacy is fundamental and compelling; invasions of this right are subject to strict scrutiny and are permissible only if there is a compelling public need. *City of Santa Barbara v Adamson* (1980) 27 C3d 123, 130, 164 CR 539. The right of privacy under the California Constitution has been applied more broadly than has that right under the federal Constitution. 27 C3d at 130 n3. See also *Committee to Defend Reproductive Rights v Myers* (1981) 29 C3d 252, 294, 172 CR 866.

**California statutes:** State statutes regulating collection of information and invasions of privacy include, *e.g.:*

- The California Financial Information Privacy Act (Fin C §§4050-4060) (see §§2A.9-2A.12);
- The Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1-1785.36) (see §§2A.19-2A.21);
- The Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786-1786.60) (see §§2A.19, 2A.22);
- The Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) (see §§2A.28-2A.30);
- The California Invasion of Privacy Act (Pen C §§630-638), relating to the use of listening devices and techniques (on pretexting provisions of the Act in Pen C §638, see §2A.32);
- The Rosenthal Fair Debt Collection Practices Act (Rosenthal Act) (CC §§1788-1788.33) (see chap 2);
- The California Right to Financial Privacy Act (Govt C §§7460-7493), relating to financial records;
- The Information Practices Act of 1977 (CC §§1798-1798.78), relating to the protection of personal and confidential information and the authorization of civil actions if an agency modifies, transfers, or destroys any record containing personal information to avoid compliance with any provisions of Act; and

- The Unfair Competition Law (UCL) (Bus & P C §§17200-17210), which bars unlawful, unfair, or fraudulent business acts or practices, and may prohibit obtaining personal information by unfair or deceptive means.

For further discussion of many of the laws listed above, the right to privacy generally, and other aspects of information privacy, information security, medical, workplace, and financial privacy, as well as identity theft and privacy issues arising in litigation, see Privacy Compliance and Litigation in California (Cal CEB 2008).

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## III. GRAMM-LEACH-BLILEY ACT

### §2A.3 A. Purpose of Act; Definition of "Financial Institution"

Congress acknowledged consumer privacy concerns in drafting the Gramm-Leach-Bliley Act (GLBA) (Pub L 106-102, 113 Stat 1338), which regulates the handling of nonpublic consumer information by financial institutions. Title V of the GLBA (15 USC §§6801-6827) is devoted to privacy issues; it addresses disclosure of and fraudulent access to consumer information and authorizes the Federal Trade Commission (FTC) and other agencies to formulate rules to implement privacy provisions. 15 USC §6804.

Under the GLBA, a "financial institution" is defined generally as a business engaging in financial activities, such as taking deposits, making loans, providing financial or investment advice, or issuing insurance policies. See 15 USC §6809(3). The GLBA requires all financial institutions to take steps to protect the privacy and security of customers' nonpublic personal information. See 15 USC §6809(4); 16 CFR §313.3(n). To achieve this end, the GLBA authorizes the agencies that regulate financial institutions to adopt regulations under the general privacy provisions (15 USC §6804) and to establish appropriate standards for administrative, technical, and physical safeguards (15 USC §6801(b)). These regulations and standards are set out in two parts: the Financial Privacy Rule (see §2A.4) and the Safeguards Rule (see §2A.6).

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## §2A.4 B. Financial Privacy Rule

Under the GLBA's Financial Privacy Rule and associated agency regulations, a financial institution must disclose its privacy practices to any consumer with whom it has a customer relationship, and to any consumer if it wants to disclose the consumer's nonpublic personal information to a nonaffiliated third party. Because the GLBA provides that this notice must go to "consumers," the privacy notice requirements apply only to individuals with accounts that are primarily for personal, family, or household purposes, not to business customers. See 15 USC §6809(9); 16 CFR §313.3(e).

**Contents of notice.** The required notice must generally cover the financial institution's policies and practices with respect to categories of nonpublic personal information it collects and disclosures to affiliates and nonaffiliated third parties. See 15 USC §6803(c); 16 CFR §313.6(a). If the institution wishes to disclose a customer's nonpublic personal information to nonaffiliated third parties, the notice must also include an explanation of the customer's right to opt out of the disclosure. See 15 USC §6802(b)(1); 16 CFR §313.7(a).

**Clear and conspicuous.** The notice must be "clear and conspicuous." 15 USC §6803(a). This means it must be "reasonably understandable and designed to call attention to the nature and significance of the information" it contains. 16 CFR §313.3(b).

**Timing of the notice.** The notice must be given when a customer relationship is established and at least once a year thereafter while the customer relationship continues. 15 USC §6803(a); 16 CFR §§313.4-313.5. A "customer relationship" is a continuing relationship with a consumer under which the financial institution provides financial products or services that are to be used primarily for the consumer's personal, family, or household purposes. 16 CFR §313.3(h). See 15 USC §6809(11).

**NOTE:** The regulations provide that the notice may be given within a "reasonable time" after the customer relationship is established if: (1) establishing the customer relationship is not at the customer's election; or (2) providing notice at the time of establishing the relationship "would substantially delay the customer's transaction and the customer agrees to receive the notice at a later time." 16 CFR §313.4(e). A relationship established "not at the customer's election" includes, *e.g.,* the relationship between an individual borrower and an institution that has purchased the individual's loan from the original lender.

A notice of revised privacy practices is ordinarily required before disclosing nonpublic personal information to a nonaffiliated third party in a manner other than as described in the initial notice. 16 CFR §313.8.

**Delivery of the notice.** The notice must be given in a way that each consumer can reasonably be expected to receive it. 16 CFR §313.9(a). It must be in writing or, if the customer agrees, electronically. 16 CFR §313.9(a). Electronic notice includes conspicuously posting the notice on the financial institution's website and requiring the consumer to acknowledge receipt of the notice as a necessary step to obtaining a particular financial product or service. 16 CFR §313.9(b)(iii).

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## §2A.5 C. Sharing Information With Nonaffiliated Third Parties

**Requirements for disclosure to nonaffiliated third parties.** The GLBA does not limit a financial institution's ability to share information with its affiliates. However, the GLBA places limits on sharing information with nonaffiliated third parties. Thus, unless an exception applies, a financial institution may not disclose a consumer's nonpublic personal information (see 15 USC §6809(4); 16 CFR §313.3(n)) to nonaffiliated third parties unless (15 USC §6802(b)):

- It has given clear and conspicuous notice to the consumer that it may do so (that is, giving the disclosures set out in §2A.4); and
- The consumer has been given an opportunity and an explanation of how to opt out, *i.e.,* direct that his or her information not be disclosed.

Despite these limits, the GLBA contains numerous exceptions on sharing nonpublic personal information with nonaffiliated third parties. Nonpublic personal information may be disclosed, for example to service providers and for joint marketing purposes (see 15 USC §6802(b)(2); 16 CFR §313.13(a)); for processing and servicing transactions requested by the consumer (see 15 USC §6802(e)(1); 16 CFR §313.14); with the consumer's consent (see 15 USC §6802(e)(2); 16 CFR §313.15(a)(1)); and for other purposes (see 15 USC §6802(e)(3)-(8); 16 CFR §313.15(a)(2)-(7)).

For a detailed discussion on GLBA regulations on financial institutions sharing information with nonaffiliates, see Privacy Compliance and Litigation in California, chap 6 (Cal CEB 2008).

**Account numbers and access codes.** The GLBA explicitly prohibits a financial institution from disclosing a consumer's account number or access code for a credit card account, deposit account, or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing, or other marketing through e-mail to the consumer. This prohibition applies regardless of the notice and opt-out provisions, and cannot be waived. 15 USC §6802(d); 16 CFR §313.12. Exceptions cover reporting to a consumer reporting agency (see 15 USC §1681a(f)); disclosures to the financial institution's agent or service provider solely for marketing of its own products or services, provided that the agent or service provider is not authorized to directly initiate charges to the account; and disclosures to a participant in a private label credit card program or an affinity or similar program. 15 USC §6802(d), (e)(1); 16 CFR §313.12(b)).

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## §2A.6 D. Safeguards Rule

The GLBA requires that financial institutions ensure the security of customer records and information, protect against anticipated threats or hazards to their security, and protect against unauthorized access to or use of the records. 15 USC §6801(b). To comply with these mandates, the agencies that implement the GLBA have promulgated standards relating to administrative, technical, and physical safeguards for keeping information secure; these regulations are often referred to as the "Safeguards Rule." See, *e.g.,* the Federal Trade Commission's "Standards for Safeguarding Customer Information" (16 CFR §§314.1-314.5), which set the standards for protecting the confidentiality of customer information acquired by financial institutions over which the FTC has jurisdiction (16 CFR §314.1(b)) and provide a good example of the security measures the GLBA requires companies to adopt.

The Safeguards Rule requires a financial institution to (16 CFR §314.4):

- Designate an employee to coordinate security of protected information;
- Identify reasonably foreseeable risks that could result in the unauthorized release of confidential customer information; this risk assessment must include consideration of:
- Employee training and management;
- Information systems; and
- Detecting, preventing, and responding to attacks, intrusions, or other systems failures.
- Design and implement safeguards to control the risks identified, and regularly test or monitor them; and
- Evaluate and adjust the safeguards imposed in light of testing results.

In addition, financial institutions must oversee their service providers to ensure that they will similarly safeguard customer information. 16 CFR §314.4(d). "Service provider" is defined as an individual or entity that "receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a financial institution." 16 CFR §314.2(d). This appellation most likely covers debt collectors.

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## §2A.7 E. Preemption of State Law

The GLBA does not preempt state financial privacy law except to the extent that the state law is inconsistent with federal law (15 USC §6807(a)). Thus, a state law providing greater privacy protection for personal information than the GLBA is not considered inconsistent (15 USC §6807(b)). See the California Financial Information Privacy Act, discussed in §§2A.9-2A.12.

The GLBA does not generally modify, limit, or supersede the Fair Credit Reporting Act of 1970 (FCRA) (15 USC §§1681-1681x) (see §§2A.13-2A.18).

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## §2A.8 F. Consequences of Failure to Comply With GLBA

Enforcement of the GLBA has been handled by the FTC, other federal financial regulators, and state insurance commissioners. See 15 USC §6805(a). The GLBA does not provide a private cause of action. See *Farley v Williams* (WD NY, Dec. 30, 2005, No. 02-CV-0667C(SR)) 2005 US Dist Lexis 38924, *9. A customer of a financial institution that has violated the GLBA privacy standards is not entitled to monetary compensation.

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# IV. CALIFORNIA FINANCIAL INFORMATION PRIVACY ACT

## §2A.9 A. Purpose of Act

The California Financial Information Privacy Act (Fin C §§4050-4060) (also known as "SB 1") was enacted to take advantage of the explicit permission that the GLBA (see §§2A.3-2A.8) gave the states to enact privacy protections stronger than those in the GLBA. See Fin C §4051.5(a)(4). The Act generally bars financial institutions from sharing or selling personally identifiable financial information without obtaining a consumer's consent, except as provided, and requires a plain-language notice of privacy rights under the Act.

**NOTE:** In enacting the California Financial Information Privacy Act, the legislature expressed its intent to afford greater privacy protections than those provided under the GLBA, and that the Act be interpreted consistent with that purpose. Fin C §4051(b).

The Act requires that consumers must "opt in" before a financial institution may share their personally identifiable financial information with an unaffiliated third party. See §2A.11. Further, consumers must be given an opportunity to "opt out" of sharing with a financial institution's financial marketing partners and affiliates, with some exceptions. See §2A.10.

**NOTE:** The Act requires affirmative consent (or opt-in) by the customer in many situations when the GLBA requires only negative consent (that is, a failure to opt out) and requires an opportunity to opt out in some cases when the GLBA does not provide opt-out rights.

**"Nonpublic personal information" defined.** "Nonpublic personal information" is personally identifiable financial information that (Fin C §4052(a); see Fin C §4052(b)):

- Is provided by a consumer to a financial institution;
- Results from a transaction between the consumer and the financial institution, or the performance of services by the institution for the consumer; or
- Is otherwise obtained by the financial institution.

The term does not include publicly available information that the financial institution has a reasonable basis to believe is lawfully made available to the general public from government records, widely distributed media, or legally-required disclosures to the general public. Fin C §4052(a).

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## §2A.10 B. Disclosing Information to Affiliates: Opt-out Permitted

A financial institution may disclose the consumer's nonpublic financial information to an affiliate only if (Fin C §4053(b)(1)):

- It clearly and conspicuously notifies the consumer annually in writing that the information may be disclosed, and
- The consumer has not "opted out" by directing that the information not be disclosed.

The affiliate sharing provisions of the California Financial Information Privacy Act are preempted to the extent that they apply to consumer credit report information covered by the Fair Credit Reporting Act of 1970 (FCRA) (15 USC §§1681-1681x)—that is, information shared among affiliates concerning a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" used or collected for purposes of determining eligibility for credit, insurance, employment, or other authorized purpose (15 USC §1681a(d)(1)). But FCRA does not preempt the provisions of the California Financial Information Privacy Act that relate to nonpublic personal financial information other than credit report information, such as consumer buying patterns. *American Bankers Ass'n v Gould* (9th Cir 2008) 541 F3d 1214.

On the FCRA, see §§2A.13-2A.18.

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## §2A.11 C. Disclosing Information to Nonaffiliates; Opt-in Required

**Consent required before disclosure.** A financial institution may not disclose a consumer's nonpublic personal information to nonaffiliated third parties unless it obtains the consumer's explicit prior consent, or opt-in. Fin C §4053(a)(1). This consent must be clear and conspicuous; the standards for the statement or form giving consent are set out in Fin C §4053(d)(1). A "safe harbor" form is provided in Fin C §4053(d)(2)(A).

The California Financial Information Privacy Act contains several exceptions to these strictures. For example, a financial institution may disclose a consumer's nonpublic financial information to a nonaffiliate for joint marketing purposes (see Fin C §4053(b)(2)), when the information is necessary for a transaction requested by the consumer, with the consumer's consent, to protect the security of the financial institution's records, to provide insurance rate information, to law enforcement agencies, and to help locate missing children, witnesses, organ donors, or missing heirs, and for other purposes. See Fin C §4056(b). A consumer's nonpublic personal information may also be released to or by a consumer reporting agency under the Fair Credit Reporting Act of 1970 (FCRA) (15 USC §§1681-1681x).

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## §2A.12 D. Penalties

The statutory remedy for disclosure or sharing of nonpublic personal information in violation of the California Financial Information Privacy Act is a civil penalty. See Fin C § 4057. Whether the violation is negligent or willful, the penalty may not exceed $2500 per violation, regardless of the amount of actual damages; if the disclosure or sharing results in the release of nonpublic personal information of more than one individual, the total penalty may not exceed $500,000. Fin C §4057(a)-(b).

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# V. FAIR CREDIT REPORTING ACT (FCRA) AND FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACTA)

## §2A.13 A. Purpose of Acts; Definitions

The Fair Credit Reporting Act of 1970 (FCRA) (15 USC §§1681-1681x) regulates the accuracy, fairness, and privacy of personal information supplied by consumer reporting agencies nationwide. See 15 USC §1681(b). The FCRA was amended in 2003 by the Fair and Accurate Credit Transactions Act (FACTA) (Pub L 108-159, 117 Stat 1952), which addressed a number of issues, including establishing requirements for credit reporting agencies, creditors, and others to help remedy the increasing problem of identity theft.

**"Consumer reporting agency" defined.** A "consumer reporting agency" (CRA) means any person business that, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and that uses interstate commerce to prepare or furnish consumer reports. 15 USC §1681a(f).

**EXAMPLE:** Examples of CRAs include the three largest agencies, often referred to as the "big three"—Equifax, TransUnion, and Experian—as well as other companies, *e.g.,* ChoicePoint, which provides background screening, and ChexSystems Inc., which compiles certain customer information from banks. In addition, other entities, such as the state Department of Motor Vehicles, can be CRAs.

**Consumer "defined."** A "consumer" is defined by the FCRA as an individual. 15 USC §1681a(c). Thus, a "consumer report" does not include reports about artificial entities, such as corporations, associations, and estates, or entities created by statute, such as a governmental agency, and the FCRA does not apply. See 16 CFR pt 600 App §603(c)-1. A "consumer report" as defined by the FCRA has three major characteristics (15 USC §1681a(d)):

- It is an oral, written, or other communication of information by a consumer reporting agency;
- It contains information about a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living; and
- The information is used or is expected to be used as a factor in establishing the consumer's eligibility for
- Credit or insurance to be used primarily for personal, family, or household purposes;
- Employment purposes; or
- Any other purpose authorized under 15 USC §1681b ("[a]ny other purpose authorized under 15 USC §1681b" includes, *e.g.,* responding to a court order, the consumer's written instructions, or responding to a request by a child support enforcement agency (see 15 USC §1681b(a)).

The FCRA, as amended by the FACTA, sets out a number of responsibilities for CRAs; it also includes some responsibilities for others involved with consumer credit reports, including users of the information (such as lenders, employers, insurers, and landlords), and furnishers of the information to consumer reporting agencies.

**NOTE:** "Financial institutions," as the term is used in the GLBA (see §2A.3), are not necessarily consumer reporting agencies, but they may be if their activities fall within the FCRA definition of consumer reporting agency.

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## §2A.14 B. Requirements for Consumer Reporting Agencies Under FCRA/FACTA

The FCRA and the FACTA require that consumer reporting agencies (CRAs) adopt reasonable procedures to meet the needs for consumer credit "in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization" of consumer information. 15 USC §1681(b). Among other things, CRAs must:

- Furnish consumer reports only for permissible purposes;
- Not include certain adverse information in consumer reports beyond certain time periods (see 15 USC §1681c(a));
- Notify consumers of the right to opt out of prescreening (see 15 USC §1681b(e));
- Provide certain information to consumers, and, under some circumstances, the government (see 15 USC §§1681f, 1681g(a));
- Not include medical information in consumer reports except under certain circumstances (see 15 USC §§1681b(g), 1681c(a)(6));
- Adopt reasonable measures to ensure privacy and accuracy in consumer reports (see 15 USC §1681e(a)); and
- Conduct a reinvestigation of any item contained in a credit file that is disputed by a consumer, when the consumer directly conveys the dispute to the CRA, and promptly delete the information if the CRA finds it inaccurate (see 15 USC §1681i(a); see also *Carvalho v Equifax Info. Servs.*, LLC (ND Cal 2008) 588 F Supp 2d 1089 (in conducting reinvestigation, there is no rule requiring CRAs to look beyond furnishers of credit information, but CRAs are not entitled as matter of law to rely on such furnishers, citing *Cushman v Transunion Corp.* (3d Cir 1997) 115 F3d 220 (denying CRA's motion for summary judgment in claim for failure to reinvestigate when it merely verified negative information with credit furnishers despite consumer's warning that information was inaccurate))).

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## §2A.15 C. When Consumer Reporting Agencies May Release Credit Reports

Under the FCRA, a consumer reporting agency (CRA) may release a consumer report only under the following circumstances (15 USC §1681b(a), (c)):

- **Court order.** In response to a court order or a subpoena issued in connection with proceedings of a federal grand jury. 15 USC §1681b(a)(1).

**NOTE:** This includes an IRS summons. 16 CFR pt 600, App §604(1)-2.

- **Consumer's written instructions.** In accordance with written instructions from the consumer. 15 USC §1681b(a)(2).

- **Credit transaction.** To a person that the CRA has reason to believe intends to use the information in connection with a credit transaction or the extension of credit to, or review or collection of an account of, the consumer. 15 USC §1681b(a)(3)(A).

**NOTE:** This includes a collection agency, detective agency, or private investigator attempting to collect a debt owed by a consumer, and an attorney trying to decide whether to sue the individual to collect a credit account. 16 CFR pt 600, App §604(3)(A)-1.

**NOTE:** A creditor may request information concerning an applicant's spouse if the spouse will be permitted to use the account or is contractually liable on the account, or the applicant is relying on the spouse's income as a basis for repayment of the credit requested. A creditor may also request any information concerning an applicant's spouse if the applicant resides in a community property state. 16 CFR pt 600, App §604(3)(A)-5.

- **Employment purposes.** To a person that the CRA has reason to believe intends to use the information for employment purposes. 15 USC §1681b(a)(3)(B). On the use of consumer reports in the employment context, see Privacy Compliance and Litigation in California §§8.19-8.26 (Cal CEB 2008).

- **Insurance.** To a person that the CRA has reason to believe intends to use the information in connection with underwriting insurance involving the person. 15 USC §1681b(a)(3)(C).

- **License or other government benefit.** To a person that the CRA has reason to believe intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality that must consider an applicant's financial responsibility or status. 15 USC §1681b(a)(3)(D).

- **Transfers of existing credit obligation.** To a person that the CRA has reason to believe intends to use the information as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation. 15 USC §1681b(a)(3)(E).

- **Legitimate business need.** To a person that the CRA has reason to believe has a legitimate business need for the information (15 USC §1681b(a)(3)(F)):

- In connection with a business transaction initiated by the consumer; or

- To review an account to determine whether the consumer continues to meet the terms of the account.

- **Government charge cards.** To executive departments and agencies in connection with the issuance of government-sponsored travel charge cards. 15 USC §1681b(a)(3)(G).

- **Child support enforcement.** In response to a request by the head of a state or local child support enforcement agency, if the person making the request certifies to the consumer reporting agency that (15 USC §1681b(a)(4)):

- The report is necessary to establish an individual's capacity to make child support payments or determine the appropriate level of those payments;

- The consumer's paternity of the child to which the obligation relates has been legally established or acknowledged by the consumer;

- The person provides at least 10 days' notice to the consumer, by certified or registered mail to the consumer's last known address, that the report will be requested; and
- The consumer report will be kept confidential, will be used solely for a purpose described above, and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.
- **Child support award.** To an agency administering a state plan under 42 USC §654 for use in setting a child support award. 15 USC §1681b(a)(5).
- **FDIC or NCUA purposes.** To the Federal Deposit Insurance Corporation (FDIC) or the National Credit Union Administration (NCUA) under certain circumstances. 15 USC §1681b(a)(6).
- **"Prescreened" offers of credit or insurance.** Special conditions apply to consumer reports provided for the purpose of making unsolicited offers of credit or insurance, commonly known as "prescreening." See 15 USC §1681b(c).

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## §2A.16 D. FCRA Applicability to Debt Collectors

The FCRA requires that credit reporting agencies implement measures to ensure the accuracy and confidentiality of consumer credit information. 15 USC §1681(b). Debt collectors and creditors implicitly fall within the purview of the FCRA as "furnishers of information" to credit reporting agencies. See 15 USC §1681s-2. Thus, a "furnisher of information," *i.e.*, a debt collector:

- May not report information that the collector knows "or has reasonable cause to believe" is inaccurate (15 USC §1681s-2(a)(1));

**NOTE:** The "reasonable cause to believe" standard means "having specific knowledge, other than solely allegations by the consumer, that would cause a reasonable person to have substantial doubts about the accuracy of the information." 15 USC §1681s-2(a)(1)(D).

- Must correct and update information (15 USC §1681s-2(a)(2));
- Must notify the credit reporting agency if the consumer disputes the information (15 USC §1681s-2(a)(3));
- Must provide notice of closed and delinquent accounts (15 USC §1681s-2(a)(4)-(5));
- Must have in place reasonable procedures to respond to any notification that it receives from a consumer reporting agency relating to information resulting from identity theft (15 USC §1681s-2(a)(6)(A));
- May not relay information to a credit reporting agency about a consumer who has submitted an identity theft report stating that the information results from the identity theft (15 USC §1681s-2(a)(6)(B)); and
- If it is an institution that extends credit, must notify a customer if it furnishes negative information to a credit reporting agency about the customer's credit (15 USC §1681s-2(a)(7)).

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## §2A.16A E. FCRA Implementing Regulations Applicable to Debt Collectors; Obligation to Investigate Direct Disputes

Regulations implementing 15 USC §1681s-2 (discussed in §2A.16) are set forth in 16 CFR §§660.1-660.4 and Appendix A to pt 660. (These particular regulations apply to furnishers that are subject to enforcement by the FTC, but parallel regulations apply to the various federal financial agencies. See, *e.g.*, 12 CFR pts 41 (Office of the Comptroller of the Currency); 12 CFR pt 571 (Office of Thrift Supervision); 12 CFR pt 334 (FDIC).)

The regulations, effective July 1, 2010 (see 74 Fed Reg 31484 (2009)), provide definitions, set forth reasonable policies and procedures concerning the accuracy and integrity of furnished information, and delineate a furnisher's obligations in the case of a direct dispute with a consumer.

**Definitions.** Under the regulations:

- "Accuracy" means that information a furnisher provides to a consumer reporting agency (CRA) about an account reflects the terms of and liability for the account, reflects the consumer's performance, and identifies the appropriate consumer (16 CFR §660.2(a));
- "Direct dispute" means a dispute submitted directly to a furnisher (including a furnisher that is a debt collector) by a consumer concerning the accuracy of any information contained in a consumer report and pertaining to an account (16 CFR §660.2(a));
- A "furnisher" is an entity that furnishes information relating to consumers to a CRA for inclusion in a consumer report (16 CFR §660.2(a)).
- "Integrity" means that information a furnisher provides to a CRA about an account is substantiated by the furnisher's records at the time, is provided in a form and manner designed to minimize the likelihood that it will be incorrectly reflected in a consumer report, and includes information in the furnisher's possession that the FTC has determined the absence of which would be materially misleading in evaluating a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, or mode of living, and is listed in Appendix A of CFR pt 660 (16 CFR §660.2(e)).

**Policies and procedures.** Each furnisher must establish and implement written policies and procedures, appropriate to its nature, size, and complexity, regarding the accuracy and integrity of information that it supplies to CRAs, taking into account the guidelines supplied in Appendix A of CFR pt 660. 16 CFR §660.3(a). It must review and update these policies periodically. 16 CFR §660.3(c).

**Direct disputes.** A furnisher must conduct a reasonable investigation of a direct dispute (as defined above) if it relates to (16 CFR §660.4(a)):

- The consumer's liability for a credit account or other debt with the furnisher;
- The terms of a credit account or other debt, such as disputes relating to type of account, balance, scheduled payments, or credit limit;
- The consumer's performance or other conduct concerning an account or other relationship with the furnisher, such as disputes relating to the current payment status, high balance, date of a payment, or date an account was open or closed; or
- Any other information contained in a consumer report that bears on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, or mode of living.

**Exceptions.** There are several exceptions to these requirements when a furnisher is not obligated to conduct an investigation. They include when the direct dispute relates to the consumer's identifying information, inquiries or requests for a consumer report, information derived from public records, information related to fraud alerts, information provided by another furnisher, or when the dispute was submitted by a credit repair organization. 16 CFR §660.4(b).

**Dispute notice.** To trigger the furnisher's obligation to investigate, the consumer must submit a dispute notice to the furnisher at its business address or any address it has specified for submitting direct disputes. 16 CFR §660.4(c). The notice must include sufficient information to identify the account, the specific information the consumer is disputing, and all supporting documentation. 16 CFR §660.4(d).

**Duty of furnisher on receiving dispute.** Once it receives the notice, the furnisher is obligated to conduct a reasonable investigation. It must review all relevant information, complete the investigation, and report the results to the consumer within 30 days of receiving the notice of dispute. 16 CFR §660.4(e)(3); see 15 USC §1681i(a)(1). If it finds the disputed information was inaccurate, it must promptly notify each CRA to which it provided inaccurate information and it must provide the correct information.

**Frivolous disputes.** Furnishers are not obligated to investigate frivolous or irrelevant disputes, as defined in the regulations, but they must notify the consumer that a dispute is frivolous or irrelevant within 5 business days after making such a determination. See 16 CFR §660.4(f)(1)-(3).

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## §2A.17 F. Identity Theft and Other Provisions Under FCRA/FACTA

In addition to those discussed in §§2A.14-2A.16, the FCRA includes provisions concerning investigative consumer reports (see 15 USC §1681d); the use of consumer reports in the employment context; the sharing of consumer credit information by affiliates; the requirements for users of consumer reports who take adverse action based on a report; the rights of consumer to dispute information in their reports; and the requirements applicable to financial institutions' disposal of customer records.

Identity theft provisions of the FACTA require that financial institutions and other creditors that use credit reports must follow guidelines ("red flags") to help prevent and detect identity theft, to verify discrepancies in consumers' addresses, and to require debit and credit card issuers to validate a consumer's notice of change of address when it is followed closely by a request for an additional or replacement card. See 15 USC §1681m(e). Further, no person or business is permitted to resell or place for collection a debt that the holder has been notified is the result of identity theft. 15 USC §1681m(f)(1). See 15 USCS §1681c-2 (notification). This prohibition applies to all persons collecting a debt (not just third party collectors) after proper notification. 15 USC §1681m(f)(2).

**PRACTICE TIP:** If a person acting as a debt collector on behalf of a third party that is a creditor or other user of a consumer report becomes aware that an apparent debtor disputes a debt on the basis that it is fraudulent or the result of identity theft, the debt collector must report this allegation to that third party. 15 USC §1681m(g)(1). Further, on the request of the apparent debtor, the debt collector must also provide all information to the consumer to which the consumer would be entitled if the victim wished to dispute the debt rather than a victim of identity theft. 15 USC §1681m(g)(2).

For further discussion of FCRA/FACTA identity theft provisions, see Privacy Compliance and Litigation in California, chap 6 (Cal CEB 2008). On procedures a debt collector must follow under California's Rosenthal Fair Debt Collection Practices Act (CC §§1788-1788.33) when the debtor claims he or she is the victim of identity theft, see §2.24A.

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## §2A.18 G. Enforcement of FCRA/FACTA

Enforcement of the provisions against information furnishers, debt collectors among them, is left exclusively to federal and state officials. 15 USC §§1681s, 1681s-2(d). However, a private right of action against furnishers exists under 15 USC §1681s-2(b) for a consumer who disputes information supplied by a furnisher. See *Akalwadi v Risk Mgmt. Alternatives, Inc.* (D Md 2004) 336 F Supp 2d 492. See §2.20.

Actions to enforce the FCRA may be brought in any federal district court, without regard to the amount in controversy. An action must be brought within 2 years after the plaintiff discovers the violation, or 5 years after the violation took place, whichever is earlier. 15 USC §1681p.

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# VI. CONSUMER CREDIT REPORTING AGENCIES ACT (CCRAA) AND INVESTIGATIVE CONSUMER REPORTING AGENCIES ACT (ICRAA)

## §2A.19 A. Purpose of Acts

The California Consumer Credit Reporting Agencies Act (CCRAA) (CC §§1785.1-1785.36) and the Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786-1786.60) are modeled after the FCRA (see §2A.13-2A.18). The CCRAA regulates "consumer credit reports" (CC §1785.3(c)), and primarily concerns a person's creditworthiness. The ICRAA, on the other hand, governs "investigative consumer reports" (CC §1786.2(c)), and is chiefly concerned with information about a person's character. See *Ortiz v Lyon Mgmt. Group, Inc.* (2007) 157 CA4th 604, 613, 69 CR3d 66 (discussing overlap and distinctions between CCRAA and ICRAA).

The CCRAA and the ICRAA apply to consumer reporting agencies (CRAs). See CC §1785.1. For that reason, they are primarily of interest to consumer debtors. Nevertheless, debt collectors and collection agencies may wish to be aware of the provisions of these acts to facilitate relations with CRAs.

**CAUTION:** Both the CCRAA and the ICRAA duplicate, to a large extent, provisions of federal law. Some provisions may be preempted by the FCRA (15 USC §§1681-1681x). See §§2A.13-2A.18. As a general rule, the FCRA does not preempt state identity theft laws, except to the extent inconsistent with a provision of the FCRA, and then only to the extent of the inconsistency. 15 USC 1681t(a). Thus, consumers are generally entitled to enforce violations of the CCRAA, and recover actual damages, attorney fees, and exemplary damages in an appropriate case. See CC §§1785.30-1785.36.

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## §2A.20 B. The Consumer Credit Reporting Agencies Act (CCRAA)

The CCRAA, California's corollary to the FCRA (see §§2A.13-2A.18), regulates consumer credit reporting agencies and consumer credit reports. See CC §1785.1. A "consumer credit reporting agency" is "any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the business of assembling or evaluating consumer credit information on consumers or other information on consumers for the purpose of furnishing consumer credit reports to third parties." CC §1785.3(d).

A "consumer credit report" is defined as "any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity," when the information is collected, used, or expected to be used to establish the consumer's eligibility for personal credit, employment, rental housing, or other specified purposes. CC §1785.3(c).

**Consumer's right to inspect.** As under the FCRA, the CCRAA requires that CRAs permit consumers to visually inspect their files, on the consumer's request and proper identification. CC §1785.10(a).

**Restrictions on release of consumer credit report.** Consumer reporting agencies (CRAs) are subject to restrictions on the disclosure of the consumer credit information that they store. Absent a court order or written consent from the consumer, a CRA may only release a consumer credit report to a person that it has "reason to believe" intends to use the information (CC §1785.11(a)):

- In connection with a credit transaction;
- For entering or enforcing a court order for support;
- For employment purposes;
- For the underwriting of insurance or an insurance claim settlement;
- To determine a consumer's eligibility for a license or other government benefit;
- In connection with the hiring of a dwelling unit; or
- When that person "[o]therwise has a legitimate business need for the information in connection with a business transaction involving the consumer."

Special rules apply to the release of credit information in connection with credit transactions *not* initiated by the consumer. In those situations, absent the consumer's authorization, the CRA may only release the report if (1) the proposed transaction involves a firm offer of credit to the consumer (such as pre-approved credit card offers) and (2) the agency provided an opt-out mechanism and the customer has not opted-out. CC §1785.11(b).

The information that the agency may release is limited to the name and address of the consumer and aggregate data applicable to the consumer. CC §1785.11(b).

**Reasonable procedures for release of information.** Every CRA must maintain procedures that (CC §1785.14):

- Require prospective users to identify themselves;
- Certify the purposes for which the info is sought; and
- Certify that the information will be used for no other purposes.

The CRA must keep a record of the purposes as stated by the user. The CRA must also make a reasonable effort to verify the identity of a new prospective user and the uses certified by the prospective user prior to furnishing the user a consumer report. CC §1785.14(a).

All of these procedures must be reasonable and designed to limit the furnishing of consumer credit reports for the purposes listed under CC §1785.11 and to avoid including unauthorized content in the reports. CC §1785.14.

For more on consumer reporting agency obligations under the CCRAA, see Privacy Compliance and Litigation in California, chap 10 (Cal CEB 2008).

**Victims of identity theft.** No creditor may sell a consumer debt to a debt collector (see 15 USC §1692a) if the consumer is a victim of identity theft and the creditor has received notice under CC §1785.16(k). CC §1785.16.2(a). This prohibition does not apply to a creditor's sale of a debt to a subsidiary or affiliate of the creditor, provided that the subsidiary or affiliate takes no action to collect the debt. CC §1785.16.2(b).

**CAUTION:** Prohibitions on reselling debt under CC §1785.16(k) are generally preempted by similar federal provisions under 15 USC §1681m(f). See 15 USC §1681t(b)(5)(F) (FCRA preempts state law "with respect to the conduct required by the specific provisions of subsections (e), (f) and (g) of section 1681m"). However, the federal statute does specifically preserve an exemption for the "disclosure of credit scores for credit granting purposes with respect to" CC §1785.16. 15 USC §1681t(b)(3)(A).

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## §2A.21 C. Enforcement and Penalties Under CCRAA

A consumer who suffers damages as a result of a violation of the CCRAA may bring an action to recover (CC §1785.31):

- For a negligent violation, actual damages including costs, loss of wages, attorney fees, and pain and suffering;
- For willful violation, actual damages and punitive damages of at least $100 and up to $5000 for each violation, and any other relief the court deems proper; and
- For a natural person obtaining a consumer credit report under false pretenses or knowingly without a permissible purpose, actual damages of at least $2500.

**NOTE:** The CCRAA gives the consumer an action against a CRA or a user of information; however, liability under CC §1785.31 does not extend to furnishers of information to CRAs. *Pulver v Avco Fin. Servs.* (1986) 182 CA3d 622, 633, 227 CR 491.

A consumer may bring an action against a person who knowingly and willfully obtains access to, or data from, a file other than as provided in CC §1785.11 (circumstances when CRA may furnish consumer report), or who uses the data received from a file in a manner contrary to an agreement with a CRA, for a civil penalty of up to $2500, costs, and attorney fees. CC §1785.19.

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## §2A.22 D. Investigative Consumer Reporting Agencies Act (ICRAA)

The Investigative Consumer Reporting Agencies Act (ICRAA) (CC §§1786-1786.60) applies to "investigative consumer reports," defined as a report in which information about "a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means." It does not include consumer reports or other compilations of information that are limited to a consumer's credit record or manner of obtaining credit. CC §1786.2(c). Investigative consumer reports may be prepared only for the following purposes (CC §§1786.12(d), 1786.16(d)):

- Employment;
- In determining eligibility or rates for insurance;
- Renting a residence;
- Determining eligibility for a license or other benefit granted by the government; or
- A court support order.

An investigative report may be furnished to any of the above only if the investigative consumer reporting agency has reason to believe the report will be used for the listed purposes. CC §1786.12. A report may also be furnished in response to a court order, subpoena, or the consumer's written request. CC §1786.12(a)-(c).

**Medical information.** An investigative report that contains medical information may not be sent to an employer, insurer, landlord, or other person listed in CC §1786.12(d) unless the consumer consents. CC §1786.12(f).

**Notice to consumer.** Generally, a person requesting an investigative consumer report must inform the consumer in advance. CC §1786.16. Notice is not required if (1) the report is for employment purposes, and (2) there is a suspicion of wrongdoing or misconduct. CC §1786.16(c).

**Other requirements for investigative consumer reports.** As with the FCRA and the CCRAA, the ICRAA prohibits certain obsolete information from being included in an investigative report. CC §1786.18. The ICRAA also requires investigative consumer reporting agencies to maintain reasonable procedures to ensure accuracy (CC §1786.20), permit consumers access to their files (CC §1786.22), and dispute the reports' completeness or accuracy (CC §1786.24).

**Adverse action and obligation of user of investigative report.** If a user of a consumer's investigative consumer report increases the charge for insurance, or denies the consumer insurance, employment, or a rental, the user must so inform the consumer and supply the name and address of the investigative consumer reporting agency that made the report. CC §1786.40.

**Remedies and penalties.** An investigative consumer reporting agency or user of information that violates any provisions of the ICRAA is liable to the consumer for the greater of actual damages or, except in the case of class actions, $10,000, plus costs and reasonable attorney fees. CC §1786.50. The ICRAA expressly preserves the right of an individual to sue an investigative consumer reporting agency, its informant, or the user of an investigative consumer report for invasion of privacy or defamation. CC §1786.52.

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# VII. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

## §2A.23 A. Overview of HIPAA and the HITECH Act Amendments

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) streamlines and sets standards for the electronic exchange of health care information for the benefit of consumers. In doing so, it includes protections for the privacy and security of medical records; these protections are embodied in the HIPAA Privacy Rule (45 CFR pt 160 and pt 164, subparts A and E) and the HIPAA Security Rule (45 CFR pts 160, 162, and 164).

Broadly speaking, the HIPAA Privacy Rule sets out the permissible uses and disclosures of protected health information, while the HIPAA Security Rule requires covered entities to safeguard electronic protected health information against impermissible uses and disclosures, and to take measures to ensure its integrity and availability while in their custody or while transmitting it to third parties. Debt collection activities that require access to patient health information may be circumscribed by regulations implementing the HIPAA Privacy Rule.

The HIPAA was significantly modified by the Health Information Technology for Economic and Clinical Health Act (HITECH Act), part of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub L 111-5, 123 Stat 115). The HITECH Act includes additional provisions concerning the privacy and security of health information that materially and directly affect more entities, businesses, and individuals in more diverse ways than in HIPAA. It also expands the reach of HIPAA to apply to business associates (see §2A.26).

In addition, it sets forth nationwide security breach notification requirements for a broad range of entities that possess electronic protected health information. Under these provisions, a covered entity or a business associate that accesses, records, holds, or discloses unsecured protected health information and discovers a breach of the information must notify each individual whose information was affected. 42 USC §17932. For a detailed discussion of these provisions, the HIPAA Security Rule, and information security breach generally, see Privacy Compliance and Litigation in California, chap 3 (Cal CEB 2008).

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## §2A.24 B. HIPAA Privacy Rule

The HIPAA Privacy Rule regulations establish standards for the use and disclosure of individually identifiable health information and for individuals' rights regarding their health information. See 45 CFR §§160.101-160.104, 160.201-160.205, 164.102-164.106, 164.500-164.534. The regulations impose restrictions on the use and disclosure of individually identifiable patient information and define when and whether an authorization is required, and whether disclosure to third parties is permitted or even mandatory.

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## §2A.25 C. Application of HIPAA Privacy Rule

The HIPAA Privacy Rule generally applies to health plans, health care clearing houses, and health care providers who transmit any health information in electronic form in connection with a standard transaction. 45 CFR §§160.102(a)(3), 160.103. Health plans, health care clearinghouses, and providers that use standard electronic transactions are called "covered entities." 45 CFR §160.103. Medicare Part D drug card sponsors are also covered entities. See 42 USC §1395w-141(h)(6)(A).

The Privacy Rule limits the disclosure of an individual's health information, including "past, present, or future payment for the provision of health care" (45 CFR §160.103) to the minimum necessary. "Payment" is broadly defined to include efforts to obtain reimbursement for services provided, and specifically includes "collection activities." 45 CFR §164.501.

**NOTE:** Health care clearinghouses may be one of numerous organizations that operate as go-betweens for health care providers and health plans. For example, a billing service that takes information from a doctor and puts it into a standard coded format would qualify as a health care clearinghouse subject to the HIPAA Privacy Rule.

**NOTE:** An unpaid medical bill may be reported to a collection agency and can appear as a negative entry on an individual's credit report. Nonmedical information, including name, address, date of birth, social security number, account number, and payment history, may be disclosed to a collection agency. See Privacy Rights Clearinghouse, Fact Sheet 8(a): HIPAA Basics: Medical Privacy in the Electronic Age, available on the Privacy Rights Clearinghouse website. For the website address, see Directory.

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## §2A.26 D. Contracts Between Covered Entities and Business Associates

A "business associate" is a person or an entity contracted to provide "legal, actuarial, accounting, consulting… or financial services" to a covered entity. 45 CFR §160.103. The HITECH Act (see §2A.23) expands the definition of "business associate" to include organizations that provide transmission of protected health information and require access on a routine basis to protected health information. See Pub L 111-5, §13408, 123 Stat 115.

When a covered entity contracts with a nonemployee for third party debt collection services, the debt collector becomes the entity's business associate. A covered entity may disclose only the minimum information necessary for the business entity to complete its assigned task, and must develop policies to determine which members of its workforce need access to protected health information to do their jobs. 45 CFR §164.502(b).

Under the HIPAA Privacy Rule, contracts between covered entities and their business associates that require disclosure of protected health information must meet specific standards. Contract terms must describe the protected health information to be made available to a business associate and the limitations on its use. 45 CFR §164.504(e)(1). The contract must also require that a business associate implement measures to prevent disclosure or use of the information—by itself or its agents—for purposes other than those specified by the contract. 45 CFR §164.504(e)(2). A covered entity that discovers a business associate has violated the contract privacy provision must try to cure the breach; alternatively, the covered entity may terminate the contract or report the problem to the HHS. 45 CFR §164.504(e)(1). Sample contract language is available on the HHS website; see Directory for the website address.

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## §2A.27 E. Preemption of State Law

The HIPAA regulations preempt state law only when they are contrary to state law, meaning that a covered entity would find it impossible to comply with both, or that the state law stands as an obstacle to a HIPAA requirement. 45 CFR §§160.201-160.203. The HIPAA does not preempt a contrary state law that relates to the privacy of individually identifiable health information and is more stringent than the HIPAA standard (meaning that it is more restrictive in limiting use or disclosure, or affords the individual greater rights of access to, or amendment of, health information). See 45 CFR §§160.202-160.203.

Thus, a covered entity may use or disclose protected health information *only* if the use or disclosure is permitted by *both* the HIPAA Privacy Rule and the applicable state law, such as California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37), discussed in §2A.25. Information on HIPAA implementation in California is available at the California Office of HIPAA Implementation (CalOHI) website; see Directory for the website address.

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# VIII. CONFIDENTIALITY OF MEDICAL INFORMATION ACT (CMIA)

## §2A.28 A. Purpose of Act

The Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) is California's general health information privacy law. The CMIA restricts the use and disclosure of medical information. Specifically, the CMIA bars covered entities (see §2A.30) from disclosing the medical information of a patient, or an enrollee or subscriber of a health care service plan, without first obtaining authorization except as required by statute. CC §56.10(a). See CC §56.10(b)-(c). Further, the CMIA prohibits covered entities from intentionally sharing, selling, using for marketing, or otherwise using "any medical information for a purpose not necessary to provide health care services to the patient," unless the individual authorizes it or it is otherwise permitted by the CMIA. CC §56.10(d).

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## §2A.29 B. Protected Medical Information

"Individually identifiable information" is defined to include information about an individual's health condition, treatment, or payment for treatment that identifies the individual or with respect to which there is a reasonable basis to believe that it could be used to identify the individual. CC §56.05(g). Individually identifiable health information includes merely demographic information; thus, an individual's name associated with a covered provider, as on a patient list, is protected. This information is protected in the hands of a covered entity, even if it was received from sources other than the individual or for purposes other than treatment, and even if the individual to whom it relates is not a patient or enrollee of the covered entity—for example, when a health care provider obtains health information about a patient's relative in order to treat the patient. See CC §56.05(g).

**NOTE:** The scope of the term "individually identifiable health information" is generally the same under the HIPAA. 45 CFR §§160.103, 164.501.

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## §2A.30 C. Entities Covered by CMIA

The Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) covers the following entities:

- Health care professionals and institutional health care providers licensed or certified under Bus & P C §§500-4999.7, the Chiropractic Initiative Act or the Osteopathic Initiative Act (uncodified initiative measures printed in Deering's Bus & P C App I and West's Bus & P C §§1000—1000-20, 3600-1—3600-5), or Health & S C §§1200-1795, 1797-1799.207 (CC §56.05(j));

- Health plans licensed under the Knox-Keene Health Care Service Plan Act of 1975 (Health & S C §§1340-1399.818) (CC §56.05(d));

- Medical groups, independent practice associations, pharmaceutical benefits managers, and medical service organizations that are not themselves health care providers or health care service plans (CC §56.05(c)); and

- Businesses that maintain medical information to make it available to an individual or health care provider, for purposes of allowing the individual to manage his or her health care or for diagnosing and treating the individual (CC §§56.06(a)).

For detailed discussion of the CMIA, see Privacy Compliance and Litigation in California, chap 7 (Cal CEB 2008).

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# IX. PRETEXTING

## §2A.31 A. Federal Law

**Gramm-Leach-Bliley Act.** The Gramm-Leach-Bliley Act (GLBA) (Pub L 106-102, 113 Stat 1338) prohibits pretexting by prohibiting "any person" from using false pretenses to obtain customer information. 15 USC §6821. Further, the Financial Privacy Rule (see §2A.4) and other regulations under GLBA ban the practice of pretexting. See 16 CFR pts 313-314. The Financial Privacy Rule's definition of "financial institution" includes "collection agencies" and "other persons [who] receive nonpublic personal information from financial institutions with whom they are not affiliated." 16 CFR §313.1(b). Whether the rule applies to attorney debt collectors is unclear; other regulation language limits the GLBA's scope to companies that are "significantly engaged" in enumerated financial activities. 16 CFR §313.3(k).

**Telephone Records and Privacy Protection Act.** The federal Telephone Records and Privacy Protection Act of 2006 (TRPPA) (18 USC §1039) contains similar provisions to California's Pen C §638 (see §2A.32). The Act prohibits the acquisition and attempted acquisition of confidential telephone records information of a covered entity (see 18 USC §1039(h)(2), (4) (definitions)) by making false or fraudulent statements or representations. 18 USC §1039(a). It also prohibits the sale, transfer, purchase, and receipt of confidential phone records information. 18 USC §1039(b)-(c).

**NOTE:** Many of the provisions of the TRPPA eventually may be found to preempt California's pretexting law, which covers much of the same conduct.

**TRPPA Penalties.** Criminal penalties under the TRPPA are more severe than the California statute, and include fines and prison sentences of up to 10 years, with double fines and an additional 5 years for repeat offenses within a 12-month period. See 18 USC §1039(b)-(e).

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§2A.32 B. California Law

**Definition of pretexting.** California outlaws the practice of "pretexting" to obtain phone records. Pen C §638. Pretexting occurs when a person obtains phone company records through fraud or deceit, *e.g.,* typically by pretending to be a telephone company subscriber to gain access to that subscriber's records.

**Prohibitions.** The statute prohibits the purchase or sale of telephone company records without the written consent of the subscriber, as well as the purchase or sale of records of telephone records from VoIP calls, cell phones, satellite phones, and regular land line calls.

**Penalties.** Obtaining phone records by fraud or deceit is a punishable by fines up to $2500 (or $10,000 for repeat offenders), imprisonment for up to 1 year in jail, or both. Pen C §638(a).

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# 3

# Starting the Action

**Philip J. Rhodes**

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## I. IDENTIFYING THE DEFENDANT

### §3.1 A. Name and Capacity

Correctly identifying the defendant in the complaint provides the foundation for the ultimate goal of the action—collecting money. Accordingly, the creditor must first ascertain the debtor's correct name. Especially with a small business entity, the debtor may refer to itself informally by several different names or variations of names.

The complaint must state the proper legal name of the defendant entity even when a fictitious business name or "dba" is used. The plaintiff cannot sue a defendant identifying him, her, or it solely by the fictitious name. A fictitious business name has no existence apart from the party using the name. Accordingly, an action against a fictitious business name only is subject to dismissal. See *Pinkerton's, Inc. v Superior Court* (1996) 49 CA4th 1342, 57 CR2d 356. Therefore, the creditor must ascertain whether the fictitious business name belongs to an individual, a partnership, a corporation, or other legal entity. Then, the complaint must identify the actual legal entity.

The plaintiff must also correctly identify the capacity of each defendant; *i.e.,* is the debtor a sole proprietorship, a partnership, a corporation, or another type of entity?

**WARNING:** If the name or capacity of the debtor are not correct, the creditor may obtain a judgment against a nonexistent entity, which will be unenforceable. See *Earl W. Schott, Inc. v Kalar* (1993) 20 CA4th 943, 24 CR2d 580 (defendant sued as "Gary Kalar, individually and dba Kalar Construction Co.," and identified in proof of service on defendant's office manager as, respectively, an individual and an association or partnership; default judgment reversed because proper party was corporation named Kalar Construction, Inc.).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.2 B. Sources of Information to Verify Name and Capacity

## §3.2 B. Sources of Information to Verify Name and Capacity

Many sources are available for confirming the correct name and legal capacity of a potential defendant. Counsel may consult:

- The client's file for credit applications, copies of checks, or other identifying documents such as letterhead or purchase orders.
- The Secretary of State, who will provide the name and service of process information for corporations, limited partnerships, limited liability partnerships, and limited liability companies. For contact information about the Secretary of State's office, see the Directory.
- The Department of Motor Vehicles (DMV) for information on individuals. The DMV will provide information directly to attorneys for business purposes on written request. Alternatively, attorneys may access DMV information through online information services in compliance with special procedures.
- Commercial online information databases such as ChoicePoint or Merlin Information Services. These services maintain information from the Secretary of State of most states as well as fictitious name filings from most California counties. For contact information for these organizations, see the Directory.
- County recorders for fictitious business name information, if the specific county does not make its fictitious name filings available through online databases.
- State licensing agencies for businesses with state law licensing requirements, such as general contractors.
- The records of the State Board of Equalization for any business that charges sales tax and for any business having a license from the Alcohol Beverage Control Commission.

Counsel should also verify whether a domestic corporation is in good standing or whether a foreign corporation is qualified to do business in California. A corporation that has been suspended for nonpayment of taxes cannot defend an action. Rev & T C §23302; *Damato v Slevin* (1989) 214 CA3d 668, 672, 262 CR 879.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.3 C. Use of Doe Defendants' Fictitious Names When Information Lacking

## §3.3 C. Use of Doe Defendants' Fictitious Names When Information Lacking

A plaintiff who does not know the defendant's name may initially sue the entity as a Doe defendant. See CCP §474. When the true name of the underlying entity is discovered, the plaintiff must substitute that entity in place of the Doe defendant. See *Pinkerton's, Inc. v Superior Court* (1996) 49 CA4th 1342, 1349, 57 CR2d 356 (mandating that trial court dismiss fictitious business name defendant "Pinkerton's, Inc., DBA Pinkerton Security & Investigation Services" owing to earlier dismissal of corporate defendant Pinkerton's, Inc. using fictitious business name).

Pleaders designate defendants by fictitious names in several basic situations, such as the following:

- If the pleader believes that certain persons are liable to the plaintiff, but does not know and cannot readily learn their names, CCP §474 enables the plaintiff to sue these defendants under fictitious names before the suit is barred by the statute of limitations. *Austin v Massachusetts Bonding & Ins. Co.* (1961) 56 C2d 596, 15 CR 817. The plaintiff may not, however, add new allegations against a fictitiously named defendant if the statute of limitations has run. See *Milam v Dickman Constr. Co.* (1964) 229 CA2d 208, 213, 40 CR 130 (charging allegations referred only to named defendants); *Williams v Goodman* (1963) 214 CA2d 856, 861, 29 CR 877.
- If the pleader believes that other persons may be involved in the events, or related to known defendants in a way that would make them liable, the plaintiff may state causes of action against fictitiously named defendants so that their true names can be substituted if they are later discovered to exist. Such speculative use of fictitiously named defendants has been recognized in appellate opinions. See, *e.g., Garrett v Crown Coach Corp.* (1968) 259 CA2d 647, 66 CR 590 (manufacturer of vehicle); *Larson v Barnett* (1950) 101 CA2d 282, 289, 225 P2d 297 (owner of vehicle); *Day v Western Loan & Bldg. Co.* (1940) 42 CA2d 226, 108 P2d 702 (employer of tortfeasor).
- If the pleader adds one or more fictitious names after each known defendant's name, additional parties can be brought in if the known defendant was not acting alone or if the pleader used an incorrect name.

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## D. Suing Different Entities

### §3.4 1. Individuals

The creditor should identify each individual by as full and complete a name as possible, identify any commonly used nicknames, and obtain the individual's social security number whenever possible.

Many theories are available to expand the list of potential individual defendants in a collection action. See §§3.5-3.8.

**CAUTION:** Due to privacy concerns, the use of a complete social security number (SSN) in public documents may be prohibited. Thus, only the last four digits of SSNs may be included in filings in federal courts. Fed R Civ P 5.2. In California courts, an abstract of judgment must include only the last four digits of the judgment debtor's SSN if it is known to the judgment creditor. CCP §674(a)(6). Only the last four digits of an SSN may be included in public documents submitted to the county recorder for recording or filing. CC §1798.89. In addition, the Franchise Tax Board must redact all but the last four digits of any SSN from lien abstracts before disclosing them to the public. Govt C §15705. In family law proceedings, the parties may redact SSNs from certain dissolution pleadings. Fam C §2024.5.

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### a. Husband and Wife

### §3.5 (1) Community Property

All of the community estate of a husband and wife is liable for all debts incurred by the marital community. Fam C §910. However, only the spouse who incurred the debt is liable individually. Therefore, a creditor should exercise caution in determining whether to name the husband, wife, or both as defendants. For example, if only the husband signed a promissory note, the creditor should name only the husband as a defendant. A judgment solely against the husband will still entitle the creditor to reach all of the community estate in recovering its judgment. See *Lezine v Security Pac. Fin. Servs.* (1996) 14 C4th 56, 64, 58 CR2d 76.

**CAUTION:** Naming the spouse who did not incur the debt as a defendant may expose the creditor to a malicious prosecution cause of action. At the very least, it may give additional negotiating leverage to the debtor, who may raise the specter of malicious prosecution liability to obtain a greater discount.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.6 (2) Separate Property

### §3.6 (2) Separate Property

Separate property is generally liable only for debts incurred by the debtor spouse. Fam C §913. If one spouse owns substantial separate property, naming both spouses may flush out the existence of the separate property and any marital property agreements between the parties. On the other hand, as noted in the CAUTION in §3.5, naming the spouse who did not incur the debt as a defendant may expose the creditor to a malicious prosecution cause of action, so the plaintiff should proceed with some care.

**NOTE:** Separate property is liable for debts incurred by either spouse on behalf of the marital community for "necessaries of life" such as food, clothing, and shelter. Fam C §914(a). Therefore, a creditor seeking to enforce an obligation incurred for items potentially categorized as "necessaries of life" should include a "husband and wife" allegation in the complaint.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.7 b. Undisclosed Corporate Principal

### §3.7 b. Undisclosed Corporate Principal

An agent who incurs a debt on behalf of a principal without disclosing the agency relationship is individually liable for the debt. An agent must disclose not only his or her agency status but the corporate status and correct identity of the principal. See Restatement (Second) of Agency §321 (1958). The failure to properly disclose the agency relationship may take many forms:

- An agent may fail to disclose the principal by incurring a debt without stating or implying that a principal exists, or by implying that a principal exists but failing to expressly disclose its existence. For example, using the term "president" or "vice president" after an agent's name without identifying the entity of which the individual is the president or vice president is an insufficient disclosure of a corporate principal's existence, even though a reasonably sophisticated person might inquire further after being put on notice of the person's capacity. See, *e.g.*, *Home Fed. Sav. & Loan Ass'n v Ramos* (1991) 229 CA3d 1609, 284 CR 1; *Sebastian Int'l v Peck* (1987) 195 CA3d 803, 240 CR 911.
- An agent may fail to disclose the principal's status as a corporate entity. If an agent executes a contract as "Widget Sales by S. Smith, Owner" when the true corporate identity is "Widget Manufacturing, Inc.," the disclosure is insufficient. See *G.W. Anderson Constr. Co. v Mars Sales* (1985) 164 CA3d 326, 210 CR 409.
- An agent may fail to disclose its principal's true corporate name and disclose only its fictitious name. Failure to disclose is insufficient to protect the agent even when the corporation has filed a proper fictitious business name statement with the appropriate agency. See *J & J Builders Supply v Caffin* (1967) 248 CA2d 292, 56 CR 365. For example, a debt incurred by "Widget Sales by S. Smith" is an insufficient disclosure of a corporate principal's existence, even when the corporation, Widget Manufacturing, Inc., has filed a fictitious business name statement for Widget Sales.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.8 c. Corporate Tortfeasors

### §3.8 c. Corporate Tortfeasors

Corporate directors and officers can incur individual liability for torts committed by the corporation if they participate, direct, authorize, or acquiesce in the tortious corporate activity. *Wyatt v Union Mortgage Co.* (1979) 24 C3d 773, 785, 157 CR 392; *O'Connell v Union Drilling & Petroleum Co.* (1932) 121 CA 302, 309, 8 P2d 867. In the debt collection context, the corporate tort can be manifested in several ways:

- A promise made without the intent to perform is fraud. See CC §1710(4). If a corporation purchases goods or services on credit, knowing that it cannot pay, it may be committing fraud. When a corporation ceases operating shortly after a purchase, the creditor may infer that the corporation never intended to pay. See Com C §2702 (reclamation rights).
- A corporate entity may convert a secured creditor's collateral or other funds to which a creditor has a special entitlement. For example, a security agreement ordinarily grants a secured creditor a security interest in collateral and its proceeds. Wrongful disposition of such collateral or its proceeds may constitute conversion. *Producers Cotton Oil Co. v Amstar Corp.* (1988) 197 CA3d 638, 242 CR 914.
- A debtor may convert collateral by decreasing its value. For example, a debtor who strips equipment from a commercial truck for use in another vehicle commits conversion, as does a debtor who intentionally disregards regular maintenance and repair to collateral. See *Itule v Metalease, Inc. (In re Itule)* (BAP 9th Cir 1990) 114 BR 206, 210. In some circumstances, a creditor may have a special statutory entitlement to funds, either on a fiduciary or quasi-fiduciary basis, and failure to properly account for such funds and to remit them to the creditor may constitute conversion. See, *e.g.,* Ins C §§1733-1734 (imposing fiduciary duties on insurance broker or agent receiving premium payments from insureds); Food & A C §56623 (prohibiting commission produce merchant from using proceeds of consigned produce in manner that jeopardizes prompt payment). *Fischer v Machado* (1996) 50 CA4th 1069, 58 CR2d 213. Any corporate officer or principal who is shown to have participated, directed, authorized, or acquiesced in the wrongful acts is individually liable. 124 CA3d at 572.

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## §3.9 2. General Partnerships

A California general partnership exists when any two or more persons engage in a business for profit. Corp C §16202(a). A partnership is an entity distinct from its partners. Corp C §16201. Generally, a partnership and the individual partners are jointly and severally liable for both the contract and tort liabilities of the partnership. Corp C §16306.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.10 a. Identify Formation of Partnership

## §3.10 a. Identify Formation of Partnership

Because a partnership may exist without any formal organization whenever two or more persons agree to engage in an enterprise for profit, a creditor should always investigate, either before filing an action or during discovery, whether an apparent sole proprietorship may be a partnership with previously undiscovered partners.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.11 b. Identify All Partners

### §3.11 b. Identify All Partners

A partnership name must reflect all partners' names or acknowledge the existence of additional partners, *e.g.,* John Doe & Associates. If the name does not include all partners' names, the partnership must file a fictitious business name statement with the county clerk for the partnership's principal place of business. Bus & P C §§17900(b)(2), 17910, 17915. Therefore, to discover the names of all the partners, a creditor should check either the county records or online databases for a fictitious business name statement for the partnership. Bus & P C §17913.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.12 c. Identify Basis of Liability

### §3.12 c. Identify Basis of Liability

Each partner is deemed an agent of the partnership when dealing with third persons on the partnership's behalf. If the partner acts within the apparent ordinary course of business, all partners are jointly and severally liable for the debts incurred. Corp C §16301(1). Each partner is also jointly and severally liable for any tort liabilities incurred by any other partner acting within the apparent ordinary course of business. Corp C §§16305-16306.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.13 3. Limited Partnerships

## §3.13 3. Limited Partnerships

A California limited partnership consists of one or more general partners and one or more limited partners. Corp C §15611(r). The general partner or partners manage the partnership and incur personal liability for the partnership's contract and tort liabilities identical to a partner in a general partnership. A limited partner generally does not incur liability for partnership liabilities. Corp C §15632(a); *Gruendi v Oewel Partnership, Inc.* (1997) 55 CA4th 654, 658, 64 CR2d 217. See §3.14 for exceptions.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.14 a. Exception to Liability Limit of Limited Partner

### §3.14 a. Exception to Liability Limit of Limited Partner

A limited partner who participates in the control of the partnership may be subject to liability as a general partner to specific third parties who transact business with the partnership with actual knowledge at the time of their transaction of the limited partner's participation in the control of the partnership. Corp C §15632.

Corporations Code §15632(b) lists activities that do not constitute participation in the control of the partnership. Given the broad scope of §15632(b), only a limited partner's direct participation in the partnership's day-to-day operations subjects the partner to general liability for a partnership debt.

**NOTE:** Unlike alter ego allegations, a limited partner's liability is not an area where a fishing expedition might be successful, because the plaintiff must have actual knowledge of the limited partner's participation.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.15 b. Failure to Adhere to Formation Requirements

### §3.15 b. Failure to Adhere to Formation Requirements

To form a limited partnership, all partners must enter into a partnership agreement and all general partners must execute and file with the Secretary of State a certificate of limited partnership. Corp C §15621(a). When pursuing an action against a limited partnership, the creditor should obtain a copy of the certificate of limited partnership to verify the existence and identity of, and addresses for service of process on, the limited partnership and all general partners. See Corp C §15621(a).

When a limited partnership has failed to file a certificate of limited partnership, a creditor should include all the ostensible limited partners as defendants in the action. The partnership's failure to take the required steps necessary to form a limited partnership arguably relegates the partnership to general partnership status, creating individual liability for all ostensible limited partners. However, California law provides some protection for parties who have a good faith belief that their involvement in the partnership is solely as a limited partner. See Corp C §15633(a).

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## §3.16 4. Limited Liability Partnerships

Attorneys and accountants may operate as limited liability partnerships (LLPs). An LLP allows each partner to participate in management but limits each partner's individual liability to that of his or her own misconduct as long as the partnership provides certain minimum security for claims against the partnership. Corp C §16306(c). See Corp C §16956(a).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.17 a. Registration Requirements

### §3.17 a. Registration Requirements

An LLP must register with the Secretary of State, setting forth its name, the nature of its business, its principal business location, its agent for service of process, and its designation as a registered limited liability partnership. Corp C §16953(a). An LLP must also comply with all requirements of the appropriate licensing agency—accountants with the State Board of Accountancy, and attorneys with the State Bar of California. Corp C §16953(h).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.18 b. Effect of Failure to Register

### §3.18 b. Effect of Failure to Register

California law recognizes only registered LLPs and foreign LLPs. Corp C §16951. Therefore, partners of an unregistered California LLP do not enjoy the limitation of liability in Corp C §16306(c).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.19 5. Limited Liability Companies

## §3.19 5. Limited Liability Companies

A limited liability company (LLC) combines features of a partnership with features of a corporation. See generally Forming and Operating California Limited Liability Companies (2d ed Cal CEB 2007). For third party creditor purposes, California law treats an LLC as a corporate entity. See Corp C §17101. It has its own independent legal identity (Corp C §17003), and thus a creditor must properly identify the name and legal capacity of the LLC as a defendant in any action.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.20 a. Limited Liability

### §3.20 a. Limited Liability

Individual members of an LLC are not liable for the LLC's contract or tort liabilities solely because of their membership status. Corp C §17101(a). The members may, however, incur individual liability in some limited circumstances. See Corp C §§17254-17255, 17353; Forming and Operating California Limited Liability Companies §§6.23-6.40 (2d ed Cal CEB 2007). An LLC's members also share a risk of liability for tortious activities identical to their corporate shareholder counterparts. Corp C §17101(c).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.21 b. Alter Ego Liability

### §3.21 b. Alter Ego Liability

An LLC's members share an almost identical risk of alter ego liability as shareholders of a corporation. (On corporate alter ego liability, see §3.23.) The failure of an LLC's members to hold regular meetings does not itself result in an alter ego determination, however, unless the LLC's operating agreement expressly requires such meetings. Corp C §17101(b).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.22 c. Guarantor Liability

### §3.22 c. Guarantor Liability

An LLC member may independently agree to guarantee some or all of the obligations of the LLC. Corp C §17101(c). The operating agreement may include an agreement that a member be liable for some or all of the LLC's obligations. Corp C §17101(e).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.23 6. Corporations

## §3.23 6. Corporations

A corporation has its own independent legal identity and is wholly responsible for its own debts and obligations. See *Minifie v Rowley* (1921) 187 C 481, 487, 202 P 673; *Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 836, 26 CR 806. The corporation must file its articles of incorporation with the Secretary of State. Corp C §200. It must also file annually an information statement, setting forth its officers, directors, and agent for service of process. Corp C §1502. A creditor should obtain a copy of this statement before filing an action.

**NOTE:** Counsel should call the Secretary of State to ascertain that the corporation remains in good standing. See Directory for telephone number. A corporation that is suspended for nonpayment of taxes cannot defend a legal action in a state court. Rev & T C §23302; *Damato v Slevin* (1989) 214 CA3d 668, 672, 262 CR 879.

Absent special circumstances, a corporation's officers, directors, and shareholders are not individually liable for corporate debts. Exceptions to limited liability include the following:

- If an officer, director, shareholder, or other related entity is the alter ego of the corporation, a creditor may be able to "pierce the corporate veil" of limited liability. See §§3.116-3.119A.
- If a corporation makes loans or distributions prohibited by statute to shareholders or insiders, the shareholders or insiders may be liable. Therefore, a creditor should investigate what funds, if any, the corporation distributed to its shareholders during relevant time periods. This investigation may prove particularly useful in cases involving insolvent corporations because of statutory prohibitions and restrictions on distributions by such corporations. Corp C §316; see Corp C §§500-503, 506, 2009, 2011. Owing to the insolvency, it may be only directors or shareholders who have sufficient assets to satisfy the creditor's claim.

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## §3.24 II. SUBJECT MATTER JURISDICTION AND VENUE

Proposition 220, passed June 2, 1998, amended Cal Const art VI, §5 to permit the merger of a county's superior and municipal courts into a single county superior court. All 58 California counties have now unified their trial courts.

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## A. Determining Jurisdiction; Jurisdictional Limits

### §3.25 1. Superior Court

Superior courts have original subject matter jurisdiction over all matters requiring judicial resolution. See Cal Const art VI, §10. Under trial court unification, the superior court has subject matter jurisdiction over civil matters formerly within the municipal court's jurisdiction, which are classified as "limited civil cases."

**NOTE:** As a practical matter, although the state constitution still authorizes municipal and justice courts (see Cal Const art VI, §5), as a result of unification, the superior court is the only trial court in California. Although trial court unification has eliminated the municipal court, it has not eliminated the distinctions between limited civil cases (see §3.26) and unlimited cases. Important procedural differences (*e.g.*, lower court costs, simplified discovery, different fast track rules for collection cases) still exist between limited civil cases and unlimited cases. See §§3.66-3.79.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.26 2. Limited Civil Cases

## §3.26 2. Limited Civil Cases

Actions in which the amount of the demand or the value of the property in issue does not exceed $25,000 are classified as limited civil cases. CCP §86(a)(1). All others are unlimited. The amount in controversy is calculated exclusive of attorney fees, interest, and costs. CCP §85(a). There are also specific types of cases that have been designated by statute as limited civil cases (see generally CCP §86), including, among others:

- An action at law in which the demand or the value of the property in controversy amounts to $25,000 or less, exclusive of interest, unless the case involves the legality of a tax, impost, assessment, toll, or municipal fine. CCP §86(a)(1).
- An action to cancel or rescind a contract in connection with an action to recover money not exceeding $25,000, or property of a value not exceeding $25,000, paid or delivered under, or in consideration of, the contract, and actions to revise a contract when the relief is sought in an action on the contract if the action is otherwise a limited civil action. CCP §86(a)(3).
- An action to enforce or foreclose a personal property lien when the amount of the lien is $25,000 or less. CCP §86(a)(5).
- An action to enforce and foreclose, or a petition to release, liens of mechanics, materialmen, artisans, laborers, and others, when the amount of the lien is $25,000 or less. CCP §86(a)(6).
- An action for equitable relief (*e.g.*, temporary restraining order, preliminary injunction, appointment of receiver) when necessary (1) to preserve the rights or property of a party, (2) to enforce a judgment, or (3) to determine the title to personal property seized in a limited civil case. CCP §86(a)(8).
- An action for recovery of an interest in personal property or to enforce the liability of the debtor of a judgment debtor, when the value of the interest or debt does not exceed $25,000. CCP §86(a)(9).

Limited civil cases are subject to economic litigation procedural rules that limit the parties' costs. See §§3.66-3.79. Therefore, it may be desirable to attempt to retain the "limited civil case" classification even if the demand potentially exceeds the jurisdictional limit. See CCP §403.040(d) (if misclassification of case is due solely to excess in amount of demand, excess may be remitted and action may continue as limited civil case). On the reclassification, see §3.27A.

**PRACTICE TIP:** The plaintiff may attempt to have the action proceed as a limited civil case if the plaintiff indicates its intention to waive recovery of any excess by stating "not to exceed $25,000" in the prayer of the complaint.

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### §3.27 3. Small Claims Court

Small claims courts have jurisdiction over actions for which the amount of the demand does not exceed $5000, and (with certain exceptions) for actions brought by a natural person when the amount does not exceed $7500. CCP §§116.220(a), 116.221. For detailed discussion of jurisdiction in small claims courts, see §7.80.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.27A B. Jurisdictional Classification

### §3.27A B. Jurisdictional Classification

The "jurisdictional classification" of a case refers to its classification as a limited civil case or an unlimited civil case. CCP §32.5. The rules for reclassification of civil proceedings are set forth in CCP §§403.010-403.090.

It is up to the party initiating the action to classify the case in the first instance. The caption of every pleading filed in a limited civil case must contain the words "Limited Civil Case." CCP §422.30(b); Cal Rules of Ct 2.111(10).

After the initiation of a cause of action, its jurisdictional classification can be changed in the following ways:

- A party filing an amended initial pleading (complaint, cross-complaint, petition) that changes the jurisdictional classification of the case from limited to unlimited may reclassify the case by simultaneously paying any applicable reclassification fees. CCP §403.020(a). For reclassification fees, see CCP §403.060; Govt C §70619. If the amended pleading changes the classification from unlimited to limited, no fee is required, and the clerk must reclassify the case. CCP §403.060(c).
- The parties may stipulate to reclassification of the case within the time allowed to respond to the initial pleading. CCP §403.050(a).
- A party to a limited civil case filing a cross-complaint that causes the case to exceed the amount-in-controversy limitation or that requests relief unavailable in a limited civil case may reclassify the case by stating in the caption that the action is a limited civil case to be reclassified by cross-complaint and by simultaneously paying the reclassification fees. CCP §403.030.
- A defendant or a cross-defendant may file a motion for reclassification. CCP §403.040(a)-(b). If the motion is filed within the time to amend the initial pleading, the court must grant it, regardless of fault, if the initial pleading incorrectly classified the case as a limited civil case or failed to state that it was a limited civil case. CCP §403.040(a). If the motion is filed after the deadline for amending the pleading, the moving party must also demonstrate good cause for the delay. CCP §403.040(b).
- The court may reclassify a complaint at any time on its own motion. CCP §403.040(a).

Reclassification is not required in the following circumstances:

- The judgment actually rendered in a case not classified as a limited civil case is one that could have been rendered in a limited civil case. CCP §403.040(e).
- The plaintiff in a case that is misclassified as a limited civil case solely because the demand in the complaint exceeds the amount-in-controversy limitation remits the excess. CCP §403.040(f).

On reviewing the trial court's order reclassifying, or declining to reclassify, a case, see California Civil Procedure Before Trial §§6.27-6.34 (4th ed Cal CEB 2004).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.27B C. Applicability of Pre-Unification Law on Aggregating Claims

### §3.27B C. Applicability of Pre-Unification Law on Aggregating Claims

Before trial court unification, CCP §396 governed the transfer of cases between superior and municipal courts. That section provides when an action is brought in a court that lacks subject-matter jurisdiction over it, the court must transfer the case to the proper court. CCP §396(b). On jurisdictional classification, see §3.27A. Nevertheless, it appears likely that a number of rules that evolved in interpreting CCP §396 will be retained under the jurisdictional classification rules.

The following principles seem likely to be of continued use in determining whether a case is appropriately classified or reclassified:

- A court should not reclassify a case as a limited civil case over plaintiff's objection unless it determines that the matter will necessarily result in a verdict of $25,000 or less. *Walker v Superior Court* (1991) 53 C3d 257, 262, 279 CR 576 (trial court abused discretion by transferring two cases to municipal court despite settlement recommendation of $25,000 in one and arbitration award of $25,000 in the other).
- A complaint that states only that damages are "in excess of $25,000" is sufficient; a specific figure is not required. See *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 444, 178 CR 77 (upholding superior court's subject-matter jurisdiction based on complaint seeking damages "in excess of $5,000," which was jurisdictional amount at that time). The demand must be in good faith. *Sellery v Ward* (1942) 21 C2d 300, 131 P2d 550.
- A court hearing a complaint properly classified as an unlimited civil case should also be able to entertain a cross-complaint arising out of the same transaction, even it seeks damages of $25,000 or less. *Sullivan v California Realty Co.* (1904) 142 C 201, 75 P 767.

In addition, the following guidelines for determining amount in controversy seem likely to be of continued use under trial court unification:

- In computing the amount in controversy, claims for interest are excluded. CCP §85(a); *Christian v Superior Court* (1898) 122 C 117, 54 P 518 (interest on note cannot be added to principal to determine amount in controversy, even when parties stipulated in note that unpaid interest would be treated as principal and itself bear interest).
- Costs are not included in computing the amount in controversy. *Henigan v Ervin* (1895) 110 C 37, 42 P 457.
- Attorney fees are not included in determining the amount in controversy. CCP §85(a)
- Plaintiff may not state any amount for punitive damages in a claim. CC §3295(e).

Finally, the following principles relating to aggregation of damages appear likely to be of continued use in determining how a case should be classified or reclassified:

- When one plaintiff alleges multiple claims against a single defendant in a complaint, the demands of all the claims are aggregated to determine the amount in controversy. *Hammell v Superior Court* (1932) 217 C 5, 17 P2d 101; *Strahan v Rodney* (1950) 97 CA2d 448, 217 P2d 711.
- When one plaintiff has separate claims against several defendants, aggregation is not permitted. *Myers v Sierra Valley Stock & Agricultural Ass'n* (1898) 122 C 669, 55 P 689; *Heavilin v Westchester Fire Ins. Co.* (1936) 12 CA2d 695, 56 P2d 252.
- When the plaintiff has only one claim but alleges different theories of recovery, aggregation is not permitted. *Perry v Farley Bros. Moving & Storage* (1970) 6 CA3d 884, 86 CR 397.
- When several plaintiffs have joint claims against one defendant, the claims are aggregated. *Frost v Mighetto* (1937) 22 CA2d 612, 71 P2d 932.
- When two or more plaintiffs join separate claims under CCP §378 (permissive joinder), aggregation is not permitted. *Winrod v Wolters* (1903) 141 C 399, 74 P 1037; *Colla v Carmichael U-Drive Autos, Inc.* (1930) 111 CA Supp 784, 294 P 378. However, if former practice continues after trial court unification, if one of the claims is for more than $25,000, the entire action is properly classified as an unlimited civil action. *Emery v Pacific Employers Ins. Co.* (1937) 8 C2d 663, 67, P2d 1046; *All-Cool Aluminum Awning Co. v Superior Court* (1964)

224 CA2d 660, 36 CR 769.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§§3.28-3.38 Calculating Claims to Determine Jurisdiction and Consequences of Improper Subject Matter Jurisdiction [Deleted]

## §§3.28-3.38 Calculating Claims to Determine Jurisdiction and Consequences of Improper Subject Matter Jurisdiction [Deleted]

These sections have been deleted due to trial court unification. On jurisdictional classifications and reclassification of claims, see §§3.26-3.27A.

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## D. Statutory Venue Rules

### §3.39 1. Actions Against Individuals

Generally, a creditor may file an action against an individual defendant only in a county where the defendant (CCP §395(a); see *Deas v Lido Lumber Co.* (1955) 132 CA2d 402, 282 P2d 90 (action to set aside default judgment); *Myers v Superior Court* (1946) 75 CA2d 925, 172 P2d 84 (action to quiet title to personal property)):

- Must perform the obligation,
- Entered into the agreement, or
- Resides at the commencement of the action.

The county where the defendant enters into the agreement is the county where he or she must perform the obligation unless a special contract in writing specifies a different county for performance. CCP §395(a); *Caffrey v Tilton* (1952) 38 C2d 371, 374, 240 P2d 273; *Causley v Superior Court* (1968) 267 CA2d 757, 73 CR 585; *Armstrong v Smith* (1942) 49 CA2d 528, 536, 122 P2d 115. Courts strictly construe the "special contract in writing" requirement. *Dawson v Goff* (1954) 43 C2d 310, 315, 273 P2d 1.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.40 a. Restricted Venue in Consumer Cases

### §3.40 a. Restricted Venue in Consumer Cases

For a consumer obligation "arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family, or household use" or "arising from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller," a creditor may file an action only in a county where the defendant (CCP §395(b)):

- Signed the contract,
- Resided when he or she entered into the contract, or
- Resides at the commencement of the action.

These venue provisions also apply to an action brought by a consumer plaintiff concerning a consumer transaction under §395(b). *Fontaine v Superior Court* (2009) 175 CA4th 830, 96 CR3d 607. The provisions apply to actions to enforce consumer obligations that do not fall within the scope of either the Unruh Act (CC §§1801-1812.20; see §3.41) or the Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.5; see §3.42), which have different venue restrictions.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.41 b. Restricted Venue in Unruh Act Cases

### §3.41 b. Restricted Venue in Unruh Act Cases

The Unruh Act, applicable to retail installment sales contracts, provides the creditor with four venue choices (CC §1812.10):

- The county where the defendant signed the contract;
- The county where the defendant resided when he or she entered into the contract;
- The county where the defendant resided at the commencement of the action; or
- The county where purchased goods have become fixtures to real property.

A statute permitting venue in a county other than the defendant's county of residence is strictly construed. *Gallin v Superior Court* (1991) 230 CA3d 541, 545, 281 CR 304 (class action brought by Milli Vanilli product purchasers not entitled to override preference for venue at defendant's residence despite special statutory venue provisions).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.42 c. Restricted Venue in Rees-Levering Act Cases

## §3.42 c. Restricted Venue in Rees-Levering Act Cases

The Rees-Levering Motor Vehicle Sales and Finance Act, applicable to automobile sale finance contracts as defined in CC §2981, provides the creditor with four venue choices (CC §2984.4):

- The county where the defendant signed the contract;
- The county where the defendant resided when he or she entered into the contract;
- The county where the defendant resided at the commencement of the action; or
- The county where the buyer principally garages the financed vehicle.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.43 d. Pleading Procedure for Restricted Venue Cases

### §3.43 d. Pleading Procedure for Restricted Venue Cases

Under the three special consumer venue statutes—CCP §395(b) (see §3.40), the Unruh Act (see §3.41), and the Rees-Levering Motor Vehicle Sales and Finance Act (see §3.42)—the creditor must include an allegation in a verified complaint or in a separate affidavit of the facts providing the basis for proper venue in the county where it commences the action. CCP §396a. Judicial Council Form PLD-C-001, paragraph 7, provides space for these allegations. See form in §3.122. If the creditor does not plead these facts, the court may dismiss the action without prejudice. CCP §396a.

**PRACTICE TIP:** If the action is not subject to these special consumer venue statutes, many attorneys state this expressly even though such an allegation is not required.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.44 e. Form: Complaint-Contract (Judicial Council Form PLD-C-001) [Deleted]

## §3.44 e. Form: Complaint-Contract (Judicial Council Form PLD-C-001) [Deleted]

[This section has been deleted because the form has been moved to a more appropriate location in the book. See §3.122.]

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.45 f. Waiver of Improper Venue in Restricted Venue Cases

### §3.45 f. Waiver of Improper Venue in Restricted Venue Cases

As with the general venue rules, a defendant may waive a plaintiff's improper choice of venue. A consumer defendant, however, may waive an improper venue only in writing or in open court, and only when represented by counsel. CCP §396a.

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### §3.46 g. Narrower Federal Venue Restriction

The federal Fair Debt Collection Practices Act (FDCPA) (15 USC §§1692-1692p; see chap 2) narrows a creditor's venue choices even further. Under federal law, a debt collector must bring suit for actions involving real property where the real property is located. 15 USC §1692i(a)(1). In actions not involving real property collateral, the creditor must file the action in the county where the debtor signed the contract or where the debtor resides at the commencement of the action. 15 USC §1692i(a)(2)(A)-(B). Often, eliminating venue in the county where the debtor previously resided has little practical effect on the creditor's venue choices because the county where the debtor signed the contract is usually the county where the debtor resided at the time he or she signed the contract.

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### h. Special Circumstances

### §3.47 (1) Defendants of Unknown Residence

A creditor who does not know the defendant's actual residence and cannot discover it through reasonable diligence may file the action in any county. CCP §395(a); *Thurber v Thurber* (1896) 113 C 607, 45 P 852.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.48 (2) Nonresident Defendants

## §3.48 (2) Nonresident Defendants

If none of the defendants reside in the state, the creditor may file the action in any county. CCP §395(a); *Banta v Wink* (1897) 119 C 78, 51 P 17.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.49 (3) Departing Individuals

## §3.49 (3) Departing Individuals

A creditor may file an action in any county where either the plaintiff or the defendant resides or where the plaintiff may serve the defendant if he or she is about to depart the state without intending to return and there is no reasonable likelihood of the defendant's timely return. CCP 395(a); *Polk v Bradbury* (1932) 127 CA 383, 15 P2d 865.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.50 (4) Actions Against Multiple Defendants

## §3.50 (4) Actions Against Multiple Defendants

An action against multiple defendants may be brought in the county of residence of any of the defendants. *Monogram Co. v Kingsley* (1951) 38 C2d 28, 237 P2d 265.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.51 2. Actions Against Corporations or Other Associations

## §3.51 2. Actions Against Corporations or Other Associations

A creditor may file an action against a corporation or similar association, such as an LLC, in any county where (CCP §395.5):

- The parties made the agreement,
- The parties must perform any provision of the agreement,
- The obligation under the agreement arises,
- The breach of the agreement occurs, or
- The defendant has its principal place of business.

An unincorporated association that files a statement with the Secretary of State designating its principal office in California is treated as a corporation, and the principal office constitutes the association's principal place of business for venue purposes. CCP §395.2. Venue is *not* based on the residence of a member in an action against an association that has filed such a statement. If the association did not file such a statement, however, it has no residence, for venue purposes, separate from that of its members. Therefore, a creditor may file the action in any county where an association member resides. *San Francisco Found. v Superior Court* (1984) 37 C3d 285, 296, 208 CR 31; *Carruth v Superior Court* (1978) 80 CA3d 215, 145 CR 344; *Mosby v Superior Court* (1974) 43 CA3d 219, 229, 117 CR 588.

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## §3.52 3. Actions Against Both Individual and Corporate Defendants

If the action includes both individual and corporate defendants, the creditor's venue choices are limited to the corporation's principal place of business or the residences of the individual defendants. *Carruth v Superior Court* (1978) 80 CA3d 215, 220, 145 CR 344.

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## E. Contractual Venue Provisions

### §3.53 1. Choice of Venue Provision Not Enforceable

A court will not enforce a choice of venue provision in a contract specifying the county in which an action may be tried. *Smith, Valentino & Smith v Superior Court* (1976) 17 C3d 491, 495, 131 CR 374; *General Acceptance Corp. v Robinson* (1929) 207 C 285, 289, 277 P 1039 (provision that trial of any action occur in San Francisco was void and unenforceable).

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### §3.54 2. Specificity Required to Establish Place of Performance

Contracts are generally presumed to require performance in the county where the defendant enters into the agreement. CCP §395(a). A contract may, however, expressly designate the place of performance that will establish venue if the contract contains a written term or if the parties enter into a separate written agreement specifying a different county of performance. *Causley v Superior Court* (1968) 267 CA2d 757, 73 CR 585 (promissory note required payment at Santa Rosa, California). The courts strictly construe the "special contract in writing" requirement. *Dawson v Goff* (1954) 43 C2d 310, 315, 273 P2d 1. For example, neither an implied contract nor an inferred place of performance constitutes sufficient specification of the place of performance. *Causley v Superior Court, supra*; *Armstrong v Smith* (1942) 49 CA2d 528, 122 P2d 115. See also *Diepenbrock v Auslen* (1960) 185 CA2d 747, 750, 8 CR 659 (denying change of venue to defendant's county of residence when oral contract was entered into and to be performed in Sacramento County).

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## §3.55 3. Place of Performance for Payment of Money

Ordinarily, the place of performance of a contract term requiring the payment of money is the place where the creditor resides. *Blumer v Kirkman Corp.* (1952) 38 C2d 480, 484, 241 P2d 17; *Anaheim Extrusion Co. v Superior Court* (1985) 170 CA3d 1201, 216 CR 815. Because a contract term requiring payment as performance is not complete until the creditor receives the payment, performance occurs where the creditor resides unless otherwise designated.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.56 F. Strategic Considerations Regarding Venue

## §3.56 F. Strategic Considerations Regarding Venue

The plaintiff is entitled to choose the venue for an action. This selection is binding on the plaintiff if made properly. *Karson Indus. v Superior Court* (1969) 273 CA2d 7, 77 CR 714. A plaintiff may choose from any of the potential counties of proper venue in an action against a corporate defendant. See CCP §395.5. A defendant may change venue only to the county of its principal place of business and only if the venue selected by plaintiff is not a permitted venue. 273 CA2d at 8.

A plaintiff who chooses an improper venue loses the privilege of selecting venue and may not change its initial venue choice. *Cook v Pendergast* (1882) 61 C 72, 79. However, a plaintiff may move to change its venue under forum non conveniens grounds. See CCP §397. See §3.58. Therefore, a creditor should carefully consider its choice of venue at the outset.

In selecting venue, a creditor should consider:

- Calendar congestion,
- Judicial quality,
- Juror predilections,
- Convenience to witnesses or counsel,
- Favorable or unfavorable local rules, and
- Mandatory alternative dispute resolution provisions.

**CAUTION:** Deliberately filing collection complaints in courts lacking proper venue constitutes an unfair business practice under CC §3369. See *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 101 CR 745.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/ G. Changing Venue/§3.57 1. Improper Venue

## G. Changing Venue

### §3.57 1. Improper Venue

On a defendant's successful motion to change venue on the grounds of improper venue, the court must transfer the action to the defendant's designated choice. CCP §398; *Brown Materials Co. v Angus* (1937) 20 CA2d 32, 66 P2d 470.

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### §3.58 2. Forum Non Conveniens

On motion by either party, the court may order a change of venue (or deny the defendant's motion for change) for the purpose of obtaining a fair trial or for the convenience of witnesses if such change serves the ends of justice. CCP §397(b)-(c). See *San Jose Hosp. v Etherton* (1927) 84 CA 516, 258 P 611. The moving party carries the burden of proof on this issue. *Peiser v Mettler* (1958) 50 C2d 594, 607, 328 P2d 953.

Unlike a motion to change venue on the ground that the plaintiff's choice was improper, which only a defendant may bring, a plaintiff may bring a motion to change venue under §397. The plaintiff may transfer venue to a place where he or she could not have originally filed the action under the ordinary venue rules. Grounds for such a transfer include the convenience of witnesses or inability to obtain an impartial trial. See *Paeseno v Superior Court* (1988) 204 CA3d 17, 250 CR 842 (impartial trial); *Lieberman v Superior Court* (1987) 194 CA3d 396, 239 CR 450 (convenience of witness). Thus, a plaintiff who contemplates bringing a motion for a change of venue under §397 should initially file the action in a proper venue to avoid a motion to change an improper venue by the defendant.

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### §3.59 3. Defendant's Challenge to Improper Venue

A defendant may challenge improper venue by moving to transfer venue to an appropriate court before or concurrently with its response to the complaint. CCP §396b(a); *Dugar v Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 819, 116 CR 412 (raising issue as affirmative defense in answer is inadequate). See CCP §§396a-396b. Failure to challenge in a timely manner waives any objection to the plaintiff's improper venue selection. *Brock v Superior Court* (1947) 29 C2d 629, 634, 177 P2d 273. Improper venue is not a jurisdictional defect and does not present grounds for collaterally attacking a judgment. *Barquis v Merchants Collection Ass'n* (1972) 7 C3d 94, 119, 101 CR 745.

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## III. STATUTE OF LIMITATIONS

### §3.60 A. Determining Applicable Time Period

The statute of limitations varies depending on the type of contract or claim at issue.

- **Oral contracts.** The statute of limitations for an action on an oral contract is generally 2 years. CCP §339.
- **Written contracts.** The statute of limitations for an action on a written contract is generally 4 years. CCP §337. A written contract need not exist within the four corners of one document; several documents taken together, such as an exchange of letters, may adequately set forth the terms of a written contract.
- **Commercial Code contracts.** The statute of limitations for an action on a contract for the sale of goods governed by article 2 of the Commercial Code is 4 years, regardless of whether the contract is oral or written. Com C §2725.
- **Negotiable promissory notes.** The statute of limitations for an action to enforce a negotiable promissory note is 6 years after the note's due date. If the holder accelerates the due date, the statute of limitations is 6 years after the accelerated due date. Com C §3118(a). For a written promissory note payable on demand, the statute of limitations is 6 years after the date of demand. If the holder does not make a demand, the statute of limitations is 10 years after the last payment of either principal or interest. Com C §3118(b). Thus, the holder of a promissory note must verify whether the note is negotiable and thus subject to a 6-year limitations period, or nonnegotiable and subject to the 4-year period applicable to written contracts in general. A negotiable note consists of an unconditional promise to pay a fixed sum that (1) is payable to bearer or to order at issuance or possession, (2) is payable on demand or at a definite time, and (3) does not require the promisor to perform any other act in conjunction with payment. Com C §3104(a).

**PRACTICE TIP:** To avoid any dispute over whether a note is negotiable, a plaintiff should always seek to bring an action on the note within the 4-year period rather than waiting.

- **Conversion.** The statute of limitations for an action based on conversion is 3 years. CCP §338(c).
- **Common counts.** The statute of limitations for all common counts based on a writing is 4 years. CCP §337(1). Without a writing, the statute of limitations is 2 years. CCP §339(1). The account stated, book account, and mutual, open, and current account common counts require a writing. Therefore, the statute of limitations for these actions is 4 years, even if the underlying transaction was entirely oral in nature. CCP §337(2). See *Gardner v Rutherford* (1943) 57 CA2d 874, 884, 136 P2d 48; *Foothill Ditch Co. v Wallace Ranch Water Co.* (1938) 25 CA2d 555, 564, 78 P2d 215.

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## §3.61 B. Accrual Rules

The statute of limitations generally begins to run when the breach occurs. *Niles v Louis H. Rapoport & Sons* (1942) 53 CA2d 644, 651, 128 P2d 50. Specific rules apply for anticipatory breach (see §3.62), breach of a contract requiring installment payments (see §3.63), actions not discovered or which could not be discovered with reasonable diligence (see §3.64), and common counts of accounts stated and book accounts (see §3.65).

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### §3.62 1. Anticipatory Breach

A cause of action arises on an anticipatory breach by a contracting party. The other party may sue immediately if it chooses to do so or may wait until after the actual time of performance. The limitations period begins running from the actual time performance is due rather than from any earlier indication of anticipatory breach. *Brewer v Simpson* (1960) 53 C2d 567, 593, 2 CR 609. For example, when a debtor indicates that he or she cannot or will not make a balloon payment on a promissory note 6 months before its due date, the creditor may file its action prior to the due date. However, the limitations period will not begin to run until the payment due date.

**PRACTICE TIP:** The creditor should consider suing immediately, particularly when the debtor's anticipatory breach results from a shortage of funds or insolvency.

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### §3.63 2. Installment Payments

A cause of action on a contract that requires installment payments over a period of time accrues immediately on the breach of any required installment payment to recover money. The statute of limitations bars the cause of action on installment payments due more than 4 years earlier. *Trigg v Arnott* (1937) 22 CA2d 455, 459, 71 P2d 330. In an action for specific performance of a contract for sale of land, however, the creditor may wait until the final installment and then commence an action within the limitations period. *Tahoe Pines Co. v Newman* (1922) 59 CA 186, 189, 210 P 445. The statute of limitation begins to run from the time the final installment payment is due rather than from any earlier installment breach. *Union Sugar Co. v Hollister Estate Co.* (1935) 3 C2d 740, 47 P2d 273.

The mere presence of an acceleration clause does not affect the commencement of the statute of limitations, regardless of whether it takes effect automatically or at the creditor's election. *Jones v Wilton* (1938) 10 C2d 493, 499, 75 P2d 593; *Congregational Church Bldg. Soc'y v Osborn* (1908) 153 C 197, 201, 94 P 881; *Trigg v Arnott* (1937) 22 CA2d 455, 458, 71 P2d 330. If the creditor elects to accelerate the obligation, however, the election will cause the statute of limitations to begin running.

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### §3.64 3. Discovery Rule

Ordinarily, a contracting party is presumed to know of the breach when it occurs. If the party does not know when the breach occurs, the statute of limitations does not begin to run until the plaintiff discovers the injury and its cause or could have discovered it through the exercise of reasonable diligence. See *Neel v Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 C3d 176, 187, 98 CR 837; *April Enters. v KTTV* (1983) 147 CA3d 805, 820, 195 CR 421; *Seelenfreund v Terminix, Inc.* (1978) 84 CA3d 133, 137, 148 CR 307. To rely on this discovery rule, the plaintiff must plead facts setting forth ignorance of the breach at the time it occurred and the date of its discovery within the applicable limitations period. *April Enters. v KTTV* (1983) 147 CA3d 805, 832, 195 CR 421 (plaintiff alleged that defendant breached contract by erasing videotapes of plaintiff's television show but plaintiff did not immediately discover erasure); *G.D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 26, 122 CR 218 (statute starts to run at time of act, not discovery, if plaintiff fails to allege facts of discovery).

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### §3.65 4. Account Stated and Book Accounts

The statute of limitations for common counts for accounts stated and book accounts begins to run on the date of the last entry in the account. *Gardner v Rutherford* (1943) 57 CA2d 874, 882, 136 P2d 48; *Foothill Ditch Co. v Wallace Ranch Water Co.* (1938) 25 CA2d 555, 565, 78 P2d 215. When an account stated consists of one item, the statute begins to run on the date of that item; when the account stated consists of more than one item, the statute does not begin to run until the date of the last item. CCP §337(2). See *Rosati v Heimann* (1954) 126 CA2d 51, 55, 271 P2d 953; *Hallford v Baird* (1938) 27 CA2d 384, 80 P2d 1040. A debtor's payment on the account constitutes an entry in the account and therefore it restarts the clock on the limitations period. *Furlow Pressed Brick Co. v Balboa Land & Water Co.* (1921) 186 C 754, 200 P 625. Not every payment constitutes an entry in the account. If the creditor terminates the extension of credit on account, further partial payments toward the settled debt do not constitute an entry in the account and do not restart the clock on the statute of limitations period. *R.N.C., Inc. v Tsegeletos* (1991) 231 CA3d 967, 283 CR 48. Payment of the balance due on an account does not stop the running of the statute of limitations on a separate account between the same debtor and creditor. *Davidson v Tilden* (1978) 86 CA3d 283, 150 CR 194.

See §§3.85, 3.89 for discussion of book accounts and accounts stated.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.66 IV. ECONOMIC LITIGATION RULES IN LIMITED CIVIL CASES

## §3.66 IV. ECONOMIC LITIGATION RULES IN LIMITED CIVIL CASES

All limited civil cases (see §3.26) must follow procedural rules designed to reduce the parties' cost of litigation. See CCP §§90-100. These rules drastically limit pleading battles and formal discovery, and provide abbreviated trial preparation and trial practice procedures. Therefore, they are particularly useful for reducing the creditor's litigation expenses in collection actions.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.67 A. Applicable Actions

## §3.67 A. Applicable Actions

The economic litigation rules (CCP §§90-100) apply to all limited civil cases *i.e.*, cases in which the jurisdictional amount does not exceed $25,000. CCP §91(a). The rules do not apply to small claims court actions or to unlawful detainer actions. CCP §91(b). Any party may obtain a waiver from the economic rules on a noticed motion showing that the limitations are impracticable in the particular case. CCP §91(c). See §3.70.

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## §3.68 B. Pleading Limitations

The economic litigation rules limit the pleadings as well as the methods available to attack a pleading. CCP §92. A defendant need not verify an answer, even in response to a verified complaint. CCP §92(b). The parties may not employ special demurrers or motions to strike to attack the pleadings. CCP §92(c)-(d).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.69 C. Discovery Limitations

### §3.69 C. Discovery Limitations

To eliminate expensive discovery and discovery battles, the economic litigation rules severely restrict written discovery in the following manner (CCP §94):

- Each party may use no more than 35 written discovery requests in any combination of interrogatories, demands for production, or requests for admission. CCP §94(a).
- If the litigation involves more than two parties, each party may propound a combination of 35 written discovery requests on each other party. CCP §94(a).
- Each party may conduct only one written or oral deposition. CCP §94(b). In most collection cases, the plaintiff only needs to depose the individual debtor or the business debtor's most knowledgeable representative.
- Each party may conduct discovery involving subpoenas duces tecum of third parties requiring only the production of documents, physical and mental examinations, and expert witness information limited only by the applicable provisions of the Discovery Act (CCP §§2016.010-2036.050). CCP §94(c)-(e).

The rules allow a party to move for additional discovery if necessary. CCP §95.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.70 1. Waiver of Limitations Available

## §3.70 1. Waiver of Limitations Available

The parties may obtain a waiver from the strict discovery limits by stipulating to additional discovery. CCP §95(b). A debtor with limited resources, however, should carefully limit the amount of additional discovery allowed.

A party may also obtain a waiver by noticed motion, showing that (CCP §95(a)):

- It will be unable to prosecute or defend the action effectively without a waiver,
- It has used all available discovery in good faith (and not to unduly burden, harass, or increase expenses of the action); and
- It has attempted to obtain the additional discovery by stipulation, or to obtain the information by alternative means.

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## §3.71 2. Discovery Alternatives—The Case Questionnaire

To supplement the limited discovery, the plaintiff may elect to use a case questionnaire. CCP §93(a); Judicial Council Form DISC-010. The case questionnaire consists of a page each of background questions, personal injury and property damage-related questions, and contract-related questions. A plaintiff who chooses to use the case questionnaire must completely answer the questionnaire itself and serve it on the defendant, together with a blank case questionnaire for the defendant's use. CCP §93(a). The defendant must complete the questionnaire and serve it with the answer. CCP §93(b). For Judicial Council Form DISC-010, see §3.72.

The plaintiff may move to compel responses and for a monetary sanction under CCP §§2023.010-2023.040. If the defendant still fails to respond after the court order, the plaintiff may obtain issue, evidence, or terminating sanctions, as well as additional monetary sanctions under CCP §§2023.010-2023.040. CCP §93(e).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.72 3. Form: Case Questionnaire (Judicial Council Form DISC-010)

## §3.72 3. Form: Case Questionnaire (Judicial Council Form DISC-010)



**DO NOT FILE WITH THE COURT**

**THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT**

DISC-010

| SUPERIOR COURT OF CALIFORNIA, COUNTY OF | |
|---|---|
| PLAINTIFF *(Name)*:<br>DEFENDANT *(Name)*: | CASE NUMBER |

# CASE QUESTIONNAIRE—FOR LIMITED CIVIL CASES (Under $25,000)

REQUESTING PARTY *(Name)*:

RESPONDING PARTY *(Name)*:

## —INSTRUCTIONS—

A. The purpose of the case questionnaire is to help the parties settle their differences without spending a lot of money. This is accomplished by exchanging information about the case early in the lawsuit. The exchange of case questionnaires may be started only by a plaintiff (or cross-complainant) in a limited civil case. The case questionnaire is optional, and if plaintiff (or cross-complainant) exercises the option, only this form may be used.

B. **Instructions for plaintiffs (and cross-complainants)**

1. Under Code of Civil Procedure section 93, a plaintiff (or cross-complainant) may serve a completed case questionnaire and a blank questionnaire with a complaint (or cross-complaint).
2. This is the only way you can require defendants (or cross-defendants) to serve you with a completed case questionnaire.

C. **Instructions for defendants (and cross-defendants)**

1. If you have been served with a completed case questionnaire by a plaintiff (or cross-complainant), then you must fill in the blank case questionnaire. Your completed case questionnaire must be served on that same plaintiff (or cross-complainant) with your answer to the complaint (or cross-complaint).
2. **THIS IS NOT AN ANSWER OR RESPONSE TO THE COMPLAINT.**

D. **Instructions for all parties**

1. **ALL QUESTIONS REFER TO THE INCIDENT OR AGREEMENT IN THIS LAWSUIT ONLY.**
2. Answer each question. If a question is not applicable, answer "NA."
3. Your answers are not limited to your personal knowledge, but you are required to furnish information available to you or to anyone acting on your behalf, whether you are a plaintiff, defendant, cross-complainant, or cross -defendant.
4. Type or legibly print your answer below each question. If you cannot completely answer a question in the space provided on the case questionnaire, check the "attachment" box and put the number of the question and the complete answer on an attached sheet of paper or form MC-025. You should *not* put part of an answer on the case questionnaire and part on the attachment. You may put more than one answer on each attached page.
5. When you have completed the case questionnaire, sign the verification and serve the original.
6. You may compel compliance with these requirements under Code of Civil Procedure section 93.
7. **DO NOT FILE THIS CASE QUESTIONNAIRE WITH THE COURT.**



Form Adopted for Mandatory Use
Judicial Council of California
DISC-010 [Rev. January 1, 2007]



Code of Civil Procedure, § 93
www.courtinfo.ca.gov

Print

**DO NOT FILE WITH THE COURT** **DISC-010**

| PLAINTIFF *(Name)*: | CASE NUMBER: |
|---|---|
| DEFENDANT *(Name)*: | |

**—QUESTIONS—**

1. FOR ALL CASES

   a. State your name and street address.

   b. State your current business name and street address, the type of business entity, and your title.

   c. Describe in detail your claims or defenses and the facts on which they are based, giving relevant dates.

      ☐ See attachment for answer number 1c.

   d. State the name, street address, and telephone number of each person who has knowledge of facts relating to this lawsuit, and specify his or her area of knowledge.

      ☐ See attachment for answer number 1d.

   e. Describe each document or photograph that relates to the issues or facts. You are encouraged to attach a copy of each. For each that you have described but not attached, state the name, street address, and telephone number of each person who has it.

      ☐ See attachment for answer number 1e.

| PLAINTIFF *(Name)*: | CASE NUMBER: |
|---|---|
| DEFENDANT *(Name)*: | |

1. f. Describe each item of physical evidence that relates to the issues and facts; give its location; and state the name, street address, and telephone number of each person who has it.

☐ See attachment for answer number 1f.

g. State the name and street address of each insurance company and the number of each policy that may cover you in whole or part for the damages claimed.

☐ See attachment for answer number 1g.

2. FOR PERSONAL INJURY OR PROPERTY DAMAGE CASES

a. Describe each injury or illness that you received and your present complaints about each.

☐ See attachment for answer number 2a.

b. State the name, street address, and telephone number of each physician, dentist, or other health care provider who treated or examined you; the type of treatment; the dates of treatment; and the charges by each to date.

☐ See attachment for answer number 2b.

c. Itemize the medical expenses you anticipate in the future.

☐ See attachment for answer number 2c.

d. Itemize your loss of income to date, give the name and street address of each source, and show how the loss is computed.

☐ See attachment for answer number 2d.

Print

**DO NOT FILE WITH THE COURT** DISC-010

| PLAINTIFF *(Name)*: | CASE NUMBER: |
|---|---|
| DEFENDANT *(Name)*: | |

2. e. Itemize the loss of income you anticipate in the future, give the name and street address of each source, and show how the loss is computed.

☐ See attachment for answer number 2e.

f. Itemize your property damage, and state the amount or attach an itemized bill or estimate.

☐ See attachment for answer number 2f.

9. Describe each other item of damage or cost that you claim, and state the amount.

☐ See attachment for answer number 2g.

3. FOR CASES BASED ON AGREEMENTS

a. In addition to your answer to 1e, state all the terms and give the date of any part of the agreement that is not in writing.

☐ See attachment for answer number 3a.

b. Describe each item of damage or cost you claim, state the amount, and show how it is computed.

☐ See attachment for answer number 3b.

**VERIFICATION**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)



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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.73 D. Trial Preparation and Procedure

## §3.73 D. Trial Preparation and Procedure

The economic litigation rules attempt to simplify both trial preparation and direct testimony for limited civil cases.

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## §3.74 1. Evidentiary Disclosures

Either party may serve on the other a request for identification of all witnesses and evidence the party intends to offer at trial. The request may be served no more than 45 days nor less than 30 days before the first scheduled trial date. The party receiving the request must respond within 20 days after the date of service. CCP §96.

Ordinarily, a party in an action governed by the economic litigation rules should make this request. Mutual exchange of these evidentiary identification statements is not required; only the party serving a timely request is entitled to the evidentiary identification statement. Because a trial may hold surprises for a party that has not conducted thorough discovery, the minimal effort required to serve a request is usually worthwhile.

**PRACTICE TIP:** The party serving the request may want to wait until the 30th day before trial to serve the request. This will avoid tipping off counsel who is unfamiliar with this procedure until it is too late for adverse counsel to serve a request of its own. Alternatively, if the party serving the request wishes to obtain a response to its request earlier than 10 days before trial, serving the request earlier than the 30th day before trial is worthwhile.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.75 a. Required Content

### §3.75 a. Required Content

The party responding to the request must identify the names and addresses of each witness the party intends to call at trial and the physical evidence the party intends to offer. The party must also identify documents it intends to offer with a description and, if available to the party, provide copies of the documents with the response. CCP §96(a).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.76 b. Exceptions

### §3.76 b. Exceptions

The party responding to the request need not identify parties to the litigation it intends to call as witnesses, adverse parties, any witnesses or evidence intended for impeachment, or any documents obtained by discovery in the action. CCP §97(b).

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### §3.77 c. Penalty for Noncompliance

On objection by the opposing party, the court must exclude any witnesses or evidence offered at trial but not included in the party's previous evidentiary identification statement except witnesses or evidence used for impeachment purposes. CCP §97(a).

The court may excuse a failure to identify witnesses or evidence and allow introduction if it finds that the party made a good faith effort to comply with the request or that grounds exist under CCP §473 for excuse. CCP §97(b).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.78 2. Direct Testimony Alternative

### §3.78 2. Direct Testimony Alternative

In lieu of direct testimony (and the witnesses' presence) at trial, a party may offer direct testimony in the form of an affidavit or declaration. CCP §98. The testimony may include expert testimony and testimony authenticating documentary evidence. The court may use the written statement as evidence in lieu of direct testimony under either of the following conditions:

- **Opportunity to subpoena appearance.** A party may offer a written declaration or affidavit as evidence as long as the opposing party had the opportunity to subpoena the witness to appear for cross-examination. CCP §98(a). The party must serve the opposing party with the written statement no later than 30 days before trial and must provide a current address of the witness, who must be available for subpoena at that address during the 20 days immediately before trial. Thus, CCP §98(a) places the burden on the opposing party to subpoena the witness.
- **Former deposition testimony.** A party may offer all or part of a witness's deposition testimony from a deposition in the case as long as the opposing party had the opportunity to participate in the deposition. CCP §98(b). The opposing party need not actually participate or even attend the deposition. Therefore, a party should carefully consider whom to serve with either a deposition notice or a subpoena for the deposition of a third party to preserve the ability to use the deposition testimony at trial, particularly of an expert witness.

**NOTE:** Providing the opportunity to participate probably also requires some good faith effort at scheduling any deposition at a mutually convenient time for all parties so that a party wishing to attend may do so.

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### §3.79 3. "Fast Track" Local Rules

Generally, collection actions fall within the scope of the Trial Court Delay Reduction Act (Govt C §§68600-68620). However, the Judicial Council has adopted Cal Rule of Ct 3.740, which takes collection cases (as defined in the rule) out of fast track time lines and sets up a new time line for them. This new time line gives plaintiff 180 days to serve the complaint (Rule 3.740(d)) and an additional 180 days to obtain a default judgment (Rule 3.740(e)). Counsel should carefully review local rules when filing an action in an unfamiliar county because each county implements the Act differently through its own rules.

The local rules implementing the Trial Court Delay Reduction Act normally require service of the complaint within specified time limits, may require the filing of the proof of service within specified time limits, may limit the extension of any time to respond, and may require the filing of certain "diligence statements," status conference questionnaires, or case management conference questionnaires. Often, a county has its own forms, and forms designated by the same name often vary widely from county to county.

Most counties also require attendance of counsel at one or more status conferences, which the court often sets on the filing of the complaint.

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## V. ANALYZING APPROPRIATE CAUSES OF ACTION

### §3.80 A. Common Counts

Common counts consist of a general series of legal conclusions used to plead an indebtedness contrary to California's ordinary code pleading requirements. *Philpott v Superior Court* (1934) 1 C2d 512, 518, 36 P2d 635; 4 Witkin, California Procedure, *Pleading* §§553-570 (5th ed 2009); King, *The Use of Common Counts in California*, 14 USC L Rev 288 (1941). Although the language varies depending on the type of common count, the allegations of a common count typically are that:

- The defendant owes the plaintiff a certain amount,
- The defendant owes the amount for consideration received from the plaintiff, and
- The defendant has not paid the amount due.

Often, a common count includes an allegation of the complaint's timeliness under the applicable statute of limitations by stating that the action occurred "within the last two (or four) years." Common count pleading does not require this allegation, however, and failure to allege timeliness under the applicable statute of limitations does not subject the cause of action to a demurrer. See *Evans v Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902.

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## 1. Advantages and Disadvantages

### §3.81 a. Fact-Specific Pleading Not Required

Common counts do not require fact-specific pleading and survive both general and special demurrers. See *Pike v Zadig* (1915) 171 C 273, 152 P 923; *Moya v Northrup* (1970) 10 CA3d 276, 88 CR 783. This advantage makes them quick and easy to draft or cut and paste from standard forms, especially in a high-volume practice.

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### §3.82 b. Common Counts May Support Deficient Contract Causes of Action

Creditors often plead a contract cause of action that alleges specific facts combined with a common count with the same underlying specific facts. The common count may permit the creditor to recover when it lacks sufficient facts to prevail on the contract claim, or the contract claim may permit the creditor to recover if the specific facts do not fit within the legal theory comprising the common count. However, if a contract count is defective, both the contract count and the common count based on the same specific facts are subject to demurrer. See *Zumbrun v University of S. Cal.* (1972) 25 CA3d 1, 14, 101 CR 499; *Hays v Temple* (1937) 23 CA2d 690, 695, 73 P2d 1248. See also *Jones v Daly* (1981) 122 CA3d 500, 509, 176 CR 130.

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### §3.83 c. Attorney Fees Award

If the creditor prevails only on the common count but not the contract cause of action, the creditor may not recover attorney fees under CC §1717. Thus, if the creditor prevails, the judgment should specify the successful causes of action to prevent the court from limiting the creditor to its common count remedies. See *McKenzie v Kaiser-Aetna* (1976) 55 CA3d 84, 127 CR 275.

A successful party in an action on a book account may recover attorney fees limited to the lesser of $800 for book accounts maintained for consumer purposes, $1000 for commercial book accounts, or 25 percent of the principal obligation. CC §1717.5(a). In any event, the fees awarded must be the lesser of the amount allowed under CC 1717.5(a), the amount of any default attorney fee schedule adopted by the court, or an amount otherwise provided by the court. CC §1717.5(b).

**PRACTICE TIP:** The availability of these attorney fees, although minimal, makes it important to plead and prove a book account whenever possible, especially in a high-volume, small-amount practice. See *Maggio, Inc. v Neal* (1987) 196 CA3d 745, 752, 241 CR 883 (differentiating between book account and account stated).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.84 d. May Prevent Recovery of Prejudgment Interest at Contract Rate

### §3.84 d. May Prevent Recovery of Prejudgment Interest at Contract Rate

A creditor who prevails on a common count but not the contract cause of action may not recover prejudgment interest at the contract rate. CC §§3287-3291.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/ 2. Description of Common Counts/ §3.85 a. Book Account

## 2. Description of Common Counts

### §3.85 a. Book Account

A book account is an indebtedness evidenced by a detailed statement kept by the creditor that constitutes the principal record of transactions between the creditor and the debtor. A book account:

- Arises from a contract or fiduciary relation;
- Shows debits and credits in connection with the relationship;
- Is entered in the regular course of business conducted by the creditor; and
- Is kept in a reasonably permanent form and manner in a bound book, on a sheet or sheets fastened in a book or to a backing, on a card or cards, or in any other reasonably permanent form and manner.

CCP §337a; *Costerisan v DeLong* (1967) 251 CA2d 768, 770, 59 CR 803; *Tillson v Peters* (1940) 41 CA2d 671, 677, 107 P2d 434; *Egan v Bishop* (1935) 8 CA2d 119, 47 P2d 500; *Chandler v Robinett* (1913) 21 CA 333, 131 P 891.

Judicial Council Form PLD-C-001(2) for common counts contains a pleading of "open book account for money due" at paragraph CC-1(a)(1). See form in §3.122.

**PRACTICE TIP:** Counsel should consider using Judicial Council forms for pleadings. Their use can save a great deal of time because they are easily prepared. In addition, they contain all the information necessary to avoid pleading defects. If used with some imagination, they can be quite flexible through the use of attachment sheets.

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### §3.86 b. Mutual, Open, and Current Account

A mutual, open, and current account is an account between two parties consisting of (*Norton v Larco* (1866) 30 C 126, 130):

- Mutual demands,
- Open items not reduced to an account stated, and
- Current items of different dates and different amounts.

The mutual demands between the parties may consist of mutual credits, mutual debts to be setoff, or a preexisting debt to one party constituting a credit to the other. The mutual, open, and current account need not follow any particular form, and the account need not be evidenced by a writing. *Parker v Shell Oil Co.* (1946) 29 C2d 503, 513, 175 P2d 838.

The Judicial Council form does not contain a mutual, open, and current account cause of action, but the allegation may be stated almost identically to an open book account. See §3.134. A mutual, open, and current account need not exist in writing. See form in §3.122.

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### §3.87 (1) Agreement of Mutual Setoff

An agreement must exist between the parties, either express or implied, that each party will set off their demands against the demands of the other so that the account constitutes one liability owing to one of the parties. *Parker v Shell Oil Co.* (1946) 29 C2d 503, 507, 175 P2d 838. Some courts deem this understanding present whenever one party would have the legal right to offset its debt against the other party's. *Gould v Wood* (1928) 205 C 141, 143, 270 P 183.

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### §3.88 (2) Noncash Credits Required

At least some of the credits on each side must consist of items other than cash. *Gould v Wood* (1928) 205 C 141, 143, 270 P 183; *Carter v Canty* (1919) 181 C 749, 756, 186 P 346.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.89 c. Account Stated

### §3.89 c. Account Stated

An account stated cause of action is based on an account stated in writing at a specified time and place between the creditor and the debtor of a specified and agreed on amount due. See, *e.g*., *Tringali v Vest* (1951) 106 CA2d 720, 236 P2d 171. The debtor's payment of a portion of the amount or failure to object to the amount within a reasonable time constitutes agreement to the amount due. See *Maggio, Inc. v Neal* (1987) 196 CA3d 745, 752, 241 CR 883 (providing criteria for distinguishing between book account and account stated); *Hallford v Baird* (1938) 27 CA2d 384, 80 P2d 1040. Credit card statements are an example of both an account stated and a book account.

Judicial Council Form PLD-C-001(2) for common counts contains a pleading of account stated at paragraph CC-1(a)(2). See form in §3.122.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.90 d. Money Had and Received

### §3.90 d. Money Had and Received

An action for money had and received is based on the debtor's indebtedness to the creditor in a specified amount "for money had and received by the defendant for the use of the plaintiff." See *Pike v Zadig* (1915) 171 C 273, 152 P 923; *Smith v Randall* (1942) 51 CA2d 195, 124 P2d 334. This common count serves as a "catchall," and a creditor may plead it in a creative variety of factual circumstances, such as the following:

- **Mistake or fraud.** When money is paid under mistake, fraud, or coercion when no contract was involved (see *Minor v Baldridge* (1898) 123 C 187, 55 P 783; *Long v Harrision* (1931) 113 CA 321, 324, 298 P 148; *Philpott v Superior Court* (1934) 1 C2d 512, 516, 36 P2d 635).
- **Void, voidable, or unenforceable contracts.** When the underlying contract is void (see *Smith v Randall, supra*) or when an express contract is voidable or unenforceable (see *Philpott v Superior Court*, *supra*; *Crocker-Anglo Nat'l Bank v Kuchman* (1964) 224 CA2d 490, 36 CR 806).
- **Fully performed contracts.** When the creditor has fully performed under an express valid contract (see *Weitzenkorn v Lesser* (1953) 40 C2d 778, 793, 256 P2d 947; *Castagnino v Balletta* (1889) 82 C 250, 257, 23 P 127; *Kawasho Int'l U.S.A. v Lakewood Pipe Serv.* (1983) 152 CA3d 785, 793, 201 CR 640).
- **Partially performed contracts.** To recover the reasonable value of the plaintiff's services in partial performance of a contract when the defendant prevented full performance (see *Oliver v Campbell* (1954) 43 C2d 298, 305, 273 P2d 15; *Firpo v Pacific Mut. Life Ins. Co.* (1926) 80 CA 122, 125, 251 P 657; *S.C.V. Peat Fuel Co. v Tuck* (1878) 53 C 304).

This count is improper when the plaintiff lends money to the defendant, but failure to plead the proper common count probably will not prove fatal. See *Rains v Arnett* (1961) 189 CA2d 337, 344, 11 CR 299; *Jones v Re-Mine Oil Co.* (1941) 47 CA2d 832, 843, 119 P2d 219. See §3.93 on the common count for money lent.

Judicial Council Form PLD-C-001(2) for common counts contains a pleading of "money had and received" at paragraph CC-1(b)(1). See form in §3.122.

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### §3.91 e. Work, Labor, and Services

The work, labor, and services common count is based on the debtor's indebtedness to the creditor for work, labor, or services performed at the debtor's request. It includes the value of any materials necessary to perform the work, labor, or services. See *Haggerty v Warner* (1953) 115 CA2d 468, 475, 252 P2d 373; *Lucy v Lucy* (1937) 22 CA2d 629, 71 P2d 949. The plaintiff may recover either a specified sum or, to prevent the defendant from being unjustly enriched, the reasonable value of the services. See *McFarland v Holcomb* (1898) 123 C 84, 55 P 761; *Evans v Zeigler* (1949) 91 CA2d 226, 230, 204 P2d 902; *Parker v Solomon* (1959) 171 CA2d 125, 136, 340 P2d 353.

Judicial Council Form PLD-C-001(2) for common counts contains a pleading of "work, labor, services and materials" at paragraph CC-1(b)(2). See form in §3.122.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.92 f. Goods Sold and Delivered

## §3.92 f. Goods Sold and Delivered

The goods sold and delivered common count is based on goods and merchandise sold and delivered by the creditor for which the debtor promised to pay. (In this context, delivery refers to the transfer of possession of the goods to the debtor rather than actual physical delivery.) Although carrying the "sold and delivered" label, the complaint need not specifically allege "delivery." *Johnson v Dixon Farms Co.* (1915) 29 CA 52, 155 P 134. The creditor may recover either a specified sum, such as the price agreed on, or the reasonable value of the goods. See *Weitzenkorn v Lesser* (1953) 40 C2d 778, 793, 256 P2d 947.

**PRACTICE TIP:** Although not required, the count should state whether the plaintiff seeks a specified sum or reasonable value. See *Preston v Central Cal. Water & Irrig. Co.* (1909) 11 CA 190, 196, 104 P 462.

Judicial Council Form PLD-C-001(2) for common counts contains a pleading of "goods, wares, and merchandise sold and delivered" at paragraph CC-1(b)(3). See form in §3.122.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.93 g. Money Lent; Money Paid or Expended

### §3.93 g. Money Lent; Money Paid or Expended

The common count for money lent is for money loaned to the debtor by the creditor. The common count for money paid or expended is for money paid to a third party for the defendant or at his or her request. See *Pleasant v Samuels* (1896) 114 C 34, 45 P 998; *Moya v Northrup* (1970) 10 CA3d 276, 88 CR 783.

Judicial Council Form PLD-C-001(2) for common counts contains a pleading of "money lent" at paragraph CC-1(b)(4) and for "money paid, laid out, and expended" at paragraph CC-1(b)(5). See form in §3.122.

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## B. Contract Actions

### §3.94 1. Existence of Contract

A contract action must specify whether the contract is written, oral, or implied by conduct; failure to do so subjects it to a special demurrer. CCP §430.10. Rather than characterizing the nature of the contract in conclusory language, the plaintiff should plead specific facts clearly establishing the nature of the contract. For example, the plaintiff should plead the details of the conversations comprising the terms of the oral contract to establish the existence of an oral contract.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.95 a. Written Contracts

### §3.95 a. Written Contracts

Plaintiff should plead an action involving a written contract in two steps:

(1) The plaintiff should plead facts establishing the making of the contract; and

(2) The plaintiff should set forth the contract in the complaint verbatim, either by reciting the language of the contract in the body of the complaint or by attaching a copy of the contract to the complaint and incorporating it by reference. *International Aerial Tramway Corp. v Konrad Doppelmayr & Sohn* (1969) 70 C2d 400, 406, 74 CR 908; *Lambert v Haskell* (1889) 80 C 611, 22 P 327.

**CAUTION:** The plaintiff should include all material parts of the written contract as an exhibit to the complaint, which may require the addition of several different documents. A written contract may incorporate other documents, such as a standard credit application or a credit agreement. Failure to include a document constituting a material part of the written contract may subject the complaint to a general demurrer. See, *e.g.*, *Gilmore v Lycoming Fire Ins. Co.* (1880) 55 C 123.

Alternatively, the plaintiff may plead an action involving a written contract by pleading its legal effect. *Snyder v United Props. Co.* (1921) 53 CA 428, 431, 200 P 366. To do so, the plaintiff must analyze the contract terms, plead the facts establishing the making of the contract, and plead the duties or obligations of the contracting parties based on the material, relevant contract terms. This method is not widely used or recommended, because it requires more effort from the drafter and leaves more margin for error.

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### §3.96 b. Oral Contracts

When pleading an oral contract, the plaintiff need not allege the exact terms of the oral agreement but should instead plead the legal effect of the terms of the agreement. *Weitzenkorn v Lesser* (1953) 40 C2d 778, 780, 256 P2d 947. The plaintiff must plead sufficient facts to show the material terms of the contract with sufficient certainty; failure to do so subjects the complaint to a general demurrer. *Bagley v International Harvester Co.* (1949) 91 CA2d 922, 206 P2d 43. In some circumstances, the law may imply necessary missing terms if the plaintiff pleads sufficient facts to establish a contract. *Khoury v Maly's, Inc.* (1993) 14 CA4th 612, 616, 17 CR2d 708; Com C §2311(a). See Com C §§2305, 2308-2310. The plaintiff should not rely on these implied terms unless no other alternative exists. The absence of one or more necessary terms may cause a court to find that the parties did not reach a sufficient meeting of the minds to form a contract. See Restatement (Second) of Contracts §§27, 33; *Brooks v Allard* (1966) 244 CA2d 283, 284, 53 CR 82; *Magna Dev. Co. v Read* (1964) 228 CA2d 230, 242, 39 CR 284.

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### §3.97 2. Performance

The plaintiff who seeks to hold the defendant to the terms of a contract must allege performance on the plaintiff's part as required by the contract (*Caspar Lumber Co. v Stowell* (1940) 37 CA2d 58, 61, 98 P2d 744) or some event or occurrence that excused the plaintiff from performing as required by the contract. See §§3.98-3.99 on excuse and waiver.

Generally, a plaintiff may plead the fact of performance in general conclusory terms. CCP §457; *Barnhart Aircraft, Inc. v Preston* (1931) 212 C 19, 297 P 20. The *Barnhart* court found sufficient the plaintiff's allegations that (212 C at 25):

> Plaintiff did and performed each and every act and thing incumbent on it to be performed fully and completely in accordance with the terms and provisions of said agreement and *addendum*, except in so far as such performance has been prevented by the acts and omissions of the defendants.

If the right to performance is conditioned on the plaintiff's demand, the plaintiff must specifically allege making the demand rather than relying on conclusory pleading of performance. *Mullally v Townsend* (1897) 119 C 47, 51, 50 P 1066. The specific demand allegation need only state that the plaintiff made the required demand; it need not provide circumstantial details. In the extreme, the allegations of the complaint can imply that the demand was made. *California Canneries Co. v Great W. Lumber Co.* (1919) 44 CA 69, 72, 185 P 1008 (finding allegation of "refusal to perform" necessarily implied making of demand).

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### §3.98 a. Excuse or Prevention

If the defendant's conduct prevents the plaintiff from performing the contract terms, the plaintiff may plead that conduct as an excuse of performance. *Gruenberg v Aetna Ins. Co.* (1973) 9 C3d 566, 578 n9, 108 CR 480. The plaintiff must plead the excuse in specific allegations rather than the general allegations of performance. *Daum v Superior Court* (1964) 228 CA2d 283, 287, 39 CR 443.

The plaintiff must distinguish between performance and excuse. Failure to do so may bar the plaintiff's recovery. A plaintiff who failed to perform cannot recover on a contract without alleging the excused performance, even if the plaintiff proves sufficient facts to establish the action at trial. *Kirk v Culley* (1927) 202 C 501, 261 P 994. Therefore, the plaintiff who has not fully performed may wish to plead a breach of contract claim alleging that performance was excused.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.99 b. Waiver

### §3.99 b. Waiver

The plaintiff may allege that his or her performance under the contract was not required because the defendant waived the right to performance. The plaintiff must allege specific facts constituting waiver of the right to require performance. *Cohen v Metropolitan Life Ins. Co.* (1939) 32 CA2d 337, 347, 89 P2d 732.

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### §3.100 3. Breach

The plaintiff must allege the fact of the defendant's breach and should detail alleged facts constituting the breach. *Wise v Southern Pac. Co.* (1963) 223 CA2d 50, 60, 35 CR 652, disapproved on other grounds in *Applied Equip. Corp. v Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 510, 28 CR2d 475. Generally, the breach in a collection case arises solely from the defendant's failure to pay money. However, the plaintiff should review the note and other contract terms to determine every alternative means of performance and should allege facts that constitute a breach of any such alternative means. Failure to do so is a fatal defect that negates any allegation of breach. *Moore v Besse* (1866) 30 C 570 (contract permitted performance between November 1 and February 1; complaint alleging failure to perform on December 4 failed to adequately allege breach).

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### §3.101 4. Causation

Causation should not create significant pleading problems in a collection case. The defendant's failure to perform a promise to pay money results in the plaintiff's loss of use of money from the promised date of performance. Therefore, the plaintiff can easily calculate resulting damages.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.102 C. Actions Against Guarantors

## §3.102 C. Actions Against Guarantors

California law does not distinguish between guarantors and sureties. The law treats obligations of both a guarantor and a surety according to the terms of the guaranty contract. Each constitutes a promise by one party to answer for the debt of another under the terms of the guaranty contract. CC §2787.

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## §3.103 1. Implied Condition of Guaranty: No Action to Recover Until Primary Obligor Defaults

A guaranty contains an implicit condition that the creditor may not seek to recover from the guarantor until the primary obligor on the debt defaults. As long as the primary obligor performs the required payment obligation, the guarantor has no duty to perform under the terms of the guaranty. See CC §2807.

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### §3.104 2. Consideration Required

The creditor must provide consideration to the guarantor for the guaranty. CC §2792. For a guaranty obtained at the time of the original obligation, the original obligation forms the required consideration. The creditor presumably required the guaranty as a condition of extending credit under the original obligation and therefore the creditor need not provide separate consideration to the guarantor. CC §2792.

A creditor that obtains the guaranty at any time after the original obligation must provide separate consideration for the guaranty. CC §2792. The creditor's forbearance on default or other restructuring or extension of the original obligation often provides the necessary consideration. *Beverly Hills Nat'l Bank v Glynn* (1968) 267 CA2d 859, 867, 73 CR 808; *Bank of America v Granger* (1931) 115 CA 210, 219, 1 P2d 479.

Like any other contract, the law presumes that the creditor provided consideration for the guaranty. The party seeking to invalidate the guaranty bears the burden of proving that it did not receive consideration for giving the guaranty. CC §1615.

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### §3.105 3. When Writing Is Required

Generally, the parties must put the guaranty in writing, which need not state the consideration provided for the guaranty. CC §2793. A guaranty is deemed an original obligation of the guarantor and does *not* have to be in writing in the following situations:

- **Value given guarantor by original obligor.** When the guarantor receives (a) property (generally from the original obligor) subject to a promise to apply the property to the obligation guaranteed or (b) a discharge from his or her own obligation to another (generally from the original obligor). CC §2794(1).
- **Logical effect or construction.** When the terms or other circumstances of the apparent guaranty and the provision of consideration by the creditor render the debt the primary obligation of the guarantor. CC §2794(2). For example, when the "guarantor" orders goods from the creditor and instructs the creditor to deliver them to another but charge them to the guarantor, the guarantor becomes the primary obligor and the third party becomes the guarantor. *Shapiro v Greenberg* (1928) 94 CA 241, 270 P 1008.
- **Novation.** When the guarantor makes the promise to answer for another's debt in exchange for either the cancellation of the original debt or the release of property levied or held to satisfy the original debt. CC §2794(3); *Parrish v Greco* (1953) 118 CA2d 556, 258 P2d 566.
- **Main purpose is guarantor's own economic benefit.** When the guarantor makes the promise to answer for the original obligation primarily for his or her own economic benefit. CC §2794(4); *Ogden v United Bank & Trust Co.* (1929) 206 C 571, 574, 275 P 430 (bank agreed to guarantee farming partnership's obligation to farming contractor when bank held right to receive a portion of the farm's crops as rental payments from farming partnership).
- **Agent for sale of goods.** When a guarantor/commission agent agrees to sell merchandise and guarantee payment of the sales proceeds from the buyer. CC §2794(5). This is a specific category of the main purpose exception because the commission agent's promise to guarantee assists the agent in procuring goods for sale so that he or she can earn a commission.
- **Transfer of payment instrument.** When the guarantor transfers a payment instrument such as a promissory note, either in satisfaction of a prior debt or in exchange for new consideration, a guaranty promise made in connection with the transfer becomes an original obligation of the guarantor. CC §2794(6).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/ D. Prejudgment Interest/§3.106 1. Interest Begins Accruing on Specific Date

## D. Prejudgment Interest

### §3.106 1. Interest Begins Accruing on Specific Date

If a debtor owes a liquidated sum certain as of a specific date or a sum certain calculable as of a specific date, the creditor is entitled to prejudgment interest accruing from that date to the date of entry of judgment. CC §3287(a). For example, if an invoice is due on "net 30" terms, the invoice amount is due 30 days after the invoice date and the creditor is entitled to prejudgment interest on that amount starting 30 days after the invoice date to the date of entry of judgment.

If the amount owed is an unliquidated sum, the court in its discretion may award prejudgment interest to the creditor. The court determines the date from which it accrues based on the particular circumstances of the case, but it only begins to accrue after the creditor files the action. CC §3287(b).

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### §3.107 2. Exception: Prevention by Law or Creditor Action

Prejudgment interest accrual is suspended, either temporarily or permanently, when operation of law (*e.g.,* a court order) prevents the debtor from paying the debt. CC §3287(a); *Bank of China v Wells Fargo Bank* (9th Cir 1953) 209 F2d 467, 476; *Perkins v Benguet Consol. Mining Co.* (1942) 55 CA2d 720, 769, 132 P2d 70. Prejudgment interest accrual is also suspended when creditor action prevents the debtor from paying the debt. See *Lane v Wilkens* (1964) 229 CA2d 315, 324, 40 CR 309 (debtor tendered payment but creditor refused on basis later determined to be invalid; accrual of prejudgment interest on the tendered amount suspended).

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## 3. Rate of Prejudgment Interest

### §3.108 a. Express Contract Rate

If the contract specifies an interest rate, the creditor may continue to charge that rate after filing a collection action until a judgment or other new obligation supersedes the contract. CC §3289(a).

For retail installment contracts governed by the Unruh Act (CC §§1801-1812.20), the contract finance charge serves as the contract interest rate for the purpose of calculating prejudgment interest. CC §3289.5.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.109 b. Legal Rate

### §3.109 b. Legal Rate

If the contract does not specify an interest rate, the creditor may charge interest at 10 percent per annum for contracts entered into after January 1, 1986. CC §3289(b). For contracts entered into before January 1, 1986, that do not specify an interest rate, the creditor may charge interest at 7 percent per annum. Cal Const art XV, §1; *Michelson v Hamada* (1994) 29 CA4th 1566, 1585, 36 CR2d 343.

**CAUTION:** Article XV of the California Constitution gives the legislature the right to set the rate of interest on judgments. An argument may be made that CC §3289, which sets the prejudgment rate of interest, is beyond the constitutional authority of the legislature, making the only prejudgment rate, without a contract, 7 percent.

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## VI. DRAFTING THE COMPLAINT: PRELIMINARY ALLEGATIONS

### §3.110 A. Plaintiff's Capacity or Standing to Sue

In a separate paragraph, each plaintiff should identify its status as an individual, corporation, partnership, limited liability company, or other business entity. To allege facts showing proper venue, an individual plaintiff should generally identify his or her county of residence, and a business entity plaintiff should generally identify its principal place of business or state of formation and registration. In addition, business entities required to register with a government agency and individuals engaged in a regulated or licensed business generally must demonstrate their compliance with the applicable statute. See §§3.111-3.112.

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## §3.111 1. Corporate Good Standing Required

A corporation must be in good standing with the Secretary of State to pursue or defend a legal action in a California state court. Rev & T C §23301; *Traub Co. v Coffee Break Serv.* (1967) 66 C2d 368, 57 CR 846; *Gar-Lo, Inc. v Prudential Sav. & Loan Ass'n* (1974) 41 CA3d 242, 116 CR 389; *Alhambra-Shumway Mines, Inc. v Alhambra Gold Mine Corp.* (1957) 155 CA2d 46, 50, 317 P2d 649. The Secretary of State may suspend a corporation's good standing for failure to timely pay franchise taxes or failure to file a return. Suspension is not automatic and does not take effect until the name of the corporation is transmitted by the Franchise Tax Board to the Secretary of State. A certificate of suspension may be obtained from the Secretary of State but is not required for suspension to be effective. Rev & T C §23302; *Damato v Slevin* (1989) 214 CA3d 668, 671, 262 CR 879.

A lack of good standing does not result in a permanent disability to maintaining a legal action. Once the corporation cures its suspension of good standing, it may obtain a certificate of revivor and again prosecute and defend actions in the California state courts. Rev & T C §§23305-23305a; *Color-Vue, Inc. v Abrams* (1996) 44 CA4th 1599, 1603, 52 CR2d 443.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.112 2. Licensure Good Standing

## §3.112 2. Licensure Good Standing

An individual engaged in an occupation requiring a license or other certification must generally allege valid licensure or certification. For example, a contractor without a valid license in force during the entire time required to perform the contract may not file or maintain an action to collect amounts due under a contract. Bus & P C §7031; *Stephens v Baker & Baker* (1957) 150 CA2d 558, 310 P2d 73; *Sheble v Turner* (1941) 46 CA2d 762, 767, 117 P2d 23. See 5 Witkin, California Procedure, *Pleading* §906 (5th ed 2009).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.113 B. Defendant's Capacity

## §3.113 B. Defendant's Capacity

The plaintiff should allege the defendant's capacity by identifying the defendant and his or her status as an individual, partnership, corporation, limited liability company, or other type of business entity. To allege facts showing proper venue based on the defendant's residence or principal place of business, the complaint should identify the city and county of residence of an individual or the principal place of business or state of formation and registration of a business entity. See forms in §3.125.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.114 C. Federal Court Jurisdiction

## §3.114 C. Federal Court Jurisdiction

A plaintiff who chooses to file an action in federal court must provide a reference to the statutory basis for federal jurisdiction at the beginning of the complaint. Fed R Civ P 8(a)(1); *Dracos v Hellenic Lines, Ltd.* (4th Cir 1983) 705 F2d 1392, 1395. The plaintiff need not provide factual allegations forming the basis for federal jurisdiction.

There are two bases for federal jurisdiction:

(1) Federal question jurisdiction (28 USC §1331); and

(2) Diversity jurisdiction (28 USC §1332).

The federal question jurisdiction statute gives the district courts original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 USC §1331. This provision is not self-effectuating; rather, it is dependent on other specific grants of federal jurisdiction contained in individual federal statutes. The courts have interpreted the provision fairly narrowly and use different tests for determining when a controversy "arises under" federal law for purposes of §1331. A federal court will not have jurisdiction under the "arising under" language unless the lawsuit "really and substantially involves a dispute or controversy respecting the validity, construction, or effect" of the federal law. *Shulthis v McDougal* (1912) 225 US 561, 569, 56 L Ed 1205, 1211, 32 S Ct 704. The Ninth Circuit generally uses the test that the claim arises under federal law if the result "turns on" the federal question. *Mobil Oil Corp. v City of Long Beach* (9th Cir 1985) 772 F2d 534, 539.

Under the diversity statute, the district courts have original jurisdiction in all civil actions with an amount in controversy exceeding $75,000 (excluding interest and costs) between (28 USC §1332(a)):

- Citizens of different states;
- Citizens of a state and citizens or subjects of a foreign state;
- Citizens of different states in actions in which citizens or subjects of a foreign state are additional parties; and
- A foreign state (as plaintiff) and citizens of a state or states.

The courts have construed diversity jurisdiction strictly. See *City of Indianapolis v Chase Nat'l Bank* (1941) 314 US 63, 76, 86 L Ed 47, 54, 62 S Ct 15 (strict construction intended to relieve federal courts of suits properly belonging in state courts and to avoid offense to state sensitiveness). See also *Kantor v Wellesley Galleries, Ltd.* (9th Cir 1983) 704 F2d 1088, 1092 (congressional grant of diversity jurisdiction to be strictly construed).

On how to assert either federal question jurisdiction or diversity jurisdiction in drafting a complaint, see California Civil Procedure Before Trial, chap 7 (4th ed Cal CEB 2004).

**NOTE:** The Supreme Court has held that an assignee for collection of a legal claim for money owed has standing to pursue the claim in federal court. *Sprint Communications Co., L.P. v APCC Servs., Inc.* (2008) ___ US ___, 171 L Ed 2d 424, 128 S Ct 2531 (assignee had standing even though assignee promised to remit litigation proceeds to assignor).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.115 D. Venue

## §3.115 D. Venue

The complaint should include any other allegations necessary to establish venue. For example, if the plaintiff seeks to establish venue in the county where the parties entered into the contract, he or she should plead the location where the contract was made. If the plaintiff seeks to establish venue in the county where the defendant breached the contract, the plaintiff should plead the location of the breach (usually where defendant should have performed on the contract).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.116 E. Alter Ego Allegation

### §3.116 E. Alter Ego Allegation

If the debtor is a corporation, the creditor should consider carefully including some form of alter ego allegation, if facts known to the creditor support an inference of personal negligence, that the corporate veil could be pierced as to the individual defendant, or that the business entity was not a corporation at the relevant time. See *Puryear v Golden Bear Ins. Co.* (1998) 66 CA4th 1188, 1197, 78 CR2d 507 (alter ego claims legally tenable only when attorneys have "evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial"). Some factors supporting an alter ego finding may exist in many small, closely held corporate entities, particularly those run by less sophisticated principals.

**CAUTION 1:** An attorney's signature on a pleading is deemed an implied certification that all factual contentions have evidentiary support, "or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." CCP §128.7(b)(3). Whether the traditional qualification that facts are alleged "on information and belief" satisfies this requirement has not yet been ruled upon. It appears to be safer to use the language of §128.7.

**CAUTION 2:** Making a statement as to alter ego liability "on information and belief" may insulate a declarant or affiant from criminal liability for perjury (for statements under oath), and it may avoid a judicial admission. It does not, however, insulate the pleader from liability for malicious prosecution: "No one can obtain a license to maliciously prosecute a lawsuit simply by reciting 'information and belief.'" *Mabie v Hyatt* (1998) 61 CA4th 581, 596 n9, 71 CR2d 657.

**CAUTION 3:** Defendants prevailing on a bifurcated alter-ego claim are entitled to an immediate award of attorney fees. The court's finding that corporate officers were not personally liable constituted a favorable termination of the case for each officer as an individual. *Pueblo Radiology Med. Group, Inc. v Gerlach* (2008) 163 CA4th 826, 77 CR3d 880.

The alter ego doctrine traditionally is applied to pierce the corporate veil so that a shareholder may be held liable for the debts or conduct of the corporation. However, some courts recognize that the corporate veil may be pierced in reverse so that a corporation may be held liable for the debts or conduct of a shareholder. A typical "reverse pierce" or "inside reverse pierce" scenario involves a corporate insider, or someone claiming through that person, trying to pierce the corporate veil from within, such that the corporate entity and the individual will be considered as one. *Postal Instant Press, Inc. v Kaswa Corp.* (2008) 162 CA4th 1510, 1518, 77 CR3d 96. A variant of the reverse piercing theory, sometimes called "outside" or "third party" reverse piercing, occurs when a third party outsider seeks to reach corporate assets to satisfy claims against an individual shareholder. As an issue of first impression in California, the concept of outside reverse piercing of the corporate veil has been held not to apply in California. *Postal Instant Press, Inc. v Kaswa Corp., supra*.

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## §3.117 1. Alter Ego Factors

The alter ego doctrine involves a determination that the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa. The elements of such a determination require that (*Minifie v Rowley* (1921) 187 C 481, 487, 202 P 673):

- The corporation is not only influenced and governed by that person, but there is such a unity of interest and ownership that the individuality, or separateness, of the person and the corporation has ceased; and
- The facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction fraud or promote injustice.

An extensive discussion of the factors that may give rise to a finding of alter ego is provided in *Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 839, 26 CR 806. They include (210 CA2d at 838):

- Failure to keep corporate records,
- Failure to hold regular corporate meetings,
- Failure to register stock,
- Commingling of corporate and individual assets,
- Common counsel for corporate and individual affairs, and
- Common employees or principals.

If egregious enough, a court may find an alter ego situation when only one or two factors exist; the creditor need not demonstrate the presence of every factor to successfully pierce the corporate veil and reach an individual's assets.

Other leading cases on alter ego liability include *Communist Party v 522 Valencia* (1995) 35 CA4th 980, 993, 41 CR2d 618 (alter ego doctrine could not be used to impute ownership interest in corporations or their properties to respondent because respondent had always treated corporations as separate entities); *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1248, 1 CR2d 301 (alter ego liability as generally reserved for parent-subsidiary relationship, but under single-enterprise rule, liability can be found between sister companies); *Minton v Cavaney* (1961) 56 C2d 576, 15 CR 641 (trial court not required to believe statement that decedent was only a "temporary" director and officer "for accommodation"); and *Automotriz del Golfo de Calif., S.A. de C.V. v Resnick* (1957) 47 C2d 792, 306 P2d 1 (trial court entitled to consider failure to issue stock and creation and operation of corporation with little or no capital in determining whether defendants were personally liable for debt).

A checklist of specific factors is set forth in §3.119A.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.118 2. Alter Ego Not Limited to Principals

### §3.118 2. Alter Ego Not Limited to Principals

When several related entities exist, a creditor may find it useful to investigate the potential for an alter ego finding against other entities in addition to the corporate principals. The debtor corporation may serve only as an operating entity for another corporate or limited liability entity holding substantial assets. Particularly with the increasing requirement by large lenders that a borrower establish and use a "bankruptcy-remote" entity, pursuit of an alter ego theory against other entities may prove necessary.

**NOTE:** A bankruptcy-remote entity, used specifically in real estate development, is an entity that owns little or no property other than the collateral serving as the lender's security. However, the entity may have substantial operating connections to a parent company. If the entity files bankruptcy, the lender has several strategic advantages owing to the use of the bankruptcy-remote entity.

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### §3.119 3. Postjudgment Amendment to Add Alter Ego

Although a creditor may seek to amend postjudgment to add an alter ego as a judgment debtor, the creditor must overcome an additional burden under this procedure.

The creditor must demonstrate that the potential judgment debtor's interests were adequately represented in the action. *NEC Elec. v Hurt* (1989) 208 CA3d 772, 777, 256 CR 441. The creditor must show that the corporation and alter ego shared interests in the litigation and that the alter ego controlled the litigation, affording him or her the opportunity to litigate the liability. In addition, the creditor must demonstrate that it acted with due diligence on discovering the alter ego relationship. *Alexander v Abbey of the Chimes* (1980) 104 CA3d 39, 47, 163 CR 377.

The creditor may amend the judgment to add the alter ego defendant by a motion after trial (104 CA3d at 44), a petition for order to show cause (*Motores de Mexicali v Superior Court* (1958) 51 C2d 172, 174, 331 P2d 1), a separate action against the alter ego to establish liability (*Silverman v Superior Court* (1988) 203 CA3d 145, 151, 249 CR 724), or joint debtor proceedings under CCP §§989-994 (*Vincent v Grayson* (1973) 30 CA3d 899, 905, 106 CR 733).

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.119A 4. Checklist: 28 Ways to Show Alter Ego

## §3.119A 4. Checklist: 28 Ways to Show Alter Ego

▶ To download **Word** version, right click and choose *Save Target As*

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**Domination and Control by One Person**

- 1. Domination and control of corporation by individual (see *Minifie v Rowley* (1921) 187 C 481, 487, 202 P 673; *Communist Party v 522 Valencia* (1995) 35 CA4th 980, 993, 41 CR2d 618).
- 2. Sole ownership of all the stock in a corporation by one individual or the members of a family (see *Minifie v Rowley* (1921) 187 C 481, 202 P 673; *Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 839, 26 CR 806).
- 3. Commingling personal and corporate funds (*Sweet v Watson's Nursery* (1939) 33 CA2d 699, 92 P2d 812).
- 4. Diversion of corporate funds for noncorporate use (see *Puccetti v Girola* (1942) 20 C2d 574, 128 P2d 13; *Goldberg v Engelberg* (1939) 34 CA2d 10, 92 P2d 935).
- 5. Treatment by an individual of assets of corporation as his or her own (*Minifie v Rowley* (1921) 187 C 481, 488, 202 P 673; *Mid-Century Ins. Co. v Gardner* (1992) 9 CA4th 1205, 1215, 11 CR2d 918).
- 6. Payment of personal expenses from corporate funds (*Puccetti v Girola* (1942) 20 C2d 574, 128 P2d 13).
- 7. Corporate affairs conducted at home (*Stark v Coker* (1942) 20 C2d 839, 847, 129 P2d 390).
- 8. Statements such as "I am the Southern California Home Building Co" (*Stark v Coker* (1942) 20 C2d 839, 847, 129 P2d 390; *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1248, 1 CR2d 301).
- 9. Individual holds himself or herself out as personally responsible for debts of corporation (*Stark v Coker* (1942) 20 C2d 839, 129 P2d 390; *Shafford v Otto Sales Co., Inc*. (1957) 149 CA2d 428, 308 P2d 428).

**Disregard of Corporate Formalities**

- 10. Minute book entries are meager (see *Riddle v Leuschner* (1959) 51 C2d 574, 335 P2d; *Temple v Bodega Bay Fisheries, Inc.* (1960) 180 CA2d 279, 282, 4 CR 300).
- 11. Failure to make minute entries for important corporate transactions (*Thompson v L.C. Roney Co.* (1952) 112 CA2d 420, 246 P2d 1017).
- 12. Few meetings of directors or shareholders (*Stark v Coker* (1942) 20 C2d 839, 846, 129 P2d 390).
- 13. Failure to apply for permit to issue stock (*Automotriz del Golfo de Calif., S.A. de C.V. v Resnick* (1957) 47 C2d 792, 306 P2d 1).
- 14. Failure to issue stock (*Automotriz del Golfo de Calif., S.A. de C.V. v Resnick* (1957) 47 C2d 792, 306 P2d 1).
- 15. No market value for stock (*Stark v Coker* (1942) 20 C2d 839, 847, 129 P2d 390).
- 16. Stock not paid for, or corporate funds so expended that nothing is available for general creditors (*Temple v Bodega Bay Fisheries, Inc.* (1960) 180 CA2d 279, 283, 4 CR 300).
- 17. Disregard of legal formalities; failure to maintain arms-length relationship (see *Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 840, 26 CR 806; *McCombs v Rudman* (1961) 197 CA2d 46, 51, 17 CR 351).
- 18. All of the above (*Tomaselli v Transamerica Ins. Co*. (1994) 25 CA4th 1269, 31 CR2d 433; *Engineering Service Corp. v Longridge Inv. Co.*(1957) 153 CA2d 404, 415, 314 P2d 563).

**Undercapitalization or Insolvency**

- 19. Undercapitalization (see *Minton v Cavaney* (1961) 56 C2d 576, 15 CR 641; *Automotriz del Golfo de Calif., S.A. de C.V. v Resnick* (1957) 47 C2d 792, 797, 306 P2d 1 (if "corporation carries on business without

substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable that shareholders should set up such a flimsy organization to escape personal liability); *Mid-Century Ins. Co. v Gardner* (1992) 9 CA4th 1205, 1212, 11 CR2d 918).

- 20. Corporate insolvency occurring comparatively soon after incorporation (*Engineering Service Corp. v Longridge Inv. Co.*(1957) 153 CA2d 404, 415, 314 P2d 563).
- 21. No corporate business or assets at time of trial (*Stark v Coker* (1942) 20 C2d 839, 847, 129 P2d 390; *Temple v Bodega Bay Fisheries, Inc.* (1960) 180 CA2d 279, 282, 4 CR 300).

**Fraud**

- 22. Failure to disclose corporate status to plaintiff (*Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 839, 26 CR 806).
- 23. Diversion of assets from corporation to a shareholder to the detriment of creditors (*Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 840, 26 CR 806).

**Fraudulent Intercorporate Shift of Assets**

- 24. Formation of corporation with subsequent transfer to it of existing liability of another person (*Associated Vendors, Inc. v Oakland Meat Co.* (1962) 210 CA2d 825, 840, 26 CR 806).
- 25. Shift of assets from target corporation to shell corporation (see *Mirabito v San Francisco Dairy Co*. (1934) 1 C2d 400, 35 P2d 513; *Blank v Olcovich Shoe Co*. (1937) 20 CA2d 456, 67 P2d 376).
- 26. Shift of assets from target corporation to another corporation without sufficient consideration to pay creditors of target (debtor) corporation (*Thompson v L.C. Roney Co.* (1952) 112 CA2d 420, 246 P2d 1017).

**Other Intercorporate Relationships**

- 27. Interlocking directorates (*Mirabito v San Francisco Dairy Co.* (1934) 1 C2d 400, 35 P2d 513; *Thompson v L.C. Roney Co.* (1952) 112 CA2d 420, 246 P2d 1017).
- 28. No corporate income tax returns filed.

*Comment:* The occasions when the alter ego doctrine will or will not be applied cannot be reduced to a pat formula. The examples above are merely illustrative, and are not at all inclusive. See §3.117; see also Organizing Corporations in California, chap 1A (3d ed Cal CEB 2001).

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### §3.120 F. Fictitious Name Allegation

Fictitiously named defendants are usually named in the caption of the complaint as a group, for example, as "Doe 1 through Doe 100" or "Does I through XX." The plaintiff must directly allege ignorance of the true names of defendants sued by fictitious names. Without this allegation, a new party cannot be brought in by amendment after the statute of limitations has run. *Kline v Beauchamp* (1938) 29 CA2d 340, 84 P2d 194. See also *Stephens v Berry* (1967) 249 CA2d 474, 57 CR 505 (First Doe through Fourth Doe are fictitious names sued under CCP §474); *Lipman v Rice* (1963) 213 CA2d 474, 28 CR 800 (John Doe One to John Doe Twenty are fictitiously named individuals); *Armstrong v Superior Court* (1956) 144 CA2d 420, 423 n1, 301 P2d 51 (allegation that "Doe One and Doe Two are fictitious persons" means that they are imaginary (versus being sued under fictitious *names*)). But see *Motor City Sales v Superior Court* (1973) 31 CA3d 342, 346, 107 CR 280 (sufficient to say that defendants, Does I through XXV, inclusive, are sued under CCP §474).

It is not necessary to allege that the plaintiff does not know the capacities of the fictitiously named parties. A capacity can be stated when the complaint is amended to show the true name. Nor is it necessary to indicate that a fictitiously named defendant is a corporation or other business entity. "Doe 1" can stand for a corporation or other entity as well as for a person. See *Irving v Carpentier* (1886) 70 C 23, 11 P 391 ("Pacific Improvement Co." substituted for fictitious name "Tom Jones").

It is not necessary to state that the plaintiff will (or prays leave to) amend to show the true names when they are ascertained. Code of Civil Procedure §474 gives the plaintiff the right to amend the complaint and does not require such a recital or the statement that the plaintiff give notice that he or she will amend.

**WARNING:** Statements such as "each Doe is in some manner negligently responsible for plaintiff's injury and damages" are usually not considered sufficient charging allegations and have been stricken from complaints by law and motion judges as stating a legal conclusion. But see *Breceda v Gamsby* (1968) 267 CA2d 167, 72 CR 832.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.121 G. Assignment Allegation

## §3.121 G. Assignment Allegation

The plaintiff must plead the assignment from another creditor of the right to recover the debt. The plaintiff should also plead its right to enforce all obligations of the other party under the underlying contract. See *National Reserve Co. v Metropolitan Trust Co.* (1941) 17 C2d 827, 831, 112 P2d 598. Failure to so plead may be curable by amendment. *Miller v Republic Grocery, Inc.* (1952) 110 CA2d 187, 192, 242 P2d 396; *Credit Bureau v Horeth* (1943) 60 CA2d 47, 139 P2d 962.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/ VII. COMPLAINT FORMS/ A. Judicial Council Form Complaints/§3.122 1. Form: Complaint-Contract (Judicial Council Form PLD-C-001)

## VII. COMPLAINT FORMS

### A. Judicial Council Form Complaints

### §3.122 1. Form: Complaint-Contract (Judicial Council Form PLD-C-001)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT:<br>☐ DOES 1 TO _____ | |
| **CONTRACT**<br>☐ **COMPLAINT** ☐ **AMENDED COMPLAINT *(Number):***<br>☐ **CROSS-COMPLAINT** ☐ **AMENDED CROSS-COMPLAINT *(Number):*** | |
| **Jurisdiction *(check all that apply):***<br>☐ **ACTION IS A LIMITED CIVIL CASE**<br>**Amount demanded** ☐ **does not exceed $10,000**<br>☐ **exceeds $10,000 but does not exceed $25,000**<br>☐ **ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)**<br>☐ **ACTION IS RECLASSIFIED by this amended complaint or cross-complaint**<br>☐ **from limited to unlimited**<br>☐ **from unlimited to limited** | CASE NUMBER: |

1. **Plaintiff*** *(name or names):*

   alleges causes of action against **defendant*** *(name or names):*

2. This pleading, including attachments and exhibits, consists of the following number of pages:
3. a. Each plaintiff named above is a competent adult
   ☐ **except** plaintiff *(name):*
   (1) ☐ a corporation qualified to do business in California
   (2) ☐ an unincorporated entity *(describe):*
   (3) ☐ other *(specify):*

   b. ☐ Plaintiff *(name):*
   a. ☐ has complied with the fictitious business name laws and is doing business under the fictitious name *(specify):*

   b. ☐ has complied with all licensing requirements as a licensed *(specify):*
   c. ☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3c.
4. a. Each defendant named above is a natural person

| | |
|---|---|
| ☐ **except** defendant *(name):* | ☐ **except** defendant *(name):* |
| (1) ☐ a business organization, form unknown | (1) ☐ a business organization, form unknown |
| (2) ☐ a corporation | (2) ☐ a corporation |
| (3) ☐ an unincorporated entity *(describe):* | (3) ☐ an unincorporated entity *(describe):* |
| (4) ☐ a public entity *(describe):* | (4) ☐ a public entity *(describe):* |
| (5) ☐ other *(specify):* | (5) ☐ other *(specify):* |

* If this form is used as a cross-complaint, plaintiff means cross-complainant and defendant means cross-defendant.



Form Approved for Optional Use
Judicial Council of California
PLD-C-001 [Rev. January 1, 2007]

**COMPLAINT—Contract**

Code of Civil Procedure, § 425.12

Print

**PLD-C-001**

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

4. *(Continued)*
   b. The true names of defendants sued as Does are unknown to plaintiff.
      (1) ☐ Doe defendants *(specify Doe numbers):* _____ were the agents or employees of the named defendants and acted within the scope of that agency or employment.
      (2) ☐ Doe defendants *(specify Doe numbers):* _____ are persons whose capacities are unknown to plaintiff.
   c. ☐ Information about additional defendants who are not natural persons is contained in Attachment 4c.
   d. ☐ Defendants who are joined under Code of Civil Procedure section 382 are *(names):*

5. ☐ Plaintiff is required to comply with a claims statute, **and**
   a. ☐ has complied with applicable claims statutes, *or*
   b. ☐ is excused from complying because *(specify):*

6. ☐ This action is subject to ☐ Civil Code section 1812.10 ☐ Civil Code section 2984.4.
7. This court is the proper court because
   a. ☐ a defendant entered into the contract here.
   b. ☐ a defendant lived here when the contract was entered into.
   c. ☐ a defendant lives here now.
   d. ☐ the contract was to be performed here.
   e. ☐ a defendant is a corporation or unincorporated association and its principal place of business is here.
   f. ☐ real property that is the subject of this action is located here.
   9. ☐ other *(specify):*

8. The following causes of action are attached and the statements above apply to each *(each complaint must have one or more causes of action attached):*
   ☐ Breach of Contract
   ☐ Common Counts
   ☐ Other *(specify):*

9. ☐ Other allegations:

10. **Plaintiff prays** for judgment for costs of suit; for such relief as is fair, just, and equitable; and for
    a. ☐ damages of: $
    b. ☐ interest on the damages
       (1) ☐ according to proof
       (2) ☐ at the rate of *(specify):* percent per year from *(date):*
    c. ☐ attorney's fees
       (1) ☐ of: $
       (2) ☐ according to proof.
    d. ☐ other *(specify):*

11. ☐ The paragraphs of this pleading alleged on information and belief are as follows *(specify paragraph numbers):*

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF PLAINTIFF OR ATTORNEY)

*(If you wish to verify this pleading, affix a verification.)*



*Comment:* Remember that to be effective, two different documents must be used. The first is the form complaint,

such as this form. The second states the specific cause(s) of action, needed for the complaint to be complete (see form in §3.122A). A form complaint alone, without the specific causes of action is defective and subject to demurrer, a motion to strike, or a motion for judgment on the pleadings at time of trial.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.122A 2. Form: Cause of Action--Common Counts (Judicial Council Form PLD-C-001(2))

## §3.122A 2. Form: Cause of Action—Common Counts (Judicial Council Form PLD-C-001(2))



| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

## _____ (number) CAUSE OF ACTION—Common Counts

ATTACHMENT TO ☐ Complaint ☐ Cross - Complaint

*(Use a separate cause of action form for each cause of action.)*

CC-1. Plaintiff *(name):*

alleges that defendant *(name):*

became indebted to ☐ plaintiff ☐ other *(name):*

a. ☐ within the last four years
   (1) ☐ on an open book account for money due.
   (2) ☐ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☐ within the last ☐ two years ☐ four years
   (1) ☐ for money had and received by defendant for the use and benefit of plaintiff.
   (2) ☐ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff.
      ☐ the sum of $
      ☐ the reasonable value.
   (3) ☐ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
      ☐ the sum of $
      ☐ the reasonable value.
   (4) ☐ for money lent by plaintiff to defendant at defendant's request.
   (5) ☐ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
   (6) ☐ other *(specify):*

CC-2. $ , which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest ☐ according to proof ☐ at the rate of _____ percent per year from *(date):*

CC-3. ☐ Plaintiff is entitled to attorney fees by an agreement or a statute
   ☐ of $
   ☐ according to proof.

CC-4. ☐ Other:



Form Approved for Optional Use
Judicial Council of California
PLD-C-001(2) [Rev. January 1, 2009]

**CAUSE OF ACTION—Common Counts**

CEB

Code of Civil Procedure, § 425.12
www.courtinfo.ca.gov

*Comment:* Remember that to be effective, two different documents must be used. The first is the form complaint (see form in §3.122), and the second states the specific cause(s) of action, needed for the complaint to be complete, such

as this form. A form complaint alone, without the specific causes of action, is defective and subject to demurrer, a motion to strike, or a motion for judgment on the pleadings at time of trial.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/ B. Attorney-Drafted Complaint/§3.123 1. Form: Caption and Introductory Language

## B. Attorney-Drafted Complaint

### §3.123 1. Form: Caption and Introductory Language

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | |
|---|---|
| _ _[*Name(s)*]_ _**,** _ _[*e.g., a California corporation*]_ _**,** **Plaintiff(s)** **vs** _ _[*Name(s)*]_ _**,** _ _[*e.g., a California corporation*]_ _**, and DOES 1 through 25 Inclusive, Defendant(s)** | **No.** _ _ _ _ _ _ _<br>**COMPLAINT FOR MONEY—**<br>_ _[*e.g., BREACH OF WRITTEN CONTRACT; COMMON COUNTS; BREACH OF GUARANTY*]_ _<br>**PRAYER OF COMPLAINT:**<br>**$**_ _[*amount*]_ _<br>**Hearing:** _ _[*date; time*]_ _<br>**Dep't:** _ _[*number*]_ _<br>**Hearing judge:** _ _[*if known*]_ _<br>**Action filed:** _ _[*date*]_ _<br>**Trial date:** _ _[*if set*]_ _ |

**Plaintiff alleges:**

**GENERAL ALLEGATIONS**

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.124 2. Form: Identification of Plaintiff

## §3.124 2. Form: Identification of Plaintiff

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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[*Add one of the following alternatives*]

[*Alternative 1: Corporate plaintiff*]

**_. Plaintiff _ _**[*name of corporate plaintiff*]**_ _ ("Corporate Plaintiff") is and was at all relevant times a corporation, duly organized and existing under California law with its principal place of business in _ _**[*specify*]**_ _.**

[*Alternative 2: Individual plaintiff*]

**_. Plaintiff _ _**[*name of individual plaintiff*]**_ _ ("Individual Plaintiff") is and was at all relevant times a resident of _ _**[*name of county*]**_ _ County, California.**

[*If applicable, add the following option*]

[*Option: License required to file and maintain action*]

**At all times mentioned in this complaint, Individual Plaintiff was a _ _**[*specify*]**_ _, properly licensed by the State of California. Such license was in full force and effect at all times mentioned in this complaint and it has not been revoked or suspended.**

*Comment:* If a plaintiff is organized as a different type of entity, *e.g.,* a partnership, limited liability company, or limited liability partnership, the designation of the defendant as "Corporate Defendant" should be changed accordingly.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.125 3. Form: Identification of Defendant

## §3.125 3. Form: Identification of Defendant

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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[*Add one of the following alternatives*]

[*Alternative 1: Corporate defendant*]

**_. Corporate Plaintiff and Individual Plaintiff ("Plaintiff") are informed and believe and based thereon allege that defendant, _ _[*name*]_ _ ("Corporate Defendant"), is and was at all relevant times a corporation, duly organized and existing under California law with its principal place of business in _ _[*specify*]_ _.**

[*Alternative 2: Corporate surety as defendant*]

**_. At all times mentioned herein, Defendant _ _[*name of surety (generally on contractor's bond)*]_ _ ("Defendant Surety") is and was a corporation doing business in the County of _ _[*specify*]_ _, California, and within this judicial district, and is empowered to, among other things, issue surety bonds to contractors within the State of California.**

[*Alternative 3: Individual defendants*]

**_. Defendant _ _[*name of First Individual Defendant*]_ _ ("First Individual Defendant") is and was at all relevant times a resident of the County of _ _[*specify*]_ _, California.**

**_. Defendant _ _[*name of Second Individual Defendant*]_ _ ("Second Individual Defendant") is and was at all relevant times a resident of the County of _ _[*specify*]_ _, California.**

[*If applicable, add one of the following options*]

[*Option 1: Individual defendants married*]

**_. Plaintiff is informed and believes and based on such information and belief alleges that First Individual Defendant and Second Individual Defendant are and were at all relevant times husband and wife.**

[*Option 2: Individual defendants acting as partnership*]

**_. First Individual Defendant and Second Individual Defendant were at all times mentioned herein and now are associated in business as partners and transact business as such partners under a common name, to wit: _ _[*name of partnership defendant*]_ _, and First Individual Defendant and Second Individual Defendant are sued herein under Code of Civil Procedure §369.5 and as individuals.**

[*Alternative 4: Doe defendants*]

**_. Plaintiff is unaware of the true names and capacities of defendants sued herein as DOES 1 through 25, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff believes that each fictitiously sued defendant was in some way responsible for the acts alleged in the complaint.**

[*If applicable, add one or both of the following options*]

[*Option 1: Defendants as agents*]

**_. Plaintiff is informed and believes and based on such information and belief alleges, that First Individual Defendant, Second Individual Defendant, Corporate Defendant, and DOES 1 through 25, inclusive, are and were each the agent, servant, and employee of one another, and to the extent of doing the acts alleged herein, each acted within the course and scope of said agency or employment.**

[*Option 2: Claim assigned*]

**_. Before the commencement of this action, _ _[*name of assignor(s)*]_ _ assigned _ _[*its/their*]_ _ claims against Defendants to Plaintiff for collection.**

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.126 4. Form: Venue

## §3.126 4. Form: Venue

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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[*Add one of the following alternatives*]

[*Alternative 1: Venue—Action not subject of CC §1812.10 or §2984.4*]

**_. This action is not subject to Civil Code §1812.10 or §2984.4. Defendants reside in and/or the obligation was entered into within this judicial district.**

[*Alternative 2: Venue—Action subject to CCP §395*]

**_. This action is not subject to Civil Code §1812.10 or §2984.4. This action is subject to Code of Civil Procedure §395. The obligation was entered into in, and/or when the obligation was entered into the defendant resided in, and/or when this action was commenced the defendant resided in, this judicial district.**

[*Alternative 3: Venue—Action subject to CC §1812.10*]

**This action is not subject to Civil Code §2984.4. This action is subject to Civil Code §1812.10. The obligation was entered into in, and/or when the obligation was entered into the defendant resided in, and/or when the action was commenced the defendant resided in, and/or the goods purchased have become affixed to real property located in, this judicial district.**

[*Alternative 4: Venue—Action subject to CC §2984.4*]

**This action is not subject to Civil Code §1812.10. This action is subject to Civil Code §2984.4. The obligation was entered into in, and/or when the obligation was entered into the defendant resided in, and/or when the action was commenced the defendant resided in, and/or the vehicle purchased with the obligation is garaged in, this judicial district.**

[*If applicable, add the following option*]

[*Option: Required notification*]

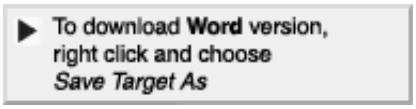
**_. Plaintiff's attorneys notified defendants in writing that they intended to sue and that suit could result in judgment, including costs under Code of Civil Procedure §1033. Notice was sent by _ _**[*e.g., first class mail, postage prepaid*]**_ _.**

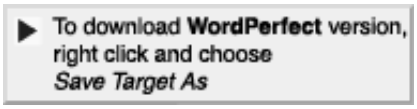
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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.127 5. Form: Cause of Action for Breach of Written Contract

## §3.127 5. Form: Cause of Action for Breach of Written Contract

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.




**_ _[*E.g., FIRST*]_ _ CAUSE OF ACTION**

**BREACH OF WRITTEN CONTRACT (Against Corporate Defendant)**

**_. Plaintiff realleges paragraphs 1 through _ _[*number*]_ _ and incorporates them by reference herein.**

**_. On about _ _[*date*]_ _, at _ _[*specify*]_ _ County, California, Corporate Defendant entered into a written agreement for the purchase of _ _[*specify*]_ _ (the "Contract"). A copy of the Contract is attached hereto as Exhibit A and is incorporated by reference herein as though fully set forth.**

**_. Under the terms of the Contract, Corporate Defendant agreed to pay Plaintiff _ _[*specify payment terms*]_ _.**

**_. Plaintiff has performed all conditions, covenants, and promises required by it on its part to be performed in accordance with the terms and conditions of the Contract _ _[*, except those conditions, covenants, and promises waived by Defendant or excused by Defendant's failure to perform under the Contract*]_ _.**

**_. Beginning on or after _ _[*date*]_ _, Corporate Defendant breached the Contract by failing to make timely payments as agreed.**

**_. Plaintiff has repeatedly demanded payment from Corporate Defendant. The last demand was made on _ _[*date*]_ _.**

**_. The Contract provides that in the event legal action is taken to enforce payment, the prevailing party is entitled to recover reasonable attorney fees and costs.**

**_. As a result of Corporate Defendant's breach of the Contract, Plaintiff has not received Corporate Defendant's monthly payments, and has been damaged in the sum of $_ _[*amount*]_ _ together with interest at the contract or statutory rate and all attorney fees and costs incurred in collecting this amount.**

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## 6. Common Count Causes of Action

### §3.128 a. Form: Money Had and Received

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*E.g., SECOND*]_ _ **CAUSE OF ACTION**

**COMMON COUNT FOR MONEY HAD AND RECEIVED (Against Corporate Defendant)**

**_. Plaintiff realleges paragraphs 1 through _ _[*number*]_ _ and incorporates them by reference in this complaint.**

**_. _ _[*Within the last _ _[number]_ _ years/On or about _ _[date]_ _]_ _, at _ _[_ _[specify]_ _, California]_ _, Corporate Defendant became indebted to Plaintiff in the sum of $_ _[*amount*]_ _ for money had and received by Corporate Defendant for the use and benefit of Plaintiff.**

**_. Plaintiff has repeatedly demanded payment from Corporate Defendant with no response from Corporate Defendant. Plaintiff last demanded repayment on _ _[*date*]_ _.**

*Comment:* The optional language "within the last _ _[*number*]_ _ years" in this form and in the forms in §§3.129-3.133 establishes compliance with the statute of limitations. The proper limitations period should be inserted here if this language is used; *e.g.,* two years for most oral contracts. See §§3.60-3.65 on statute of limitations.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.129 b. Form: Goods Sold and Delivered at Agreed Price

## §3.129 b. Form: Goods Sold and Delivered at Agreed Price

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*E.g., SECOND*]_ _ **CAUSE OF ACTION**

**COMMON COUNT FOR GOODS SOLD AND DELIVERED AT AGREED PRICE (Against Corporate Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _[*number*]_ _ as though fully set forth herein.**

**_. _ _[*Within the last _ _[number]_ _ years/On or about _ _[date]_ _]_ _, at _ _[_ _[specify]_ _, California]_ _, Corporate Defendant became indebted to Plaintiff in the sum of $_ _[*amount*]_ _ for goods sold and delivered to Corporate Defendant, and Corporate Defendant then and there agreed to pay said amount.**

**_. Plaintiff has repeatedly demanded payment from Corporate Defendant with no response from Corporate Defendant. The last demand was made on _ _[*date*]_ _.**

*Comment:* See Comment in §3.128.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.130 c. Form: Reasonable Value of Goods Sold and Delivered

## §3.130 c. Form: Reasonable Value of Goods Sold and Delivered

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*E.g., SECOND*]_ _ **CAUSE OF ACTION**

**REASONABLE VALUE OF GOODS SOLD AND DELIVERED (Against Corporate Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ as though fully set forth herein.**

**_.** _ _[*Within the last* _ _[*number*]_ _ *years/On or about* _ _[*date*]_ _]_ _*, at* _ _[_ _[*specify*]_ _*, California*]_ _**, Plaintiff sold and delivered certain goods at the request of Corporate Defendant, and Corporate Defendant agreed to pay Plaintiff the reasonable value of those goods.**

**_. At the time of sale and delivery, the fair and reasonable value of the goods was at least $**_ _[*amount*]_ _**.**

*Comment:* See Comment in §3.128.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.131 d. Form: Work, Labor, Services, and Materials

## §3.131 d. Form: Work, Labor, Services, and Materials

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*E.g., SECOND*]_ _ **CAUSE OF ACTION**

**WORK, LABOR, SERVICES, AND MATERIALS (Against Corporate Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _[*number*]_ _ as though fully set forth herein.**

**_.** _ _[*Within the last _ _[number]_ _ years/On or about _ _[date]_ _]_ _, at _ _[_ _[specify]_ _, California*]_ _, Corporate Defendant became indebted to Plaintiff in the agreed sum of $_ _[*amount*]_ _ for work, labor, _ _[*materials,*]_ _ and services performed by Plaintiff for Corporate Defendant.**

**_. Plaintiff has repeatedly demanded payment from Corporate Defendant with no response from Corporate Defendant. The last demand was made on _ _[*date*]_ _.**

*Comment:* See Comment in §3.128.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.132 e. Form: Reasonable Value of Work, Labor, Services, and Materials

## §3.132 e. Form: Reasonable Value of Work, Labor, Services, and Materials

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*E.g., SECOND*]_ _ **CAUSE OF ACTION**

**REASONABLE VALUE OF WORK, LABOR, SERVICES, AND MATERIALS (Against Corporate Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _[*number*]_ _ as though fully set forth herein.**

**_.** _ _[*Within the last _ _[number]_ _ years/On or about _ _[date]_ _]_ _,* **at** _ _[_ _[*specify*]_ _*, California*]_ _, **Plaintiff performed construction services for Corporate Defendant. Corporate Defendant knew that Plaintiff was providing these services and** _ _[*promised to pay their reasonable value/accepted, used, and enjoyed the services Plaintiff provided*]_ _**.**

**_. The fair and reasonable value of the services provided to Corporate Defendant is at least $**_ _[*amount*]_ _**.**

*Comment:* See Comment in §3.128.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.133 f. Form: Account Stated

## §3.133 f. Form: Account Stated

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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_ _[*E.g., SECOND*]_ _ **CAUSE OF ACTION**

**ACCOUNT STATED (Against Corporate Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _[*number*]_ _ as though fully set forth herein.**

**_. _ _[*Within the last _ _[number]_ _ years/On or about _ _[date]_ _]_ _, at _ _[_ _[specify]_ _, California]_ _, an account was stated _ _[orally/in writing]_ _ between Plaintiff and Corporate Defendant.**

**_. On this statement, a balance of $_ _[*amount*]_ _ was owed to Plaintiff from Corporate Defendant.**

**_. Corporate Defendant agreed to pay this balance. _ _[*A true and correct copy of the account is attached as Exhibit _ _ and is incorporated by reference in this complaint.*]_ _**

*Comment:* See Comment in §3.128.

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.134 g. Form: Book Account

## §3.134 g. Form: Book Account

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

**_ _**[*E.g., SECOND*]**_ _ CAUSE OF ACTION**

**BOOK ACCOUNT [CCP §337a] (Against Corporate Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _**[*number*]**_ _ as though fully set forth herein.**

**_. Within the last _ _**[*number*]**_ _ years at _ _**[*specify*]**_ _, California, Corporate Defendant became indebted to Plaintiff on an _ _**[*open book/mutual, open, and current*]**_ _ account for money due in the sum of $_ _**[*amount*]**_ _ for _ _**[*goods, wares, and merchandise sold and delivered/services performed*]**_ _ by Plaintiff to Corporate Defendant at its request, and for which Corporate Defendant agreed to pay the above sum. A true and correct copy of this account is attached as Exhibit _ _ and is incorporated by reference in this complaint.**

**_. Plaintiff has repeatedly demanded payment from Corporate Defendant with no response from Corporate Defendant. The last demand was made on _ _**[*date*]**_ _.**

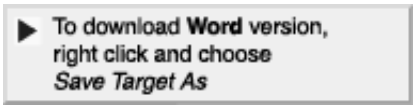
*Comment:* See Comment in §3.128.

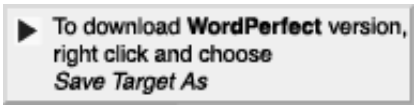
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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.135 h. Form: Statement of Amount Due--For Use With All Common Counts

## §3.135 h. Form: Statement of Amount Due—For Use With All Common Counts

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.




[*Alternative 1: Statement of Amount Due (Claim Not Assigned)*]

**_. Corporate Defendant has failed to fully repay Plaintiff** _ _[*except for credits in the amount of* *$*_ _[*amount*]_ _]_ _ **and, as of** _ _[*date*]_ _**, there is now due and owing $**_ _[*amount*]_ _ **together with interest at the** _ _[*rate of* _ _[*specify*]_ _ *percent per year/contract rate*]_ _ **from** _ _[*date*]_ _**.**

[*Alternative 2: Statement of Amount Due (Multiple Assignors)*]

**_. Corporate Defendant has failed to fully repay Plaintiff** _ _[*except for credits in the amount of* *$*_ _[*amount*]_ _]_ _ **and, as of** _ _[*date*]_ _**, there is now due and owing $**_ _[*amount*]_ _ **together with interest at the** _ _[*rate of* _ _[*specify*]_ _ *percent per year/contract rate*]_ _ **from** _ _[*date*]_ _ **for** _ _[*name of first assignor*]_ _**; and $**_ _[*amount*]_ _ **together with interest at the** _ _[*rate of* _ _[*specify*]_ _ *percent per year/contract rate*]_ _ **from** _ _[*date*]_ _**, for** _ _[*name of second assignor*]_ _**.**

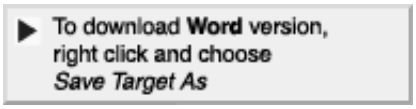
*Comment:* This form is written for a claim by an assignee of two assignors. If there were more than two assignors, counsel should add additional clauses to show the amounts due on behalf of each assigned claim.

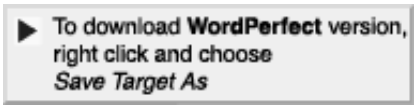
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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.136 i. Form: Attorney Fees--For Use With All Common Counts

## §3.136 i. Form: Attorney Fees—For Use With All Common Counts

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.




[*Add one of the following alternatives*]

[*Alternative 1: Contractual provision for attorney fees*]

**_. The Contract provides that the prevailing party shall recover reasonable attorney fees if either party must institute an action to enforce the Contract terms.**

[*Alternative 2: Attorney fees under CCP §337a*]

**_. The Contract constitutes a book account for which the prevailing party shall recover reasonable attorney fees under Code of Civil Procedure §337a if either party must institute an action to enforce the book account.**

[*Alternative 3: Attorney fees under CC §1717.5*]

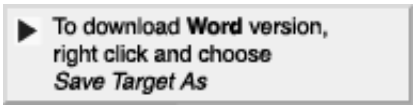
**_. The Contract constitutes a book account, which accrued after January 1, 1987, for which the prevailing party shall recover under Code of Civil Procedure §337a reasonable attorney fees of the lesser of $660.00 or 25 percent of the principal balance, to wit the sum of $_ _[*amount*]_ _, if either party must institute an action to enforce the book account.**

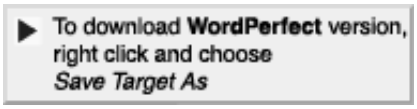
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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.137 j. Form: Damages--For Use With All Common Counts

## §3.137 j. Form: Damages—For Use With All Common Counts

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.




**_. As a result of Corporate Defendant's failure to repay the amount owed, Plaintiff has been damaged in the sum of $_ _[*amount*]_ _, together with accrued interest on that sum, and all attorney fees and costs incurred in collecting this amount.**

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.138 7. Form: Cause of Action Against Surety on Continuing Guaranty

## §3.138 7. Form: Cause of Action Against Surety on Continuing Guaranty

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.

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**_ _[*E.g., THIRD*]_ _ CAUSE OF ACTION**

**AGAINST SURETY ON CONTINUING GUARANTY [CC §2814] (Against First Individual Defendant)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _[*number*]_ _ as though fully set forth in this complaint.**

**_. On or about _ _[*date*]_ _, at _ _[*specify*]_ _, California, First Individual Defendant made, executed, and delivered to Plaintiff an instrument designated a personal guaranty, a copy of which is attached hereto as Exhibit B and made a part hereof.**

**_. In the guaranty, First Individual Defendant individually guaranteed all present and future obligations of Corporate Defendant, including all indebtedness and liability to Plaintiff of every nature then owing or thereafter to be incurred by Corporate Defendant.**

**_. The purpose of this guaranty was to induce Plaintiff to extend credit to Corporate Defendant.**

**_. Plaintiff acted in reliance on the guaranty and Corporate Defendant is now indebted to Plaintiff in the sum of $_ _[*amount*]_ _.**

**_. No part of this sum has been paid by Corporate Defendant. First Individual Defendant has not paid any of the sum due under the guaranty despite Plaintiff's demand. There is now due, owing, and unpaid from First Individual Defendant the principal sum of $_ _[*amount*]_ _ plus interest on that sum.**

**_. The guaranty provides that, if any action is brought to enforce the guaranty, First Individual Defendant will pay additional sums for costs of suit, including reasonable attorney fees. Plaintiff has been obligated to institute and prosecute this action to enforce the guaranty.**

**_. As a result of First Individual Defendant's breach of the guaranty, Plaintiff has not received the amount owed by First Individual Defendant under the guaranty, and has been damaged in the sum of $_ _[*amount*]_ _ together with interest and attorney fees incurred in collecting this amount.**

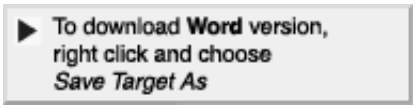
*Comment:* Repeat for other defendant, as appropriate.

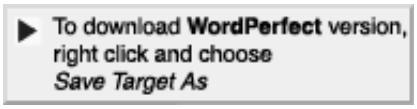
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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.139 8. Form: Cause of Action Against Defendants on Promissory Note

## §3.139 8. Form: Cause of Action Against Defendants on Promissory Note

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.




**_ _[*E.g., FOURTH*]_ _ CAUSE OF ACTION**

**AGAINST DEFENDANT ON PROMISSORY NOTE (Against _ _[*e.g., First Individual Defendant*]_ _)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _[*number*]_ _ as though fully set forth herein.**

**_. On or about _ _[*date*]_ _, at _ _[*specify*]_ _, California, _ _[*e.g., First Individual Defendant*]_ _ made, executed, and delivered to Plaintiff its promissory note for good and valuable consideration, a copy of which is attached as Exhibit C and made a part hereof. Among other things, said promissory note provides that _ _[*e.g., First Individual Defendant*]_ _ shall pay to plaintiff the total amount of $_ _[*amount*]_ _, with interest at the rate of _ _[*number*]_ _ percent per year from _ _[*date*]_ _. A true copy of said note is attached hereto, labeled Exhibit _ _, and incorporated herein by reference as though fully set forth.**

**_. _ _[*E.g., First Individual Defendant*]_ _ has failed and refused to pay said note, although due demand has been made.**

**_. As a result of _ _[*e.g., First Individual Defendant's*]_ _ failure to pay said note, Plaintiff has been damaged in the sum of $_ _[*amount*]_ _, together with accruing interest thereon at the rate of _ _[*number*]_ _ percent per year from _ _[*date*]_ _, and all attorney fees incurred in collecting this amount.**

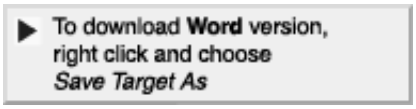
*Comment:* Repeat for other defendants, as appropriate.

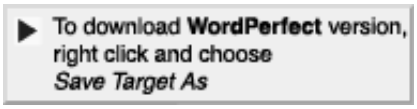
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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.140 9. Form: Cause of Action on Not Sufficient Funds Check

## §3.140 9. Form: Cause of Action on Not Sufficient Funds Check

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§3.123-3.141.




**_ _**[*E.g., FIFTH*]**_ _ CAUSE OF ACTION**

**AGAINST DEFENDANT ON NOT SUFFICIENT FUNDS CHECK**
**(Against _ _**[*e.g., First Individual Defendant*]**_ _)**

**_. Plaintiff hereby incorporates by reference the allegations of paragraphs 1 through _ _**[*number*]**_ _ as though fully set forth herein.**

**_. On or about _ _**[*date*]**_ _, _ _**[*e.g., First Individual Defendant*]**_ _, for good and valuable consideration, gave to Plaintiff a check, in writing, a true copy of which is attached hereto, marked Exhibit _ _ and incorporated by reference herein as though fully set forth.**

**_. The check was presented to the bank for payment and the bank refused to honor it for lack of funds or credit or because the maker had no account.**

**_. Written notice was given to defendant by certified mail under Civil Code §1719 that defendants could be held liable, in addition to the principal sum, for treble the check amount, but in no case less than one hundred dollars or more than fifteen hundred dollars if they failed to pay the amount due.**

**_. Defendant has not paid the check, and there is now due, owing, and unpaid from defendant to plaintiff, the sum of $_ _**[*amount*]**_ _.**

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.141 10. Form: Prayer for Relief

## §3.141 10. Form: Prayer for Relief

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**WHEREFORE, Plaintiff prays for judgment in its favor against all defendants jointly and severally and Does 1 to 25 as follows:**

**_. For the principal amount of $_ _[*amount*]_ _ against all Defendants;**

[*If applicable, add the following option*]

[*Option: If bad check penalties apply*]

**_. For $1500 plus the costs of mailing demand by certified mail pursuant to Civil Code §1719.**

[*Continue*]

**_. For prejudgment interest;**

**_. For costs of suit herein named;**

**_. For reasonable attorney fees; and**

**_. For such other and further relief as the court may deem proper.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

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**Source:** Business Law/Debt Collection Practice in California/3 Starting the Action/§3.142 VIII. SERVICE OF PROCESS

## §3.142 VIII. SERVICE OF PROCESS

For discussion of service of process, see California Civil Procedure Before Trial, chap 17 (4th ed Cal CEB 2004).

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# 4

# Representing the Debtor

**Philip J. Rhodes**
**Roger R. Rubin**

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## §4.1 I. ROLE OF DEBTOR'S COUNSEL: EVALUATING DEBTOR'S CIRCUMSTANCES

Acting as counsel to a debtor who is in a state court collection action or who is a bankruptcy candidate requires that the attorney serve in several capacities. The attorney must provide both legal advice and basic financial advice. The attorney may serve as a sympathetic ear or a nagging voice. Debtors come in all shapes and sizes, and the debtor's attorney must learn to handle all types.

The attorney's role at the outset is to determine why the potential client has been prompted to seek legal representation.

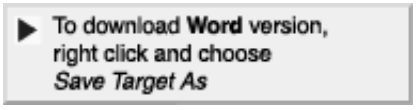
The attorney must decide quickly whether to represent the potential client, so that he or she has enough time to contact other attorneys before a filing deadline is missed. Whether to represent the debtor requires counsel to determine rapidly if the alleged debt arises out of a business transaction or a consumer transaction, whether there is a pending court action, the stage of that court proceeding, and if and when a judgment has been entered.

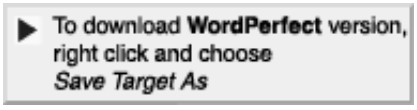
In most cases, the attorney must decide whether to represent the client by the end of the initial interview. That decision will turn on a variety of considerations such as the merits of the debtor's defense or affirmative claims and the debtor's ability to pay attorney fees. The decision will also be influenced by the debtor's objectives in attempting to resolve the case and whether these goals are realistic, and, under the circumstances, what realistic goals would actually be and what the attorney can do to achieve those goals.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.2 A. Checklist: Master Checklist for Analyzing Client's Debt Problem and Handling Collection Action

## §4.2 A. Checklist: Master Checklist for Analyzing Client's Debt Problem and Handling Collection Action




This checklist provides the attorney with an orderly procedure for analyzing the client's debt problems and establishing the best way to help the client deal with the current collection action.

A. Analyzing debtor's legal problem(s)

1. Initial telephone contact.

    a. In initial telephone contact, or as soon thereafter as possible, determine stage of debt collection action, *i.e.,* why debtor is calling attorney, what papers have been received by debtor from creditor, and how they were received (see §4.5). Has litigation commenced? If so, in what county and what is the case number? Are the proceedings prejudgment or postjudgment? Request relevant documentation be brought to initial conference, *e.g.*:

        (1) Demand letters for payment of money to debtor from creditor, most recent statements of accounts, documentation as to whether there is a written contract or promissory note evidencing the debt, and whether the debt is secured or unsecured;

        (2) "Final demand" letters, notices of "charge off," and/or assignment to third party "debt collector" for collection;

        (3) Civil complaints filed;

        (4) Service of process; and requests for entry of default mailed to debtor;

        (5) Notice of entry of judgment and judgment entered;

        (6) Enforcement of judgment proceedings (*e.g.,* notice of levy on bank account or real property, order of examination, or wage garnishment);

    b. Determine whether debtor is calling on behalf of himself or herself as an individual.

    c. Is the alleged debt business-related (*e.g.,* credit card standing in name of a business entity) or incurred primarily for personal, family, or household purposes.

    d. If advisable, send potential client Financial Statement (Judicial Council Form EJ-165) (see §9.61) to complete before the consultation. If appropriate, send formal list of documents to produce (see §4.9). If debtor has any interest in real property, has a high income, or might require special consideration, then send Debtor's Questionnaire (see §4.10) as well.

    e. If a legal action is pending, request potential client to obtain copies of all pertinent pleadings filed with the court, *e.g.,* complaint, affidavit of service of process, filings regarding default judgment, notice of entry of judgment, return of writs by sheriff or constable.

**PRACTICE TIP:** Many counties provide online access to case information, including files scanned by the court and posted in the register of actions. For the websites of the Superior Courts in California, see the Directory.

2. Initial Interview.

    a. Advise debtor that truth is imperative, and that everything discussed in the meeting is strictly confidential.

**PRACTICE TIP:** If more than one person is attending the interview (*e.g.,* husband and wife, unless the debt is a community debt), there may be conflict of interest and/or significant confidentiality issues. Truthfulness will likely be more difficult to achieve when more than one party is present. Counsel should gently ask all others present to please wait in the reception area for "confidentiality reasons."

b. Determine debtor's personal status, place of residence, age, marital status, employment, and dependents.

c. Obtain financial data, consisting of current monthly income and expenses (or profit and loss) as well as a financial statement that fully discloses *all* assets and liabilities. If not already done, provide client with Financial Statement (Judicial Council Form EJ-165) (see §9.61) or Debtor's Questionnaire, and assist client in completing the form(s). Also, provide debtor with Exemptions from the Enforcement of Judgments (Judicial Council Form EJ-155) (see §§9.55, 9.55A), which specifies assets exempt from enforcement of judgment. After reviewing list, determine if any of client's assets are not exempt.

**NOTE:** If the client is a wage earner, the most recent three pay stubs will greatly assist in assessing the debtor's financial situation. Bank statements can be used to verify monthly expenses.

d. If court proceedings have begun, assume time is of the essence. See CCP §12. Determine status of legal action and deadlines (1) for filing required responsive pleadings; (2) for filing for relief from default or relief from judgment under CCP §473 or attacking judgment as void or voidable; (3) for filing claims of exemption at the office of the levying officer (sheriff or marshall in county where the asset subject to levy is located); or (4) to respond to other procedures being used to aid in the enforcement of judgment.

e. Determine if (1) debt is joint or several and if debtor is married or a domestic partner; (2) debt is one for which the community or partnership is liable; and (3) debtor owns real or personal property standing in the name of the debtor and the spouse or domestic partner, or other third party. Claim ownership to or possession of the property levied upon.

f. Determine if debtor has transferred any assets to third party. If assets have been transferred to avoid, hinder, or delay creditors, there may be fraudulent conveyance problems.

g. Determine nature of debt:

(1) Secured or not? If secured, identify security; determine if perfected.

(2) Business or personal obligation? If personal, does it arise from a "consumer credit transaction" (which means "a transaction between a natural person and another person in which property, services or money is acquired on credit by that natural person from such other person primarily for personal, family or household purposes")? See CC §§1788.2(e), 1799.90(a).

If business, what form of business? Possibilities are sole proprietorship, community property, partnership, corporation, or LLC. What is the debtor's relationship with the business? If a corporation, are there alter ego problems imposing personal liability? On alter ego liability, see §§3.21, 3.23, 3.116-3.119A.

Is a collection action being brought by the original creditor, has the debt been "assigned for collection" with a third party debt collector, or is the debt holder an assignee of the debt or judgment?

(3) Is there documentary evidence of claim, debt, or liability? (Counsel must see document or copy or endorsed-filed copy of judgment.) On documents to be brought to initial meeting, see 1.a., above.

(4) Can any special enforcement procedures be used, *e.g.,* taxes, child support, student

loan repayment, loss of state or local licensure (such as for uninsured motorists, banker's lien, tax liens, or refund offsets), foreclosure/repossession, private sale, prejudgment writs of attachment, or claim and delivery?

(5) Is alleged claim or debt disputed? Are there any defenses, setoffs, or cross-complaints? Any claims arising from state and federal consumer protection statutes?

(6) Are there any defenses, setoffs, or cross-complaints? See §§4.73-4.92.

(7) Is identity theft present? See §2.24B. If so, request copy of required police report. See Pen C §530.6.

(8) Are there other parties to debt, *e.g.,* spouses or ex-spouses, guarantors or co-signers? Is there insurance coverage or indemnification? On potential liability of spouse, see chap 13.

(9) Can debtor borrow money? Will creditor take less to reach settlement and release (see CC §§1541-1542) or accord satisfaction of disputed debt (CC §§1524-1526) or, if judgment entered, acknowledgment of full satisfaction of judgment (see CCP §724.010(a))?

(10) Is debt dischargeable in bankruptcy? Is debtor currently eligible for Chapter 7 liquidation, or is debt counseling a prerequisite (see §§12.13-12.14D)?

(11) How will costs and attorney's fees be paid?

B. Analyzing transaction

1. Validity and enforceability of contract, account, or obligation. Oral contract? Written contract? Open-book account?
2. Defenses of business debtors in transactions governed by the California Uniform Commercial Code. See California UCC Sales and Leases (Cal CEB 2002); Secured Transactions in California Commercial Law Practice (2d ed Cal CEB 2001).
3. Defenses to consumer debts (see paragraph D, below) or affirmative causes of action based on federal or state consumer protection statutes or regulations that may apply to a particular transaction (see §4.36).
4. Debt collection torts include intentional/negligent infliction of mental and emotional distress, invasion of privacy, defamation, malicious prosecution, abusive process, slander of title, or usury.

C. Alternatives in dealing with creditors

1. Negotiation or renegotiation of obligation, loan consolidation, or compositions. See §4.101.
2. Asset protection, transmutation of assets from non-exempt to exempt status (see CCP §§704.010-704.210); Recorded Declaration of Homestead for real property residence. Consult Exemptions from the Enforcement of Judgments (Judicial Council Form EJ-155) (see §§9.55, 9.55A).
3. Settlement. See §§4.102-4.125.
4. Assignment for benefit of creditors. See §§4.126-4.131.
5. Alternative dispute resolution by mediation or arbitration which may be required by contract or statute.
6. Consumer debt counseling or petition for Chapter 7 (discharge) or Chapter 13 (payment plan) relief in Bankruptcy Court. See chap 12.

D. Defending debt collection actions

1. General tactical considerations.
2. Response to complaint.

a. Consider venue and transfer.

b. Consider challenging service of process.

c. Consider Demand for Bill of Particulars (see §§4.57-4.65).

3. Defenses against attachment and temporary protective orders.

4. Prejudgment remedies other than attachment.

a. Claim and delivery.

b. Miscellaneous prejudgment creditor's remedies and debtor's defenses.

5. Pretrial and trial.

a. Debtor's objections to discovery.

b. Offer to compromise.

c. Dismissal.

d. Joint debtor's recourses.

E. Postjudgment proceedings

1. Attack on judgment.

a. Motion for new trial (CCP §657) within 15 days.

b. Motion to vacate judgment and entry of new and different judgment (CCP §§663, 663a) 15 days after notice of entry of judgment by clerk.

c. Motion to set aside default or default judgment due to judgment debtor's mistake, inadvertence, surprise, or excusable neglect (CCP §473) within 6 months of entry of judgment.

d. Motion to set aside and vacate judgment because void or voidable or entered by clerical error, *e.g.*, if judgment is taken without lawful service of process (extrinsic fraud, *i.e.*, lack of due process precluding jurisdiction) or if judgment entered exceeds amount prayed for in complaint. See last paragraph of CCP §473. Subject to defense of laches, motions to set aside void or voidable judgments may be brought at any time.

e. Appeal.

f. Satisfaction of judgment and release of judgment lien.

2. Debtor's remedies against execution.

a. Recall and quash writ of execution.

b. In limited civil cases ($25,000) or less, move for payment in installments (CCP §582.5).

c. File claim of exemption with levying officer (not court). If on tangible asset (usually within 10 days of notice of levy), use Claim of Exemption (Judicial Council Form EJ-160) (see §9.60), usually within 10 days of notice of levy. If by wage garnishment, use Financial Statement (Judicial Council Form EJ-165) (CCP §706.124) (see §9.61), at any time. Only one wage garnishment is permitted at a time; a second garnishment is ineffective (CCP §705.023).

3. Supplemental proceedings.

a. Order of Examination (CCP §708.110) requires debtor (or knowledgeable third party, *e.g.,* spouse) to appear and answer to aid in enforcement of judgment; failure may result in order for arrest or contempt of court and order that attorney fees be awarded to creditor (CCP §708.170(a)). Service of Order of Examination creates a lien on all the personal property of the debtor for 1 year from

the date served. CCP §708.110(d).

b. Document requests and interrogatories to debtor.

c. Creditors suits against third parties indebted to debtor (CCP §708.210).

d. Charging orders against debtors interest in partnership (CCP §708.310).

e. Assignment orders and claims of exemption (CCP §§708.510-708.560).

f. Real estate or personal property levy (CCP §§701.510-701.830).

g. Third party claimants of property levied upon (CCP §§720.010-720.800), *e.g.*, traceable separate property of nondebtor spouse or family member.

4. Exemptions and homesteads (see chap 9).

a. Statutory exemptions.

b. Exemptions of jointly owned or community property.

c. Remedies against levy of exempt property.

d. Homesteads.

F. Bankruptcy (see chap 12)

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.3 B. Assessing the Potential Client

## §4.3 B. Assessing the Potential Client

Initial discussions with the potential client give the attorney an opportunity to assess the debtor's sophistication, financial management abilities, and mental and emotional state. All these factors will dictate how much work counsel must undertake to get complete overall financial information from the debtor. They will also dictate how successful any settlement or workout requiring extra financial discipline may be.

In addition, the consumer debtor may be stressed, ashamed, or fearful of what will happen. The debtor has probably received countless calls from zealous debt collectors, causing the debtor considerable stress.

Counsel must first gain the trust of the debtor and explain that the interview is confidential. If there is more than one person at the initial meeting (*e.g.,* a spouse, parent, child, partner, or friend) confidentiality may be lost, there may be a conflict of interest, and the debtor may be inhibited in telling the truth.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.4 C. Assessing the Primary Problem

## §4.4 C. Assessing the Primary Problem

Most debtors seek legal counsel for one primary problem, even though their real problem may be an overwhelming mountain of debt. The debtor's counsel should ascertain the nature of the primary problem because it is probably the one needing the most urgent attention from counsel.

The debtor's counsel should identify the nature and status of "the problem" by asking:

- What is the stage of any collection proceedings, *i.e.,* is the debtor just receiving collection letters and demands for payment or has the creditor already threatened foreclosure, started legal proceedings, or received a judgment? See §4.5.
- Is the debt secured by any of the debtor's property? See §4.6.
- Who is asserting the claim? The original creditor, debt collection agency representing the original creditor, or an assignee of the account or judgment?
- Are there any demand letters or debt validation letters?
- Date of last extension of credit on account?
- If multiple debts, what stage is the collection process for each and are there any payment preferences?
- Can non-exempt assets be transmuted to exempt assets, *e.g.,* $9700 savings account transmuted to a life insurance or annuity policy (see CCP §704.100; *In re Simpson* (9th Cir 2009) 557 F3d 1010 (single-premium annuities are not included within California statutory life insurance exemption))?
- Is there a contractual arbitration clause?

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## §4.5 1. Stage of Proceedings

If the creditor has not started legal proceedings and the debt is not secured, it is unlikely that any ill consequences will result from a failure to act immediately. In California, absent a security interest, a creditor cannot ordinarily garnish wages or levy bank accounts before initiating legal proceedings. One notable exception in federal law permits a federal student loan guarantor to issue an "administrative" wage garnishment to a student loan borrower's employer. 20 USC §1095a. Even after starting legal proceedings, without a writ of attachment (see §§6.1-6.110), a creditor ordinarily cannot garnish wages or levy bank accounts before obtaining a judgment. However, a debtor's bank may be entitled to limited setoff against the debtor's account for a consumer debt claimed to be owed the bank by the debtor. See Fin C §864. See also *Martin v Wells Fargo Bank* (2001) 91 CA4th 489, 110 CR2d 653.

If the creditor has started legal proceedings, the debtor's counsel must immediately verify the deadline for responding to the complaint. If the debtor was personally served with the complaint (*i.e.*, the process server handed it to the debtor or left it with the debtor personally), the debtor must respond within 30 days after service. CCP §412.20. If the debtor was substitute served (*e.g.*, the process server left it with someone else in the debtor's household), the complaint is deemed to have been served 10 days after the mailing required to complete the substitute service (CCP §415.20), and the debtor then has 30 days to respond. See California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004) for discussion of service of process.

Because the debtor may take days or weeks to consult counsel after receiving service of a summons and complaint, the debtor's counsel may have little time to respond to the complaint. Whenever possible, counsel should contact the creditor's attorney to verify the date of service of the summons and complaint. If the time to respond is about to expire, counsel should request an extension.

**NOTE:** Counsel should check local rules for the particular county's policy on extensions of time to respond. Govt C §§68600-68620. Many counties permit only one extension, not to exceed 15 days without a court order, and require counsel to file a stipulation with the court. See, *e.g.,* San Diego Super Ct R 2.1.6. Therefore, counsel should request the maximum extension allowed initially.

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## §4.6 2. Collateral for Debt

If the debt is secured by the debtor's property, counsel should identify the nature of the collateral. Personal property collateral is subject to self-help repossession, allowing the creditor to repossess the collateral without a court order or other legal intervention, if it can do so without breaching the peace. See Com C §9609. Self-help repossession usually occurs when the collateral is an automobile, although a creditor's disposition of repossessed vehicles is subject to certain notice and accounting requirements. See CC §2983.2.

The agreements for many charge cards issued by retail stores contain a grant of a security interest in the goods purchased with the charge card. In theory, a creditor could recover these goods through self-help repossession. As a practical matter, they are usually household goods that a creditor cannot repossess using self-help because they are inside the debtor's residence.

Although the Commercial Code still applies to consumer transactions, California and federal consumer protection and similar regulatory statutes supersede the Commercial Code. Com C §9201. See, *e.g.*, the Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.5).

If the debt is secured by real property, counsel should ascertain whether the creditor has begun foreclosure proceedings (usually nonjudicial) and, if so, when they began. The creditor must wait at least 3 months and 20 days after the recording of the notice of default before holding a nonjudicial foreclosure sale. CC §§2924, 2924f.

**NOTE:** For certain residential real property loans, the creditor must wait to give the notice of sale until at least 90 days after the lapse of the 3 months specified in CC §2924. This deferred notice of sale provision applies to loans recorded between January 1, 2003, and January 1, 2008, when the loan was the first mortgage on the property, and the property was the borrower's principal residence. CC §2923.52(a).

However, a nonjudicial foreclosure (trustee's) sale could shield the debtor from any deficiency judgment. See CCP §§580b, 580d. Real property security interests and associated remedies are beyond the scope of this book, but every debtor's counsel should have a basic understanding of the real estate foreclosure process in order to protect the client's interests. See California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009) for discussion of real estate foreclosure processes.

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## D. Assessing Overall Financial Situation

### §4.7 1. Obtaining Necessary Information

In addition to addressing a debtor's immediate problems, an attorney must assess the debtor's overall financial situation before recommending a course of action. To obtain full information about the debtor's finances, counsel should give the debtor a list of documents to bring to the initial consultation. See §4.9. Counsel will also need to review an extensive financial questionnaire once the client has completed it. For a form of questionnaire, see §§4.10-4.14. Alternatively, counsel could ask the client to complete standard bankruptcy forms to obtain the necessary information; however, if the client is not yet seriously considering the bankruptcy option, counsel probably should not suggest this alternative.

Some attorneys send the list and questionnaire with a letter requesting the potential client to bring the completed questionnaire and the requested documents to the initial consultation. The letter should emphasize the importance of providing candid and complete information. Requesting the debtor to complete the questionnaire before the initial consultation allows counsel and the potential client to quickly focus on his or her overall financial situation; the debtor will have focused on the information to prepare the questionnaire and the attorney will have the information available early in the consultation.

Other attorneys prefer to ask only that the debtor bring the requested documents to the initial consultation because the questionnaire is lengthy and may require considerable time and effort to complete. The requested documents, in conjunction with information learned talking with the debtor, may enable counsel to learn enough about the debtor's overall financial situation to recommend a preliminary course of action. Many potential clients are already under a great deal of stress from their financial difficulties and find it painful to focus on their problems at the level required to complete the questionnaire. The debtor may feel so overwhelmed by the attorney's questionnaire that he or she does not even show up for the initial consultation, forgoing needed legal assistance. Or a potential client may simply ignore the questionnaire and the list of documents and arrive at the initial consultation without enough information to assist the debtor's counsel. Instead, after gaining the client's confidence and trust in the initial meeting, the attorney can ask the debtor to complete the questionnaire.

At the very least, counsel should assist the debtor in fully completing a financial statement on Judicial Council Form WG-007/EJ-165 (see §9.61), which may be provided to the creditor or creditor's counsel to demonstrate the debtor's lack of ability to pay the debt and that the debtor is in fact judgment-proof.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.8 2. Analyzing the Information

### §4.8 2. Analyzing the Information

Counsel should analyze the debtor's financial situation in much the same manner as a business's cash flow:

- After paying essential bills each month, how much cash does the debtor have available to pay overdue debts? If the debtor has one or two small financial hurdles and enough extra cash flow each month to eventually get over them, the debtor may be able to work his or her way out of financial difficulties.
- Can the debtor persevere with some old-fashioned belt-tightening, or will the debtor throw good money after bad?
- Does the debtor expect any positive change in his or her finances in the near future?
- Is the judgment-proof debtor able to borrow funds from friends or family in order to attempt to offer a lesser amount in full and final settlement of debt? A reasonable offer based solely on the debtor's "borrowing power" may achieve full release of the debt.
- Is the debt one that is for the "necessaries of life" (such as the support of the debtor and family, including housing, food, clothing, and medical expenses (CCP §703.115)) that would prevent later wage garnishment exemption? See CCP §706.051(c)(1). On what constitutes "necessaries of life," see *J.J. MacIntyre Co. v Duren* (1981) 118 CA3d Supp 16, 18, 173 CR 715.

The attorney must help the debtor answer these questions realistically without any bias toward one particular solution.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.9 3. Form: List of Documents to Bring to Interview

## §4.9 3. Form: List of Documents to Bring to Interview

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LIST OF DOCUMENTS TO BRING TO INTERVIEW

For your initial consultation with the attorney, please bring with you copies of the following documents. The attorney may need to keep or photocopy some or all of them.

1. All contracts you have signed that obligate you to pay money, such as loans, promissory notes, lines of credit, and installment purchase agreements.

2. All payment books for loans.

3. All papers regarding any lawsuits brought by you or against you.

4. All letters from lawyers, collection agencies, finance companies, and other creditors.

5. If you own or are buying your home, the deed and any title insurance policy on your home, mortgage or deed of trust, any declaration of homestead, appraisals, and other legal papers pertaining to your home. If you rent your home, bring your lease.

6. If you own or are buying any other real estate (including cemetery lots), the deed, and any other legal papers pertaining to the property.

7. All stock certificates, bonds, and investment account statements.

8. All insurance policies.

9. All savings passbooks and checking account statements.

10. All tax returns filed in the last 3 years.

11. If you are divorced or are in the process of getting divorced, any orders, judgments, court decrees, or property settlement agreements.

12. All automobile title papers or registration certificates.

13. If you are now or have been in business:

    a. Inventory of stock and office and shop equipment,

    b. List of accounts receivable and amounts due, with full names and addresses,

    c. Balance sheets,

    d. Profit and loss statements,

    e. Any other business records, and

    f. Any financial statements issued to any creditors or credit information agencies.

14. All passbooks or statements from any IRA, Keogh, or other retirement plans.

15. All statements, plans, and documents on any retirement plans.

[*Option: If questionnaire to be filled out before meeting*]

16. The questionnaire completely filled out.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/ 4. Debtor's Questionnaire/ §4.10 a. Form: Instructions for Debtor's Questionnaire

## 4. Debtor's Questionnaire

### §4.10 a. Form: Instructions for Debtor's Questionnaire

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INSTRUCTIONS FOR QUESTIONNAIRE

Every question below is important, and you should answer each one carefully and completely. If the answer to a question is "No" or "None," indicate that. If you do not know the answer, write "Unknown." Do not leave any questions blank. This office must have this information in order to evaluate your situation and give you the best possible legal advice.

Your answers are protected by the attorney-client privilege. No information will be released without your consent.

Take your time. Inaccurate or incomplete answers will limit the accuracy and usefulness of our advice. List all debts, even those you intend to pay. List your creditors' names and addresses accurately and fully (including zip codes). Include relatives and others you intend to pay.

If you dispute a debt or a part of a debt, list the total amount of the creditor's claim, with an explanation of the dispute and the amount in dispute. If you do not know the exact amount you owe, list an approximate amount. Indicate the date each debt was incurred and the nature of the debt (such as "medical bill" or "purchase of 1984 Ford auto").

The creditor originally entitled to collect the debt often transfers this right to another party, known as the "assignee" of your creditor. If a collection agency, finance company, other assignee, or an attorney for an assignee has contacted you about a debt that you originally owed to someone else, list the original creditor, as well as the collection agency or finance company (including each office of that agency with which you have done business), the attorney, and anyone else who has communicated with you about the debt.

The questions in the section titled "Nondischargeable Debts" enable us to learn which debts would not be discharged if you filed for bankruptcy. If these debts represent a large part of your indebtedness, bankruptcy may not solve your problems.

Some questions inquire about wrongdoing or alleged wrongdoing on your part. Try to be as objective as possible when answering them. If any possibility exists that someone may accuse you of wrongdoing, state the facts fully, even if you believe that the accusation has no merit. If you prefer, we can discuss the facts when we review the questionnaire.

We must ascertain which of your creditors are secured and which are unsecured. A secured creditor may legally remove some item of your property without a court order because you have agreed to permit him or her to take (or repossess) this property. Typical examples of secured creditors include your home mortgage lender, your automobile loan lender, sellers of household furniture or appliances on credit, and finance companies that obtained an agreement permitting them to seize household possessions in exchange for the loan. An unsecured creditor is one to whom you owe money but who does not have a security interest in your property. Typical examples of unsecured creditors are general credit card accounts and loans made on your personal credit.

If you have a VA or FHA loan on your home, list the VA or FHA office that processed the loan, as well as the company to which you make your payments.

If you owe more than one debt to the same creditor, such as continuing purchases from a single store or refinancing arrangements with a bank or a finance company, include information about each debt.

Few people realize how many creditors they have. For example, if a creditor has assigned a debt, as explained above, both the party to whom the debt was originally owed and the party who is attempting to collect the debt are

creditors. If you borrowed money and are now dealing with a different office of the lender, you must list each office as a creditor. If a friend cosigned a loan for you, you must list your friend as a creditor, as well as the company that made the loan.

The following is a list of typical debts. It is not intended to be complete, but it should help you recall all your debts. You must list every debt you have, not just those appearing on this list.

1. Taxes (federal, state, county, city, income, property, sales, and any other taxes).

2. Wages you owe any employee(s).

3. Money you hold for any employee(s).

4. Taxes or social security payments you have withheld for any employee(s).

5. Money owed to any branch of the federal or state government, such as the Small Business Administration and FHA.

6. Money you owe a former spouse, such as alimony, child support, or property settlement payments.

7. Rent, mortgages, and deeds of trust.

8. Conditional sales contracts, such as appliance or furniture purchase loans or rent-to-purchase agreements.

9. Automobile purchase contracts.

10. Revolving credit accounts, such as Visa, Mastercard, and store charge accounts and gas and oil credit cards.

11. Judgments against you for money (include names and addresses of creditors, assignees, and attorneys).

12. Lawsuits pending against you (include names and addresses of all parties, assignees, and attorneys).

13. Liens against you (include names and addresses of persons holding liens and their attorneys).

14. Medical bills from physicians, clinics, or hospitals.

15. Debts for property that has already been repossessed.

16. Loans on insurance polices.

17. Loans you cosigned (even if the other person is paying the loan).

18. Loans cosigned by someone for you.

19. Loans owed to friends and relatives.

20. Loans you obtained for someone else's benefit.

21. Debts for services rendered to you, such as legal and accounting services.

List all your assets with equal care. When you list the real and personal property you own, estimate its value in its used condition, not its new or replacement value. If you are unsure of the value, give an approximate amount, and we will discuss the matter when you return the papers.

If you fail to list all your property, you may have to forfeit certain nonexempt items to creditors in future legal proceedings. Listing the property in this questionnaire will alert this office to its existence and should enable us to protect your interests and prevent losing the property to creditors.

If you own your home, list the complete address and bring the deed or title insurance policy so that we can describe

it properly. A mistake might result in the loss of your property.

If you do not have space on the form to complete the information requested, attach additional sheets. On those sheets, please refer to the number of the question you are answering. Make a note of all questions you do not understand or cannot fully answer so that we can discuss them.

You will find requests throughout the questionnaire for papers and documents. Be sure to bring them with you to our office. They will assist us in properly advising you. We will return them to you after we complete our services.

Please indicate that you have read and understand the above information by signing these instructions and returning them with the completed questionnaire.

Date: _ _ _ _ _ _ __[*Client's signature*]__
__[*Spouse's signature*]__

*Comment:* By completing the questionnaire, the attorney will have all the necessary information if the debtor chooses to file for bankruptcy. For further discussion of bankruptcy, see chap 12.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.11 b. Form: Questionnaire

## §4.11 b. Form: Questionnaire

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1. Name and Residence
   a. Full name (no initials):_____
   b. Social security number:_____
   c. Have you used any other name or names within the past 6 years (include both personal and business names): If you have used other names, please state:_____

      _____

      _____
   d. At what address do you now reside:_____
   e. At what other addresses have you resided during the past 6 years?_____

      _____
   f. Marital status

      Married ___ Divorced ___ Separated ___ Single ___ Widowed ___

      Divorce or dissolution pending? Yes ___ No ___

      Other (e.g., long-term live-in partner)_____
   g. Spouse's name:_____
   h. Spouse's social security number:_____
2. Occupation and Income
   a. Are you currently employed? Yes ___ No ___
   b. What is your occupation?_____
   c. Name and address of your employer:_____

      _____
   d. How long have you been employed at your present job, business, or profession?
   e. Is your spouse currently employed? Yes ___ No ___

      If yes, please state:

      Your spouse's occupation:_____

      Your spouse's employer:_____
   f. How long has your spouse been employed at his or her present job, business, or profession?_____
   g. Have you been involved in a business partnership during the past 6 years? Yes ___ No ___

      If yes, please state:

      Name of partnership:_____

      Dates:_____

      Address:_____

      Other parties:_____

      Nature of business:_____
   h. Have you been in business by yourself or with others within the past 6 years? Yes ___ No ___

If yes, please state:

Name of business:_____

Dates:_____

Address:_____

Other parties:_____

Nature of business:_____

i. What income did you receive from your trade or profession during this current year to date and the last 2 calendar years?

Current year to date: $_____

Last year: $_____

Year before last: $_____

j. What income did you receive from sources other than your job, profession, or business during the last 2 years (investments, sales of property, spousal or child support, etc.)?_____

| | |
|---|---|
| Current year to date: $_____ | Source(s): _____ |
| Last year: $_____ | Source(s): _____ |
| Year before last: $_____ | Source(s): _____ |

3. Tax Returns and Refunds

a. Where did you file your federal and state income tax returns in the last 2 years?

Last year:_____

Year before last:_____

b. Did you receive any tax refunds during the past year?
Yes ___ No ___

If yes, please state sources (federal, state, etc.) and the amounts:

Sources:_____

Amounts:_____

c. Are you presently entitled to any tax refunds from any governmental entity? Yes ___ No ___

If yes, please state the sources and amounts:

Sources:_____

Amounts:_____

d. If you are to receive any tax refunds, are these amounts owed to you jointly with another person or entity? Yes ___ No ___

If yes, please identify which taxes and the person(s) or entity(ies) jointly entitled to such refunds:

4. Financial Accounts, Certificates of Deposit, and Safe Deposit Boxes

a. Have you had any bank accounts in your own name or any other name(s) during the past 2 years? Yes ___ No ___

If yes, please state the following for each account (use additional sheets if necessary):

Name of account:_____

Account number:_____

Institution and address where account located:_____

Type of account (checking, savings, etc.):_____

Amount presently on deposit: $ _____

Name, address, and relationship of other persons authorized to make withdrawals from the accounts:

_____

b. Have you maintained any accounts in names other than your own during the past 2 years? Yes ___ No ___

If yes, please state the following for each account, regardless of whether the accounts were maintained alone or jointly with another person or entity (use additional sheets if necessary):

Name of account:_____

Account number:_____

Institution and address where account located:_____

Type of account (checking, savings, etc.):_____

Amount presently on deposit: $ _____

Name, address, and relationship of other persons authorized to make withdrawals:

_____

_____

c. Do you have accounts at any other financial institutions, such as credit unions, savings and loan associations, or investment brokerage houses in your name or any other name, either alone or with anyone else? Yes ___ No ___

If yes, please state the following for each account (use additional sheets if necessary):

Name of account:_____

Account number:_____

Institution and address where account located:_____

Type of account (checking, savings, etc.):_____

Amount presently on deposit: $ _____

Names and addresses of all persons authorized to make withdrawals:

_____

_____

d. Have you owned, rented, leased, or used any safe deposit box or other depository within the past 2 years? Yes ___ No ___

If yes, please state the following information for each box or depository:

Name of bank or depository:_____

Address of bank or depository:_____

Name box held in:_____

Other persons who have/had access:_____

Description of contents:_____

_____

e. Have you surrendered or transferred any safe deposit boxes or other depositories? Yes ____ No ____

If yes, please state the following:

Location of box or depository:_____

Date of surrender or transfer:_____

Name and address of person or entity receiving box or depository:

_____

5. Books and Records

a. Have you kept books of accounts or records relating to your financial affairs within the past 2 years? Yes ___ No ___

If yes, please state the name and address of anyone having possession of your books and records:

_____

_____

b. If any of your books and records are not available, please explain:

_____

c. Have any books of accounts or records relating to your affairs been destroyed, lost, or otherwise disposed of within the previous 2 years? Yes ___ No ___

If yes, please state the following:

Date of destruction, loss, or disposition:_____

Reason for destruction, loss, or disposition:_____

6. Property Held for Another Person

Do you hold any property that belongs to some other person or entity?
Yes ___ No ___

If yes, please state the following:

Name of person or entity:_____

Address of person or entity:_____

Description of property or value:_____

Describe any writings or documents reflecting such possession:

_____

_____

7. Prior Bankruptcy

Have you ever declared bankruptcy or been forced into bankruptcy?
Yes ___ No ___

If yes, please state the following:

Date of prior bankruptcy:_____

Location of bankruptcy court:_____

Type of bankruptcy:_____

Case number:_____

Disposition of case (e.g., was a discharge granted, case dismissed, plan confirmed, *etc.*):

8. Receiverships, General Assignments, and Other Modes of Liquidation:

a. Is any of your property in the hands of a receiver, trustee, liquidating agent, or similar person or entity? Yes ____ No ____

If yes, please explain:_____

b. Have you assigned or transferred any of your property or other valuable rights to creditors, or to others for the benefit of your creditors? Yes ____ No ____

If yes, please state the following for each assignment (use additional sheets if necessary):

Date of assignment:_____

Name and address to whom assigned:_____

Amount realized by you because of the assignment: $_____

Disposition of proceeds:_____

Your estimate of the value of the transferred property, without deduction for deeds of trust, liens, or other encumbrances:

$_____

c. Have you entered into any settlements or agreements with any creditors during the past year? Yes ____ No ____

If yes, please describe:_____

_____

9. Property Held by Another

Does anyone hold any property of yours or any property in which you have an interest? Yes ____ No ____

If yes, please state:

Name of person or entity:_____

Address of person or entity:_____

Location of property:_____

Description of property:_____

Reason person is holding your property:_____

10. Suits, Executions, and Attachments

    a. Are you a party to any litigation or lawsuit pending at this time?
    Yes ____ No ____

    If yes, please state the following information for each matter (use additional sheets if necessary):

    Name of case:_____

    Court where case is pending (superior, municipal, judicial, small claims, etc.):

    Location of court:_____

    Case number:_____

    Nature of proceedings (collection, personal injury, property dispute, criminal, etc.):

    b. Have you been a party to any suit that was terminated, dismissed, or settled within the past year? Yes ____ No ____

    If yes, please state the following information for each matter (use additional sheets if necessary):

    Name of case:_____

    Court where case is pending (superior, municipal, judicial, small claims, *etc*.):

    Location of court:_____

    Case number:_____

    Nature of proceedings (collection, personal injury, property dispute, criminal, etc.):

    c. Have you had any property attached or seized within the past year?
    Yes ____ No ____

    If yes, please state the following information for all such property (use additional sheets if necessary):

    Property attached or seized:_____

    By whom (name and address):_____

    d. Have you had any wages garnished within the past year?
    Yes ____ No ____

    If yes, please state the following:

    Amount of wages garnished:_____

    Dates of garnishment:_____

    Party obtaining garnishment order:_____

11. Payments of Loans, Installment Purchases, and Other Debts

    a. Have you made any payments, in whole or in part, on any loans during the past year? Yes ____ No ____

    b. Have you made any payments, in whole or in part, on any installment purchase during the past year? Yes ____ No ____

    c. Have you made any payments, in whole or in part, on other debts of any kind during the past year? Yes ____ No ____

    If your answer to any of the above is yes, please state the following for each payment (use additional sheets if necessary):

    Name of persons receiving payment:_____

    Address of persons receiving payment:_____

    Amount of loan, debt, and purchase price of goods and services:

    _____

    _____

Date of original transaction:_____

Dates and amounts of payments:_____

Relationship, if any, of person receiving payment:_____

d. If you are completing this questionnaire for a partnership or corporation, was any debt payment made to any party who was a partner, officer, director, stockholder, or insider, or to a relative of a partner, officer, director, stockholder, or insider? Yes ____ No ____

e. Have you had any debts to any creditors, including banks, that were set off by that creditor against your debt during the past year? (A setoff occurs when a creditor refuses to perform an obligation in your favor in order to set off your debt to the creditor. For example, a bank might take money from your savings account because you did not pay on a loan or credit card account.) Yes ____ No ____

If yes, please state the following information for each setoff (use additional sheets if necessary):

Name of creditor:_____

Address of creditor:_____

Details of setoff:_____

12. Transfers of Property

a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donations, during the pest year?
Yes ____ No ____

If yes, please state the following information for each gift (use additional sheets if necessary):

Name:_____

Address:_____

Date:_____

Description of gift:_____

Value of gift: $_____

b. Have you transferred any real or personal property during the past year, either absolute or for purposes of security for a debt?
Yes ____ No ____

If yes, please state the following information for each transfer (use additional sheets if necessary):

Description of property:_____

Date of transfer or disposition:_____

Name of person to whom transferred:_____

Method of disposition:_____

Relationship of person receiving property:_____

Amount received in return for transfer: $_____

13. Repossessions and Returns. Has any of your property been returned to, or repossessed by, the seller or other secured party during the past year? Yes ____ No ____

If yes, please state the following information for each repossession or return (use additional sheets if necessary):

Name of party obtaining property:_____

Address:_____

Description of property:_____

Value of property: $_____

14. Losses

a. Have you lost any property as a result of fire, theft, or gambling during the past year? Yes ____ No ____

If yes, please state for each loss (use additional sheets if necessary):

Date of loss:_____

Address of loss:_____

Person to whom lost (if applicable):_____

Description of lost property:_____

Value of lost property: $_____

b. If you have lost any property in the past year, was the loss covered by insurance? Yes ____ No ____

If yes, please state for each loss (use additional sheets if necessary):

Were insurance proceeds recovered:_____

Is a claim currently pending:_____

Amount of claim: $_____

Name and address of insurance company:_____

15. Payments or Transfers to Attorneys

a. Have you consulted with an attorney during the past year?
Yes ____ No ____

If yes, please state:

Name of attorney:_____

Address:_____

Dates or periods of consultation or representation:_____

Purpose of consultation or representation:_____

b. Have you paid any money or transferred any property to an attorney or to another person on behalf of an attorney in the past year?
Yes ____ No ____

If yes, please state:

Amount paid or value of property transferred: $_____

Date of payment or transfer:_____

c. Have you agreed to pay any money or transfer any property to an attorney, or to another person on behalf of the attorney?
Yes ____ No ____

If yes, please state:

Amount to be paid or value of property to be transferred:_____

Terms of agreement:_____

16. Creditors Having Priority

a. Do you owe any money to a present or former employee for any of the following: wages, salary, commissions, vacation, severance, or sick leave? Yes ____ No ____

If yes, state the following (use additional sheets if necessary):

| Name of Employee | Address | Nature and Amount of Debt |
|---|---|---|
| _____ | _____ | _____ |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

b. If any debts are owed to employees, were these debts incurred either in the past 90 days or in the 90 days immediately before terminating your business? Yes ____ No ____

If yes, please identify:_____

c. Do you owe any debts for contributions to employee benefit plans?
Yes ____ No ____

If yes, please identify and explain:_____

_____

If you owe any debt to an employee benefit plan, was the debt incurred for services rendered either within the past 180 days or in the 180 days immediately before terminating your business?
Yes ____ No ____

If yes, please identify and explain:_____

_____

d. Do you owe any debts to individuals for deposits made toward the purchase, lease, or rental of property or services?
Yes ____ No ____

If yes, was the transaction entered into for personal, family, or household use, rather than for business purposes?
Yes ____ No ____

If yes, was the property or service delivered or provided as agreed?
Yes ____ No ____

Will anyone claim that you owe them money for a deposit toward the purchase, lease, or rental of property or services that were not delivered? Yes ____ No ____

If yes, please explain:_____

e. State whether you owe any amounts to the following state and federal taxing authorities, their addresses, and the amounts owed.

| Taxing Authority | Address | Amount Owed |
|---|---|---|
| Internal Revenue Service | _____ | $_____ |
| Social Security Administration | _____ | $_____ |
| Franchise Tax Board | _____ | $_____ |
| Department of Benefit Payments | _____ | $_____ |
| Department of Social Services | _____ | $_____ |
| Other taxing authorities (identify) | _____ | $_____ |
| TOTAL | | $_____ |

17. Secured Creditors

The following questions concern debts secured by real or personal property. The most common examples of such debts include homes, automobiles, mobilehomes, and large household goods such as appliances or furniture. Any item of real or personal property, however, can be used as security for a debt. Therefore, if you are in doubt, list the debt in this portion of the questionnaire and indicate your lack of knowledge regarding the security. If necessary, use additional sheets to reflect all secured creditors.

State the following information for each secured creditor:

Name of creditor:_____

Account number: _____ Date debt incurred:_____

Complete mailing address (including zip code):_____

_____

Basis for debt (loan, purchase of car, etc.):_____

_____

Amount of debt claimed by creditor: $_____

If disputed, amount you admit owing: $_____

Specific description of each item of collateral, i.e., property the creditor can take if you do not pay (include year, make, model, location of property, and market value of each item):_____

Amount of each installment payment and when due:_____

If the payments are not current, the amount in arrears:_____

Is some other party also responsible for the debt?
Yes ____ No ____

If yes, please state name and address of each responsibility:

_____

_____

18. Unsecured Creditors

For each unsecured creditor, please state the following information:

Name of creditor:_____

Account number:_____

Creditor's complete mailing address (including zip code):

_____

_____

Basis for debt:_____

Amount claimed by creditor: $_____

NOTE: A contingent debt is one that depends on the happening of an event. For example, if you guaranteed another person's debt, you will not owe the creditor until the other person stops paying the debt as required. An unliquidated debt is one that cannot be easily calculated. For example, if you injured someone in an accident for which you are at fault, you most likely will not know how much you owe them. A debt subject to setoff is one that can be reduced by a debt the other party owes you. For example, if a contractor performed some remodeling for his accountant, the contractor could set off any amount owed to the accountant against any amount the accountant owes the contractor.

Is the debt contingent, unliquidated, disputed, or subject to setoff?
Yes ____ No ____

If yes, please identify and explain:_____

_____

Is the debt evidenced by judgment, negotiable instrument, or other writing? Yes ____ No ____

If yes, please identify and attach a copy of the writing to this questionnaire:

Was the debt incurred as a partner, joint obligor, or cosigner?
Yes ____ No ____

If yes, please identify and state the name and address of the partner, joint obligor, or cosigner:

_____

19. Real Property

a. State the addresses or locations of all real property (land, buildings, etc.) in which you have an interest of any kind:

_____

b. Describe the real property stated above (raw land, single-family residence, condominium, apartment, or office building, etc.):_____

_____

c. State the nature of your interest in any property that you might inherit (include separate and community property, equitable and future interests, life estates, leases, and any other rights and powers over real property):

d. State the nature of the document by which you acquired each of your interests in the above real properties (grant deed, court judgment, probate order, etc.):_____

_____

e. State the estimated value of your interest in real property *without* deduction for deeds of trust, liens, or other

encumbrances: $_____

f. State the following information for each deed of trust, mortgage, encumbrance, or other lien against each interest of real property owned by you:

Property address:_____

Name and address of lienholder:_____

Amount of lien: $_____

20. Personal Property

Please answer each of the questions below. Your statement must include the description, location, and value of all personal property in your possession, whether or not you own it, as of the date of preparing this questionnaire.

a. Cash on hand: $_____

Description and location:_____

b. Deposits of money with banking institutions, savings and loan associations, brokerage houses, credit unions, public utility companies, landlords, and others: $_____

Description and location:_____

c. Household goods, supplies, and furnishings: $_____

Description and location:_____

d. Books, pictures, and other art objects; stamp, coin, and other collections: $

Description and location:_____

e. Wearing apparel: $_____

Description and location:_____

f. Jewelry: $_____

Description and location:_____

g. Firearms, sports equipment, and other personal possessions: $__

Description and location:_____

h. Automobiles, trucks, trailers, and other vehicles: $_____

Description and location:_____

i. Boats, motors, and their accessories: $_____

Description and location:_____

j. Livestock, poultry, and other animals: $_____

Description and location:_____

k. Farming equipment, supplies, and implements: $_____

Description and location:_____

l. Office equipment, furnishings, and supplies: $_____

Description and location:_____

m. Machinery, fixtures, equipment, and supplies (other than those listed in Items j and l) used in business: $

Description and location:_____

n. Inventory: $_____

Description and location:_____

o. Tangible personal property of any other description: $_____

Description and location:_____

p. Patents, copyrights, licenses, franchises, and other general intangibles (specify all documents and related writings): $

Description and location:_____

q. Government and corporate bonds and other negotiable and nonnegotiable instruments: $

Description and location:_____

r. Other liquidated debts owed to you: $_____

Description and location:_____

s. Contingent and unliquidated claims you may have against others (give estimated value of each): $

Description and location:_____

t. Interests in insurance policies (provide name of insurance company on each policy and provide the surrender or refund value of each):

$_____

Description and location:_____

u. Annuities (list and name each issuer): $_____

Description and location:_____

v. Stocks and interests in incorporated and unincorporated companies (list separately): $

Description and location:_____

w. Interests in partnerships (list separately): $_____

Description and location:_____

x. Equitable and future interests, life estates, and rights or powers exercisable for the benefit of the bankrupt or debtor (specify all related written instruments): $_____

Description and location:_____

y. Personal property of any kind not otherwise stated above: $_____

Description and location:_____

z. Total value: $_____

21. Do you own, or have in your possession, property of any kind that is not stated on this questionnaire? Yes ____ No ____

If yes, please state details, including description and value:

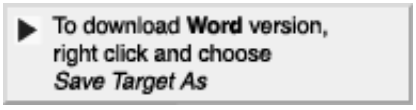
_____ $_____

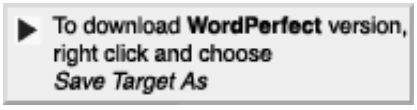
_____ $_____

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.12 c. Form: Oath to Questionnaire

## §4.12 c. Form: Oath to Questionnaire




**I, _ _[*name*]_ _, declare that I have personally prepared, reviewed, and read the answers in the _ _[*questionnaires/ forms/statements*]_ _ attached and that I have completely, accurately, and truthfully stated the information requested regarding all my debts and property, and all other information requested to the best of my knowledge, information, and belief.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.13 d. Form: Summary of Business Interests

## §4.13 d. Form: Summary of Business Interests

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BUSINESS INTERESTS

Please state the following for each of your business interests (use additional sheets if necessary):

1. Form of entity (corporation, partnership, etc.):_____
2. Type of business (grocery, restaurant, service, etc.):_____
3. Percentage owned and options to buy additional shares or percentages:
_____
4. Date of acquisition:_____
5. Source of investment:_____
6. Estimated value: $_____
7. Annual net income: $_____
8. Please attach as exhibits the following documents:
    a. Profit and loss statements
    b. Balance sheets
9. Equipment and its value:_____
10. Insurance coverage on the property:_____

_____

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.14 5. Form: Budget Questionnaire

## §4.14 5. Form: Budget Questionnaire

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**BUDGET**

### A. MONTHLY INCOME

Please state your family's average monthly income (including wages, pensions, unemployment compensation, disability income, dividends, interest income, and your spouse's income) in the spaces provided below. In arriving at gross income, do not subtract deductions taken from your paycheck for taxes, credit union loans or savings, stock or bond purchase plans, or other voluntary or involuntary deductions. This information is required for the court documents if a bankruptcy petition is filed and is also necessary for negotiating with your creditors. Please estimate carefully and do not attempt either to reduce or to overstate actual amounts of income and expenses.

| 1. Gross Family Income | Client | Spouse | Other Long-Term Live-in Partner |
|---|---|---|---|
| Wages | $_____ | $_____ | $_____ |
| Social security (old age or disability) | $_____ | $_____ | $_____ |
| State disability or unemployment insurance | $_____ | $_____ | $_____ |
| Public assistance (welfare, AFDC payment, etc.) | $_____ | $_____ | $_____ |
| Child and spousal support | $_____ | $_____ | $_____ |
| Dividends and interest | $_____ | $_____ | $_____ |
| Rents | $_____ | $_____ | $_____ |
| All other sources (specify): _____ _____ | $_____ | $_____ | $_____ |
| TOTAL | $_____ | $_____ | $_____ |

| 2. Deductions From Gross Family Income | Client | Spouse | Other Long-Term Live-in Partner |
|---|---|---|---|
| Income taxes (state and federal) | $_____ | $_____ | $_____ |
| Social security | $_____ | $_____ | $_____ |
| Unemployment insurance | $_____ | $_____ | $_____ |
| Medical or other insurance | $_____ | $_____ | $_____ |
| Union or other dues | $_____ | $_____ | $_____ |
| Retirement or pension fund | $_____ | $_____ | $_____ |
| Savings plan, credit union | $_____ | $_____ | $_____ |

| | | | |
|---|---|---|---|
| Other (specify): _____ | $_____ | $_____ | $_____ |
| TOTAL | $_____ | $_____ | $_____ |

| 3. Net Monthly Income | Client | Spouse | Other Long-Term Live-in Partner |
|---|---|---|---|
| TOTAL | $_____ | $_____ | $_____ |

**B. NECESSARY EXPENSES** (not deducted above)

Itemize how much of your monthly take-home income you budget for each of the following categories

| | |
|---|---|
| 1. Family Maintenance Expenses | |
| Groceries | $_____ |
| Clothing | $_____ |
| Charge accounts | $_____ |
| Dry cleaning and shoe repair | $_____ |
| Other | $_____ |
| TOTAL | $_____ |
| 2. Housing and Related Expenses | |
| Rent or mortgage payments | $_____ |
| Electricity and gas | $_____ |
| Cable television | $_____ |
| Telephone | $_____ |
| Fuel | $_____ |
| Water | $_____ |
| Sewage | $_____ |
| Domestic help/babysitter | $_____ |
| Taxes | $_____ |
| Insurance | $_____ |
| Repairs and remodeling | $_____ |
| Garden supplies (tools, plants, etc.) | $_____ |
| Other | $_____ |
| TOTAL | $_____ |
| 3. Work-Related Expenses | $_____ |
| Transportation | $_____ |
| Bridge tolls | $_____ |
| Dues (union, etc.) | $_____ |
| Other | $_____ |
| TOTAL | $_____ |

4. Educational Expenses

College tuition $_____

Travel expenses $_____

Allowance $_____

School lunches $_____

Athletic expenses $_____

Nursery school $_____

PTA and other school affairs $_____

Music lessons $_____

Private tutors $_____

Subscriptions $_____

School uniform purchases $_____

Laundry (uniforms, etc.) $_____

Toys and birthday gifts $_____

Other $_____

TOTAL $_____

5. Medical Expenses (not covered by insurance)

Hospital and doctor bills $_____

Dental bills $_____

Insurance $_____

Drugs and medication $_____

Other $_____

TOTAL $_____

6. Automobile Expenses

Monthly payments $_____

Insurance $_____

Gas and oil $_____

Repairs and new parts $_____

Other

TOTAL $_____

7. Social and Political Contributions

Church, temple, etc. $_____

Charities $_____

Political donations $_____

Other $_____

TOTAL $_____

8. Entertainment

Movies, plays, concerts, etc. $_____

| | |
|---|---|
| Dining out | $_____ |
| Videotapes | $_____ |
| Books | $_____ |
| Records and audiotapes | $_____ |
| Photography | $_____ |
| Sports | $_____ |
| Subscriptions (newspapers, magazines, etc.) | $_____ |
| Other | $_____ |
| TOTAL | $_____ |
| 9. Miscellaneous Estimate monthly expenses for: | |
| Vacations | $_____ |
| Holidays | $_____ |
| Special family events (weddings, etc.) | $_____ |
| Christmas savings | $_____ |
| Retirement, if not deducted | $_____ |
| Life insurance | $_____ |
| Other insurance not listed elsewhere | $_____ |
| Haircuts, beauty treatments, etc. | $_____ |
| Bank charges | $_____ |
| Debts reduced to judgment | $_____ |
| Payments to former or separated spouse | $_____ |
| Child support, alimony, or spousal support | $_____ |
| Other | $_____ |
| TOTAL | $_____ |
| TOTAL OF CATEGORIES 1-9 | $_____ |

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.15 6. Form: Interview Questions on Specific Collection Action

## §4.15 6. Form: Interview Questions on Specific Collection Action

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**A. Original Transaction**

1. Did the original debt result from a purchase, loan, or lease?

   _____

2. If a purchase, what was bought, *e.g.,* car, furniture?_____
3. What representations were made to you about the item, *e.g.,* 5-year warranty unbreakable?
4. Were the representations made orally or in writing?
   (If in writing, the client should bring in the brochure, letter, contract, etc., that set forth the warranted facts.)
5. Who made the representations, *e.g.,* door-to-door salesman, television announcer, store manager?
6. Were you satisfied with the merchandise you bought?_____
   a. If not, why not?_____
   b. Did you complain?_____
   c. Name of person you complained to?_____
   d. Date(s) of complaint?_____
   e. What was the response to your complaint?_____
7. How did you happen to do business with this seller or lender (*e.g.*, advertising, previous transactions).

   _____

**B. The Debt**

1. What was the amount of the original debt? $_____
2. Were any of the following later added to the debt?

   | | |
   |---|---|
   | Interest: | $_____ |
   | Collection costs: | $_____ |
   | Court costs: | $_____ |
   | Attorney fees: | $_____ |
   | Late charges: | $_____ |
   | Other: | $_____ |

3. If you claim you do not owe the money, is it because:

   ____ The creditor has the wrong person?

   ____ If a loan, you never received the money?

   ____ You never received the merchandise?

   ____ The merchandise is defective?

   ____ You bought the merchandise because of a lie told by the salesman?

   ____ You bought the merchandise because of a mistake?

   ____ You did not know that you were signing a contract?

   ____ You never received a copy of the contract?

   ____ The contract was blank in whole or in part when you signed it?

____ You were forced to sign the contract?

____ You did not know what you were doing?

____ You paid the amount that you were told was due under the contract?

____ You were told you could cancel the contract and you did?

____ You filed bankruptcy proceedings and listed the debt on your bankruptcy schedules?

____ Other (supply details):_____

_____

4. If you claim you owe only part of the amount claimed, explain the difference:
_____

_____

5. If you admit that you owe the money:
   a. What is the amount due on each payment? $_____
   b. Did you fail to make any payments? ____
   c. How many have you missed? _____
   d. How many have you made? _____
   e. Total amount paid: $_____
   f. Total amount still due: $_____
   g. How often do you make the payments (*e.g.,* monthly, weekly)?
   _____
   h. Has your creditor ever accepted reduced payments?
   _____
   i. Did the creditor ever tell you that late payments would be accepted?
   _____
   j. Did the creditor ever tell you that reduced payments would be accepted?
   k. Do you have anything in writing stating that the creditor would accept late or reduced payments? Yes ____ No ____ (If yes, bring copies of these documents.)
   l. Who made statements on behalf of the creditor that late or reduced payments would be accepted?

      Were there any witnesses to such statements? Yes ____ No ____ (If yes, bring names, addresses, and phone numbers of witnesses.)
   m. If you were told that a "late payment charge" or a "service charge" would be assessed for making delayed payments, was this disclosed to you in any writing? Yes ____ No ____ (If yes, bring in copy of any such writing.)

**C. Court Action**

1. Have you been given or shown any court papers indicating that a suit has been filed against you on this debt? Yes ____ No ____
2. Have you seen any documents titled "Summons" or "Complaint"?
Yes ____ No ____ (If yes, bring in summons and complaint) When did you receive them?
3. If you do not have the papers, where are they?_____

_____

4. When you were served with the papers, did you:
   a. Give them to a lawyer? Yes ____ No ____ If yes, give the name and address of the lawyer:

   _____
   b. Answer the papers? Yes ____ No ____

      If yes, how did you answer?_____
   c. Ignore them? Yes ____ No ____ If yes, why? _____
   d. Other?_____

5. Has there been a trial or settlement in the case?

   Yes ____ No ____ If yes:

   a. When?_____

   b. Where?_____

   c. Name and address of your lawyer:_____

   _____

   d. Result of the suit (*e.g.,* judgment for creditor or settlement for $_____):

6. Did you ever receive notice that the creditor intended to take your default? Yes ____ No ____ (If yes, bring in that notice.)

7. Did you ever receive notice that a judgment had been entered against you? Yes ____ No ____ (If yes, bring in that notice.)

**D. Documents**

1. Did you sign a contract or any other papers for this purchase, loan, or lease? Yes ____ No ____ (If yes, bring in copies.)

2. With whom did you sign the contract originally (*e.g.,* name of seller or finance company)?

   Name and address:_____

3. Who holds the contract now (*i.e.*, who is attempting to collect the debt: collection agency, finance company, etc.)? Name and address:

   _____

4. If you are now being contacted by someone other than your original creditor, did your original creditor notify you that the debt had been assigned?_____

5. Who presented the contract or other papers for you to sign?

   Name and address:_____

6. With whom, acting on the creditor's behalf, did you deal before you signed the papers?

   Name and address:_____

7. Be sure to bring in all contracts, agreements, notices, receipts, payments, books, or any other papers relating to the original debt and any transfer of the debt.

*Comment:* If the debtor is consulting with counsel on a particular debt, rather than on a series of charges or various accounts, the attorney must elicit detailed information about the debt claim. The attorney may use the following questions as a guide when interviewing the client.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.16 7. Form: Attorney's Summary of Debtor's Questionnaire for Bankruptcy Schedules

## §4.16 7. Form: Attorney's Summary of Debtor's Questionnaire for Bankruptcy Schedules

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### DEBTS

| Bankruptcy Schedule | Debts | Community Property | Separate Property |
|---|---|---|---|
| Schedule E | Wages, etc., having priority | $_____ | $_____ |
| Schedule E | Deposits of money | $_____ | $_____ |
| Schedule E | Taxes owed to United States | $_____ | $_____ |
| Schedule E | Taxes owed to states | $_____ | $_____ |
| Schedule E | Taxes owed to other taxing authorities | $_____ | $_____ |
| Schedule D | Secured claims | $_____ | $_____ |
| Schedule F | Unsecured claims without priority | $_____ | $_____ |
| | DEBT TOTAL | | $_____ |

### PROPERTY

| Bankruptcy Schedule | Property Description | Amount |
|---|---|---|
| Schedule A | Real property (total value) | $_____ |
| Schedule B(1) | Cash on hand | $_____ |
| Schedule B(2) | Bank or financial institution account deposits | $_____ |
| Schedule B(3) | Deposits | $_____ |
| Schedule B(4) | Household goods | $_____ |
| Schedule B(5) | Books, pictures, and collections | $_____ |
| Schedule B(6) | Wearing apparel and personal possessions | $_____ |
| Schedule B(9) | Interests in insurance policies | $_____ |
| Schedule B(10) | Annuities | $_____ |
| Schedule B(12) | Interests in corporations and unincorporated companies | $_____ |
| Schedule B(13) | Interests in partnerships | $_____ |
| Schedule B(14) | Bonds and other instruments | $_____ |
| Schedule B(18) | Equitable and future interests, rights, | |

| | | |
|---|---|---|
| | and powers in personal property | $_____ |
| Schedule B(20) | Contingent and unliquidated claims | $_____ |
| Schedule B(21) | Patents and other general intangibles | $_____ |
| Schedule B(23) | Automobiles and other vehicles | $_____ |
| Schedule B(24) | Boats, motors, and accessories | $_____ |
| Schedule B(26) | Office equipment and supplies | $_____ |
| Schedule B(27) | Machinery, equipment, and supplies used in business | $_____ |
| Schedule B(28) | Inventory | $_____ |
| Schedule B(29) | Livestock and other animals | $_____ |
| Schedule B(31) | Farming supplies and implements | $_____ |
| Schedule B(33) | Property not otherwise scheduled | $_____ |
| | PROPERTY TOTAL | $_____ |

*Comment:* This form is compiled by the attorney from the debtor's questionnaire and provides a handy summary of the nature of the client's debts (*e.g.,* secured or unsecured, dischargeable or nondischargeable) and whether the debtor's property is exempt or nonexempt. It is derived from Official Bankruptcy Schedules D, E, and F (debts) and A and B (assets). If bankruptcy is the appropriate solution for this client, the form will assist the attorney in recommending appropriate relief under the Bankruptcy Code.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.17 E. Easing Fears and Correcting Misinformation

## §4.17 E. Easing Fears and Correcting Misinformation

Depending on his or her level of sophistication, a debtor may have certain worries or fears based on misinformation or lack of information. Many debtors worry that they will lose their household property, including their residence, to one or more creditors or that they will lose their job because of a wage garnishment. One of the primary services provided by a debtor's attorney is correcting this misinformation and easing the debtor's fears about what may happen during any legal process that a creditor may use to collect a debt.

The debtor, who may not understand that debt collection is a civil proceeding, may even think that an adverse judgment will result in jail time, and will find relief in knowing that the Debtor's Prison has been abolished. See Cal Const art I, §10. However, if a debtor served with an Order of Examination fails to appear at the debtor's examination as ordered, a contempt of court proceeding may be brought that could result in incarceration.

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## §4.18 1. Ending Creditor Harassment

A creditor's communication can become harassing or threatening to a debtor, even if a creditor is following the dictates of the fair debt collection practices laws and especially if the debtor has many creditors seeking to collect past due debts. See chap 2. Counsel should advise the debtor that he or she can end a creditor's communication attempts by referring the creditor to counsel. See, *e.g.,* CC §1788.14(c) (consumer debts). Regardless of whether the debtor retains the attorney, the debtor can instruct creditors to cease communication with the debtor. See §§2.16-2.17. The federal Fair Debt Collection Practices Act (15 USC §§1692-1692p) provides rules specifying when the collector of a consumer debt must cease communication with the debtor. 15 USC §1692c(c).

**PRACTICE TIP:** Ceasing communication with the creditor may prompt the creditor to immediately file a lawsuit. Therefore, continuing communication with a creditor may buy the debtor some additional time to resolve problems.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.19 2. Form: Preserving Exempt Property

## §4.19 2. Form: Preserving Exempt Property

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| Type of property | Location, description, and, if relevant to claim, present use of property | Statute creating exemption | Value claimed exempt |
|---|---|---|---|
| _____ | _____ | _____ | $_____ |
| | _____ | | |
| | _____ | | |
| _____ | _____ | _____ | $_____ |
| | _____ | | |
| | _____ | | |
| TOTAL | | | $_____ |

*Comment:* Counsel should provide the client a copy of Judicial Council Form EJ-165 (see §9.61) to help refresh his or her recollection as to assets he or she owns. Counsel should also explain the breadth of California's judgment debtor exemptions and assure the debtor that, with certain exceptions, he or she is unlikely to lose any property to creditors. See CCP §§703.010-704.995. For most lower, middle, and sometimes even upper-middle class debtors, it is likely that all or substantially all of the debtor's property will be exempt from creditors. However, few clients are qualified to determine whether their assets are exempt. The attorney can complete this form to identify exempt property.

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## §4.20 3. Dealing With Bank Levies

A primary exception to the generous protection afforded debtors by California's exemptions (CCP §§703.010-704.995) is the creditor's ability to levy on bank accounts (CCP §700.140). If there is another name on the bank account, counsel should determine if that other account holder might file a third party claim, and should advise the debtor of the third party's remedy. See §§9.49A-9.49G.

If the creditor is a financial institution, it also has an equitable right to set off against any accounts standing in a debtor's deposit accounts. See Fin C §§864, 6660. The term "debt" means an "interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes" but does mean a charge for bank services or a debit for uncollected funds or for an overdraft of an account imposed by a bank on a deposit account. Fin C §§864(a)(2), 6660(a)(5). When the debt arises from an extension of credit to a natural person primarily for personal, family, or household purposes, the first $1000 in the bank account is exempt from setoff. Fin C §§864(b), 6660(b); see *Martin v Wells Fargo Bank* (2001) 91 CA4th 489, 494, 110 CR2d 653 (setoff applied when business credit card used for personal and household expenses). If the funds on deposit in the bank account can be traced to funds that are exempt (*e.g.,* unemployment or disability benefits (see CCP §§704.120, 704.130)), the bank cannot exercise its setoff rights. See *Kruger v Wells Fargo Bank* (1974) 11 CA3d 352, 357, 113 CR 449.

Counsel might consider filing a claim of exemption with the levying officer (if within 10 days of the Notice of Levy) by tracing the funds in the account to show they are derived from an exempt source, such as "paid earnings" (CCP §704.070) or unemployment benefits (CCP §704.120). On the procedure for filing a claim of exemption, see §§9.56-9.67.

If the debtor has little or no money in the accounts subject to levy, the judgment creditor's bank account levies may not recover very much money. However, the levies will most likely greatly disrupt the debtor's finances.

Preventing creditors from obtaining funds from the debtor allows the debtor to maintain control over his or her limited funds and to continue paying essential bills. The debtor can set aside funds for legal counsel to defend against the creditor's action or to file for bankruptcy. The debtor can also set aside funds for other uses, such as making a settlement payment if doing so would assist the debtor.

**PRACTICE TIP:** A judgment-debtor should immediately consider going on a cash or money order basis, and closing bank accounts if a bank levy is made, or if judgment is imminent.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.21 4. Dealing With Wage Garnishments

### §4.21 4. Dealing With Wage Garnishments

Another limitation to the protection given judgment debtors by California's exemptions is the creditor's ability to garnish up to 25 percent of debtor's earned wages. See CCP §§706.010-706.154, 704.070. However, the debtor may be eligible to claim that all or part of the 25 percent is exempt as necessary for the support of the debtor and family. CCP §§703.115, 706.051. See *J.J. MacIntyre Co. v Duren* (1981) 118 CA3d Supp 16, 173 CR 715. The debtor will most likely need to prepare and file a claim of exemption form for wage garnishment (see Claim of Exemption (Judicial Council Form EJ160), set forth in §9.60) to be signed by debtors, as well as attaching the Financial Statement (Judicial Council Form EJ165) (see §9.61).

**PRACTICE TIP:** When completing Form EJ165, special care should be given to accurately determine the monthly income of the household, including the spouse. If the client is regularly employed, request the last three pay stubs, which will contain all the mandatory deductions. Also, determine how often the client is paid. For example, if payroll is every 2 weeks and the gross income is $2000, the monthly income would be $4333.33 ($2000 every 2 weeks equals $1000 x 52 weeks, divided by 12). Special attention must be given to real property assets to determine the amount of any equity that the client may have (alone or with others). Both the deed and any deeds of trust should be reviewed along with the monthly mortgage statement.

Counsel should carefully review with the client the monthly household expenditures and determine how much is currently being spent for the "necessaries of life," *e.g.,* rent and home mortgage payments, utilities, food, clothing, medical/dental expenses, transportation, education, insurance (*e.g.,* homeowner's, life, health, auto, and other policies), and payment for support of dependents.

The form requires a determination of what installment payments are being made on debts to other creditors. For credit card debts, have the client provide at least the most recent statement of account for each credit card obligation. (The levying creditor has no doubt reviewed a credit report on the debtor revealing the debtor's payments to other creditors.) If current payments are being voluntarily made by the debtor to other creditors, a judgment creditor would be able to argue at any hearing on the claim of exemption that those payments should be made instead to the levying judgment creditor.

The judgment creditor may choose to levy on a bank account traced to paid earnings held in a deposit account. The judgment debtor is entitled to claim an exemption for no less than 75 percent of the balance of paid earnings in the account on the date of the levy. 15 USC §1173; CCP §704.070; see *Ford Motor Credit Co. v Waters* (2008) 166 CA4th Supp 1, 83 CR3d 826. The remaining 25 percent may be subject to a further claim of exemption, which the debtor can prove "is necessary for the support of the judgment debtor and family" (CCP §723.051; see *J.J. MacIntyre Co. v Duren* (1981) 118 CA3d Supp 16, 173 CR 715) provided that the underlying debt is, itself, not for a "necessary of life."

The wage exemptions may not be available unless the judgment debtor is an "employee" as defined by CCP §706.011(c). Therefore, the earnings of a self-employed person or sole proprietor may be subject to garnishment up to 100 percent. See *Moses v DeVersecy* (1984) 157 CA3d 1071, 1074, 203 CR 906.

Counsel should determine if wages are currently being garnished. Only one garnishment can be placed on wages at a single time. CCP §706.023. If a prior garnishment is in effect, such as an earnings withholding order for support, then a second garnishment is ineffective. The employer should immediately notify the creditor in writing that the second garnishment is ineffective, accompanied by the text of CCP §706.023(c).

If this is the first wage garnishment, it also may be advisable for the debtor, by using the exemption procedure as an opportunity, to judicially establish how much, if any, can be garnished per pay period from his or her salary. The amount could be considerably less than would be allowed in a bankruptcy Chapter 13 payment plan, unless the debtor qualifies for relief under Chapter 7, which has become more difficult since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stat 23). See §§12.14-12.14D.

Bankruptcy proceedings would, of course, substantially inhibit the enforcement of subsequent judgments by wage

levy.

Although the debtor may worry about losing his or her job because of the wage garnishment, federal and state law prohibit an employer from terminating an employee due to a wage garnishment for a single indebtedness. See 15 USC §1674; Lab C §2929.

**NOTE:** Debtors may be discharged for multiple garnishments based on multiple debts. *Cheatham v Virginia Alcoholic Beverages Control Bd.* (4th Cir 1974) 501 F2d 1346. See also *Brennan v Kroger Co.* (7th Cir 1975) 513 F2d 961.

A creditor may contact an employer to verify the debtor's whereabouts and employment but may communicate orally with the employer only once; any further communication with the employer must be in writing. CC §1788.12(a). See 15 USC §§1692a-1692d.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.22 F. Client's Objectives

## §4.22 F. Client's Objectives

After fully assessing the debtor's financial situation, counsel must help the client set realistic objectives for counsel's representation; *i.e.,* how the debtor's dollars should be spent most wisely for legal advice and representation.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.23 1. Resolving Absolutely Hopeless Financial Situation

## §4.23 1. Resolving Absolutely Hopeless Financial Situation

A debtor's financial situation may be absolutely hopeless because of either the amount of debt owed or the aggressive tactics of one or more creditors. If the situation is absolutely hopeless, counsel should help the debtor recognize this and ascertain what to salvage and how to move on. The attorney's best advice may be a referral to a bankruptcy specialist if counsel does not have the necessary bankruptcy expertise.

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## §4.24 2. Buying Time to Work Out Solution

Sometimes the debtor's financial situation provides counsel with enough time to work out a solution to the debtor's financial problems short of filing for bankruptcy. Counsel should help the debtor ascertain whether the hope for a business turnaround is realistic or is unfounded optimism. If the debtor has only one or two problem creditors and a positive cash flow, defending a lawsuit may allow the debtor time to save cash for a lump-sum settlement or to begin making installment payments. The defense of a suit may also provide a debtor, particularly a business debtor, with sufficient time to rehabilitate business finances that may have soured because of the business cycle or other external factors.

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## §4.25 3. Saving Assets Serving as Collateral

A debtor in an almost hopeless financial situation may still have the opportunity to save some assets serving as collateral for certain loans, such as the debtor's home or automobile. Counsel should be realistic when discussing these issues with the debtor. A debtor who is only one or two payments behind and has a positive cash flow after paying essential bills may be able to pay past due arrearages on a home loan or car loan.

If the debtor's finances are already stretched tight and the debtor is several months behind, it may be better to let go of the collateral. If paying past due arrearages and remaining current on future payments is unrealistic and the debtor will probably lose the collateral anyway, counsel should help the client realize this early on, before the debtor has paid thousands of dollars in arrearages.

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### §4.26 4. Dealing With Nondischargeable Debt

Counsel should help the debtor determine whether he or she has nondischargeable or potentially nondischargeable debt because its existence may significantly alter the type of assistance the debtor needs. Nondischargeable debt may make a bankruptcy less attractive or alter the type of bankruptcy under consideration. Nondischargeable debt may also make a settlement of some type with the creditor more attractive or sometimes a necessity. Nondischargeable debts may include recent tax obligations, debts arising from intentional tort liability, from fraud or certain breaches of fiduciary duty, or from credit card debt incurred close to a bankruptcy petition filing. 11 USC §523(a). On bankruptcy issues, see chap 12.

**PRACTICE TIP:** If the debtor is a bankruptcy candidate, counsel should immediately advise the debtor to stop using all credit cards or other lines of credit except in extremely rare circumstances.

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## §4.27 II. ACCEPTING OR DECLINING REPRESENTATION

Counsel should avoid giving the debtor specific advice during the initial consultation. Instead, the attorney should ascertain the scope of the debtor's problems and generally explain various alternatives and strategies for resolving them. After the initial consultation, the attorney must decide whether to represent the potential client. Only after deciding to accept representation should the attorney provide specific advice tailored to the client's problems. The attorney should consider several factors in making this decision:

- Does the attorney have the required expertise to represent the debtor? See Cal Rules of Prof Cond 3-110. For example, if the attorney does not have bankruptcy expertise and the client will need it, the attorney should refer the debtor to an attorney with such expertise. For further discussion of Rule 3-110, see §1.12.
- Are the debtor's objectives realistic given his or her financial condition? If after a frank discussion a debtor who is buried under a hopeless mountain of debt still insists that he or she can work his or her way out of debt, the attorney-client relationship will be highly unsatisfactory for both parties.
- Are the debtor's objectives permissible under law? See Cal Rules of Prof Cond 3-200. For example, counsel should assist the bankruptcy candidate with exemption planning. See *In re Carey* (10th Cir 1991) 938 F2d 1073. But see *In re Levine* (11th Cir 1998) 134 F3d 1046. Properly advising the debtor of all available exemptions and the debtor's options for using them is one of the most important functions of a bankruptcy attorney; failure to do so almost surely constitutes malpractice. If the debtor seeks assistance in fraudulently transferring assets before filing a bankruptcy petition, however, the attorney should decline representation.
- What is the scope of the representation? If the debtor has one or more lawsuits pending against him or her, the debtor and the attorney should decide whether the attorney will appear and defend the lawsuits or will only provide advice and counsel on potential settlements or on a potential bankruptcy filing.
- If the attorney is defending against enforcement of judgment, he or she must determine whether to request that service on the judgment debtor be made by serving an attorney specified in a request signed by the judgment debtor with that attorney's written consent. See CCP §684.020(b)(1). Otherwise, all writs, notices, orders, or other paper that are required to be served postjudgment must be served on the judgment debtor. See CCP §684.020(a).
- Can the attorney and debtor agree on fees and costs? The attorney should arrange for an adequate retainer or monthly payments with the debtor, given the debtor's financial condition. The savvy debtor's counsel must ensure that he or she receives payment on a current basis during the representation to avoid receiving a preferential transfer before a bankruptcy filing that may be subject to being set aside.

An attorney who declines representation should clearly inform the potential client of this at the end of the initial consultation or as soon as possible thereafter. Time is of the essence. The attorney should remind the debtor of any upcoming dates that require action on the debtor's part, such as the date to respond to a Summons and Complaint in superior court or the date to file a claim of exemption with the levying officer (the sheriff or constable) who will be levying on the debtor's assets to enforce the judgment. If these upcoming dates require action, the attorney should suggest that the debtor consult another attorney on the matter. If immediate action is needed, the attorney should suggest that the client file, in pro per, either appropriate pleadings in court or a claim of exemption with the sheriff.

**PRACTICE TIP:** The attorney should send the client a letter after the consultation, again declining to accept representation and reminding the debtor of any upcoming dates that require action by the debtor.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.28 III. DEFENSE STRATEGIES

## §4.28 III. DEFENSE STRATEGIES

In consultation with counsel, the debtor must decide whether to:

- Expend funds necessary to settle a claim before litigation (see §§4.52, 4.100-4.121);
- Defend the pending collection action if a complaint has been filed (see §§4.28-4.51); or
- Preserve the debtor's rights in enforcement of judgment proceedings.

Although the debtor may decide not to take any of these actions (see, *e.g.,* §4.53), in most situations some protections can be offered with minimum attorney time and cost (see §4.51), even in the post-judgment context.

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## §4.29 A. Aggressive Defense

A debtor who has a strong, meritorious defense may wish to contest either liability or the amount owed. Potential grounds for defense require the debtor's attorney to review the creditor-debtor transaction to determine whether a contract defense is available. An extensive discussion of contract defenses is beyond the scope of this book, and counsel should consult a treatise on contract law. See, *e.g.,* California Law of Contracts, chaps 8-10 (Cal CEB 2007) for a discussion of defenses that are most appropriate to consumer creditor-debtor transactions. See also §§4.30-4.35.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.30 1. Goods or Services Not Satisfactory

## §4.30 1. Goods or Services Not Satisfactory

The debtor may defend against the action because of the unsatisfactory nature of the goods or services for which the debt was incurred. The debtor may seek to reduce the debt or eliminate it entirely. Eliminating the debt, however, may require the debtor to return any goods received in the transaction.

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### §4.31 2. Deficiency Claim on Secured Debt Barred

The debtor may seek to avoid any liability by asserting that a secured creditor's deficiency claim is barred. For credit sales of personal property consumer goods collateral, other than motor vehicles, the Unruh Act (CC §§1801-1812.20) bars a deficiency claim that the Commercial Code ordinarily permits. CC §1812.5. The Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.5) permits a deficiency claim on vehicle credit transactions, but a creditor's failure to follow proper notice or sale procedures in foreclosing may limit or bar a deficiency claim. CC §2983.8(b). For real property collateral, either the type of debt secured or the foreclosure method used may bar a deficiency claim. CCP §§580b (purchase money note deficiency bar), 580d (nonjudicial sale deficiency bar). Thus, the debtor's counsel should always investigate the circumstances surrounding any foreclosure.

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## §4.32 3. Adhesion Contract

In consumer transactions, the debtor often will have executed a form contract drafted by the creditor, with little or no opportunity to bargain over contract terms. When the creditor is trying to enforce an unfavorable contract provision against the debtor, the attorney should be alert to the possibility that the debtor may have an adhesion contract defense to the action, or that the contract may have an element of unconscionability that affects the standard rules of contract interpretation. See §4.33; see also California Law of Contracts, chap 5 (Cal CEB 2007).

**Definition.** The term "adhesion contract" means "a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates the subscribing party only the opportunity to adhere to the contract or reject it." *Neal v State Farm Ins. Cos.* (1961) 188 CA2d 690, 694, 10 CR 781; see also *Graham v Scissor-Tail, Inc.* (1981) 28 C3d 807, 171 CR 604. In *Graham,* the California Supreme Court found that "such contracts are, of course, a familiar part of the modern legal landscape in which the classical model of 'free' contracting by parties of equal or near equal bargaining strength is often found to be unresponsive to the realities brought about by increasing concentrations of economic and other power," which are "an inevitable fact of life for all citizens—businessman and consumer alike." 28 C3d at 817; see also *Armendariz v Foundation Health Psych Care Servs., Inc.* (2000) 24 C4th 83, 113, 99 CR2d 745.

**When enforceable.** Contracts of adhesion are generally enforceable according to their terms. However, "a provision contained in such a contract cannot be enforced if it does not fall within the reasonable expectations of the weaker or 'adhering' party." *Fischer v First Int'l Bank* (2003) 109 CA4th 4433, 1446, 1 CR3d 162; *24 Hour Fitness, Inc. v Superior Court* (1998) 66 CA4th 1199, 1213, 78 CR2d 533.

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### §4.33 4. Unconscionability

A court may refuse to enforce a contract if it finds that the contract, or any clause of it, was unconscionable when entered into. Civil Code §1670.5(a) provides that a contract clause found to be unconscionable is unenforceable, unless the court severs the clause or so limits its application as to avoid any unconscionable result. The Consumers Legal Remedies Act (CC §§1750-1784) includes insertion of an unconscionable provision in the contract in its list of unfair and deceptive consumer practices. CC §1770(a)(19).

**Elements of unconscionability.** Unconscionability has both a *procedural* and a *substantive* element. A court may not refuse to enforce a contract clause unless it determines that the clause is both procedurally and substantively unconscionable. CC §1670.5(a). See *Armendariz v Foundation Health Psych Care Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745.

**Procedural unconscionability.** The first element, procedural unconscionability, generally takes the form of a contract of adhesion. See *Little v Otto Stiegler* (2003) 29 C4th 1064, 130 CR2d 892. This element focuses on the aspects of oppression and surprise. *Armendariz,* 24 C4th at 114; *Wayne v Staples, Inc.* (2006) 135 CA4th 466, 482, 37 CR3d 544. In *Wayne*, the court stated that (135 CA4th at 480):

> [o]ppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice.… Surprise involves the extent to which the terms of the bargain are hidden in a "prolix printed form" drafted by a party in a superior bargaining position.

**Substantive unconscionability.** The second element, substantive unconscionability, focuses on the actual terms of the agreement and evaluates whether they create "overly-harsh" or "one-sided" results. *Armendariz v Foundation Health Psych Care Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745; *Little v Otto Stiegler* (2003) 29 C4th 1064, 1071, 130 CR2d 892. The question is whether the contractual provisions reallocate risk in an objectively unreasonable or unexpected manner. See *Jones v Wells Fargo Bank* (2003) 112 CA4th 1527, 1539, 5 CR3d 835. Put another way, "substantive unconscionability focuses on the terms of the agreement and whether those terms are 'so one-sided as to' shock the conscience." *Kinney v United Health Care Servs., Inc.* (1999) 70 CA4th 1322, 1330, 83 CR2d 348.

**Both elements not required in same degree.** While the courts will refuse to enforce agreements that are procedurally and substantively unconscionable, the two factors need not each exist to the same degree. "The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to a conclusion that the term is unenforceable and visa versa." *Armendariz,* 24 C4th at 114.

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### §4.34 5. Essential Contract Element Reserved or Uncertain

A contract that leaves an essential element for future agreement of the parties is unenforceable. For example, an agreement that stated "method of payment to be agreed upon before delivery" was held to be void in *Avalon Prods., Inc. v Lentini* (1950) 98 CA2d 177, 180, 219 P2d 485.

Mere uncertainty of a contract provision will not, however, always render the contract void. Failure to state the price, *e.g.,* is not necessarily a fatal defect in a contract covered by Com C §2305. On the enforceability of a contract with uncertain provisions, see generally California Law of Contracts, chap 5 (Cal CEB 2007).

If a contract provision is ambiguous or uncertain, it could be interpreted most strongly against the party who caused the uncertainty to exist. CC §1654. That is, any ambiguity is to be interpreted against the party who drafted the contract. Consumer transactions, which usually involve form contracts drafted by the creditor, may operate in the debtor's favor. See, *e.g., Sands v EIC, Inc.* (1981) 118 CA3d 231, 173 CR 342.

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## §4.35 6. Void or Voidable Contract

A void contract has no legal standing and cannot be enforced. *Progressive Collection Bureau v Whealton* (1944) 62 CA2d 873, 145 P2d 912. An unlawful contract may be one that violates an express provision of law or be contrary to public policy or otherwise contrary to good morals. See CC §1667.

In a consumer transaction, violation of consumer protection statutes might bar the claim. See §4.36.

Contracts are voidable when made by certain categories of persons, such as minors and persons of unsound mind. See CC §§25-42. See California Law of Contracts, chap 2 (Cal CEB 2007).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.36 7. Violation of Consumer Protection Statute Bars Claim

### §4.36 7. Violation of Consumer Protection Statute Bars Claim

The debtor may seek to defend an action based on federal or state consumer protection statutes. Violations of consumer protection statutes may result from the creditor's actions in the original transaction, such as failure to include required notices in a contract, or from the creditor's actions in attempting to collect the debt.

Whenever an attorney has a consumer client, the attorney should review the consumer protection statutes in CC §§1738-3268 to see whether one of the consumer protection provisions govern the transaction at issue. An applicable consumer protection statute may provide an affirmative defense or a direct cause of action against the creditor. The particular statute may also provide for attorney fees or statutory penalties, making the debtor's defense of the collection action more economically feasible. A consumer protection defense may provide the extra advantage the debtor needs to resolve the single debt collection problem satisfactorily without having to file for bankruptcy or take more drastic measures.

Numerous consumer protection statutes govern specific types of contracts between businesses and consumers, such as:

- CC §§1812.50-1812.69 (dance studio lessons);
- CC §§1812.300-1812.316 (membership camping);
- CC §§1812.80-1812.97 (health studio services);
- CC §§1694-1694.4 (dating services);
- CC §§1694.5-1694.9 (weight loss services);
- Cal Const art XV, §1 (usury; but see CC §1916.1);
- Bus & P C §§7150-7168 (home improvements);
- CC §§1667-1670.7 (unlawful contracts);
- CC §§1812.620-1812.649 (Karnette Rental-Purchase Act);
- CC §§1801-1812.20 (Unruh Act) (retail installment sales);
- CC §§1747-1748.95 (Song-Beverly Credit Card Act of 1971);
- CC §§2981-2984.6 (Rees-Levering Motor Vehicle Sales and Finance Act);
- CC §§2985.7-2992 (vehicle leasing);
- Bus & P C §§9880-9889.68 (Automotive Repair Act);
- CC §1793.22 (Tanner Consumer Protection Act ("Lemon Law"));
- CC §1793.23-1793.24 (Automotive Consumers Notification Act);
- CC §§1750-1784 (Consumers Legal Remedies Act);
- 15 USC §1601-1693r (Truth in Lending Act);
- Bus & P C §§300-352 (Consumer Affairs Act);
- CC §§1790-1795.7 (Song-Beverly Consumer Warranty Act);
- CC §§1788-1788.33 (Rosenthal Fair Debt Collection Practices Act);
- 15 USC §§1692a-1692p (federal Fair Debt Collection Practices Act);
- Bus & P C §§7000-7191 (Contractor's State License Law);
- Com C §2312-2317 (Uniform Commercial Code warranties);
- CC §§1798.92-1798.97 (identity theft);
- CC §§1799.90-1799.104 (consumer credit contracts);
- CC §§1812.620-1812.649 (rental-purchase contracts); and
- CC §§1350-1378 (Davis-Stirling Common Interest Development Act, particularly CC §1367 (liens for assessments and enforcements)).

**PRACTICE TIP:** The National Consumer Law Center publishes a series of practice guides covering fair debt collection, credit regulation, warranties, unfair and deceptive practices, and repossessions and foreclosures on a federal law level. For contact information for the National Consumer Law Center, see the Directory.

For discussion of the California and federal Fair Debt Collection Practices Acts, see chap 2.

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## 8. Interest and Finance Charges

### §4.37 a. Computing and Quoting Finance Charges

**Counsel must analyze elements of "debt."** In counsel's analysis, the "debt" or obligation the creditor claims is owed must be broken out into the principal amount claimed, accrued interest on the principal amount, and the applicable finance charges. Applicable finance charges in many debts include, *e.g.,* late fees, penalties, and over-limit fees. This analysis is vital not only to determine the amount of the debt claimed, but also to ascertain the client's exposure to prejudgment interest. On prejudgment interest, see §4.49. Counsel may determine that the interest miscalculated is usurious, and this may be raised as an affirmative defense. On usury, see §§4.86-4.92.

**Interest and finance charge distinguished.** Interest is the amount that compensates the creditor for the use of the creditor's money, while the finance charge includes costs of extending credit. These charges vary, depending on the type of transaction. See, *e.g.,* CC §§1805.4 (retail installment contracts), 1810.6 (retail installment accounts).

**Simple and compound interest.** Interest may either be "simple" or "compound." Computation of accrued interest is based on a 365-day year (a 366-day year in leap years) and the actual number of days elapsed in the period during which the interest accrues. If interest is calculated on any basis other than a 365-day year, the basis must be stated in the promissory note or written agreement. See *Fletcher v Security Pac. Nat'l Bank* (1979) 23 C3d 442, 153 CR 28 (quoting interest calculated on basis of 360-day year as "per annum" violates Bus & P C §17500).

**Calculating compound interest.** Compound interest is calculated by adding accrued interest to the principal amount due periodically as called for by the terms of the promissory note or written agreement. In most consumer transactions, interest is compounded in each "billing cycle" using one of the four methods described in §4.47. The billing cycle is usually monthly. In a delinquent credit card account, the compounding of the monthly accrual of interest, finance charges, late fees, and/or overdraft fees can effectively increase the annual percentage rate resulting in substantial interest and finance charges.

Requirements for interest and finance charges are governed by a variety of applicable statutes, depending on the nature of the transaction. See §§4.38-4.39.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.38 (1) California Law

### §4.38 (1) California Law

As noted in §4.37, interest is the amount that compensates the creditor for the use of the creditor's money, while the finance charge includes costs of extending credit. These charges vary, depending on the type of transaction, and are governed by applicable statutes, such as:

- The California Constitution article XV (usury);
- The Unruh Act (CC §§1801-1812.20) (retail installment sales);
- The Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.6);
- Civil Code §§2985.7-2993 (vehicle leasing);
- The Industrial Loan Law (Fin C §§18000-18707);
- Financial Code §§21000-21307 (pawnbrokers);
- The California Finance Lenders Law (Fin C §§22000-22780); and
- The California Credit Union Law (Fin C §§14000-16906).

Interest rates and finance charges are often stated as percentages that may be applied in different ways in computing the dollar amount of the charge. Three methods of computation are commonly used in California installment lending:

(1) **Percent-per-month method.** Under this method, the charge is computed at a monthly percentage rate on declining principal balances. Maximum rates are expressed and computed in this manner under Fin C §21200 (pawnbrokers), Fin C §§18212 (Industrial Loan Law), and Fin C §15100 (California Credit Union Law).

(2) **Percent add-on method.** Here, the percentage rate is applied to the original principal balance to obtain a dollar amount, which is added to the principal; the total is then divided by the number of installments to determine the amount of each payment. Because this method does not allow for the reduction of the principal balance as the borrower makes installment payments, the true annual rate, computed on declining balances, is greater than the add-on percentage. The add-on method is often used by commercial banks for consumer installment loans.

(3) **Precompute method.** This method, permitted under Fin C §22400, is similar to the add-on method. Under the precompute method, charges are computed in advance at the prescribed monthly rate on scheduled declining balances (as if each payment were made as scheduled), and the total charge for the term of the contract, so computed, is added to the original principal. Monthly payments are then determined in the same manner as under the add-on method.

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### §4.39 (2) Federal Law

The Truth in Lending Act (15 USC §§1601-1667f) requires that charges be disclosed both as the total cost of credit (finance charge) and the cost of credit as a yearly rate (annual percentage rate). See 15 USC §§1605-1606; 12 CFR §§226.4, 226.6, 226.18. Although the methods of computing charges described in §4.38 may be used to determine the amount of the finance charge, both figures must be converted and stated to the consumer in accordance with the federal requirements.

The interaction of state and federal disclosure requirements sometimes results in two or three separate finance charge quotations for the same loan. For example, Fin C §22307 requires that personal property brokers express their charges as a percent per month. For such loans, the cost of credit must be stated as an annual percentage rate, a monthly percentage rate, and a dollar amount.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.40 b. California Consumer Loan Regulation

### §4.40 b. California Consumer Loan Regulation

An extensive statutory scheme in California governs the organization, licensing, and operations of consumer lenders. Many consumer finance companies operate under the California Finance Lenders Law (Fin C §§22000-22780). Industrial loan companies, distinguished principally by their authority to issue investment certificates to obtain funds to lend (Fin C §18315), are governed by the Industrial Loan Law (Fin C §§18000-18707). Credit unions organized under state law are regulated by the California Credit Union Law (Fin C §§14000-16906). All these laws are administered by the Commissioner of Corporations.

Pawnbrokers, sometimes called "collateral lenders," are regulated under Fin C §§21000-21307. State banks are regulated by Fin C §§99-3904. National banks are also subject to these provisions to the extent that they are consistent with and do not infringe on federal law (primarily Title 12 of the United States Code). Fin C §100(b). Mortgage loan brokers are regulated by the Real Property Loan Law (Bus & P C §§10240-10248.3) and regulations are adopted by the Real Estate Commissioner (10 Cal Code Regs §§2840-2849.1). On regulation of loans made by mortgage loan brokers, see California Real Property Sales Transactions (4th ed Cal CEB 2007).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.41 (1) California Finance Lenders Law

## §4.41 (1) California Finance Lenders Law

**Application and exemptions.** The California Finance Lenders Law (Fin C §§22000-22780) applies to most lenders, including personal property brokers, who take as security any contract or obligation involving the forfeiture of rights to personal property of which the borrower retains use or possession or who take any assignment of wages, salary, earnings, income, or commission. Fin C §22009. It extends to open-end credit plans (Fin C §22467) as well as to consumer (Fin C §§22203-22204) and commercial (Fin C §22502) loans. See Fin C §22001.

The Finance Lenders Law does not limit the size of loans made by lenders licensed under it, but many of its provisions apply only to loans of less than a specified amount ($5000 or $10,000). See Fin C §§22250, 22053.

Credit card operations are specifically excluded from the Finance Lenders Law. Fin C §22052. Also exempt from its provisions are banks, trust companies, savings and loan associations, industrial loan companies, credit unions, small businesses, investment companies, business and industrial development corporations, licensed pawnbrokers (Fin C §22050), and other specified lenders.

**Rates on loans.** Maximum rates are graduated according to the size of the loan and are applied to different portions of the unpaid balance (Fin C §22303):

- 2½-percent per month on the unpaid balance of the loan up to $225;
- 2-percent per month on the unpaid balance in excess of $225 up to $900;
- 1½-percent per month on the unpaid balance in excess of $900 up to $1650; and
- 1-percent per month on any amount over $1650.

**Charge limitations.** The charge limitations include all costs of the credit extended; no additional charges are permitted except for insurance as specified in Fin C §§22313-22316, 22455, which include collateral and credit life and disability insurance, subject to the requirements of the law and regulations. Charges may be precomputed, *i.e.,* calculated in advance and added on to the principal amount, subject to provisions requiring refund of precomputed charges on prepayment. Fin C §22400.

**Who may make loans.** Loans under the Finance Lenders Law may be made only by persons licensed as brokers under the law. Fin C §22100. Regulations covering the activities of personal property loan brokers are found in 10 Cal Code Regs §§1400-1570.

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## §4.42 (2) Industrial Loan Law

Industrial loan companies are incorporated under the Industrial Loan Law (Fin C §§18000-18707) and must be authorized to engage in the industrial loan business after application to the Commissioner of Corporations, who bases approval or denial on specified statutory criteria, including the adequacy of capital structure, officers' abilities, and public convenience and advantage. Fin C §18117. An industrial loan company may sell or issue certificates of investment to the public (Fin C §§18315-18325), make certain real estate loans (Fin C §§18209-18210), and conduct an insurance premium financing business (Fin C §§18560-18643). An industrial loan company, particularly if it sells investment certificates to the public, is subject to capital and reserve requirements and lending restrictions. See, *e.g.,* Fin C §§18130-18139, 18319-18320. There are also limits on charges by an industrial loan company. See Fin C §§18212-18212.1.

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## §4.43 (3) Credit Union Law

State credit unions may be incorporated under, and are subject to, the regulatory provisions of the California Credit Union Law. See Fin C §§14000-16906. Only members of a credit union are eligible for loans (Fin C §14950), and by law these members must be subject to a common bond of employment, membership, or residence (see Fin C §14155). Credit unions often offer low-cost loans because, by meeting certain statutory criteria, they can qualify as tax-exempt organizations for federal income tax purposes (IRC §501(c)(14)(A)), and they can often use space and facilities donated by employers, thus reducing their costs.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.44 c. Finance Charges in Retail Installment Sales

### §4.44 c. Finance Charges in Retail Installment Sales

The Unruh Act (CC §§1801-1812.35) compels disclosure of the true cost of consumer credit transactions and regulates finance charges in retail credit and installment sales. A retail installment sale is the "sale of goods or the furnishing of services by a retail seller to a retail buyer for a deferred payment price payable in installments." CC §1802.5.

Finance charges imposed in retail installment sales may exceed the usury rate (see §§4.86-4.92) on the theory that the finance charges are not merely interest but represent the premium the buyer pays for the privilege of paying for the goods or services over time rather than in cash at the time of purchase. *Wilson v J. E. French Co.* (1931) 214 C 188, 4 P2d 537; see 58 Ops Cal Atty Gen 166, 169 (1975). The Unruh Act sets limits on permissible finance charges in retail installment transactions (CC §§1805.1, 1805.8), and the Rees-Levering Motor Vehicle Sales and Finance Act similarly limits permissible charges on automobile installment sales (CC §2982(j)).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.45 (1) Retail Installment Contracts

## §4.45 (1) Retail Installment Contracts

Retail installment contracts, or closed-end contracts, are used in single or isolated credit transactions, such as the purchase of a durable and expensive item (*e.g.,* a refrigerator) from a department store. Most such contracts are regulated by either the Unruh Act (CC §§1801-1812.20) or the Rees-Levering Motor Vehicle Sales and Finance Act (CC §§2981-2984.4). The transaction involves (CC §§1803.1-1803.3):

- A written contract between the seller and the customer, which is executed in a specified form when a particular purchase is made;
- A downpayment by the customer at that time (which may be in the form of cash, a trade-in, or both);
- A finance charge, as defined in CC §1802.10, calculated when the contract is prepared and added (with other charges permitted by the Unruh Act, if they apply to the transaction) to the unpaid balance of the sale price; and
- A provision in the contract in which the customer agrees to pay the resulting total (the amount financed) in a scheduled sequence of fixed consecutive payments.

The maximum finance charge that may be imposed in Unruh Act transactions is specified in CC §1805.1. For automobile sales, see CC §2982(j). Installment purchases of other items by the same customer, if made on the same closed-end basis, are made under separate contracts or under appropriate add-on provisions, as permitted and regulated by the Unruh Act, in a single contract. CC §§1808.1-1808.6.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.46 (2) Retail Installment Accounts

## §4.46 (2) Retail Installment Accounts

The retail installment account, also called an installment account or revolving account, is established by an agreement between a retail seller and a consumer under which the consumer promises to pay, in installments, the outstanding balance incurred in retail installment sales, whether or not a security interest in the goods sold is retained by the seller. CC §1802.7. Under a retail installment account, the finance charge is expressed as a percent of the periodic balances that accrue under the agreement, and the charge is not capitalized or stated as a dollar amount in the agreement. CC §1802.7.

The revolving account carries a finance charge as defined in CC §1802.10, but the Unruh Act (CC §§1801-1812.20) does not require that it be precomputed as in a closed-end contract; instead, it is periodically calculated on the basis of monthly balances as provided in CC §1810.2. These balances are billed to the customer on statements mailed after the close of the monthly billing cycle, a time period that is defined in CC §1802.17. CC §1810.3. The retail seller must disclose in writing these and other matters to the customer before the first transaction is made on a retail installment account. CC §1810.1. The contents of each monthly statement are prescribed in CC §1810.3. By 1975, the revolving account had made significant inroads into the closed-end contract arrangement in California. See generally 70 Ops Cal Atty Gen 256 n3 (1987).

For retail installment account sales, CC §1810.2 sets forth the maximum permissible monthly finance charges that may be assessed on unpaid balances.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.47 (a) Methods of Calculation

## §4.47 (a) Methods of Calculation

Several methods are used to calculate the interest and finance charge that is billed for the current cycle of the open-book or revolving account:

**Previous balance method.** This method is the one used primarily by retail stores. Its distinctive features are that (1) credits granted in the current cycle are acknowledged only if they cancel the previous balance, in which case no finance charge is made for the cycle; (2) credits are ignored in the charge calculation if they do not cancel the previous balance; and (3) debts incurred in the current cycle are always ignored in calculating the finance charge.

Because the previous balance method results in the calculation of charges on a balance (the previous balance) as it appears from month to month, charges will not exceed the ceiling fixed by CC §1810.2. See *Seibert v Sears, Roebuck & Co.* (1975) 45 CA3d 1, 12, 120 CR 233 ("use of the previous balance method may produce an inequitable result in a specific case involving a specific billing cycle" but does not violate the Unruh Act).

**Adjusted balance method.** Under this method, credits posted to the account during the current cycle are subtracted from the previous balance shown as the opening balance on the statement covering the cycle. The result is an adjusted balance that is used as the basis for calculating the finance charge shown on the statement. The distinctive feature of this method is that current *credits* are taken into account in computing the charge, but current *debits* are not; the net result obviously works to the customer's advantage.

**Ending balance method.** Under this method, the sum of debits charged to the account during the current cycle is added to the previous balance shown on the statement, credits granted during the cycle are subtracted from it, the net balance between them is struck as of the cycle's closing date, and the finance charge is calculated on the basis of the result (which is a new ending balance for the current cycle). The distinctive feature of this method is that current debits *and* current credits are reflected in the calculation of the finance charge for the current cycle.

**Average daily balance method.** Under this method, the sum of the actual daily balances in the account during the current cycle is divided by the number of days in the cycle, and the quotient is used as the basis for calculating the finance charge.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.48 (b) Chart: Calculation Methods Compared

### §4.48 (b) Chart: Calculation Methods Compared

In *Seibert v Sears, Roebuck & Co.* (1975) 45 CA3d 1, 12 n15, 120 CR 233, the court presented the following comparison of the results of the four predominant methods of calculation (see §4.47) when applied to the same account. The raw data came from the defendants' actual customers, who had been billed for finance charges calculated under the previous balance method.

| Customer | Period of Account History | Actual Previous Balance Method | Adjusted Balance Method | Ending Balance Method | Average Daily Balance Method |
|---|---|---|---|---|---|
| **Plaintiff #1** | 7/70-12/71 | $76.57 | $65.28 | $84.63 | $83.26 |
| **Plaintiff #2** | 5/70-9/71 | 7.70 | 2.88 | 12.59 | 13.64 |
| **Plaintiff #3** | 10/66-12/71 | 121.54 | 83.68 | 124.70 | 125.12 |
| **Plaintiff #4** | 11/65-12/71 | 286.96 | 259.57 | 291.85 | 295.20 |
| **Plaintiff #5** | 1/67-12/71 | 100.76 | 89.93 | 107.95 | 104.31 |
| **Plaintiff #6** | 10/70-12/71 | 33.00 | 30.52 | 42.45 | 40.22 |
| **Plaintiff #7** | 8/67-12/71 | 456.62 | 439.68 | 497.02 | 510.96 |

These illustrations demonstrate that the previous balance method usually produces finance charges that are higher than those produced by the adjusted balance method, but lower than those produced by either the ending balance method or the average daily balance method.

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### §4.49 d. Prejudgment Interest

**When proper.** If the creditor has filed a complaint, counsel must calculate the debtor's exposure to prejudgment interest. Prejudgment interest is proper when there is a calculable liquidated sum certain as of a specific date. That is, the test for recovery of prejudgment interest under CC §3287(a) is whether the debtor actually knows the amount owed or, if from reasonably available information, could have computed the amount. See *Cassinos v Union Oil Co.* (1993) 14 CA4th 1770, 1789, 18 CR2d 574. The contract rate of interest agreed on continues to be chargeable after the breach of contract or default, in consumer cases, by failure to make the monthly payments in a timely fashion. CC §3289(a). For further discussion of prejudgment interest, see §§3.106-3.109.

**Constitutional limits on prejudgment interest: usury.** In its general usury law, the California Constitution provides that the rate of interest for loans for money, goods, or things in action, or on accounts after demand, is 7 percent per year, but that the parties may contract in writing for a rate of interest of 10 percent per year for loans primarily for personal, family, or household purposes. For other loans, the parties may contract for a rate of interest of 10 percent per year, or, if greater, 5 percent per year plus the prevailing interest rate at the Federal Reserve Bank of San Francisco. Cal Const art XV, §1. The California Constitution also provides numerous exceptions to the usury law. See §4.86.

Regardless of the exceptions, charges for usurious interest may in certain cases, especially consumer cases, give the debtor's counsel reason to argue the prejudgment element of the debt claimed. Counsel might well assert that in the absence of any legislative act to the contrary, the rate of prejudgment interest is 7 percent as provided by the California Constitution; see *Continental Airlines v McDonald Douglas Corp.* (1989) 216 CA3d 388, 434, 264 CR 779.

**Limits on prejudgment interest: common count and book account.** Counsel may also argue in certain situations that the complaint fails to allege a written contract but only states the claim in a common count. See CC §§3287-3291. The common count represents a "chose in action" stating a right to recover money (see CC §953) based on, *e.g.,* a book account, money had and received, goods sold and delivered, or indebtedness for work, labor, or services performed at the debtor's request. See §§3.85-3.93.

In most commercial consumer credit transactions, primarily credit cards, credit is extended by the creditor to the debtor on a "book account" and renders a detailed statement each month. A book account is defined as follows (CCP §337a):

> The term "book account" means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.

The common count might also be claimed by a debt purchaser, which is the assignee of the account holder, for collection. See CC §954.

**Limits on prejudgment interest: breaches of statutory obligations.** The constitutional 7-percent annual rate of interest might also apply to breaches of statutory obligations. See CC §3289(b); *Los Angeles Nat'l Bank v Bank of Canton* (1995) 31 CA4th 726, 745, 37 CR2d 389. See also *Pro Value Props., Inc. v Quality Loan Serv. Corp.* (2009) 170 CA4th 579, 88 CR3d 381.

**Limits on prejudgment interest: personal services.** When the indebtedness arises from personal services rendered to the debtor in a consumer transaction, the statements of account might well reveal monthly interest being charged at a rate in excess of 10-percent per annum. For example, a provider of consumer professional services may render statements of account which provide a "finance charge" of 1.5-percent per month. This would constitute a usurious interest and give rise to that affirmative defense in answer to the complaint. See §§4.86-4.92.

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### §4.50 e. Postjudgment Interest

**When accrues.** If the creditor has obtained a judgment, then, as CCP §685.010(a) states, "[i]nterest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied." The statute does not permit recovery of more than 10-percent simple interest on a judgment from the date of a judgment entry until satisfaction. See *Mendez v Kurten* (1985) 170 CA3d 481, 487, 215 CR 924.

The rule that interest on interest (*i.e.,* compound interest) may not be recovered on the principal balance of the judgment applies when the judgment is renewed. At that time, accrued interest is included in the renewed judgment and the renewed judgment then bears interest at the rate of 10-percent per annum. Specifically, CCP §683.110(b) prevents renewal more often than every 5 years. See *Westbrook v Fairchild* (1992) 7 CA4th 889, 893, 9 CR2d 277.

**Verifying calculations.** The judgment debtor's counsel must verify the calculations that add postjudgment interest to the amount of the judgment. See Enforcing Civil Money Judgments, step 31 (Cal CEB Action Guide November 2008). If there has been partial satisfaction of the judgment, then counsel must make the calculations based on the accrual of simple interest whereby any postjudgment payment is first applied to accrued interest and then applied to reduction of the principal balance of the judgment.

**PRACTICE TIP:** Under certain circumstances, if the debtor has the ability to pay the debt in full (*e.g.,* a business debtor's debt arising from a business transaction), the debtor may want to make payment in full, thus extinguishing the obligation. See CC §§1485-1505. Specifically, CC §1485 provides that an "obligation is extinguished by an offer of performance, made in conformity to the rules herein prescribed, and with the intent to extinguish the obligation." If the debtor immediately tenders payment by deposit into the creditor's bank account (if known) or by other deposit in the name of the creditor with a bank as provided in CC §1500, the tender "stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." CC §1504. However, although CC §1504 provides for the stopping of interest when there has been an offer of performance, CC §1494 requires that the offer be free from unwarranted conditions. A conditional tender does not come within the provisions of CC §1504. *Mission Ins. Group, Inc. v Merco Construction Eng'rs, Inc.* (1983) 147 CA3d 1059, 1067, 195 CR 781.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.51 B. Cost-Effective Minimum Defense

## §4.51 B. Cost-Effective Minimum Defense

In a minimum defense strategy, the attorney must answer the complaint and, if the complaint alleges common counts, make demand for and obtain a bill of particulars (see §§4.57-4.65) to evidence the charges and credits that support the amount prayed for in the complaint. A minimum defense gives counsel the opportunity to negotiate a reasonable settlement with the creditor's attorney, buying the debtor time that may be useful in solving less than hopeless financial problems. Even a minimum defense can result in significant attorney fees, however, because the debtor and counsel may need to respond to discovery requests or appear at depositions.

**PRACTICE TIP:** To ensure that the debtor understands the limited nature of counsel's representation when a cost-effective minimum defense is used, the engagement letter should clarify the scope of representation. If the amount in controversy is $25,000 or less and the pending action is a limited civil case, then, in most cases, pleadings and discovery are subject to special rules. See CCP §§90-100.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.52 C. Settle the Action

## §4.52 C. Settle the Action

As an alternative to, or in conjunction with, a cost-effective minimum defense, the debtor may wish to settle the action. Several strategies are available to debtor's attorneys to reach an advantageous settlement with the creditor. See §§4.100-4.125.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.53 D. Do Nothing

## §4.53 D. Do Nothing

The debtor and counsel may decide to do nothing to defend a filed action, allowing the creditor to obtain a default judgment and begin proceedings to enforce the judgment. Before using this strategy, the debtor and counsel should carefully consider the risks.

**PRACTICE TIP:** Even if the debtor and counsel agree to adopt this strategy, it is good practice to send the debtor a letter clearly explaining the potential risks.

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## §4.54 E. Other Alternatives

The debtor's attorney may recommend other alternatives to defending or settling the action, such as an assignment for the benefit of creditors (see §§4.126-4.131), consumer credit counseling, or one of the alternatives discussed below.

**Consolidation loans.** A consolidation loan may pay all or most of a debtor's pressing debts and allow for repayment of the refinancing lender at a lesser amount per month than was previously required for all the debts. Consolidation loans frequently involve real property collateral, and usually result in lower interest charges and consumer interest, which can range from 13 to 28 percent per annum. The debtor's attorney may have to review the refinancing agreement and ensure that the client understands the terms of the written security agreement. The client should also be advised about the danger of allowing unsecured debts, such as credit card accounts or medical bills, to be converted by the consolidation lender to secured debts, especially if the security used to be the debtor's home.

**Professional debt prorating.** When a debtor has multiple creditors, the debtor is most likely a candidate for bankruptcy relief. For consumer debtors, it is either a Chapter 7 liquidation plan or a Chapter 13 repayment plan, or for business debtors, a Chapter 11 plan. Before filing for relief in bankruptcy court, the debtor should be referred to a debt adjustment or prorating service. These services, some of which may be free to the debtor, work out arrangements under which the debtor pays the service a fixed sum each month and the service distributes the funds to the creditors. These services may be run as a nonprofit organization, such as consumer credit counselors.

**Extension.** The debtor's attorney might work out an informal adjustment with creditors under which the debtor receives an extension of time to meet an agreed-on obligation. The debtor might consider substituting a new obligation for the old obligation by a novation agreement. See CC §1531.

**Composition.** The debtor's attorney might consider arranging a composition of the debtor's outstanding obligations, in addition to or instead of an extension of payment. Compositions are always advantageous to the debtor and should be attempted if a source of immediate payment is available. Under this type of agreement, each creditor agrees to take a payment of less than the amount owed in full settlement of his or her claim. Compositions are more commonly used by business debtors, who may continue to be customers of their creditors, or by an individual debtor considering a lump sum payment.

On relief in federal bankruptcy court generally, see chap 12.

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## §4.55 IV. METHODS OF DEFENSE

Counsel must determine whether to file a demurrer or a motion to strike. See California Civil Procedure Before Trial, chaps 23-24, 30 (4th ed Cal CEB 2004). However, the complaint in the usual debt collection action will allege causes of action for breach of contract and/or one or more of the variety of common counts which may apply to the debtor-creditor transaction. On pleading of written or oral contracts, see §§3.94-3.105; for a description of the various forms of action that fall under the rubric "common counts," see §§3.85-3.93. Counsel must then determine whether a motion to change venue would be appropriate. See §§3.39-3.59.

Usually, in debt collection cases, grounds rarely exist to sustain a demurrer. Common counts do not require, as long as separately stated in the complaint, facts-specific pleading, and they are basically immune to both general and special demurrers. See §3.81.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.56 A. Initial Response to Summons and Complaint

## §4.56 A. Initial Response to Summons and Complaint

The defendant must respond to the summons and complaint within 30 days after service of process is effected, depending on the method of service. See §4.5. On preparing the answer to the complaint, see §§4.66-4.72.

In most collection cases, the first step is to serve a demand for a bill of particulars (see CCP §454) on the plaintiff, which the plaintiff must respond to within 10 days of service (15 days if by mail). While service of the demand does not extend the time within which to answer the complaint, a full bill of particulars of charges and credits to the account can be vital to establishing illegal, improper, or unauthorized charges to the account, or that the debt may be barred by the statute of limitations. See §§4.57, 4.74.

Because the demand for a bill of particulars does not extend the defendant's time to answer or otherwise respond to the complaint, counsel may wish to request from the plaintiff an extension of time to answer or otherwise respond to the complaint pending receipt of the bill of particulars.

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## B. Bill of Particulars

### §4.57 1. Purpose; Legal Parameters

A plaintiff pleading on the common counts is not required to specify the items of account in the pleadings. *McFarland v Holcomb* (1898) 123 C 84, 55 P 761. However, a defendant may make a demand for a bill of particulars in most of the various actions on common counts and in many other contract actions as well, despite language in CCP §454 limiting the demand to actions on "accounts." See *Jensen v Dorr* (1911) 159 C 742, 116 P 553 (complaint for value of labor and materials); *Firpo v Pacific Mut. Life Ins. Co.* (1926) 80 CA 122, 251 P 657 (common count for money had and received). See also 4 Witkin, California Procedure, *Pleading* §§499-514 (5th ed 2009).

The object of a bill of particulars is to give the party demanding it reasonable notice of the items constituting the claim sued on so that he or she may prepare for, trial. *Dobbins v Hardister* (1966) 242 CA2d 787, 51 CR 866. Because the creditor need not specify the particular items of an alleged claim in a complaint on common counts, the complaint does not usually provide the debtor with adequate notice. A complaint on common counts is not, however, subject to attack by demurrer. The defendant's remedy is to demand a bill of particulars. CCP §454.

**WARNING:** A demand for a bill of particulars under CCP §454 does not extend the time to answer. *Svistunoff v Svistunof* (1952) 108 CA2d 638, 239 P2d 650. The debtor should seek an extension of the time to plead, either by stipulation or court under CCP §1054, pending receipt of the bill of particulars. See *Dobbins v Hardister, supra.*

A bill of particulars is not a pleading (*Weiner v Davies* (1967) 248 CA2d 387, 391, 56 CR 546), but is considered an amplification of the pleadings. See *Abbott v Limited Mut. Compensation Ins. Co.* (1938) 30 CA2d 157, 85 P2d 961. It is considered incorporated into the original complaint to determine the parameters of recovery and the admissibility of evidence. See *Gough v Security Trust & Sav. Bank* (1958) 162 CA2d 90, 94, 327 P2d 555.

When a bill of particulars shows that the amount of the claim is less than that prayed for in the complaint, the bill limits recovery to the lesser amount (see §4.60). *Abbott v Limited Mut. Compensation Ins. Co., supra.*

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.58 2. Use in Collection Actions

### §4.58 2. Use in Collection Actions

A demand for a bill of particulars may be made in various collection actions, including:

- Actions for services or materials allegedly furnished under a contract. *Jensen v Dorr* (1911) 159 C 742, 116 P 553.
- Actions in quantum meruit. *Caruso v Snap-Tite, Inc.* (1969) 275 CA2d 211, 212, 79 CR 642.
- Actions for reasonable value of legal services. *Baroni v Musick* (1934) 3 CA2d 419, 39 P2d 435.
- Actions for money had and received. *Firpo v Pacific Mut. Life Ins. Co.* (1926) 80 CA 122, 251 P 657.
- Actions for money lent or money paid. *Moya v Northrup* (1970) 10 CA3d 276, 88 CR 783.
- Actions for good sold and delivered. *Ben Hur Mfg. Co. v Empire Factors* (1960) 181 CA2d 123, 132, 5 CR 181.
- Actions on common counts. See §§3.80-3.93.

It has been held that the plaintiff need not respond to a demand for a bill of particulars in an action on an account stated, on the theory that an account stated is a distinct contract that supersedes the original items of the account. *Auzerais v Naglee* (1887) 74 C 60, 15 P 371; *Ahlbin v Crescent Commercial Corp.* (1950) 100 CA2d 646, 224 P2d 131. Similarly, a bill of particulars may not be demanded to itemize damages in suit based on negligent failure to perform contract duties. *Distefano v Hall* (1963) 218 CA2d 657, 677, 32 CR 770.

**PRACTICE TIP:** Although the information obtained by a demand for a bill of particulars is the same information that may be obtained through discovery, the primary purpose of discovery is to produce evidence for use at trial. In contrast, the primary purpose of a bill of particulars is to amplify the complaint in order to make it easier for the defendant to respond. Further, a demand for a bill of particulars is ordinarily less expensive than discovery, which involves more attorney time.

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### §4.59 3. Requirements for Demand for Bill of Particulars

Code of Civil Procedure §454 does not specify the form of a demand for a bill of particulars, other than to require that the demand be written.

Similarly, the statute does not specify a procedure for delivering the demand for a bill of particulars to the plaintiff. The common, and recommended, practice is to mail a copy of the demand to the office of the plaintiff's attorney and file the original with a declaration of service by mail with the court clerk. This procedure establishes the 10-day period within which the adverse party must furnish the bill (see §4.60). The time may be extended for up to 30 days by the court. CCP §1054. See *Dobbins v Hardister* (1966) 242 CA2d 787, 51 CR 866.

**WARNING:** Although filing a demand for a bill of particulars is a first appearance for jurisdictional purposes, it is *not a* responsive pleading that bars entry of the defendant's default. See §4.57.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.60 4. Delivery of Bill; Requirements

### §4.60 4. Delivery of Bill; Requirements

The plaintiff must deliver the bill of particulars to the defendant within 10 days after the demand (CCP §454) or within an extended time granted by the court (see CCP §1054) "or be precluded from giving evidence thereof." CCP §454. Thus, as a practical matter, delivery seems to be required within 10 days after *service* of the demand. The Code of Civil Procedure does not require that the bill of particulars be filed with the court. See CCP §454 ("must deliver to the adverse party"). See also *Edelman v McDonnell* (1899) 126 C 210, 58 P 528.

**PRACTICE TIP:** The creditor's attorney should serve the defendant with the bill of particulars by mail and then file the original, along with proof of service, with the court clerk for ready reference at trial.

Code of Civil Procedure §454 does not specify the requisite level of detail for bills of particulars. *Meredith v Marks* (1963) 212 CA2d 265, 270, 27 CR 737. The bill of particulars furnished in response to the demand need be nothing more than "a copy of the account." CCP §454. However, when an action is based on a book account, the bill should include a copy of the ledger account and a copy of each invoice supporting the charges indicated on the account. A court will determine the sufficiency of the bill of particulars in response to the demand. *Butler Bros. v Connolly* (1962) 204 CA2d 22, 26, 22 CR 175. The bill must be verified if the complaint is verified. CCP §454. On the sufficiency of the bill of particulars, see *Gilmore v Hill* (1957) 152 CA2d 881, 313 P2d 898.

Although a bill of particulars does not constitute competent evidence of the debts, the delivery of the bill effectively limits the plaintiff's evidence to the items specified. *Silva v Linneman* (1946) 73 CA2d 971, 167 P2d 794. When a bill of particulars shows that the amount of the claim is less than that prayed for in the complaint, the bill limits recovery to the lesser amount. For example, when the complaint prayed for recovery of $5000 for services allegedly performed for two defendants, and the bill of particulars set forth facts and figures showing the total of the account to be $3000, recovery was limited to the lesser amount. *Abbott v Limited Mut. Compensation Ins. Co.* (1938) 30 CA2d 157, 85 P2d 961.

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### §4.61 5. Motion for Further Bill of Particulars

When the plaintiff's bill of particulars is defective or inadequate, the defendant must seek a further bill by noticed motion. CCP §454. The failure to do so constitutes a waiver of the defects and bars the debtor from later excluding evidence of the account. See *Burton v Santa Barbara Nat'l* Bank (1966) 247 CA2d 427, 55 CR 529. The plaintiff may respond with a further bill, an amended bill, or both. *Ames v Bell* (1907) 5 CA 1, 89 P 619. For a form of motion for further bill of particulars, see §4.65.

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### §4.62 6. Failure to Comply With Demand

Under CCP §454, the penalty for the plaintiff's failure to deliver the bill of particulars within 10 days after the demand is that the plaintiff is "precluded from giving evidence thereof." Although the statutory language is mandatory, courts have interpreted §454 in a manner considerably more favorable to plaintiffs. Thus, if the plaintiff is late in delivering the bill of particulars, the court is unlikely to preclude evidence of the account as long as the bill is furnished in ample time to permit the debtor to examine it and prepare a defense. *McCarthy v Mt. Tecarte Land & Water Co.* (1896) 110 C 687, 692, 43 P 391 (10 day period discretionary when bill delivered shortly after deadline and no prejudice to defendant); *Cromer v Strieby* (1942) 54 CA2d 405, 128 P2d 916. The debtor's attorney must monitor the plaintiff's compliance carefully and take further steps as necessary to protect the debtor's rights.

If the plaintiff fails to deliver a response to the debtor's demand, the debtor's attorney should file a pretrial motion for an order excluding any evidence of matters covered by the demand. See *Burton v Santa Barbara Nat'l Bank* (1966) 247 CA2d 427, 55 CR 529. Otherwise, the debtor's attorney runs the risk that the court may permit proof of the account over a belated objection at trial. See *Banchero v Cofis* (1950) 96 CA2d 717, 216 P2d 151 (disfavoring eleventh-hour motions); 4 Witkin, California Procedure, *Pleading* §507 (5th ed 2009).

A plaintiff who fails to deliver the bill of particulars may use the provisions of CCP §473 to be relieved from this default for mistake, inadvertence, excusable neglect, or surprise. See *St. John v Consolidated Constr. Co.* (1920) 182 C 25, 189 P 276 (plaintiff permitted to file bill at opening of trial; defendant granted continuance to examine it). Note, however, that if the bill furnished at this point is inadequate, the court is likely to exclude evidence of the account. See *Banchero v Cofis, supra.*

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## 7. Forms

### §4.63 a. Form: Demand for Bill of Particulars

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

[*Title of court*]

[*Title of case*] )
_____)
)
)

**No. _ _ _ _ _ _**
**DEMAND FOR BILL OF PARTICULARS**

**To _ _**[*name of plaintiff*]**_ _ and _ _**[*his/her*]**_ _ attorney of record in this action:**

**Demand is made by _ _**[*name of defendant*]**_ _ for a bill of particulars setting forth the items of the account or accounts on which the _ _**[*e.g., first*]**_ _ cause of action is based, and in particular the date, nature, and place of performance of the _ _**[*contract/agreement*]**_ _ alleged in the complaint, and _ _**[*state other particulars demanded, e.g., date when each item is claimed to have been sold or delivered, safe price, itemized statement, character of and charges for the services alleged to have been rendered*]**_ _.**

**Date: _ _ _ _ _ _** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for _ _**[*name of defendant*]**_ _**

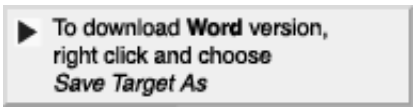
*Copies,* Original to be filed with court clerk with original proof of service (recommended procedure, although filing and service not strictly required; see §4.59); one copy to be served by mail on plaintiff; copies for each attorney of record and unrepresented party; office copies.

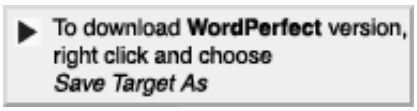
*Comment:* Although CCP §454 merely calls for *a written demand* on the plaintiff for a copy of the account, it is nonetheless recommended that debtor's attorney follow the practice of serving the demand and filing it with the court with a proof of service to establish the 10-day period within which the plaintiff must furnish the bill of particulars.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.64 b. Form: Bill of Particulars

## §4.64 b. Form: Bill of Particulars




[*Title of court*]

[*Title of case*] )
_____)
)

**No. _ _ _ _ _ _**
**BILL OF PARTICULARS**

**To _ _[*name of defendant*]_ _ and _ _[*his/her*]_ _ attorney of record in this action:**

**PLEASE TAKE NOTICE that the attached account, marked Exhibit _ _ _ and incorporated by reference, is a copy of the account demanded by you.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name of plaintiff*]_ _

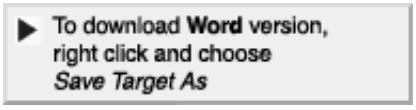
*Copies*: Original with exhibits attached to be filed with court clerk with original proof of service (recommended procedure, although filing and service not strictly required by CCP §454; see §4.59); copy to be served on attorney for party demanding bill; copies for service on each attorney of record and unrepresented party; office copies.

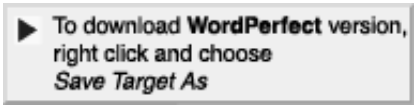
*Comment:* Counsel should attach as an exhibit an exact copy of the ledger or other account record of items set forth in the company account, or other statements of particulars demanded. It may be in the plaintiff's interest also to attach copies of invoices supporting the charges on the account. Verification of these invoices by the defendant may remind him or her of the items claimed and result in payment rather than further litigation.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.65 c. Form: Notice of Motion for Order for Further Bill of Particulars

## §4.65 c. Form: Notice of Motion for Order for Further Bill of Particulars




[*Title of court*]

| | |
|---|---|
| [*Title of case*] | **No.** _ _ _ _ _ _ |
| ) | **NOTICE OF MOTION FOR** |
| _____) | **ORDER FOR FURTHER** |
| ) | **BILL OF PARTICULARS** |
| ) | **Hearing:** _ _[*date; time*]_ _ |
| ) | **Dep't:** _ _[*number*]_ _ |
| ) | **Trial date:** _ _[*if set*]_ _ |
| ) | |
| ) | |

**To _ _[*name of plaintiff*]_ _ and _ _[*his/her*]_ _ attorney of record in this action:**

**PLEASE TAKE NOTICE that on _ _[*date*]_ _ at _ _[*time*]_ _ or as soon thereafter as the matter can be heard, in Department ___ of the above court at _ _[*address*]_ _, _ _[*name of defendant*]_ _ will move the court for an order directing that you furnish to _ _[*him/her*]_ _ a further bill of the particular items on which the account alleged in your complaint Is based. This motion is made on the ground that the bill of particulars furnished is incomplete and defective in that _ _[*e.g., it does not give to defendant the date of the items set forth, the type of merchandise allegedly furnished, the amount of such merchandise, or the price per unit*]_ _.**

**This motion is based on this notice, on the pleadings, records, and files in this action, and on the attached memorandum in support of the motion.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name of defendant*]_ _

*Copies*: Original to be filed with court clerk with proof of service; copies for service on each attorney of record and unrepresented party; office copies.

*Comment:* For discussion of situations in which the defendant may need to file this motion, see §4.61. The motion must be accompanied by a memorandum in support of the motion (Cal Rules of Ct 3.1113) and should specify the inadequacies of the bill that was furnished and the difficulties they pose for the defendant in framing a response to the complaint.

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## C. Answer

### §4.66 1. Denial of Material Allegations

The answer, which raises the issues that are to be tried in court, must deny all material allegations in the complaint. CCP §§431.10, 431.30. Failure to deny a material allegation of the complaint constitutes an admission and precludes the defendant from offering evidence to deny the allegation at trial. CCP §431.20; *Rembold v City & County of San Francisco* (1952) 113 CA2d 795, 249 P2d 58.

Defendants file answers in order to:

- Make a general appearance in the action (CCP §1014);
- Prevent the plaintiff from taking judgment by default (CCP §585);
- Require the plaintiff to prove all material allegations of fact denied in the answer (CCP §590);
- State defenses that may prevent the plaintiff from obtaining judgment from the defendant (CCP §§420, 430.30(b)); and
- State objections to the complaint and its allegations that would constitute a ground for demurrer when that ground does not appear on the face of the pleading (CCP §§430.10, 430.30(b)).

**PRACTICE TIP:** Because of the high cost of failing to deny a material allegation, the answer should deny *all* allegations of the complaint without attempting to decide whether they are material. See CCP §431.10.

When drafting the denials in the answer, the attorney certifies that: "The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief." CCP §128.7(b)(4). If the complaint is not verified, a general denial is sufficient to put at issue material allegations. CCP §431.30(d). For Judicial Council Form PLD-050, General Denial, see §4.72. On answering a verified complaint, see §4.67.

**PRACTICE TIP:** The answer is ordinarily the first pleading that the creditor's counsel sees from the debtor. Before receiving the answer, creditor's counsel may be unaware of a potential defense to the complaint. Although an experienced creditor's counsel has seen many answers containing potential defenses pleaded in standard form language that proved to be meritless, a well-pleaded specific answer may encourage a better settlement in the early stages of litigation, or at least signal the debtor's willingness to vigorously defend the action.

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### §4.67 2. Verified Answer

If the complaint is verified or if the plaintiff is a public entity, the answer must generally be verified. CCP §446. In two instances, however, a verified complaint does not require a verified answer:

(1) A defendant need not file a verified answer, regardless of whether the complaint is verified, if the action falls within the scope of the economic litigation rules because the amount in controversy does not exceed $25,000. CCP §§91(d), 92(b).

(2) If the principal amount in controversy does not exceed $1000 exclusive of interest, the defendant may file a general denial using an abbreviated Judicial Council form. CCP §431.40. For Judicial Council Form PLD-050, General Denial, see §4.72.

Except for these two instances, an answer to a verified complaint must contain specific separate admissions or denials of the allegations, which may be based on the debtor's information or belief rather than on a general denial. CCP §431.30(d).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.68 3. Considerations When Preparing Answer

## §4.68 3. Considerations When Preparing Answer

Before drafting an answer in a collection action, the debtor's attorney should review the facts of the case and the complaint to determine:

- Whether statutory grounds for a demurrer or an objection appear on the face of the complaint (CCP §430.10);
- Whether proper plaintiffs and defendants have been joined (CCP §430.10(d));
- Whether to obtain an extension of time to answer (CCP §1054);
- What pleaded facts to admit, what matters to deny, and how to deny the various allegations of the complaint;
- Whether the answer must be verified (CCP §§92, 446);
- Whether a general denial is proper (CCP §§431.30-431.40);
- What defenses are available under a general denial (CCP §§431.20(a), 431.30(d));
- What affirmative defenses are to be asserted (CCP §§431.20(b), 431.30(b));
- What affirmative remedies may be available (see chap 2); and
- Whether to cross-complain and whether new parties must be brought in on the cross-complaint (CCP §§422.10-422.19, 425.10, 426.30, 426.50).

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### §4.69 4. Denial of Amount Claimed

The debtor's answer must contain specific or general denials of material allegations in the complaint. CCP §431.30(b)(1). In most collection actions, the defendant will be able to deny the entire paragraph in which the amount claimed by the plaintiff is alleged. See CCP §431.30(f). In some cases, however, it may be necessary to deny that the sum claimed is owed. In doing so, the defendant must be sure to use language denying that *any* amount is owed, such as: "Answering paragraph 4 of the complaint, defendant denies that she is indebted to plaintiff in any amount." Denial of only the specific amount claimed to be payable as an indebtedness, or damages, or the value in a certain sum, exactly as alleged, is an implied admission that some other sum is due, and is fatally defective. *Armer v Dorton* (1942) 50 CA2d 413, 123 P2d 94.

For extensive discussion of this issue, see California Civil Procedure Before Trial, chap 25 (4th ed Cal CEB 2004).

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### §4.70 5. Denial on Information and Belief

The defendant may deny an allegation in the complaint "on information and belief, or for lack of sufficient information or belief." CCP §431.30(f). The defendant may use this denial only when he or she cannot admit or deny the allegation positively. See *Dobbins v Hardister* (1966) 242 CA2d 787, 51 CR 866. A defendant may not use information and belief denials when the matter is presumptively within the defendant's knowledge (see *Oliver v Swiss Club Tell* (1963) 222 CA2d 528, 35 CR 324) or is a matter of public record (see *Curtin v Salomon* (1926) 80 CA 470, 251 P 237). Under the latter rule, the defendant probably cannot deny on information and belief that, for example, the plaintiff is duly licensed to do business as a collection agency, because this information is a matter of public record.

The phrase "defendant is informed and believes and therefore denies" was held to be meaningless in *Poe v Francis* (1933) 132 CA 330, 333, 22 P2d 801. The defendant's allegations should not only state that he or she lacks information or belief sufficient to enable him or her to answer, but should also deny the allegations by adding the phrase "and, basing denial on that ground, denies…." *Ziegler v Ohio Farmers Ins. Co.* (1937) 23 CA2d 138, 72 P2d 557.

Attorneys should exercise caution when using information and belief denials in collection actions. In certain situations, a denial according to information and belief, or for lack of information and belief, may be held improper. See *Raphael Weill & Co. v Crittenden* (1903) 139 C 488, 73 P 238 (denial of allegation that goods were sold and delivered to defendant). Such defects in the answer, however, are deemed waived if not objected to at trial. See *Cockerell v Title Ins. & Trust Co.* (1954) 42 C2d 284, 267 P2d 16.

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## 6. General Denials

### §4.71 a. Legal Basis

The defendant in a collection case may answer by filing a general denial in any action in which (1) the complaint is unverified, (2) the amount in controversy does not exceed $1000, or (3) the case is subject to CCP §§90-100 on economic litigation (*i.e.,* the amount in controversy in a municipal or justice court case does not exceed $25,000), and the suit is not based on a claim assigned to a third party for collection. CCP §§431.30(d), 431.40(a). A general denial has been held sufficient to answer a complaint based on common counts and to entitle the defendant to raise any available defense, including one that might otherwise require special pleading. See *Aetna Carpet Co. v Penzner* (1951) 102 CA2d 859, 228 P2d 347. It is unclear what effect the 1986 revisions to CCP §431.30(d) have had on the rule stated in these cases. It is recommended that affirmative defenses be specially pleaded; they may be included on Judicial Council Form PLD-050, General Denial. See §4.72.

A written general denial is simply a statement that the defendant denies all the allegations of the complaint. It may contain a statement of any new matter constituting a defense. CCP §431.40(a). A general denial may be made on Judicial Council Form PLD-050 and need not be verified. CCP §431.40(c).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.72 b. Form: General Denial (Judicial Council Form PLD-050)

## §4.72 b. Form: General Denial (Judicial Council Form PLD-050)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | ***FOR COURT USE ONLY*** |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/PETITIONER:<br>DEFENDANT/RESPONDENT: | |
| **GENERAL DENIAL** | CASE NUMBER:: |

If you want to file a general denial, you MUST use this form if the amount asked for in the complaint or the value of the property involved is $1,000 or less.

You MAY use this form for a general denial if:

1. The complaint is not verified; ***or***
2. The complaint is verified and the case is a limited civil case (the amount in controversy is $25,000 or less), BUT NOT if the complaint involves a claim for more than $1,000 that has been assigned to a third party for collection.

(See Code of Civil Procedure sections 85–86, 90–100, 431.30, and 431.40.)

1. DEFENDANT *(name)*:
   generally denies each and every allegation of plaintiff's complaint.
2. ☐ DEFENDANT states the following FACTS as separate affirmative defenses to plaintiff's complaint *(attach additional pages if necessary)*:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DEFENDANT OR ATTORNEY)

If you have a claim for damages or other relief against the plaintiff, the law may require you to state your claim in a special pleading called a cross-complaint or you may lose your right to bring the claim. (See Code of Civil Procedure sections 426.10–426.40.)

The original of this *General Denial* must be filed with the clerk of this court with proof that a copy was served on each plaintiff's attorney and on each plaintiff not represented by an attorney. There are two main ways to serve this *General Denial*: by personal delivery or by mail. It may be served by anyone at least 18 years of age EXCEPT you or any other party to this legal action. Be sure that whoever serves the *General Denial* fills out and signs a proof of service. You may use the applicable Judicial Council form (such as form POS-020, POS-030, or POS-040) for the proof of service.



Form Adopted for Mandatory Use
Judicial Council of California
PLD-050 [Rev. January 1, 2009]



CEB
Code of Civil Procedure, §§ 431.30, 431.40
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### §4.73 D. Affirmative Defenses

The answer must contain "any new matter constituting a defense," *i.e.,* any affirmative defenses. CCP §431.30(b). The defenses must be stated separately and must identify the cause of action to which the defenses relate. CCP §431.30(g). The debtor's counsel should consider the standard contract affirmative defenses stated in §§4.74-4.92 when drafting the answer to the complaint. These are suggestive but not exhaustive of the various defenses that might arise from the transaction or transactions between the debtor and the creditor.

**NOTE:** Many attorneys attach a form list of affirmative defenses as a matter of course to each answer they file without making sure that they apply to a particular complaint or cause of action. This practice can result in sanctions against the debtor, the attorney, or both. See CCP §128.7.

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## §4.74 1. Statute of Limitations

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The defendant must specifically plead a statute of limitations defense affirmatively rather than by denial to avoid waiving the defense. See *Minton v Cavaney* (1961) 56 C2d 576, 581, 15 CR 641. The defendant must identify the cause of action to which the defense relates and the section and subsection (if applicable) of the appropriate statute of limitations. CCP §§431.30(g), 458. For example, a statute of limitations defense based on the 2-year statute for oral contracts must refer to the cause of action for breach of the oral contract, as in the following example:

**FIRST AFFIRMATIVE DEFENSE TO SECOND CAUSE OF ACTION FOR BREACH OF ORAL CONTRACT**

**Plaintiff's Second Cause of Action for breach of an oral contract is barred by the statute of limitations as set forth in Code of Civil Procedure §339(1).**

Note, however, that a plaintiff was not barred from bringing an action seeking an unpaid 10-year old judgment against the defendant by the applicable statute of limitations because the limitations period was tolled by the defendant's petition for bankruptcy and the resulting automatic stay, and the debt was nondischargeable in bankruptcy. *Kertesz v Ostrovsky* (2004) 115 CA4th 369, 8 CR3d 907.

For discussion of when the limitations period starts on an open-book account, see CCP §337 and *R.N.C., Inc. v Tsegeletos* (1991) 231 CA3d 967, 283 CR 48. See also §3.65. The 4-year period of limitations on an open-book account begins as of the last entry in the book account. See *Davidson v. Tilden* (1978) 86 CA3d 283, 150 CR 194. However, an open-book account does not remain open indefinitely so that a payment toward the debt is an "entry" to ascertain the applicable limitations period. As noted in *Tsegeletos*, 231 CA3d at 972:

> [A] book account like any open account becomes closed once the account creditor ceases to extend credit and there will be no further activity on the account other than the payments by a creditor towards the settled debt.... Thus, it is clear that the 'open' or 'closed' nature of a book account turns not on the account balance per se, but on the parties' expectations of possible future transactions between them [on that account].

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## §4.75 2. Mistake, Fraud, Duress, and Undue Influence

The defendant must affirmatively plead the defenses of mistake, fraud, duress, and undue influence as new matters in an appropriate affirmative defense. These defenses should be pleaded with the same specificity as a complaint to set aside the contract based on the same allegations. See, *e.g., California Trust Co. v Gustason* (1940) 15 C2d 268, 101 P2d 74.

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### §4.76 3. Estoppel, Waiver, Laches, and Unclean Hands

The defendant must affirmatively plead the defenses of estoppel, waiver, laches, and unclean hands as new matters in an appropriate affirmative defense. See *California Academy of Sciences v County of Fresno* (1987) 192 CA3d 1436, 238 CR 154. The defendant must plead the facts constituting the defense with the same specificity that would be required in a complaint based on the same facts. See *Victor Oil Co. v Drum* (1920) 184 C 226, 242, 193 P 243 (laches); *Wienke v Smith* (1918) 179 C 220, 176 P 42 (waiver); *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists* (1964) 227 CA2d 675, 726, 39 CR 64 (unclean hands); *Benson v Andrews* (1958) 166 CA2d 44, 52, 332 P2d 698 (estoppel).

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## §4.77 4. Statute of Frauds

The defendant may properly raise a statute of frauds defense solely by denial, based on the ground that the parties never formed a contract, because they failed to put the oral agreement in writing as required by the statute of frauds. *Aero Bolt & Screw Co. v Iaia* (1960) 180 CA2d 728, 742, 5 CR 53. It is appropriate and helpful, however, to raise a statute of frauds defense as an affirmative defense to put the plaintiff and the court on notice.

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### §4.78 5. Illegality of Contract

Generally, illegality of a contract is an affirmative defense that should be specially pleaded unless the illegality appears from the face of the complaint (see *Eaton v Borck* (1954) 124 CA2d 10, 13, 268 P2d 58) or the evidence discloses the contract's illegality (see *Cain v Burn* (1955) 131 CA2d 439, 280 P2d 439 (defense precluded as unjust enrichment)).

Further, the defendant may raise the illegality defense solely by denial on the ground that the parties never formed a contract. *Lewis & Queen v N.M. Ball Sons* (1957) 48 C2d 141, 147, 308 P2d 713. In any event, raising illegality as an affirmative defense puts the plaintiff and the court on notice and permits the defendant to plead the facts constituting the defense with specificity in the affirmative defense. The contract may be contrary to an express provision of law (CC §1667(1)) or may be unenforceable because it is contrary to public policy or good morals (CC §1667(2)-(3)).

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## §4.79 6. Unconscionability

Raising unconscionability as an affirmative defense is always advisable, if grounds exist, to put the plaintiff and the court on notice and to permit the defendant to plead the facts constituting the defense with specificity.

The court's authority to refuse to enforce an unconscionable contract or a clause is set forth in CC §1670.5(a). For more detailed discussion of unconscionability, see §4.33.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.80 7. Failure of Condition Precedent or Subsequent

### §4.80 7. Failure of Condition Precedent or Subsequent

The defendant may properly raise the failure of performance because of unfulfilled conditions precedent or subsequent solely by denial. *Eucalyptus Growers Ass'n v Orange County Nursery & Land Co.* (1917) 174 C 330, 334, 163 P 45. Raising failure of condition as an affirmative defense, however, puts the plaintiff and the court on notice and permits the plaintiff to plead the facts surrounding the condition (which may not be obvious on the contract's face) and the failure of the condition with specificity in the affirmative defense.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.81 8. Excuse for Nonperformance

## §4.81 8. Excuse for Nonperformance

The defendant must raise any defense excusing performance under the terms of a contract as an affirmative defense. Such an excuse may be the plaintiff's breach or anticipatory breach, failure of consideration, or impossibility or impracticability of performance. See *Alvernaz v H.P. Garin Co.* (1932) 127 CA 681, 688, 16 P2d 683.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.82 9. Setoff

## §4.82 9. Setoff

The defendant must affirmatively raise any defense arising from the setoff of either past overpayments or a separate debt or obligation. *Title Ins. Co. v State Bd. of Equalization* (1992) 4 C4th 715, 731, 14 CR2d 822. Pleading a setoff arising from a separate debt or obligation by affirmative defense is especially important because the separate debt constitutes a new matter requiring new factual proof beyond the proof of the initial complaint.

**PRACTICE TIP:** Defendant's counsel should also plead any claim arising from a separate debt or obligation as a separate cross-complaint to enable the defendant to recover affirmatively. See CCP §431.30(c) (prohibiting answer from including claim for affirmative relief).

**NOTE:** A defendant can raise the setoff defense even if the applicable statute of limitations bars affirmative recovery on the obligation. CCP §431.70.

Further, the defendant may have claims against the plaintiff that would otherwise be barred by the statute of limitations because they are claims for affirmative relief but which can be raised as affirmative defenses under CCP §431.70, which provides, in part:

> Where cross-demands for money have existed between persons, at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by once such person, the other person may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim would at the time of filing the answer be barred by the statute of limitations.

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### §4.83 10. Payment

A plaintiff must plead nonperformance or nonpayment as an essential element of a breach of contract action. Therefore, the defendant's complete or partial payment of any amount owed under a contract is properly raised by denial of the allegations in the complaint, which preserves the issue sufficiently for trial. *Bank of Shasta v Boyd* (1893) 99 C 604, 34 P 337. Like many other defenses, however, the better practice is to specifically plead the fact of any payments as an affirmative defense to the complaint.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.84 11. Release, Novation, or Accord and Satisfaction

### §4.84 11. Release, Novation, or Accord and Satisfaction

To assert a defense discharging any obligation on the contract, the defendant must raise any facts or allegations constituting a release, novation, or accord and satisfaction by an affirmative defense. The defendant must specifically plead the facts constituting the defense. See, *e.g., Alexander v Angel* (1951) 37 C2d 856, 860, 236 P2d 561 (novation); *Landis v Morrissey* (1886) 69 C 83, 86, 10 P 258 (release; accord and satisfaction); *Owens v Noble* (1946) 77 CA2d 209, 215, 175 P2d 241 (accord and satisfaction); *Stanton v Santa Ana Sugar Co.* (1927) 84 CA 206, 208, 257 P 907 (mutual rescission).

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## §4.85 12. Common Count Defenses

Owing to the general lack of specificity required to plead a cause of action based on a common count, the defendant need not plead any affirmative defenses; a general denial permits the defendant to raise any defense to the common count at trial. See *Heaton-Hobson Assoc. Law Offices v Arper* (1904) 145 C 282, 78 P 721; *Aetna Carpet Co. v Penzner* (1951) 102 CA2d 859, 228 P2d 347. If a specific affirmative defense applies to a common count, however, the better practice is to plead specific facts of the applicable affirmative defense. See *Smith v Norman I. Fadel, Inc.* (1963) 215 CA2d 13, 17, 29 CR 839.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.86 13. Usury

## §4.86 13. Usury

When defending the debtor, the attorney should not overlook the possibility that the original transaction was usurious under either federal or California law. On usury in relation to prejudgment interest, see §4.49.

The essential elements of usury are discussed in *WRI Opportunity Loans II, LLC v Cooper* (2007) 154 CA4th 525, 533, 65 CR3d 205, citing *Ghirado v Antonioli* (1994) 8 C4th 791, 798, 35 CR2d 418:

- The transaction is a loan or forbearance;
- The interest to be paid exceeds the statutory maximum;
- The loan and interest are absolutely repayable by the borrower; and
- The lender has willful intent to enter into a usurious transaction.

California's usury law, included in the California Constitution (Cal Const art XV, §1), sets interest rates for personal and nonpersonal loans and forbearances and then sets out express exemptions for certain lenders and types of loans.

First, for any loan or forbearance of any money, goods, or things in action "for use primarily for personal, family or household purposes," a lender who is not exempt from the interest limitations of California usury laws may contract for a rate not exceeding 10 percent simple interest per year. Cal Const art XV, §1(1).

Second, for loans or forbearances in writing that are not "for use primarily for personal, family or household purposes" (which includes loans primarily for the purchase, construction, or improvement of real property), the interest rate that a nonexempt lender may charge is limited to the higher of (a) 10 percent or (b) 5 percent over the discount rate charged by the Federal Reserve Bank of San Francisco under 12 USC §347 to member banks for money advanced on the applicable date. Cal Const art XV, §1(2). The current rate is available online from the Federal Reserve Bank of San Francisco; for the website, see the Directory.

Certain lenders and loans are expressly exempted from the interest limitations of the usury laws. They include loans or forbearances made by banks or by "any other class of persons authorized by statute." Cal Const art XV, §1. Additionally, a panoply of statutes creates further exemptions from usury. See, *e.g.,* CC §§1912-1916.12; Corp C §25118; Fin C §§1504, 1917.005, 1917.220. The "usury law… is riddled with so many exceptions that the law's application itself seems to be the exception rather than the rule." *Ghirado v Antonioli* (1994) 8 C4th 791, 807, 35 CR2d 418, modified at 9 C4th 558A.

For public policy reasons, the defense of usury may not be waived by the borrower at the time a loan is made. See *Baruch Inv. Co. v Huntoon* (1967) 257 CA2d 485, 496, 65 CR 131.

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### §4.87 a. Credit Sales Not Subject to Usury Laws

A credit sale in California is not subject to usury laws because it does not constitute a loan or forbearance. When property is sold on credit, any additional charges imposed by the seller over the cash price are explained as a function of the "time price differential" doctrine; that is, the seller is charging more for the property because it is permitting payment to be made over a period of time. *Southwest Concrete Prods. v Gosh Constr. Corp.* (1990) 51 C3d 701, 705, 274 CR 404. The modification of an obligation, which began as a credit sale, does not constitute a "loan or forbearance" and is therefore not subject to the usury law. *Ghirado v Antonioli* (1996) 14 C4th 39, 57 CR2d 687.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.88 b. Lenders Exempt From Usury Laws

### §4.88 b. Lenders Exempt From Usury Laws

Certain lenders are expressly exempted from the interest limitations of the usury laws. The following list is illustrative, not exclusive:

- National banks;
- State banks incorporated under the laws of the State of California;
- Foreign (other nation) banks that maintain branch or agency offices in California;
- Foreign (other state) banks;
- Commercial finance lenders;
- California savings and loan associations;
- California credit unions;
- Insurance companies;
- Pension funds; and
- Certain California nonprofit agricultural lenders.

Any successor in interest to a loan made by a member of an exempt class is also exempt. Cal Const art XV, §1.

The legislature periodically adds new categories of lenders to the list of exempt entities. For a detailed list of California usury law exemptions, see California Real Estate Finance Practice: Strategies and Forms §3.39 (Cal CEB 2000).

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### §4.89 c. Loans Exempt From Usury Laws

Certain types of loans are expressly exempted from the interest limitations of California usury laws. *Stickel v Harris* (1987) 196 CA3d 575, 242 CR 88. These include shared appreciation loans (CC §1917; see *Jones v Wells Fargo Bank* (2003) 112 CA4th 1527, 5 CR3d 835 (upholding shared appreciation loans against claim of unconscionability)), loans arranged by real estate brokers and secured in whole or in part by liens on real property (CC §1916.1), certain debt instruments issued under the California securities laws (Corp C §25116), certain debt instruments of publicly held companies (Corp C §25117), debt of certain large commercial borrowers that meet certain financial criteria (Corp C §25118(a)), and certain business loans of at least $300,000 that are not made to or guaranteed by individuals (Corp C §25118(b)). Credit extensions in connection with the sale of goods or property are likewise exempt under the "time price differential" doctrine (explained in §4.87). See *Boerner v Colwell Co.* (1978) 21 C3d 37, 145 CR 380. Similarly, interest on a note may be exempt from usury laws if payment is entirely contingent on the occurrence of a future event, such as the receipt of royalties under a patent license. *D-Beam Ltd. Partnership v Roller Derby Skates, Inc.* (9th Cir 2004) 366 F3d 972. Federal law also exempts from state usury laws any "federally related" loan secured by a first lien on residential real property. See 12 CFR §590.3.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.90 d. Items Covered by Usury Laws

### §4.90 d. Items Covered by Usury Laws

Counsel should be aware that the usury law may apply to some types of transactions and charges even though they do not at first seem to involve an interest charge. Examples include the following:

- **Joint ventures and other equity investments.** It is presumed that business transactions are "fair, regular and legal." *Giorgi v Conradi* (1962) 199 CA2d 82, 85, 18 CR 588.
- **Commercial paper.** On whether issuance of commercial paper is "sale" of a "security" or a loan to the issuer, see *J. T. Jenkins Co. v Kennedy* (1975) 45 CA3d 474, 119 CR 578 (rebating in sales transactions).
- **Extensions, renewals, modifications, and exchanges.** Once a transaction is usurious, taint attaches to all extensions and renewals, regardless of form. See *DCM Partners v Smith* (1991) 228 CA3d 729, 278 CR 778 (if initial transaction is exempt, modification also exempt).
- **Points and bonuses.** A point is 1 percent of the loan amount, usually paid by the borrower before or concurrently with the funding of the loan. The crucial question is whether the additional charge is a legitimate one for expenses and services connected with the loan or merely a device to avoid the usury laws. See *In re Vehm Eng'g Corp*. (1975) 521 F2d 186.
- **"Sweetheart" contracts and "tying" arrangements.** Any collateral advantage or benefit exacted by the lender as compensation for the loan may constitute interest. See *Mission Hills Dev. Corp. v Western Small Bus. Inv. Co.* (1968) 260 CA2d 923, 67 CR 505.
- **Discounts.** Discounts may be treated as additional interest if routinely offered as part of a pattern. *Glaire v La Lanne-Paris Health Spa, Inc.* (1974) 12 C3d 915, 927, 117 CR 541, 548.
- **Commissions paid to lender.** Commissions may sometimes be considered interest. *Bayne v Jolley* (1964) 227 CA2d 630, 38 CR 873. But see *Hobbs v Buck* (1981) 115 CA3d 176, 171 CR 258 (commission paid to trustee administering trust was held analogous to "finder's fee" to independent agent and thus not to be characterized as interest).
- **Reimbursement for expenses.** Reimbursements that may be considered interest include unrelated fees (*Burr v Capital Reserve Corp.* (1969) 71 C2d 983, 991, 80 CR 345, 351), lender's participation in share of profits (*Brown v Cardoza* (1944) 67 CA2d 187, 153 P2d 767), payment by or to third parties (see 59 Ops Cal Atty Gen 452 (1976)), and compound interest on delinquent interest payments. See *OCM Principal Opportunities Fund, LP v CIBC World Mkts. Corp*. (2008) 168 CA4th 185, 85 CR3d 350 (permitting compounding of interest on renewal of judgment).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.91 e. Those Against Whom Usury May Be Asserted

### §4.91 e. Those Against Whom Usury May Be Asserted

Usury may be asserted, either offensively or as a defense or cross-complaint to a collection action, against the following:

- The lender who received the usurious rate of interest. See *Clarke v Horany* (1963) 212 CA2d 307, 27 CR 901 (usurious amount paid to lender's agent; lender, not agent, liable because statute does not impose liability on agents or abettors of noncorporate lender); and
- A lender's assignee who receives usurious payments. *Liebelt v Carney* (1931) 213 C 250, 2 P2d 144.

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### §4.92 f. Remedies

If a lender is not exempt, the loan is not exempt, the California usury law applies to a proposed loan or forbearance, and the effective interest rate exceeds the appropriate usury ceiling, then possible remedies include the following:

- The borrower is not obligated to pay interest on the loan and, in an action to recover the principal of the loan, any interest paid on the loan can be applied against the principal amount of the loan (see *In re Vehm Eng'g Corp*. (1975) 521 F2d 186); and
- If an action is brought within 1 year after the date of an interest payment, the borrower can recover (or offset) triple the amount of any interest on the loan during the preceding year (CC App I, §3).

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## §4.93 E. Cross-Complaints

The debtor's counsel should consider whether any of the debtor's potential claims against the creditor constitute claims that the debtor should assert in a cross-complaint against the creditor or assignee. See CCP §426.30. On filing a cross-complaint alleging identity theft, see §2.24B.

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### §4.94 1. Compulsory Cross-Complaints

Generally, if a defendant's cause of action is related to the cause of action in the complaint, the defendant must assert it in a compulsory cross-complaint. See CCP §426.30. A related cause of action is "a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint." CCP §426.10(c); *Currie Med. Specialties, Inc. v Bowen* (1982) 136 CA3d 774, 186 CR 543. A claim required to be asserted in a compulsory cross-complaint is barred forever if the defendant fails to assert it in a cross-complaint. CCP §426.30(a). Certain exceptions apply to the general requirement that a plaintiff plead related causes of action in a compulsory cross-complaint. See CCP §§426.30(b), 426.40, 426.60.

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## §4.95 2. Permissive Cross-Complaints

A defendant may file a cross-complaint of any nature, regardless of how unrelated, against the plaintiff. CCP §428.10(a). The defendant may also file a cross-complaint against a third person who is not a party to the action if the cross-complaint cause of action arises from the same facts or involves a claim, right, interest in property, or controversy that is the subject of the complaint. CCP §428.10(b).

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### §4.96 3. Cross-Complaint Procedure

The defendant must file a cross-complaint against any party who filed the complaint before or at the time the answer is filed. CCP §428.50(a). The defendant may file any other cross-complaint at any time before the court sets a date for trial. CCP §428.50(b). A defendant who fails to file cross-complaints at the appropriate time must obtain leave of court to file it later. CCP §§426.30(a), 426.50. The party filing the cross-complaint must prepare the cross-complaint as a separate document, not as part of the answer. CCP §428.40.

A party on whom a cross-complaint is served may demur, answer, or move to strike all or any part of the cross-complaint. The cross-defendant has 30 days in which to respond. CCP §432.10. The sufficiency of the statement of a cause of action in a cross-complaint is attacked by demurrer. On demurrers, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004). If, however, the only basis for challenging the cross-complaint is its inappropriateness as a cross-complaint, *i.e.,* it is unrelated to the transaction or property subject to the complaint, the party should use a motion to strike rather than a demurrer. See *Amacorp Indus. Leasing Co. v Robert C. Young Assocs.* (1965) 237 CA2d 724, 47 CR 294.

For further discussion of motions to strike and cross-complaints, see Civ Proc Before Trial, chaps 24 and 26, respectively.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.97 F. Demand Arbitration

## §4.97 F. Demand Arbitration

The ordinarily much more informal nature of an arbitration proceeding may provide a quicker resolution to a dispute and a less expensive method to try the contested issues. Arbitration may prove useful, especially if the parties dispute the facts regarding the creditor's performance or the debtor's payments. Arbitration may arise in two contexts: contractual or judicial. See §§4.98-4.99.

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### §4.98 1. Contractual

Although many standard contracts require the parties to arbitrate any disputes, creditors who initiate a collection action do not always seek arbitration. The debtor's attorney should search any written agreements between the parties for a mandatory arbitration clause. If the creditor has already filed a complaint, the debtor may file a petition to compel arbitration in lieu of an answer. CCP §1281.7. The court must rule on the merits of the petition and order arbitration if an arbitration clause exists. CCP §1281.2. This statute, however, also specifies circumstances for disregarding an agreement to arbitrate. CCP §1281.2.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.99 2. Judicial

### §4.99 2. Judicial

Judicial arbitration is required in many disputes (CCP §§1141.10-1141.31; Cal Rules of Ct 3.810-3.830):

- It is mandatory in cases filed in courts with 18 or more judges if the amount in controversy, in the court's opinion, will not exceed $50,000 for each plaintiff. See CCP §1141.11(a); Cal Rules of Ct 3.811(a)(1).
- Courts with fewer than 18 judges may provide for arbitration of certain cases by local rule. CCP §§1141.11(b)-(c); Cal Rules of Ct 3.811(a)(2)-(3).
- It is mandatory when the parties have stipulated to it or when the plaintiff elects arbitration and agrees that the award shall not exceed the amount specified in CCP §1141.11 ($50,000). CCP §1141.12; Cal Rules of Ct 3.811(a)(4)-(5).

The most common exception to the mandatory provisions for collection actions arises when the complaint demand exceeds $50,000. Cal Rules of Ct 3.811(a), (b)(8). The parties may choose to judicially arbitrate, however, by waiving that limit. Cal Rules of Ct 3.811(a)(1)-(2). For extensive discussion of judicial arbitration, see California Civil Procedure Before Trial, chap 37 (4th ed Cal CEB 2004).

Judicial arbitration is not binding, but parties often choose to accept the judicial arbitration award rather than request a trial. A party dissatisfied with an arbitration award is entitled to request a trial de novo. CCP §1141.20. The party requesting a trial de novo may be liable for specified fees and costs incurred in connection with the action, however, if the outcome of the trial is not more favorable to that party in either the amount of damages awarded or the type of relief granted. CCP §1141.21.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.100 G. Settlement

## §4.100 G. Settlement

The debtor and counsel, as well as the creditor and counsel, may wish to avoid the time and expense of trial and find some way to settle the matter. Although the debtor may admit the validity of the debt or admit part of the debt, he or she may have neither the present ability nor any future ability to satisfy the judgment. However, the debtor may have limited resources to pay or some borrowing power with family or friends to enable him or her to offer a lump sum payment for an accord, satisfaction, and release. If so, the accord, satisfaction, and release should be coupled with dismissal of the entire action with prejudice, and each party should bear his or her own attorney's fees and costs. If the dismissal cannot be filed immediately, then a notice of settlement should be filed with the court. Cal Rules of Ct 3.1385(a). See §7.14.

If a lump sum settlement is not possible, then the debtor, through counsel, should try to negotiate a discounted payoff over time and enter into a written settlement agreement, with stipulation for entry of judgment. Counsel for the plaintiff should then file a notice of conditional settlement. Cal Rules of Ct 3.1385(c). See Judicial Council Form CM-200 (Notice of Settlement of Entire Case). Once payment has been completed, dismissal is appropriate.

If judgment has been entered, then payment should be in exchange for an acknowledgment of full satisfaction of judgment (CCP §724.060), or an agreement that the creditor will stay further enforcement proceedings if payments are made according to a schedule, and then satisfaction acknowledged on payment of the stipulated amount. Counsel should ensure that the debtor obtains a properly executed and acknowledged satisfaction of judgment form for recordation.

**CAUTION:** Counsel for the debtor negotiating a lump sum settlement for less than the full amount owed may trigger an income tax obligation based on the amount of debt forgiveness achieved by the lump sum payment. For further discussion, see §4.101.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.101 1. Negotiation Tactics

## §4.101 1. Negotiation Tactics

The debtor's attorney may use several different tactics, depending on the debtor's financial circumstances, to obtain the best settlement possible at the earliest available time. A purely financially motivated creditor, usually a financial institution, finance company, or credit card company, will have to weigh the settlement offer against several factors, including:

- The creditor's actual out-of-pocket loss, the balance amount "written off," and no further extensions of credit;
- The amount now claimed by the creditor, including stated principal, stated interest, fees, penalties, administrative costs, and costs of collection, including attorney fees; see CC §§1717 (contractual), 1717.5 (book account);
- The expenses associated with litigation and trial;
- The risk of either failing to obtain a favorable judgment or obtaining a judgment for less than the full amount;
- The potential for satisfaction of judgment after trial; and
- The expense of collecting the final judgment.

The creditor should carefully consider these factors. A substantial discount may be merited to reach agreement on the dollar amount to be paid and the terms of payment. This may be particularly true if the debtor is in dire financial circumstances, or may choose to spend available funds on legal fees rather than paying off the creditor (and perhaps several other creditors). The creditor may be highly motivated to offer to discount the claim in exchange for a lump-sum payment.

The debtor's attorney's most effective negotiating tool is the debtor's financial condition. In the best negotiating position, the debtor is completely judgment-proof; *i.e.,* the exemption statutes will enable the debtor to protect all its assets from the creditor. See CCP §§703.010-704.995. The creditor may choose to accept a token payment relative to the amount of the debt, either in a lump sum or over time, rather than pursue the matter to judgment and recover an even smaller amount, considering the additional time, effort, and cost.

If the debtor has multiple creditors and is a potential candidate for a bankruptcy filing based on the financial statement, then the creditor, as a business decision, might be willing to negotiate the debt and associated interest, costs, and fees.

Ordinarily, a creditor cannot require disclosure of the debtor's financial information to investigate the potential collectibility of its debt unless the complaint seeks punitive damages. *Doak v Superior Court* (1968) 257 CA2d 825, 65 CR 193 (award of punitive damages not authorized). The debtor may have to disclose and certify his or her financial condition, however, if the settlement is based on the debtor's judgment-proof status. The debtor's attorney should review the debtor's financial situation before offering to disclose it to the creditor during litigation and should be careful not to reveal the debtor's financial condition too soon. The attorney should reveal only basic numbers and categories of assets and debts (which may already be known by the creditor), and should be cautious about disclosing the location of bank accounts or nonexempt assets that might be subject to attachment or execution. Note that the creditor may already know where the debtor banks.

**CAUTION:** Counsel for the debtor negotiating a lump-sum settlement for less than the full amount claimed by the creditor may trigger an income tax obligation based on the amount of debt forgiveness achieved by that lump sum or lesser sum payment. The creditor bank or other financial institution, for example, may be required to report the amount of debt forgiveness by filing IRS Form 1099-C, as required by Treas Reg §1.6050P-1(c), and send a copy to the debtor. The debtor-taxpayer must then report the income.

Both creditors' and debtors' counsel should review the specific instructions for Form 1099-C to determine to what extent, if any, the settlement represents a "forgiveness of debt" under IRC §61(a)(12). See IRS specific instructions for Form 1099-C. Note that the instructions define a debt as "any amount owed to you including stated principal, stated interest, fees, penalties, administrative costs, and fines," but only require the reporting of stated principal in lending transactions. Thus, there is a potentially large exception to the reporting requirement for nonprincipal amounts, which include penalties, fines, fees, and administrative costs (arguably including attorney

fees).

When negotiating an amount to be paid, debtor's counsel should attempt to determine the dollar amounts of the "stated principal" or an amount that could be agreed on by the parties to be the "stated principal" not only for settlement purposes but for tax reporting purposes. The stated principal can best be found by a demand for a bill of particulars, which usually consists of a series of transactions on an open-book account. See IRC §§108, 1017. The line item statement of a purchase and credits on the account should reveal or enable counsel to calculate the stated principal. For a form of demand for bill of particulars, see §4.63.

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## 2. Stipulated Judgment

### §4.102 a. Procedure for Stipulated Judgment

Settling an already-commenced lawsuit often involves using a stipulation for the entry of judgment or a stipulated judgment. If the debtor agrees to make payments as part of the settlement, the stipulation should delay entry of any judgment until a default by the debtor under the terms of the stipulation. Such stipulations generally require written notice of any payment default and give the debtor a 10- to 15-day period to cure a noticed default. After a debtor's failure to cure a noticed default, the stipulation provides for the entry of judgment, generally on submission to the court of creditor's counsel's written declaration setting forth the default.

Creditors often require that the default eliminate any discount of the obligation given in exchange for voluntary payment. The debtor's default may also result in the imposition of interest or other penalties, either from the date of the stipulation or an earlier point in time. These terms are subject to significant negotiation during the settlement process.

The debtor should attempt to include a release provision that is as broad as possible, *e.g.,* a waiver of all claims against the debtor, whether known or unknown.

The United States Supreme Court announced, in *Archer v Warner* (2003) 538 US 314, 155 L Ed 2d 454, 123 S Ct 1462, that a creditor could contest the dischargeability of a settlement obligation when the facts of the settled underlying lawsuit set forth grounds for nondischargeability. 155 L Ed 2d at 459. The Court reached this holding notwithstanding broad release language between the parties "'discharging' the [settling defendants] 'from any and every right, claim, or demand' that the [settling defendants] 'now have or might otherwise hereafter have against' them, 'excepting only obligations under' [the settlement documents, which included a promissory note and related instruments]." 155 L Ed 2d at 460.

**PRACTICE TIP:** The Court's decision still leaves open the possibility that the parties may expressly contract to resolve any potential nondischargeability claims that might arise in a later bankruptcy by the settling defendants. To do so, however, the debtor's attorney should include express language clearly resolving all factual issues constituting grounds for any nondischargeability claims. In addition, the debtor's attorney should, if possible, include express language waiving the settling plaintiff's right to assert a claim of nondischargeability in any subsequent bankruptcy proceeding. It is likely that the law regarding what constitutes an effective waiver by a creditor of any nondischargeability claims prior to the filing of a bankruptcy petition will continue to evolve.

For its part, the debtor must usually execute a release of any claims against the creditor parallel to the release executed by the creditor. Before advising the debtor to waive claims against the creditor, counsel should explore whether such counterclaims exist, either based on the transaction itself or on the creditor's violation of consumer protection statutes. If potential counterclaims do exist, counsel should advise the debtor in writing of their possible effect on the litigation or the debt, absent their waiver in a settlement.

If possible, the debtor's attorney should restrict execution of any stipulation to the party initially liable on the debt. If only one spouse is liable, the attorney should attempt to preserve that status, particularly if the nondebtor spouse has significant separate property.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.103 b. Form: Stipulation for Entry of Judgment

**§4.103 b. Form: Stipulation for Entry of Judgment**

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name of plaintiff)*]_ _, **Plaintiff** | ) | **No. _ _ _ _ _ _** |
| **vs.** | ) | **STIPULATION FOR ENTRY OF JUDGMENT** |
| _ _[*Name of defendants*]_ _, **Defendants** | ) | |
| | ) | |

**Plaintiff, _ _[*name of plaintiff*]_ _, a corporation, and Defendants, _ _[*name of defendants*]_ _, hereby stipulate and agree as follows:**

**1. Plaintiff and Defendants agree that judgment may be entered in favor of Plaintiff and against Defendants in the sum of $_ _[*amount*]_ _ principal, $_ _[*amount*]_ _ costs, $_ _[*amount*]_ _ attorney fees, plus interest on the principal sum to accrue at the rate of _ _[*number*]_ _ percent per annum from and after _ _[*date*]_ _; provided, however, that if Defendants pay Plaintiff the principal sum of $_ _[*amount*]_ _ as follows, Plaintiff shall dismiss this entire action with prejudice: _ _[*Specify payment terms.*]_ _**

**2. All payments shall be made by check payable to Plaintiff and mailed to _ _[*specify*]_ _, or such other address as Plaintiff may, from time to time, designate in writing to Defendants.**

**3. Time is of the essence with respect to prompt payment of moneys due from Defendants as specified above.**

**4. IT IS HEREBY STIPULATED by and between plaintiff and defendants, that in the event of any default on payment as outlined above, not cured within _ _[*e.g., ten*]_ _days after notice, the judgment in the above-entitled cause shall be entered in favor of the plaintiff, and against the defendants in the sum of $_ _[*amount*]_ _, principal, together with interest from _ _[*date*]_ _, at the rate prayed for in the complaint and for costs of suit in the amount of $_ _[*amount*]_ _, less a credit for any payments made pursuant to this stipulation. If a notice of default and demand to cure has to be given, it may be made by facsimile or first class mail to the defendants at_ _[*address*]_ _.**

**5. IT IS FURTHER STIPULATED that in the event that judgment is entered based on a breach of the payment schedule outlined above, each partial payment shall be credited first to the accrued interest due on the date the payment is received by the attorneys for the plaintiff, then to a reduction of the principal balance, and last to the accrued costs.**

**6. IT IS FURTHER STIPULATED that should the defendants refinance any real property during the term of this payment schedule, the balance then due shall be immediately due and payable.**

**7. THE PARTIES FURTHER STIPULATE that should the payment plan extend to a point in time that is greater than three years from the date the complaint was filed, each side waives the provisions of Code of Civil Procedure §583.420 for dismissal for failure to bring the case to trial within three years.**

**8. THE PARTIES FURTHER STIPULATE that should the payment plan extend to a point in time that is greater than five years from the date the complaint was filed, each side waives the provisions of Code of Civil Procedure §583.310 for dismissal for failure to bring the case to trial within five years.**

**9. IT IS FURTHER STIPULATED that a declaration by plaintiff's attorney under penalty of perjury setting forth the facts of default shall suffice to entitle plaintiff to entry of judgment herein without a hearing.**

**10. THE PARTIES FURTHER STIPULATE that the failure of any payment to clear the bank on which it is drawn the first time it is presented for payment shall constitute an act of default.**

**11. THE PARTIES FURTHER STIPULATE that each party will cooperate with the other party in signing such documents as may be needed to effectuate any term of this agreement, and the failure to so cooperate shall constitute an act of default.**

**12. THE PARTIES FURTHER STIPULATE that, if a Right to Attach Order has been granted, regardless of whether a Writ of Attachment has been issued or levied, should a court dismiss the matter and retain jurisdiction pending the payment of the final installment that the parties waive the provisions of Code of Civil Procedure §490.010(b) and agree that the Attachment was not wrongful despite the plaintiff not having a judgment entered.**

**13. Plaintiff shall not file this Stipulation unless Defendants are in material breach of this Stipulation.**

**14. On timely payment of all sums set forth in paragraph 2, Plaintiff shall forthwith file a dismissal with prejudice of this entire action, with an endorsed filed copy of said Request for Dismissal served on counsel for Defendants.**

**15. Defendants hereby waive notice of entry of judgment in the event of** their **material breach and expressly waive all rights to stay of execution and appeal. Defendants agree that judgment may be entered by ex parte application and declaration of Plaintiff or Plaintiffs' counsel, with five days' written notice of such application to counsel for Defendants.**

**16. Except as otherwise may be provided in this Stipulation, each party shall bear its own attorney fees and costs.**

**17. Plaintiff, through _ _[*his/her/its*]_ _ counsel, shall execute, serve, and file a "Notice of Settlement" under California Rules of Court 3.1385(c).**

**18. The parties acknowledge that they are entering into this Stipulation to settle a disputed debt and to avoid the time and expense of litigating the dispute.**

[*Add one of the following alternatives*]

[*Alternative 1: No IRS Form 1099-C*]

**The parties further acknowledge that** $_ _[*principal sum being paid*]_ _ **will not constitute "debt forgiveness" or trigger the issuance of an IRS Form 1099-C.**

[*Alternative 2: IRS Form 1099-C issued by Plaintiff*]

**The parties further acknowledge that on payment of the lump sum set forth in paragraph 1, Plaintiff will issue an IRC Form 1099-C to the Internal Revenue Service for debt forgiveness in the amount of** $_ _[*amount*]_ _**.**

**19. This Stipulation is intended by the parties to be enforceable under Code of Civil Procedure §664.6. Further, this Stipulation is a binding agreement between the parties and shall be construed in accordance with the laws of the State of California; provided, however, that no ambiguities in this argument shall be construed against the party preparing this Stipulation.**

**20. This Stipulation may be executed in two counterparts and shall be effective on the signature of all parties and counsel.**

**Date:** _ _ _ _ _ _ __[*Signature of plaintiff*]__
_ _[*Typed name*]_ _

**Date:** _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _

**APPROVED AS TO FORM:**

**Date:** _ _ _ _ _ _ _ _[*Name of firm*]_ _

**By:** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for Plaintiff**

**Date:** _ _ _ _ _ _ _ _[*Name of firm*]_ _

**By:** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for Defendant**

*Comment:* For form release provisions included in a settlement agreement, see §4.115.

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## §4.104 3. Ancillary Agreements

A creditor may request that the debtor, or another party, execute a written promissory note as part of any settlement. An independent promissory note provides a simple document with which to liquidate the debt owed, which the creditor may transfer to third parties. Similarly, the creditor may also request that the debtor, or another party, provide guaranties or security interests to secure performance under the settlement agreement.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/ 4. Settlement and Release Agreement Form/§4.105 a. Form: Heading and Recitals

## 4. Settlement and Release Agreement Form

### §4.105 a. Form: Heading and Recitals

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.

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**SETTLEMENT AND GENERAL RELEASE AGREEMENT**

**This Settlement and General Release Agreement ("Agreement") is made on _ _[*date*]_ _, by _ _[*name of corporate defendant*]_ _ ("Corporate Defendant") and _ _[*name of individual defendant*]_ _ ("Individual Defendant") (Corporate Defendant and Individual Defendant are collectively referred to as "Defendants"), with reference to the following facts:**

**RECITALS**

**A. _ _[*Describe the contractual agreement between the parties that resulted in the debt at issue*]_ _. A true and correct copy of this agreement ("Underlying Agreement") is attached to this Agreement as Exhibit A.**

**B. _ _[*Describe relationship between defendants*]_ _.**

**C. _ _[*Describe Defendants' failure to pay amounts due*]_ _.**

**D. Defendants acknowledge and confirm that as of _ _[*date*]_ _, Defendants are in default on payments due pursuant to the Underlying Agreement, and pursuant to the Underlying Agreement, Defendants owe _ _[*identify creditor*]_ _ ("Creditor") the remaining principal balance of $_ _[*amount*]_ _, plus accruing interest and attorney fees ("Amount Owed").**

**E. On _ _[*date*]_ _, Creditor filed an action titled _ _[*specify*]_ _, in _ _[*name of county*]_ _ Superior Court ("Court Action"). In its verified complaint, Creditor alleged causes of action for _ _[*specify*]_ _.**

**F. Defendants and Creditor desire to avoid the expense of litigating the payment defaults and the defenses raised, and desire to settle the dispute that has arisen regarding the Amount Owed.**

**NOW, THEREFORE, in consideration of the mutual recitals, covenants, and conditions in this Agreement, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:**

**AGREEMENT**

*Comment:* A creditor will request acknowledgment of default, but the debtor should avoid doing so, particularly in a settlement or workout agreement made before the creditor commences litigation.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.106 b. Form: Effective Date

## §4.106 b. Form: Effective Date

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[*Add one of the following alternatives*]

[*Alternative 1: Set effective date*]

**1. Effective Date. This Agreement shall be valid and binding among all parties as of _ _**[*date*]**_ _ ("Effective Date").**

[*Alternative 2: Effective date based on occurrence of condition*]

**1. Effectiveness of Agreement. This Agreement shall be valid, binding, and effective between the parties only on the occurrence of _ _**[*specify any relevant condition*]**_ _.**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.107 c. Form: Payments

## §4.107 c. Form: Payments

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[*Add one of the following alternatives*]

[*Alternative 1: Payment in equal installments*]

**2. Payment by Defendants. Defendants shall pay Creditor one monthly installment in the amount of $_ _[*amount*]_ _ on or before _ _[*date*]_ _, and _ _[*number*]_ _ equal monthly installments of principal and interest in the sum of $_ _[*amount*]_ _ on or before the _ _[*e.g., 5th*]_ _ day of each month beginning on _ _[*date*]_ _, and continuing monthly thereafter through _ _[*date*]_ _, at which time any remaining principal and accrued interest shall be due and payable.**

[*Alternative 2: Single payment conditioned on dismissal of court action*]

**2. Settlement Payment and Exchange of Documents.**

**a. *Defendants' Actions*. Defendants shall deliver $_ _[*amount*]_ _ to _ _[*specify*]_ _ in certified funds payable to Creditor and a duly executed original of this Agreement and all accompanying documents to be executed by Defendants.**

**b. *Creditor's Actions*. On receipt of the certified funds by _ _[*specify*]_ _, Creditor shall deliver to Defendants a duly executed original of this Agreement and all accompanying documents to be executed by Creditor, including a duly executed Request for Dismissal Without Prejudice of Entire Court Action.**

**c. *Waiver of Fees and Costs*. As additional consideration for this Agreement, each party waives any right to the collection of attorney fees and court costs relating in any manner to the Court Action.**

[*Alternative 3: Payment by secured promissory note*]

**2. *Settlement Payment.* Defendants shall pay to Creditor the principal amount of $_ _[*amount*]_ _, plus interest at the rate of _ _[*number*]_ _ percent compounded _ _[*daily/monthly/annually*]_ _, which shall be paid under the terms of the Promissory Note of even date attached to this Agreement as Exhibit _ _ ("Promissory Note"), which Defendants shall execute in favor of Creditor. Defendants shall provide additional security for repayment of the Promissory Note by executing a deed of trust of even date, attached to this Agreement as Exhibit _ _ ("Deed of Trust"), in favor of Creditor, encumbering that certain real property in _ _[*name of county*]_ _ County, commonly known as _ _[*address or description*]_ _.**

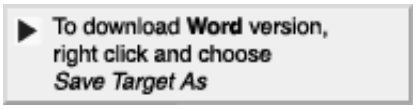
*Comment:* Counsel should exercise caution in structuring a settlement using a promissory note and a deed of trust accompanied by a stipulation for entry of judgment. Entry of the judgment bars the creditor from enforcing the deed of trust. Thus, on default by the debtor under the settlement agreement, the creditor must elect to enforce the judgment or enforce the deed of trust. For discussion of one-action rule, see California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009).

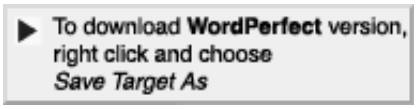
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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.108 d. Form: Stipulations

## §4.108 d. Form: Stipulations

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[*Add one of the following alternatives*]

[*Alternative 1: Stipulation for entry of judgment*]

**3. Stipulation for Entry of Judgment. Concurrently with the execution of this Agreement, Defendants shall also execute a stipulation for entry of judgment in the form attached to this Agreement as Exhibit _ _ ("Stipulation"), providing for entry of a judgment in the form attached to this Agreement as Exhibit _ _ ("Judgment") against Corporate Defendant in the principal amount of $_ _[*amount*]_ _, plus past due accrued interest of $_ _[*amount*]_ _, and attorney fees of $_ _[*amount*]_ _, altogether a total of $_ _[*amount*]_ _, plus continuing interest on the total amount from _ _[*date*]_ _, to the date of entry of the judgment at the rate of _ _[*number*]_ _ percent per annum. Creditor shall be entitled to have the court enter a judgment under the Stipulation immediately on delivery of the Stipulation.**

[*Alternative 2: For use in conjunction with Stipulation of Judgment to obtain potential for judgment against nonparty*]

**3. Stipulation for Confession of Judgment. Concurrently with the execution of this Agreement, _ _[*nonparty debtors*]_ _ shall execute a Confession of Judgment in favor of Creditor for $_ _[*amount*]_ _ and all necessary related documents in the forms attached to this Agreement as Exhibit _ _ ("Confession"). The Confession and related documents shall not be filed until the occurrence of _ _[*specify any relevant condition*]_ _.**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.109 e. Form: Guaranties

## §4.109 e. Form: Guaranties

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**4. <u>Guaranties of Obligations by Principals.</u> Concurrently with the execution of this Agreement, _ _**[*names of guarantors*]**_ _ shall each execute a continuing guaranty of the Amount Owed by Corporate Defendant to Creditor in the form attached to this Agreement as Exhibit _ _ ("Guaranties").**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.110 f. Form: Representations and Warranties

## §4.110 f. Form: Representations and Warranties

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**5. Representations and Warranties. To induce each other to enter into this Agreement, the parties represent and warrant as follows:**

**a. Defendants represent and warrant that their execution, delivery, and performance of this Agreement has been duly and properly authorized and does not and will not, with or without the giving of notice, passage of time, or both:**

**(i) Violate any provision of any law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award presently in effect to which they are subject;**

**(ii) Result in a breach, or constitute or cause a default, under any material indenture, agreement (whether oral or written), commitment, lease, or instrument to which Defendants are a party or by which they are bound;**

**(iii) Require any approval, authorization, or consent of any federal, state, municipal, or other governmental commission, board, or agency, or any person or entity to which the parties are bound, by contract or otherwise, for the execution and delivery of this Agreement; or**

**(iv) Breach or put Defendants in default under any indenture, agreement (whether oral or written), lease, or instrument to which they or any of them are a party, other than the default resulting from Corporate Defendant's failure to make timely payments to Creditor.**

**b. Defendant, _ _[*name of corporate defendant*]_ _ represents and warrants that it is a _ _[*specify form of entity*]_ _ duly formed and authorized to do business in the State of California by the Secretary of State of California; and**

**c. Each party represents and warrants that:**

**(i) It is the sole and lawful owner of all right, title, and interest in and to each claim or other matter that such party releases in this Agreement and has not assigned or transferred, or purported to assign or transfer, to any entity, any claim or other matter released, waived, or dismissed in this Agreement;**

**(ii) There is no other person or entity from whom a release or waiver should be obtained to fully and completely resolve (a) the Court Action, (b) any rights or claims arising under that Action or by reason of the dispute among the parties, or (c) any other claims, rights, demands, liabilities, and actions released in this Agreement;**

**(iii) It has not filed, and shall not file, any further litigation on the Amount Owed dispute, or any other facts, events, or omissions (actual or alleged) that relate, either directly or indirectly, to the dispute;**

**(iv) Neither it nor any of its officers, agents, partners, employees, representatives, insurers, or attorneys has made any statement or representation to any other party regarding any fact relied on in entering into this Agreement, and it does not rely on any statement, representation, or promise of any other party or any other party's officers, agents, partners, employees, representatives, insurers, or attorneys in executing this Agreement, or in making the settlement provided for in this Agreement, except as expressly stated in this Agreement;**

**(v) It has made any investigation of the facts pertaining to this settlement and this Agreement and of all**

**matters pertaining to them, as it deems necessary;**

**(vi) All representations and warranties in this Agreement are true and correct, including any financial disclosures made as a condition of this settlement or to induce Creditor to enter into this settlement, as of the date of this Agreement and shall survive the execution of this Agreement.**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.111 g. Form: No Modification

## §4.111 g. Form: No Modification

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**6. No Modification. Defendants acknowledge that:**

**a. Except as expressly provided in this Agreement, it is not intended to be, and shall not be deemed or construed to be, a novation, release, modification, amendment, or waiver of Creditor's rights or of the Defendants' obligations under the Judgment or the Underlying Agreement;**

**b. This Agreement shall not be deemed to cure any of Defendants' existing defaults under the Judgment or the Underlying Agreement;**

**c. Creditor reserves all available rights and remedies at law, in equity, and under the Judgment and the Underlying Agreement in connection with any event of default by Defendants under the Judgment or the Underlying Agreement, except as expressly set forth in this Agreement; and**

**d. This Agreement is not intended to be, and shall not be deemed or construed to be, a modification, amendment, or waiver of any other obligation owed by Defendants or any of them to Creditor not expressly set forth in this Agreement.**

*Comment:* The creditor can use this or similar language to preserve specific unique rights under the original agreements between the parties, such as rights to security or collateral, obligations imposing fiduciary duties on the debtor, and other matters.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.112 h. Form: Events of Default

## §4.112 h. Form: Events of Default

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.

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**7. Events of Default. The occurrence of any of the following events shall be an event of default ("Event of Default").**

**a. *Failure to Perform Monetary Obligations*. Failure to perform any of the monetary obligations set forth in this Agreement;**

**b. *Failure to Perform Nonmonetary Obligations.* Failure to perform any of the nonmonetary obligations set forth in this Agreement and failure to cure the same within _ _[*e.g., 5*]_ _ days after written notice of such failure from the other party;**

**c. *Representations and Warranties.* Any representation or warranty in this Agreement shall be false, misleading, or incorrect;**

**d. *Default Under Related Documents.* An event of default under any other agreement executed pursuant to or in connection with this Agreement and failure to cure the default within any cure period provided in such other agreement;**

**e. *Insolvency or Bankruptcy*. An order for relief under Title 11 of the United States Code is entered by or against any of the parties to this Agreement and any related agreements (such as guaranties executed by third parties) or a receiver, assignee for the benefit of creditors, or other such similar party is appointed to take possession, in whole or in part, of any Defendants' property because of Insureds' alleged insolvency or alleged default under any agreement.**

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## §4.113 i. Form: Remedies

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.

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**8. Remedies. On the occurrence of an Event of Default and at all times thereafter, all Defendants' obligations shall become immediately due and payable without demand, presentment, or notice, all of which requirements Defendants waive, and Creditor, at its option, without the need to obtain any prior approval of any court, shall be entitled to:**

**a. *Reopen Court Action.* Immediately take any action necessary to reopen the Court Action, file the Stipulation, and obtain entry of the Judgment under the terms of this Agreement;**

**b. *Enforce Judgment.* Immediately take any action to enforce the Judgment;**

**c. *Enforce Guaranties.* Immediately take any action to enforce the Guaranties as well as exercise any other rights and remedies available to Creditor at law or in equity;**

[*If applicable, add the following option*]

[*Option: If payment by secured promissory note*]

**d. *Enforce Promissory Note and Deed of Trust.* Exercise any of its rights or remedies set forth in the Promissory Note or the Deed of Trust; and**

[*Continue*]

**[e]. *Enforce Other Remedies.* Immediately exercise any of its rights or remedies provided in any other agreement executed in connection with this settlement agreement.**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.114 j. Form: Remedies Cumulative; No Waiver

## §4.114 j. Form: Remedies Cumulative; No Waiver

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.

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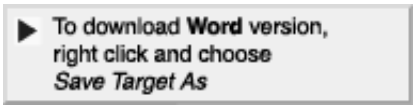
**9. <u>Remedies Cumulative; No Waiver.</u> All such rights and remedies shall be cumulative. No failure or delay by Creditor in exercising any power, right, or remedy shall operate as a waiver of such power, right, or remedy, and no single or partial exercise of any such power, right, or remedy shall preclude any further exercise of such power, right, or remedy or the exercise against any other party of any other power, right, or remedy.**

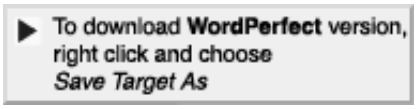
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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.115 k. Form: Waiver and Release

## §4.115 k. Form: Waiver and Release

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.




[*Add one of the following alternatives*]

[*Alternative 1: Limited Release*]

**10. Waiver and Release.**

**a. Expressly conditioned on Defendants' full performance of all terms of this Agreement, the parties release, waive, and relinquish all rights, claims, or defenses arising from or relating to the failure of Corporate Defendant to pay the Amount Owed that they have or may have against each other, both individually and jointly, including their respective agents, representatives, successors, and assigns, through the date of this Agreement.**

[*If applicable, add one or more of the following options*]

[*Option 1: No release of other obligations*]

**This release shall not constitute a release of any obligations or duties of Creditor under the _ _**[*identify agreement*]**_ _.**

[*Option 2: Release does not affect warranties*]

**This release shall not affect the validity or invalidity of the warranty given under the _ _**[*identify agreement*]**_ _.**

[*Continue*]

**This release shall constitute a specific release of the matters set forth in this Agreement and it shall not constitute a general release of either known or unknown claims of either party.**

[*Alternative 2: General release*]

**10. Waiver and Release. Each party acknowledges and warrants that this release is voluntary and is not made under threat or duress. Each party shall cooperate in the execution of any other document necessary to effect the intention of this release. Each party releases the other parties as follows:**

**a. *Release by Creditor.* Except for Defendants' obligations under this Agreement and any related documents, Creditor releases and discharges Defendants and their parents, children, predecessors in interest, subsidiaries, affiliates, partners, agents, representatives, attorneys, principals, associates, employees, successors, and assigns, and each of them, from any and all claims, demands, liabilities, actions, and causes of action that Creditor has or hereafter may have or claim or hereafter may claim to have against Defendants and their parents, children, predecessors in interest, subsidiaries, affiliates, partners, agents, representatives, attorneys, principals, associates, employees, successors, and assigns or affiliates, and each of them.**

**b. *Release by Defendants.* Defendants and each of them release and discharge Creditor and its parents, children, predecessors in interest, subsidiaries, affiliates, partners, agents, representatives, attorneys, principals, associates, employees, successors, and assigns, and each of them, from any and all claims, demands, liabilities, actions, and causes of action that Defendants and each of them have or hereafter may have or claim to have against Creditor or its predecessor in interest, or its parents, children, predecessors in interest, subsidiaries, affiliates, partners, agents, representatives, attorneys, principals, associates, employees, successors, and assigns or affiliates, and each of them.**

**By executing this release, Creditor and Defendants waive any and all rights they may have under Civil Code §1542, which provides:**

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH DEBTOR.**

_____ _____

**Initials** **Initials**

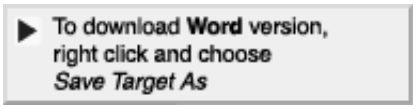
*Comment:* Ordinarily, in settling an action, the parties wish to execute a general release of all claims. When the parties have an ongoing business relationship, however, the debtor as well as the creditor must consider whether a limited release is more appropriate. For example, the creditor may have an ongoing obligation to warrant and repair a good or provide a service. In this situation, the parties should use the limited release in the first alternative above.

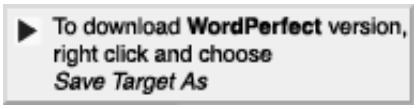
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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.116 I. Form: Advice of Counsel

## §4.116 I. Form: Advice of Counsel

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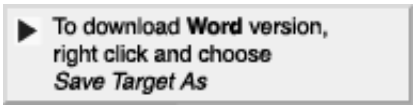

**11. Advice of Counsel. Each party has obtained, or has had the opportunity to obtain, advice of counsel regarding this Agreement and all related documents and transactions referred to in this Agreement. Each party has been, or has had the opportunity to be, fully advised on his, her, or its rights and responsibilities in connection with this Agreement and all related documents and transactions referred to in this Agreement and on the meaning of Civil Code §1542.**

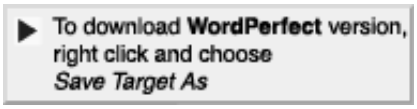
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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.117 m. Form: No Admission of Liability

### §4.117 m. Form: No Admission of Liability

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.




**12. No Admission of Liability. None of the parties admits, expressly or impliedly, any fact or liability with respect to any matter relating to the Underlying Agreement, Court Action, or Amount Owed except as expressly set forth in this Agreement. The parties have entered into this Agreement solely for the purpose of compromise and settlement and to avoid the further expense, delay, and risk of litigation. Creditor acknowledges that the payment by Defendants of the sum or sums set forth in paragraph 2 of this Agreement, if paid in full, will not constitute debt forgiveness, and Creditor will not file a Form 1099-C with the Internal Revenue Service.**

*Comment:* If the settlement agreement uses an acknowledgment of the debt owed, such as that set forth in paragraph D of the recitals (see §4.105), this paragraph could refer to that acknowledgment.

When the creditor is a financial institution, bank, trust company, savings and loan association, credit union, finance company, or credit card company, the issue of debt forgiveness must always be considered by both counsel for creditor and debtor. For discussion of this issue, see the "Caution" in §4.101. For a bill of particulars that may be used to determine "stated principal" for these purposes, see §§4.63-4.64.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.118 n. Form: Attorney Fees

## §4.118 n. Form: Attorney Fees

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**13. Attorney Fees. Defendants shall pay immediately on demand all Creditor's costs and expenses, including reasonable attorney fees, if after default this Agreement is placed in the hands of one or more attorneys for enforcement, or if Creditor finds it necessary or desirable to secure the services or advice of one or more attorneys regarding enforcement of this Agreement against Defendants, any guarantor, or any other party liable to Creditor under this Agreement or any related agreement or to protect its rights under this Agreement, whether or not an action is commenced. The prevailing party in any action or proceeding to interpret or enforce any provision of this Agreement shall be entitled, in addition to any judgment or award on such action or proceeding, to an award for all costs and expenses (including costs of all legal or administrative proceedings or hearings and attorney fees) incurred by the prevailing party, including without limitation all attorney fees and related costs of appeal or enforcement of any such judgment or award.**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.119 o. Form: Confidentiality

## §4.119 o. Form: Confidentiality

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**14. <u>Confidentiality.</u> This Agreement and its terms are to be treated confidentially. The parties shall not disclose these terms to anyone except to the extent disclosure is necessary for properly filing income tax returns, necessary for obtaining professional liability insurance, or required by legal process. The parties shall be allowed to state only that the claims described in the Court Action, more fully described in the recitals in this Agreement, have been settled and that the settlement terms are confidential.**

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.120 p. Form: Miscellaneous Provisions

## §4.120 p. Form: Miscellaneous Provisions

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.

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**15. Recitals. No promise, inducement, or representation other than as set forth in this Agreement has been made, offered, or relied on, and the terms of this Agreement are contractual and not a mere recital. The recitals to this Agreement are true and correct, and are incorporated in and made a part of it.**

**16. Duty of Cooperation. The parties shall at all times fully cooperate with each other and shall cause their respective agents and attorneys to cooperate in a prompt and timely manner in connection with the performance of all obligations of the parties under this Agreement. The parties shall execute and deliver such additional documents or certificates, and take such further action, as may be necessary or otherwise reasonably requested of them to fully perform the provisions of this Agreement.**

**17. Amendment. No amendment, modification, or addition to this Agreement or to any attached exhibit shall be valid unless it is in a writing executed by the parties.**

**18. Successor and Assigns. This Agreement shall bind and inure to the benefit of each party and each party's respective successors, assigns, heirs, and personal representatives.**

**19. Waiver. Except as set forth in Paragraph _ _, the parties shall not be deemed to have waived any of their respective rights under this Agreement unless such waiver is in a writing signed by the party claimed to have waived that right, nor shall a written waiver by a party be deemed a subsequent waiver of an additional right.**

**20. Entire Agreement. This Agreement, together with the attached exhibits, contain the entire agreement of the parties with respect to the Amount Owed dispute, and no representations, inducements, promises, or agreements, whether oral or written, not expressly set forth in this Agreement or the attached exhibits shall have any force or effect. Without limiting the generality of the foregoing, Defendants specifically acknowledge and agree that, except as set forth in this Agreement and the attached exhibits, neither Creditor nor any of its officers, employees, representatives, contractors, agents, or attorneys has made any other representations or promises of any nature whatsoever to, or entered into any other agreements with, Defendants relating to any settlement, restructuring, or modifications of the obligations of Defendants to Creditor, or the transactions contemplated by this Agreement or any further financing with respect to the Defendants. The terms of this Agreement and the attached exhibits may not be discharged or terminated orally but may be discharged or terminated only by an instrument in writing, signed by the party against which enforcement of the discharge or termination is asserted.**

**21. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe the provisions of this Agreement.**

**22. Governing Law. California law shall govern the validity, interpretation, operation, and enforcement of each provision in this Agreement. This provision is an expression of the parties' intent made in light of the substantial contacts that the transaction to which this Agreement relates has with the State of California.**

**23. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original but all of which shall together constitute one and the same document. A facsimile signature is as valid as an original signature.**

**24. Survival. All warranties and representations of each party shall survive termination of this Agreement.**

**25. Time. Time is of the essence to each provision of this Agreement.**

**26. Neutral Interpretation. This Agreement is the product of the parties' negotiations and shall be interpreted in a neutral manner. Any presumption regarding the construction or interpretation for or against any party by reason of that party having drafted any or all of this Agreement shall not apply.**

**IN WITNESS WHEREOF, the parties to this Agreement have caused it to be executed as of the date first written above.**

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## §4.121 q. Form: Signature

The form text in this section is part of a larger form. For your convenience, downloading any one of the sections included in the form will download the entire form. The inclusive section numbers are §§4.105-4.121.

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**Date:** _ _ _ _ _ _

_ _[*NAME OF CORPORATION*]_ _,
**a** _ _[*state of incorporation*]_ _ **corporation**

**By:** __[*Signature*]__
**Name:** _ _[*Typed name*]_ _
**Its:** _ _[*Title*]_ _

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _

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### §4.122 5. Confession of Judgment

Before a lawsuit is filed, a debtor may "confess" to a judgment against him or her for "money due or to become due" or for a contingent liability to the plaintiff. CCP §1132(a). The confession of judgment procedure enables a creditor to later obtain a judgment quickly without the necessity of a pending lawsuit at the time of the confession of judgment. Using this procedure, a debtor may stipulate to the entry of judgment in a court action that is not yet filed, and may not be filed unless the debtor defaults under a settlement agreement.

The confession of judgment procedure has three parts: the debtor's statement confessing the judgment (see §4.123), an attorney's certificate regarding the debtor's confession (see §4.124), and the judgment itself (see §4.125). The creditor files the confession of judgment and the attorney's certificate with the court clerk and pays a minimal filing fee, which, like any other filing fee, becomes a cost recoverable as part of the judgment. The clerk then enters the confessed judgment. CCP §1134(a). The creditor should prepare the confession of judgment pleadings to be filed in the county where the individual defendant resides. If no individual defendant is a party, the creditor should prepare the pleadings to be filed in the county where the business defendant has its principal place of business.

The debtor's statement must be verified under oath and must (CCP §1133):

- Authorize the entry of a judgment against the debtor for a specified sum;
- Concisely state the facts establishing the debtor's liability;
- If for money due or to become due, show that the confessed sum is justly due or to become due; and
- If to secure a contingent liability, show that the confessed sum does not exceed the contingent liability.

The attorney's certificate must be executed by an attorney independently representing the debtor and must support the confession of judgment by stating that (CCP §1132(b)):

- The attorney reviewed the proposed judgment;
- The attorney advised the defendant about the rights and defenses waived by the confession of judgment; and
- The attorney advised the debtor to use the confession of judgment procedure.

As a practical matter, the confession of judgment procedure has limited usefulness. Before a creditor files a lawsuit, the debtor often has no attorney representing him or her to provide the advice required by the attorney's certification. Further, the confession of judgment procedure may not provide the debtor with as advantageous a settlement posture as forcing the creditor to file suit. Once a creditor files suit, the confession of judgment procedure serves no useful purpose, because the creditor can instead obtain a default judgment or a stipulated judgment.

The confession of judgment procedure serves a useful purpose only in limited circumstances. It may be useful if the debtor represented by an attorney wishes to negotiate a quick settlement without incurring the costs necessary to have the attorney prepare and file an answer and become involved in defending a lawsuit. A creditor settling an action before filing a lawsuit may desire a means of enforcement that does not require the subsequent filing of a lawsuit; a confession of judgment provides a means of doing so. It may also be useful if the parties to an action wish to stipulate to a judgment but also wish to include a nonparty as a judgment debtor. The parties could, however, accomplish this by stipulating to amend the complaint to add the nonparty before stipulating to a judgment.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.123 a. Form: Confession of Judgment Statement

## §4.123 a. Form: Confession of Judgment Statement

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | |
|---|---|
| **In the Matter of the Confession)** | **No. _ _ _ _ _ _** |
| **of Judgment by )** | **CONFESSION OF JUDGMENT** |
| _ _[*Name(s) of defendant(s)*]_ _, ) | **STATEMENT (CCP §1133)** |
| **a California corporation, )** | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s) )** | **Dep't:** _ _[*number*]_ _ |
| **In Favor of )** | **Hearing judge:** _ _[*if known*]_ _ |
| _ _[*Name(s) of plaintiff(s)*]_ _, ) | **Action filed:** _ _[*date*]_ _ |
| **Plaintiff(s) )** | **Trial date:** _ _[*if set*]_ _ |
| **_____)** | |
| **)** | |

**Defendants, _ _[*name of defendants*]_ _, as a condition of, and concurrently with, the parties' Settlement Agreement and General Release ("Release"), hereby confess judgment in this action in favor of _ _[*name of plaintiff*]_ _ in the sum of $_ _[*amount*]_ _ owed as of _ _[*date*]_ _, and authorize entry of judgment against _ _[*him/her/it/them*]_ _ in that sum for amounts owed under the agreement between the parties arising from Defendants' breach _ _[*describe; e.g., failure to pay for widget delivered on _ _[date]_ _]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for plaintiff**

**Date:** _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _

**APPROVED AS TO FORM:**

**Date:** _ _ _ _ _ _ _ _[*Name of firm*]_ _

**By:** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for defendants**

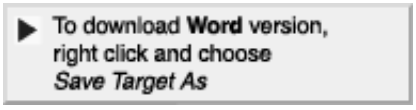
*Comment:* The confession of judgment statement must "state concisely the facts out of which it arose," or, if a contingent liability, "the facts constituting the liability." CCP §1133. If the parties use a confession of judgment to support an out-of-court settlement, the statement of facts should describe the settlement agreement and the debtor's original liability. Note also that there should be a signature line for each defendant.

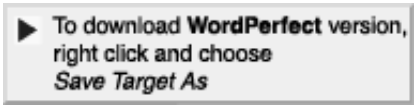
The fee for filing the confession of judgment form is $30. CCP §1134(b); Govt C §70626(b)(3).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.124 b. Form: Attorney's Declaration in Support of Statement Confessing Judgment

## §4.124 b. Form: Attorney's Declaration in Support of Statement Confessing Judgment




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | |
|---|---|
| **In the Matter of the Confession of Judgment by** _ _[*Name(s) of defendant(s)*]_ _, **a California corporation, Defendant(s) In Favor of** _ _[*Name(s) of plaintiff(s)*]_ _, **Plaintiff(s)** | **No. _ _ _ _ _ _ DECLARATION IN SUPPORT OF STATEMENT CONFESSING JUDGMENT (CCP §1132(b))** |

_ _[*Name*]_ _ **declares:**

**1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record in this matter for** _ _[*name(s) of defendant(s)*]_ _ **("Defendant(s)"), the parties confessing judgment in this action.**

**2. I further declare that I have examined the proposed judgment and have advised Defendants on the waiver of rights and defenses under the confession of judgment procedure and have advised Defendants to use this procedure.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on** _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

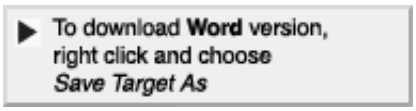
**Date:** _ _ _ _ _ _ _ _[*Name of firm*]_ _

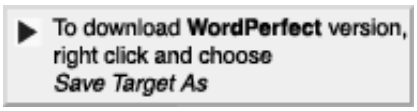
**By:** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.125 c. Form: Judgment

**§4.125 c. Form: Judgment**




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ _ Court, County of _ _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ _** *Judicial District*]_ _

| | |
|---|---|
| **In the Matter of the Confession of Judgment by** _ _[*Name(s) of defendant(s)*]_ _, **a California corporation, Defendant(s) In Favor of** _ _[*Name(s) of plaintiff(s)*]_ _, **Plaintiff(s)** | **No. _ _ _ _ _ _ _ JUDGMENT (CCP §1134) Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _ |

**Under the confession of judgment statement on file in the above-titled matter, this court orders the following judgment to be entered:**

**IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff** _ _[*name of plaintiff*]_ _ **shall have and recover from defendants** _ _[*name(s) of defendant(s)*]_ _ **the principal amount of $**_ _[*amount*]_ _**, plus interest from the date of entry of the judgment at the legal rate provided by law.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

**Clerk**
**By:** __[*Signature*]__
**Deputy**

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## §4.126 H. Assignment for Benefit of Creditors

As an alternative to settling with individual creditors or filing bankruptcy, the debtor may consider an assignment for the benefit of creditors; *i.e.,* assigning all its assets to an assignee, usually an independent third party, for liquidation and distribution to the creditors. The assignment is best suited to the liquidation of a small business with tangible assets. In addition to providing many of the benefits of bankruptcy (see §4.127), an assignment may provide more flexibility to both the debtor and the creditors and may avoid the expense and delay of a bankruptcy proceeding.

The attorney for the assignee, absent allegations of fraud or an interest in the assigned assets other than as a source of payment of fees, owes no duty of care to a particular creditor or to the class of creditors as a whole by virtue of his or her representation of the assignee. *Berg & Berg Enters. v Sherwood Partners, Inc.* (2005) 131 CA4th 802, 32 CR3d 325, modified at 2005 Cal App Lexis 1348 (Aug. 25, 2005, H026821).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.127 1. Bankruptcy-Like Benefits

## §4.127 1. Bankruptcy-Like Benefits

An assignment for the benefit of creditors provides many of the benefits of bankruptcy to both the debtor and the creditors:

- The assignment does not include debtor property that is exempt from a money judgment (CCP §§493.010(a), 1801), but it does include all other transferable property of the assignor (CCP §493.010(a)). Thus, the general assignment permits the debtor to retain exempt property as in bankruptcy (see 11 USC §522).
- The assignment terminates all temporary protective orders or attachment liens granted within the 90-day period before the assignment. CCP §493.030(a). On an appropriate request by the assignee, any levying officer holding debtor property under an attachment must turn that property over to the assignee. CCP §493.040. The assignment subrogates the assignee to the rights of the attachment creditor, providing the assignee with powers similar to those of a trustee in bankruptcy. 11 USC §544; CCP §493.060(a).
- The assignment provides the assignee with the power to set aside preferential transfers, giving the assignee powers (and transferees defenses) essentially identical to those in 11 USC §547. CCP §1800. There is a 90-day reach-back period for general creditors and a 1-year reach-back period for insiders. CCP §1800(b)(4).

**WARNING:** The Ninth Circuit has held that CCP §1800 is preempted by the Bankruptcy Code. See *Sherwood Partners, Inc. v Lycos, Inc*. (9th Cir 2005) 394 F3d 1198. However, a California appellate court subsequently disagreed, concluding that CCP §1800 is not preempted by the Bankruptcy Code. *Haberbush v Charles and Dorothy Cummins Family Ltd. Partnership* (2006) 139 CA4th 1630, 1640, 43 CR3d 814.

- The assignment entitles creditors to notice of the assignment (see 11 USC §342) to give them an opportunity to file a claim with the assignee for any moneys owed them by the assignor. CCP §1802.
- The assignment preserves the priority status given to certain wage claims and certain consumer deposit claims (see 11 USC §507(a)(4), (7)). CCP §§1204, 1204.5.
- The assignment grants the assignee the right to occupy any business premises of the assignor for 90 days after the rent is paid despite any lease prohibitions on assignment. CC §1954.1.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.128 2. Advantage of Flexibility

### §4.128 2. Advantage of Flexibility

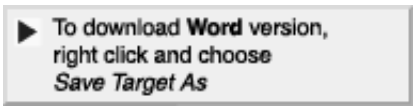
Because the assignment for the benefit of creditors occurs outside a bankruptcy proceeding, the procedure may offer much more flexibility to the parties than bankruptcy would provide. The parties may select a mutually acceptable assignee. Often, the Credit Managers Association of California (listed in local telephone directories of major cities) serves as the assignee; their staff is experienced in performing the tasks required of an assignee. The assignment can be used in conjunction with a settlement agreement with some or all of the creditors, incorporating any other provisions necessary or appropriate in the circumstances. An assignment may prove most useful for a small corporation or close corporation if the corporation would not receive a bankruptcy discharge in any event.

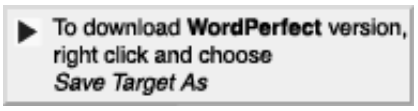
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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/ 3. Assignment Agreement Forms/§4.129 a. Form: General Assignment

### 3. Assignment Agreement Forms

### §4.129 a. Form: General Assignment




**GENERAL ASSIGNMENT**

**THIS ASSIGNMENT is made on _ _[*date*]_ _, by _ _[*name of assignor*]_ _ of _ _[*address*]_ _, federal tax identification number _ _[*number*]_ _ ("Assignor"), to _ _[*name of assignee*]_ _, a California corporation, of _ _[*address*]_ _ ("Assignee"). The undersigned agree to the following, each provision of which is mutually dependent and reciprocal.**

**Assignor, in consideration of the covenants and agreements to be performed by Assignee as stated in this Assignment, and of the sum of $_ _[*amount*]_ _ paid to Assignor by Assignee, hereby assigns to the Credit Managers Association of California, its successors and assigns, in trust for the benefit of Assignor's creditors generally, all of Assignor's property of every kind and nature, wherever situated, both real and personal, and any interest or equity in that property not exempt from execution, including but not limited to all stock or merchandise, store furniture and fixtures, book accounts, books, bills receivable, cash on hand, cash in bank, deposits, patents, copyrights, trademarks and trade names, insurance policies, tax refunds, rebates, insurance refunds and claims, choses in action that are legally assignable, together with the proceeds of any existing nonassignable choses in action that may be recovered or received by the Assignor after the date of this Assignment.**

**This Assignment specifically includes all claims for refund or abatement of all excess taxes assessed against or collected from Assignor by the United States Treasury Department and any State or local taxing agency. Assignor agrees to sign and execute powers of attorney and all other documents as required to enable Assignee to file and prosecute, compromise, or settle all claims before the Internal Revenue Service and any State or local taxing agency. Assignor further agrees to endorse any tax refund checks relating to the prior operations of Assignor's business and to deliver those checks to Assignee.**

**Leases and leasehold interests in real estate are not included in this Assignment. However, if Assignee finds that these interests may be assigned and that they have a realizable value for creditors, then Assignor agrees that, on written demand of Assignee, it will assign and transfer these interests to Assignee, or its nominee, for administration under the terms of this Assignment.**

**Contracts and agreements between Assignor and any labor union or trade associations are not included in this Assignment.**

**Assignor authorizes the forwarding of its mail by the United States Postal Department as directed by Assignee.**

**Assignee will receive the assigned property and conduct the assigned business, if Assignee deems it feasible, and is irrevocably authorized at any time after the execution of this Assignment to sell, lease, or otherwise dispose of the assigned property on terms that Assignee deems fit. Assignee will apply the net proceeds arising from the conduct of the business and from the sale, lease, or other disposition of that property as follows:**

**FIRST: To deduct from the proceeds (or to reimburse itself with respect to) all sums that Assignee may at its option pay for the discharge of any lien on any of the property and any indebtedness that under the law is entitled to priority of payment, and all expenses, including a reasonable fee to Assignee and to the attorney for Assignee. If a Creditors' Committee has been selected at any meeting of Assignor's creditors (without regard to the actual amount or number of creditors present at such creditors' meeting), then a reasonable fee will be paid to the attorney appointed by the Creditors' Committee in an amount fixed by the Creditors' Committee and**

**Assignee.**

**SECOND: The balance of the proceeds then remaining will be paid to Assignor's creditors pro rata according to the indebtedness due each of them, individually, from Assignor.**

**With respect to the fees referred to above, the term "a reasonable fee to Assignee" includes the following:**

**(a) An administration fee of 5 percent of the total funds handled in connection with this Assignment and for assembling, inventorying, collecting, and liquidating the assets assigned, excluding moneys received or disbursed in connection with any actual continuing operation of the business assigned, as distinguished from moneys received in connection with collecting and liquidating the assets assigned, but not less than $__[*amount, e.g., $5000*]__ ;**

**(b) A fee of 1 percent of all disbursements to secured and priority creditors; and**

**(c) A fee of 3 percent of all distributions to general creditors.**

**Assignee is entitled to reimbursement of all expenses incurred as a result of its administration.**

**In addition to the foregoing fees and charges, Assignee is entitled to a further fee equal to all interest earned and received by Assignee on any trust and other funds in its hands and arising from this Assignment. All dividends not claimed by Assignor's creditors will, two years after the date of the closing of the administration of this Assignment, be retained by Assignee as additional fees earned for its services under this Assignment.**

**When applicable in the opinion of the Board of Directors of Assignee, an additional and reasonable fee may be taken for special, unusual, or extraordinary services actually performed by Assignee in connection with the operation, management, preservation, or administration of the assigned assets. In this connection, Assignee's Board of Directors or President is has the right and discretion to determine the nature and extent of those special, unusual, or extraordinary services and the amount of additional fees in connection with those services.**

**The fees shall be paid from the assigned property, from the proceeds of the assigned property, and from any interest, income, increments, and any additions to the property.**

**Any contract, liability, or obligation made by Assignee in connection with the administration of this Assignment do not personally bind Assignee or any of its officers, agents, or employees, but obligates Assignee in its capacity as Assignee only, whether or not that contract, liability, or obligation so provides. Assignee shall be liable only in its official capacity for reasonable care and diligence in administering the estate created by this Assignment.**

**Assignor extends the statute of limitations on the respective claims of all existing creditors for one year after the date of this Assignment.**

**Assignee is authorized and empowered to appoint agents, field representatives, attorneys, and accountants as Assignee may deem necessary. After appointment, these appointees are fully authorized to open bank accounts in the name of the Assignee (or its nominees or agents); to deposit assigned assets or their proceeds in those bank accounts; and to draw checks on those accounts. These appointees are also empowered and authorized to do any other acts and to execute any documents in connection with this assignment as Assignee may consider necessary or advisable.**

**This Agreement contains the entire agreement between the parties. The terms of this Agreement are contractual and not a mere recital. The undersigned agree not to disclose the terms of this Agreement to anyone not a party to the underlying action or an insurer or counsel for same.**

**This Agreement may be executed in one or more copies, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.**

**Date: _ _ _ _ _ _** **Date: _ _ _ _ _ _**

**ASSIGNOR:** **ASSIGNEE:**

_ _[*Name of assignor*]_ _ _ _[*Name of assignee*]_ _

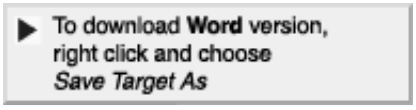
**By:** __[*Signature*]__ **By:** __[*Signature*]__
_ _[*Typed name*]_ _ _ _[*Typed name*]_ _

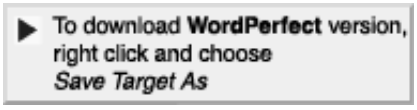
*Comment:* The procedure for obtaining an assignment order, as well as the relevant forms, are discussed in chap 11.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.130 b. Form: Minutes of the Meeting

**§4.130 b. Form: Minutes of the Meeting**




**MINUTES OF THE MEETING**

_ _[*City*]_ _**, California** _ _[*Date*]_ _

**At a meeting of the directors of** _ _[*name of corporation*]_ _ **("Corporation") held at the Corporation's office at** _ _[*address*]_ _**, at** _ _[*time*]_ _**, the following directors were present:**

_ _[*List directors present*]_ _**.**

**The following directors were absent:**

_ _[*List absent directors*]_ _**.**

**The President of the Corporation announced that the purpose of the meeting was to consider the financial condition of the Corporation and the advisability of making a general assignment for the benefit of creditors.**

**On motion by** _ _[*identify*]_ _**, seconded by** _ _[*identify*]_ _**, the following resolution was adopted:**

**BE IT RESOLVED:**

**That any two of the officers of this corporation be and hereby are authorized and directed by the directors of this Corporation: (a) to make an assignment of all assets of the corporation to** _ _[*name of assignee, e.g., Credit Managers Association of California, a California corporation, of Burbank, California*]_ _ **("Assignee") for the prorata benefit of all creditors of this Corporation; (b) to execute said assignment containing such provisions as may be agreed on between them and Assignee; and (c) to execute and deliver to Assignee such other deeds, assignments, and agreements as may be necessary to carry this resolution into effect.**

**BE IT FURTHER RESOLVED:**

**That Assignee, for the benefit of creditors, be and hereby is authorized to execute and file and prosecute on behalf of this Corporation all claims for refund or abatement of all excess taxes heretofore or hereafter assessed against or collected from this Corporation and any one officer of this corporation be and hereby is authorized and directed to make, execute, and deliver in favor of such person as may be designated by the officer a power of attorney authorizing the attorney-in-fact to process any tax claims for it on behalf of this Corporation.**

**There being no further business to come before the directors, the meeting was adjourned subject to the call of the President or Vice President.**

**I,** _ _[*name*]_ _**, President of** _ _[*name of corporation*]_ _**, a corporation, certify that the foregoing is a true and correct copy of the minutes of the meeting of directors held at the place and hour stated and that the resolution in these minutes was adopted by the directors at this meeting and it has not been modified or rescinded.**

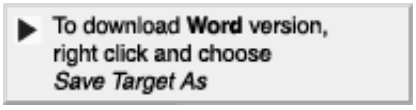
**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _**,**
**President**

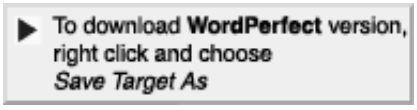
[*CORPORATE SEAL*]

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.131 c. Form: Stockholders' Consent to Assignment

## §4.131 c. Form: Stockholders' Consent to Assignment




### CONSENT TO ASSIGNMENT BY STOCKHOLDERS

**We, the undersigned, being owners and holders of _ _[*number*]_ _ shares of stock, being more than 50 percent of the subscribed and issued stock of _ _[*name of corporation*]_ _, a corporation, do hereby consent to the within assignment and transfer of the property of _ _[*name of corporation*]_ _.**

| **Name** | **Shares Held** |
|---|---|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

*Comment:* A signature line should be added for each stockholder.

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## §4.132 V. RELIEF FROM DEFAULT OR JUDGMENT

Counsel might find after the first interview that he or she must rescue the debtor from a default judgment. Judgment is obtained by default in over 90 percent of the collection claims filed in consumer debt collection actions.

Counsel must take special care to examine the "judgment roll" (see CCP §670(a)) and the facts relevant to determining whether or not grounds to vacate and set aside the default and default judgment exist.

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## A. Introduction

### §4.133 1. Overview of Available Relief

**Default due to mistake, inadvertence, surprise, or neglect.** Most requests for relief from entry of default or default judgment are made when the defendant has not filed a responsive pleading within the time permitted, despite having received actual notice of the action. Requests for relief in this situation usually rely on a showing of mistake, inadvertence, surprise, or excusable neglect by the defendant or the defendant's attorney, or inexcusable neglect by the defendant's attorney, and must be made within a reasonable time, not exceeding 6 months from the entry of the default or the default judgment. CCP §473(b). See §§4.137-4.144.

**Default due to extrinsic fraud or mistake.** If the request for relief is not made within 6 months after entry of default, the defendant will have to establish that the failure to respond is because of extrinsic fraud or mistake. This relief may be sought at any time, but the party must act with due diligence. The court's authority to grant this relief arises from its equitable powers. See §§4.145-4.149.

**Void default judgment.** In addition to any other grounds for relief, the defendant may seek relief at any time if the original default judgment was void. CCP §473(d). See §§4.150-4.151.

**Default due to lack of actual notice.** If defendant is seeking relief from a default that was entered after defendant failed to appear because he or she did not receive actual notice of the action in time to defend—either because personal service was defective or because service was accomplished by means other than personal service, *e.g.,* by substituted service or publication—relief must be sought within 2 years after the judgment or 180 days after service of notice of the judgment, whichever is earlier. CCP §473.5. For discussion, see §§4.152-4.155.

**Excessive damages in default judgment due to judicial error.** If the judge erroneously awarded default damages that are "excessive as a matter of law," a motion under CCP §473 is not the proper means of seeking relief; rather, the defendant should move for a new trial, *i.e.,* "a new judgment." *Don v Cruz* (1982) 131 CA3d 695, 704, 182 CR 581 (defendant's motion treated as motion for new trial although not framed as such). See also *Misic v Segars* (1995) 37 CA4th 1149, 1154, 44 CR2d 100.

**If court has assumed jurisdiction of attorney's practice.** If a judgment is taken against a party represented by an attorney after the court has assumed jurisdiction over that attorney's practice under Bus & P C §§6180, 6190, relief from the judgment may be sought under CCP §473.1.

**Mandatory or discretionary relief.** Except for a motion based on mistake, inadvertence, surprise, or neglect by the moving party's *attorney,* all motions for relief from default are addressed to the discretion of the court. CCP §473(b). If the attorney files an affidavit of fault, the court *must* grant the application for relief "unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." CCP §473(b).

Moreover, whenever relief from a default judgment is granted under CCP §473, the court in its discretion may (CCP §473(c)):

- Impose a penalty of up to $1000 on an offending attorney or defaulting party;
- Direct an offending attorney to pay an amount of up to $1000 to the State Bar Client Security Fund; or
- Grant such other relief as appropriate.

**NOTE:** Discretionary relief from an attorney or client mistake, inadvertence, surprise, or neglect may also be granted for events other than default, such as "judgment, dismissal, order or other proceeding." CCP §473(b).

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### §4.134 2. Who Seeks Relief?

In most cases, the party moving for relief under CCP §473(b) is the defendant. However, the plaintiff may also seek relief, *e.g.,* from a dismissal based on discovery violations. See *Aldrich v San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 216 CR 300; *Elston v City of Turlock* (1985) 38 C3d 227, 211 CR 416.

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### §4.135 3. Compare—Independent Action in Equity

An independent action in equity may be brought to set aside the default or default judgment; the grounds for this action are the same grounds that form the basis of a motion to set aside a default or default judgment. *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 178 CR 77. An independent action in equity is seldom used, however, because filing a motion is quicker and less costly.

**PRACTICE TIP:** Unlike an equitable motion, filing an independent action also permits a party to (1) conduct discovery proceedings and (2) present its case by oral testimony instead of declarations. It is likely that the court will be able to devote more attention to the matter in a trial setting than in a law and motion hearing.

The procedures for filing an independent action in equity are similar to those for filing any other action. The time limits for commencing the action are the same as for the filing of a motion addressed to the court's equity powers. The defendant should attach a proposed answer or other responsive paper to the complaint and incorporate it by reference. See CCP §473; *Shields v Siegel* (1966) 246 CA2d 334, 342, 54 CR 577. Because the action seeks equitable relief, there is no right to a jury trial. *Holt v Parmer* (1951) 106 CA2d 329, 235 P2d 43.

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### §4.136 4. Judicial Policy in Favor of Deciding Case on Merits

A long-standing judicial preference in favor of determining a matter on its merits guides the court in deciding a motion for relief from entry of default or default judgment. *Rappleyea v Campbell* (1994) 8 C4th 975, 980, 35 CR2d 669. Courts look with disfavor on a party who, regardless of the merits, seeks to capitalize on the adversary's mistake, surprise, inadvertence, or neglect. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620. Appellate courts are more disposed to affirm an order that compels a trial on the merits than one that permits a default judgment to stand—particularly when it appears that a meritorious defense can be made. *Weitz v Yankosky, supra*; *Slusher v Durrer* (1977) 69 CA3d 747, 138 CR 265. See also *Ford v Herndon* (1976) 62 CA3d 492, 133 CR 111. On appellate review, see §4.161.

This judicial policy applies regardless of whether relief is sought by motion under CCP §473(b) (*Elston v City of Turlock* (1985) 38 C3d 227, 211 CR 416), by equitable motion in the trial court (*Weitz v Yankosky, supra*), or by an independent action in equity to set aside a default judgment (*Shields v Siegel* (1966) 246 CA2d 334, 54 CR 577).

However, some courts have shown a willingness to sustain the entry of defaults and default judgments; counsel for defendants can not expect that such motions will routinely be granted. See, *e.g., Transit Ads, Inc. v Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 281, 75 CR 848 (moving party must make substantial showing, and "unusual pressure of business" is not by itself sufficient). See also *Davis v Thayer* (1980) 113 CA3d 892, 170 CR 328; *Goodhue v Tureaud* (1979) 100 CA3d 205, 160 CR 677; *Uva v Evans* (1978) 83 CA3d 356, 147 CR 795. But see *Hamm v Elkin* (1987) 196 CA3d 1343, 242 CR 545 (court questioned analysis in *Uva* and set aside default judgment on similar facts).

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## B. Relief in Cases of Mistake, Inadvertence, Surprise, or Neglect

### §4.137 1. Discretionary Relief Under CCP §473(b)

If the defendant was served in a manner that gives the defendant actual notice of the litigation, the court *may* relieve a party or the party's attorney from a "judgment, dismissal, order or proceeding taken against him or her" based on "his or her mistake, inadvertence, surprise, or excusable neglect." CCP §473(b). For the time limits to seek relief on this basis, see §§4.142-4.144.

A motion for relief from entry of default or default judgment under CCP §473(b) is addressed to the court's discretion, unless the attorney files an affidavit of fault. On mandatory relief in cases of attorney affidavit of fault, see §4.141. The court's discretion under CCP §473(b) is extremely broad because of the strong judicial preference for deciding matters on the merits. The court's ruling will be reversed on appeal only on a clear showing of abuse of discretion. *Shamblin v Brattain* (1988) 44 C3d 474, 243 CR 902.

**NOTE:** The same rule applies when the motion is addressed to the court's equity powers, although to the extent the court's power to grant relief under its equity powers is different from its power under §473, its power is narrower. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620.

A defendant may be entitled to *discretionary* relief under CCP §473(b) for an attorney's excusable neglect regardless of whether his or her attorney submits the "affidavit of fault" required for *mandatory* relief. See *State Farm Fire & Cas. Co. v Pietak* (2001) 90 CA4th 600, 610, 109 CR2d 256 (defendant entitled to discretionary relief from dismissal based on attorney's excusable misinterpretation of interpleader statute even though mandatory relief not proper). A motion under CCP §473 that seeks discretionary relief but is accompanied by an attorney's declaration suggesting attorney fault does not require the trial court to grant relief under §473's mandatory provisions. *Luri v Greenwald* (2003) 107 CA4th 1119, 1124, 132 CR2d 680.

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### §4.138 a. Mistake

Relief from default may be granted when the default occurs because of a reasonable mistake of fact or law of a party or the party's attorney. *City of Ontario v Superior Court* (1970) 2 C3d 335, 85 CR 149. However, mere ignorance of the law is no excuse. *City of Ontario v Superior Court, supra*. A self-represented plaintiff cannot assert that choosing to act as his or her own attorney is a mistake of law. *Burnete v La Casa Dana Apartments* (2007) 148 CA4th 1262, 1267, 56 CR3d 437. An honest mistake of law is a valid ground for relief when the legal problem posed "is complex and debatable." *McCormick v Board of Supervisors* (1988) 198 CA3d 352, 360, 243 CR 617. A paralegal's mistake that results in default is attributable to the attorney responsible for supervising the paralegal. *Hu v Fang* (2002) 104 CA4th 61, 63, 127 CR2d 756.

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### §4.139 b. Excusable Neglect

"Excusable neglect" means neglect that might have been committed by a reasonably prudent person in the same or similar circumstances and that was the actual cause of the default. *Transit Ads, Inc. v Tanner Motor Livery, Ltd.* (1969) 270 CA2d 275, 75 CR 848. The court will look to see whether the default could have been avoided through the exercise of reasonable care. *Elms v Elms* (1946) 72 CA2d 508, 164 P2d 936. The court may grant relief from a default judgment that results from both attorney mistake or neglect and the client's unintentional conduct. *Benedict v Danner Press* (2001) 87 CA4th 923, 927, 104 CR2d 896.

The moving party must be sure that the neglect shown in the declaration is the actual cause of the default. *Transit Ads, Inc. v Tanner Motor Livery, Ltd., supra*. For example, the declarations may show excusable neglect by the defendant in relying on his insurer but fail to show that the insurer's failure to respond was excusable. See, *e.g., Scognamillo v Herrick* (2003) 106 CA4th 1139, 131 CR2d 393.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.140 c. Examples

### §4.140 c. Examples

Examples of excusable neglect include the following:

- Illness or disability of the defendant or the defendant's attorney (*Stone v McWilliams* (1919) 43 CA 490, 185 P 478);
- Fraud or unfair conduct of the plaintiff or the plaintiff's attorney (*Starkweather v Minarets Mining Co.* (1935) 5 CA2d 501, 43 P2d 321);
- Accident or inadvertence (*Bernards v Grey* (1950) 97 CA2d 679, 218 P2d 597);
- Reasonable reliance on a third party to defend (*Fayusi v Permatex, Inc.* (2008) 167 CA4th 681, 697, 84 CR3d 351);
- Reliance on opposing counsel to warn before taking default (*Robinson v Varela* (1977) 67 CA3d 611, 136 CR 783);
- An attorney's abandonment of the client (*Seacall Dev., Ltd. v Santa Monica Rent Control Bd.* (1999) 73 CA4th 201, 86 CR2d 229); and
- Death in the defendant's family (*Shapiro v Clark* (2008) 164 CA4th 1128, 1137, 80 CR3d 398).

In contrast, an attorney-defendant's neglect was found not to be excusable when his excuse was that his answer was stolen from his mailbox even though (1) he was fully aware of the complaint against him and (2) after he did not receive a conformed copy from the court, he failed to check to see if the answer had in fact been filed. *Lockyer v Brar* (2005) 134 CA4th 659, 36 CR3d 272.

For additional examples of excusable and inexcusable neglect, see 8 Witkin, California Procedure, *Attack on Judgment in Trial Court* §§158-172 (5th ed 2009).

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### §4.141 2. Mandatory Relief Under CCP §473(b)

Under CCP §473(b), the court *must* grant relief from default or a default judgment for "attorney neglect," even inexcusable neglect, when an application for relief is made:

- Within 6 months after entry of judgment;
- Is in proper form; and
- Is accompanied by "an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect."

This relief is often referred to as "mandatory" because the court *must* grant relief unless it finds that the attorney was not actually the cause of the neglect, *e.g.,* when the attorney is merely covering up for the client. See *Jerry's Shell v Equilon Enters., LLC* (2005) 134 CA4th 1058, 36 CR3d 637.

If relief is granted based on the attorney's affidavit of fault, the court must order the attorney to pay reasonable compensatory legal fees and costs to the opposing counsel or parties. CCP §473(c).

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### 3. Timing: When to Request Relief Under CCP §473(b)

#### §4.142 a. Six-Month Time Limit

Under CCP §473(b), a motion for relief from the entry of default or default judgment must be made "within a reasonable time, in no case exceeding six months," after entry of the default or default judgment.

The period begins to run when the clerk enters the default (*Koski v U-Haul Co.* (1963) 212 CA2d 640, 28 CR 398), not from the time the judgment is entered (*Rutan v Summit Sports, Inc.* (1985) 173 CA3d 965, 219 CR 381), unless the defendant wants relief from merely the default judgment, not entry of default. The motion is deemed to be made when the notice of motion is filed and served. CCP §1005.5; *First Small Bus. Inv. Co. v Sistim, Inc.* (1970) 12 CA3d 645, 90 CR 798.

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### §4.143 b. Six-Month Limitation Is Jurisdictional

The 6-month time limit of CCP §473(b) is jurisdictional; the court has no power to grant relief under §473(b) once the time has lapsed. *Lee v An* (2008) 168 CA4th 558, 563, 85 CR3d 620 (judgment was void, not voidable); *Sporn v Home Depot, Inc*. (2005) 126 CA4th 1294, 24 CR3d 780 (defendant not entitled to relief under §473(b) because motion was filed more than 6 months after entry of judgment and defendant had been served with complaint on both its designated agent and in-house counsel).

**NOTE:** Courts have construed "6 months" to mean either 182 days (*Davis v Thayer* (1980) 113 CA3d 892, 170 CR 328) or 182 days plus 10 days for mailing of notice of default (*National Diversified Servs. v Bernstein* (1985) 168 CA3d 410, 214 CR 113), not 6 calendar months (*e.g.,* March 20 to September 20).

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### §4.144 c. Diligence Requirement—Motion Must Be Made Within "Reasonable" Time

In addition to the 6-month maximum time limit, CCP §473(b) requires that the motion be made "within a reasonable time." Whether this requirement has been met is a matter for the trial court's discretion, based on the circumstances of the particular case. *Benjamin v Dalmo Mfg. Co.* (1948) 31 C2d 523, 190 P2d 593. The defendant has the burden of establishing by a preponderance of the evidence not only that the default or default judgment was entered as a result of the defendant's "mistake, inadvertence, surprise or excusable neglect" (CCP §473; *Luz v Lopes* (1960) 55 C2d 54, 10 CR 161), but also that the defendant sought relief diligently and that any delay in filing the motion is excusable (*Kendall v Allied Investigations, Inc.* (1988) 197 CA3d 619, 243 CR 42 (motion denied when there was 5-month, 24-day delay without explanation); *Benjamin v Dalmo Mfg. Co., supra* (no explanation for 3-month delay)). But see *Romer, O'Connor & Co. v Huffman* (1959) 171 CA2d 342, 341 P2d 62 (4-month delay excusable when defendant was out of country and defense counsel promptly contacted plaintiff's attorney); *Waite v Southern Pac. Co.* (1923) 192 C 467, 221 P 204 (5-month delay owing to mistake of law held excusable when no prejudice to adverse party shown).

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## C. Equitable Relief in Cases of Extrinsic Fraud or Mistake

### §4.145 1. Court's Equitable Authority

The trial court has inherent equitable power to set aside a judgment obtained through fraud or mistake whenever the fraud or mistake is discovered. The burden is on the moving party to prove the elements of extrinsic fraud or mistake. See *Moghaddam v Bone* (2006) 142 CA4th 283, 47 CR3d 602.

A motion for equitable relief from the entry of default or default judgment will be granted only when the moving party shows that a different result is probable in a trial on the merits. *Smith v Busniewski* (1952) 115 CA2d 124, 251 P2d 697. Parties seeking equitable relief should attach a proposed answer or other responsive paper with the motion, indicating a probability of success on the merits. *Shields v Siegel* (1966) 246 CA2d 334, 342, 54 CR 577.

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### §4.146 2. No Time Limitation

Although the grounds listed in CCP §473(b) for relief from entry of default or default judgment (party or attorney mistake, inadvertence, or excusable neglect (see §§4.137-4.140)) are lost if the motion is not made within 6 months after entry of the judgment, no such limitation applies to a request for relief from a judgment obtained through *extrinsic* fraud or mistake. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620. See also *Sporn v Home Depot, Inc*. (2005) 126 CA4th 1294, 24 CR3d 780.

To the extent that the court's equity power to grant relief from default after 6 months differs from its powers under CCP §473(b), the equity powers must be considered narrower, not wider. *Weitz v Yankosky* (1966) 63 C2d 849, 857, 48 CR 620. However, the terms extrinsic fraud or mistake have been broadly construed to "encompass almost any set of extrinsic circumstances" that prevent a fair adversarial hearing. *Estate of Sanders* (1985) 40 C3d 607, 614, 221 CR 432. See also *U.S. v Throckmorton* (1878) 98 US 61, 65, 25 L Ed 93, which enumerates those circumstances:

> Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/ 3. Examples/§4.147 a. Extrinsic Fraud Found

### 3. Examples

### §4.147 a. Extrinsic Fraud Found

Examples of extrinsic fraud include the following:

- Appellant's false offer to compromise claim on estate with children of deceased, which caused them to forgo opportunity to contest her claims (*Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276);
- Plaintiff's granting defendant extension of time to plead and then requesting entry of default before extension expired (*H&H Inv. Co. v T-J Constr. Co.* (1969) 275 CA2d 58, 79 CR 890);
- Defendant's reliance on reasonable belief that defendant's employer would respond to complaint (*Desper v King* (1967) 251 CA2d 659, 59 CR 657); and
- Wife's reliance on husband's assurance that he would respond to complaint (*Higley v Bank of Downey* (1968) 260 CA2d 640, 67 CR 365; but see *Marriage of Stevenot* (1984) 154 CA3d 1051, 202 CR 116 (no extrinsic fraud in dissolution action when wife waited more than 1 year to seek legal advice and husband had done nothing to mislead her into believing that he would not proceed)).

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### §4.148 b. No Extrinsic Fraud Found

The plaintiff's failure to enforce a default judgment until after expiration of the 6-month time limit does not in itself constitute extrinsic fraud. *Ford v Herndon* (1976) 62 CA3d 492, 496, 133 CR 111, disapproved on other grounds in *Salas v Cortez* (1979) 24 C3d 22, 154 CR 529; *Dahler v American Pipe & Constr. Co.* (1968) 257 CA2d 816, 65 CR 259.

Intrinsic fraud or mistake (*i.e.,* fraud or mistake that goes to the merits of the action) when the defendant was not prevented from participating in the action is not a ground for relief. *Marriage of Stevenot* (1984) 154 CA3d 1051, 202 CR 116. For example, an attorney's mistaken belief about the applicable law is not extrinsic fraud or extrinsic mistake, but is intrinsic and as such cannot be the basis for equitable relief. *Westinghouse Credit Corp. v Wolfer* (1970) 10 CA3d 63, 88 CR 654. However, when the defendant's failure to answer results from the attorney's mistake of fact (*Hallett v Slaughter* (1943) 22 C2d 552, 140 P2d 3) or from the attorney's total failure to represent the defendant (*Orange Empire Nat'l Bank v Kirk* (1968) 259 CA2d 347, 66 CR 240), equitable relief is available if the attorney's failure to represent amounts to "positive misconduct" (*Lopez v Superior Court* (1986) 178 CA3d 925, 935, 223 CR 798).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.149 c. Extrinsic Mistake

### §4.149 c. Extrinsic Mistake

Extrinsic mistake occurs when the mistake of a third party prevents a defendant with a meritorious defense to the action from appearing. *Baske v Burke* (1981) 125 CA3d 38, 44, 177 CR 794. Examples of extrinsic mistake include:

- Incapacity or disability of the party or attorney (*Humes v MarGil Ventures, Inc.* (1985) 174 CA3d 486, 220 CR 186);
- Reliance on a third person (*Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620);
- Reliance on attorney who commits positive misconduct (*People v One Parcel of Land* (1991) 235 CA3d 579, 286 CR 739); and
- Error of court clerk resulting in defendant's lack of notice of proceedings (*Baske v Burke* (1981) 125 CA3d 38, 177 CR 794).

An example of a court not finding extrinsic mistake is *Cruz v Fagor Am., Inc.* (2007) 146 CA4th 488, 506, 52 CR3d 862 (failure of corporate chairman or claims officer to receive properly served summons and complaint due to internal mistake).

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## D. Relief if Default Judgment Is Void

### §4.150 1. Relief May Be Requested at Any Time

If the default judgment is void, the court, on motion of one party with notice to the other parties, may set it aside at any time. See CCP §473(d) (court may set aside "any void judgment or order").

**NOTE:** The distinction between "void" and "voidable" judgments is important: Voidable judgments must be set aside before they become final. See *Lee v An* (2008) 168 CA4th 558, 565, 85 CR3d 620.

A judgment is void if a court lacks fundamental authority over the subject matter, question presented, or party (168 CA4th at 565), *e.g.*:

- The court that renders it lacks personal or subject matter jurisdiction (*Marriage of Goodarzirad* (1986) 185 CA3d 1020, 1030, 230 CR 203);
- The court clerk enters a default judgment under CCP §585(a) without authority to do so (CCP §473(d); *Brown v Superior Court* (1966) 242 CA2d 519, 51 CR 633);
- The defendant received no actual notice (*Wisdom v Ramirez* (1985) 177 CA3d Supp 1, 222 CR 923); or
- The damages awarded in a default judgment are in excess of what is demanded in the complaint (*In re Marriage of Lippel* (1990) 51 C3d 1160, 1167, 276 CR 290; *Heidary v Yadollahi* (2002) 99 CA4th 857, 864, 121 CR2d 695).

**NOTE:** A default judgment that is not subject to set aside may be *modified* if the damage award is in excess of the prayer and thus violates CCP §580; *Becker v S.P.V. Constr. Co.* (1980) 27 C3d 489, 165 CR 825.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.151 2. Examples

### §4.151 2. Examples

Examples of void default judgments that were set aside include:

- *Levine v Smith* (2006) 145 CA4th 1131, 52 CR2d 197 (default judgment void because it exceeded amount specified in complaint);
- *Summers v McClanahan* (2006) 140 CA4th 403, 44 CR3d 338 (though court did not state that judgment was void, it set aside default judgment for lack of jurisdiction when service did not substantially comply with CCP §416.90);
- *Strathvale Holdings v E.B.H*. (2005) 126 CA4th 1241, 25 CR3d 372 (lack of personal jurisdiction rendered default judgment void; thus, it may be challenged at any time);
- *Falahati v Kondo* (2005) 127 CA4th 823, 26 CR3d 104 (default judgment was void and subject to set aside under CCP §473(d) because it was (1) based on complaint that did not apprise defendant of nature of plaintiff's demand against him or amount of damages sought, and (2) defendant was denied opportunity to respond to amendment purporting to add him as defendant); and
- *Wisdom v Ramirez* (1985) 177 CA3d Supp 1, 222 CR 923 (court may set aside any void judgment or order when summons was not properly served and defendant had no actual notice).

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### §4.152 E. Relief if No Actual Notice to Defendant

When service of summons did not result in actual notice to a defendant in time to defend the action and a default or default judgment has been entered, the defendant may move to set aside the default or default judgment and for leave to defend the action. CCP §473.5(a). The lack of actual notice must not have been caused by the defendant's avoidance of service or inexcusable neglect. CCP §473.5(b).

Grounds for relief under CCP §473.5 usually result from service of process by means other than personal service, *e.g.,* substituted service or service by publication. See, *e.g., Tunis v Barrow* (1986) 184 CA3d 1069, 229 CR 389 (motion under §473.5 proper when service of process completed by publication that did not result in actual notice to defendant).

Relief has also been granted under this section when there was apparent personal service under circumstances creating doubt over whether the defendant received actual notice from the personal service. *Rosenthal v Garner* (1983) 142 CA3d 891, 191 CR 300.

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### §4.153 1. Equitable Authority

When entry of default or default judgment has resulted from the defendant's not having had actual notice of the action in time to defend, the court may also grant relief under its inherent equitable power to set aside the default or default judgment. The grounds for an equitable motion are limited to extrinsic fraud or mistake. See §§4.145-4.149. These terms are given a broad meaning and include all circumstances that deprive an adversary of fair notice of hearing regardless of whether the particular conduct would constitute fraud or mistake in the strict sense. *Munoz v Lopez* (1969) 275 CA2d 178, 79 CR 563 (decided under former CCP §473a). See *Bennett v Hibernia Bank* (1956) 47 C2d 540, 305 P2d 20.

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## 2. Timing: When to Request Relief if No Actual Notice to Defendant

### §4.154 a. CCP §473.5

A motion for relief from default or default judgment made under CCP §473.5 must be filed "within a reasonable time," and no later than the earlier of (1) 2 years after entry of a default judgment against the defendant or (2) 180 days after service on defendant of written notice that a default or default judgment has been entered. CCP §473.5(a). Thus, both CCP §§473 and 473.5 establish a jurisdictional outer time limit and a diligence requirement.

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### §4.155 b. Equitable Powers

A motion addressed to the court's inherent equitable powers must be made within a reasonable time, but it is not subject to the CCP §473.5 time limits. *Munoz v Lopez* (1969) 275 CA2d 178, 79 CR 563 (decided under former CCP §473a). Although there is no jurisdictional time limit, a motion for equitable relief is subject to the same requirement as for a CCP §473 motion—that it be made within a reasonable time, *i.e.,* the moving party must move diligently on learning of the entry of default or default judgment. *Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620.

The most important factors in determining whether the moving party has exercised due diligence are (*McCreadie v Arques* (1967) 248 CA2d 39, 56 CR 188; see, *e.g., Weitz v Yankosky, supra*):

- The length of time from discovery of the entry of default and the filing of the application;
- The reasons for any delay; and
- Anything that has occurred that would prejudice the plaintiff if the motion were granted.

**NOTE:** If the motion is made on the ground that the summons was not properly served, the judgment would be void, and the motion to set aside could be filed when the defendant learns of the default. *Sipe v McKenna* (1948) 88 CA2d 1001, 200 P2d 61. See §4.150.

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## F. Procedure: How to Obtain Relief From Default or Default Judgment

### §4.156 1. Motion Under CCP §473(b)

Motions for relief from default under CCP §473(b) are discussed in §§4.137-4.144. Frequently, a defendant first learns of the entry of a default judgment when a levy of execution is threatened or has occurred. To avoid the levy of a writ or to stop additional levies from being made, the defendant may need to obtain a stay of execution pending the hearing and determination of the motion for relief from the default judgment. If timely requested, a stay may be obtained ex parte when the motion for relief from default judgment is filed. The request for the stay will require its own moving papers, including supporting declarations. The declarations in support of the motion to vacate are usually sufficient, with minor additions (*e.g.,* the fact that the levy is threatened), to support the request for the stay.

For most money judgments, the court's authority to grant a stay lapses 10 days after the final date on which an appeal could have been filed. See CCP §§917.1, 918(b). For judgments entered in superior court, the appeal period is the earliest of (Cal Rules of Ct 8.104(a)):

- 60 days after the clerk mails the party filing the notice of appeal a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date that either was mailed;
- 60 days after the party filing the notice of appeal serves or is served by a party with a document titled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or
- 180 days after entry of judgment.

Appeals in the appellate division of the superior court are governed by Cal Rules of Ct 8.800-8.936.

For judgments entered in a limited civil case, the appeal period is the earliest of (Cal Rules of Ct 8.822(a)):

- 30 days after the date of mailing of notice of entry of judgment by the clerk;
- 30 days after service of written notice of entry of judgment by a party; or
- 90 days after entry of judgment.

If the time for granting a stay has passed before the defendant becomes aware of the default judgment, the defendant should make an ex parte application for an order shortening time for hearing of the motion for relief from default. On time for service of motions, see CCP §1005(b). For a form of order, see §4.165.

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### §4.157 a. Opposition

On a motion to set aside a default or default judgment, the plaintiff may controvert the defendant's moving papers with counterdeclarations. See, *e.g., Elms v Elms* (1946) 72 CA2d 508, 164 P2d 936. If the plaintiff was prejudiced by the delay, the counterdeclarations should set forth facts showing the prejudice. The burden of proof to show prejudice is on the opposing party. See, *e.g., Aldrich v San Fernando Valley Lumber Co.* (1985) 170 CA3d 725, 740, 216 CR 300. However, it is improper for the plaintiff to attempt to factually dispute the defendant's defense if the defendant has attached a copy of the proposed answer or other pleading as required by CCP §473. *First Small Bus. Inv. Co. v Sistim, Inc.* (1970) 12 CA3d 645, 90 CR 798. The motion is not a substitute for a trial on the merits. *Skolsky v Electronovision Prods., Inc.* (1967) 254 CA2d 246, 62 CR 91.

Given the court's inclination to hear matters on their merits and thus grant motions to set aside defaults or default judgments, plaintiff's counsel may have more success in endeavoring to convince the court to grant relief on the imposition of appropriate conditions. See §4.136.

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### §4.158 b. Hearing and Evidence

Usually, a motion to vacate default or default judgment is heard on declaration and counterdeclaration, but the court has the discretion to take oral evidence. See, *e.g., Reifler v Superior Court* (1974) 39 CA3d 479, 114 CR 356 (family law issues); Cal Rules of Ct 3.1306(a). Local practice varies. Some courts may permit oral testimony of the parties or witnesses, at least for cross-examination on specific matters in dispute. If oral testimony is permitted, parties or witnesses who will be testifying must be present in the courtroom at the time of the hearing. Some courts may also grant a continuance of the hearing to allow discovery to be taken of the parties or witnesses whose declarations have been filed.

After hearing the arguments and considering the evidence, the court may rule on the motion from the bench or take the matter under submission. On making its decision, the court enters an order granting or denying the motion. The court may deny the motion without prejudice if the showing in support of the motion is deficient but can be cured on a new motion. In some cases, a party can renew the motion even if the original motion was denied. See §4.160.

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### §4.159 2. Motion Under CCP §473.5

Motions for relief from default under CCP §473.5 are discussed in §§4.152-4.155. A notice of motion under CCP §473.5 must designate a hearing date as prescribed by CCP §1005(b) (normally, at least 16 court days after date of service; longer if notice of motion is served by mail; subject to court order shortening time). CCP §473.5(b).

A motion under CCP §473.5 for relief from entry of default or default judgment must be accompanied by an affidavit or declaration under penalty of perjury (CCP §2015.5) showing that the defendant's lack of actual notice was not caused by the defendant's avoidance of service of process or inexcusable neglect.

**PRACTICE TIP:** It is advisable, whether required or not, to include such a declaration and copy when the motion is made under the court's equity powers independent of the statutory grounds of CCP §473.5.

For forms of motion and a declaration that can be adapted for use, see §§4.162-4.163.

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### §4.160 3. Renewal if Motion Denied

Both as a statutory requirement and as a practical requirement to avoid being burdened by multiple applications for the same relief, courts require that any motion for renewal or reconsideration be based on facts different from those presented in the original motion. CCP §1008. Like the original motion, a renewed motion must be made within the same time, *i.e.,* 6 months after the entry of default or default judgment. *Northridge Fin. Corp. v Hamblin* (1975) 48 CA3d 819, 122 CR 109 (motion for renewal untimely when made 24 days after 6-month period expired).

A renewed motion should be noticed and supported by declarations in the same manner as the original motion, although the renewed motion can incorporate by reference applicable portions of the original motion, such as the proposed answer. It must also be shown by declaration that a prior motion was made, the date of the prior motion, the judge who heard the original motion, the disposition of that motion, and what new facts are claimed. CCP §1008.

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### §4.161 G. Appellate Review

An order granting or denying relief from a default judgment is appealable as an order after judgment. CCP §§904.1(a)(2) (unlimited civil case), 904.2(b) (limited civil case (see chap 6)); *Tunis v Barrow* (1986) 184 CA3d 1069, 229 CR 389 (order denying motion to vacate appealable; order denying motion to reconsider not appealable). Because of the availability of a direct appeal, relief by mandamus will be granted only in unusual circumstances. A court's prejudgment denial of relief from default is interlocutory and not separately appealable. *Shapiro v Clark* (2008) 164 CA4th 1128, 1137, 80 CR3d 398.

Because judicial policy in favor of a trial on the merits takes precedence over the policy of upholding a trial court order denying relief unless abuse of discretion is shown, appellate courts are usually more willing to uphold an order granting relief than an order that denies relief. This result is not automatic, however, and appellate courts will uphold orders denying relief particularly when the defendant has not been diligent in seeking relief. A default judgment in excess of the prayer can be raised for the first time on appeal. Such a judgment is an act in excess of jurisdiction and is never waived. *Petty v Manpower, Inc.* (1979) 94 CA3d 794, 156 CR 622.

On the timing of the notice of appeal, see §4.156. On filing an appeal, see California Civil Appellate Practice, chap 7 (3d ed Cal CEB 1996).

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/ H. Forms/§4.162 1. Form: Notice of Motion to Set Aside Default and Default Judgment

## H. Forms

### §4.162 1. Form: Notice of Motion to Set Aside Default and Default Judgment

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
**Attorney for** _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

**Superior Court, County of _ _ _ _ _ _**

_ _[*Limited Civil Case*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION AND** |
| **vs** | ) | **MOTION TO SET ASIDE** |
| _ _[*Name(s)*]_ _, | ) | **DEFAULT** _ _[*AND DEFAULT* |
| **Defendant(s)** | ) | *JUDGMENT*]_ _**;** _ _[*POINTS* |
| | ) | *AND AUTHORITIES;*]_ _ |
| _____ | ) | _ _[*DECLARATION(S);*]_ _ |
| | ) | _ _[*PROPOSED ORDER*]_ _ |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |

**Please take notice that on** _ _[*date*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, in** _ _[*department*]_ _ **of the** _ _[*court*]_ _ **located at** _ _[*full address*]_ _**,** _ _[*e.g., plaintiff*]_ _**,** _ _[*name*]_ _**, will and hereby does move the Court under Code of Civil Procedure §**_ _[*473/473.5*]_ _ **for an order vacating and setting aside the default** _ _[*and default judgment*]_ _ **entered in this action on** _ _[*date(s)*]_ _**, and for leave to file the attached proposed** _ _[*pleading, e.g., answer, demurrer*]_ _**. The grounds for issuance of this order are that** _ _[*name*]_ _**'s failure to respond to the complaint within the time allowed is because of the** _ _[*mistake, inadvertence, surprise, or excusable neglect of* _ _[*defendant/defendant's attorney*]_ _*/mistake, inadvertence, surprise, or neglect of defendant's attorney*]_ _**, as is more fully set forth in the declaration(s) filed in support of this motion.**

**This motion is based on this notice, the attached documents and exhibits, including** _ _[*specify by title (or nature) and date, e.g., the Declaration of* _ _[*name*]_ _*, dated* _ _[*date*]_ _]_ _**, the proposed** _ _[*answer/demurrer*]_ _ **filed with the motion,** _ _[*and*]_ _ **on all papers filed and records in this action** _ _[*, and on any evidence received at the hearing*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies*: Original (file with court clerk); a copy for service for each attorney of record and unrepresented party; office copies.

*Comment:* See §§4.156-4.160 (motion for relief from default and default judgment). Some attorneys routinely include

in a notice of motion a request for "other just relief." This language is unnecessary with respect to a motion to set aside a default or default judgment because the court has the express authority by statute to base the granting of the motion on the defendant's satisfaction of conditions. See CCP §473. This form, with minor adaptations, may also be used to seek to set aside defaults or default judgments entered as a result of extrinsic fraud. See §§4.145-4.149.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.163 2. Form: Declaration Supporting Motion to Set Aside Entry of Default and Default Judgment

## §4.163 2. Form: Declaration Supporting Motion to Set Aside Entry of Default and Default Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
**Attorney for** _ _[*e.g., Defendant*]_ _, _ _[*name*]_ _

**Superior Court, County of** _ _ _ _ _ _

_ _[*Limited Civil Case*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | _ _[*NAME*]_ _ **SUPPORTING** |
| _ _[*Name(s)*]_ _, | ) | **MOTION OF** _ _[*NAME*]_ _ **TO** |
| **Defendant(s)** | ) | **SET ASIDE DEFAULT** _ _[*AND* |
| | ) | *DEFAULT JUDGMENT*]_ _ |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |

_ _[*Name*]_ _ **declares:**

[*Option 1*]

**1. I am the attorney for** _ _[*name*]_ _, _ _[*e.g., defendant*]_ _ **in this action.**

[*Option 2*]

**1. I am the** _ _[*e.g., defendant*]_ _ **in this action.**

[*Option 3*]

**1. I am the** _ _[*state relationship, e.g., president*]_ _ **of the** _ _[*e.g., defendant*]_ _ **in this action, and I am authorized to make this declaration on** _ _[*his/her/its*]_ _ **behalf.**

[*Continue*]

**2. I have personal knowledge of all facts stated in this declaration and, if called to testify, I could and would do so.**

**3. The entry of default** _ _[*and default judgment*]_ _ **against** _ _[*e.g., defendant*]_ _ **in this action was because of** _ _[*my/*_ _[*name*]_ _*'s*]_ _ **mistake, inadvertence, surprise, or excusable neglect in that** _ _[*state facts, e.g., on November 22, 1992, I spoke by telephone with Mr. Smith, counsel for plaintiff. During that conversation I asked Mr. Smith for an extension of time to plead on behalf of my client until December 4, 1992. Mr. Smith agreed to the extension*]_ _**.**

[*Add if appropriate*]

**4. The entry of default** _ _[*and default judgment*]_ _ **was discovered by me on** _ _[*date*]_ _**. This motion was**

**not filed earlier because** _ _[*state facts showing due diligence*]_ _**.**

[*Continue with any additional statements*]

**I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Title if relevant*]_ _

*Copies*: Original (attach to and file with original of notice of motion); a copy for service for each other party; office copies.

*Comment:* See §§4.156-4.160 (motion for relief from default and default judgment). The supporting declaration for a motion to set aside a default or default judgment should be made by either the attorney or the defendant, depending on who has knowledge of the facts. It may occasionally be necessary to use the declaration of more than one person. A declaration framed only in terms of the conclusory language that there was excusable negligence is insufficient. *Kendall v Allied Investigations, Inc.* (1988) 197 CA3d 619, 243 CR 42. When the motion is addressed to the court's inherent equity power on the ground of extrinsic fraud or mistake, the declaration of a third person may be needed. See §§4.145-4.149 for discussion of mistake, inadvertence, surprise, or excusable neglect. If a significant delay occurred between the time the defendant or the defendant's attorney learned of the default or default judgment and the time the motion was filed, the declaration must state facts on which the court can conclude that the delay is excusable and that the defendant acted diligently in seeking to have the default or default judgment set aside. See §4.144.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.164 3. Form: Order Staying Execution and Shortening Time

## §4.164 3. Form: Order Staying Execution and Shortening Time

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**Superior Court, County of _ _ _ _ _ _**

_ _[*Limited Civil Case*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER STAYING EXECUTION** |
| **vs** | ) | **AND SHORTENING TIME FOR** |
| _ _[*Name(s)*]_ _, | ) | **MOTION TO SET ASIDE** |
| **Defendant(s)** | ) | **DEFAULT _ _[*AND DEFAULT* |
| | ) | *JUDGMENT*]_ _ |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |

**The motion of _ _[*e.g., defendant*]_ _, _ _[*name*]_ _, for a stay of execution and an order shortening time was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of attorneys and parties represented by each*]_ _.**

**Satisfactory proof having been made, and good cause appearing,**

**It is ordered that:**

**1. Execution on the judgment in this action be stayed until _ _[*date*]_ _, at _ _[*time*]_ _, or until a decision is rendered on the motion to _ _[*e.g., set aside entry of default judgment*]_ _, whichever occurs first.**

**2. The time for hearing the motion to _ _[*e.g., set aside entry of default judgment*]_ _ be shortened so that the motion may be heard on _ _[*date*]_ _, if _ _[*e.g., defendant*]_ _ serves the moving papers on _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _, by _ _[*e.g., personal service*]_ _ by _ _[*date*]_ _.**

**3.** _ _[*State any additional orders*]_ _.

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge**

*Copies*: Original (present to judge for signature, then file); one copy for service on each other party; office copies.

*Comment:* The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134.

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**Source:** Business Law/Debt Collection Practice in California/4 Representing the Debtor/§4.165 4. Form: Order Setting Aside Entry of Default and Default Judgment

## §4.165 4. Form: Order Setting Aside Entry of Default and Default Judgment

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**Superior Court, County of _ _ _ _ _ _**

_ _[*Limited Civil Case*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | **ORDER SETTING ASIDE** |
| **vs** | ) | **ENTRY OF DEFAULT** _ _[*AND* |
| _ _[*Name(s)*]_ _, | ) | *DEFAULT JUDGMENT*]_ _ |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |

**The motion of** _ _[*e.g., defendant*]_ _, _ _[*name*]_ _**, for an order setting aside entry of default** _ _[*and default judgment*]_ _ **was regularly heard at the above date and time. Appearing as attorneys were:** _ _[*List names of attorneys and parties represented by each*]_ _**.**

**Satisfactory proof having been made, and good cause appearing,**

**It is ordered that:**

**1. The motion be granted** _ _[*, subject to the conditions set forth below*]_ _**.**

**2. The default** _ _[*and default judgment*]_ _ **previously entered be set aside and vacated.**

**3.** _ _[*E.g., Defendant*]_ _ **have** _ _[*number*]_ _ **court days to respond to the complaint.**

[*Add if appropriate*]

**4. The above order takes effect only after** _ _[*e.g., defendant*]_ _ **has complied with the following conditions by** _ _[*date*]_ _**:** _ _[*State conditions in numbered paragraphs*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

*Copies*: Original (present to judge for signature, then file); one copy for each other party; three office copies.

*Comment:* Local practice varies on whether a formal order is required or whether the court simply issues a minute order. On the court's discretion and power to impose conditions on a motion to set aside entry of a default or default judgment under CCP §473, see §4.153.

The format of attorney-drafted court papers is governed by Cal Rules of Ct 2.100-2.119. For example, pleading paper (with consecutive line numbers at the left margin of each page) must be used. On when preprinted Judicial Council forms must or may be filed with the court, see Cal Rules of Ct 1.30-1.44, 2.131-2.134.

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# 5

# Discovery in Debt Collection Actions

**Kenneth H. Brown**

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# I. USING DISCOVERY

## §5.1 A. Discovery in Debt Collection Actions

The financial stakes in most debt collection actions usually limit the scope of discovery as a practical matter because of the attendant expense. Therefore, no attempt is made in this chapter to treat discovery comprehensively. For comprehensive coverage of discovery, see California Civil Discovery Practice (4th ed Cal CEB 2006). However, although discovery is often limited in debt collection actions, certain common discovery tools can substantially aid the debt collection attorney. This chapter briefly covers requests for admissions, interrogatories, demands for inspection, and depositions.

**NOTE:** This chapter deals with collection cases in the prejudgment stages. There are significant differences between discovery in the prejudgment stage and during judgment enforcement. For example, many privileges that apply to prejudgment discovery do not apply to postjudgment discovery in locating assets. In addition, there is no direct method of delivering a document subpoena to a third party witness in the postjudgment situation. On the other hand, there is a wider scope of allowable discovery in judgment enforcement. For a complete discussion of discovery in the postjudgment stages, see chap 8.

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## §5.2 B. Limitations on Discovery

The parties to a debt collection matter may conduct discovery based on the same procedures that apply to any other civil action. The statutory law governing discovery is found at CCP §§2016.010-2036.050. Note that Code of Civil Procedure §§90-100 restrict discovery for limited civil cases.

Discovery is limited to nonprivileged matters that are (CCP 2017.010):

- Relevant to the subject matter of the action or to a pending motion; and
- Admissible in evidence or appear reasonably calculated to lead to the discovery of admissible evidence.

Additionally, CCP §2018.030 limits the discovery of attorney work product, which is usually not relevant in debt collection actions. For additional information on work product, see California Civil Discovery Practice, chap 3 (4th ed Cal CEB 2006).

Although a thorough discussion of applicable privileges is beyond the scope of this chapter, it is notable that a qualified right of privacy protects a person's financial affairs. See *Doak v Superior Court* (1968) 257 CA2d 825, 827, 65 CR 193. Accordingly, despite the relevance of the defendant's financial condition in a debt collection matter, this information is generally not discoverable unless a claim for punitive damages was made and then it is subject to the conditions set forth in CC §3295. After the court issues a right to attach order, however, the plaintiff may discover, through any appropriate discovery method, the identity, location, and value of property in which the defendant has an interest. CCP §485.230.

Another way to obtain information on the defendant's financial condition is by acquiring tax returns. Although there is also a qualified privilege to withhold disclosure of federal and state tax returns and the information in them, the privilege is often waived if the defendant has submitted copies of tax returns with loan or credit applications. See Evid C §912(a). Subpoenaing the files of the defendant's lenders may thus yield copies of his or her tax returns.

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## §5.3 C. Timing Considerations

Counsel unfamiliar with legal issues raised by the complaint or the answer should conduct research *before* starting discovery, not after. A thorough appreciation of the law applicable to a given case may suggest avenues of questioning, which might otherwise not be apparent and for which the opponent may be unprepared.

No deposition should be taken until the noticing party develops an overall discovery plan and is confident not only that a particular individual should be deposed but also that the timing is appropriate. At a minimum, strategy should include consideration of the elements of the plaintiff's cause of action, potential defenses, problems of proof, amenability of the case to summary disposition, likelihood of settlement, and cost of discovery and trial. On planning discovery, see California Civil Discovery Practice, chap 2 (4th ed Cal CEB 2006).

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## II. DISCOVERY TOOLS

### §5.4 A. Requests for Admission (CCP §§2033.010-2033.080)

Requests for admission are written requests that any other party to the action admit the following:

- The genuineness of specified documents;
- The truth of specified facts;
- The truth of opinions relating to facts; or
- The truth of the application of law to fact.

A litigant may use requests for admission as a matter of right without first obtaining a court order. See *Cembrook v Superior Court* (1961) 56 C2d 423, 427, 15 CR 127; *Demyer v Costa Mesa Mobile Home Estates* (1995) 36 CA4th 393, 42 CR2d 260, disapproved on other grounds in *Wilcox v Birtwhistle* (1999) 21 C4th 973, 983, 90 CR2d 260. The party that serves requests for admission is called the "requesting party" or the "propounding party," and the party on which they are served is the "responding party." For additional information on requests for admission, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006).

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.5 1. Use of Requests for Admission

## §5.5 1. Use of Requests for Admission

The purpose of serving requests for admission is usually to narrow factual issues and to save time and expense in preparing, producing, and introducing evidence on the points that are not seriously contested. In addition to reducing trial time and facilitating summary judgment, requests for admission can also propel a case toward settlement. Requests for admission differ from other discovery procedures in that they seldom elicit new information; rather, they are used to verify information that is not disputed. They can also be useful in learning what counsel's opponent is prepared to admit or deny or which issues the opponent considers worthy of trial.

Requests for admission are often the most important discovery vehicle for plaintiff's counsel in a collection case. For example, it may be necessary to prove at trial that the defendant signed a document, ordered goods, or requested services. The most cost-effective way to eliminate these issues for trial or summary judgment motion is usually by serving requests for admission under CCP §§2033.010-2033.080.

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## §5.6 2. Binding Nature of Admission

An admission made by a party in response to requests for admission is conclusively binding on that party unless the court permits withdrawal or amendment of the admission under CCP §2033.300. It appears that parties other than the responding party (and, perhaps, the requesting party) are not bound by admissions, but they may nevertheless use them against the responding party (and, perhaps, against the requesting party).

A party that has admitted the genuineness of a document may still object to its admission in evidence on hearsay, best evidence, or other grounds for exclusion.

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### §5.7 3. Service and Filing

A plaintiff may serve requests for admission on another party without leave of court at any time beginning 10 days after the other party was served with a summons or appeared, whichever occurs first. CCP §2033.020(b). It is possible to serve requests for admission earlier with leave of the court. For procedure, see California Civil Discovery Practice §9.9 (4th ed Cal CEB 2006).

Requests for admission may be served by mail, by personal delivery to the other party or the party's attorney, or as otherwise provided in CCP §§1010-1020. On service of papers in actions, see California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004). On service by mail extending the time to respond, see §5.41.

Although a plaintiff in a debt collection matter is primarily concerned with the debtor or debtors, all parties in an action are entitled to be kept abreast of each other's discovery activities. The party requesting admissions must serve a copy of them on the party to whom they are directed and on all other parties that have appeared in the action. CCP §2033.070.

Neither the original nor a copy of the requests for admission need be filed with the court unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. CCP §2033.270(a).

**PRACTICE TIP:** Sometimes, asking the other party to stipulate that certain factual matters are true and that specified documents are genuine is easier, faster, and less expensive than preparing, serving, and enforcing written requests for admission.

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### §5.8 4. Time to Respond

The responses must be made within 30 days after service unless an extension is obtained by written agreement with the party serving the requests or by court order. CCP §2033.250(a). If the set of requests for admission was served on the responding party by mail, the responses may be served within the extensions provided in CCP §1013(a), depending on the method of service. CCP §2016.050. On service by mail extending the time to respond, see §5.41.

The demanding and responding parties may also agree to extend the time for responding to all or part of the request. This agreement may be informal, but it must be confirmed in a writing that specifies the extended date for service of the response. CCP §2033.260(a)-(b). Ordinarily, a confirmation letter drafted by counsel for the responding party and signed by opposing counsel is sufficient. (It is good practice to have opposing counsel sign and return a copy of the letter.) Unless the letter expressly states otherwise, the agreement to extend time preserves the responding party's right to respond to the request in any manner, *i.e.,* no objections or other grounds for refusing to comply with the request are waived by agreeing to extend the time to respond. CCP §2033.260(c).

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## §5.9 5. Effect of Failure to Timely Respond

Failure to serve a timely, sworn, written response to requests for admission entitles the requesting party to move for an order that the matters specified in the request be deemed admitted and for monetary sanctions. CCP §2033.280(b).

If admissions have been deemed admitted under these provisions, relief may still be obtained by a noticed motion to withdraw or amend the deemed admission. See *Wilcox v Birtwhistle* (1999) 21 C4th 973, 979, 90 CR2d 260.

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## §5.10 6. Limitations on Use of Requests for Admission

A party may serve as a matter of right no more than 35 requests for admission that relate to the truth of facts. CCP §2033.030(a). More than 35 requests for admission that relate to the truth of facts may be propounded if a declaration, substantially in the form set forth in CCP §2033.050, is attached to the requests for admission. CCP §2033.030(b). There is no limit on the number of requests for admission concerning the genuineness of documents that one party can serve on another party in a superior court action, except, as justice requires, to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. CCP §2033.030(c).

Additional limitations on requests for admissions apply in limited civil cases. See §§3.67, 5.20, 5.27.

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## 7. Judicial Council Request for Admission Forms

### §5.11 a. Using Judicial Council Forms

The Judicial Council has developed and approved official form requests for admission for use in state court lawsuits based on fraud or breach of contract. See CCP §2033.710. The Judicial Council decided that its obligation was fulfilled by its approval of a single, printed, blank form. It declined to formulate specific requests related to subject matter. The printed "blank" form (designated Judicial Council Form DISC-020) is available from the clerk of each trial court. CCP §2033.740(b). A reproduction of this form is set out in §5.12 for reference. Use of this Judicial Council-approved form is optional.

**JUDICIAL PERSPECTIVE:** The Judicial Council form should be used only if it is the most effective way to make the request. The courts generally prefer a specially prepared request for admission if it reduces ambiguity and does not undermine the request. Unless the issues are simple, use of the form may not be advisable.

An attorney who uses the Judicial Council printed form may use attachment pages for more than the three or four requests that will fit in the spaces provided on the form. The form may be used as the first page of a long set of individual requests. Attached pages should be labeled to minimize the possibility of loss or confusion. For example:

_ _[*Short title of case*]_ _ **No.** _ _ _ _ _ _
**Requests for Admission, Set No.** _ _ _ _ _ _
**From** _ _[*name*]_ _ **to** _ _[*name*]_ _
**Attachment A: Additional Requests**

**NOTE:** Counsel should be aware that the use of Judicial Council-approved requests for admission are included in the statutory limit of 35. See §5.10. This rule may limit practical use of these form requests. Another limitation is that a lengthy set of requests for admission with attachment pages may be more confusing than useful in proving a case.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.12 b. Form: Request for Admission (Judicial Council Form DISC-020)

## §5.12 b. Form: Request for Admission (Judicial Council Form DISC-020)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| SHORT TITLE: | |
| **REQUESTS FOR ADMISSION**<br>☐ **Truth of Facts** ☐ **Genuineness of Documents**<br>**Requesting Party:**<br>**Answering Party:**<br>**Set No.:** | CASE NUMBER: |

## INSTRUCTIONS

Requests for admission are written requests by a party to an action requiring that any other party to the action either admit or deny, under oath, the truth of certain facts or the genuineness of certain documents. For information on timing, the number of admissions a party may request from any other party, service of requests and responses, restrictions on the style, format, and scope of requests for admission and responses to requests, and other details, see Code of Civil Procedure sections 94–95, 1013, and 2033.010–2033.420 and the case law relating to those sections.

An answering party should consider carefully whether to admit or deny the truth of facts or the genuineness of documents. With limited exceptions, an answering party will not be allowed to change an answer to a request for admission. There may be penalties if an answering party fails to admit the truth of any fact or the genuineness of any document when requested to do so and the requesting party later proves that the fact is true or that the document is genuine. These penalties may include, among other things, payment of the requesting party's attorney's fees incurred in making that proof.

Unless there is an agreement or a court order providing otherwise, the answering party must respond in writing to requests for admission within 30 days after they are served, or within 5 days after service in an unlawful detainer action. There may be significant penalties if an answering party fails to provide a timely written response to each request for admission. These penalties may include, among other things, an order that the facts in issue are deemed true or that the documents in issue are deemed genuine for purposes of the case.

Answers to *Requests for Admission* must be given under oath. The answering party should use the following language at the end of the responses:

*I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.*

_____ _____

*(DATE)* *(SIGNATURE)*

These instructions are only a summary and are not intended to provide complete information about requests for admission. This *Requests for Admission* form does not change existing law relating to requests for admissions, nor does it affect an answering party's right to assert any privilege or to make any objection.

## REQUESTS FOR ADMISSION

You are requested to admit within 30 days after service, or within 5 days after service in an unlawful detainer action, of this *Requests for Admission* that:

1. ☐ Each of the following facts is true *(if more than one, number each fact consecutively)*:

   ☐ Continued on Attachment 1

2. ☐ The original of each of the following documents, copies of which are attached, is genuine *(if more than one, number each document consecutively)*:

   ☐ Continued on Attachment 2

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)



Form Approved for Optional Use
Judicial Council of California
DISC-020 [Rev. January 1, 2008]

**REQUESTS FOR ADMISSION**

CEB

Code of Civil Procedure,
§§ 94–95, 2033.010–2033.420, 2033.710

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## 8. Attorney-Drafted Request for Admission

### §5.13 a. Format

A set of requests for admission that does not use Judicial Council Form DISC-020 as a first page must comply with the format requirements of Cal Rules of Ct 2.111. Thus, in the upper left corner of the first page, the name, State Bar number, address, and telephone number of the attorney should appear. The name of the court and the short title and number of the case should also appear in the caption. See sample forms in §5.14.

The name of the paper, REQUEST FOR ADMISSION, should be typed or printed below the case number. The first paragraph immediately below the caption must show the following (CCP §2033.060(b)):

- Identity of the requesting party;
- Identity of the responding party; and
- Set number.

The paper need not state the date on which a response is due. If, however, the parties agree in advance that the responding party may have more than the 30 days specified in CCP §2033.250(a), it is helpful to include a final response date in the introductory line. The form in §5.14 uses this approach.

Including a response date helps counter procrastination by the opposing party and the "excuse" that the response was late because of an office calendaring mistake. To avoid confusion, counsel should place the due date in boldface type on the face page of the document. Otherwise, the responding party will have to know and understand the code on this point. Whether or not a response due date is specified, counsel should include in the calculation of when the response is due any additional time allowed, based on the method of service of the RFAs. See CCP §1013.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.14 b. Form: Request for Admission

## §5.14 b. Form: Request for Admission

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **REQUEST FOR ADMISSION** |
| **vs** | ) | |
| _ _[*Name(s)*]_ _, | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**Propounding Party:** _ _[*Name*]_ _

**Responding Party:** _ _[*Name*]_ _

**Set No. :** _ _[*Number*]_ _

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _ **requests that you admit the truth of each of the following** _ _[*on or before* _ _[*date*]_ _]_ _**:**

**1. The** _ _[*describe items or services*]_ _ **were ordered by you.**

**2. The** _ _[*describe items or services*]_ _ **were received by you.**

**3. The** _ _[*describe items or services*]_ _ **were the same as ordered.**

**4. The** _ _[*describe items or services*]_ _ **were delivered in a timely fashion.**

**5. The** _ _[*describe items or services*]_ _ **were free from any defects.**

**6. The** _ _[*describe items or services*]_ _ **were purchased on open account.**

**7. You received** _ _[*describe invoice or other similar document*]_ _**, a copy of which is attached to this request as Exhibit _ _ _, shortly after the date set forth in** _ _[*describe document*]_ _**.**

**8. You have never objected to the** _ _[*describe invoice or similar document*]_ _ **attached to this request as Exhibit _ _ _.**

**9. The price shown in Exhibit _ _ _, is the correct price for the items stated in that Exhibit.**

**10. The amount shown due and owing in Exhibit _ _ _ is true and correct.**

[*Add if sale of goods*]

**11. None of the items set forth in Exhibit _ _ _ have been returned without a credit being issued.**

[*Continue*]

**[12.] Defendant _ _**[*name*]**_ _ is the same entity to whom the invoice attached to this request as Exhibit _ _ _ is addressed.**

**[13.] The person who executed the _ _**[*describe document under which items or services were ordered*]**_ _ attached to this request as Exhibit _ _ _ was authorized to do so.**

**_ _**[*Plaintiff/Defendant*]**_ _, _ _**[*name*]**_ _, requests that you admit under oath that the original of the following documents, copies of which are attached, are genuine:**

**D-1. _ _**[*Describe document, invoice, purchase order, etc.*]**_ _.**

**Date:** _ _ _ _ _ _ **_ _**[*Name of firm*]**_ _**

**By: __**[*Signature*]**__**
**_ _**[*Typed name*]**_ _**
**Attorney for _ _**[*name of propounding party*]**_ _**

*Copies:* Original (retain); copies for service (one for each other party); office copies.
*Comment:* Paragraph 11 should be used if the debt arises from the sale of goods.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.15 B. Interrogatories (CCP §§2030.010-2030.410)

## §5.15 B. Interrogatories (CCP §§2030.010-2030.410)

Interrogatories are written questions served by one party on another, which must be answered in writing under oath. CCP §§2030.010(a), 2030.250(a). Note that they may be served only on parties. The party that serves the interrogatories is called the "propounding party." The party on whom they are served is called the "responding party." The interrogatories may inquire about any matter that is relevant to the subject matter of the action unless the matter is privileged or protected by the work product rule. CCP §2017.010, CCP §2018.030; *Smith v Superior Court* (1961) 189 CA2d 6, 12, 11 CR 165.

For additional information on interrogatories, see California Civil Discovery Practice, chap 7 (4th ed Cal CEB 2006). On privileges, see Civil Discovery, chap 3.

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## §5.16 1. Use of Interrogatories

Interrogatories are commonly used to ascertain a party's contentions and factual bases for them and to ascertain the existence and description of documents that may then be the subject of a request for inspection. See §§5.22-5.29. Attorneys often use them to facilitate settlement by phrasing the interrogatories to force the opposing parties into self-contradictory positions. Interrogatories are particularly useful to the propounder for obtaining all knowledge that is available to the responding party (see CCP §2030.010), including knowledge of the responding party's agents and attorneys. See *Pantzalas v Superior Court* (1969) 272 CA2d 499, 77 CR 354.

**PRACTICE TIP:** Interrogatories are much less expensive than depositions, a factor to consider when damages are minor. Interrogatory responses, however, are frequently prepared by the party's attorney, making it more likely that careful consideration has gone into the responses to minimize the adverse impact on the responding party. The nature of the interrogatories may inadvertently disclose to the responding party the thoughts, impressions, and legal theories of the propounding party's attorney.

In a debt collection matter, interrogatories are often used in conjunction with requests for admission in order to explore requests that have been denied by the defendant. For example, an interrogatory can require a party to state all facts on which the party bases a denial to a request for admission and to identify persons with knowledge of these facts. The responding party is obligated to provide information available to it as well as information available to its agents and attorneys. For this reason, interrogatories are especially useful in obtaining all information available to an entity.

Interrogatories are also properly used to learn the parties' contentions and the facts supporting their contentions. CCP §2030.010(b). These goals generally cannot be achieved by deposition. *Rifkind v Superior Court* (1994) 22 CA4th 1255, 27 CR2d 822.

Creditor's counsel should be aware that a party responding to interrogatories may make writings available to the propounding party. See §5.22.

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### §5.17 2. Service and Filing

A plaintiff may serve interrogatories on another party without leave of court at any time after the other party was served with a summons or appeared. It is possible to serve interrogatories earlier with the court's permission. On motion, the court may permit a plaintiff to propound interrogatories at an earlier time with or without notice. CCP §2030.020(c). The timing of interrogatories is also governed by CCP §§2024.010-2024.060. A defendant may serve interrogatories on a party at any time without leave of the court.

The interrogatories may be served by mail, by personal delivery to the other party or the party's attorney, or as otherwise provided in CCP §§1010-1020. On service of papers in actions, see California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004). On service by mail extending the time to respond, see §5.41.

Although a plaintiff in a debt collection matter is primarily concerned with the debtor or debtors, all parties in the action are entitled to be kept abreast of each other's discovery activities. The party propounding interrogatories must serve a copy of them on the party to whom they are directed and on all other parties that have appeared in the action. CCP §2030.080.

Parties have 30 days before the date initially set for trial to complete discovery, and they have 15 days before the first date set for trial to have motions about discovery heard. CCP §2024.020(a).

**PRACTICE TIP:** If the trial date is continued, counsel may seek continuance or reopening of the discovery cutoff dates. CCP §2024.050(a).

The right to complete discovery or to have discovery motions heard closer to the trial date is a matter of discretion for the court (CCP §2024.050) except that if the motion pertains to a witness identified under CCP §2034.010-2034.730, the right to complete the discovery continues to the 15th day before the date initially set for trial, and the right to have a motion on this discovery heard continues to the 10th day before the date initially set for trial. CCP §2024.030. The last set of interrogatories served by mail should be sent at least 71 days before the trial date (15 days plus 35 days to answer when interrogatories are mailed), plus 16 court days' notice for the discovery motion (plus 5 days if notice is mailed within the state). See CCP §§1005(b), 2016.050, 2030.260(a). Because practices vary, counsel should consult local court rules or written uniform policies on discovery. See also CCP §2024.040(b).

Interrogatories are not filed with the court. CCP §2030.280(a).

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## §5.18 3. Time to Respond

Unless the court extends or shortens the time to respond, answers or objections to interrogatories must be served within 30 days after the date of service of the interrogatories. CCP §2030.260(a). When interrogatories have been served by mail, this period is extended. See §5.41.

The party propounding interrogatories and the responding party may agree to extend the time for service of a response to a set of interrogatories or to particular interrogatories in a set, to a date beyond that provided in CCP §2030.260. CCP §2030.270(a). Ordinarily, a confirmation letter drafted by counsel for the responding party and signed by opposing counsel is sufficient. (It is good practice to have opposing counsel sign and return a copy of the letter.) Unless the agreement expressly states otherwise, the right to respond (including objections and other responses allowed by CCP §2030.210) is also extended. If a party must move for an extension but the motion cannot be heard before expiration of the time in which to respond, the party should obtain an ex parte order extending the time to reply when filing the notice of motion.

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## §5.19 4. Effect of Failure to Timely Respond

A party's failure to answer interrogatories within the time provided by law will result in a waiver of certain rights and can result in a motion to compel answers by the propounder of the interrogatories. CCP §§2030.290-2030.300.

Failure to make a timely response to interrogatories results in both a waiver of any right to exercise the option to produce writings under CCP §2030.230 and a waiver of the right to object to the interrogatories, including objections based on privilege or on the protection for work product under CCP §2018.030. CCP §2030.290(a). See *Schaff v Superior Court* (1983) 146 CA3d 921, 194 CR 546; *Mannino v Superior Court* (1983) 142 CA3d 776, 191 CR 163. Relief from waiver is possible under CCP §2030.290(a). See California Civil Discovery Practice §7.57 (4th ed Cal CEB 2006).

A monetary sanction is available for the first instance of failure to respond to interrogatories, with more severe sanctions available thereafter. CCP §2030.290(c).

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.20 5. Limitations on Use of Interrogatories

## §5.20 5. Limitations on Use of Interrogatories

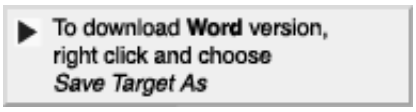
A party may propound to another party 35 specially prepared interrogatories and any additional number of official form interrogatories (approved by the Judicial Council) without attaching a supporting declaration. More than 35 specially prepared interrogatories may be propounded if a declaration, in substantially the form set forth in CCP §2030.050, is attached to the interrogatories.

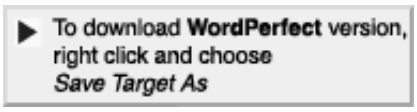
The number of permissible interrogatories may be further limited in limited civil cases, when $25,000 or less is at issue. See §3.67.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.21 6. Form: Specially Prepared Interrogatories

## §5.21 6. Form: Specially Prepared Interrogatories




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for Plaintiff,** _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **INTERROGATORIES SET NO.** |
| **vs** | ) | _ _[*NUMBER*]_ _ |
| _ _[*Name(s)*]_ _, | ) | **(Nos. _ _ to _ _)** |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**Propounding Party: Plaintiff**, _ _[*name*]_ _

**Responding Party: Defendant,** _ _[*name*]_ _

**Set No:** _ _[*Number*]_ _

**Plaintiff,** _ _[*name*]_ _**, requests that defendant**, _ _[*name*]_ _**, answer the following interrogatories, set no.** _ _[*number*]_ _**, under oath within 30 days after the date of service, under Code of Civil Procedure §2030.260(a).**

[*Add if more than one party to answer*]

**Plaintiff requests either that the answers to these interrogatories be signed by all defendants or that each of them sign a separate set of answers on** _ _[*his/her*]_ _ **own behalf.**

[*Continue*]

**Interrogatory no.** _ _[*number*]_ _**:** _ _[*Set out interrogatory*]_ _**.**

**Interrogatory no.** _ _[*number*]_ _**:** _ _[*Set out interrogatory*]_ _**.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain, with original proof of service, for possible filing with court); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* The Judicial Council official form interrogatories are meant for civil actions based on personal injury, property damage, and unlawful detainer. As such, they are not useful in debt collection actions.

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## §5.22 C. Discovery of Documents and Electronically Stored Information (CCP §§2031.010-2031.510)

**NOTE:** The Electronic Discovery Act (Stats 2009, ch 5), effective June 29, 2009, amended discovery provisions of the Code of Civil Procedure to address discovery of electronically stored information and to permit discovery by means of copying, testing, or sampling in addition to inspection of documents, tangible things, and other property.

A party initiates discovery by making a written demand on the party from whom discovery is sought. The date set for inspecting, copying, testing, or sampling discovery materials must be at least 30 days after the service of the written demand. CCP §2031.030(c)(2). Unless an extension of the time to respond is obtained by written agreement or court order, the responding party must serve a written response within 30 days after service, stating its intention to comply, its inability to do so, or any objections it may have. CCP §2031.260(a).

A demand for production of electronically stored information may specify the form in which the electronically stored information is to be produced. CCP §2031.030(a)(2). If the demand does not specify the form for producing the information, the responding party must produce the information in the form in which it is ordinarily maintained or in a reasonably usable form. CCP §2031.280(d).

As an alternative to a demand for inspecting, copying, testing, or sampling, the party seeking discovery may notice a deposition under CCP §2025.280, specifying in the notice the documents that the party must bring to the deposition. However, the procedure for inspecting, copying, testing, or sampling documents is considerably cheaper and more convenient than a deposition if a deposition is not otherwise required.

The creditor's counsel should be aware that a party responding to interrogatories may make writings available to the propounding party whenever answering an interrogatory would require preparing a compilation, abstract, audit, or summary of the writings if the cost of doing so would be approximately the same for either party. CCP §2030.230. This provision applies only to documents and authorizes the party receiving them only to examine, audit, or inspect and make copies, compilations, abstracts, or summaries of them.

**PRACTICE TIP:** Do not overlook the possibility of a written stipulation for obtaining inspection of documents. See California Civil Discovery Practice §§8.42-8.44 (4th ed Cal CEB 2006). See §5.28.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.23 1. Use of Demand for Inspection

## §5.23 1. Use of Demand for Inspection

In a straightforward debt collection matter, the plaintiff usually has all relevant documents in its possession, and requesting documents will be unnecessary. If the defendant raises affirmative defenses, however, it may be appropriate to request documents relating to the defenses. For example, if the debtor/defendant asserts a defense based on the alleged payment of the underlying debt, the plaintiff should request all checks and other evidence of payment that the defendant contends were not credited to his or her account.

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## §5.24 2. Service and Filing

A plaintiff may serve a demand on another party without leave of court at a time beginning 10 days after the defendant has been served with a summons or has appeared. CCP §2031.020(b). A plaintiff may serve an earlier demand on a defendant, however, if a court order, for good cause shown, has been obtained. CCP §2031.020(d).

The demand may be served by mail, by personal delivery to the other party or to the party's attorney, or as otherwise provided in CCP §§1010-1020. On service of papers in actions, see California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004). On service by mail extending the time to respond, see §5.41.

Although a plaintiff in a debt collection matter is primarily concerned with the debtor or debtors, all parties in the action are entitled to be kept abreast of each other's discovery activities. The party propounding a demand for inspection, copying, testing, or sampling must serve a copy of it on the party to whom it is directed and on all other parties that have appeared in the action. CCP §2031.040.

Technically, a demand for inspection, copying, testing, or sampling can be personally served on a party as late as 60 days before trial. This timing allows inspection to take place 30 days after the demand is served (CCP §2031.030(c)(2)) but no later than 30 days before trial (CCP §2024.020(a)).

Demands for inspection, copying, testing, or sampling are not filed with the court. CCP §2031.290(a).

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## §5.25 3. Time to Respond

The party to whom the demand is directed must respond to it, in writing, within 30 days after it is served. If the demand was served by mail, the period is extended as provided in CCP §1013. The court may order the time for response shortened on the demanding party's motion or extended on the responding party's motion. CCP §2031.260(a). The demanding and responding parties may also agree to extend the time for responding to all or part of the demand. This agreement may be informal, but it must be confirmed in a writing that specifies the extended date for service of the response. CCP §2031.270(a)-(b). Ordinarily, a confirmation letter drafted by counsel for the responding party and signed by the opposing counsel is sufficient; it is good practice to have opposing counsel sign and return a copy of the letter. Unless this letter expressly states otherwise, the agreement to extend time preserves the responding party's right to respond to the demand in any manner, *i.e.,* no objections or other grounds for refusing to comply with the demand are waived by agreeing to extend the time to respond to demands for inspection. CCP §2031.270(c).

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### §5.26 4. Effect of Failure to Timely Respond

A party who fails to serve a timely response to a demand for inspection, copying, testing, or sampling waives any objections to it, including ones based on privilege and work product. CCP §2031.300(a). On the party's motion, the court may relieve the party of this waiver if (CCP §2031.300(a)(1)-(2)):

- The party subsequently served a response that substantially complied with CCP §§2031.210, 2031.220, 2031.240, and 2031.280; and
- The party's failure to respond resulted from mistake, inadvertence, or excusable neglect.

Neither a party nor the party's attorney may be sanctioned "for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system." CCP §2031.300(d)(1).

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## §5.27 5. Limitations on Discovery Requests

Statutory provisions governing requests for inspection do not limit the number of document requests that may be made. See CCP §§2030.010-2031.510. Certain numerical limitations may apply, however, in limited civil cases, when $25,000 or less is at issue. See §3.67.

On limitations to discovery of electronically stored information, see §5.27A.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.27A 6. Protective Order for Electronically Stored Information

## §5.27A 6. Protective Order for Electronically Stored Information

A party responding to a demand for electronically stored information may seek a protective order if the party can prove that the electronically stored information demanded is not reasonably accessible because of undue burden or expense. CCP §2031.060(c). However, if the court finds that there is good cause for production of the electronically stored information demanded, it may set conditions for discovery of the information, including shifting the cost burden. CCP §2031.060(e).

Discovery of electronically stored information, even if it is reasonably accessible, must be limited if the court determines that (CCP §2031.060(f)):

- The information can be obtained from a more convenient, less expensive source;
- The discovery sought is unreasonably cumulative or duplicative;
- The demanding party could have obtained the information sought; or
- The burden or expense outweighs the likely benefit.

Code of Civil Procedure §2031.285, added by the Electronic Discovery Act (Stats 2009, ch 5), sets forth procedures to address the inadvertent disclosure of privileged materials or work product in electronic information produced in discovery.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/ 7. Demand Forms/ §5.28 a. Form: Stipulation for Inspection, Copying, Testing, or Sampling

## 7. Demand Forms

### §5.28 a. Form: Stipulation for Inspection, Copying, Testing, or Sampling

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **STIPULATION FOR** |
| **vs** | ) | **INSPECTION, COPYING,** |
| _ _[*Name(s)*]_ _, | ) | **TESTING, OR SAMPLING** |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**Through _ _[*name*]_ _, attorney for plaintiff, and _ _[*name*]_ _, attorney for defendant, the parties stipulate that:**

[*Option 1: Only nonprivileged documents or things must be produced*]

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **will produce for** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, **the following items, none of which are privileged:** _ _[*Identify specific documents or things*]_ _.

[*Option 2: Both privileged and nonprivileged documents or things must be produced*]

_ _[*Plaintiff/Defendant*]_ _, _ _[*name*]_ _, **will produce all nonprivileged items within the following categories:** _ _[*Describe categories*]_ _. _ _[*Plaintiff/Defendant*]_ _ **will describe any item in one or more of the categories that** _ _[*plaintiff/defendant*]_ _ **claims to be privileged with sufficient particularity to permit the claim of privilege to be tested by motion, including the date on which it was written, the identity of the person who wrote it, the identity of the person or persons who received it, the purpose of its preparation, and the persons who have seen or had access to it or a copy of it since its preparation.**

[*Continue*]

**The above-described items will be produced for inspection, copying, testing, or sampling by** _ _[*name and capacity*]_ _ **on** _ _[*date*]_ _, **at** _ _[*time*]_ _, **at** _ _[*e.g., the office of plaintiff's attorney*]_ _, **located at** _ _[*address*]_ _, **California.**

**The above-described** _ _[*e.g., production, inspection*]_ _ **may be** _ _[*monitored/supervised*]_ _ **by** _ _[*designate representative of producing party or give name of specific person designated*]_ _.

**The above-described** _ _[*documents/things/land*]_ _ _ _[*is/are*]_ _ **currently in the possession, custody, or control of** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _. **The matter to be inspected is relevant to the subject matter of this action and is itself admissible in evidence or is calculated to lead to discovery of admissible evidence.**

**Counsel for _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, will file this stipulation with the Court and request that an order incorporating its terms be issued without further notice or hearing.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for plaintiff,**
_ _[*name*]_ _

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for defendant,** _ _[*name*]_ _

*Copies:* Original with proof of service attached (retained by counsel for demanding party); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Normally, the party responding to a demand for inspection, copying, testing, or sampling does not need to identify the items produced. See CCP §§2031.210-2031.320. The elimination of this step requires the demanding party to conduct further discovery to ascertain which documents were withheld from production on the ground of privilege. This stipulation allows the production and this further discovery to be accomplished at the same time.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.29 b. Form: Demand for Inspection, Copying, Testing, or Sampling

## §5.29 b. Form: Demand for Inspection, Copying, Testing, or Sampling

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DEMAND FOR INSPECTION,** |
| **vs** | ) | **COPYING, TESTING, OR** |
| _ _[*Name(s)*]_ _, | ) | **SAMPLING** |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**Demanding Party:** _ _[*name*]_ _

**Responding Party:** _ _[*name*]_ _

**Set No.:** _ _[*number*]_ _

**Plaintiff,** _ _[*name*]_ _**, demands under Code of Civil Procedure §§2031.010-2031.510 that defendant,** _ _[*name*]_ _**, produce the items described below, for inspection and** _ _[*copying/photographing/testing/sampling*]_ _ **by** _ _[*name and capacity*]_ _**, on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, at** _ _[*e.g., the office of plaintiff's attorney*]_ _**, located at** _ _[*address*]_ _**, California. The items to be produced are:** _ _[*Separately list and number each item or category of items to be produced; describe categories of items with sufficient particularity to allow party to easily discern what is to be produced*]_ _**.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original with proof of service attached (retained by counsel for demanding party); copies for service (one for each attorney of record and unrepresented party); office copies.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.30 D. Depositions (CCP §§2025.010-2025.620)

## §5.30 D. Depositions (CCP §§2025.010-2025.620)

Counsel use depositions most often to discover all relevant information an opposing party knows about the case, including sources of additional discovery, such as the existence and location of percipient witnesses and pertinent documents. Oral depositions provide the best opportunity to obtain truthful discovery responses from another party. Unlike interrogatories and requests for admission, the responses come directly from the witness rather than from counsel for the adverse party. Although more expensive than requests for admission, oral depositions may enable counsel to obtain an admission more directly and truthfully from an opposing party. If the deponent is an organization, it will designate an officer, director, managing agent, or employee to be deposed. CCP §2025.230.

Although nonparties may cooperate with counsel and voluntarily relate information about the case, they are not required to do so. The deposition is the only authorized discovery method for compelling nonparty testimony. CCP §2020.010(a). For this reason, a written deposition to obtain sworn testimony from a nonparty on relatively uncontroversial matters may be worthwhile. See CCP §§2028.010-2028.080. Nonparty depositions can also be taken by written questions following the procedures of CCP §§2028.010-2028.080. On procedures for written depositions, see California Civil Discovery Practice §§5.160-5.199 (4th ed Cal CEB 2006).

Procedures for conducting oral depositions are set forth in CCP §§2025.010-2027.010. Procedures for compelling a nonparty to attend a deposition, to produce documents and things, or both, by subpoena, are set forth in CCP §§2020.010-2020.510. This chapter deals solely with depositions of a party because nonparty depositions are relatively rare in debt collection matters.

For additional information on depositions, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006).

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.31 1. Use of Depositions

## §5.31 1. Use of Depositions

Depositions have two main purposes: to discover material information and to preserve testimony.

Depositions are frequently used to discover the sources of additional information, such as the location of witnesses and pertinent documents. The oral deposition method is designed to elicit spontaneous testimony from the witness and is thus most likely to reveal deficiencies in the opposing party's case.

Deposition testimony that is otherwise admissible can be used for the following purposes and in the following circumstances:

**To contradict or impeach deponent's testimony.** Any party may use the deposition testimony of any deponent to contradict or impeach the in-court testimony of the deponent, or for any other purpose permitted by the Evidence Code. CCP §2025.620(a).

**For any other purpose.** A party may use a deposition for any purpose, when:

- The deponent is an adverse party, or someone who was, when the deposition was taken, an officer, director, managing agent, employee, agent, or designee under CCP §2025.230 of an adverse party. This rule applies even though the deponent is available to testify, has testified, or will testify. CCP §2025.620(b).
- The deponent resides more than 150 miles from the trial or hearing. CCP §2025.620(c)(1).
- The deponent (without the procurement or wrongdoing of the party offering the deposition for the purpose of preventing testimony in open court) is (CCP §2025.620(c)(2)(A)-(E)):
- Exempted or precluded on the ground of privilege from testifying about the matter to which the deponent's testimony is relevant,
- Disqualified from testifying,
- Dead or unable to attend or testify because of existing physical or mental illness or infirmity,
- Absent from the trial or other hearing and the court is unable to compel the deponent's testimony by its process, or
- Absent from the trial or hearing and the party offering the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance through court processes.

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## §5.32 2. Service and Filing

A plaintiff must wait 20 days after the defendant is first served or appears in the action before serving a notice or subpoena of deposition. CCP §2025.210(b); *California Shellfish, Inc. v United Shellfish Co.* (1997) 56 CA4th 16, 64 CR2d 797 (absent court order, plaintiff cannot subpoena independent witness for deposition or production of documents until 20 days after defendant has appeared or been served with summons or appeared).

The waiting period imposed on the plaintiffs prevents their compelling discovery before defendants have had time to consult with counsel and conduct investigations about the action. See *Waters v Superior Court* (1962) 58 C2d 885, 892, 27 CR 153. For good cause shown, the plaintiff may apply ex parte or by noticed motion for an order shortening the 20-day waiting period. CCP §2025.210(b).

Service of a deposition notice alone, without an accompanying subpoena, is sufficient to compel the following individuals to attend a deposition and testify:

- A party (CCP §2025.280(a));
- A party's expert (CCP §2034.460(a));
- An officer, director, managing agent, or employee of a party (CCP §2025.280(a)).

A managing agent is someone who exercises discretion in dealing with corporate matters and identifies with its interests in testifying. See 58 C2d at 896. If it is unclear whether a particular individual qualifies as a managing agent, counsel should serve a subpoena.

Whether the deponent is a party or a nonparty, counsel taking the deposition must serve a deposition notice on all parties who have appeared in the action. CCP §2025.240(a). The only exception is that, when counsel requests a nonparty's production of business records without requiring any personal appearance under CCP §2020.410, the deposition subpoena serves as the notice of deposition. CCP §2025.220(b).

The deposition notice, or the accompanying proof of service, must specify the parties or their attorneys on whom the notice is being served. CCP §2025.240(a). An identical copy of any deposition subpoena served on a nonparty deponent must be served with the parties' deposition notice. CCP §2025(d).

The deposition notice is not filed with the court. The examining party retains the original notice and proof of service. It is not filed with the court unless it becomes relevant in a law and motion hearing. See Cal Rules of Ct 3.250. For special requirements when consumer records are subpoenaed, see §5.38.

For a form for notice of deposition, see §5.35. For a stipulation to take a deposition, see §5.37.

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### §5.33 3. Time to Respond

Depositions do not require a written response unless the deponent objects to the deposition. Defects in the deposition notice are rarely significant to the outcome of a case. A party objecting to a deposition notice that fails to comply with the notice requirements of CCP §§2025.210-2025.280 must serve written objections specifying each impediment. Failure to do so waives any error or irregularity. CCP §2025.410(a).

Objections must be served on the noticing party and all attorneys or parties who received notice of the deposition "promptly," and in no event less than three calendar days before the date scheduled for the deposition. When serving objections three calendar days before the deposition date, the objecting party must comply with CCP §1011 by personally serving the noticing party. CCP §2025.410(b).

No particular form for the written objection is required. Because the ultimate purpose of objecting is to prevent the deposition transcript from being used at trial, however, it is good practice to use a pleading format with a proof of service attached to establish compliance with the statute. See CCP §2025.410.

A party may make a formal noticed motion for a protective order; the court cannot grant a protective order ex parte. *St. Paul Fire & Marine Ins. Co. v Superior Court* (1984) 156 CA3d 82, 85, 202 CR 571. An example of when a protective order may be appropriate is when the deposing party seeks access to high-level corporate employees who lack personal knowledge or involvement in the litigation, particularly when the plaintiff has yet to exhaust less intrusive means of discovery. *Liberty Mut. Ins. Co. v Superior Court* (1992) 10 CA4th 1282, 1287, 13 CR2d 363 (deposition of corporation's president may "raise a tremendous potential for discovery abuse and harassment").

The timing of a motion for a protective order, whether made before, after, or even during a deposition, is a matter of practicality and strategy. Orders that change the date, time, or location of depositions should obviously be requested in advance. The court is unlikely to issue a protective order based solely on the moving party's *anticipation* that improper questioning or other conduct will occur. When a nonparty witness possesses privileged information, however, and counsel has no standing to instruct the witness not to answer, a party's only recourse may be to seek an order limiting the scope of the deposition. Nonetheless, the strongest evidence of the need for a protective order is a deposition transcript revealing that the moving party has attempted to be reasonable and has requested relief from the court only as a last resort. At the very least, such a record lessens the likelihood of sanctions, even if the motion is lost. On seeking protective orders during or after a deposition, see California Civil Discovery Practice §§5.139-5.141 (4th ed Cal CEB 2006).

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## §5.34 4. Limitations on Use of Depositions

Once a party has taken a deposition of a natural person, including a party, neither the party who gave notice of the deposition nor any other party who received notice may take another deposition of the deponent except that, for good cause shown, the court may permit a subsequent deposition and the parties, with the consent of a deponent who is not a party, may agree to a subsequent deposition. Also, a party is not precluded from taking a subsequent deposition of a natural person who has previously been examined on behalf of an organization under CCP §2025.230 or for the limited purposes of discovering the identity, location, and value of property in which the deponent has an interest under CCP §485.230 (permitting discovery after the issuance of a right to attach order). In limited civil cases (when $25,000 or less is at issue), a party is permitted only one deposition as to each adverse party. CCP §94(b).

The deponent need not obtain a protective order to avoid being redeposed. The burden is on the noticing party to obtain a court order, on a showing of good cause, authorizing the second deposition. See CCP §2025.610. When important defendants have not appeared in the action, however, counsel representing the deponent should consider moving for an order under CCP §2025.420 to protect the deponent's right to give only one deposition. Otherwise, after their appearance, the parties who neither were present at the deposition nor received notice of it may take a subsequent deposition.

These restrictions apply to *subsequent* depositions of an individual whose first deposition was completed. They do not prohibit multiple sessions of the same deposition, even if substantial time elapses between sessions.

For a comprehensive discussion of initiating, preparing, taking, and defending depositions, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006).

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/ 5. Deposition Forms/§5.35 a. Form: Notice of Deposition (CCP §2025.220(a))

## 5. Deposition Forms

### §5.35 a. Form: Notice of Deposition (CCP §2025.220(a))

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ _ Court, County of _ _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF DEPOSITION** |
| **vs** | ) | **(CCP §2025.220(a))** |
| _ _[*Name(s)*]_ _, | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**PLEASE TAKE NOTICE that the deposition of _ _[*name*]_ _ will be taken on _ _[*date*]_ _, at _ _[*time*]_ _, at _ _[*address*]_ _.**

[*Option 1: Deponent is nonparty*]

**The deponent is not a party to this action. _ _[*If known, state deponent's address and telephone number; if deponent's name is unknown, give description sufficient to identify person or class to which person belongs*]_ _. A copy of the deposition _ _[*subpoena/subpoena duces tecum*]_ _ is attached to this notice.**

[*Option 2: Deponent is corporation or other organization*]

**The deponent is not a natural person. The examination will cover the following matters: _ _[*Describe with reasonable particularity to enable organization to designate and produce employees most qualified to testify on its behalf on those matters*]_ _.**

[*Add if party-deponent must produce documents or other tangible things*]

**The deponent must bring the following documents to the deposition: _ _[*Describe with reasonable particularity*]_ _.**

[*Add if deposition will be recorded on audiotape or videotape*]

**This deposition will be recorded on _ _[*audiotape/videotape*]_ _ in addition to being stenographically recorded.**

[*Continue*]

**The attached proof of service lists all attorneys of record and any unrepresented parties on whom this notice of deposition is being served.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* This form contains information required by CCP §2025.220(a). If the parties alter the requirements by written stipulation, the notice should be altered accordingly.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.36 b. Form: Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-002)

## §5.36 b. Form: Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things (Judicial Council Form SUBP-002)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| —<br><br>TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/ PETITIONER:<br><br>DEFENDANT/ RESPONDENT: | |
| **CIVIL SUBPOENA (DUCES TECUM) for Personal Appearance and Production of Documents and Things at Trial or Hearing AND DECLARATION** | CASE NUMBER: |

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known)*:**

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS your appearance is excused as indicated in box 3b below or you make an agreement with the person named in item 4 below.**

| | | | | | |
|---|---|---|---|---|---|
| a. Date: | Time: | ☐ Dept.: | ☐ Div.: | ☐ Room: | |
| b. Address: | | | | | |

2. **IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, *AND* CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.**
3. YOU ARE *(item a or b must be checked)*:
   a. ☐ Ordered to appear in person and to produce the records described in the declaration on page two or the attached declaration or affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized by Evidence Code sections 1560(b), 1561, and 1562 will not be deemed sufficient compliance with this subpoena.
   b. ☐ Not required to appear in person if you produce (i) the records described in the declaration on page two or the attached declaration or affidavit and (ii) a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose the original declaration of the custodian with the records. Seal the envelope. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number; your name; and the date, time, and place from item 1 in the box above. (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party listed at the top of this form.
4. **IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE YOU ARE TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**
   a. Name of subpoenaing party or attorney: b. Telephone number:
5. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 4.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PERSON ISSUING SUBPOENA)

(Declaration in support of subpoena on reverse) (TITLE)



Form Adopted for Mandatory Use
Judicial Council of California
SUBP-002 [Rev. July 1, 2009]

**CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION**

CEB
Code of Civil Procedure, § 1985 et seq.
www.courtinfo.ca.gov

| PLAINTIFF/PETITIONER: | CASE NUMBER: |
|---|---|
| DEFENDANT/RESPONDENT: | |

The production of the documents or the other things sought by the subpoena on page one is supported by *(check one)*:
☐ the attached affidavit or declaration ☐ the following declaration:

**DECLARATION IN SUPPORT OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING**
**(Code Civ. Proc., §§ 1985,1987.5)**

1. I, the undersigned, declare I am the ☐ plaintiff ☐ defendant ☐ petitioner ☐ respondent ☐ attorney for *(specify)*: ☐ other *(specify)*:
   in the above-entitled action.
2. The witness has possession or control of the following documents or other things and shall produce them at the time and place specified in the *Civil Subpoena for Personal Appearance and Production of Documents and Things at Trial* or *Hearing* on page one of this form *(specify the exact documents or other things to be produced)*:

   ☐ Continued on Attachment 2.
3. Good cause exists for the production of the documents or other things described in paragraph 2 for the following reasons:

   ☐ Continued on Attachment 3.
4. These documents or other things described in paragraph 2 are material to the issues involved in this case for the following reasons:

   ☐ Continued on Attachment 4.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

.....
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF ☐ SUBPOENAING PARTY ☐ ATTORNEY FOR SUBPOENAING PARTY)

## Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the date on which you are to appear. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civil Code, § 54.8.)

(Proof of service on page 3)

Print

SUBP-002

| PLAINTIFF/PETITIONER: | CASE NUMBER: |
|---|---|
| DEFENDANT/RESPONDENT: | |

**PROOF OF SERVICE OF CIVIL SUBPOENA (DUCES TECUM) FOR PERSONAL APPEARANCE AND PRODUCTION OF DOCUMENTS AND THINGS AT TRIAL OR HEARING AND DECLARATION**

1. I served this *Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. Witness fees *(check one)*:
      (1) ☐ were offered or demanded and paid. Amount: . . . . . $ _____
      (2) ☐ were not demanded or paid.
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff or marshal.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
   f. ☐ Registered professional photocopier.
   g. ☐ Exempt from registration under Business and Professions Code section 22451.
   h. Name, address, telephone number, and, if applicable, county of registration and number:

**I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

**(For California sheriff or marshal use only)**
**I certify** that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)



*Copies:* Original (retain with proof of service for filing with court if future motion is made); copies for service (one for

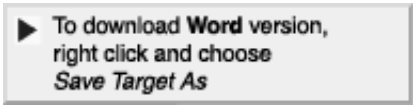
subpoenaed deponent, for each attorney of record, and for unrepresented party, attached to the deposition notice served on parties); office copies.

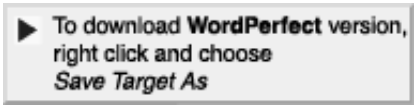
*Comment:* If documents and things are to be produced at the deposition, the subpoena must designate the records to be produced by specifically describing each individual item or "reasonably particularizing" each category of item.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.37 c. Form: Stipulation for Taking Deposition (CCP §2016.030)

## §5.37 c. Form: Stipulation for Taking Deposition (CCP §2016.030)




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **STIPULATION FOR TAKING** |
| **vs** | ) | **DEPOSITION (CCP §2016.030)** |
| _ _[*Name(s)*]_ _, | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**Under Code of Civil Procedure §2016.030, the parties stipulate through their counsel that _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, will take the deposition on oral examination of _ _[*name of deponent*]_ _ on _ _[*date(s) of deposition*]_ _, at _ _[*time of deposition*]_ _, at _ _[*address*]_ _, and that further notice of the taking of the deposition and service is waived.**

| | |
|---|---|
| **Date:** _ _ _ _ _ _ | **Date:** _ _ _ _ _ _ |
| __[*Signature*]__ | __[*Signature*]__ |
| _ _[*Typed name*]_ _ | _ _[*Typed name*]_ _ |
| **Attorney for plaintiff** | **Attorney for defendant** |

*Copies:* Original (retain with proof of service for filing with court if future motion is made); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Counsel should be certain that all matters agreed to are identified in the stipulation (*e.g.,* production of documents, intent to videotape deposition).

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## §5.38 6. Subpoena of Consumer's Personal Records

When a third party is subpoenaed to produce a consumer's records, CCP §1985.3 imposes requirements in addition to those in CCP §§2020.010-2020.510. The special requirements include providing the consumer with notice of the subpoena and assuring the deponent that the consumer has been provided with notice or has authorized the production of his or her records. See §5.39 for notice form. After receiving notice that personal records are sought, the consumer may move to quash the subpoena before the date for production. It is likely that the special provisions of CCP §1985.3 will apply to a party seeking financial information from a defendant's lender, so this section should be carefully reviewed before initiating any such discovery.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.39 a. Form: Notice of Privacy Rights (CCP §1985.3)

## §5.39 a. Form: Notice of Privacy Rights (CCP §1985.3)

▶ To download **Word** version, right click and choose *Save Target As*

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF PRIVACY RIGHTS** |
| **vs** | ) | **(CCP §1985.3)** |
| _ _[*Name(s)*]_ _, | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**PLEASE TAKE NOTICE that records concerning you are being sought from** _ _[*name and address of entity or person in possession of records*]_ _**, named on the deposition subpoena enclosed with this notice. Also enclosed is the deposition notice served by the subpoenaing party on all other parties in this action.**

**If you object to** _ _[*name of entity or person in possession of those records*]_ _ **furnishing copies of these records to the parties in this action, you must, before** _ _[*date of production*]_ _**, either (1) obtain the written agreement of** _ _[*name of party's attorney causing subpoena to be issued*]_ _ **to cancel or limit the subpoena or (2) file a written motion under Code of Civil Procedure §1987.1 in the above-named Court to prevent or limit production of your records.**

**If you cannot obtain the written agreement of the party's attorney seeking your records to cancel or limit the subpoena, you should consult an attorney immediately to assist you in protecting your rights of privacy.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain with proof of service for filing with court if future motion is made); copies for service (one for consumer and for each attorney of record and unrepresented party); office copies.

*Comment:* The notice must be in a typeface designed to call attention to itself. Copies of the deposition subpoena and the deposition notice must be served with the consumer notice.

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**Source:** Business Law/Debt Collection Practice in California/5 Discovery in Debt Collection Actions/§5.40 b. Form: Proof of Service of Notice of Privacy Rights

## §5.40 b. Form: Proof of Service of Notice of Privacy Rights

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **PROOF OF SERVICE OF** |
| **vs** | ) | **NOTICE OF PRIVACY RIGHTS** |
| _ _[*Name(s)*]_ _, | ) | **IN COMPLIANCE WITH CCP** |
| **Defendant(s)** | ) | **§1985.3** |
| _____ | ) | |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**I am over age 18, am not a party in this action, and** _ _[*reside/am employed*]_ _ **in** _ _[*name of county*]_ _ **County, California, at** _ _[*address*]_ _**.**

**On** _ _[*date*]_ _**, I served the Notice of Privacy Rights (Code of Civil Procedure §1985.3), dated** _ _[*date*]_ _**, as follows:**

[*Option 1: Personal delivery*]

**By personal delivery of a true copy of this notice to** _ _[*name of consumer or, if consumer is party to action, name of consumer's attorney*]_ _ **at** _ _[*address where served*]_ _**.**

[*Option 2: United States mail*]

**By placing a true copy of this notice in a sealed envelope, with prepaid postage, in the United States mail at** _ _[*name of city*]_ _**, California, addressed to** _ _[*name of consumer or, if consumer is party to action, name of consumer's attorney*]_ _ **at** _ _[*address*]_ _**.**

[*Continue*]

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain with proof of service for filing with court if future motion is made); copies for service (one for consumer and for each attorney of record and unrepresented party); office copies.

*Comment:* This suggested form should be attached to the consumer notice. A copy of the proof of service (or the consumer's written authorization to release personal records) must accompany the deposition subpoena to show the required compliance with CCP §1985.3; otherwise, the witness has a substantial basis for refusing to produce the

subpoenaed consumer records.

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## §5.41 III. EXTENSION OF TIME TO RESPOND TO DISCOVERY SERVED BY MAIL

When requests for admission, interrogatories, or a request to inspect are served by mail, the time to respond is extended by 5 calendar days if mailed to an address in California, 10 calendar days if mailed to an address outside California but in the United States, and 20 calendar days if mailed to an address outside the United States. CCP §2016.050.

Generally, when the time to respond, or perform or complete any act under the Civil Discovery Act (CCP §§2016.010-2036.050) falls on a Saturday, Sunday, or holiday, the time is extended to the next day that is not a Saturday, Sunday, or holiday. CCP §2016.060. "Holidays" for these purposes are defined in CCP §§10 and 135.

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# 6

# Prejudgment Remedies

**Gregory C. Nuti**

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## I. ATTACHMENT

### §6.1 A. Overview

Attachment is a provisional or prejudgment remedy. Other prejudgment remedies are claim and delivery (obtained by an application for a writ of possession; see §§6.111-6.166) and receivership (see §§11.33-11.34). Attachment allows the plaintiff (or cross-complainant) to levy on and obtain a lien against the defendant's (or cross-defendant's) property to ensure availability of assets to satisfy any judgment. A plaintiff who succeeds in obtaining a writ of attachment can convert its unsecured position into a secured one, which may be advantageous if the defendant files for bankruptcy. See chap 12 on bankruptcy.

Attachment can be an extremely effective remedy in uncomplicated collection actions and may affect the outcome of the entire case. A writ of attachment, however, applies only to California property. Attachment is a purely statutory remedy and the code provisions are strictly construed. *Jordan-Lyon Prods., Ltd. v Cineplex Odeon Corp*. (1994) 29 CA4th 1459, 35 CR2d 200; *Vershbow v Reiner* (1991) 231 CA3d 879, 282 CR 684. Thus, before filing an application for a writ of attachment, counsel should become familiar with the procedural requirements.

In addition to ascertaining whether attachment is authorized for a particular action (see §6.3), counsel also must decide whether it is a practical remedy, given the size of the claim and the extent and availability of the defendant's assets. Although attachment is available for obligations as small as $500 (CCP §483.010(a)), the cost of obtaining and serving the writ may not be justified. The levying officer's fees alone may be several hundred dollars. Also, obtaining a writ of attachment is pointless if a corporate defendant has no assets or if an individual defendant is judgment proof (*i.e.,* has no assets in excess of available exemptions). See §6.11 on exemptions. Therefore, counsel should ascertain at the outset the extent of the defendant's assets and their availability for attachment. The effort made in discovering those assets should correlate to the size of the plaintiff's underlying claims. Finally, because attachment is not an exclusive remedy, counsel should also consider other forms of relief. CCP §483.010(d).

If an investigation of the defendant's assets is warranted, it may be prudent to undertake the investigation before filing the action. In theory, the plaintiff may seek a writ of attachment at any stage of the proceeding (CCP §484.010) and may conduct discovery to locate the defendant's assets (CCP §485.230). Once the summons and complaint are served, however, there is a risk that the defendant will transfer or conceal assets. If assets subject to attachment are discovered before the action is filed, a writ of attachment may be sought on an ex parte basis, giving the defendant little or no time to hide assets. See §§6.33-6.36.

Counsel should also be familiar with the levy procedures of the levying officer in each jurisdiction where assets are located. It may be helpful to contact the officer and simply ask what documents need to be submitted, and the amount of the necessary fees and deposits. In busier jurisdictions, the levying officer is not always able to immediately serve the writ and levy on the property. Therefore, counsel may wish to time the filing of the action to coincide with the officer's ability to enforce the writ without delay, thus limiting the defendant's opportunity to hide, move, or transfer assets.

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## §6.2 B. Arbitration and Other Procedural Considerations

**Arbitration clauses.** If the contract being sued on has an arbitration clause and the plaintiff wishes to preserve the right to enforce it, the plaintiff must comply with CCP §1281.8, which provides that

- A party to an arbitration agreement may seek a writ of attachment in connection with a pending arbitration, but only on the ground that the award sought by the applicant may be rendered ineffectual without provisional relief. CCP §1281.8(b).
- The writ application must be accompanied by a copy of the complaint in the proceeding and a statement of whether the party is reserving its right to arbitration. If an arbitration is not pending, the writ application must be accompanied by copies of the demand for arbitration and any response to it. CCP §1281.8(b).
- Applying for a writ of attachment will not waive any right that the applicant may have under the arbitration clause if, at the time the application is presented, the applicant also presents to the court an application to stay all other proceedings in the action pending arbitration of any issue, question, or dispute that is claimed to be arbitrable and relevant to the action in which the provisional remedy is sought. CCP §1281.8(d).
- A claim by the party opposing the issuance of the writ that the controversy is not subject to arbitration is not a ground for denying issuance of the writ. CCP §1281.8(c).

**Election of remedies.** If the plaintiff asserts both contract and tort claims, an attachment levy may be viewed as election of the contract remedy. *Baker v Superior Court* (1983) 150 CA3d 140, 147 n5, 197 CR 480. However, the election of remedies doctrine is generally disfavored. *Wafter Int'l Corp. v Khorsandi* (1999) 69 CA4th 1261, 82 CR2d 241.

**Antideficiency statutes.** Seeking a writ of attachment does not constitute an "action" for purposes of CCP §726(a) or a failure to comply with other statutory or judicial requirements to proceed first against security. CCP §483.012. (Code of Civil Procedure §726(a) states that "there can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein.")

However, an attorney who seeks a writ of attachment on a guaranty of a debt secured by real property must review the loan documents carefully. If the guarantor is also a primary obligor on the original obligation, such as a general partner, the one-action sanction may apply. *Prestige Ltd. Partnership v East Bay Car Wash Partners (In re Prestige Ltd. Partnership)* (9th Cir 2000) 234 F3d 1108.

**NOTE:** The holding in *Prestige* would appear to be overruled by CCP §483.012, which was enacted in 1997 during the midst of the case. Neither the parties nor the court mention the statute.

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### §6.3 C. When Attachment Is Available

To obtain a right to attach order, the plaintiff's claims must satisfy all of the following criteria:

**Claims based on express or implied contract.** Attachment is available in an action on a claim or claims for money, each of which is based on a contract, express or implied. CCP §483.010(a). The term "contract" includes leases for real and personal property. Implied contracts include those implied by law or quasi-contracts. Attachment is also available in unlawful detainer actions to the extent of the unpaid rent at the time the action is filed plus estimated rent, computed at the lease rate, through the estimated date that the plaintiff will gain possession. CCP §483.020.

**Total amount of claim if fixed or readily ascertainable of at least $500.** Each claim must be fixed or readily ascertainable in an aggregate amount not under $500, exclusive of costs, interest, and attorney fees. CCP §483.010(a); see Comment to CCP §483.010. Claims may be aggregated to reach the $500 requirement. Although the amount of the claim need not be liquidated, it must be readily ascertainable from the contract. See *CIT Group/Equip. Fin., Inc. v Super DVD, Inc*. (2004) 115 CA4th 537, 8 CR3d 927 (when lessee defaulted on commercial equipment lease, lessor was entitled to issuance of right to attach order regardless of fact that total amount of payments due was not stated in lease because clear and definite formula for computation of damages existed: the monthly rent multiplied by the unexpired term).

**Not secured by real property.** The claim cannot be secured by real property unless it has become unsecured (or undersecured) through no act of the plaintiff or the person to whom the security was given. CCP §483.010(b).

**Claims secured by personal property.** Attachment is allowed on claims secured by personal property or by fixtures under the Commercial Code. CCP §483.010(b).

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## D. Defendants Subject to Writ of Attachment

### 1. Natural Persons

### §6.4 a. Debts Incurred for Personal, Family, or Household Purposes

Attachment is *not* available against a natural person if the claim is based on the sale or lease of property, a license to use property, or the furnishing of services or a loan of money when the defendant incurred the obligation primarily for personal, family, or household purposes. An exception is made for claims against a natural person who is a nonresident and has not appeared in the action. CCP §483.010(c); *Kadison, Pfaelzer, Woodard, Quinn & Rossi v Wilson* (1987) 197 CA3d 1, 242 CR 595.

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### §6.5 b. Debts Incurred in Connection With Trade, Business, or Profession

A natural person residing in California may have property attached only if the underlying claim arose from the conduct of his or her trade, business, or profession. CCP §483.010(c). The business activity must be of a "frequent or continuous nature." See *Security Pac. Nat'l Bank v Matek* (1985) 175 CA3d 1071, 1074, 223 CR 288. The defendant may be the primary obligor, alter ego, or guarantor of the primary obligor. See *Nakasone v Randall* (1982) 129 CA3d 757, 764, 181 CR 324; *Advance Transformer Co. v Superior Court* (1974) 44 CA3d 127, 118 CR 350.

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### §6.6 c. Out-of-State Residents

Attachment is available in any action to recover money against a natural person who does not reside in California. CCP §492.010(a). Property owned by a nonresident natural person is subject to attachment as long as the Code of Civil Procedure, commencing with CCP §488.300, provides a method of levy.

Until the defendant appears, any property for which there is a method of levy is subject to attachment. Once the defendant appears, only nonexempt property may be levied on; exempt property already attached must be released on order of the court. CCP §492.040. See §6.11 on exempt property. Attachment of the defendant's property may confer quasi in rem jurisdiction when personal jurisdiction is not available. See *Root v Superior Court* (1962) 209 CA2d 242, 246, 25 CR 784.

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## §6.7 2. Corporations and Other Legal Entities Qualified to Do Business in California

Attachment is available against legal entities organized under California law or foreign corporations qualified to do business in California. See CCP §487.010(a)-(b). See also *Gill v De Sanz* (1975) 52 CA3d 457, 125 CR 384.

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## §6.8 3. Nonqualified Foreign Entities

Foreign corporations not qualified to do business in California and foreign partnerships that have not filed a designation under Corp C §15700 are subject to attachment in California. CCP §492.010(b)-(c).

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## E. Property Subject to Attachment

### 1. Natural Persons

### §6.9 a. Generally

Under CCP §487.010(c), the following property may be attached:

- Accounts receivable, chattel paper, and general intangibles arising from the defendant's trade, business, or profession, except individual claims under $150 (CCP §487.010(c)(2));
- Equipment (CCP §487.010(c)(3));
- Farm products (CCP §487.010(c)(4));
- Inventory (CCP §487.010(c)(5));
- Final money judgments arising from the defendant's trade, business, or profession (CCP §487.010(c)(6));
- Cash used in the defendant's business in excess of the first $1000, including cash in deposit accounts (CCP §487.010(c)(7));
- Negotiable documents of title (CCP §487.010(c)(8));
- Instruments (CCP §487.010(c)(9));
- Securities (CCP §487.010(c)(10));
- Minerals, oil, and gas to be extracted from property (CCP §487.010(c)(11)); and
- Interests in real property, except leaseholds with unexpired terms of less than 1 year (CCP §487.010(c)(1)) and, with respect to homestead property, only the surplus over the homestead, plus all liens and encumbrances on the homestead (CCP §487.025).

Formerly, bankruptcy law prevented involuntary judgment liens from attaching to homestead property that did not have equity in excess of the already existing liens and the homestead exemption. However, the Ninth Circuit overruled its own prior law in light of subsequent appellate decisions by California state courts. *Wolfson v Watts (In re Watts)* (9th Cir 2002) 298 F3d 1077 (recognizing California courts' interpretation of CCP §704.950(c)).

Although *Watts* involved a judgment lien created by the recording of an abstract of judgment, the benefits of this rule also extend to attachment liens. Any subsequent judgment lien obtained by the creditor relates back to the creation of the attachment lien. CCP §697.020(a). Thus, a creditor with an attachment lien is entitled to the benefit of any surplus equity acquired by the debtor after the perfection of the attachment lien.

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### §6.10 b. Community Property

If the defendant is married, community property of the type listed in §6.9 is subject to attachment if the community property would be subject to enforcement of any judgment obtained in the action. CCP §487.010(d). If the writ of attachment reaches community property, it reaches any such property in the possession or control of the defendant's spouse. CCP §487.010(d)(2).

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### §6.11 c. Exemptions

For natural persons, the following property is exempt from attachment:

- All property exempt from enforcement of a money judgment (CCP §487.020(a); *Studwell, Inc. v Korean Exch. Bank* (1997) 55 CA4th 1185, 1190, 64 CR2d 538);
- Property necessary to support the defendant or the defendant's family (CCP §487.020(b));
- "Earnings" as defined by CCP §706.011(a), which generally include all compensation earned by the defendant for services (CCP §487.020(c)); and
- All other property not subject to attachment under CCP §487.010 (see §6.9).

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## §6.12 2. Corporations and Other Legal Entities

All property owned by legal entities is subject to attachment as long as Article 2 commencing with CCP §488.300 provides a method of levy on the property. CCP §487.010(a)-(b); see *Studwell, Inc. v Korean Exch. Bank* (1997) 55 CA4th 1185, 1190, 64 CR2d 538.

There is no exempt property for corporations or other legal entities.

The following are examples of corporate assets that are not attachable:

- Nontransferable letters of credit (55 CA4th at 1190);
- Pending contractual arbitration actions (*Jordan-Lyon Prods., Ltd. v Cineplex Odeon Corp.* (1994) 29 CA4th 1459, 35 CR2d 200).

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## F. Amount Secured by Attachment Lien

### §6.13 1. Generally

The amount of the attachment lien is calculated as follows:

- The amount of the debt claimed in the plaintiff's complaint (CCP §483.015(a)(1)); plus
- Estimated costs and attorney fees as the court may allow by contract or statute (CCP §§482.110, 483.015(a)(2)); less the sum of the following:
- any unsatisfied portion of a money judgment in favor of the defendant against the plaintiff (CCP §483.015(b)(1));
- the amount of any cross-complaint asserted by the defendant if attachment is authorized for the cross-claim (CCP §483.015(b)(2));
- the amount of any claim made under CCP §431.70 (setoff rights barred by statute of limitations) if attachment would have been authorized for that claim had it been brought before the limitations period expired (CCP §483.015(b)(3)); and
- the value of any security interest held by the plaintiff securing the claim, plus any amount that the security decreased in value because of the acts of the plaintiff or a prior security holder (CCP §483.015(b)(4)).

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### §6.14 2. Unlawful Detainer Actions

In unlawful detainer actions, the amount of the plaintiff's attachment lien is the sum of the following:

- The amount of unpaid rent as of the filing of the complaint (CCP §483.020(a)(1));
- The amount of rent from the filing of the complaint until the estimated date the plaintiff will obtain possession of the property (CCP §483.020(a)(2)); and
- Estimated costs and attorney fees as the court may allow by contract or by statute (CCP §§482.110, 483.020(a)(3)); less the sum of:
- any unsatisfied portion of a money judgment in favor of the defendant against the plaintiff (CCP §483.015(b)(1));
- the amount of any cross-complaint asserted by the defendant if attachment is authorized for the cross-claim (CCP §483.015(b)(2));
- the amount of any claim made under CCP §431.70 (addressing setoff rights barred by statute of limitations), if attachment would have been authorized for that claim had it been brought before the limitations period expired (CCP §§483.015(b)(3), 483.020(d)); and
- the value of any security interest held by the plaintiff securing the claim, plus any amount that the security decreased in value because of the acts of the plaintiff or a prior security holder (CCP §§483.015(b)(4), 483.020(d)).

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## G. Characteristics of Attachment Lien

### §6.15 1. Effect of Lien

A levy on property under a writ of attachment creates an attachment lien on the property from the time of levy until 3 years after the date the writ of attachment is issued. CCP §§488.500(a), 488.510(a). The attached property remains subject to the lien to the same extent as it would under an execution lien. See CCP §§697.720-697.750. If the property attached is subject to lien under a temporary protective order (CCP §§486.010-486.110) or if the property attached is in the possession or control of a third party and is subject to a lien (CCP §§491.110-491.200), the priority of the attachment lien relates back to the date the earlier lien was created (CCP §488.500(e)).

**Equipment and inventory.** If equipment or inventory of a going business or farm products are attached, the attachment lien has the same force and effect as a judgment lien on personal property. CCP §488.500(c). See CCP §§697.510-697.670 (personal property judgment liens).

**Vehicles.** If a vehicle, vessel, mobilehome, or commercial coach is attached, the attachment lien does not affect the rights of a bona fide purchaser or encumbrancer who obtains possession of both the property and its documents of title. If the levying officer obtains both possession of the property and its document of title, the attachment lien has the same priority as a lien under Com C §9301 at the time the officer took possession. If the levying officer obtains possession of the property but not its document of title, however, the attachment lien has the same force and effect as an unperfected security interest that attaches on the date of the notice of attachment. CCP §488.500(d).

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### §6.16 2. Duration of Lien

An attachment lien is valid for 3 years after the date the writ of attachment issues. CCP §488.510(a). This period may be extended in 1-year increments, but the maximum period of the attachment, including extensions, may not exceed 8 years. A motion to extend the attachment lien must be made no less than 10 and no more than 60 days before its expiration. The defendant must be given at least 5 days' notice of the motion to extend the period of the lien. CCP §488.510(b), (d). An attachment lien survives the death of the defendant. CCP §488.510(e).

Failure to record an extension of a real property attachment lien within 3 years after its issuance results in the lien's termination. *Arcata Publications Group v Beverly Hills Publishing Co.* (1984) 154 CA3d 276, 201 CR 223.

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## H. Obtaining Writ of Attachment

### §6.17 1. Timing

If the defendant has appeared in the action, the plaintiff must file and serve its application for a writ of attachment in accordance with CCP §1005(b), which requires 16 court days' notice, plus an additional 5 days if the application is mailed. CCP §484.040. If the defendant has not yet appeared, service must be made in the same manner as for a summons. CCP §§413.10-417.40, 482.070(d), 1010.

The defendant must file and serve its opposition, and, if a natural person, his or her claim of exemption no later than 5 court days before the hearing. CCP §484.060(a).

The plaintiff must file its reply to the defendant's opposition at least 2 court days before the hearing. CCP §484.060(c).

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### §6.18 2. Plaintiff's Required Papers

The plaintiff may seek a writ of attachment at any time after filing the complaint. CCP §484.010. To obtain an initial writ of attachment, the plaintiff must obtain a "right to attach order" from the court. A right to attach order is like a declaratory relief order, determining for purposes of the action that the plaintiff's claim is one for which a writ of attachment may issue, whether then or later. To obtain a right to attach order and writ, the plaintiff must file and serve the following documents (CCP §484.040; Cal Rules of Ct 3.1113):

- Summons and Complaint;
- Notice of Application and Hearing for Right to Attach Order and Writ of Attachment;
- Application for Right to Attach Order and Writ of Attachment;
- Declaration in Support of Application for Writ of Attachment; and
- Memorandum in support of motion (commonly referred to as a memorandum of points and authorities) for Application for Writ of Attachment.

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### §6.19 a. Notice of Hearing

The Notice of Application and Hearing for Right to Attach Order and Writ of Attachment must contain the following recitals (CCP §484.050), all of which are in Judicial Council Form AT-115:

- That a hearing will be held at the date, time, and place set forth in the notice;
- That an attachment will be ordered if the court finds that the plaintiff's claim is probably valid and the other requirements for attachment are established;

**NOTE:** A claim has "probable validity" when it is "more likely than not" that the plaintiff will obtain a judgment against the defendant on that claim. CCP §481.190; *Loeb & Loeb v Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1118, 212 CR 830.

- That the hearing is not for the purpose of determining the actual validity of the claim (the actual validity of the claim will be decided in subsequent proceedings and will not be affected by the decisions made at the hearing on the application);
- That the amount to be secured by the attachment is determined by CCP §§482.110, 483.010, 483.015, and 483.020;
- That, if the right to attach order is issued, a writ of attachment will be issued to attach the property described in the application unless the court finds that the property sought is exempt from attachment or that its value is clearly in excess of the amount necessary to satisfy the amount to be attached;
- That additional writs may be issued to attach other nonexempt property based on the right to attach order;
- That, if the defendant opposes the application, the opposition must be filed and served at least 5 court days before the hearing under CCP §484.060 (see §6.23 for opposition requirements);
- That, if a claim of exemption is asserted by a natural person, it must be included in the opposition or filed separately under CCP §484.070;
- That, if the defendant fails to assert an exemption, it will be barred absent a showing of changed circumstances occurring after the expiration of the time for claiming the exemption;
- That the defendant's opposition papers may request a determination that other property not covered by the application is subject to an exemption and that failure to do so will not preclude the defendant from asserting an exemption at a later time; and
- That the defendant, the defendant's attorney, or both may be present at the hearing.

**NOTE:** The notice must also contain the following statement:

**You may seek the advice of an attorney on any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time for the hearing.**

**FURTHER NOTE:** The use of Judicial Council forms in an attachment proceeding is optional. The forms incorporate complex provisions of the law and are themselves complex. They should not be used without reading the applicable statutes, and no box or blank should be completed or ignored without a complete understanding of its purpose.

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### §6.20 b. Application

The Application for Right to Attach Order and Writ of Attachment must be executed under oath and contain all the following statements and other information (CCP §484.020) (see Judicial Council Form AT-105):

- That the claim is one on which attachment is authorized;
- The amount to be secured by the attachment;
- That the attachment is sought for no other purpose than recovery on the claim;
- That the plaintiff has no information or belief that the claim has been discharged in bankruptcy or that prosecution of the claim is stayed by bankruptcy;
- A description of the property to be attached, the statutes prescribing the method of levy, and a statement that the plaintiff is informed and believes that the property is subject to attachment.

If the defendant is a natural person, the property description must be reasonably adequate to permit the defendant to identify it. CCP §484.020(e). In *Bank of America v Salinas Nissan, Inc.* (1989) 207 CA3d 260, 254 CR 748, the court found an all-inclusive description of property ("all defendants' real property, personal property, equipment, motor vehicles, chattel paper, negotiable instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, general intangibles, property subject to pending actions, final money judgments, and personalty in estates of decedents") sufficiently descriptive to allow a defendant to assert an exemption.

If the defendant is a corporation, partnership, or other unincorporated association, this element may be satisfied by including a reference to all property subject to attachment under CCP §487.010.

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### §6.21 c. Declaration

The declaration in support of the Application for Right to Attach Order and Writ of Attachment must show the facts giving rise to the plaintiff's claim. CCP §484.030. It must contain admissible evidence showing the "probable validity" of the claim. (It is subject to evidentiary objections.) The facts stated in the declaration must be set forth with particularity. Except when matters are specifically permitted to be shown by information and belief, the declarant must swear to the statements in the declaration under penalty of perjury, and must be competent to testify. Regarding matters based on information and belief, the declarant must state the facts on which they are based and show the nature of his or her information and the reliability of his or her informant. See CCP §482.040.

If claims are based on business records, the declarant must be the custodian of the records in order to authenticate the documents relied on to prove the claim.

**NOTE:** If the basis for an ex parte application is the defendant's insolvency, the declarant should refer to the defendant's debts not subject to a bona fide dispute. See §§6.33-6.36 on ex parte applications.

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### §6.22 d. Memorandum in Support of Motion

Although not specifically required under the attachment statutes, it is good practice to file a memorandum in support of motion, commonly referred to as a memorandum of points and authorities. See Cal Rules of Ct 3.1113. See also Cal Rules of Ct 3.1114(b).

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### §6.23 3. Defendant's Notice of Opposition

If the defendant opposes issuance of the right to attach order or objects to the amount sought to be secured by the attachment, it must file a Notice of Opposition no later than 5 *court* days before the date set for the attachment hearing. CCP §484.060(a). The notice must state the grounds on which the opposition is based.

The defendant must also file and serve a declaration supporting any factual issues raised and a memorandum in support of motion (commonly referred to as a memorandum of points and authorities). The Notice of Opposition may include a claim of exemption. CCP §484.060(b).

If the defendant fails to timely file a Notice of Opposition, it cannot oppose issuance of the right to attach order. CCP §484.060(a).

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### 4. Claim of Exemption

#### §6.24 a. Natural Persons Only

Generally, only a natural person may claim property as exempt. However, the trustees of a revocable living trust may be entitled to claim a declared homestead exemption, as they may for a writ of execution (see §9.57). *Fisch, Spiegler, Ginsburg & Ladner v Appel* (1992) 10 CA4th 1810, 1813, 13 CR2d 471 (no requirement that title holder to homesteaded property be natural person).

**NOTE:** It is unclear whether trustees may claim exemptions for other property held in the trust, but there is no logical reason they should not be able to.

The defendant may claim an exemption in the Notice of Opposition or may file a claim of exemption as a separate pleading with supporting declarations and a memorandum in support of motion. The claim of exemption must be filed at least 5 *calendar* days before the hearing.

**NOTE:** Other objections to the application are due 5 *court* days before the hearing. CCP §484.070(e).

The exemption claim must describe the property claimed as exempt and specify the statute supporting the claim. CCP §484.070(c).

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### §6.25 b. Failure to Assert Exemption

A defendant that fails to assert a timely claim of exemption or fails to prove the exemption may not later claim the property as exempt unless there is a change in circumstances as provided under CCP §482.100. CCP §484.070(a); *Bank of America v Salinas Nissan, Inc.* (1989) 207 CA3d 260, 268, 254 CR 748.

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### §6.26 c. Real Property Exemptions

A defendant that asserts exemptions for real property does not waive such exemptions by failing to assert them in the opposition to the plaintiff's application. CCP §484.070(a)-(b). If a dwelling is attached and the plaintiff later obtains a favorable judgment, the defendant may assert any exemption in opposition to the plaintiff's attempted enforcement of the judgment. See CCP §§704.710-704.850.

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### §6.27 d. Property Not Included in Plaintiff's Application

A defendant may, but need not, assert exemptions for property that the plaintiff's application does not seek to attach. CCP §484.070. If the defendant does assert such an exemption, and the court finds otherwise, the defendant may not later claim the exemption without proving a change in circumstances. CCP §§482.100, 484.070. See §6.28.

Thus, asserting exemptions for property not identified in the plaintiff's application is a double-edged sword for a defendant. If the assertion is successful, the plaintiff cannot obtain additional writs against the property on an ex parte basis. See CCP §§484.310-484.370 on additional writs. But if it is unsuccessful, the plaintiff may be alerted to property that may otherwise have remained undetected.

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### §6.28 e. Change in Circumstances

Code of Civil Procedure §482.100 supplies the procedure for a defendant to claim an exemption even after the original exemption was denied or waived for failure to assert it in opposition to the application for the writ of attachment. Section 482.100 incorporates the procedures in the Enforcement of Judgments Law. See CCP §§703.510-703.610.

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### §6.29 f. Plaintiff's Opposition to Claim of Exemption

To oppose the claim of exemption, the plaintiff must file a Notice of Opposition at least two days before the hearing, along with any declarations and a memorandum in support of motion.

If the plaintiff fails to oppose a claimed exemption, the court cannot issue a writ of attachment for the property. See *Bank of America v Salinas Nissan, Inc.* (1989) 207 CA3d 260, 254 CR 748. If the defendant claims that *all* the property sought to be attached is exempt and the plaintiff fails to oppose the claimed exemptions, the court cannot hold a hearing and no attachment will issue. CCP §484.070(f). If the plaintiff opposes the claimed exemption, the burden of proving the exemption shifts to the defendant. CCP §484.070(g).

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## 5. Hearing

### §6.29A a. Type of Hearing

Both parties should be prepared for an evidentiary hearing rather than just law and motion oral argument. Code of Civil Procedure §484.090 permits the judge to "receive and consider at the hearing additional evidence, oral or documentary." CCP §484.090(d). At least one court has interpreted this statute as a mandate that a court hold an evidentiary hearing similar to a bench trial because of the drastic nature of the remedy. See *Hobbs v Weiss* (1999) 73 CA4th 76, 79, 86 CR2d 146.

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### §6.30 b. Issuance of Right to Attach Order

The court must issue a right to attach order setting forth the amount to be secured by the attachment if it finds that (CCP §484.090):

- The claim is one for which attachment may be issued;
- The plaintiff has established the probable validity of the claim (*i.e.,* it is "more likely than not" that the plaintiff will obtain a judgment against the defendant on that claim);

**NOTE:** At a minimum, the plaintiff must prove a prima facie case. If the defendant appears, the court must consider the relative merits of the parties' positions and determine the probable outcome. See Cal L Rev'n Comm'n Comment to CCP §484.090, 1974 Addition; *Loeb & Loeb v Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1118, 212 CR 830.

- Attachment is not sought for purposes other than to recover on any subsequent judgment;
- The amount to be secured by the attachment is greater than zero; and
- The property is not exempt from attachment.

The order for issuance of the writ of attachment is conditioned on the plaintiff's filing an undertaking under CCP §§489.210-489.220. CCP §484.090(b). See §§6.45-6.49 on undertakings.

If the court finds that the property is exempt, the right to attach order shall describe the exempt property and prohibit its attachment. CCP §484.090(c).

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### §6.31 c. Continuances

The court has discretion to continue the hearing at the request of either party on a showing of good cause. CCP §484.080. The court may extend any protective order in place for no more than 10 days after the continued hearing date. The court may also continue the hearing to allow the parties to present additional evidence or legal authorities. CCP §484.090(d).

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### §6.32 6. Effects of Court's Findings

The court's findings in connection with issuing a writ of attachment may not be used as evidence or referred to at trial, and "shall have no effect on the determination of any issues in the action." CCP §484.100. The defendant does not waive any defenses to the plaintiff's claim by failing to rebut the plaintiff's evidence or to oppose the writ application. CCP §484.110(a). Likewise, the plaintiff does not waive any defenses by failing to rebut the defendant's evidence or to oppose the defendant's request to reduce the amount secured by the attachment. CCP §484.110(b).

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## 7. Obtaining Ex Parte Writ of Attachment

### §6.33 a. Required Showing

To obtain a writ of attachment ex parte, the plaintiff must make the same showing required for a noticed hearing. See §6.30. The plaintiff must also demonstrate by declaration that he or she will suffer "great or irreparable injury" if required to proceed with a noticed hearing. CCP §485.010(a).

The required showing of great or irreparable injury must be supported by evidence, not conclusory statements. *Western Steel & Ship Repair, Inc. v RMI, Inc.* (1986) 176 CA3d 1108, 1114, 222 CR 556. Such injury may be *inferred* if:

- The property may be easily concealed, substantially impaired in value, or otherwise made unavailable for levy (CCP §485.010(b)(1));
- The defendant is not repaying an obligation owed to the plaintiff, and in general is not paying debts as they become due. If the plaintiff makes such a showing, the defendant is entitled to a hearing to review the issuance of the writ 5 days after serving the plaintiff with a notice requesting a court hearing (CCP §485.010(b)(2), (c));
- The property to be attached is the subject of a recorded and published bulk sales notice (CCP §485.010(b)(3), (c));

**NOTE:** Any writ of attachment issued ex parte is restricted to the property identified in the bulk sales notice and the proceeds from its sale. The levying officer must serve the writ on the transferee or auctioneer within 5 days after levy.

- The defendant opened an escrow for the sale of a liquor license (CCP §485.010(b)(4), (c)).

**NOTE:** Any ex parte writ of attachment is limited to "plaintiff's pro rata share of the proceeds of the sale in escrow."

The ex parte application may be filed with the complaint or at any time thereafter. If the court finds that the required showing of great or irreparable injury has not been met, the court shall so state. The same declarations and supporting papers may be used later to support a noticed application.

**PRACTICE TIP:** A request for ex parte relief must be in writing and include an application containing the case caption and stating the requested relief (see Cal Rules of Ct 3.1202), a declaration in support of the application making the requisite affirmative factual showing (see Cal Rules of Ct 3.1202(c)), a declaration based on personal knowledge as to the notice (see Cal Rules of Ct 3.1204), a memorandum, and a proposed order. Cal Rules of Ct 3.1201. Parties appearing at the ex parte hearing must serve the application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless service has been made. Cal Rules of Ct 3.1206.

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### §6.34 b. Notice

Absent exceptional circumstances, the plaintiff must provide notice to all other parties no later than 10:00 a.m. on the court day prior to the ex parte appearance. Cal Rules of Ct 3.1203(a); see Cal Rules of Ct 3.1204(a) (contents)). The existence of exceptional circumstances may excuse a party from giving notice or may justify shorter notice. See Cal Rules of Ct 3.1204(c). The plaintiff's counsel must prepare and file a declaration regarding notice stating one of the following (Cal Rules of Ct 3.1204(b)):

- That the plaintiff or the plaintiff's counsel has given notice to the opposing party or the opposing party's attorney, including the date, time, manner, and name of the party so informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under Cal Rules of Ct 3.1203, that the plaintiff informed the opposing party where and when the application would be made;
- That the plaintiff or the plaintiff's counsel in good faith attempted to notify the opposing party or the opposing party's counsel of the hearing but was unable to do so, and specifying those efforts; or
- The reasons the plaintiff should not be required to provide notice to the opposing party.

If notice is provided after the 10:00 a.m. deadline discussed above, the declaration regarding notice must also explain the exceptional circumstances justifying the shorter notice. Cal Rules of Ct 3.1204(c)(1).

**PRACTICE TIP:** Notwithstanding the failure of an applicant to comply with the time of notice requirements discussed above, the clerk may not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer. Cal Rules of Ct 3.1205.

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### §6.35 c. Hearing

The plaintiff should bring the following to the hearing:

- An ex parte right to attach order and order for issuance of a writ of attachment;
- Writs of attachment for each county in which the plaintiff seeks to levy; and
- The required undertaking (see §§6.45-6.49 on undertakings).

To avoid delay in obtaining the attachment, counsel may also wish to bring an application for a writ of attachment on a noticed hearing, an application for a Temporary Protective Order (TPO), or both, if the court denies the ex parte request. See §6.37 on TPOs.

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### §6.36 d. Nonresident Defendant

A nonresident defendant's property can be attached only on an ex parte basis unless the plaintiff can effect service on the defendant. In addition to the showing required for a noticed hearing (see §6.30), the evidence supporting the application must show, and the court must find, that:

- The defendant is a nonresident within the meaning of CCP §492.010 (CCP §§492.020(b)(1), 492.030(a)(3));
- The action is to recover money against that nonresident (CCP §492.030(b)(1));
- The attachment is sought only to recover on the claim on which the attachment is based (CCP §492.030(a)(4));
- The plaintiff has established the probable validity of the claim on which the action is based (CCP §492.030(a)(2));
- The plaintiff would be entitled to a judgment on the claim on which the attachment is based and that claim is one on which an attachment may issue (CCP §§492.020(b)(2), 492.030(a)(1)); and
- The nonresident defendant's property has been identified and is subject to attachment (CCP §§492.020(b)(3), 492.030(a)(5), 492.040).

**NOTE:** The evidence supporting this last element may be based on information and belief. CCP §492.020(c).

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## 8. Obtaining Temporary Protective Order (TPO)

### §6.37 a. Effect of TPO

A Temporary Protective Order (TPO) prohibits a defendant from transferring certain identified property or the proceeds of its sale until the plaintiff has the opportunity for a hearing on its application for a writ of attachment or an opportunity to levy on the property once the writ is issued. A TPO binds only the defendant, regardless of service on, or knowledge of, a third party. CCP §486.070. Its provisions must take into account the effects on both the defendant and the plaintiff. CCP §486.040.

**NOTE:** If the subject property is farm products, a TPO cannot prohibit the defendant from selling the products in the ordinary course of business, but it may restrict disposition of the proceeds. CCP §486.050.

Service of a TPO on the defendant creates a lien on property owned by the defendant at the time of service. The levy of a writ of attachment perfects the lien created by service of the TPO. Unless the lien created by the TPO has been perfected by levying under a writ of attachment, it terminates at the same time as the TPO. CCP §486.110. The lien continues on the property, personal or real, even if it is transferred, unless the transferee qualifies as one of the several types of bona fide purchasers described in CCP §697.740.

**PRACTICE TIP:** Whenever possible, strongly consider applying for a TPO for the sole benefit of obtaining the early TPO lien. If you suspect that a debtor may file a bankruptcy petition, obtaining the TPO lien starts the 90-day preference period sooner.

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### §6.38 b. Procedure

A TPO may be obtained in conjunction with a noticed or an ex parte application for a writ of attachment. CCP §486.010. The court may deny an ex parte application for a writ of attachment, despite satisfaction of all the elements of CCP §485.220, and instead issue a TPO if it finds that doing so would be in the interests of justice and equity for the parties. CCP §486.030. The court's issuance of a TPO while denying an ex parte application for writ of attachment converts the ex parte application to an application after notice and hearing. CCP §486.030(b). Thus, a TPO constitutes a plaintiff's fall-back position when seeking an ex parte order for writ of attachment.

Most courts will grant a TPO and set a continued hearing date for the application if the plaintiff does not provide sufficient justification for issuing an order for attachment and writ of attachment on an ex parte basis. The TPO will prevent the defendant from transferring or concealing assets pending the subsequent hearing on the application.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.39 c. Required Showing

### §6.39 c. Required Showing

The TPO must state the amount sought to be secured by the attachment under the application for the right to attach order. CCP §486.020. The court must issue the TPO, conditioned on the filing of an undertaking (see §6.45-6.49), if it finds that (CCP §486.020):

- The claim on which the application is based is one on which an attachment may be based;
- The plaintiff has established the probable validity of the claim;
- The order is not sought for a purpose other than recovery on the claim; and
- The plaintiff will suffer "great or irreparable injury" if the TPO is not issued.

**NOTE:** Great or irreparable injury may be shown by evidence based on information and belief. CCP §486.010.

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### §6.40 d. Service

The TPO must be served personally on the defendant. CCP §486.080. Because a TPO binds *only* the defendant, the defendant's attorney should not be served in lieu of personal service on the defendant. CCP §486.070. The TPO should be recorded in any county where there is real property subject to the TPO.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.41 e. Defendant's Ability to Write Checks Despite TPO

### §6.41 e. Defendant's Ability to Write Checks Despite TPO

Under CCP §486.060, a defendant subject to a TPO may continue to issue checks for:

- Payroll expenses, including fringe benefits, taxes, and premiums for workers' compensation and unemployment insurance, owed in the ordinary course of business before the levy of a writ of attachment;
- Payment for goods delivered C.O.D. for use in the defendant's business, trade, or profession;
- Payment of taxes to avoid incurring tax penalties;
- Payment of reasonable attorney fees and costs for the defendant's representation in the action;
- Any other purpose, as long as the total does not exceed the greater of:
- the amount by which the total amount on deposit exceeds the sum of the amount sought to be secured by the attachment and the amounts listed above; or
- $1000 dollars.

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### §6.42 f. Expiration

A TPO expires on the earlier of (CCP §486.090):

- Forty days after it is issued;
- The date specified in the order; or
- As to specific property described in the order, when a levy of attachment on that property is made by the plaintiff.

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### §6.43 g. Termination

A defendant that has appeared in the action can seek termination of the TPO. If its motion to terminate the TPO is granted, the defendant will be required to provide an undertaking in the amount sought to be secured by the attachment. CCP §489.320. In lieu of a formal motion to terminate, the parties may stipulate to terminate the TPO in exchange for the defendant's posting of a bond.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.44 h. Checklist: Documents Needed to Obtain TPO

## §6.44 h. Checklist: Documents Needed to Obtain TPO

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- The summons and complaint, if not already on file.
- A check for any court-required filing fee.
- An application for a TPO.
- Again, a check for any court-required filing fee.
- Declarations in support of the TPO and, if appropriate, specification of the facts supporting ex parte relief.
- If sought ex parte, a declaration from the plaintiff's attorney demonstrating satisfaction of the notice requirements of Cal Rules of Ct 3.1200-3.1207. See Cal Rules of Ct 3.1201(3).
- A supporting memorandum in support of motion (commonly referred to as a memorandum of points and authorities).
- The undertaking.
- The TPO, setting forth the terms and conditions imposed on the defendant.

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## 9. The Undertaking

### §6.45 a. Purpose

Before the court issues a TPO or orders the clerk to issue a writ of attachment, the plaintiff must post an undertaking. The undertaking is a form of insurance policy to satisfy any amounts the defendant may recover for a wrongful attachment. CCP §489.210. A writ issued accidentally by the clerk, when the plaintiff has not posted the required undertaking, is void. *Vershbow v Reiner* (1991) 231 CA3d 879, 282 CR 684.

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### §6.46 b. Amount

Unless the court determines that the "probable recovery for wrongful attachment" exceeds the statutory minimum, the required undertaking for the plaintiff under CCP §489.220 is $10,000.

The defendant is not entitled to an increased undertaking simply because the value of the property to be attached exceeds the statutory minimum. *North Hollywood Marble Co. v Superior Court* (1984) 157 CA3d 683, 204 CR 55.

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### §6.47 c. Substitution of Attached Property for Undertaking

A defendant who has appeared in the action may substitute property subject to an attachment with an undertaking in the amount of the property to be released or the amount that would otherwise be secured by the attachment, whichever is less. The amount of the undertaking may not exceed the amount of any judgment the plaintiff may recover if the plaintiff prevails in the action. CCP §489.310.

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### §6.48 d. Substitution of TPO With Undertaking

A defendant may terminate a TPO by noticed motion and posting an undertaking in an amount equal to the property otherwise secured by the attachment. CCP §489.320.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.49 e. Filing Requirements

### §6.49 e. Filing Requirements

Any required undertaking must be filed with the court before the clerk will issue a writ of attachment, or before the TPO can become effective. Unless the surety on the undertaking is an admitted surety insurer (see CCP §§995.610-995.670), the court must approve the undertaking. CCP §489.060.

The plaintiff may not want to object if the defendant files an undertaking in the amount sought by the attachment from an admitted surety insurer to release property from a TPO or an attachment lien. Such an undertaking gives the plaintiff a readily available source of funds to satisfy any subsequent judgment without having to auction sundry types of property. There are additional procedural requirements, however, for executing on a bond after obtaining judgment. See CCP §§996.410-996.495.

**NOTE:** It is always a good idea to bring the undertaking to the hearing, so that whatever relief is granted may be enforced immediately.

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## I. Obtaining Additional Writs of Attachment

### §6.50 1. Procedural Considerations

Because all corporate and partnership property is already subject to attachment under CCP §487.010 and need not be specifically identified in the application, additional writs of attachment are necessary only for individuals. If seeking additional writs on an ex parte basis, the plaintiff must again make a showing of imminent, irreparable harm. See §6.33. When seeking an additional writ, the only real issue is whether the property sought is exempt from attachment. Because the court has previously issued a right to attach order, it has already ruled that the claim is one on which attachment may be based.

Additional writs may be obtained against a nonresident after the issuance of the right to attach order but before any hearing is held on the nonresident defendant's motion to set aside the attachment order. CCP §492.060.

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### §6.51 2. Claiming Exemptions Under Additional Ex Parte Writs

The defendant may claim exemptions for property levied on under additional writs of attachment that the plaintiff obtains ex parte, as long as:

- An exemption for personal property is claimed within 30 days after the levying officer served the defendant with the notice of attachment (CCP §485.610(a)); and
- An exemption for real property is claimed before judgment (CCP §§485.610(a), 487.030).

See generally CCP §§703.510-703.610 (exemptions from enforcement of judgments).

The defendant may also claim an exemption under CCP §487.020, which allows an exemption for property necessary for the defendant's support, using the procedures in CCP §482.100, except that the defendant need not demonstrate a change in circumstances.

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## J. Levying on Writ of Attachment

### §6.52 1. Contents of Writ

A writ of attachment must contain the following information (CCP §488.010):

- The date the writ was issued;
- The title of the court that issued the writ, the case name, and the number of the action;
- The name and address of the plaintiff and the name and last known address of the defendant;
- The amount to be secured by the attachment; and
- A description of the property to be levied on to satisfy the attachment. The description needs to match the description in the Right to Attach Order.

**NOTE:** A separate original writ of attachment is required for each county where property to be levied on is located.

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## §6.53 2. Levying Officer

The levying officer is the sheriff or marshal in the county where the property to be levied on is located. CCP §§481.140, 488.020. Any right to attach order must direct the defendant to transfer possession of the attached property to the same levying officer, *i.e.,* the levying officer in the county where the property is located. *Pacific Decision Sciences Corp. v Superior Court* (2004) 121 CA4th 1100, 18 CR3d 104. Thus, a writ of attachment issued by a California court to reach intangible property in New Jersey and Florida needed to be issued to levying officers in those states, not in California. *Pacific Decision Sciences Corp. v Superior Court, supra.*

It is advisable to contact the levying officer well in advance, inform the officer of your intention to seek an attachment, and identify the type of the property to be levied on. Doing so will allow the plaintiff to learn the levying officer's procedures and availability to execute the writ, what documents and the number of copies the officer will require, the manner of paying the officer's costs, *i.e.,* certified funds or check, what amount must be paid in advance, and the time frame in which the levying officer can conduct the levy.

**NOTE:** In most urban jurisdictions (*e.g.,* Los Angeles, San Francisco) the sheriff or marshal will not serve any writs that may be served by a registered process server. See CCP §488.090. In such cases, the sheriff or marshal will open a file and the plaintiff must arrange with a process server to actually serve the writ and levy on the property to be attached.

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### §6.54 3. Instructions for Levying Officer

The instructions to the levying officer must be in a signed writing, usually a letter, containing the following information (CCP §§488.020-488.040):

- A description of the property to be levied on;
- Whether the property is a dwelling and, if so, whether it is personal property (*e.g.,* a mobilehome);
- If the summons and complaint have not been served, instructions to the levying officer to serve them at the same time as the writ of attachment;
- The correct name and address of anyone to be served;
- If the plaintiff expects to make multiple levies with the same writ, instructions to hold the writ pending the plaintiff's further instructions.

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### §6.55 4. Costs

Before conducting the levy, the levying officer must receive sufficient funds to cover the costs of performing the levy. CCP §488.050. If the levying officer is to take possession of property under the writ of attachment, the officer must receive funds sufficient to cover the officer's costs of taking and keeping the property for a period not to exceed 15 days. If the levying officer is required to keep the property for more than 15 days, he or she is entitled to additional funds for the extra period. The levying officer must release the property if the costs are not timely paid.

**NOTE:** The levying officer may not have space to warehouse the items. If that is the situation, the plaintiff must make arrangements to store the items privately.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.56 5. Checklist: Documents to Provide to Levying Officer

## §6.56 5. Checklist: Documents to Provide to Levying Officer

To download **Word** version, right click and choose *Save Target As*

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- Letter of instructions
- Any required costs or expenses
- Notice of attachment, which must set forth all information required by CCP §488.060, including:
- The capacity in which the person is notified
- The specific property sought to be attached
- The person's rights under the attachment, including the right to make a third party claim under CCP §§720.010-720.800; and
- The person's duties under the attachment
- Original writ of attachment and sufficient copies for each person to be served
- Right to attach order and order for the issuance of the writ
- The summons and complaint, if not already served
- Garnishee's memorandum, if not provided by the levying officer

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### §6.57 6. Timing

After being provided with instructions, costs, and the required documents, the levying officer shall "levy the writ without delay … on the property described in the writ or so much thereof as is clearly sufficient to satisfy the amount to be secured by the attachment." CCP 488.020(b). The levy must be conducted within 180 days after the writ is issued. CCP §699.530(b).

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### §6.58 7. Personal Property in Defendant's Private Place

The procedures for levying on personal property in a defendant's private place are as follows (see CCP §§488.070, 699.030):

- First, the levying officer shall demand delivery of the property and inform the defendant that he or she may be liable for costs and attorney fees incurred in further proceedings to obtain possession. If the defendant does not deliver the property, the levying officer need only notify the plaintiff that the officer has not obtained custody of the property.
- Second, if the defendant refuses to deliver the property to the levying officer, the plaintiff can request the court to issue, either ex parte or on noticed hearing, an order directing the officer to seize the property. With such an order, the levying officer may break open the building where the property is located and seize the property, unless the officer reasonably believes that entry and seizure will involve a substantial risk of death or serious bodily harm to anyone. The application for such an order must state:
- the property to be levied on; and
- the location of the property to be levied on according to the plaintiff's best knowledge, information, and belief.

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### §6.59 8. Service on Third Party and Defendant

A third party with an interest in the property to be levied on must be served by the levying officer with a copy of the notice of attachment, a copy of the writ of attachment, and a garnishee's memorandum. CCP §§488.345, 488.465, 488.610, 700.040. The levying officer must, at the time of the levy or promptly thereafter, serve the defendant with a copy of the notice of attachment and of the writ of attachment. CCP §488.305.

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### §6.60 9. Levy by Process Server

For certain types of property, a registered process server may be used in lieu of a levying officer. CCP §488.080. See §6.61. This option is useful and may even be necessary because speed and timing are often crucial, and the sheriff or marshal is not always available to serve civil writs immediately.

Before conducting the levy, the process server must deposit a copy of the writ of attachment with the levying officer and pay the required fee. CCP §488.080(b). Within 5 court days after levy, the process server must file additional documents with the officer. See CCP §488.080(d); §6.62.

The process server should be given detailed written instructions. See CCP §488.030; §6.54. If the process server does not conduct the levy correctly, it may be ineffective; the levying officer is not required to perform any duties under the writ (*e.g.,* taking the property into custody) and may release any property sought to be attached. CCP §488.080(e).

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### §6.61 a. Property Subject to Levy

A process server can conduct the levy on:

- Real property, by:
- recording with the recorder of the county where the real property is located a copy of the writ of attachment and a notice of attachment that describes the real property levied on. If the property records are in the name of a third person, the notice must identify that person and the recorder will index a copy of the writ and notice under the name of the third party and the defendant;
- serving personally or by mail a copy of the writ and the notice on the entity whose property is subject to the levy. If the property records are in the name of a third person, the third person must also be served with the writ and notice; and
- serving a copy of the writ and notice on one occupant of the real property.

**NOTE:** See generally CCP §§488.080, 488.315, 700.015.

- Growing crops, timber to be cut, or minerals and the like, including oil and gas, by filing a copy of the writ of attachment and notice of attachment with the county recorder's office where the crops, timber, or minerals are located. If the crops, timber, or minerals are on property in the name of a third person, the notice must identify that person and the recorder will index a copy of the writ and notice of attachment under the name of the third party and the defendant. Similar rules for service of the writ and notice apply as when real property is levied on (see above). See generally CCP §§488.325, 700.020.
- Personal property in the custody of a levying officer, by delivering the writ of attachment to the officer. CCP §§488.080(a)(3), 488.355, 700.050.
- Equipment of a going business (except for a vehicle or vessel), by filing with the Secretary of State a notice of attachment containing the plaintiff's name and mailing address, the defendant's last known mailing address, the title of the court where the case is pending, the cause and number of the action, a description of the specific property attached, and a statement that the plaintiff has acquired an attachment lien on the property. CCP §§488.080(a)(4), 488.375.
- Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business, by filing with the Department of Motor Vehicles or Department of Housing and Community Development, as appropriate, a notice of attachment and paying the required filing fee. CCP §§488.080(a)(5), 488.385.
- Farm products or inventory of a going business other than growing crops, timber, or minerals, by filing a notice of attachment with the Secretary of State. CCP §§488.080(a)(6), 488.405.
- Personal property used as a dwelling, including a mobilehome, by serving a copy of the writ of attachment and a notice of attachment on one occupant of the property. CCP §§488.080(a)(7), 700.080.
- Deposit accounts, by personally serving a copy of the writ of attachment and 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. See generally CCP §§488.080(a)(8), 488.445, 700.120.
- Property in a safe deposit box, by personally serving a copy of the writ of attachment and notice of attachment on the financial institution where the safe deposit box is maintained. If the safe deposit box is in a third person's name, the third person must also be served with the writ and notice. CCP §§488.080(a)(9), 488.060, 488.465.
- Accounts receivable or general intangibles, by personally serving a copy of the writ of attachment and notice of attachment on the account debtor and by serving any third person otherwise receiving payments on account of the receivable or general intangible. CCP §§488.080(a)(10), 488.470.
- Final money judgments, by filing a copy of the writ of attachment and notice of attachment with the clerk of the court that entered the final money judgment and by serving the same on the judgment debtor. CCP §§488.080(a)(11), 488.480.
- An interest in the personal property of a decedent's estate, by serving a copy of the writ of attachment and notice of attachment on the decedent's personal representative. CCP §§488.080(a)(12), 488.485.

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### §6.62 b. Documents Provided by Process Server to Levying Officer

The process server must provide the following documents to the levying officer (sheriff or marshal) within 5 court days after the levy (CCP §488.080(d)):

- The writ of attachment;
- A proof of service by the registered process server stating the manner of the levy;
- Proof of any necessary service of the notice of attachment and writ of attachment on other persons; and
- The instructions as required by CCP §488.030 (see §6.54).

Once the process server has completed the levy and provided the levying officer with the required documents, the officer must perform the remaining duties, as long as the officer has received his or her service fee. Govt C §26721.

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### §6.63 10. Custody and Control of Attached Property

When the levying method requires the levying officer to take custody of the attached property, the officer may remove the property for safekeeping and install a keeper or otherwise obtain possession or control of the property. CCP §488.090. The property is retained by the levying officer pending a judgment or release. CCP §§488.730-488.740.

**NOTE:** The plaintiff should ascertain at the outset how much the levying officer will charge to store the property, because storage charges sometimes exceed the value of the property.

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### §6.64 11. Return Writ and Inventory

The levying officer is required to take a full inventory of the attached property and make a report of his or her actions. Within 60 days after the officer receives the writ, the inventory, report, and writ must be returned to the originating court. CCP §488.130.

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### §6.65 12. Liability of Levying Officer

Unless the levying officer or process server has actual knowledge that the information provided by the plaintiff is incorrect, the levying officer or process server may rely on that information. CCP §§488.030(c), 488.040(b), 488.080(e), 488.140(a). The levying officer is not liable for damage to the levied property by fire, theft, injury, or damage of any kind unless the officer was negligent in the care or handling of the property. CCP §488.140(b).

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### §6.66 13. Methods of Levy

The methods for levying on various types of property are set forth in CCP §§488.300-488.485. A complete description of these methods is beyond the scope of this chapter, but they may be found as follows:

| Type of Property | Method of Levy Described in |
|---|---|
| Real property | CCP §§488.315, 700.015 |
| Growing crops, timber to be cut, minerals to be extracted, oil and gas | CCP §§488.325, 700.020 |
| Tangible personal property in defendant's possession | CCP §488.335 |
| Tangible personal property in third person's possession | CCP §§488.345, 700.040 |
| Personal property in levying officer's custody | CCP §§488.355, 700.050 |
| Goods in possession of bailee not covered by negotiable document of title | CCP §§488.365, 700.060 |
| Equipment of a going business | CCP §488.375 |
| Vehicle or vessel of a going business | CCP §488.385 |
| Farm products or inventory of a going business | CCP §§488.395, 488.325, 488.405 |
| Personal property used as a dwelling | CCP §§488.415, 700.080 |
| Vehicle or vessel with certificate of ownership | CCP §§488.425, 700.090 |
| Chattel paper | CCP §§488.435, 700.100 |
| Instruments | CCP §§488.440, 700.110 |
| Negotiable documents of title | CCP §§488.445, 700.120 |
| Securities | CCP §488.450; Com C §8112 |
| Deposit accounts | CCP §§488.455, 488.465 |
| Safe deposit boxes | CCP §§488.460, 488.465 |
| Safe deposit boxes and deposit accounts in third party's name | CCP §488.465 |
| Account receivables and general intangibles | CCP §488.470 |
| Property that is subject of pending action or special proceeding | CCP §488.475 |
| Final money judgment | CCP §488.480 |
| Defendant's interest in personal property of a decedent's estate | CCP §488.485 |

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### §6.67 14. Effect of Levy: Attachment Liens

A levy on a writ of attachment creates an attachment lien from the time of the levy until 3 years after the date the writ was issued. CCP §§488.500(a), 488.510. The lien remains, even if the property is transferred or encumbered, to the same extent as the property would remain subject to an execution lien. CCP §§488.500(b), 697.710-697.750. If the property attached is also subject to a lien arising from a TPO, the priority of the attachment lien relates back to the date the TPO lien was created. CCP §488.500(e).

**Equipment and inventory.** If equipment is attached under CCP §488.375 or §488.405 (equipment, farm products, or inventory of a going business in defendant's possession or control), the lien has the same force and effect as a judgment lien on personal property. See CCP §§697.510-697.670.

**Vehicles.** If a vehicle, vessel, mobilehome, or commercial coach is attached under CCP §488.385 (equipment of a going business in defendant's possession or control), the attachment lien does not affect the rights of a bona fide purchaser or encumbrancer. If the levying officer obtains the certificate of title or registration card, then the plaintiff's lien has the priority of a secured creditor's interest under Com C §9301, *i.e.,* generally senior to an unperfected security interest and junior to an existing, perfected security interest. If the levying officer does not obtain possession of the certificate of title or registration card, the attachment lien has the same force and effect as an unperfected security interest that attached when the notice of attachment was filed. CCP §488.500(d).

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## K. Property in Third Party's Possession

### §6.68 1. Service of Order for Examination Creates Lien

When a plaintiff with a right to attach order believes that a third party either has possession of property in which the defendant has an interest or is indebted to the defendant in an amount exceeding $250, the plaintiff may move ex parte for an order directing the third party to appear in court to answer regarding the property or debt. CCP §491.110(a).

If the motion sufficiently describes the property or debt, then service of the order creates a lien on the defendant's interest in the property or debt. CCP §491.110(c). The order must display a notice, in 14-point boldface type or capital letters, that failure to appear may subject the third party to arrest and punishment for contempt, in addition to the plaintiff's reasonable attorney fees. CCP §§491.110(d), 491.130. The order is effective only if fees for mileage from the third party's residence to the place of examination are tendered to the third party at the same time as service. CCP §491.110(e).

If the third party is a corporation, partnership, or other organization, and the order to appear for the examination does not require the appearance of a specified individual, the organization must designate one or more officers, managing agents, or other persons familiar with the property or debt to appear. Anyone specifically directed by the order to appear must do so but may be accompanied by other individuals familiar with the property or debt. CCP §491.140(a)-(d).

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### §6.69 2. Place of Examination

A third party may not be required to appear before the court issuing the writ if the third party's residence or place of business is outside the court's county *and* 150 miles or more from the court. CCP §491.150(b). The third party may be examined, however, before a superior court in the county where the third party resides or has a place of business. CCP §491.150(c).

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### §6.70 3. Failure to Appear

If a person fails to appear, the court may either (CCP §491.160(a)(1)(A)-(B)):

- Pursuant to a warrant, have the person brought before the court, and hold him or her in contempt; or
- Issue a warrant for the arrest of the person pursuant to CCP §1993.

If the failure to appear was without good cause, the plaintiff may recover attorney fees reasonably incurred in the examination proceeding. CCP §491.160(a)(2).

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### §6.71 4. Determining Competing Claims

If the third party claims an interest in the property that is adverse to the defendant, or denies that the debt exists, the court may, if the plaintiff requests, rule on competing interests in the property or the existence of the debt. Although that ruling is binding on the plaintiff, the defendant, and the third party, it is subject to appeal.

The court may not make such a determination, however, if the third party's claim is made in good faith and if (CCP §491.170):

- The court would not be a proper forum for an independent civil action determining the competing property interests or existence of the debt, and the third party objects to the court's making that determination;
- A civil action is already pending on the competing property interests or the debt when the notice of examination is served; or
- The court concludes that the property interests or the existence of the debt should be decided in a creditor's suit.

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### §6.72 5. Protective Order Against Third Party

A plaintiff may apply, either ex parte or on noticed motion, for an order restraining a third party from transferring property or paying a debt to the defendant until the court can rule on the interests involved or until a creditor's suit can be commenced and a similar order obtained in that action. CCP §491.170(c)-(d); see CCP §491.340. An undertaking may be required in either instance. CCP §491.170(c)-(d).

In any proceeding involving the third party provisions of CCP §§491.110-491.200, the court may, on its own motion or on the motion of the prospective examinee, issue such orders as justice requires. CCP §491.180.

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### §6.73 6. Postexamination Results

If the court finds that the defendant has an interest in property in a third person's possession or control, or that the third person owes a debt to the defendant, the court may order the defendant's interest in the property or payment of the debt to be attached or to be delivered or paid to the levying officer if the officer has a writ of attachment for the property or debt. CCP §491.190.

If, in determining the parties' respective interests, the court awards a judgment against the third party (*i.e.*, disputed debt between defendant and third party is resolved in defendant's favor), the plaintiff may attach the judgment and may enforce it as if the defendant had obtained the judgment against the third party. Unless the plaintiff prevails in the underlying action giving rise to the attachment, however, any money or property obtained in enforcing the judgment must be held by the court, the levying officer, or as the court directs. CCP §491.360.

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## 7. Bringing Creditor's Suit

### §6.74 a. Alternative to Third Party Examination

Instead of seeking an examination under CCP §§491.110-491.200 (see §6.68), the plaintiff may bring a suit against a third person based on that person's possession or control of property in which the defendant has an interest or that person's indebtedness to the defendant. CCP §491.310.

An attachment lien must be in effect to commence a creditor's suit. CCP §491.330(b). The defendant should be joined in the action, although it is not an indispensable party. CCP §491.320. The defendant's residence is not considered for purposes of the venue of the action unless the contract between the defendant and the third person so provides. CCP §491.320.

There is no right to a jury trial in a creditor's suit. CCP §491.350.

The court may restrain or enjoin the third person from transferring the attached property or paying the attached debt to the defendant or anyone else. The court, in its discretion, may require an undertaking. CCP §491.340.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.75 b. Limitations Period

### §6.75 b. Limitations Period

A creditor's suit must be commenced before the later of (CCP §491.330(a)):

- The time when the defendant may bring an action against the third person concerning the property or debt; or
- One year after the creation of an attachment lien on the property or debt, as long as the lien is created during the time the defendant may bring an action against the third party concerning the property or debt.

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### §6.76 c. Judgment

A creditor's suit may proceed to judgment if the attachment lien is in effect. CCP §491.330(c). If the plaintiff establishes the third person's liability, the court shall enter judgment. The judgment may be enforced as if it had been obtained by the defendant against the third party, but unless the plaintiff prevails in the underlying action against the defendant, the money or property obtained in enforcing the judgment will be held by the court, the levying officer, or as the court directs. CCP §491.360.

Costs incurred or taxed against the plaintiff may not be recovered from the defendant. CCP §491.370.

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## 8. Obtaining Lien on or Intervening in Pending Action Between Defendant and Third Party

### §6.77 a. Subject Property Must Be Attachable

If the defendant is a party to another action or special proceeding, the plaintiff may obtain a lien on (CCP §§491.410-491.415):

- Any cause of action asserted by the defendant in the other action for money or property, if the money or property would be subject to attachment should the defendant prevail in the action or proceeding; and
- The defendant's rights to money or property under any judgment subsequently procured in the other action, if the money or property would be subject to attachment.

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### §6.78 b. Exception for Arbitrations

A private arbitration under a contractual arbitration clause is not an "action" or a "special proceeding" for purposes of the attachment statute. *Jordan-Lyon Prods., Ltd. v Cineplex Odeon Corp.* (1994) 29 CA4th 1459, 1468, 35 CR2d 200. The court reasoned that the arbitration is an extrajudicial proceeding not covered in the attachment statutes.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.79 c. Procedure for Obtaining Lien

### §6.79 c. Procedure for Obtaining Lien

To obtain a lien, the plaintiff must file the following in the action or proceeding between the defendant and the third party (CCP §491.410(b)):

- A notice of lien;
- A copy of the plaintiff's right to attach order; and
- A copy of the order permitting creation of a lien, made by the court that issued the right to attach order.

**NOTE:** The lien may be requested at the same time as the right to attach order, but if that order has already issued, the plaintiff may apply for an order permitting creation of the lien in the same manner as the plaintiff would request additional writs of attachment. CCP §§491.410-491.415. See §§6.50-6.51. To obtain the order, the plaintiff must first file an undertaking. See CCP §§489.210-489.220; §§6.45-6.49.

The statute is specific concerning what the notice of lien should contain (see CCP §491.420):

- A statement that a lien has been created under CCP §491.410, the title of the court, and the cause and number of the pending action or proceeding in which the notice of lien is filed;
- The names and last known addresses of the defendant and the plaintiff;
- The title of the court where the plaintiff's action against the defendant is pending and the cause and number of the action;
- The amount secured by the attachment at the time the notice of lien is filed;
- A statement that the lien attaches to any cause of action of the defendant and to the defendant's rights to money or property under any judgment subsequently procured in the action or proceeding; and
- A statement that no compromise, dismissal, settlement, or satisfaction of the pending action or proceeding or any of the defendant's rights to money or property under any judgment procured in such action may be entered into by or on behalf of the defendant and that the defendant may not enforce the defendant's rights to money or property under any judgment procured in the pending action or proceeding by a writ or otherwise, unless one of the following requirements is satisfied:
- the court's approval is first obtained or
- the plaintiff's written consent or release of the lien is first obtained.

At the time of filing, or promptly afterwards, the plaintiff should serve the lien notice and a statement of the date the notice was filed on all parties who have appeared in the pending action or proceeding. Failure to serve does not affect the lien created per se, but a party's rights are not affected by the lien until the party has notice of it. CCP §491.410(c).

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### §6.80 d. Effect of Lien

The defendant may not enforce any judgment it obtains in the action and cannot compromise, dismiss, or settle the action without a release of the lien, the plaintiff's written consent, or a court order obtained by a noticed motion served on the plaintiff. CCP §491.440.

If the defendant obtains a judgment that it has an interest in property, the court may order the party in possession or control of the property not to transfer it until it can be attached or otherwise applied to satisfy the plaintiff's lien. CCP §491.460(b).

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### §6.81 e. Exemptions

No later than 30 days after the defendant has notice of the creation of the plaintiff's lien, the defendant may claim that all or any portion of the money or property it may recover in the action or special proceeding is exempt from attachment. The exemption claim must be made by application on noticed motion and is decided by the court in which the defendant's third party action is pending. The plaintiff is not required to file any opposition to the claim of exemption. CCP 491.470(a). The court may rule on the exemption claim at any time before the entry of judgment or may consolidate the exemption hearing with a hearing for an attachment application under CCP §491.460. CCP 491.470(b).

The defendant's failure to claim an exemption is a waiver of the exemption. CCP 491.470(a).

If the defendant prevails in establishing an exemption, the plaintiff's lien on the exempt property terminates. CCP §491.470(c).

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### §6.82 f. Intervention

After the plaintiff obtains a lien in the defendant's action against a third party, the plaintiff may apply to that court for permission to intervene in the action. CCP §491.430.

Alternatively, if the defendant is entitled to money or property in its action against a third party, and the plaintiff has properly created a lien in that action, the court may order the defendant's rights to money or property under the judgment to be attached or otherwise applied to satisfy the lien. The plaintiff's application for such an order must be on noticed motion, and served on all other parties to the action. For purposes of making such a motion, the plaintiff is deemed a party to the action. CCP §§491.430, 491.460-491.470.

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## §6.83 9. Third Party Duties and Liabilities After Levy

The duties and liabilities of third persons after a levy on a judgment are set forth in CCP §§701.010-701.070, which also apply to a levy on a writ of attachment and are incorporated into CCP §488.600.

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## 10. Garnishee's Memorandum

### §6.84 a. Third Party's Delivery to Levying Officer

When the levying officer serves a writ of attachment and notice of attachment on a third person, the officer must request the third person to complete the garnishee's memorandum. CCP §488.610(a). Regardless of whether the levy is effective, the third party must complete the memorandum and return it to the levying officer within 10 days after the request, unless the third party (CCP §488.610(f)):

- has delivered to the levying officer all property sought to be attached; or
- has paid to the levying officer all amounts the party owes to the defendant that are subject to the attachment.

The third party must set forth the property withheld from the levy, the reason for not delivering the property or paying the amount due, and the names and addresses of any other persons having a claim or right to the attached property. CCP §488.610(b).

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### §6.85 b. Exception for Banks

If a deposit account or safe deposit box is attached and the financial institution is required to provide a garnishee's memorandum, the institution need only disclose information available at the office or branch location of the levy. CCP §488.610(e).

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### §6.86 c. Return of Memorandum

If the third person returns the garnishee's memorandum, the levying officer must deliver a copy of it to the plaintiff and attach the original to the writ to be returned to the court. If the garnishee's memorandum is not returned to the levying officer, the officer must note this fact in the officer's return of the writ of attachment to the court. CCP §488.610(c)-(d). A third person who fails to return a required garnishee's memorandum may be responsible, in the court's discretion, for the plaintiff's costs and attorney fees incurred in obtaining the information. CCP §488.610(d).

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### §6.87 d. Liability for Disclosure

The garnishee's memorandum must be completed under penalty of perjury, but the third party completing the memorandum is not liable for the accuracy of the information in it. CCP §488.620.

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### §6.88 L. Treatment of Attached Property

Once attachment is obtained, the plaintiff's goal is to preserve the value of the attached property, which can be done by a court-appointed receiver, appropriate orders to the levying officer, or even by sale. The plaintiff may be required to pay any fees and expenses of a receiver, or they may be paid from the proceeds of the property's disposition. See §§11.33-11.34 on receivers.

Orders regarding the treatment or disposition of the levied property can be obtained from the court by noticed motion or ex parte. If the property is perishable or rapidly declining in value, the levying officer may take any action, in good faith, to preserve its value, including selling the property without a court order. CCP §488.700. Unless otherwise ordered by the court, the sale must comply with the sale and collection procedures of CCP §§701.510-701.680.

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## M. Releasing Excessive Attachment

### §6.89 1. Property Subject to Release

The defendant may move for an order releasing the attached property to the extent it is worth more than the amount to be secured by the attachment. CCP §488.720. The court will rule on the value of the defendant's interest in the property and, to the extent the value of that interest exceeds the amount to be secured, order the property released. CCP §488.730.

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### §6.90 2. Defendant Prevails in Action

If the final judgment is in the defendant's favor, the court will order a discharge of the attachment and a release of any attached property. Attached property, proceeds from the sale of attached property, money collected during a levy, and any undertakings will be delivered to the person from whom it was taken. CCP §488.740.

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## N. Wrongful Attachment

### §6.91 1. When Attachment Is Wrongful

A levy on a writ of attachment or temporary protective order is wrongful if it is not authorized, unless both of the following are established:

- The levy was not authorized, solely because it was against a natural person and was based on a claim for property or money that the defendant primarily used for personal, family, or household purposes (CCP §490.010(a)(1), (c)); and
- The person who sold, leased or licensed the property, furnished the services, or lent the money reasonably believed that it would not be primarily used for personal, family, or household purposes (CCP §490.010(a)(2)).

A levy under a writ of attachment or temporary protective order is also wrongful if (CCP §490.010(b)-(c)):

- The plaintiff does not recover judgment; or
- The plaintiff levies ex parte on exempt property (except when the writ is for a nonresident attachment) unless the plaintiff reasonably believed that the property attached was not exempt.

Improper attachment of exempt property may qualify as an abuse of process. See *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 349, 66 CR 697; *McNabb v Byrnes* (1928) 92 CA 337, 268 P 428.

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### §6.92 2. Liability for Wrongful Attachment

If attachment was wrongful, the defendant can recover all damages proximately caused by the wrongful attachment and all reasonable costs and expenses, including attorney fees, incurred in defeating the attachment. The defendant's recovery is limited to the amount of the undertaking. CCP §490.020. See §§6.45-6.49 on undertakings.

The defendant may also recover damages caused by a wrongful attachment or temporary protective order on any common law theory of recovery, including malicious prosecution and abuse of process. CCP §490.040; *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 66 CR 697; *North Hollywood Marble Co. v Superior Court* (1984) 157 CA3d 683, 204 CR 55.

The defendant's damages for wrongful attachment must be offset against any unsatisfied amounts owed to the plaintiff on a judgment in the action in which the wrongful attachment damages are awarded. CCP §490.040.

A third party may not recover damages under CCP §490.010 for a wrongful attachment. The third party's remedies are set forth in CCP §§720.110-720.800 and, for joint deposit accounts and safe deposit boxes, in CCP §488.465.

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### §6.93 O. Nonstatutory Attachment Not Permitted

The use of an injunction or other equitable remedy to secure payment of a potential judgment is not permitted. *Doyka v Superior Court* (1991) 233 CA3d 1134, 285 CR 14; *Medford v Superior Court* (1983) 140 CA3d 236, 189 CR 227.

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## P. Appeals

### §6.94 1. Appealing Right to Attach Order

A party may directly appeal an order (a) granting the right to attach and issuing a writ of attachment, (b) discharging an attachment order, or (c) denying a motion to discharge an attachment order. CCP §904.1(a)(5); *Perpetual Am. Bank, F.S.B. v Terrestrial Sys.* (9th Cir 1987) 811 F2d 504. Review may also be obtained with a writ of mandate. See *Weaver v Superior Court* (1949) 93 CA2d 729, 735, 210 P2d 246; *Alexander v Superior Court* (1928) 91 CA 312, 316, 266 P 993. There is no right to appeal from denial of an application for a writ of attachment. *International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc.* (1983) 142 CA3d 733, 735, 191 CR 227.

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### §6.95 2. Appealing Judgment on Underlying Claim

If the plaintiff prevails and the defendant stays execution of the judgment by filing a timely appeal and undertaking, all of the defendant's attached property is released from attachment on the plaintiff's failure to make a timely objection to the undertaking or, if a timely objection is made, on a ruling that the undertaking is sufficient. CCP §489.420.

An appeal by the plaintiff also releases the property from attachment, unless the plaintiff (CCP §921):

- perfects the appeal within 5 days after written notice of entry of the order subject to appeal; and
- posts an undertaking sufficient to pay all costs and damages that the respondent may sustain by reason of the attachment.

The requirements for the amount of the undertaking are set forth in CCP §921.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/ Q. Judicial Council Forms for Attachment/§6.96 1. Form: Application for Right to Attach Order, Temporary Protective Order, Etc. (Judicial Council Form AT-105)

## Q. Judicial Council Forms for Attachment

### §6.96 1. Form: Application for Right to Attach Order, Temporary Protective Order, Etc. (Judicial Council Form AT-105)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **APPLICATION FOR**<br>☐ **RIGHT TO ATTACH ORDER** ☐ **TEMPORARY PROTECTIVE ORDER**<br>☐ **ORDER FOR ISSUANCE OF WRIT OF ATTACHMENT**<br>☐ **ORDER FOR ISSUANCE OF ADDITIONAL WRIT OF ATTACHMENT**<br>☐ **After Hearing** ☐ **Ex Parte**<br>☐ **Against Property of Nonresident** | CASE NUMBER: |

1. Plaintiff *(name)*:
   applies ☐ after hearing ☐ ex parte for
   a. ☐ a right to attach order and writ of attachment.
   b. ☐ an additional writ of attachment.
   c. ☐ a temporary protective order.
   d. ☐ an order directing the defendant to transfer to the levying officer possession of
      (1) ☐ property in defendant's possession.
      (2) ☐ documentary evidence in defendant's possession of title to property.
      (3) ☐ documentary evidence in defendant's possession of debt owed to defendant.

2. Defendant *(name)*:
   a. ☐ is a natural person who
      (1) ☐ resides in California.
      (2) ☐ does not reside in California.
   b. ☐ is a corporation
      (1) ☐ qualified to do business in California.
      (2) ☐ not qualified to do business in California.
   c. ☐ is a California partnership or other unincorporated association.
   d. ☐ is a foreign partnership that
      (1) ☐ has filed a designation under Corporations Code section 15800.
      (2) ☐ has not filed a designation under Corporations Code section 15800.
   e. ☐ is other *(specify)*:

3. Attachment is sought to secure recovery on a claim upon which attachment may issue under Code of Civil Procedure section 483.010.

4. Attachment is not sought for a purpose other than the recovery on a claim upon which the attachment is based.

5. Plaintiff has no information or belief that the claim is discharged or the prosecution of the action is stayed in a proceeding under Title 11 of the United States Code (Bankruptcy).

(Continued on reverse)



Form Approved for Optional Use
Judicial Council of California
AT-105 [Rev. January 1, 2000]

**APPLICATION FOR RIGHT TO ATTACH ORDER, TEMPORARY PROTECTIVE ORDER, ETC. (Attachment)**

Code of Civil Procedure,
§§ 482.030, 484.010 et seq.

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

6. ☐ Plaintiff's claim or claims arise out of conduct by the defendant who is a natural person of a trade, business, or profession. The claim or claims are not based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where any of the foregoing was used by the defendant primarily for personal, family, or household purposes.

7. The facts showing plaintiff is entitled to a judgment on the claim on which the attachment is based are set forth with particularity in the
   a. ☐ verified complaint.
   b. ☐ attached affidavit or declaration.
   c. ☐ following facts *(specify)*:

8. The amount to be secured by the attachment is: $
   a. ☐ which includes estimated costs of: $
   b. ☐ which includes estimated allowable attorney fees of: $

9. Plaintiff is informed and believes that the following property sought to be attached for which a method of levy is provided is subject to attachment:
   a. ☐ Any property of a defendant who is **not** a natural person.
   b. ☐ Any property of a nonresident defendant.
   c. ☐ Property of a defendant who is a natural person that is subject to attachment under Code of Civil Procedure section 487.010 described as follows *(specify)*:

   d. ☐ Property covered by a bulk sales notice with respect to a bulk transfer by defendant on the proceeds of the sale of such property *(describe)*:

   e. ☐ Plaintiff's pro rata share of proceeds from an escrow in which defendant's liquor license is sold *(specify license number)*:

10. Plaintiff is informed and believes that the property sought to be attached is not exempt from attachment.

11. ☐ The court issued a Right to Attach Order on *(date)*:
    *(Attach a copy.)*

12. ☐ Nonresident defendant has not filed a general appearance.

(Continued on page three)



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

13. a. Plaintiff ☐ alleges on ex parte application for order for writ of attachment
☐ is informed and believes on application for temporary protective order
that plaintiff will suffer great or irreparable injury if the order is not issued before the matter can be heard on notice because
(1) ☐ it may be inferred that there is a danger that the property sought to be attached will be
(a) ☐ concealed.
(b) ☐ substantially impaired in value.
(c) ☐ made unavailable to levy by other than concealment or impairment in value.
(2) ☐ defendant has failed to pay the debt underlying the requested attachment and is insolvent as defined in Code of Civil Procedure section 485.010, subdivision (b)(2).
(3) ☐ a bulk sales notice was recorded and published pursuant to Division 6 of the Commercial Code with respect to a bulk transfer by the defendant.
(4) ☐ an escrow has been opened under the provisions of Business and Professions Code section 24074 with respect to the sale by the defendant.
(5) ☐ other circumstances *(specify)*:

b. The statements in item 13a are established by ☐ the attached affidavit or declaration
☐ the following facts *(specify)*:

14. ☐ Plaintiff requests the following relief by temporary protective order *(specify)*:

15. Plaintiff
a. ☐ has filed an undertaking in the amount of: $
b. ☐ has not filed an undertaking.

Date:

. . . . . .
(TYPE OR PRINT NAME OF PLAINTIFF OR PLAINTIFF'S ATTORNEY)

▶ _____
(SIGNATURE OF PLAINTIFF OR PLAINTIFF'S ATTORNEY)

**DECLARATION**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

16. Number of pages attached: ____



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.97 2. Form: Notice of Application and Hearing for Right to Attach Order and Writ of Attachment (Judicial Council Form AT-115)

## §6.97 2. Form: Notice of Application and Hearing for Right to Attach Order and Writ of Attachment (Judicial Council Form AT-115)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **NOTICE OF APPLICATION AND HEARING FOR**<br>☐ **RIGHT TO ATTACH ORDER**<br>☐ **ORDER FOR ISSUANCE OF**<br>☐ **WRIT OF ATTACHMENT**<br>☐ **ADDITIONAL WRIT OF ATTACHMENT** | CASE NUMBER: |

1. Notice to defendant *(name, address, and telephone number, if known)*:

2. Plaintiff has filed an application for
   a. ☐ a right to attach order and writ of attachment. *(Check items 6a, 6b, and 6d(1).)*
   b. ☐ a writ of attachment. *(Check item 6d(2).)*
   c. ☐ an additional writ of attachment. *(Check item 6d(2).)*

3. A hearing on plaintiff's application will be held in this court as follows:

| Date: | Time: | ☐ Dept.: | ☐ Div.: | ☐ Rm.: |
|---|---|---|---|---|

4. The request of plaintiff for an order is based upon the application and affidavit or declaration filed and served with this notice.

5. Your attention is directed to the following sections of the Code of Civil Procedure that set forth when attachment may or may not be issued, the manner of calculating the amount to be secured by the attachment, the court's discretion to include costs and attorney's fees, and special limitations on the amount to be secured by attachment in unlawful detainer proceedings. (Code Civ. Proc., §§ 482.110, 483.010, 483.015, 483.020.)

6. **You are notified that**
   a. ☐ A right to attach order will be issued if the court finds at the hearing that plaintiff's claim is probably valid and the other requirements for issuing the order are established. This hearing may include both written and oral presentations, but is not for the purpose of determining whether the claim is actually valid. Determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decision at the hearing on the application for the order.
   b. ☐ If you desire to oppose the issuance of a right to attach order or object to the amount to be secured by the attachment as provided in Code of Civil Procedure section 483.015 (or Code of Civil Procedure section 483.020 in unlawful detainer actions), you must file with this court and serve on plaintiff (no later than five court days prior to the date set for hearing in item 3) a notice of opposition and supporting declaration or affidavit as required by Code of Civil Procedure section 484.060.
   c. If a right to attach order is or has been issued, a writ of attachment will be issued to attach your property described in plaintiff's application unless the court determines that the property is exempt from attachment or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, since the right to attach order will not necessarily be limited to your property described in plaintiff's application, a writ of attachment may later be issued to attach other nonexempt property of yours.

(Continued on reverse)



Form Approved for Optional Use
Judicial Council of California
AT-115 [Rev. January 1, 2000]

**NOTICE OF APPLICATION AND HEARING FOR RIGHT TO ATTACH ORDER AND WRIT OF ATTACHMENT (Attachment)**

Code of Civil Procedure,
§§ 482.030, 484.010 et seq.

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

6. d. If you claim that all or some portion of the property described in plaintiff's application is exempt from attachment, you must no later than five court days prior to this hearing

(1) ☐ include your claim of exemption in your notice of opposition filed and served pursuant to Code of Civil Procedure section 484.060 or file and serve a separate claim of exemption with respect to the property as provided in Code of Civil Procedure section 484.070.

(2) ☐ file with the court and serve on plaintiff a claim of exemption with respect to the property as provided in Code of Civil Procedure section 484.350.

If you fail to make a claim of exemption with respect to personal property, or make a claim of exemption with respect to real or personal property, but fail to prove that the property is exempt, any further claim of exemption with respect to the property will be barred unless you show a change in circumstances occurring after expiration of the time for claiming exemptions.

e. Claims of exemption resulting from a change of circumstances, whether after denial of a previous claim or expiration of the time for claiming exemptions, may be asserted as provided in Code of Civil Procedure section 482.100.

f. You may obtain a determination at the hearing whether property not described in the application is exempt from attachment. Your failure to claim that property not described in the application is exempt from attachment will not preclude you from making a claim of exemption with respect to the property at a later time.

g. You may also obtain a determination at the hearing whether the amount sought to be secured by the attachment shall be reduced by
(1) the amount of any money judgment in your favor and against plaintiff that remains unsatisfied and enforceable,
(2) the amount of any indebtedness of the plaintiff that you have claimed in a cross-complaint filed in the action if your claim is one upon which an attachment could be issued,
(3) the amount of any claim asserted by you as a defense in the answer pursuant to Code of Civil Procedure section 431.70 if the claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations, or
(4) the value of any security interest in your property held by plaintiff to secure the indebtedness claimed by plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or a prior holder of the security interest.

h. The amount to be secured by an attachment is determined pursuant to the following statutes:
(1) **Code of Civil Procedure section 482.110.** A writ of attachment may include an estimate of the costs and allowable attorney fees.
(2) **Code of Civil Procedure section 483.010.** An attachment may issue on a claim for $500 or more based on a contract, express or implied, exclusive of attorney fees, costs, and interests. If the claim was originally secured by an interest in real property (e.g., a mortgage or trust deed), an attachment may issue only if the security has become valueless or decreased in value to less than the amount owing on the claim, through no fault of plaintiff or the security holder (if different from plaintiff).
(3) **Code of Civil Procedure section 483.015.** The amount to be attached includes the amount of the indebtedness claimed by plaintiff, plus estimated costs and allowable attorney fees, reduced by the sum of the following:
(a) the amount of any unsatisfied money judgment held by defendant against plaintiff;
(b) the amount of any indebtedness of plaintiff claimed by defendant in a cross-complaint filed in the action (if a writ of attachment could issue on the claim);
(c) the amount of any cross-demand for money owed by plaintiff to defendant that is barred by the statute of limitations (but assertable as a Code of Civil Procedure section 431.70 defense) if the debt was one upon which a writ of attachment could have been issued before the statute of limitations ran; and
(d) the amount of any security interest held by plaintiff in defendant's property, together with any decrease in the value of the underlying security caused by plaintiff or a prior security holder.

(Continued on page three)



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

(4) **Code of Civil Procedure section 483.020.** An attachment ordered in an unlawful detainer proceeding may include:
(a) the amount of rent past due when the complaint is filed;
(b) an additional amount for the estimated rent due from the date the complaint was filed until the estimated date of judgment or delivery of possession to plaintiff; plus
(c) estimated costs and attorney fees.

Any prepaid rent or lease deposits held by plaintiff are disregarded in calculating the amount of attachment. However, the amount of attachment will be reduced by the amounts described in Code of Civil Procedure section 483.015 (above).

i. Either you or your attorney or both of you may be present at the hearing.

j. YOU MAY SEEK THE ADVICE OF AN ATTORNEY AS TO ANY MATTER CONNECTED WITH PLAINTIFF'S APPLICATION. THE ATTORNEY SHOULD BE CONSULTED PROMPTLY SO THAT THE ATTORNEY MAY ASSIST YOU BEFORE THE TIMES FOR FILING YOUR OPPOSITION AND CLAIMS OF EXEMPTION, AND FOR THE HEARING.

Date:

. . . . . .
(TYPE OR PRINT NAME OF PLAINTIFF OR PLAINTIFF'S ATTORNEY)

▶ _____
(SIGNATURE OF PLAINTIFF OR PLAINTIFF'S ATTORNEY)



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.98 3. Form: Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment (Judicial Council Form AT-120)

## §6.98 3. Form: Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment (Judicial Council Form AT-120)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| ☐ **RIGHT TO ATTACH ORDER AND ORDER FOR ISSUANCE OF WRIT OF ATTACHMENT AFTER HEARING**<br>☐ **ORDER FOR ISSUANCE OF ADDITIONAL WRIT OF ATTACHMENT AFTER HEARING** | CASE NUMBER: |

1. a. The application of plaintiff *(name)*:
   for ☐ a right to attach order and order for issuance of writ of attachment
   ☐ an order for issuance of additional writ of attachment
   against the property of defendant *(name)*:
   came on for hearing as follows:
   (1) Judge *(name)*:
   (2) Hearing date: Time: ☐ Dept.: ☐ Div.: ☐ Rm.:
   b. The following persons were present at the hearing:
   (1) ☐ Plaintiff *(name)*: (3) ☐ Plaintiff's attorney *(name)*:
   (2) ☐ Defendant *(name)*: (4) ☐ Defendant's attorney *(name)*:

**FINDINGS**

2. THE COURT FINDS
   a. Defendant *(specify name)*: is a ☐ natural person ☐ partnership
   ☐ unincorporated association ☐ corporation ☐ other *(specify)*:
   b. The claim upon which the application is based is one upon which an attachment may be issued.
   c. Plaintiff has established the probable validity of the claim upon which the attachment is based.
   d. The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.
   e. The amount to be secured by the attachment is greater than zero.
   f. ☐ Defendant failed to prove that all the property described in plaintiff's application is exempt from attachment.
   g. ☐ The following property of defendant, described in plaintiff's application
   (1) ☐ is exempt from attachment *(specify)*:
   (2) ☐ is not exempt from attachment *(specify)*:
   h. ☐ The following property, not described in plaintiff's application, claimed by defendant to be exempt
   (1) ☐ is exempt from attachment *(specify)*:
   (2) ☐ is not exempt from attachment *(specify)*:
   i. ☐ An undertaking in the amount of: $ is required before a writ shall issue, and plaintiff
   ☐ has ☐ has not filed an undertaking in that amount.
   j. A Right to Attach Order was issued on *(date)*: pursuant to
   ☐ Code of Civil Procedure section 484.090 (on hearing) ☐ Code of Civil Procedure section 485.220 (ex parte)
   k. ☐ Other *(specify)*:

(Continued on reverse)



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

## ORDER

3. THE COURT ORDERS
   a. Plaintiff has a right to attach property of defendant *(name)*:
      in the amount of: $
   b. ☐ The property described in items 2g(1) and 2h(1) of the findings is exempt and shall not be attached.
   c. The clerk shall issue ☐ a writ of attachment ☐ an additional writ of attachment in the amount stated in item 3a
      ☐ forthwith ☐ upon the filing of an undertaking in the amount of: $
      (1) ☐ for any property of a defendant who is **not** a natural person for which a method of levy is provided.
      (2) ☐ for the property of a defendant who is a natural person that is subject to attachment under Code of Civil Procedure section 487.010, described as follows *(specify)*:

      (3) ☐ for the property covered by a bulk sales notice with respect to a bulk transfer by defendant or the proceeds of sale of such property, described as follows *(specify)*:

      (4) ☐ for plaintiff's pro rata share of proceeds from an escrow in which defendant's liquor license is sold. The license number is *(specify)*:

   d. ☐ Defendant shall transfer to the levying officer possession of
      (1) ☐ any documentary evidence in defendant's possession of title to any property described in item 3c;
      (2) ☐ any documentary evidence in defendant's possession of debt owed to defendant described in item 3c;
      (3) ☐ the following property in defendant's possession *(specify)*:

**NOTICE TO DEFENDANT: FAILURE TO COMPLY WITH THIS ORDER MAY SUBJECT YOU TO ARREST AND PUNISHMENT FOR CONTEMPT OF COURT.**

   e. ☐ Other *(specify)*:

   f. Total number of boxes checked in item 3: _____

Date:

. . . . . ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF JUDGE OR COMMISSIONER)



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.99 4. Form: Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Judicial Council Form AT-125)

## §6.99 4. Form: Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Judicial Council Form AT-125)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **EX PARTE**<br>☐ **RIGHT TO ATTACH ORDER AND ORDER FOR ISSUANCE OF WRIT OF ATTACHMENT (RESIDENT)**<br>☐ **ORDER FOR ISSUANCE OF ADDITIONAL WRIT OF ATTACHMENT (RESIDENT)** | CASE NUMBER: |

1. The application and supporting declaration or affidavit of plaintiff *(name)*:
for an ex parte ☐ right to attach order and order for issuance of writ of attachment ☐ order for issuance of an additional writ of attachment has been considered by the court.

**FINDINGS**

2. THE COURT FINDS
   a. Defendant *(specify name)*: is a ☐ natural person
   ☐ partnership ☐ unincorporated association ☐ corporation ☐ other *(specify)*:
   b. The claim upon which the application is based is one upon which an attachment may be issued under Code of Civil Procedure section 483.010.
   c. Plaintiff has established the probable validity of the claim upon which the attachment is based.
   d. The attachment is not sought for a purpose other than the recovery on the claim upon which the application is based.
   e. The amount to be secured by the attachment is greater than zero.
   f. The affidavit or declaration accompanying the application shows that the property sought to be attached, or the portions thereof to be specified in the writ, are not exempt from attachment.
   g. The portion of the property sought to be attached described in item 3b is not exempt from attachment.
   h. An undertaking in the amount of: $ is required before a writ shall issue, and plaintiff
   ☐ has ☐ has not filed an undertaking in that amount.
   i. Great or irreparable injury will result to the plaintiff if issuance of the order is delayed until the matter can be heard on notice, based on the following:
      (1) ☐ There is a danger that the property sought to be attached would be
      (a) ☐ concealed. (b) ☐ substantially impaired in value.
      (c) ☐ made unavailable to levy by other than concealment or impairment in value.
      (2) ☐ Defendant has failed to pay the debt underlying the requested attachment and is insolvent as defined in Code of Civil Procedure section 485.010, subdivision (b)(2), as set forth in the affidavit or declaration filed in support of this application, which specifies the defendant's known undisputed debts and the basis for plaintiff's determination that the defendant's debts are undisputed.
      (3) ☐ A bulk sales notice was recorded and published pursuant to Division 6 of the Commercial Code with respect to a bulk transfer by the defendant.
      (4) ☐ An escrow has been opened pursuant to the provisions of Business and Professions Code section 24074 with respect to the sale by the defendant of a liquor license. The liquor license number is:
      (5) ☐ Other circumstances *(specify)*:
   j. ☐ A Right to Attach Order was issued on *(date)*: pursuant to
   ☐ Code of Civil Procedure section 484.090 (on notice) ☐ Code of Civil Procedure section 485.220 (ex parte)
   k. ☐ Other *(specify)*:

(Continued on reverse)



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

## ORDER

3. THE COURT ORDERS
   a. Plaintiff has a right to attach property of defendant *(name)*:
      in the amount of: $

   b. The clerk shall issue ☐ a writ of attachment ☐ an additional writ of attachment in the amount stated in item 3a
      ☐ forthwith ☐ upon the filing of an undertaking in the amount of: $
      (1) ☐ for the property covered by a bulk sales notice with respect to a bulk transfer by defendant or the proceeds of the sale of such property, described as follows *(specify)*:

      (2) ☐ for plaintiff's pro rata share of proceeds from an escrow in which defendant's liquor license is sold. The license number is *(specify)*:
      (3) ☐ for any property of a defendant who is **not** a natural person for which a method of levy is provided.
      (4) ☐ for property of a defendant who is a natural person subject to attachment under Code of Civil Procedure section 487.010 *(specify)*:

   c. ☐ Defendant shall transfer to the levying officer possession of
      (1) ☐ any documentary evidence in defendant's possession of title to any property described in item 3b.
      (2) ☐ any documentary evidence in defendant's possession of debt owed to defendant described in item 3b.
      (3) ☐ the following property in defendant's possession *(specify)*:

**NOTICE TO DEFENDANT: FAILURE TO COMPLY WITH THIS ORDER MAY SUBJECT YOU TO ARREST AND PUNISHMENT FOR CONTEMPT OF COURT.**

   d. ☐ Other *(specify)*:

   e. Total number of boxes checked in item 3: _____

Date:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF JUDGE OR COMMISSIONER)



*Comment:* This form is to be used when the defendant is a California resident. When the defendant is a nonresident, use Judicial Council Form AT-130.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.100 5. Form: Writ of Attachment (Judicial Council Form AT-135)

## §6.100 5. Form: Writ of Attachment (Judicial Council Form AT-135)

Print

**AT-135**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO. :<br>E-MAIL ADDRESS *(Optional):* FAX NO. *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **WRIT OF ATTACHMENT**<br>☐ **AFTER HEARING** ☐ **EX PARTE** | CASE NUMBER: |

1. TO THE SHERIFF OR ANY MARSHAL OR CONSTABLE OF THE COUNTY OF:

2. TO ANY REGISTERED PROCESS SERVER: You are only authorized to serve this writ in accord with CCP 488.080.

3. This writ is to attach property of defendant *(name and last known address):*

   and the attachment is to secure: $

4. Name and address of plaintiff:

5. YOU ARE DIRECTED TO ATTACH the following property or so much thereof as is clearly sufficient to satisfy the amount to be secured by the attachment *(describe property and state its location; itemize by letter):*

   ☐ This information is on an attached sheet.

6. ☐ An interest in the real property described in item 5 stands upon the records of the county, in the name of the following person other than the defendant:
   a. Name:
   b. Mailing address, if known, as shown by the records of the office of the county tax assessor *(specify)*:

7. ☐ The real property on which the
   ☐ crops described in item 5 __ are growing
   ☐ timber described in item 5 __ to be cut is standing stands upon the records of the county in the name of
   a. Name:
   b. Address:

[SEAL]

Date: Clerk, by _____, Deputy



Form Approved for Optional Use
Judicial Council of California
AT-135 [Rev. January 1, 2003]

**WRIT OF ATTACHMENT**
**(Attachment)**

Code of Civ. Proc., § 488.010

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## §6.101 6. Application and Order for Appearance and Examination

This form is reproduced in §8.18.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.102 7. Form: Temporary Protective Order (Judicial Council Form AT-140)

## §6.102 7. Form: Temporary Protective Order (Judicial Council Form AT-140)

Print

AT-140

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **TEMPORARY PROTECTIVE ORDER** | CASE NUMBER: |

1. The court has considered the application of plaintiff for
   a. ☐ a right to attach order, order for issuance of writ of attachment pursuant to Chapter 4 (beginning with Code Civ. Proc., § 484.010), and a temporary protective order.
   b. ☐ an ex parte right to attach order and order for issuance of writ of attachment under Chapter 5 (beginning with Code Civ. Proc., § 485.010).

**FINDINGS**

2. THE COURT FINDS
   a. Defendant is a ☐ natural person ☐ partnership ☐ unincorporated association ☐ corporation ☐ other *(specify)*:
   b. The amount sought to be secured by the attachment under the application for the right to attach is: $
   c. The claim upon which the application for attachment is based is one upon which an attachment may be issued under Code of Civil Procedure section 483.010.
   d. Plaintiff has established the probable validity of the claim upon which the application for the attachment is based.
   e. The order is not sought for a purpose other than the recovery upon the claim on which the application for the attachment is based.
   f. Great or irreparable injury will result to the plaintiff if this order is not issued, based on the following:
      (1) ☐ There is a danger that the property sought to be attached would be
         (a) ☐ concealed.
         (b) ☐ substantially impaired in value.
         (c) ☐ made unavailable to levy by other than concealment or substantial impairment in value.
      (2) ☐ Defendant has failed to pay the debt underlying the requested attachment and is insolvent as defined in Code of Civil Procedure section 485.010, subdivision (b)(2).
      (3) ☐ A bulk sales notice was recorded and published pursuant to Division 6 (beginning with section 6101) of the Commercial Code with respect to a bulk transfer by the defendant.
      (4) ☐ An escrow has been opened pursuant to the provisions of Business and Professions Code section 24074 with respect to the sale by the defendant of a liquor license. The liquor license number is:
      (5) ☐ Other circumstances:

   g. ☐ The requirements of Code of Civil Procedure section 485.220 are satisfied, but a temporary protective order should issue instead of an ex parte right to attach order and order for issuance of writ of attachment.
   h. Plaintiff must file an undertaking in the amount of: $ before a temporary protective order shall issue, and plaintiff has filed an undertaking in that amount.
   i. The property subject to the following order is:

(Continued on reverse)

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

2. j. ☐ The following property of defendant is inventory or farm products held for sale and may be transferred in the ordinary course of business *(specify)*:

   k. ☐ Other *(specify)*:

## ORDER

3. THE COURT ORDERS
   a. Defendant shall not transfer, directly or indirectly, any interest in the property described in item 2i of the findings.
   b. ☐ Defendant shall not dispose of the proceeds of any transfer of inventory or farm products held for sale except under the following restrictions:

   c. ☐ Other *(specify)*:

   d. This order shall expire at the earliest of the following times:
      (1) when plaintiff levies upon specific property described in this order,
      (2) after *(date)*: , or
      (3) 40 days after the issuance of this order.

4. Number of pages attached: ____

Date:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF JUDGE OR COMMISSIONER)

**NOTICE TO DEFENDANT:** An undertaking has been filed with the court by plaintiff. You may object to the undertaking.

a. You may issue any number of checks against any of your accounts in a financial institution in this state in any amount for the following purposes:
   (1) Payment of any payroll expense (including fringe benefits and taxes and premiums for workers' compensation and unemployment insurance) falling due in the ordinary course of business prior to the levy of a writ of attachment.
   (2) Payment for goods thereafter delivered to you C.O.D. for use in your trade, business, or profession.
   (3) Payment of taxes if payment is necessary to avoid penalties which will accrue if there is any further delay in payment.
   (4) Payment of reasonable legal fees and reasonable costs and expenses required for your representation in the action.
b. In addition, you may issue any number of checks for any purpose so long as the total amount of such checks does not exceed the greater of the following:
   (1) The amount by which the total amount on deposit exceeds the sum of the amount sought to be secured by the attachment and the amounts permitted to be paid pursuant to this notice.
   (2) One thousand dollars ($1,000).
c. If the property is farm products held for sale or is inventory, the temporary protective order may not prohibit you from transferring the property in the ordinary course of business, but may impose appropriate restrictions on the disposition of the proceeds from such transfer.

[SEAL]

### CLERK'S CERTIFICATE

I certify that the foregoing is a correct copy of the original on file in my office.
Date:

Clerk, by _____, Deputy



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.103 8. Form: Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order (Judicial Council Form AT-145)

## §6.103 8. Form: Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order (Judicial Council Form AT-145)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | *FOR COURT USE ONLY* |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br>DEFENDANT: | | CASE NUMBER: |
| **APPLICATION FOR ORDER ☐ AND NOTICE OF HEARING**<br>☐ **TO TERMINATE TEMPORARY PROTECTIVE ORDER AFTER HEARING**<br>☐ **TO MODIFY OR VACATE TEMPORARY PROTECTIVE ORDER**<br>☐ **EX PARTE** ☐ **AFTER HEARING** | | |

1. ☐ To plaintiff *(name)*:

   You are notified that a hearing on defendant's application in item 2 will be held as follows:

   | date: | time: | ☐ dept.: | ☐ div.: | ☐ rm.: |
   |---|---|---|---|---|

2. ☐ Defendant *(name)*:

   makes application on notice for an order
   a. ☐ to terminate the Temporary Protective Order issued on *(date)*:
   b. ☐ to vacate the Temporary Protective Order issued on *(date)*:
   c. ☐ to modify the Temporary Protective Order issued on *(date)*:
   as follows:

3. ☐ Defendant *(name)*:

   makes ex parte application for an order
   a. ☐ to vacate the Temporary Protective Order issued on *(date)*:
   b. ☐ to modify the Temporary Protective Order issued on *(date)*:
   as follows:

4. ☐ Defendant's application to terminate the Temporary Protective Order is made on the grounds that defendant ☐ has filed ☐ will file a sufficient undertaking pursuant to CCP 489.320 in the amount of $

*(Continued on reverse)*



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

5. ☐ Defendant's application
☐ to vacate ☐ to modify the Temporary Protective Order is made on the grounds of the interests of justice and equity to the parties pursuant to CCP 486.100. Defendant's application is based upon the
a. ☐ attached affidavit.
b. ☐ following facts *(specify)*:

c. ☐ attached points and authorities.
d. ☐ following points and authorities *(specify)*:

Date:

. . . . . *(TYPE OR PRINT NAME OF DEFENDANT)* . . . . . ▶ _____ *(SIGNATURE OF DEFENDANT)*

By: . . . . . *(NAME AND TITLE)* . . . . . .

**DECLARATION**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . *(TYPE OR PRINT NAME)* . . . . . ▶ _____ *(SIGNATURE OF DECLARANT)*

6. Total number of pages attached:



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.104 9. Form: Order to Terminate, Modify, or Vacate Temporary Protective Order (Judicial Council Form AT-150)

## §6.104 9. Form: Order to Terminate, Modify, or Vacate Temporary Protective Order (Judicial Council Form AT-150)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|
| ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br><br>DEFENDANT: | |
| **ORDER** ☐ **TO TERMINATE TEMPORARY PROTECTIVE ORDER**<br>☐ **TO MODIFY TEMPORARY PROTECTIVE ORDER**<br>☐ **TO VACATE TEMPORARY PROTECTIVE ORDER** | CASE NUMBER: |

1. The court has considered the application of defendant *(name)*:

   for an order
   - ☐ to terminate Temporary Protective Order
   - ☐ to modify Temporary Protective Order
   - ☐ to vacate Temporary Protective Order

   a. ☐ On hearing as follows *(check boxes in items (3) and (4) to indicate personal presence)*:
      (1) Judge *(name)*:
      (2) Hearing date: time: ☐ dept.: ☐ div.: ☐ rm.:
      (3) ☐ Plaintiff *(name)*: ☐ Attorney *(name)*:
      (4) ☐ Defendant *(name)*: ☐ Attorney *(name)*:

   b. ☐ Ex parte.

2. THE COURT FINDS

   a. ☐ The amount sought to be secured by the attachment is
      $

   b. ☐ The interests of justice and equity to the parties require that the Temporary Protective Order issued on *(date)*:
      be ☐ modified.
      ☐ vacated because of the following facts *(specify)*:

   c. ☐ Other *(specify)*:

*(Continued on reverse)*



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

## ORDER

3. IT IS ORDERED
   a. The Temporary Protective Order issued on *(date)*: is
      ☐ terminated upon the filing of an undertaking in the amount of $
      ☐ vacated.
      ☐ modified as follows *(specify)*:

   b. ☐ Other *(specify)*:

Date:

▶ _____
*(SIGNATURE OF JUDGE)*

4. Total number of boxes checked in item 3:



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.105 10. Form: Notice of Opposition to Right to Attach Order and Claim of Exemption (Judicial Council Form AT-155)

## §6.105 10. Form: Notice of Opposition to Right to Attach Order and Claim of Exemption (Judicial Council Form AT-155)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|
| ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br><br>DEFENDANT: | |
| **NOTICE OF**<br>☐ **OPPOSITION TO APPLICATION FOR RIGHT TO ATTACH ORDER**<br>☐ **CLAIM OF EXEMPTION**<br>☐ **MOTION (AFTER ISSUANCE OF WRIT) FOR CLAIM OF EXEMPTION**<br>☐ **AND MOTION FOR CLAIM OF EXEMPTION** | CASE NUMBER: |

1. To plaintiff *(name)*:

2. You are notified that a hearing will be held in this court as follows:

| date: | time: | ☐ dept.: | ☐ div.: | ☐ rm.: |
|---|---|---|---|---|

3. This opposition or claim of exemption is filed by
   a. ☐ defendant *(specify name)*:

   b. ☐ nondefendant *(specify name and mailing address where service of opposition may be made)*:

   *(name and last known address of defendant)*:

4. Opposing party
   a. ☐ will oppose the issuance of a right to attach order upon the following grounds *(specify grounds of opposition)*:

   b. ☐ objects to the amount sought to be secured by the attachment upon the following grounds *(specify grounds of opposition)*:

*(Continued on reverse)*



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

4. c. ☐ will claim exemption.
☐ will move the court for an exemption from attachment of the following property:

(1) ☐ Property exempt from execution under CCP 703.010 et seq. *(specify code section and describe property)*:

(a) ☐ Property exempt under CCP 704.010 [motor vehicles] or 704.060 [tools of a trade] *(describe all other property of the same type, including exempt proceeds of property of the same type, owned by defendant alone or in combination with others on the date of levy and identify the property to which the exemption is to be applied, regardless of whether it was levied upon)*:

(b) ☐ Property exempt under CCP 704.100 [life insurance policies] *(state the nature and amount of all other property of the same type owned by defendant or defendant's spouse alone or in combination with others on the date of levy)*:

(2) ☐ Property which is necessary for the support of a defendant who is a natural person and the family of the defendant supported in whole or in part by the defendant (CCP 487.020(b) *(describe the property and attach a financial statement executed under oath as required in CCP 703.530)*:

(3) ☐ Compensation paid or payable to a defendant employee by an employer for personal services performed by the employee whether denominated as wages, salary, commission, bonus, or otherwise (CCP 487.020(c)) *(describe compensation)*:

(4) ☐ Property not subject to attachment pursuant to CCP 487.010 *(describe property)*:

(5) ☐ Other *(describe property and specify grounds for exemption)*:

5. Defendant's affidavit supporting any factual issues and points and authorities supporting any legal issues is attached.

6. Total number of pages attached:

Date:

. . . . . *(TYPE OR PRINT NAME)*

▶ _____ *(SIGNATURE OF DEFENDANT OR ATTORNEY)*

By: . . . . . *(NAME AND TITLE)*



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.106 11. Form: Undertaking by Personal Sureties (Judicial Council Form AT-160, CD-140)

## §6.106 11. Form: Undertaking by Personal Sureties (Judicial Council Form AT-160, CD-140)

Print

AT-160/CD-140

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| ☐ **Plaintiff's** ☐ **Defendant's** **UNDERTAKING BY PERSONAL SURETIES** ☐ **Attachment** ☐ **Claim and Delivery** | CASE NUMBER: |

1. ☐ Plaintiff *(name):*
2. ☐ Defendant *(name):*
3. Amount of undertaking: $
4. ☐ ***(Claim and delivery only)*** Address to which notice of objection to sureties may be sent *(specify):*

5. This undertaking is for ☐ attachment. ☐ claim and delivery.
6. We, the undersigned sureties, hereby submit to the jurisdiction of the court in all matters affecting our liability on this undertaking and obligate ourselves, jointly and severally, to and including the amount specified in item 3,

**ATTACHMENT**

a. ☐ **to pay the defendant named in item 2** any amount the defendant may recover for any wrongful attachment by the plaintiff named in item 1 in the action under Code of Civil Procedure section 489.210.

b. ☐ **to pay the plaintiff named in item 1** the value of the property released not exceeding the amount of any judgment which may be recovered by the plaintiff in an action against the defendant named in item 2 (Code Civ. Proc., § 489.310).

c. ☐ **to pay the plaintiff named in item 1** the amount of any judgment that may be recovered by the plaintiff in the action against the defendant named in item 2 under Code of Civil Procedure section 489.320.

**CLAIM AND DELIVERY**

d. ☐ **to the plaintiff named in item 1,** if the plaintiff recover judgment in the action, the defendant named in item 2 will pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of the property, not exceeding the amount of this undertaking under Code of Civil Procedure section 515.020.

e. ☐ **to the defendant named in item 1,** for the return of the property to the defendant if a return is ordered, and for the payment of any sum the defendant may recover against the plaintiff, not exceeding the amount of this undertaking under Code of Civil Procedure section 515.010.

7. a. (1) Surety *(name):*
   (2) Occupation:
   (3) Residence address:
   (4) Business address:
   (5) Address for service:

   b. (1) Surety *(name):*
   (2) Occupation:
   (3) Residence address:
   (4) Business address:
   (5) Address for service:



Form Adopted for Mandatory Use
Judicial Council of California
AT-160/CD-140 [Rev. January 1, 2006]

**UNDERTAKING BY PERSONAL SURETIES**
**(Attachment and Claim and Delivery)**

Code Civ. Proc., §§ 482.030; 515.010, 515.020; 995.510, 995.520
www.courtinfo.ca.gov

Print

AT-160/CD-140

| PLAINTIFF:<br>DEFENDANT: | CASE NUMBER: |
|---|---|

8. a. (1) I am neither an officer of the court nor a member of the State Bar of California, but I am a resident and ☐ householder ☐ owner of real property within California and I am worth the amount of the bond in real or personal property, or both, situated in this state, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

(2) ☐ ***(Complete if undertaking exceeds $5,000.)***

I rely on the following described property belonging to me and situated in this state as qualifying me on the undertaking *(describe property and nature of declarant's interest and specify best estimate of fair market value of each item of property):*

☐ Continued on Attachment 8a.

(3) The charges, liens, impediments, or clouds against any item of property known to me and the amounts are as follows *(specify):*

☐ Continued on Attachment 8a.

9. a. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
*(SIGNATURE OF SURETY)*

_____
*(TYPE OR PRINT NAME OF SURETY)*

8. b. (1) I am neither an officer of the court nor a member of the State Bar of California, but I am a resident and ☐ householder ☐ owner of real property within California and I am worth the amount of the bond in real or personal property, or both, situated in this state, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

(2) ☐ ***(Complete if undertaking exceeds $5,000.)***

I rely on the following described property belonging to me and situated in this state as qualifying me on the undertaking *(describe property and nature of declarant's interest and specify best estimate of fair market value of each item of property):*

☐ Continued on Attachment 8b.

(3) The charges, liens, impediments, or clouds against any item of property known to me and the amounts are as follows *(specify):*

☐ Continued on Attachment 8b.

9. b. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
*(SIGNATURE OF SURETY)*

_____
*(TYPE OR PRINT NAME OF SURETY)*

**COURT APPROVAL**
**(Attachment only)**

The undertaking is approved.

Date:

_____
(JUDICIAL OFFICER)

☐ Signature follows last attachment.



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.107 12. Form: Notice of Attachment (Judicial Council Form AT-165)

## §6.107 12. Form: Notice of Attachment (Judicial Council Form AT-165)

Print

**AT-165**

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*
After recording return to:

TELEPHONE NO.:
FAX NO. *(Optional):*
E-MAIL ADDRESS *(Optional):*
ATTORNEY FOR *(Name):*

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF**
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

*FOR RECORDER'S USE ONLY*

CASE NUMBER

PLAINTIFF:

DEFENDANT:

LEVYING OFFICER *(Name and Address):*

**NOTICE OF ATTACHMENT**
**[This form is used in connection with levy under a writ of attachment.]**

*FOR COURT USE ONLY*

TO THE PERSON NOTIFIED *(name):*

1. Plaintiff in this action seeks to attach property in which defendant has an interest. The property to be attached is
   a. ☐ *(describe property):*
   b. ☐ described in the *Writ of Attachment* and *Order for Issuance of Writ of Attachment*, attached hereto and incorporated by reference.
2. You are notified as
   a. ☐ a defendant.
   b. ☐ a person other than defendant *(state capacity in which person is being notified):*

***(Read Information for Defendant or Information for Person Other than Defendant on reverse.)***

3. A notice was filed with the
   a. ☐ Secretary of State.
   b. ☐ Department of Motor Vehicles.
   c. ☐ Department of Housing and Community Development.

4. Notice of Attachment was
   a. ☐ mailed on *(date):*
   b. ☐ delivered on *(date):*
   c. ☐ posted on *(date):*
   d. ☐ filed on *(date):*
   e. ☐ recorded on *(date):*

Signed by:

▶ _____

☐ Levying officer ☐ Registered process server



Form Approved for Optional Use
Judicial Council of California
AT-165 [Rev. January 1, 2003]

**NOTICE OF ATTACHMENT**
**(Attachment)**

Code of Civil Procedure,
§§ 482.030, 488.060

Print

## — INFORMATION FOR DEFENDANT —

1. The levying officer may be required to take custody of property described in item 1 in your possession or under your control. You have a right to be represented by an attorney in this lawsuit.
2. You may claim any available exemption for your property. An exemption for real property may be claimed any time before the entry of judgment. If the right to attach order or writ of attachment was issued without a noticed hearing and you wish to claim an exemption for personal property, you must do so within 30 days after the levying officer serves you with the Notice of Attachment describing the property. If you do not claim an exemption, you may lose it and the property is subject to attachment. If you wish to seek the advice of an attorney, you should do so immediately so that a claim of exemption can be filed on time.
3. Plaintiff has filed an undertaking. You have the right to object to the undertaking and may apply for an order to substitute an undertaking for your property which has been or is subject to being attached.
4. You have a duty to release tangible personal property to the levying officer. You have the rights and duties specified in Code of Civil Procedure section 488.395 if your farm products or inventory of a going business have been or are subject to attachment.
5. If the property is perishable or will greatly deteriorate in value, or for other good reason, you may apply ex parte, or if the court or court rule requires, by noticed motion, for an order appointing a receiver or directing the levying officer to take any action necessary to preserve the value of the property, including selling the property. The court may order any receiver to be paid from the proceeds of the sale of your property.
6. You may apply for a release of the attachment to the extent that the value of your interest in the property exceeds the amount necessary to satisfy the attachment.
7. You may apply to the court for an order modifying or vacating any temporary protective order in the interests of justice or for an order terminating the same upon filing an undertaking.
8. If the writ of attachment has been issued against you because you are a nonresident, you may have the right to attach order set aside by filing a general appearance.
9. If the writ of attachment was issued on an ex parte application, you may apply for an order that the right to attach order be set aside, the writ quashed, and any property levied upon pursuant to the writ be released.
10. If you recover judgment against plaintiff, you may apply for a release of all property attached by plaintiff under the Writ of Attachment. If judgment is recovered against you and you appeal, you have the right to obtain the release of your property by filing a sufficient undertaking.
11. You may object to the amount sought to be secured by the attachment.
12. You may recover damages for wrongful attachment.

## — INFORMATION FOR PERSON OTHER THAN DEFENDANT —

1. If the property attached or sought to be attached is in your possession or under your control and you do not claim the right to possession or a security interest, you must deliver the property to the levying officer. If you do not deny an obligation levied upon or do not claim a priority over the plaintiff's lien, you must pay to the levying officer the amount that is due and payable and that becomes due and payable during the period of the attachment lien. You must execute and deliver any documents needed to transfer the property.
2. You must complete the accompanying Memorandum of Garnishee.
3. If you claim ownership or the right to possession of real or personal property levied upon or if you claim a security interest in or lien on personal property levied upon, you may make a third-party claim and obtain the release of the property pursuant to Code of Civil Procedure sections 720.010–720.800.
4. If you have an interest in the property attached or sought to be attached and the property is perishable or will greatly deteriorate in value, or for other good reason, you may apply ex parte, or if the court or court rule requires, by noticed motion, for an order appointing a receiver or directing the levying officer to take any action necessary to preserve the value of the property, including selling the property. The court may order any receiver to be paid from the proceeds of the sale of your property.
5. **Make checks payable to the levying officer.**



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.108 13. Form: Application to Set Aside Right to Attach Order and Release Attached Property, Etc. (Judicial Council Form AT-170)

## §6.108 13. Form: Application to Set Aside Right to Attach Order and Release Attached Property, Etc. (Judicial Council Form AT-170)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br><br>DEFENDANT: | | CASE NUMBER: |

**APPLICATION AND NOTICE OF HEARING FOR ORDER**

- ☐ **to Set Aside Right to Attach Order, Quash Writ of Attachment, and Release Attached Property**
- ☐ **to Release Attached Property Exceeding in Value the Amount to be Secured**
- ☐ **to Substitute Defendant's Undertaking for Property**
- ☐ **to Increase Plaintiff's Undertaking**
- ☐ **to Determine Sufficiency of Plaintiff's Sureties**
- ☐ **to Reduce Amount to be Secured by the Attachment**

**EX PARTE APPLICATION FOR ORDER**

- ☐ **to Discharge Attachment and Release Property Levied Upon**
- ☐ **to Release Property Levied Upon Due to Filing of Undertaking on Appeal**

1. ☐ To plaintiff *(name)*:
   You are notified that a hearing on defendant's application in item 2 will be held in this court as follows:

   date: time: ☐ dept.: ☐ div.: ☐ rm.:

2. ☐ Resident ☐ Nonresident defendant
   *(name)*:
   makes application for an order
   a. ☐ (1) to set aside the Right to Attach Order issued on
      *(date)*:
      (2) to quash the Writ of Attachment issued on
      *(date)*:
      (3) to release the attached property of the defendant described in the writ.
   b. ☐ to substitute an undertaking in the amount of
      $ in lieu of
      (1) ☐ all of defendant's property which has been attached or is subject to attachment.
      (2) ☐ the following portion of defendant's property which has been attached or is subject to attachment:
         (a) value: $
         (b) description:

   c. ☐ for release of the following attached property to the extent that the value of defendant's interest in the property clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment:
      (1) value: $
      (2) description:

*(Continued on reverse)*



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

2. d. ☐ to reduce the amount to be secured by the attachment in the amount of $
*(specify grounds)*:

e. ☐ to increase the amount of plaintiff's undertaking on the following grounds (CCP 489.220) *(specify)*:

f. ☐ to determine the sufficiency of sureties on the following grounds *(specify)*:

g. ☐ to discharge the attachment and release property levied upon on the grounds that defendant recovered judgment in the action. Plaintiff has not filed and served a timely motion to vacate the judgment or for judgment notwithstanding the verdict or for a new trial; nor has plaintiff perfected an appeal; nor has plaintiff filed the undertaking required by CCP 921.

h. ☐ to release defendant's property levied upon owing to the stay of enforcement of plaintiff's judgment upon defendant's filing of an undertaking on appeal.

3. ☐ Defendant's title to the property identified in item
☐ 2b(1) ☐ 2b(2) and the manner of its acquisition is set forth in the
☐ attached affidavit ☐ following facts:

4. ☐ No defendant other than the applicant has an interest in the property described in item
☐ 2b(1) ☐ 2b(2)

5. ☐ Nonresident defendant's application is made on the grounds of a general appearance and defendant states
a. ☐ the Right to Attach Order was issued pursuant to CCP 492.010.
b. ☐ the general appearance was filed in this action on *(date)*:
c. ☐ this application is the first appearance of the defendant.

6. ☐ Defendant's application is supported by the
a. ☐ attached affidavit.
b. ☐ following facts *(specify)*:
c. ☐ attached points and authorities.
d. ☐ following points and authorities *(specify)*:

Date:

. . . . . *(TYPE OR PRINT NAME OF DEFENDANT)* . . . . . ▶ _____ *(SIGNATURE OF DEFENDANT)*

By. . . . . *(NAME AND TITLE)* . . . . . .

**DECLARATION**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . *(TYPE OR PRINT NAME)* . . . . . ▶ _____ *(SIGNATURE OF DECLARANT)*

7. Total number of pages attached:



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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.109 14. Form: Order to Set Aside Attachment, to Substitute Undertaking, Etc. (Judicial Council Form AT-175)

## §6.109 14. Form: Order to Set Aside Attachment, to Substitute Undertaking, Etc. (Judicial Council Form AT-175)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br><br>DEFENDANT: | | CASE NUMBER: |

**ORDER**

- ☐ **to Set Aside Right to Attach Order, Quash Writ of Attachment, and Release Property Levied Upon**
- ☐ **to Release Attached Property Exceeding in Value the Amount to be Secured**
- ☐ **to Substitute Defendant's Undertaking for Property**
- ☐ **to Increase Plaintiff's Undertaking**
- ☐ **to Determine Sufficiency of Plaintiff's Sureties**
- ☐ **to Discharge Attachment and Release Property Levied Upon (Ex Parte)**
- ☐ **to Release Property Levied Upon Due to Filing of Undertaking on Appeal (Ex Parte)**
- ☐ **to Reduce the Amount to be Secured by the Attachment**

1. a. The court has considered the application of defendant *(name)*:
   for an order
   - (1) ☐ to set aside Right to Attach Order, quash Writ of Attachment, and release property levied upon.
   - (2) ☐ to release attached property exceeding in value the amount to be secured.
   - (3) ☐ to substitute defendant's undertaking for property.
   - (4) ☐ to increase plaintiff's undertaking.
   - (5) ☐ determining sufficiency of plaintiff's sureties.
   - (6) ☐ to discharge attachment and release property levied upon.
   - (7) ☐ to release property levied upon due to filing of undertaking on appeal.
   - (8) ☐ to reduce the amount to be secured by the attachment.

   b. ☐ On hearing as follows *(check boxes in items (3) and (4) below to indicate personal presence)*:
   - (1) Judge *(name)*:
   - (2) Hearing date: time: ☐ dept.: ☐ div.: ☐ rm.:
   - (3) ☐ Plaintiff *(name)*: ☐ Attorney *(name)*:
   - (4) ☐ Defendant *(name)*: ☐ Attorney *(name)*:

   c. ☐ Ex parte.

2. THE COURT FINDS
   a. ☐ Plaintiff is not entitled to the Right to Attach Order issued on *(date)*:
   b. ☐ Nonresident defendant has filed a general appearance and plaintiff has not shown that the Right to Attach order is authorized by a provision other than CCP 492.010.
   c. ☐ The value of defendant's interest in property attached is
   $
   which exceeds the amount necessary to satisfy the amount to be secured by the attachment by
   $
   d. ☐ The defendants named in item 1a are the only defendants who have an interest in the property described in item 2f.
   e. ☐ The following defendants, not named in item 1a, have an interest in the property described in item 2f *(names)*:

*(Continued on reverse)*



Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

2. f. ☐ an undertaking in the amount of $ is a sufficient substitution for the following property which
   (1) ☐ has been attached *(describe)*:

   (2) ☐ is subject to attachment *(describe)*:

   g. ☐ The undertaking is insufficient as follows *(specify)*:

   h. ☐ Defendant has recovered judgment against plaintiff and (1) no timely motion to vacate the judgment or for judgment notwithstanding the verdict or for a new trial has been filed and served and is pending and no appeal has been perfected; and (2) no undertaking has been executed and filed as required by CCP 921.

   i. ☐ Enforcement of plaintiff's judgment is stayed by the filing of a undertaking on appeal and justification of defendant's sureties
      ☐ has been made.
      ☐ has been waived in writing.
      ☐ has been waived by failure to timely object.

   j. ☐ The amount to be secured by the attachment may be reduced by the amount of $

   k. ☐ Other *(specify)*:

**ORDER**

3. IT IS ORDERED

   a. ☐ The Right to Attach Order issued on *(date)*: is set aside.

   b. ☐ The Writ of Attachment issued on *(date)*: is quashed.

   c. ☐ The property levied upon pursuant to the Writ of Attachment issued on *(date)*: is released as follows:
      (1) ☐ all property.
      (2) ☐ property in the amount of $
      (3) ☐ the following property *(describe)*:

   d. ☐ Defendant may substitute an undertaking for property which has been attached as follows:
      (1) amount of undertaking: $
      (2) property *(describe)*:

   e. ☐ Defendant may file an undertaking to prevent the levy upon property as follows:
      (1) amount of undertaking: $
      (2) property *(describe)*:

   f. ☐ An increase in the amount of plaintiff's undertaking is required to a total undertaking of $ An undertaking in this amount shall be filed on or before *(date)*:

   g. ☐ Plaintiff shall file an undertaking by *(date)*: with sufficient sureties.

   h. ☐ The amount to be secured by the attachment is reduced to $

   i. ☐ Other:

   j. Total number of boxes checked in item 3:

Date:

. . . . . *(TYPE OR PRINT NAME)*

▶ _____ *(SIGNATURE OF JUDGE)*



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## §6.110 15. Notice of Lien

This form is reproduced in §11.14.

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## II. WRITS OF POSSESSION

### §6.111 A. Overview

A writ of possession is a prejudgment remedy (also known as "claim and delivery") that allows a plaintiff to obtain possession by levy of personal property that belongs to the plaintiff (or in which the plaintiff has an interest) but was wrongfully obtained or retained by the defendant. This remedy can also be used to obtain possession of property that secures an obligation of the defendant to the plaintiff. Once in possession, the plaintiff may liquidate the personal property to establish any deficiency.

Writs of possession are not always an appropriate remedy. Because such writs are restricted to personal property, unlawful detainer is the appropriate remedy for obtaining possession of real property. See generally California Landlord-Tenant Practice (2d ed Cal CEB 1997). If an obligation is unsecured, a writ of attachment may ensure the availability of property to satisfy an expected judgment. See §§6.1-6.110. To preserve the assets of a going concern, the plaintiff should consider seeking the appointment of a receiver. See §§11.33-11.34.

The entire process of applying for, noticing, opposing, and obtaining the writ is form driven, and may be overseen by such appointed officers as court commissioners. CCP §516.040. Except for the memorandum in support of motion (commonly referred to as a memorandum of points and authorities), which is optional in some jurisdictions and some supporting declarations, Judicial Council Forms are mandatory. Cal Rules of Ct 1.31(a). They include:

- Application for Writ of Possession (CD-100) (see §6.156);
- Notice of Application for Writ of Possession and Hearing (CD-110) (see §6.159);
- Order for Writ of Possession (CD-120) (see §6.161);
- Writ of Possession (CD-130) (see §6.163);
- Undertaking by Personal Sureties (CD-140) (see §6.106);
- Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession (CD-160) (see §6.164);
- Order for Release and Redelivery of Property (CD-170) (see §6.166);
- Declaration for Ex Parte Writ of Possession (CD-180) (see §6.157);
- Application for Temporary Restraining Order (CD-190) (see §6.158);
- Temporary Restraining Order (CD-200) (see §6.162);

A writ of possession can be obtained in an action pending in a federal court sitting in California to the extent it is available under California law. It may also be obtained when the dispute is subject to arbitration. CCP §1281.8.

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## §6.112 B. Checklist: Prefiling Considerations

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- If the basis for the writ of possession is a security interest, double check the security agreement for any irregularities. See generally Secured Transactions in California Commercial Law Practice, chap 2 (2d ed Cal CEB 2001) (Secured Transactions).
- Ensure that any UCC-1 financing statements were timely filed and renewed if necessary. Correctly identify the property and the debtor subject to the security interest. See *Corona Fruits & Veggies, Inc. v Frozsun Foods, Inc.* (2006) 143 CA4th 319, 48 CR3d 868 (in consolidated collection actions by two creditors, first creditor to file failed to perfect security interest in strawberry crop because its UCC-1 financing statement listed debtor's last name incorrectly, so second creditor to file had priority). See generally Secured Transactions, chap 3.
- If the obligation is secured by both personal and real property, be aware of the one-action rule. CCP §726. See *Security Pac. Nat'l Bank v Wozab* (1990) 51 C3d 991, 275 CR 201; *Shin v Superior Court* (1994) 26 CA4th 542, 31 CR2d 587; *Pacific Valley Bank v Schwenke* (1987) 189 CA3d 134, 234 CR 298. See Secured Transactions §5.11.
- Ascertain the value of the property and of the defendant's interest in it. This value will determine the amount of the plaintiff's undertaking. See §§6.136-6.137.
- Ascertain whether the obligation is guaranteed and, if so, review the requirements for providing notice to the guarantor before proceeding against the collateral. See generally Secured Transactions §§5.10, 5.12, 5.30.
- Review any guaranty for a waiver of the obligation to proceed against the primary obligor first. See Secured Transactions §§5.10, 5.12.

A careful review of the relevant documents is essential.

The application for a writ of possession (noticed or ex parte) and supporting papers may be filed either at the same time as the complaint or afterwards.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.113 C. When Available

### §6.113 C. When Available

To obtain a writ of possession, the plaintiff must have either an ownership or a security interest in identifiable personal property. A writ of possession is commonly sought by a plaintiff to obtain specific property when the defendant has:

- Defaulted on a loan or other obligation owed to the plaintiff that is secured by personal property;
- Breached a lease of the plaintiff's property;
- Embezzled or otherwise wrongfully obtained possession of the plaintiff's property; or
- Refused to return property lent or bailed to it by the plaintiff.

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### §6.114 D. Defendants Subject to Writ of Possession

Individuals, corporations, partnerships or other unincorporated associations, limited liability companies, and public entities are subject to writs of possession. CCP §511.070.

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## E. Application for Writ of Possession

### §6.115 1. Timing

An application for a writ of possession may be filed any time after commencement of an action to recover specific property.

Written notice of the application must be served within the following periods (see CCP §1005(b); Cal Rules of Ct 3.1300):

- **Personal service.** 16 court days before the scheduled hearing, if the defendant has not made a general appearance and there is cause for concern that the assets may disappear.
- **Service by mail.** 16 court days plus 5 calendar days before the scheduled hearing, if the defendant has made a general appearance.
- **Substitute service.** 16 court days plus 10 calendar days from date of mailing of the papers before the scheduled hearing, if the defendant has not made a general appearance.

**NOTE:** Since the time for filing the written notice is not set by the claim and delivery statutes, it follows the general deadlines for notice of hearings, as indicated above.

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### §6.116 2. Contents

The application for a writ of possession must be executed under oath and must include (CCP §512.010):

- A statement providing a basis for both the plaintiff's claim and the plaintiff's entitlement to possession of the property. Any written instrument serving as the basis of the plaintiff's claim must be attached.
- A statement explaining how the defendant came into possession of the property, why the defendant's retention of the property is wrongful, and the defendant's reasons for keeping the property. The defendant's reasons may be asserted on the basis of information and belief.
- A particular description of the property and a statement of its value. Serial or model numbers should be provided, if available. Even if the plaintiff has a blanket security interest in the property subject to the writ, the plaintiff may need to identify specific property subject to the writ of possession.
- The location of the property, which may be asserted on the basis of information and belief. If the location is a private place, a showing of probable cause that the property is located there. "Private places" may include private dwellings, commercial establishments, vehicles, or other private locations. See *Blair v Pitchess* (1971) 5 C3d 258, 270, 96 CR 42.
- A statement that the property has not been taken for a tax, assessment, or fine, and has not been seized under an execution against the plaintiff's property, or, if so seized, that it is statutorily exempt from seizure.

**PRACTICE TIP:** Facts in declarations must be set forth with particularity and are subject to evidentiary objections. Unless an exception exists for testimony on information and belief, the declaration must affirmatively show the declarant's ability to testify competently to the facts in the declaration if sworn as a witness. CCP §516.030. Although a verified complaint may be used in lieu of a declaration, its factual statements are subject to the same requirements. See CCP §516.030.

For a form of application, see Judicial Council Form CD-100.

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### §6.117 3. Notice of Hearing

Unless the conditions for proceeding ex parte are satisfied, a writ of possession can issue only after a noticed hearing. CCP §512.020. The Notice of Application for Writ of Possession and Hearing (Judicial Council Form CD-110) must contain all the information required by CCP §512.040, including:

- The date, time, and place of the hearing;
- A statement that the writ will issue if the court finds that the plaintiff's claim is probably valid, but that its actual validity will be decided in subsequent proceedings and will not be affected by the hearing on the application;
- A statement that, to oppose the application, the defendant must file either declarations providing sufficient evidence to defeat the plaintiff's right to issuance of the writ or an undertaking pursuant to CCP §515.020; and
- The following statement:

**If you believe that the plaintiff is not entitled to possession of the property claimed, you may wish to seek the advice of an attorney. You should consult the attorney promptly so that he or she may assist you before the time set for the hearing.**

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### §6.118 4. Service

Before the hearing on the application for a writ of possession, the plaintiff must serve the defendant with (CCP §512.030(a)):

- A copy of the summons and complaint;
- A Notice of Application for Writ of Possession and Hearing (see §6.159); and
- A copy of the application and any supporting declarations and a memorandum in support of motion.

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### §6.119 5. Defendant's Notice of Opposition

The defendant's opposition, if any, to an application for a writ of possession must be filed and served within 9 court days before the date set for the hearing. CCP §1005(b). The defendant is not required to oppose the application; failure to oppose or rebut the plaintiff's evidence does not waive any of the defendant's defenses to the plaintiff's claim and will not affect the defendant's right to produce or exclude evidence at trial. CCP §512.100.

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### §6.119A 6. Plaintiff's Reply Memorandum

If the defendant files a notice of opposition, the plaintiff may file and serve a reply memorandum at least 5 court days before the hearing. CCP §1005(b).

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### §6.120 7. Hearing

The court rules on the writ application based on the pleadings and other papers in the record. For good cause, however, the court may receive and consider additional evidence produced at the hearing, continue the hearing for the production of additional evidence, or a memorandum in support of motion. CCP §512.050. See Cal Rules of Ct 3.1113, 3.1114(b) (court may require supporting memorandum to further interests of justice).

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### §6.121 8. Issuance of Writ of Possession

The writ of possession shall issue if (CCP §512.060):

- The plaintiff has established the probable validity of its claim to possession of the property;
- The plaintiff has provided the required undertaking; and
- When the levying officer must enter a private place to take possession of property, the plaintiff has demonstrated probable cause to believe that the subject property is in the private place.

A claim has "probable validity" when it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim. See CCP §511.090; *Loeb & Loeb v Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1118, 212 CR 830.

When the plaintiff owns the property, a writ may issue even if the defendant has a claim for damages against the plaintiff for breach of contract. See *RCA Serv. Co. v Superior Court* (1982) 137 CA3d 1, 187 CR 602 (lessor entitled to writ of possession for leased equipment despite lessee's claim for equipment defects; lessor's right of possession independent of lessee's damage claim).

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### §6.122 9. Contents of Writ

A writ of possession must (CCP §512.080):

- Be directed to the levying officer in the jurisdiction where the property to be levied on is located;
- Describe the property to be levied on;
- Specify any private place that the levying office must enter to take possession of property;
- Direct the levying officer to levy on the property if found, under CCP §514.010, and to retain the property in custody until released or sold under CCP §514.030; and
- Inform the defendant of the right to object to the plaintiff's undertaking (a copy of which must be attached to the writ) and the right to obtain redelivery of the property by filing an undertaking under CCP §515.020 (see §§6.136-6.142 on undertakings).

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### §6.123 10. Turnover Orders

In conjunction with the writ of possession, the court may also issue an order requiring the defendant to relinquish the property to the plaintiff. The order must notify the defendant that failure to comply with the turnover provisions of the order may subject the defendant to being held in contempt of court. CCP §512.070.

**PRACTICE TIP:** Because the defendant may be held in contempt only if the writ is personally served on the defendant, the defendant's attorney should not be served in lieu of personal service on the defendant.

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### §6.124 11. Termination of TRO

If a temporary restraining order (TRO) is already in place at the time of the hearing on the application (see §6.120), the court must dissolve the TRO if it finds that the plaintiff is not entitled to a writ of possession. If the court does issue an order for issuance of a writ of possession, it may also issue a preliminary injunction to remain in effect until the property is seized under the writ. CCP §513.010(c).

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### §6.125 12. Endorsement for Levy at Private Place Not Specified in Writ

If the plaintiff seeks to obtain possession of property located at a private place not specified in the writ, the plaintiff can apply for an endorsement on the writ directing the levying officer to seize the property at the private place. The plaintiff's application must establish, by declaration, probable cause to believe that the property or some part of it may be found at the private place. CCP §512.090.

**PRACTICE TIP:** The endorsement is a useful device when the levying officer cannot find the property at the location specified in the writ and the plaintiff has learned of a likely alternative location.

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### §6.126 F. Effect of Court's Determinations

The court's decision on an aspect of an application for a writ of possession or for a turnover order does not affect any aspects of the action unrelated to the writ proceedings, nor does it affect the rights of any party in any other action arising from the same claim. The court's findings in connection with the issuance of a writ may not be used as evidence or referred to at trial. CCP §512.110.

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## G. Obtaining Ex Parte Writ of Possession

### §6.127 1. Required Showing

Although courts regard ex parte writs of possession as a drastic and disfavored remedy, they are sometimes appropriate and may be obtained if the plaintiff can show probable cause that any of the following conditions exist (CCP §512.020(b)):

- The defendant obtained possession of the property by feloniously taking it from the plaintiff;

**NOTE:** The writ may not be obtained ex parte if the defendant fraudulently appropriated property entrusted to him or her or obtained possession by false representations, pretense, or embezzlement. CCP §512.020(b)(1).

- The property is a credit card;
- The defendant acquired the property in the ordinary course of the defendant's trade or business for commercial purposes; and
- the property is not necessary for the support of the defendant or the defendant's family;
- an immediate danger exists that the property will become unavailable to levy by transfer, concealment, or removal from the state, or will be substantially impaired in value by acts of destruction or by failure to take reasonable care of the property (see *Sea Rail Truckloads, Inc. v Pullman, Inc.* (1982) 131 CA3d 511, 515, 182 CR 560); and
- ex parte issuance of the writ is necessary to protect the property.

Common circumstances warranting ex parte relief include the defendant's failure to provide books and records, the defendant's opening of accounts at financial institutions other than those allowed in relevant agreements, and the defendant's diversion or concealment of assets.

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### §6.128 2. Service of Ex Parte Writ

The defendant and anyone in possession of the claimed property must be served with a copy of the following documents (CCP §512.020):

- The summons and complaint;
- The Application for Writ of Possession (Ex Parte) (see §6.156);
- Any supporting declarations;

**NOTE:** Facts in declarations must be set forth with particularity and are subject to evidentiary objections. Unless an exception exists for testimony on information and belief, the declaration must affirmatively show the declarant's ability to testify competently to the facts in the declaration if sworn as a witness. CCP §516.030.

- A notice informing the defendant of its right to file a motion to quash the ex parte writ (see CCP §512.050);
- A statement of the requirements for opposing the writ as set forth in CCP §512.040(c); and
- The following statement regarding consultation with an attorney (see CCP §512.040(d)):

**If you believe that the plaintiff is not entitled to possession of the property claimed, you may wish to seek the advice of an attorney. You should consult the attorney promptly so that he or she may assist you before the time set for the hearing.**

Local rules may govern the time for notice to the defendant.

Service on the defendant can be made immediately after the court issues the writ or when the levying officer levies on the property.

**PRACTICE TIP:** It may be worth placing the defendant under surveillance if there is a risk that the defendant will remove the property.

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### §6.129 3. Hearing

If property in the defendant's possession is taken under an ex parte writ of possession, the defendant may apply by noticed motion to have the writ quashed and the property released. CCP §512.020.

**PRACTICE TIP:** The defendant's motion and the plaintiff's motion in opposition, if any, should be supported by a memorandum in support of motion, as well as by supporting declarations filed with the court and served on the opposing party. CCP §512.050.

The court may stay delivery to the plaintiff of levied property pending a hearing on the defendant's motion to quash. CCP §512.020. If the defendant prevails, the court will order the property released to the defendant. The defendant is entitled to any damages proximately caused by the levy and loss of possession.

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## H. Temporary Restraining Orders

### §6.130 1. Considerations

A temporary restraining order (TRO) can be used to prevent the defendant from transferring, concealing, or otherwise alienating property pending the hearing on the plaintiff's application for a writ of possession. A TRO can be particularly effective when the property is money that is easily removable or commingled. It should be considered when the plaintiff cannot make the required showing for an ex parte writ. See *Sea Rail Truckloads, Inc. v Pullman, Inc.* (1982) 131 CA3d 511, 182 CR 560.

In practice, a TRO is easier to obtain than is an ex parte writ of possession because the TRO merely requires the defendant to maintain the status quo pending a hearing, while the writ requires that the property be seized. A TRO is the only ex parte remedy available when the property was not used for commercial purposes. See §6.127. A TRO also poses less risk to the plaintiff of exposure to damages. As long as the plaintiff obtains judgment in the underlying action, it should not be responsible for damages caused by the TRO, even if the court dissolves it and refuses to issue a preliminary injunction. See CCP §512.120. In contrast, if the court quashes an ex parte writ of possession, the plaintiff will be liable for damages caused by the ex parte levy even it obtains judgment in the underlying action. CCP §512.020(b).

The major drawback of a TRO is that it remains in effect only until a noticed hearing is held. See §6.135. If an ex parte writ of possession is obtained, no hearing will be held unless the defendant seeks to quash the writ.

TROs are appealable. CCP §§904.1(a)(6), 904.2(g).

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### §6.131 2. Procedure

In general, the procedures for obtaining a TRO set forth in CCP §§525-527 apply. The plaintiff may seek a TRO concurrently with the application for a writ of possession, or later. CCP §513.010(a). The application for the TRO must be accompanied by a declaration setting forth the grounds justifying its issuance. The Judicial Council has promulgated a form declaration (Judicial Council Form CD-190; see §6.158) for this purpose. The same documents required to support an ex parte application for a writ of possession must be presented when applying for a TRO. See §6.127.

**NOTE:** Parties subject to a contractual agreement to arbitrate their disputes may apply for a TRO if they can show that the arbitration award might be ineffective without such relief. CCP §1281.8(b). To avoid waiving the right to arbitrate, the party applying for a TRO must at the same time apply for a stay of all other proceedings pending arbitration. CCP §1281.8(d).

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### §6.132 3. Scope of TRO

The court has discretion to issue a temporary restraining order prohibiting the defendant from doing any of the following (CCP §513.020):

- Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of or encumbering the property;

**NOTE:** The court may not prohibit the transfer in the ordinary course of business of inventory or farm products held for sale or lease, but it may restrict disposition of the proceeds from such transfer. CCP §513.020(a). For example, the plaintiff may ask the court to prohibit the defendant from using the proceeds to pay other creditors' claims or the salaries of the defendant's management.

- Concealing or otherwise removing the property in a manner making it less available to seizure by the levying officer; or
- Impairing the property's value either by destructive acts or by failure to take reasonable care of the property.

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### 4. Ex Parte TRO

#### §6.133 a. Grounds

The plaintiff can obtain an ex parte TRO pending a hearing if the plaintiff has (CCP §513.010(b)):

- established the probable validity of its claim to possession of the property;
- provided the undertaking required by CCP §515.010(a), unless the court waived the requirement (CCP §515.010(b)); and
- demonstrated the probability of immediate danger that the property claimed may become unavailable to levy through being transferred, concealed, or removed, or may become substantially impaired in value.

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### §6.134 b. Notice

Proper notice in connection with an ex parte application for a TRO requires a declaration that (CCP §527(c)(2); Cal Rules of Ct 3.1204(b)):

- The plaintiff, no later than 10:00 a.m. on the court day before the ex parte appearance, notified the defendant or the defendant's counsel when and where the plaintiff would make the application;
- The plaintiff in good faith attempted to inform the defendant and the defendant's counsel but was unable to do so (specifying the efforts made to contact them); or
- The plaintiff should not be required to inform the defendant or its counsel because of a risk of irreparable harm or because notice would defeat the purpose of the ex parte application.

**PRACTICE TIP:** Conclusory statements are insufficient. The plaintiff must specify the basis for its belief that a risk of irreparable harm exists.

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### §6.135 c. Subsequent Proceedings

If a TRO is granted without notice to the defendant, the matter is made returnable by an order to show cause why a preliminary injunction should not be granted, on the earliest day that the court's business will allow, but no later than 15 days after the TRO is issued (or 22 days for good cause). CCP §527(d)(1). Within 5 days after the date the TRO is issued, or 2 days before the hearing, whichever is earlier, the plaintiff must serve on the defendant a copy of the complaint (if not previously served), the order to show cause stating the date, time, and place of the hearing, any declarations used in the application, and a copy of the supporting memorandum (commonly referred to as a memorandum of points and authorities) filed in support of the TRO application. CCP §527(d)(2).

If the plaintiff is not ready to proceed on the hearing date, or if the plaintiff failed to properly serve the defendant, the court will dissolve the TRO. CCP §527(d)(3). If the plaintiff was unable to make service within the time required and files an affidavit explaining the reasons for its failure, the court may reissue the TRO and set a new hearing date within the time periods allowed by CCP §527(d)(1). CCP §527(d)(5).

The defendant is statutorily entitled to one continuance of the hearing date for a reasonable period of not less than 15 days, but may be a shorter period if the defendant requests. The TRO remains in effect until the date of the continued hearing. CCP §527(d)(4).

If the court rules in the plaintiff's favor at the hearing and issues a preliminary injunction, the plaintiff typically requests that the injunction remain in effect until the claimed property is seized by the levying officer under the writ of possession. See CCP §513.010(c).

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## I. Undertakings

### §6.136 1. Purpose

Before the court issues a TRO, or orders the clerk to issue a writ of possession, the plaintiff must post an undertaking. The undertaking is a form of insurance policy to satisfy any amounts the defendant may recover if issuance of the writ of possession is wrongful. The undertaking binds the sureties to the defendant for the return of the property, if so ordered, and for the payment of any sum the defendant recovers against the plaintiff. CCP §515.010(a).

**PRACTICE TIP:** In practice, the undertaking is posted with the court after the court orders a writ of possession or a TRO.

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### §6.137 2. Amount

The minimum undertaking is twice the value of the defendant's interest in the property. The value of the defendant's interest in the property is determined by the market value of the property, less the amount owed on any conditional sales contract or security agreement and all liens and encumbrances on the property, and other pertinent factors. CCP §515.010.

**PRACTICE TIP:** If the defendant has no interest in the property (*e.g.,* because the property is overencumbered, leaving no equity for the defendant), the plaintiff could theoretically post a bond in a nominal amount. But doing so is very risky. The defendant can recover the property by posting a bond in the same amount. See §6.138. The plaintiff would then have to apply for another writ of possession, which may not be available, and thus may not regain possession of the property until after a judgment of possession is entered in the underlying action.

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### §6.138 3. Defendant's Undertaking, or "Redelivery Bond"

By filing an undertaking in an amount equal to the plaintiff's undertaking, the defendant can prevent the plaintiff from taking possession of property under a writ of possession or a turnover order and may regain possession of property already taken. See *Edwards v Superior Court* (1991) 230 CA3d 173, 178, 281 CR 30.

The undertaking must state that, if the plaintiff prevails in the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain through the loss of the property. The plaintiff's recoverable damages include all damages proximately caused by the plaintiff's failure to gain or retain possession. CCP §515.020. The undertaking must also be executed by two or more proper sureties. CCP §995.310.

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### §6.139 4. Timing of Undertaking

The defendant's undertaking may be filed at any time before the levy (see §§6.146) or within 10 days after the levy under the writ of possession. A copy of the defendant's undertaking must be mailed to the levying officer. CCP §§515.020(b), 515.030(a). Any objection by the plaintiff to the defendant's undertaking must be filed within 10 days after the defendant's undertaking was filed and must be mailed to the levying officer. CCP §515.030(b). The levying officer will hold the property to allow for resolution of the objection, collect the fees and expenses for maintenance of the property, and deliver the property to the plaintiff or the defendant. CCP §§514.030(a)(2)-(3), 515.030(d).

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### 5. Undertaking Disputes

### §6.140 a. Sufficiency of Plaintiff's Undertaking

If the court finds the plaintiff's undertaking to be sufficient, the court will order the levying officer to deliver the property to the plaintiff. CCP §515.030(c).

If the court finds the amount of the plaintiff's undertaking to be insufficient, and the plaintiff does not timely file a sufficient undertaking, the court will vacate any TRO, preliminary injunction, or writ of possession. If the levy has already occurred, the levying officer or the plaintiff must return the property to the defendant. CCP §515.030(c).

The defendant may object to the plaintiff's bond if it is not state approved. Cal Rules of Ct 3.1130.

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### §6.141 b. Sufficiency of Defendant's Undertaking

If the court finds the defendant's undertaking to be insufficient, and if the defendant does not timely file a sufficient undertaking, the court will order the levying officer to deliver the property to the plaintiff, or will order the plaintiff to retain possession, as appropriate.

If the court finds the defendant's undertaking to be sufficient, the levying officer or the plaintiff will be ordered to deliver the property to the defendant. CCP §515.030(d).

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### §6.142 6. Strategic Considerations

Although CCP §515.010 does not limit the amount of the plaintiff's undertaking, the defendant, to retain or regain possession of the property, must file an undertaking in an amount equal to the plaintiff's. See §6.138. Therefore, the plaintiff should consider posting a substantial undertaking to deter the defendant from attempting to regain the property.

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## J. Levy Procedures

### §6.143 1. Coordinating With Levying Officer

Once presented with the writ of possession, the levying officer will search for and take possession of the specified property, either by removing it to a place for safekeeping or by installing a keeper. CCP §514.010(a). The levying officer is the sheriff or marshal in the county where the property is located. CCP §511.060.

The plaintiff should coordinate with the levying officer for each county where property subject to levy is located, ascertain the officer's schedule, pay any required fees, and provide all documents necessary for the levy, including (CCP §§514.010(a), 514.020; Govt C §§26720-26750):

- Instructions signed by the plaintiff or its counsel;
- A conformed copy of the order for issuance of the writ of possession;
- The original writ of possession;
- A conformed copy of the bond, if any;
- The summons and complaint (if not served previously); and
- Any other pleadings or papers requested by the levying officer.

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### §6.144 2. Dwellings

If the property is used as a dwelling, a keeper will be installed for two days at the plaintiff's expense. Subsequently, the levying officer will remove the occupants and any contents not specified in the writ, and take exclusive possession of the property. CCP §514.010(b).

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### §6.145 3. Private Places

If the specified property is in a private place (see §6.116), the levying officer must announce his or her identity, authority, and purpose. If the property is not delivered voluntarily, the levying officer may break into the private place in a manner the officer deems least likely to cause damage. If the officer reasonably believes that entry and seizure will involve a substantial risk of death or serious bodily harm to anyone, he or she must make a return to the court stating the reasons for the belief that the risk exists.

The search and seizure provisions of CCP §514.010 do not authorize the levying officer to enter or search any private place not specified in the writ of possession or other court order.

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### §6.146 4. Delivery of Writ and Undertaking to Defendant

When levying, the officer must deliver to the person in possession of the property a copy of the writ of possession, a copy of the plaintiff's undertaking, if any, and a copy of the order for issuance of the writ. CCP §514.020(a). If no one is in possession of the property at the time of levy, the officer must serve on the defendant the writ, the undertaking, if any, and the order. If the defendant has not appeared in the action, service will be made in the same manner as for a summons and complaint. See CCP §§415.10-415.50. Otherwise, service will be made in accordance with CCP §§1010-1020. CCP §514.020(b).

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### §6.147 5. Return of Writ to Court

The levying officer must return the writ of possession to the court within 30 days after the levy, but in no event more than 60 days after the writ is issued. CCP §514.040.

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### §6.148 6. Cost Considerations

When obtaining property under a writ of possession, the plaintiff can be charged twice for moving and keeping the property: first, for the levying officer's costs to initially remove and store the property, and second, when the property is removed from the levying officer's storage place and stored elsewhere. For property that is difficult to move or requires special care, this process can be expensive.

To avoid paying double expenses, the plaintiff should coordinate moving and storage with the levying officer. The levying officer will sometimes permit the plaintiff to designate a moving company and storage facility, which must be bonded, allowing the officer to transfer possession of the property without requiring the plaintiff to physically remove the property from the levying officer's safekeeping.

Alternatively, once the court has entered the order for issuance of the writ of possession, the plaintiff should consider asking the defendant to surrender the property voluntarily. If the parties' contract provides for recovery of costs and expenses incurred in the action or in obtaining possession of the property, the defendant may prefer to surrender the property to minimize its liability for such costs.

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## K. Treatment of Property After Levy

### §6.149 1. Property in Possession of Levying Officer

After taking possession of the property, the levying officer keeps the property in a secure place for 10 days to allow the defendant time to file an undertaking for redelivery or an objection to the plaintiff's undertaking. CCP §514.030(a)(1).

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### §6.150 a. Delivery to Plaintiff

If, within 10 days after the levy, the levying officer has not been notified by the defendant of the filing of an undertaking for redelivery (see §6.138) or of an objection to the plaintiff's undertaking (see §6.140), the levying officer will deliver the property to the plaintiff, as long as the officer has received its fees for taking and storing the property. CCP §514.030(a)(1). The plaintiff may then sell the property to establish the amount of any deficiency. Com C §§9610-9611, 9615.

Before liquidating the property, the plaintiff should assess the risk of losing at trial. Furthermore, if the plaintiff chooses to liquidate the property, it must comply with the technical requirements of Com C §§9610-9611, or risk losing any deficiency. The requirements of those sections are beyond the scope of this chapter, but they include (1) accounting for any surplus, (2) timely notice to the defendant of the liquidation, and (3) timely notice to any guarantor. See *Ford & Vlahos v ITT Commercial Fin. Corp.* (1994) 8 C4th 1220, 36 CR2d 464; *C.I.T. Corp. v Anwright Corp.* (1987) 191 CA3d 1420, 237 CR 108; *Connolly v Bank of Sonoma County* (1986) 184 CA3d 1119, 229 CR 396. See generally Secured Transactions in California Commercial Law Practice, chap 5 (2d ed Cal CEB 2001).

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### §6.151 b. Delivery to Defendant

If, within 10 days after levy of the property, the levying officer receives notice that the defendant has filed an undertaking for redelivery of the property, and the plaintiff has not timely objected to the defendant's undertaking, the officer will return the property to the defendant on receiving the balance due for taking and keeping the property. If the plaintiff objects to the defendant's undertaking, the levying officer must retain the property until the plaintiff's objection is resolved under CCP §515.030. CCP §514.030(a)(3). If the property has already been delivered to the plaintiff, and the plaintiff does not object to the defendant's undertaking, the plaintiff must redeliver the property to the defendant. CCP §515.020(d).

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### §6.152 2. Perishable or Depreciating Property

If the defendant has not filed an undertaking for redelivery of property in the levying officer's or plaintiff's possession (see §6.138), the court may order the sale of any property that is perishable, deteriorating, or depreciating in value, or if for some other reason a sale would best serve the parties' interests. The proceeds of the sale are deposited with the court pending judgment. CCP §514.040(b).

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## §6.153 3. Third Party Claims

When a third party claims levied property, the provisions of CCP §720.010 on third party claims apply.

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### §6.154 L. Plaintiff's Failure to Prevail

If the plaintiff fails to recover judgment in the action, the plaintiff must return the levied property to the defendant. The plaintiff is liable for all of the defendant's damages proximately caused by any TRO, preliminary injunction, levy, or turnover order obtained by the plaintiff in the action. CCP §512.120.

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### §6.155 M. Unsuccessful Levy

If the levying officer cannot find the property at the identified location, the plaintiff may conduct discovery to learn the correct location or disposition and may obtain an additional writ or endorsement. The plaintiff may also hire an investigator to find the property.

**PRACTICE TIP:** If the court's Order for Writ of Possession contains a turnover order (see item 5g on Judicial Council Form CD-120; §6.161) and if the order was personally served on the defendant, the plaintiff should consider contacting the defendant (or plaintiff's counsel should consider contacting defendant's counsel) and explaining that failure to turn over the property in compliance with the order may subject the defendant to contempt of court.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/ N. Judicial Council Forms for Writs of Possession/§6.156 1. Form: Application for Writ of Possession After [Ex Parte] Hearing and for Temporary Restraining Order (Judicial Council Form CD-100)

## N. Judicial Council Forms for Writs of Possession

### §6.156 1. Form: Application for Writ of Possession After [Ex Parte] Hearing and for Temporary Restraining Order (Judicial Council Form CD-100)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **APPLICATION FOR WRIT OF POSSESSION** ☐ **AFTER HEARING**<br>☐ **EX PARTE** ☐ **AND FOR TEMPORARY RESTRAINING ORDER** | CASE NUMBER: |

1. Plaintiff* has filed a complaint and makes claim for delivery of property in the possession of the defendant named in b.
   a. Plaintiff *(name):*
   b. Defendant *(name):*

2. Plaintiff applies for *(check all that apply):*
   a. ☐ Writ of possession after hearing (Code Civ. Proc, (C.C.P.), § 512.010).
   b. ☐ Ex parte writ of possession (C.C.P., § 512.020). *(File* Declaration for Ex Parte Writ of Possession, *form CD-180.)*
   c. ☐ Temporary restraining order (C.C.P., § 513.010). *(File* Application for Temporary Restraining Order, *form CD-190.)*
3. The basis of the plaintiff's claim and right to possession of the claimed property is specified in ☐ a written document, a copy of which is attached. ☐ the verified complaint. ☐ the attached declaration. ☐ the following facts *(specify):*

4. Claimed property *(Describe, state value, and further identify any property that is a farm product (Code Civ.Proc., § 511.040) or inventory held for sale or lease (Code Civ. Proc., § 511.050)):*

☐ Continued on Attachment 4.

* "Plaintiff" includes cross-complainant, "defendant" includes cross-defendant, and "complaint" includes cross-complaint.



Form Adopted for Mandatory Use
Judicial Council of California
CD-100 [Rev. January 1, 2006]

**APPLICATION FOR WRIT OF POSSESSION**
**(Claim and Delivery)**

Code Civ. Proc. § 512.010
www.courtinfo.ca.gov

Print

| PLAINTIFF: | CASE NUMBER: |
|---|---|
| DEFENDANT: | |

5. A showing that the claimed property is wrongfully detained by defendant, of how the defendant came into possession of the claimed property, and, according to Plaintiff's best knowledge, information, and belief, of the reason for the defendant's detention of the claimed property, is made ☐ in the verified complaint. ☐ in the attached declaration. ☐ as follows *(specify):*

6. To Plaintiff's best knowledge, information, and belief the claimed property or some part of it is located as stated
☐ in the verified complaint. ☐ in the attached declaration. ☐ as follows (specify):
*(Include in this statement whether any part of the claimed property is within a private place that may have to be entered to take possession. If so, complete item 7.)*

7. ☐ Facts showing probable cause for belief that the claimed property or some part of it is located in the private place referred to in item 6 are specified ☐ in the verified complaint. ☐ in the attached declaration. ☐ as follows:

8. The claimed property has not been taken for a tax, assessment, or fine, pursuant to statute, and *(check one):*
   a. ☐ has not been seized under an execution against the plaintiff's property.
   b. ☐ has been seized under an execution against the plaintiff's property, but is exempt from such seizure under *(code section):*

9. ☐ This action is subject to the ☐ Unruh Retail Installment Sales Act (Civ. Code, §§ 1801-1812.10);
☐ Rees-Levering Motor Vehicle Sales and Finance Act (Civ. Code, §§ 2981-2984.4).
Facts showing that this is the proper court are specified in the ☐ verified complaint. ☐ attached declaration.

10. Total number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated:

▶ _____ _____
(TYPE OR PRINT NAME) (PLAINTIFF'S SIGNATURE)





**APPLICATION FOR WRIT OF POSSESSION**
**(Claim and Delivery)**

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). This form has sections for all the information required for a noticed application, an ex parte application, and a TRO. The information set forth in the application should be supported by a verified complaint, supporting declarations, or both. The court must be presented with facts sufficient to show that the declarant and the information are credible and reliable. See CCP §511.090, stating that a claim has "probable validity" if it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.157 2. Form: Declaration for Ex Parte Writ of Possession (Judicial Council Form CD-180)

## §6.157 2. Form: Declaration for Ex Parte Writ of Possession (Judicial Council Form CD-180)

Print

CD-180

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **DECLARATION FOR EX PARTE WRIT OF POSSESSION** | CASE NUMBER: |

1. ☐ A showing that the defendant* gained possession of the property described in the application, which was not entrusted to the defendant, by feloniously taking such property from the plaintiff* by means other than by false or fraudulent representation, pretense, or embezzlement is made in the ☐ verified complaint. ☐ attached declaration. ☐ as follows:

2. ☐ A showing that the property described in the application is a credit card is made in the ☐ verified complaint ☐ attached declaration ☐ as follows:

3. ☐ A showing that the defendant acquired possession of the property described in the application in the ordinary course of trade or business for commercial purposes, and (a) the property is not necessary for the support of the defendant or the defendant's family; (b) there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed or removed from the state, or will become substantially impaired in value by acts of destruction, or by failure to take care of the property in a reasonable manner; and (c) the ex parte issuance of a writ of possession is necessary to protect the property is made in the ☐ verified complaint. ☐ attached declaration. ☐ as follows:

4. The plaintiff ☐ has ☐ has not filed an undertaking under Code of Civil Procedure section 515.010.
5. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

_____ ▶ _____
(TYPE OR PRINT PLAINTIFF'S NAME) (PLAINTIFF'S SIGNATURE)

* "Plaintiff" includes cross-complainant, and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-180 [Rev. January 1, 2006]

**DECLARATION FOR EX PARTE WRIT OF POSSESSION**
**(Claim and Delivery)**

Code Civ. Proc., §§ 512.010; 512.020
www.courtinfo.ca.gov

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a).

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.158 3. Form: Application for Temporary Restraining Order (Judicial Council Form CD-190)

## §6.158 3. Form: Application for Temporary Restraining Order (Judicial Council Form CD-190)

Print

CD-190

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **APPLICATION FOR TEMPORARY RESTRAINING ORDER** | CASE NUMBER: |

1. Plaintiff* *(name):* has filed an application for a writ of possession and
   a. ☐ a hearing has not been set.
   b. ☐ a hearing will be held on *(date):* Time: ☐ Dept.: ☐ Rm.:

2. Plaintiff requests a temporary restraining order that will apply to *(check all that apply):*
   a. ☐ the farm products (Code Civ. Proc., § 511.040) held for sale or lease described in the application for writ of possession.
   b. ☐ the inventory (Code Civ. Proc., § 511.050) described in the application for writ of possession.
   c. ☐ the property (other than the above) described in the application for writ of possession.

3. Plaintiff requests that defendant *(name):*
   be prohibited from *(check all that apply):*
   a. ☐ transferring any interest in the property referred to in items 2a or 2b by sale, pledge, or grant of security interest or otherwise disposing of or encumbering it, except in the ordinary course of business.
   b. ☐ transferring any interest in the property referred to in item 2c by sale, pledge, or grant of security interest or otherwise disposing of or encumbering it.
   c. ☐ concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer.
   d. ☐ impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner *(specify any needed precautions):*

* "Plaintiff" includes cross-complainant and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-190 [Rev. January 1, 2006]

**APPLICATION FOR TEMPORARY RESTRAINING ORDER**
**(Claim and Delivery)**

Code Civ. Proc., §§ 513.010, 513.020
www.courtinfo.ca.gov

Print

CD-190

| PLAINTIFF: | CASE NUMBER: |
| --- | --- |
| DEFENDANT: | |

4. ☐ Plaintiff requests the following restrictions on the disposition of the proceeds of a transfer of the property described in items 2a or 2b in the ordinary course of business *(specify):*

5. ☐ Facts showing the probability that there is an immediate danger that the property referred to in item 2 may become unavailable to levy by reason of being transferred, concealed, or removed or may become substantially impaired in value are specified ☐ in the verified complaint. ☐ in the attached declaration. ☐ as follows:

6. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT PLAINTIFF'S NAME) (PLAINTIFF'S SIGNATURE)



*Comment:* Use of this form is mandatory (Cal Rules of Ct 1.31(a)) for either a noticed or an ex parte application for a TRO. See CCP §513.010. The expiration date is either 15 days after the date of the order or, on a finding of good cause by the court, 22 days. CCP §527(a).

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.159 4. Form: Notice of Application for Writ of Possession and Hearing (Judicial Council Form CD-110)

## §6.159 4. Form: Notice of Application for Writ of Possession and Hearing (Judicial Council Form CD-110)



CD-110

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **NOTICE OF APPLICATION FOR WRIT OF POSSESSION AND HEARING** | CASE NUMBER: |

TO DEFENDANT* *(name):*

1. A hearing on the plaintiff's application for a writ of possession for levy on personal property described in the application, including attachments, claimed to be wrongfully detained by you, will held be in this court, as follows:

   a. Date: Time: ☐ Dept.: ☐ Rm.:

   b. Address of court: ☐ same as noted above ☐ is *(specify):*

2. The writ of possession will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. This hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in later proceedings in the action and will not be affected by the decision at the hearing on the application for the writ.
3. If you wish to oppose the issuance of the writ, you must file with this court and serve on the plaintiff's attorney, or on the plaintiff if the plaintiff has no attorney, one or more declarations providing evidence sufficient to defeat the plaintiff's right to issuance of the writ.
4. If you fail to oppose the issuance of the writ, the court at the hearing may do the following:
   a. Order that a writ of possession be issued.
   b. Order that you or anyone in possession transfer possession of the claimed property to the plaintiff (Code Civ. Proc., § 512.070).
   c. Grant injunctive or other relief.
5. If a writ of possession is issued, you may stay the delivery of the property or regain possession of property taken under the writ by filing an undertaking with the court in accordance with Code of Civil Procedure section 515.020.
6. **IF YOU BELIEVE THE PLAINTIFF MAY NOT BE ENTITLED TO POSSESSION OF THE PROPERTY CLAIMED, YOU MAY WISH TO SEEK THE ADVICE OF AN ATTORNEY. SUCH ATTORNEY SHOULD BE CONSULTED PROMPTLY SO THAT HE OR SHE MAY ASSIST YOU BEFORE THE TIME SET FOR THE HEARING.**

Dated:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY)

* "Plaintiff" includes cross-complainant, and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-110 [Rev. January 1, 2006]

**NOTICE OF APPLICATION FOR WRIT OF POSSESSION AND HEARING**
**(Claim and Delivery)**

Code Civ. Proc., § 512.040
www.courtinfo.ca.gov

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). The plaintiff must serve this form *unless* proceeding ex parte. It contains all the information the plaintiff must provide to the defendant under CCP §512.040.

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### §6.160 5. Memorandum in Support of Motion

A memorandum in support of motion (commonly referred to as a memorandum of points and authorities) for the writ application is optional in some jurisdictions. Some courts require a supporting memorandum if the plaintiff seeks a particular type of relief. For example, in the Los Angeles Superior Court, a plaintiff seeking a turnover order typically must support the request with a memorandum in support of motion.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.161 6. Form: Order for Writ of Possession (Judicial Council Form CD-120)

## §6.161 6. Form: Order for Writ of Possession (Judicial Council Form CD-120)

Print

CD-120

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **ORDER FOR WRIT OF POSSESSION**<br>☐ **AFTER HEARING** ☐ **EX PARTE** | CASE NUMBER: |

**AFTER HEARING**

1. ☐ The application of the plaintiff* for a writ of possession was heard as follows *(check boxes in 1c and 1d to indicate personal presence at the hearing):*
   a. Judicial Officer *(name):*
   b. Hearing date: Time: ☐ Dept.: ☐ Rm.:
   c. ☐ Plaintiff *(name):* ☐ Attorney *(name):*
   d. ☐ Defendant *(name):* ☐ Attorney *(name):*

**EX PARTE**

2. ☐ The application of the plaintiff for an ex parte writ of possession has been considered by the court.
3. **The court finds:**
   a. ☐ Defendant has been properly served as required by Code of Civil Procedure section 512.030. *(Do not check this item if the application is ex parte.)*
   b. Plaintiff ☐ has ☐ has not filed an undertaking as required by Code of Civil Procedure section 515.010.
   c. Plaintiff has established the probable validity of the plaintiff's claim to possession of the following property *(specify):*

   ☐ Continued on Attachment 3c.
   d. ☐ There is probable cause to believe this property or some part of it is located at one or more of the following private places *(specify):*

   ☐ Continued on Attachment 3d.

*"Plaintiff" includes cross-complainant, and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-120 [Rev. January 1, 2006]

**ORDER FOR WRIT OF POSSESSION**
**(Claim and Delivery)**

Code Civ. Proc., §§ 512.020; 512.030; 512.070; 514.010–514.050; 515.010
www.courtinfo.ca.gov

Print

CD-120

| PLAINTIFF: | CASE NUMBER: |
|---|---|
| DEFENDANT: | |

## ADDITIONAL FINDINGS FOR EX PARTE ISSUANCE OF WRIT OF POSSESSION

4. ☐ **The court also finds:**
   a. ☐ Defendant gained possession of the property described in item 3c, which was not entrusted to the defendant, by feloniously taking such property from the plaintiff by means other than by false or fraudulent representation, pretense, or embezzlement.
   b. ☐ The property is a credit card.
   c. ☐ Defendant acquired possession of this property in the ordinary course of the defendant's trade or business for commercial purposes, and (1) the property is not necessary for the support of the defendant or the defendant's family; (2) there is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed or removed from the state, or will become substantially impaired in value by acts of destruction, or by failure to take care of the property in a reasonable manner; and (3) the ex parte issuance of a writ of possession is necessary to protect the property.
   d. Total number of boxes checked in item 4: _____

## ORDERS

5. **IT IS ORDERED**
   a. The clerk of this court is directed to issue a writ of possession as provided in Code of Civil Procedure section 512.020, directing the sheriff or marshal within whose jurisdiction the property described in item 3c, or some part of it, is located, to seize such property and retain custody of it as provided in Code of Civil Procedure sections 514.010–514.050.
   b. ☐ The clerk is directed to issue the writ of possession immediately.
   c. ☐ The clerk is directed to issue the writ of possession upon the plaintiff's filling of a written undertaking, as required by Code of Civil Procedure section 515.010, in the amount of: $
   d. The written undertaking required by the defendant for redelivery or to stay delivery is in the amount of: $
   e. The clerk of this court is directed to attach a copy of this order and a copy of the plaintiff's undertaking to the writ of possession.
   f. The sheriff or marshal may enter the following private place(s) to take possession of the property or some part of it:

   ☐ Continued on Attachment 5f.

   g. ☐ Defendant *(name):*
   is ordered to transfer possession of the property described in item 3c to the plaintiff. (Code Civ. Proc., § 512.070.)

**NOTICE TO DEFENDANT: Failure to comply with an order of the court to turn over possession of such property to the plaintiff may subject you to being held in contempt of court.**

6. Number of pages attached: _____

Dated:

_____
(JUDICIAL OFFICER)

☐ Signature follows last attachment.



*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). This form reflects whether the application was noticed or ex parte, and the corresponding appropriate findings. When an Order for Writ of Possession is issued, the court may also order the defendant to transfer possession of the claimed property to the plaintiff. See item 5g. It is advisable for the plaintiff to request such an order for two reasons: First, the defendant may deliver the property to the plaintiff pursuant to the turnover order, avoiding the time and expense of having a levying officer seize it. Second, a

defendant that is personally served with the Order for Writ of Possession may be held in contempt for failing to comply with the turnover order. CCP §512.070. Using this form gives the plaintiff greater leverage in negotiating a voluntary turnover of the property.

**PRACTICE TIP:** It is common to bring the proposed order, writ, and undertaking to the hearing, permitting the clerk to issue the writ immediately.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.162 7. Form: Temporary Restraining Order (Judicial Council Form CD-200)

## §6.162 7. Form: Temporary Restraining Order (Judicial Council Form CD-200)

Print

**CD-200**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **TEMPORARY RESTRAINING ORDER** | CASE NUMBER: |

1. The application of plaintiff* *(name):*
   for a temporary restraining order having been considered by the court, the court finds:
   a. Plaintiff has filed an undertaking as required by Code Civ. Proc., § 515.010, in the amount of: $
   b. Plaintiff has established the probable validity of plaintiff's claim to possession of the following property *(describe):*

   ☐ Continued on Attachment 1b.
   c. Plaintiff has established the probability that there is an immediate danger that the above-described property
   ☐ may become unavailable to levy. ☐ may become substantially impaired in value.

**IT IS ORDERED**

2. Defendant *(name):*
   is restrained from doing the following:
   a. ☐ Transferring any interest by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering
      (1) ☐ the following property *(specify):*

      ☐ Continued on Attachment 2a.
      (2) ☐ except in the ordinary course of business, the following farm products held for sale or lease:

      ☐ Continued on Attachment 2a.
      (3) ☐ except in the ordinary course of business, the following inventory:

      ☐ Continued on Attachment 2a.

* "Plaintiff" includes cross-complainant, and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-200 [Rev. January 1, 2006]

**TEMPORARY RESTRAINING ORDER**
**(Claim and Delivery)**

Code Civ. Proc., §§ 513.010, 513.020; 527
www.courtinfo.ca.gov

Print

CD-200

| PLAINTIFF: DEFENDANT: | CASE NUMBER: |
|---|---|

2. b. ☐ Concealing or otherwise removing the following property in such manner as to make it less available to seizure by the levying officer *(describe):*

☐ Continued on Attachment 2b.

c. ☐ Impairing the value of

(1) the following property *(describe):*

☐ Continued on Attachment 2c.

(2) either by acts of destruction or by failure to care for the property in a reasonable manner, including the following acts:

☐ Continued on Attachment 2c.

d. ☐ Disposing of the proceeds from the transfer of any interest in

(1) ☐ the following farm products held for sale or lease *(describe):*

☐ Continued on Attachment 2d.

(2) ☐ the following inventory *(describe):*

☐ Continued on Attachment 2d.

e. Number of boxes checked in item 2: _____

3. ☐ The clerk of this court is directed to attach a copy of plaintiff's undertaking to this order.

4. This order will have no force or effect after *(date):* (Code Civ. Proc., §§ 513.010(c), 527.)

5. Number of pages attached: _____

Date:

(JUDICIAL OFFICER)

☐ Signature follows last attachment.



*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). The plaintiff files and serves this form when the court has granted the request for a TRO. This form includes the required findings for issuance of the TRO and special restraining provisions for the claim and delivery context, including the discretionary provisions of CCP §513.020. See §6.132.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.163 8. Form: Writ of Possession (Judicial Council Form CD-130)

## §6.163 8. Form: Writ of Possession (Judicial Council Form CD-130)

Print

CD-130

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **WRIT OF POSSESSION** ☐ **AFTER HEARING** ☐ **EX PARTE** | CASE NUMBER: |

TO THE SHERIFF OR ANY MARSHAL OF THE COUNTY OF

YOU ARE DIRECTED:

1. To levy upon and retain in your custody, until released or sold (Code Civ. Proc., § 514.030), the following property or any part of it *(specify):*

2. To enter the following private place or places to take possession of the above-described property or some part of it *(specify exact locations):*

3. To return this writ and the certificate of your proceedings within 30 days after levy and service, but in no event later than 60 days after issuance of this writ.

Dated: Clerk, by _____, Deputy

| (SEAL) | **NOTICE TO DEFENDANT:** The plaintiff has filed with the court a written undertaking, a copy of which is attached. You have the right to object to the plaintiff's undertaking on a ground specified in Code of Civil Procedure section 995.920 and in the manner provided in Code of Civil Procedure section 515.030 or to obtain redelivery of the property by filing a written undertaking of your own, in an amount equal to the plaintiff's undertaking or as determined by the court under Code of Civil Procedure sections 515.010 and 515.020. You also have other rights under Code of Civil Procedure sections 512.020–512.120.<br>If your property has been taken under an ex parte writ of possession, you may apply under Code of Civil Procedure section 512.020(b) for an order that the writ be quashed, any property levied on be released, and for other relief as provided in that section, including an award of damages for any loss sustained by you as a proximate result of the levy. |
|---|---|



Form Adopted for Mandatory Use
Judicial Council of California
CD-130 [Rev. January 1, 2006]

**WRIT OF POSSESSION**
**(Claim and Delivery)**

Code Civ. Proc., §§ 512.020–512.120
www.courtinfo.ca.gov

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). This writ instructs the levying officer to levy on the property identified in the writ and to enter a specified private place if necessary to conduct the levy.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.164 9. Form: Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession (Judicial Council Form CD-160)

## §6.164 9. Form: Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession (Judicial Council Form CD-160)



CD-160

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **APPLICATION AND NOTICE OF APPLICATION AND HEARING FOR ORDER TO QUASH EX PARTE WRIT OF POSSESSION** | CASE NUMBER: |

TO PLAINTIFF* *(name):*

1. **You are notified** that defendant *(name):*
   applies for *(check all that apply):*
   a. ☐ An order to quash the ex parte writ of possession issued on *(date):* and an order releasing any levied property.
   b. ☐ Damages sustained by the defendant proximately caused by the levy of the writ of possession and the loss of possession of the property caused by the levy under Code of Civil Procedure section 512.020(b)(3)(iii).
   c. ☐ An order staying delivery of the property pending the court hearing.
2. A hearing will be held in this court, as follows:

| | | | | | |
|---|---|---|---|---|---|
| a. Date: | Time: | ☐ | Dept.: | ☐ | Rm.: |

   b. Address of court: ☐ same as noted above ☐ is *(specify):*

3. This application is made on the ground that the plaintiff is not entitled to a writ of possession. This application is supported by the ☐ verified answer ☐ attached declaration or declarations and attached memorandum of points and authorities.
4. Number of pages attached: _____

Dated:

_____ ▶ _____
(TYPE OR PRINT NAME OF DEFENDANT OR ATTORNEY) (SIGNATURE OF DEFENDANT OR ATTORNEY)

* "Plaintiff" includes cross-complainant, and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-160 [Rev. January 1, 2006]

**APPLICATION AND NOTICE OF APPLICATION AND HEARING FOR ORDER TO QUASH EX PARTE WRIT OF POSSESSION (Claim and Delivery)**

Code Civ. Proc., §§ 512.020, 512.050
www.courtinfo.ca.gov

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). If the plaintiff levies on a writ obtained ex parte, the defendant uses this form to provide the information required by CCP §512.020. See §§6.127-6.129.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.165 10. Form: Notice of Exception to Sureties and Hearing on Justification of Sureties (Judicial Council Form CD-150) [Deleted]

## §6.165 10. Form: Notice of Exception to Sureties and Hearing on Justification of Sureties (Judicial Council Form CD-150) [Deleted]

This form has been revoked by the Judicial Council of California, effective January 1, 2006.

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**Source:** Business Law/Debt Collection Practice in California/6 Prejudgment Remedies/§6.166 11. Form: Order for Release and Redelivery of Property (Judicial Council Form CD-170)

## §6.166 11. Form: Order for Release and Redelivery of Property (Judicial Council Form CD-170)

Print

**CD-170**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **ORDER FOR RELEASE AND REDELIVERY OF PROPERTY** | CASE NUMBER: |

1. The application of defendant* *(name):*
   for an order to quash the ex parte writ of possession came on for hearing as follows *(check boxes in 1c and 1d to indicate personal presence at the hearing):*
   a. Judicial officer *(name):*
   b. Hearing date: Time: ☐ Dept.: ☐ Rm.:
   c. ☐ Plaintiff *(name):* ☐ Attorney *(name):*
   d. ☐ Defendant *(name):* ☐ Attorney *(name):*

2. **The court finds**
   a. The plaintiff* has been properly served as required by Code of Civil Procedure section 512.020.
   b. The plaintiff is not entitled to the ex parte writ of possession issued on *(date):*
   c. ☐ The defendant named in item 1 has suffered damages, proximately caused by the levy of the ex parte writ of possession and the loss of possession of the property under such levy, in the amount of: $

3. **IT IS ORDERED**
   a. The ex parte writ of possession issued on *(date):* is quashed.
   b. ☐ Plaintiff *(name):*
      is ordered to deliver immediately the personal property described in the ex parte writ of possession to the defendant named in item 1 or designee *(name):*
   c. ☐ The levying officer is directed to remove any keeper placed in charge of the property and immediately deliver the personal property levied on under the ex parte writ of possession to the defendant named in item 1 or to the defendant's designee *(name):*
   d. ☐ Defendant *(name):*
      is awarded damages against the plaintiff named in item 3b in the amount of: $

Date:

(JUDICIAL OFFICER)

* "Plaintiff" includes cross-complainant, and "defendant" includes cross-defendant.



Form Adopted for Mandatory Use
Judicial Council of California
CD-170 [Rev. January 1, 2006]

**ORDER FOR RELEASE AND REDELIVERY OF PROPERTY**
**(Claim and Delivery)**

Code Civ. Proc., § 512.020
www.courtinfo.ca.gov

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a). If the defendant successfully quashes an ex parte writ, this form has sections for the information required to release and redeliver the property to the defendant under CCP §512.020.

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# 7

# Obtaining, Renewing, and Satisfying Judgment

**Richard L. Enkelis**

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## §7.1 I. SCOPE

After a complaint in a debt collection action has been filed, the parties may proceed as in any other civil action. On responses to the complaint, see chap 4. It is beyond the scope of this chapter to discuss all the procedures available to the parties. The procedures discussed in this chapter are discovery (see §§7.2-7.3); default judgments (see §§7.4-7.11); methods of obtaining judgments without trial (see §§7.12-7.25); judgments after trial (see §§7.26-7.30A); costs, attorney fees, and interest (see §§7.31-7.41); preliminary steps to enforce judgment (see §§7.44-7.57); joint debtor proceedings (see §§7.58-7.64); renewal of judgment (see §§7.65-7.70); and satisfaction of judgment (see §§7.74-7.77).

**NOTE:** This chapter deals with collection cases in the prejudgment stages. There are significant differences between discovery in the prejudgment stage and during judgment enforcement. For example, many privileges that apply to prejudgment discovery do not apply to postjudgment discovery in locating assets. In addition, there is no direct method of delivering a document subpoena to a third party witness in the postjudgment situation. On the other hand, there is a wider scope of allowable discovery in judgment enforcement. For a complete discussion of discovery in the postjudgment stages, see chap 8.

For other available procedures and detailed discussion of civil procedure before and during trial, see California Civil Procedure Before Trial (4th ed Cal CEB 2004) and California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995).

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## II. DISCOVERY

### §7.2 A. Statutory Authority

Statutory authority for discovery is in CCP §§2016.010-2036.050. Creditors and debtors, as parties, have the right to conduct discovery proceedings until 30 days before trial and have the right to have motions heard concerning discovery until 15 days before the trial date. CCP §2024.020(a). Discovery may be conducted within 30 days before trial by leave of court. CCP §2024.050(a). On the right to conduct discovery pertaining to experts until 10 days before the trial date, see CCP §2024.030. Counsel should be aware, however, that in "limited civil cases" (*i.e.,* cases involving jurisdictional amounts of $25,000 or less; see CCP §§85-86) there are limitations on the total amount of discovery that is permitted without leave of court, and limitations on depositions and other specific forms of discovery. See generally CCP §§90-100 (Economic Litigation for Limited Civil Cases, formerly Economic Litigation for Municipal and Justice Courts); see §3.67.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.3 B. Particular Applicability of Requests for Admissions

## §7.3 B. Particular Applicability of Requests for Admissions

Plaintiff's counsel in collection cases can often make effective use of requests for admissions under CCP §§2033.010-2033.740. See §§5.4-5.14. For example, it may be crucial at trial to prove that the defendant signed a certain document. Although the defendant can be required to appear at trial if given notice under CCP §1987(b)-(c), it may be better practice to obtain this admission from the defendant as a pretrial matter under CCP §§2033.010-2033.740. One obvious advantage is that if the defendant denies in response to a request for admission that his or her purported signature is genuine, the attorney can search for other evidence tending to establish its authenticity. Also, plaintiff's counsel will be alerted to the possibility that the plaintiff may have a bad case, if the defendant is telling the truth in denying the signature.

Requests for admission can also be used to get the defendant to admit that it is the entity identified in the invoice and statement; that it ordered the goods, received the goods, and received them in a timely manner; that what was received was free from defects; and that the defendant failed to pay for those goods.

If such facts are admitted or if the defendant has totally failed to respond to the request for admissions within 30 days as required by CCP §2033.250(a), the plaintiff may be able to obtain summary judgment. See §7.23. This may be done by a motion to have facts and documents deemed admitted (see CCP §2033.280(b)) and a separate motion for summary judgment based on the admitted facts and documents. Some courts require that two separate motions be brought on two separate law and motion calendars. Other courts accept that the motions are interrelated and allow them to be filed at the same time and heard on the same calendar. In those instances, the court generally hears the motion to have facts and documents deemed admitted first, followed immediately by the motion for summary judgment based on those admissions.

For a thorough discussion of requests for admissions, including forms, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006). See also California Trial Practice: Civil Procedure During Trial §§12.122-12.134 (3d ed Cal CEB 1995).

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## III. DEFAULT JUDGMENTS

### §7.4 A. Default and Debt Collection Practice

The simplest method of obtaining a judgment in a collection case is by default, when the defendant or cross-defendant fails to file a responsive pleading in the required time or files an improper pleading that is not accepted by the court. CCP §§585-586.

There are no legal consequences to being in default until the plaintiff obtains entry of the defendant's default. Accordingly, the defendant may file a responsive paper even though the time to respond has expired, if the defendant's default has not been entered.

After service of the summons and complaint, unrepresented debtors sometimes contact the plaintiff's attorney to try to arrange a payment schedule or to dispute the validity of the debt. A creditor's attorney who is so contacted should avoid any action that might give the debtor grounds to have the default vacated if a satisfactory settlement is not made and application for default is eventually made. For example, if the debt is disputed, the attorney should advise the debtor to consult an attorney or file an answer on his or her own behalf to prevent a default judgment. If settlement discussions between the attorney and the debtor have fallen apart, the attorney may want to notify the debtor in writing that a default will be taken if the debtor does not answer within a specified number of days.

Note that when a complaint has been served and a default occurs, and thereafter the complaint is amended as to a matter of substance (*e.g.,* by requesting damages greater than those specified in the original complaint), the amended complaint must be served as provided for service of summons in CCP §§413.10-417.40. In *Engebretson & Co. v Harrison* (1981) 125 CA3d 436, 178 CR 77, entry of a default judgment when there had been no proper service of an amended complaint was held improper, and the default judgment was vacated.

On differences between entry of default and judgment by default, see §§7.6, 7.9. On motions for relief from default, see §§4.132-4.165, 7.10-7.11.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.5 B. Procedural Guide

## §7.5 B. Procedural Guide

### I. WHEN NO HEARING REQUIRED

**For Contract Actions or Actions on Judgment for Recovery of Money or Damages Only When Defendant Was Served Other Than by Publication (CCP §585(a))**

| **Date** | **Filing Complaint and Service of Summons** |
|---|---|
| _____ | Complaint filed and summons issued (CCP §§411.10-412.30). |
| _____ | Proof of service with original summons filed (CCP §§417.10, 417.40). |
| _____ | Proof of service of amendment to complaint or supplemental complaint filed (CCP §§465, 471.5, 586(a)(1)). |
| _____ | Dismissal of fictitious defendants filed. |
| **Expiration Date** | **Expiration of Time to:** |
| _____ | Appear, answer, or demur (CCP §§412.20, 430.10-430.40, 585(a), 586). |
| _____ | Answer if demurrer overruled (CCP §586(a)(2)). |
| _____ | Amend answer if demurrer to answer sustained (CCP §586(a)(5)). |
| _____ | Answer after motion to strike denied or granted (no demurrer having been sustained or then pending) (CCP §§435, 585(a), 586(a)(2)-(3)). |
| _____ | Respond after motion to quash summons denied or writ of mandate denied (CCP §§418.10, 586(a)(4)). |
| _____ | Respond after motion to transfer granted or denied (CCP §§396b, 586(a)(6)). |
| **Date** | **From Default to Judgment by Default** |
| _____ | Request to enter default filed (CCP §585(a)). |
| | Declaration of nonmilitary status filed (50 USC App §520). |
| | Memorandum of costs filed (Cal Rules of Ct 3.1700). |
| | Request for attorney fees filed: |
| | Per court schedule (CCP §585(a)); |
| | Per court determination (CCP §585(a)). |
| _____ | Default entered by clerk or judge (CCP §585(a)). |
| _____ | Entry of default judgment by clerk or judge (CCP §585(a)). |
| **Date** | **Issuance and Recording of Abstract of Judgment** |
| _____ | Abstract or certified copy of judgment issued by |

clerk (CCP §674).

_____ Abstract or certified copy of judgment recorded in all counties where defendant has or may have real property (CCP §§697.310-697.340).

_____ Notice of judgment lien filed (for business personal property, filed in office of Secretary of State) (CCP §697.510).

_____ Calendar expiration of judgment lien on real property (10 years after date of entry of judgment for lien created under CCP §697.310; 10 years after date of lien's creation if created under CCP §697.320; on extending lien, see CCP §§683.180, 697.310(b), 697.320(b)).

_____ Calendar expiration of judgment lien on personal property (5 years after date of filing) (CCP §697.510(b)).

**Expiration Date** **Expiration Date for Appeal or Other Relief**

_____ Last day to apply for relief under CCP §473.

_____ Last day to file appeal (Cal Rules of Ct 8.104, 8.108).

**II. WHEN HEARING REQUIRED**

**A. For Other Actions When Defendant Has Been Served Other Than by Publication (CCP §585(b))**

**Date** **Filing of Complaint and Service of Summons**

_____ Complaint filed and summons issued (CCP §§411.10-412.30).

_____ Proof of service with original summons filed (CCP §§417.10-417.40).

_____ Proof of service of amendment to complaint or supplemental complaint filed (CCP §§465, 471.5, 586(a)(1)).

_____ Dismissal of fictitious defendants filed.

**Expiration Date** **Expiration of Time to:**

_____ Appear, answer, or demur (CCP §§412.20, 430.10-430.40, 585(b), 586).

_____ Answer if demurrer overruled (CCP §586(a)(2)).

_____ Amend answer if demurrer to answer sustained (CCP §586(a)(5)).

_____ Answer after motion to strike denied or granted (no demurrer having been sustained or then pending) (CCP §§435, 585(b), 586(a)(2)-(3)).

_____ Respond after motion to quash summons denied or writ of mandate denied (CCP §§418.10, 586(a)(4)).

_____ Respond after motion to transfer granted or denied (CCP §§396b, 586(a)(6)).

**Date** **From Default to Judgment by Default**

| | |
|---|---|
| _____ | Request to enter default filed (CCP §585(b)). |
| | Declaration of nonmilitary status filed (50 USC App §520). |
| | Memorandum of costs filed (Cal Rules of Ct 3.1700). |
| _____ | Default entered by clerk or judge (CCP §585(b)). |
| _____ | Hearing set (CCP §585(b)) (check local practice on setting for hearing). |
| _____ | After hearing evidence, default judgment rendered and signed by judge and entered (CCP §§585(b), 668). |
| **Date** | **Issuance and Recording of Abstract of Judgment** |
| _____ | Abstract or certified copy of judgment issued by clerk (CCP §674). |
| _____ | Abstract or certified copy of judgment recorded in all counties where defendant has or may have real property (CCP §§697.310-697.330). |
| _____ | Notice of judgment lien filed (for business personal property, filed in office of Secretary of State) (CCP §697.510). |
| **Date** | **Issuance and Recording of Abstract of Judgment** |
| _____ | Calendar expiration of judgment lien on real property (10 years after date of entry of judgment for lien created under CCP §697.310; 10 years after date of lien's creation if created under CCP §697.320; on extending lien, see CCP §§683.180, 697.310(b), 697.320(b)). |
| _____ | Calendar expiration of judgment lien on personal property (5 years after date of filing) (CCP §697.510(b)). |
| **Expiration Date** | **Expiration Date for Appeal or Other Relief** |
| _____ | Last day to apply for relief under CCP §473. |
| _____ | Last day to file appeal (Cal Rules of Ct 8.104, 8.108). |

**B. For All Actions When Service Is Made by Publication (CCP §585(c))**

| | |
|---|---|
| **Date** | **Filing of Complaint and Service of Summons** |
| _____ | Complaint filed and summons issued (CCP §§411.10-412.30). |
| _____ | Proof of service of summons by publication with original summons filed (CCP §§415.50, 417.10, 417.30; see CCP §763.040 for quiet title action). |
| _____ | Dismissal of fictitious defendants filed. |
| **Expiration Date** | **Expiration of Time to:** |

| | |
|---|---|
| _____ | Appear, answer, or demur (CCP §§412.20, 430.10-430.40, 585(c), 586). |
| _____ | Answer if demurrer overruled (CCP §586(a)(2)). |
| _____ | Amend answer if demurrer to answer sustained (CCP §586(a)(5)). |
| _____ | Answer after motion to strike denied or granted (no demurrer having been sustained or then pending) (CCP §§435, 585(c), 586(a)(2)-(3)). |
| **Expiration Date** | **Expiration of Time to:** |
| _____ | Respond after motion to quash summons denied or writ of mandate denied (CCP §§418.10, 586(a)(4)). |
| _____ | Respond after motion to transfer granted or denied (CCP §§396(b), 586(a)(6)). |
| **Date** | **From Default to Judgment by Default** |
| _____ | Request to enter default filed (CCP §585(c)).<br>Declaration of nonmilitary status filed (50 USC App §520).<br>Memorandum of costs filed (Cal Rules of Ct 3.1700). |
| _____ | Default entered by clerk or judge (CCP §585(c)). |
| _____ | Hearing set (CCP §585(c); see CCP §764.010 for quiet title action) (check local practice on setting for hearing). |
| _____ | After hearing evidence, default judgment rendered and signed by judge and entered (CCP §§585(c), 668, 1052). |
| **Date** | **Issuance and Recording of Abstract of Judgment** |
| _____ | Abstract or certified copy of judgment issued by clerk (CCP §674). |
| _____ | Abstract or certified copy of judgment recorded in all counties where defendant has or may have real property (CCP §§697.310-697.330). |
| _____ | Notice of judgment lien filed (on business personal property filed in office of Secretary of State) (CCP §697.510). |
| _____ | Calendar expiration of judgment lien on real property (10 years after date of entry of judgment for lien created under CCP §697.310; 10 years after date of lien's creation if created under CCP §697.320; on extending lien, see CCP §§683.180, 697.310(b), 697.320(b)). |
| _____ | Calendar expiration of judgment lien on personal property (5 years after date of filing) (CCP §697.510(b)). |
| **Expiration Date** | **Expiration Date for Appeal or Other Relief** |

| | |
|---|---|
| _____ | Last day to apply for relief under CCP §473. |
| _____ | Last day to apply for relief under CCP §473.5. |
| _____ | Last day to file appeal (Cal Rules of Ct 8.104, 8.108). |

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## §7.6 C. Entry of Default

It is the entry of default by the clerk (or judge, if no clerk) that cuts off the defendant's opportunity to file an answer or other responsive pleading. See California Civil Procedure Before Trial §38.4 (4th ed Cal CEB 2004). The plaintiff's attorney must apply to the court for entry of default on Judicial Council Form CIV-100, Request for Entry of Default (see §7.8). A copy of the form must be mailed to the defendant's attorney of record or, if none, to the defendant. CCP §587. There is no required waiting period between the mailing and the filing of the request with the court. The form must be completely filled out and must be accompanied by the original Proof of Service, if it has not already been filed. Counsel should consult local court rules and policies to check for any other requirements for entering a default.

The plaintiff's attorney should take particular care in marking the appropriate boxes of the request form to indicate whether the action is subject to CC §§1801-1812.20 (Unruh Act), CC §§2981-2984.5 (Rees-Levering Motor Vehicle Sales and Finance Act), or CCP §395(b) (action for goods, services, loans, or credit intended primarily for personal, family, or household use). See §§4.31, 4.44-4.47.

The court clerk, rather than a judge, ordinarily enters the default. See CCP §585(a).

For detailed discussion of requirements and procedures for entry of default generally, see Civ Proc Before Trial §§38.16-38.38.

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## §7.7 D. Declaration of Nonmilitary Status

A declaration of nonmilitary status must be filed before a default judgment can be entered. 50 USC App §520. The Servicemembers Civil Relief Act (50 USC App §§501-596) requires that an attorney be appointed to represent a nonappearing defendant who is in military service before a default judgment can be taken against him or her. See 50 USC App §520(1), (3)-(4). Failure to have an attorney appointed does not vitiate the default judgment obtained (*Allen v Allen* (1947) 30 C2d 433, 182 P2d 551), but the judgment may subsequently be vacated if it appears that the defendant was prejudiced in making a defense because of his or her military service. 50 USC App §520(4).

The Judicial Council Form, Request for Entry of Default (see §7.8), contains a declaration of nonmilitary status. Although this declaration must be filed before a default judgment may be entered (50 USC App §520), it need not be filed at the time the request to enter default is made. It is often filed at that time, however.

**NOTE:** Some courts may refuse to accept the declaration if it is executed earlier than a certain number of days before entry of the default judgment. Counsel should check local court rules or policies for the time in which to file the declaration of nonmilitary status.

If a defendant in military service can show that he or she was prejudiced by entry of judgment, on application by the defendant or the defendant's legal representative, no later than 90 days after termination of military service, the judgment may be vacated and the defendant "let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof." 50 USC App §520(4).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.8 E. Form: Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100)

## §7.8 E. Form: Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):* | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/PETITIONER:<br>DEFENDANT/RESPONDENT: | |
| **REQUEST FOR (Application)** ☐ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment** | CASE NUMBER: |

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date):*
   b. by *(name):*
   c. ☐ Enter default of defendant *(names):*
   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names):*

   *(Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)*
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
         ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
      (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
      (3) ☐ for default previously entered on *(date):*

2. **Judgment to be entered.**

| | Amount | Credits acknowledged | Balance |
|---|---|---|---|
| a. Demand of complaint | $ | $ | $ |
| b. Statement of damages * | | | |
| (1) Special | $ | $ | $ |
| (2) General | $ | $ | $ |
| c. Interest | $ | $ | $ |
| d. Costs *(see reverse)* | $ | $ | $ |
| e. Attorney fees | $ | $ | $ |
| f. **TOTALS** | $ | $ | $ |

   g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date):*
   *(* Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4).*

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

***FOR COURT USE ONLY***

(1) ☐ Default entered as requested on *(date):*
(2) ☐ Default NOT entered as requested *(state reason):*

Clerk, by _____, Deputy



Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2007]

**REQUEST FOR ENTRY OF DEFAULT**
**(Application to Enter Default)**

Code of Civil Procedure, §§ 585–587, 1169
www.courtinfo.ca.gov

Print

CIV-100

| PLAINTIFF/PETITIONER: | CASE NUMBER: |
|---|---|
| DEFENDANT/RESPONDENT: | |

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☐ did **not** for compensation give advice or assistance with this form. *(If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state):*
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☐ **Declaration under Code of Civil Procedure Section 585.5** *(required for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☐ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☐ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☐ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are **unknown** to plaintiff or plaintiff's attorney *(names):*
   b. ☐ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):*
      (2) To *(specify names and addresses shown on the envelopes):*

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees ..... $
   b. Process server's fees ..... $
   c. Other *(specify):* ..... $
   d. ..... $
   e. **TOTAL** ..... $ _____
   f. ☐ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

8. ☐ **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)



*Copies:* Original (filed with court clerk); copies (one mailed to each defendant's attorney of record or, if none, to each

defendant); office copies.

*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a), (b). It includes a declaration of nonmilitary status.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.9 F. Default Judgment

## §7.9 F. Default Judgment

In an action on a contract or judgment for the recovery of money or damages only, after entry of a default the clerk or judge is authorized under CCP §585(a) to enter judgment without a hearing for:

- The principal amount demanded in the complaint, less any credits acknowledged by the plaintiff;
- Interest;
- Costs; and
- Attorney fees if the court has adopted a schedule of attorney fees (*e.g.,* Los Angeles Superior Court; see Los Angeles Super Ct R 3.2) and if the contract or a statute permits their recovery (CCP §585(a)).

If the court has not adopted a schedule of attorney fees (*e.g.,* San Francisco Superior Court), the plaintiff may still request those fees when it seeks entry of default under CCP §585(a). In that situation, the court will conduct a hearing and render judgment for attorney fees and for such other relief demanded in the complaint (less any credits acknowledged) plus interest and costs. CCP §585(a). The court may permit the use of declarations in lieu of personal testimony on an application under CCP §585(a) to have attorney fees fixed. CCP §585(d). Counsel should check local court rules and policies to ascertain the court's procedures.

In all other actions, or when service has been by publication, a hearing is required before a default judgment may be rendered and entered. See CCP §585(b)-(c). Some courts may permit affidavits or declarations in lieu of personal testimony setting forth the facts entitling the plaintiff to judgment. See CCP §585(d). Other courts require testimony and will not accept affidavits or declarations. If the action is based on contract, for example, a declaration or testimony might be required to establish the validity of the contract. This may be done in an appropriate case by the declaration of the plaintiff's custodian of records, who validates the copy of the document attached to the complaint. Many courts also require that the original contract or promissory note be surrendered to the court for cancellation. If the original is no longer available, or perhaps never existed because the signatures were sent in by facsimile, a declaration to that effect will also be required. Counsel may find it necessary to ask the court to set a hearing date on its uncontested calendar so that the plaintiff may offer testimony in support of the judgment. Counsel should check local court rules or policies to verify the procedure the court follows.

**NOTE:** To obtain an enforceable default judgment against a corporation, the plaintiff must name and serve the corporation in its corporate capacity. *Earl W. Schott, Inc. v Kalar* (1993) 20 CA4th 943, 24 CR2d 580. The court in *Schott* ruled that the default judgment obtained by the plaintiff was ineffective against Kalar Construction Co. because the complaint named only Gary Kalar, individually and doing business as Kalar Construction Co. The plaintiff neither named the corporation in its complaint nor served an individual as a representative of the corporation.

**NOTE:** Debt is often bought and sold. A client who is a debt purchaser may not be able to authenticate the records of the original creditor. Counsel should check with the court for any local rules that may affect debt buyers.

For detailed discussion of default judgments generally, see California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004).

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## G. Relief From Default

### §7.10 1. Types of Motions

The two types of motions for relief from default judgments are (1) statutory (CCP §§473-473.1, 473.5) and (2) nonstatutory or equitable. Although these motions may sometimes be combined, the bases for them and their time limitations differ.

A motion for relief from entry of default or default judgment must be based on mistake, inadvertence, surprise, or excusable neglect. CCP §473. It must be brought within a reasonable time not to exceed 6 months after entry of default (if default has been entered). *Weiss v Blumencranc* (1976) 61 CA3d 536, 541, 131 CR 298.

**NOTE:** When ownership or the right to possession of real or personal property is involved, the defaulted party has only 90 days to apply for relief after service of the notice of default. See CCP §473(b). See also differing time limitations in CCP §§473.1, 473.5.

Whenever relief from default is granted based on an attorney's affidavit of fault, the court *must* direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. CCP §473(b).

Motions to set aside a default or default judgment and for leave to defend actions under CCP §473.5, and motions to set aside a default and for leave to amend under CCP §585.5, require written notice to be given to all parties, as prescribed by CCP §1005(b). CCP §1005(a)(10), (12).

In addition to statutory authority, the court has inherent equitable jurisdiction to vacate a default judgment beyond the 6-month limitation period of CCP §473 based on extrinsic fraud or mistake. See *County of Stanislaus v Johnson* (1996) 43 CA4th 832, 51 CR2d 73.

For detailed discussion of relief from default and default judgment and procedure, see §§4.132-4.165.

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## §7.11 2. Small Claims Actions

A defendant who fails to appear at a small claims hearing has no right to appeal but may file a motion to vacate the judgment under CCP §116.730 (motion to vacate for lack of appearance) or §116.740 (motion to vacate for improper service). For more detailed discussion of motions to vacate small claims court judgments, see §7.90.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/ IV. OTHER JUDGMENTS WITHOUT TRIAL/ A. Judgment by Consent or Stipulation/§7.12 1. In General

## IV. OTHER JUDGMENTS WITHOUT TRIAL

### A. Judgment by Consent or Stipulation

### §7.12 1. In General

The parties may consent to entry of judgment at any time during litigation, either on the record in open court or by stipulation. See CCP §664, which authorizes the court, on motion, to enter a judgment under the terms of a settlement. Once the judgment is entered, it can be enforced like any other judgment. A party who consents to a judgment cannot attack it on appeal (*Atchison*, *Topeka & Santa Fe Ry. Co. v Hildebrand* (1965) 238 CA2d 859, 861, 48 CR 339) unless it does not conform to the stipulation, in which case it is not deemed a consent judgment. See 9 Witkin, California Procedure, *Appeal* §44 (5th ed 2009).

The parties should specify in the stipulation whether costs are recoverable. See *Folsom v Butte County Ass'n of Gov'ts* (1982) 32 C3d 668, 677, 186 CR 589 ("costs are allowed, absent the parties' express agreement to the contrary, following entry of a consent decree"). Some stipulations provide for a liquidated sum as costs, or that each party will bear its own costs.

Recoverable attorney fees are generally an item of costs under CC §1717(a). When the stipulation for judgment is silent on attorney fees but the contract provides for their recovery, the "party prevailing on the contract" will be entitled to recover attorney fees. *Lanyi v Goldblum* (1986) 177 CA3d 181, 223 CR 32. To avoid disputes, it is important to cover attorney fees in the stipulation for judgment. *Lanyi* actually concerned a settlement under CCP §998 (see §§7.17-7.19); the court's reasoning, however, was based on general contract principles and should also apply to other settlements. See also *Crib Retaining Walls, Inc. v NBS/Lowry, Inc.* (1996) 47 CA4th 886, 54 CR2d 850; *Jackson v Homeowners Assoc. of Monte Vista* (2001) 93 CA4th 773, 113 CR2d 363.

Defense counsel will sometimes ask that the stipulation be held by the plaintiff's attorney, and not filed with the court, as long as the defendant complies with its payment provisions. These provisions in the stipulation should be clearly stated, and what constitutes default should be clearly defined. A defendant who defaults under a stipulation conditioned on the occurrence of a future event (such as failure to pay an agreed installment) is entitled to notice of default and an opportunity to be heard (*Rooney v Vernont Inv. Corp.* (1973) 10 C3d 351, 110 CR 353; *S.E.P. Assocs. v Peto* (1975) 49 CA3d 305, 122 CR 514) unless the stipulation provides for waiving notice of default and hearing. If the stipulation contains such a waiver and the defendant later defaults in payment, a judgment may be obtained by filing the stipulation and form of judgment with the court, together with a declaration of the plaintiff or its counsel setting forth the facts of the default. Local court rules should be checked, however, for any other requirements. If the stipulation does allow for notice of default and the opportunity to cure, the drafter should ensure that the provision is clear about how notice shall be given, whether by mail, facsimile, or other method, to whom the notice will be sent, and the period allowed for curing the default (*e.g.,* 10 days after the notice's mailing or transmission date).

**PRACTICE TIP:** Because notice to the debtor's attorney in these circumstances may not be effective, the better practice is to serve the notice of default on the debtor personally. See CCP §684.020 for when service may be made on the debtor's attorney.

**NOTE:** Counsel should bear in mind that the stipulation filed with the court to obtain judgment will be treated by most courts as the defendant's first appearance if the defendant has not already filed a pleading. Therefore, counsel may wish either to obtain a check for the first appearance filing fee from the defendant before filing the stipulation or to have the stipulation specifically include this fee as a cost item.

As an alternative to plaintiff's counsel holding the stipulation, the parties may agree that judgment will be entered immediately and enforcement (see chap 9) stayed, as long as the defendant meets a payment schedule. Plaintiffs often prefer this alternative because it eliminates the need for a hearing to obtain and have the judgment entered.

For a form of stipulation and judgment, see §§7.15-7.16.

For further discussion of consent or stipulated judgments generally, see California Civil Procedure Before Trial, chap 48 (4th ed Cal CEB 2004).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.13 2. Local Rules

## §7.13 2. Local Rules

Before entering into a stipulation with a defendant, counsel should check local court rules and policies for local rules. For example, the court may require that the proposed judgment to be filed be a separately signed document, or that the stipulation be filed within a prescribed time after it has been entered.

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### §7.14 3. Notice of Settlement or Request for Dismissal

Parties reaching settlement agreements must promptly notify the court. Cal Rules of Ct 3.1385(a)(1). The parties must file either a notice of settlement or a request for dismissal. See Cal Rules of Ct 3.1385(a), (b). Counsel should use either Judicial Council Form CM-200 (Notice of Settlement of Entire Case) or Judicial Council Form CIV-110 (Request for Dismissal) for this purpose. Both of these are mandatory forms.

**Notice of settlement.** When the parties settle, the party seeking affirmative relief, usually the plaintiff, must file the notice of settlement. Parties may request that the court retain jurisdiction to enforce the settlement under CCP §664.6.

Often, it will take more than 45 days past the date of the settlement to complete the terms of the agreement, *e.g.*, when the agreement requires a series of monthly payments. In these instances, the notice of settlement should indicate that the settlement is *conditional* (see Judicial Council Form CM-200 (Notice of Settlement of Entire Case), Item 1.b; see also Cal Rules of Ct 3.1385(c)) and give the date when these conditions should be fully performed and a notice of dismissal filed.

It is a good idea to calendar that date, because it is the deadline for the court's continued jurisdiction. However, if the agreement is not performed at any time before that date, *e.g.*, when required payments are not made, relief may still be sought by requesting judgment of the court.

If a party who has already filed a notice of settlement determines that a case cannot be dismissed within 45 days, the party must serve and file a notice and a supporting declaration advising the court of the party's inability to dismiss the case within 45 days, showing good cause for its inability to do so, and proposing an alternative date for dismissal. The notice and supporting declaration must be served and filed 5 court days before the time for requesting dismissal has elapsed. The court may continue the matter for good cause shown. Cal Rules of Ct 3.1385(e).

**Request for dismissal.** Filing a request for dismissal allows the entire action or part of it to be dismissed, as well as some or all of the parties. See Judicial Council Form CIV-110 (Request for Dismissal), Item 1.b.(5). When a matter is dismissed it is removed from the court's calendar. See Cal Rules of Ct 3.1385(b). However, requesting dismissal *without prejudice* (see Judicial Council Form CIV-110 (Request for Dismissal), Item 1.a.(2)) allows the case to be refilled at a later date.

**PRACTICE TIP:** It is a good practice to file a stipulation for judgment upon conditional settlement signed by each party or representative which includes the terms of the agreement and a request for dismissal without prejudice subject to CCP §664.6. See Martin & Howell, *Settlement Certainty: Making it Stick Under CCP 664.6*, 25 Civ Lit R 3 (June, 2003).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.15 4. Form: Stipulation for Judgment

## §7.15 4. Form: Stipulation for Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **STIPULATION FOR** |
| **vs** | ) | **JUDGMENT** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**IT IS HEREBY STIPULATED by and between the parties:**

**1. Defendant(s), _ _[*name(s)*]_ _, agree(s) to pay plaintiff, _ _[*name*]_ _, the sum of $_ _[*amount*]_ _ in installments, as follows: $_ _[*amount*]_ _ on execution of this stipulation, receipt of which is acknowledged by plaintiff; $_ _[*amount*]_ _ on _ _[*date*]_ _, and a like sum on the _ _[*number*]_ _ day of each month thereafter until the full sum of $_ _[*amount*]_ _ has been paid.**

**2. Payments due as stipulated above shall be made to plaintiff's attorney at _ _[*his/her*]_ _ office at _ _[*address*]_ _ payable to _ _[*name (often that of attorney)*]_ _.**

**3. If defendant(s) make(s) the payments stipulated above at the time and in the manner provided, plaintiff will not cause further proceedings to be held in the above-titled action, and on payment in full of the amounts stipulated, plaintiff will file a dismissal, with prejudice, with the clerk of the court.**

**4. If defendant(s) fail(s) to pay any installment when due, _ _[*or within _ _[e.g., five days*]_ _ thereafter,*]_ _ or if an installment is paid by check and that check fails to clear the first time it is presented for payment, plaintiff may apply to the Court for entry of judgment in plaintiff's favor and against defendant(s) for the unpaid amount then due, plus interest on that amount at the rate of _ _[*specify*]_ _ per annum from the due date of the unpaid installment, plus attorney fees in the amount of _ _[*amount*]_ _ and costs in the amount of $_ _[*amount*]_ _.**

**5. Defendant(s) hereby waive(s) notice of default and notice of any proceedings by plaintiff to have judgment entered in accordance with paragraph 4 of this stipulation.**

**6. Defendant(s) also waive(s) any right _ _[*it/they*]_ _ may have to seek dismissal of this action under Code of Civil Procedure §§583.310 and 583.420 for plaintiff's failure to prosecute the action.**

**7. This stipulation may be executed in any number of counterparts, each of which shall be an original, but all of which together shall constitute one instrument. The parties agree that a facsimile signature shall be treated in all respects as having the same effect as an original signature.**

**Date: _ _ _ _ _ _** **Date: _ _ _ _ _ _**

| | |
|---|---|
| __[*Signature*]__ | __[*Signature*]__ |
| _ _[*Typed name*]_ _ | _ _[*Typed name*]_ _ |
| **Attorney for plaintiff** | **Plaintiff** |
| **Date:** _ _ _ _ _ _ | **Date:** _ _ _ _ _ _ |
| __[*Signature*]__ | __[*Signature*]__ |
| _ _[*Typed name*]_ _ | _ _[*Typed name*]_ _ |
| **Attorney for defendant** | **Defendant** |

*Copies:* Original to be signed by the plaintiff, plaintiff's attorney, defendant(s), and attorney for defendant(s); one copy for defendant(s) and attorney for defendant(s); office copies.

*Comment:* Plaintiff's declaration alone should be sufficient to establish default in payment and all payments received. The stipulation must be personally signed by all party litigants, not just their counsel. *Levy v Superior Court* (1995) 10 C4th 578, 586, 41 CR2d 878. This form provides that it may be executed in counterparts and that faxed signatures will be treated as originals because in some instances the creditor may be outside the jurisdiction, or even outside the country.

If the case has been pending for some time and the payment schedule is an extended one, the 5-year statute for failure to bring an action to trial might come into play. See CCP §583.310. If there is even a remote possibility that the defendant could bring a dismissal motion under the 5-year statute or under the 3-year discretionary dismissal statute (CCP §583.420), then a waiver of the defendant's rights under those statutes should also be included in the stipulation.

On the requirement of notice of default and an opportunity to be heard when the stipulation contains no waiver of notice of default and hearing, see §7.12.

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## §7.16 5. Form: Judgment Pursuant to Stipulation

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT PURSUANT TO** |
| **vs** | ) | **STIPULATION** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

6

**Defendant(s), _ _[*name(s)*]_ _, and plaintiff, _ _[*name*]_ _, having stipulated that _ _[*set forth terms of stipulation*]_ _ and the stipulation having been filed on _ _[*date*]_ _, together with plaintiff's declaration establishing that _ _[*e.g., defendant failed to make payment of the installment due on _ _[date]_ _, or within five (5) days thereafter*]_ _ and that defendant has previously paid the sum of $_ _[*amount*]_ _ pursuant to the stipulation, in accordance with the stipulation:**

**IT IS ORDERED AND ADJUDGED that plaintiff, _ _[*name*]_ _, recover from defendant, _ _[*name*]_ _, the principal sum of $_ _[*amount*]_ _ together with interest in the sum of $_ _[*amount*]_ _, plus costs in the sum of $_ _[*amount*]_ _, and attorney fees in the sum of $_ _[*amount*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

*Copies:* Original (to judge for signature and then entry by clerk); copies (one for each appearing party); office copies.

*Comment:* Although not required, it is good practice to set out the terms of the stipulation in the judgment itself. This approach should defeat any argument that the judgment is inconsistent with the stipulation.

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## B. Acceptance of Offer to Compromise Under CCP §998

### §7.17 1. Time Limitations; Contents of Offer

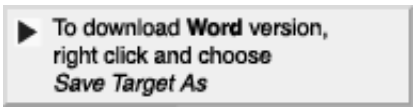
At least 10 days before commencement of trial (or arbitration), as defined in CCP §998(b)(3), a party may serve a written offer to compromise on "any other party to the action to allow judgment to be taken in accordance with the terms and conditions stated at that time." CCP §998(b). The written offer must include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer must be in writing and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party. CCP §998(b). If the offer is accepted, the offer (see §7.18) together with proof of acceptance (see §7.19) must be filed, and the clerk or judge must enter judgment accordingly. CCP §998(b)(1). If the offer is not accepted before trial, or within 30 days after it has been made, whichever comes first, the offer is deemed withdrawn and is inadmissible as evidence at trial. CCP §998(b)(2).

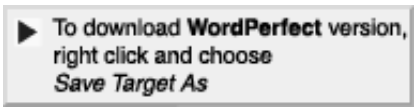
On the effect when an offer is made but not accepted and the nonoffering party fails to obtain a more favorable judgment, see §7.32. For detailed discussion of offers to compromise under CCP §998, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004); California Trial Practice: Civil Procedure During Trial §§27.51-27.58 (3d ed Cal CEB 1995).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.18 2. Form: Offer to Compromise Under CCP §998

## §7.18 2. Form: Offer to Compromise Under CCP §998




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | _ _[*PLAINTIFF'S/* |
| **vs** | ) | *DEFENDANT'S*]_ _ **OFFER TO** |
| _ _[*Name(s)*]_ _, | ) | **COMPROMISE UNDER CCP** |
| **Defendant(s)** | ) | **§998** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**PLEASE TAKE NOTICE that under Code of Civil Procedure §998 _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, offers to allow judgment to be taken in favor of _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _, and against _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, in the amount of $_ _[*amount*]_ _, _ _[*plus costs incurred to the date of this offer/each party to bear its own costs*]_ _.**

**If written notice of acceptance together with this offer is filed with the clerk of the court before the time period specified in Code of Civil Procedure §998 expires, judgment will be entered accordingly.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name of defendant/plaintiff*]_ _

*Copies:* Original (to opposing party with copy of proof of service); copy with original proof of service (to furnish court if offer not accepted and opposing party fails to get more favorable judgment); office copies.

*Comment:* Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance (see §7.19), must be in writing and signed by the counsel for the accepting party or, if not represented by counsel, by the accepting party. CCP §998(b).

Some attorneys have their client sign the offer in order to avoid any later disputes over the attorney's authority to settle. A form of notice of acceptance of the offer is set forth in §7.19; the offer to compromise, acceptance, and request to enter judgment may also be consolidated into a single form. See California Civil Procedure Before Trial §47.30 (4th ed Cal CEB 2004).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.19 3. Form: Notice of Acceptance of Offer to Compromise

## §7.19 3. Form: Notice of Acceptance of Offer to Compromise

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF ACCEPTANCE OF** |
| **vs** | ) | **OFFER TO COMPROMISE** |
| _ _[*Name(s)*]_ _, | ) | **AND REQUEST TO ENTER** |
| **Defendant(s)** | ) | **JUDGMENT** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**To** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, and to** _ _[*his/her/its*]_ _ **attorney,** _ _[*name*]_ _**:**

**PLEASE TAKE NOTICE that** _ _[*plaintiff/defendant*]_ _, _ _[*name*]_ _**, accepts the offer of** _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _**, to allow judgment to be taken against** _ _[*defendant/ plaintiff*]_ _ **and in favor of** _ _[*plaintiff/defendant*]_ _ **in the amount of $**_ _[*amount*]_ _, _ _[*plus costs incurred to the date of this offer/each party to bear its own costs*]_ _**.**

**The clerk may enter judgment accordingly.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

**REQUEST TO ENTER JUDGMENT**

**To the clerk (or a judge) of this court:**

**In accordance with the signed offer and acceptance and under Code of Civil Procedure §998, please enter judgment in this action as follows:** _ _[*Specify*]_ _**.**

*Copies:* Original (filed with court clerk with proof of service); copies (one for service on offering party); office copies.

*Comment:* Any acceptance of the offer must be in writing and signed by the counsel for the accepting party or, if not represented by counsel, by the accepting party. CCP §998(b). Some attorneys have their client sign the acceptance to avoid any disputes later over the attorney's authority to settle. The offer to compromise, acceptance, and request to enter judgment may be consolidated into a single form. See California Civil Procedure Before Trial §47.30 (4th ed Cal CEB 2004).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.20 C. Confession of Judgment

## §7.20 C. Confession of Judgment

Statutory authority for the entry of a judgment by confession is in CCP §§1132-1134. Under CCP §1132(a), a judgment by confession may be entered for money due or to become due, to secure any person against a contingent liability on the defendant's behalf, or both, without the need to file an action. The defendant must sign a written statement verified under oath to the following effect (CCP §1133):

- It must authorize the entry of judgment for a specified sum;
- If the judgment is for money due or to become due, it must concisely state the facts from which the debt arose, and show that the sum confessed is justly due or to become due;
- If the judgment is for purposes of securing the plaintiff against a contingent liability, it must concisely state the facts constituting the liability and must show that the sum confessed does not exceed that liability.

In addition, an independent attorney representing the defendant must sign a certificate that he or she "has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure." CCP §1132(b). Both the defendant's statement and the attorney's certificate must be filed with the clerk of the court where judgment is to be entered. CCP §§1132(b), 1134(a). Counsel should check local court rules and policies for any further requirements.

A judgment by stipulation (see §7.12) differs from a confession of judgment in that a stipulation is signed and filed only after an action has begun. Generally, the defendant has already been served with the summons and complaint and may even have answered. If the defendant has not answered, the stipulation is treated as the defendant's appearance. Therefore, there will ordinarily be no constitutional question raised, and the judgment by stipulation is less likely to be subject to successful attack than is a judgment by confession.

**NOTE:** In *Rivercourt Co. v Dyna-Tel, Inc.* (1996) 41 CA4th 1477, 49 CR2d 279, the court affirmed the trial court's order setting aside a confession of judgment under CCP §473 on the ground that the judgment was fraudulently entered.

On federal limitations on the use of confessions of judgment, see 16 CFR §444.2.

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## §7.21 D. Dismissal

Statutory authority for involuntary dismissal for a plaintiff's failure to proceed with reasonable diligence in prosecuting an action is in CCP §§583.110-583.430.

Dismissals for failure to timely serve the summons and complaint on the defendant or failure to timely file the return of summons or other proof of service are covered in CCP §§583.210-583.250.

Mandatory dismissal for failure to bring an action to trial within 5 years after it has begun against the defendant is covered in CCP §§583.310-583.360. Discretionary dismissal for delay in prosecution is covered in CCP §§583.410-583.430. See also Cal Rules of Ct 3.1342.

The plaintiff's attorney, for various reasons, may desire at some point to dismiss the action voluntarily. Counsel should bear in mind that, when there is no cross-complaint or motion pending for an order transferring the action to another court under CCP §396b, the plaintiff may dismiss the action under CCP §581(b)(1) at any time before the actual commencement of trial (as defined in CCP §581(a)(6)). Such a voluntary dismissal is without prejudice unless it is expressly made with prejudice. 6 Witkin, California Procedure, *Proceedings Without Trial* §283 (5th ed 2009).

A defendant in whose favor a dismissal is entered is entitled to costs. CCP §1032(a)(4), (b).

Whether the defendant is also entitled to attorney fees is a more complex question. If the action is solely for breach of contract, CC §1717 bars the defendant from recovering its attorney fees when the plaintiff voluntarily dismisses the action. If the action involves both contract and tort claims, recovery will depend on the language in the attorney fee clause. *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830. See *Casella v Southwest Dealer Servs., Inc.* (2007) 157 CA4th 1127, 69 CR3d 445 (discussing *Santisas* and interpreting contract language).

If the case is voluntarily dismissed based on a settlement agreement, and the settlement agreement either reserves to the court the issue of a prevailing party and attorney fees, or contains an attorney fee provision, then there may be a prevailing party and an award of attorney fees. *Jackson v Homeowners Assoc. of Monte Vista* (2001) 93 CA4th 773, 113 CR2d 363.

For detailed discussion of voluntary dismissals before and after commencement of trial and forms, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

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## §7.22 E. Judgment on the Pleadings

A motion for judgment on the pleadings may be made at any time before trial, during trial, or before final judgment is rendered. See *Dobbins v Hardister* (1966) 242 CA2d 787, 791, 51 CR 866; *Shabrick v Moore* (1961) 195 CA2d 56, 15 CR 310. Either a plaintiff or a defendant may make such a motion. The ground for the motion is the same as that for a general demurrer, *i.e.,* the complaint (or cross-complaint) fails to state facts sufficient to constitute a cause of action or the answer fails to state facts sufficient to constitute a defense. In determining whether to grant the motion, the court applies the same rules that apply to a general demurrer. See *Colberg, Inc. v State ex rel Dep't of Pub. Works* (1967) 67 C2d 408, 412, 62 CR 401.

When a motion for judgment on the pleadings is made before the trial, a written notice must be filed and served on the opposing party. See generally CCP §§1005(a), 1010-1011. The notice must be accompanied by a memorandum in support of motion (commonly referred to as a memorandum of points and authorities). If not, the court may construe the absence of the memorandum as an admission that the motion is not meritorious. Cal Rules of Ct 3.1113.

For detailed discussion of judgment on the pleadings and a form for notice of motion and judgment, see California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004). See also California Trial Practice: Civil Procedure During Trial §§6.94-6.96 (3d ed Cal CEB 1995).

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## F. Summary Judgment

### §7.23 1. In General

A party who contends that there is no merit, or no defense, to the action, can move for summary judgment under CCP §437c. The summary judgment procedure may be particularly useful in uncomplicated collection litigation. Success on the motion will obviate the need for trial. The court must grant the motion "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CCP §437c(c). The summary judgment procedure is not limited to any particular type of case. Such a motion is proper even if the debt sued on is unliquidated. *Bank of America v Oil Well Supply Co.* (1936) 12 CA2d 265, 55 P2d 885.

The motion may not be made until 60 days have elapsed since the general appearance of the party against whom the motion is directed, except with leave of court on a showing of good cause. CCP §437c(a). The notice of motion and supporting papers (including a memorandum in support of motion (commonly referred to as a memorandum of points and authorities); see Cal Rules of Ct 3.1113).

must be served on all the other parties at least 75 days before the hearing date unless the notice of motion is served by mail, in which case (a) 5 days are added to the 75-day period if the mailing address is in California, (b) 10 days are added if the mailing address is outside California but in the United States, and (c) 20 days are added if the mailing address is outside the United States. CCP §437c(a).

**NOTE:** If the notice of motion is served by facsimile transmission, express mail, or other method of overnight delivery, the 75-day notice period is increased by 2 court days. CCP §437c(a).

Unless the court for good cause orders otherwise, the motion may not be heard later than 30 days before the trial date. CCP §437c(a).

Supporting and opposing affidavits (or declarations; see CCP §2015.5) must be made on personal knowledge, set forth admissible evidence, and "show affirmatively that the affiant [or declarant] is competent to testify to the matters stated in the affidavits or declarations." CCP §437c(d). Discovery and matters of which judicial notice may be taken may be used to support the motion. CCP §437c(b). The supporting papers must include a separate statement that sets forth plainly and concisely all material facts that the moving party contends are undisputed. Each stated material fact must be followed by a reference to the supporting evidence. CCP §437c(b).

If the claim has been assigned, there should be a declaration by both the assignor, stating the fact of the assignment, and the assignee, stating that he or she received and accepted the assignment, was the holder of the claim at the commencement of the action, and is still the assignee of the claim. *Kimber v Jones* (1954) 122 CA2d 914, 265 P2d 922. See §§7.24-7.25 for sample forms.

Any opposition to the motion for summary judgment must be served and filed at least 14 days before the hearing date. Reply papers must be served and filed at least 5 days before the hearing date. CCP §437c(b). See CCP §437c(b) for content of opposition papers.

Counsel should bear in mind that any objections to affidavits or declarations on the ground that they (a) are not made on personal knowledge, (b) do not set forth admissible evidence, or (c) fail to affirmatively show that the affiant is competent to testify to the matters stated in the affidavits or declarations are waived unless made at or before the hearing. CCP §437c(d). See also Cal Rules of Ct 3.1352, 3.1354. Thus, opposing counsel should carefully review the moving parties' supporting affidavits or declarations for inadmissible evidence. Because some courts require that objections be put in writing rather than made orally at the hearing, counsel should check local court rules or practices.

A party may move for summary adjudication of a cause of action, an affirmative defense, a claim for damages, or an issue of duty only if the court's granting of the motion would completely dispose of the cause, defense, claim, or issue of duty. CCP §437c(f).

For a detailed discussion of summary judgment and forms, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.24 2. Form: Declaration in Support of Motion for Summary Judgment (Book Account)

## §7.24 2. Form: Declaration in Support of Motion for Summary Judgment (Book Account)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT** |
| _ _[*Name(s)*]_ _, | ) | **OF MOTION FOR SUMMARY** |
| **Defendant(s)** | ) | **JUDGMENT** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**I am the office manager of** _ _[*name of company*]_ _**.**

**I am also assistant secretary of the company, which is, and since** _ _[*date*]_ _**, has continuously been, a corporation organized and existing under the laws of the State of California, with its principal place of business located at** _ _[*city*]_ _**, California.**

**I know** _ _[*name*]_ _**, the defendant in this action.**

_ _[*Name of company*]_ _ **keeps a set of books of original entry; in that set is a portion devoted to accounts receivable. I have supervision and control of those books and those accounts.**

**Attached and incorporated by reference is the original ledger sheet, taken from the accounts receivable ledger, showing the name of the** _ _[*person/entity*]_ _ **against whom the account is kept,** _ _[*name of defendant*]_ _**.** _ _[*He/She/It*]_ _ **is the same** _ _[*person/entity*]_ _ **who is the defendant named in this action.**

**This ledger sheet is kept in the regular course of the business of** _ _[*name of company*]_ _**, and the entries on it are the first permanent record of the company's accounts receivable against the defendant; each entry is made at or about the time of the transaction.**

**The balance shown on the account to be due from the defendant is $**_ _[*amount*]_ _**, no part of which has been paid.**

**Attached and incorporated by reference are copies of sales slips, each of which represents the sale shown by the charges appearing on the ledger sheet; all of these sales slips are under my supervision and control in the usual and ordinary course of business, and they are the original business records of** _ _[*name of company*]_ _**.**

**All the facts set forth above are within my personal knowledge, and if called to testify as a witness in this case I would be competent to testify to those facts.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Comment:* Affidavits or declarations must (a) be made on personal knowledge; (b) state admissible evidence; and (c) state that the affiant is competent to testify on the matters. CCP §437c(d). Materials incorporated by reference into declarations or affidavits must comply with the rules of evidence. *Dugar v Happy Tiger Records, Inc.* (1974) 41 CA3d 811, 815, 116 CR 412.

A printed representation of computer information, a computer program, or images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. Evid C §§1552(a), 1553. That presumption affects the burden of producing evidence. If the opposing party produces evidence that a printed representation is inaccurate or unreliable, the party introducing it has the burden of proving by a preponderance of the evidence that the printed representation is an accurate representation of the existence and content of the printed record. Evid C §1553.

In this sample declaration, every element necessary to introduce the book account into evidence is set forth. See Evid C §1271 (business record exception to hearsay rule). See also *Costerisan v DeLong* (1967) 251 CA2d 768, 59 CR 803. On definition of a book account, see CCP §337a.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.25 3. Form: Declaration of Assignee in Support of Motion for Summary Judgment (Book Account)

## §7.25 3. Form: Declaration of Assignee in Support of Motion for Summary Judgment (Book Account)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **MOTION FOR SUMMARY** |
| **Defendant(s)** | ) | **JUDGMENT** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**I am** _ _[*specify title or position*]_ _ **of** _ _[ *name*]_ _**, the plaintiff in this action.**

**Before the commencement of this action, on** _ _[*date*]_ _**,** _ _[*name of assignor*]_ _ **assigned the book account and the claim represented by it to plaintiff for collection, and plaintiff then became, and ever since has been, the assignee and holder of it.**

**The facts set forth above are within my personal knowledge, and if called to testify as a witness in this case I would be competent to testify to those facts.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on** _ _[*date*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Comment:* If the complaint is based on a claim that has been assigned to the plaintiff and the fact of the assignment has been put in issue by the pleadings, it is still necessary to prove that the assignee received and accepted the assignment and at the time of the commencement of the action was still the assignee of the claim. *Kimber v Jones* (1954) 122 CA2d 914, 265 P2d 922. One of the declarations in support of the motion for summary judgment should contain facts sufficient to warrant the admission of the assignment in evidence. On specified officers signing an assignment on behalf of a corporation, see Corp C §313.

For form of order for entry of summary judgment and form of judgment, see California Civil Procedure Before Trial §§36.162-36.163 (4th ed Cal CEB 2004).

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## V. JUDGMENT AFTER TRIAL

### §7.26 A. Trial by Court or Jury

Attorneys handling debt collection cases for plaintiffs usually prefer trial by court to trial by jury. Nonjury cases usually come to trial much sooner than jury cases and take less time to try. It is also commonly believed that juries are more sympathetic to defendants in collection cases. On right to jury and demand for jury trial, see California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004). See also California Trial Practice: Civil Procedure During Trial §§8.1-8.18 (3d ed Cal CEB 1995).

When the case is tried before a court rather than a jury, the trial usually proceeds in the order specified in CCP §607 unless the court directs otherwise. CCP §631.7. The judge who tries a case without a jury assumes the jury's function as the trier of fact.

At trial, the plaintiff has the burden of producing evidence to establish its case. Generally, a custodian of records meets this burden through testimony that:

- The plaintiff keeps books in the ordinary course of its business;
- Such books and related records are under the custody and control of the custodian;
- As part of keeping those books, accounts receivable are recorded;
- Among the accounts receivable entries, there is an account receivable for the defendant;
- If the defendant's account receivable is referenced in a document, such as an invoice or some other demand for payment, the custodian is aware of the manner in which such documents are customarily prepared in the plaintiff's business; and
- In the ordinary course of the plaintiff's business, entries in the books are made or documents are prepared at or near the time of an event relating to the account.

These are the conditions necessary for a business record to qualify under the business records exception to the hearsay rule. See Evid C §1271.

Once the business records are admitted into evidence, the plaintiff has generally established its prima facie case for an action on a book account. (Similar proof is also necessary to establish common count claims for an account stated and for goods sold and delivered. See generally §§3.85-3.93.) The burden then shifts to the defendant to establish its defenses, *e.g.,* that the goods were never purchased, that they were not timely delivered, or that they were defective.

It is often possible to stipulate in chambers that the account documents are authentic and that the plaintiff can establish the existence of the book account. The judge will then start the case in the defense mode, with the defendant having the burden of defeating the prima facie case that has already been deemed established.

Counsel should bear in mind that, when the complaint is brought in the name of an assignee, proof that the claim was assigned before commencement of the action is necessary when it is an issue and has not been admitted. If a written assignment was made, the original assignment should be available in court.

Counsel should also bear in mind that, if the plaintiff is required to be licensed under Bus & P C §143, he or she cannot bring or maintain an action for compensation for the performance of any act or contract for which a license is required without alleging and proving that he or she was duly licensed at all times during the performance of that act or contract.

**PRACTICE TIP:** Plaintiff's failure to plead and prove licensure is grounds for a nonsuit. The defendant should move for a nonsuit before the plaintiff puts on any evidence at trial so that there will be no basis for a request to amend the complaint to conform to proof.

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## §7.27 B. Statement of Decision

In a court trial, the court must issue a statement of decision explaining the factual and legal bases for its decision on each of the principal controverted issues at trial if any party makes a timely request for the court to issue such a statement. CCP §632. The request must be made either within 10 days after the court announces a tentative decision or before submission of the matter for decision if the trial lasted less than one calendar day or less than eight hours in total. CCP §632; see *Mitchell v County of Orange* (1985) 165 CA3d 1185, 211 CR 563 (trial over two-day period lasted less than three hours; request for statement of decision made on tenth day after court's notice of intended decision was untimely). The request must specify the issues for which the party is requesting the statement of decision. CCP §632.

Procedures concerning the statement of decision are set forth in CCP §632 and Cal Rules of Ct 3.1590. For detailed discussion of the statement of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.52 (3d ed Cal CEB 1995).

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## C. Drafting Judgment

### §7.28 1. In General

Although the Code of Civil Procedure does not specify any particular form for a judgment, counsel drafting a proposed judgment should bear in mind the following four rules:

(1) A judgment is sufficient if it shows that the matter has been determined in one of the litigant's favor or that the parties' rights have been adjudicated. *Avakian v Dusenberry* (1936) 15 CA2d 55, 58 P2d 1306.

(2) The name of the parties in whose favor and against whom the judgment is rendered must be specified. *Shriver v Superior Court* (1920) 48 CA 576, 192 P 124 (judgment void for uncertainty for failure to indicate in whose favor and against whom judgment was rendered). But see *LaMar v Superior Court* (1948) 87 CA2d 126, 196 P2d 98 (omission in judgment of name of party obligated to pay petitioner was clerical error that court had power to correct).

(3) The amount of the judgment must "be computed and stated in dollars and cents, rejecting fractions." CCP §577.5.

(4) A money judgment must indicate either that the plaintiff is entitled to an award in a specific amount or that the plaintiff takes nothing. *Ferrara v Jordan* (1955) 134 CA2d Supp 917, 286 P2d 589.

The forms of judgments that counsel may adapt to the particular needs of his or her case are set forth in §§7.29-7.30A. Counsel should check local rules and policies to ascertain whether there are local requirements for the form of a judgment. For further discussion on form and additional requirements for special types of judgments, see California Trial Practice: Civil Procedure During Trial §§23.13-23.18 (3d ed Cal CEB 1995).

When the judgment to be entered is stipulated to in open court, the preparation of a written stipulation for judgment is not necessary unless required by local court rules or the judge. Care must be taken to state the terms of the stipulation into the record in open court so that no problems will arise later in having judgment entered. On rare occasions when a written stipulation is required, after stating the terms of the stipulation on the record, the stipulation should be prepared, signed by counsel (and by the parties, if possible), and filed with the court. For a form of judgment pursuant to stipulation, see §7.16.

When a statement of decision has been requested in a court trial in superior court, the court must prepare and mail a proposed statement of decision and a proposed judgment to all parties that have appeared at trial unless the court directs a party to prepare, mail, and submit to the court the proposed statement and judgment. Cal Rules of Ct 3.1590(e). On time limitations, objections to a proposed statement of decision and proposed judgment, and procedure generally, see Cal Rules of Ct 3.1590).

**PRACTICE TIP:** California Rules of Court 3.1590 does not apply if the trial was completed within one day. Cal Rules of Ct 3.1590(k). Counsel should check local court rules and policies to ascertain whether there is a specified procedure.

On the court's equitable power to amend a judgment to add a judgment debtor, on the theory that an entity is the alter ego of the original judgment debtor, see *Hall, Goodhue, Haisley & Barker, Inc. v Marconi Conf. Ctr. Bd.* (1996) 41 CA4th 1551, 49 CR2d 286. As a general rule, a court may amend its judgment at any time so that the judgment will properly designate the real defendants. See also *Milrot v Stamper Med. Corp.* (1996) 44 CA4th 182, 51 CR2d 424; *Carr v Barnabey's Hotel Corp.* (1994) 23 CA4th 14, 28 CR2d 127.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.29 2. Form: Judgment Pursuant to Stipulation (In Open Court)

## §7.29 2. Form: Judgment Pursuant to Stipulation (In Open Court)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT PURSUANT TO** |
| **vs** | ) | **STIPULATION** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**Plaintiff,** _ _[*name*]_ _**, and defendant,** _ _[*name*]_ _**, having stipulated in open court on the record for judgment in this action,** _ _[*and having signed and filed a written stipulation for judgment in this action,*]_ _

**IT IS ORDERED AND ADJUDGED that plaintiff,** _ _[*name*]_ _**, shall recover from defendant,** _ _[*name*]_ _**, the principal sum of $**_ _[*amount*]_ _**, together with interest in the sum of $**_ _[*amount*]_ _**,** _ _[*attorney fees in the sum of $*_ _[*amount*]_ _,]_ _ **and costs in the sum of $**_ _[*amount*]_ _**.**

[*Add if appropriate*]

**Stay of execution is ordered on the condition that $**_ _[*amount*]_ _ **per month is paid on the judgment by defendant,** _ _[*name*]_ _**, to plaintiff,** _ _[*name*]_ _**, beginning on** _ _[*date*]_ _**, and that the same sum is paid on or before the** _ _[*number*]_ _ **day of each month thereafter until the judgment is satisfied. If defendant fails to make any payment when due, execution is to be issued without further notice for the entire unpaid amount of the judgment.**

[*Continue*]

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

*Copies:* Original (presented to judge for signature, then filed; local rules may also require submission of unsigned copies); conformed copies (although not required, one for service on each attorney of record and unrepresented party); office copies.

*Comment:* The Judicial Council has developed a form (JUD-100), set forth in §7.30A, for use as a judgment in many different situations. Counsel should consider using this form as it provides a clear showing of the arithmetic involved in the total judgment and may facilitate the issuance of a writ of execution or an abstract of judgment.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.30 3. Form: Judgment After Trial by Court

## §7.30 3. Form: Judgment After Trial by Court

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT AFTER TRIAL BY** |
| **vs** | ) | **COURT** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**This action came on regularly for trial on** _ _[*date*]_ _**, at** _ _[*time*]_ _**.** _ _[*Name*]_ _ **appeared as attorney for plaintiff,** _ _[*name*]_ _**, and** _ _[*name*]_ _ **appeared as attorney for defendant,** _ _[*name*]_ _**. A jury trial having been waived, the court having heard the testimony and considered the evidence, the matter having been submitted for decision, and**

[*Add one of the following alternatives*]

[*Alternative 1: Statement of decision issued*]

**the court having issued a statement of decision,**

[*Alternative 2: No statement of decision issued*]

**a statement of decision having** _ _[*not been requested/been waived*]_ _**,**

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Judgment is for plaintiff*]

**IT IS ORDERED AND ADJUDGED that plaintiff,** _ _[*name*]_ _**, recover from defendant,** _ _[*name*]_ _**, the principal sum of $**_ _[*amount*]_ _**, together with interest in the sum of $**_ _[*amount*]_ _**,** _ _[*plus interest in the sum of $*_ _[*amount*]_ _ *per day after* _ _[*date judgment form prepared*]_ _ *until the judgment is signed by the judge,*]_ _ _ _[*attorney fees in the sum of $*_ _[*amount*]_ _,]_ _ **and costs in the sum of $**_ _[*amount*]_ _**.**

[*Alternative 2: Judgment is for defendant*]

**IT IS ORDERED AND ADJUDGED that plaintiff,** _ _[*name*]_ _**, take nothing by way of** _ _[*his/her/its*]_ _ **complaint and that defendant,** _ _[*name*]_ _**, recover** _ _[*his/her/its*]_ _ **costs in the sum of $**_ _[*amount*]_ _ _ _[*and attorney fees in the sum of $*_ _[*amount*]_ _]_ _**.**

[*Continue*]

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

*Copies:* See §7.29.

*Comment:* When one of the attorneys prepares the form of judgment for presentation to the court (see §7.28), all amounts should be entered except for court costs. The clerk enters that amount after a memorandum of costs is filed or, if a motion to tax costs is filed, after costs have been determined.

The legal interest should be computed and entered on the form. When the judgment will be signed immediately after counsel prepares the form, interest should be computed up to the date of preparation of the judgment and that amount should be entered on the form. When there will be a gap in time between preparation of the judgment form and signature by the judge, counsel can compute and enter on the form the amount of interest due on the date the form was prepared, specifying the amount that will be due thereafter until the judgment is signed.

When the judgment is for different amounts against different defendants, or includes different rates of interest on different amounts of principal for different periods of time, that fact should be clearly indicated so that the appropriate calculations can be made.

In some courts, the interest amount should not be included, because the clerk computes and enters it. Counsel should check local court rules or policies to ascertain who computes the amount of interest and enters it on the judgment form.

The Judicial Council has developed a form (JUD-100), set forth in §7.30A, for use as a judgment in many different situations. Counsel should consider using this form as it provides a clear showing of the arithmetic involved in the total judgment and may facilitate the issuance of a writ of execution or an abstract of judgment.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.30A 4. Form: Judgment (Judicial Council Form JUD-100)

## §7.30A 4. Form: Judgment (Judicial Council Form JUD-100)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **JUDGMENT**<br>☐ **By Clerk** ☐ **By Default** ☐ **After Court Trial**<br>☐ **By Court** ☐ **On Stipulation** ☐ **Defendant Did Not Appear at Trial** | CASE NUMBER: |

## JUDGMENT

1. ☐ **BY DEFAULT**
   a. Defendant was properly served with a copy of the summons and complaint.
   b. Defendant failed to answer the complaint or appear and defend the action within the time allowed by law.
   c. Defendant's default was entered by the clerk upon plaintiff's application.
   d. ☐ **Clerk's Judgment** (Code Civ. Proc., § 585(a)). Defendant was sued only on a contract or judgment of a court of this state for the recovery of money.
   e. ☐ **Court Judgment** (Code Civ. Proc., § 585(b)). The court considered
      (1) ☐ plaintiff's testimony and other evidence.
      (2) ☐ plaintiff's written declaration (Code Civ. Proc., § 585(d)).

2. ☐ **ON STIPULATION**
   a. Plaintiff and defendant agreed (stipulated) that a judgment be entered in this case. The court approved the stipulated judgment and
   b. ☐ the signed written stipulation was filed in the case.
   c. ☐ the stipulation was stated in open court ☐ the stipulation was stated on the record.

3. ☐ **AFTER COURT TRIAL.** The jury was waived. The court considered the evidence.
   a. The case was tried on *(date and time)*:
      before *(name of judicial officer)*:
   b. Appearances by:
      ☐ Plaintiff *(name each)*:
      (1)
      (2)
      ☐ Continued on Attachment 3b.
      ☐ Plaintiff's attorney *(name each)*:
      (1)
      (2)
      ☐ Defendant *(name each)*:
      (1)
      (2)
      ☐ Continued on Attachment 3b.
      ☐ Defendant 's attorney *(name each)*:
      (1)
      (2)
   c. ☐ Defendant did not appear at trial. Defendant was properly served with notice of trial.
   d. ☐ A statement of decision (Code Civ. Proc., § 632) ☐ was not ☐ was requested.





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| PLAINTIFF: | CASE NUMBER: |
|---|---|
| DEFENDANT: | |

**JUDGMENT IS ENTERED AS FOLLOWS BY:** ☐ **THE COURT** ☐ **THE CLERK**

4. ☐ **Stipulated Judgment.** Judgment is entered according to the stipulation of the parties.

5. **Parties.** Judgment is

a. ☐ for plaintiff *(name each):*

and against defendant *(names):*

☐ Continued on Attachment 5a.

b. ☐ for defendant *(name each):*

c. ☐ for cross-complainant *(name each):*

and against cross-defendant *(name each):*

☐ Continued on Attachment 5c.

d. ☐ for cross-defendant *(name each):*

6. **Amount.**

a. ☐ Defendant named in item 5a above must pay plaintiff on the complaint:

| | | |
|---|---|---|
| (1) ☐ | Damages | $ |
| (2) ☐ | Prejudgment interest at the annual rate of % | $ |
| (3) ☐ | Attorney fees | $ |
| (4) ☐ | Costs | $ |
| (5) ☐ | Other *(specify)*: | $ |
| (6) | **TOTAL** | $ |

b. ☐ Plaintiff to receive nothing from defendant named in item 5b.

☐ Defendant named in item 5b to recover costs $

☐ and attorney fees $

c. ☐ Cross-defendant named in item 5c above must pay cross-complainant on the cross-complaint:

| | | |
|---|---|---|
| (1) ☐ | Damages | $ |
| (2) ☐ | Prejudgment interest at the annual rate of % | $ |
| (3) ☐ | Attorney fees | $ |
| (4) ☐ | Costs | $ |
| (5) ☐ | Other *(specify)*: | $ |
| (6) | **TOTAL** | $ |

d. ☐ Cross-complainant to receive nothing from cross-defendant named in item 5d.

☐ Cross-defendant named in item 5d to recover costs $

☐ and attorney fees $

7. ☐ Other *(specify):*

Date:

☐ _____
JUDICIAL OFFICER

Date:

☐ Clerk, by _____, Deputy

(SEAL)

**CLERK'S CERTIFICATE** *(Optional)*

I certify that this is a true copy of the original judgment on file in the court.

Date:

Clerk, by _____, Deputy





*Comment:* The Judicial Council developed this form for use as a judgment in many different situations. Although use

of the form is optional, counsel should consider using it to provide a clear showing of the arithmetic involved in the total judgment and to facilitate the issuance of a writ of execution or an abstract of judgment. For other forms of judgment, see §§7.29 and 7.30.

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## D. Costs

### §7.31 1. Statutory Authority

Claims for costs are governed by CCP §§1021-1038. Specific allowable costs are set forth in CCP §1033.5. Numerous other provisions for costs are scattered throughout the codes. Some of these, as well as a tender and deposit by a debtor under CCP §1025, are discussed in §§7.32-7.34. Recovery of attachment costs and bond premiums are discussed in §§7.35-7.36. For detailed discussions of recoverable costs, see California Trial Practice: Civil Procedure During Trial §§27.3-27.111 (3d ed Cal CEB 1995). On postjudgment costs of enforcement of judgment, see §§11.47-11.56.

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## 2. Selective Cost Provisions

### §7.32 a. Effect of CCP §998 Offer

Code of Civil Procedure §998 provides for offers to compromise by the plaintiff as well as by the defendant. A plaintiff who does not accept an offer of the defendant and later fails to obtain a judgment more favorable than that in the offer (exclusive of attorney fees and costs) cannot recover costs and must pay the defendant's costs from the time of the offer. CCP §998(c). The court in its discretion may also require the plaintiff to pay the defendant's costs from the date the complaint was filed plus necessary costs incurred by the defendant for expert witness services. CCP §998(c). The defendant's costs are deducted from any damages awarded to the plaintiff; if the costs exceed that award, the net amount is awarded to the defendant and judgment is entered accordingly. CCP §998(e).

Similarly, if the defendant does not accept an offer made by the plaintiff and later fails to obtain a judgment more favorable than that offer, the court may require the defendant to pay a reasonable sum to cover the necessary costs for expert witness services incurred by the plaintiff after the offer. CCP §998(d).

For time limitations and forms, see §§7.17-7.19. For detailed discussion of CCP §998 offers to compromise, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004); California Trial Practice: Civil Procedure During Trial §§23.2, 27.51-27.66 (3d ed Cal CEB 1995).

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### §7.33 b. Tender and Deposit by Debtor

In an action for recovery of money only, the defendant's answer may allege that before commencement of the action the defendant tendered to the plaintiff the full amount to which the plaintiff was entitled. If the defendant deposits that amount in court for the plaintiff and the allegation is found to be true, the plaintiff cannot recover costs but must instead pay the defendant's costs. CCP §1025.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.34 c. Transfer of Action

### §7.34 c. Transfer of Action

When an action is transferred from a court that lacks subject matter jurisdiction to a court that has subject matter jurisdiction under CCP §396, costs and fees, including filing fees in the transferee court, are to be paid by the party filing the action in the improper court unless the court directs otherwise. CCP §§396, 399. If the plaintiff does not pay the fees and costs within 5 days after notice of the order is served, the defendant may pay them and recover them either as an offset against the plaintiff's judgment or as costs if the defendant prevails in the action. CCP §399(a).

**NOTE:** If the costs and fees are not paid within the time specified in CCP §399, the action may be dismissed on noticed motion. CCP §399(a).

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### §7.35 d. Attachment Costs

Expenses of attachment are recoverable costs. CCP §1033.5(a)(5). They must be included in the cost bill (see §7.37) and cannot be collected later as part of the costs on execution. *Hotchkiss v Smith* (1895) 108 C 285, 41 P 304. Fees for serving writs of attachment and any notary fees for the affidavit and bond are recoverable when an attachment is proper. *Kinkade v Champion Horse Shoe Co.* (1916) 32 CA 435, 163 P 228. See also CCP §482.110, which permits attachment costs to be included in the amount attached.

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### §7.36 e. Bond Premiums

Premiums on necessary surety bonds are recoverable costs. CCP §1033.5(a)(6). See *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 150, 135 CR 802 (premiums paid for surety bonds in connection with attachment). See also CCP §995.250(a), which provides that premiums reasonably paid by a party under a statute requiring the bond in the action or proceeding are recoverable costs. CCP §995.250(a)-(b).

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## §7.37 3. Procedure for Recovery

A prevailing party who desires to recover costs must serve on the adverse party and file a memorandum of costs within 15 days after either the date the clerk mails notice of entry of judgment or dismissal under CCP §664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. Cal Rules of Ct 3.1700(a)(1). The memorandum must be verified under oath by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case. Cal Rules of Ct 3.1700(a)(1).

A party who is dissatisfied with any of the claimed costs may, within 15 days after service of the memorandum of costs, move to strike or to have the costs taxed. Cal Rules of Ct 3.1700(b)(1). See *Jimenez v City of Oxnard* (1982) 134 CA3d 856, 858 n2, 184 CR 864 (motion to strike cost bill treated as motion to tax cost). The 15-day period is extended if service is by mail. Cal Rules of Ct 3.1700(b)(1). Unless the entire cost memorandum is objected to, the motion to strike or tax costs must refer to each item objected to by the same number and appear in the same order as the corresponding cost item claimed on the memorandum of costs and state why the item is objectionable. Cal Rules of Ct 3.1700(b)(2). On stipulating to extend the time for filing the cost memorandum or moving to strike or tax costs, see Cal Rules of Ct 3.1700(b)(3).

**PRACTICE TIP:** A party who is applying for a default judgment (by either the clerk or the court) at the time of making the application must request costs on the Request for Entry of Default (Application to Enter Default) (Judicial Council Form CIV-100). Cal Rules of Ct 3.1700(a)(2). See §7.8.

For further discussion of the procedure to recover prejudgment costs, see California Trial Practice: Civil Procedure During Trial §§27.88-27.102 (3d ed Cal CEB 1995). On recovery of postjudgment costs for enforcement of the judgment, see §§11.47-11.56.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/ E. Attorney Fees/§7.38 1. Procedure

## E. Attorney Fees

### §7.38 1. Procedure

Attorney fees are recoverable only when authorized by statute or provided for by contract unless a judicially created exception to this rule applies (*e.g.,* the common fund doctrine or the substantial benefit theory).

**NOTE:** Contracting parties may validly agree that the prevailing party will be awarded attorney fees incurred in any litigation between themselves, whether that litigation sounds in tort or in contract. A contract allowing a prevailing party to recover attorney fees incurred in any action "arising out of the execution of the agreement" may support an award of attorney fees to the prevailing party in an action alleging both contract and tort claims. *Santisas v Goodin* (1998) 17 C4th 599, 607, 71 CR2d 830. However, in *Casella v Southwest Dealer Servs., Inc.* (2007) 157 CA4th 1127, 1161, 69 CR3d 445, the court distinguished the attorney fee provision in *Santisas*. The *Casella* attorney fee provision started out broadly, using the phrase "[i]f any legal action arises under this Agreement" similar to the language at issue in *Santisas*, 17 C4th at 607. But the *Casella* provision then narrowed, limiting the recovery of reasonable attorney fees to those "incurred in enforcing or attempting to enforce any of the terms, covenants or conditions." The complaint stated only tort claims for wrongful termination, fraud, and violation of Lab C §970. Because tort claims do not "enforce" a contract, attorney fees were unavailable. See CC §1717(a).

Whether authorized by statute or by contract, attorney fees are allowable as an item of costs. CCP §1033.5(a)(10)(A), (c)(5); CC §1717(a). See Cal Rules of Ct 3.1702(e)). The award of these fees is made on noticed motion or on entry of a default judgment unless the parties stipulate otherwise. CCP §1033.5(c)(5). A notice of motion to claim attorney fees, for services up to and including the rendition of judgment in the trial court (including fees on an appeal before rendition of judgment in trial court), must be served and filed within the time for filing a notice of appeal. Cal Rules of Ct 3.1702(b)(1). See Cal Rules of Ct 8.104, 8.108. However, if a party is entitled to statutory or contractual attorney fees that are fixed without the necessity of a court determination, the fees must be claimed in the memorandum of costs. Cal Rules of Ct 3.1702(e). See §7.37.

The parties may extend the time for making the motion by filing a stipulation before expiration of that time period. The deadline may be extended up to 60 days after expiration of the time for filing notice of appeal or, if a notice of appeal is filed, until the time within which a memorandum of costs must be served and filed. Cal Rules of Ct 3.1702(b)(2).

The trial judge may also extend the time for filing a motion for attorney fees on a showing of good cause, in the absence of a stipulation or for a longer period than allowed by stipulation. Cal Rules of Ct 3.1702(d).

Many courts have attorney fee schedules when a contract or promissory note provides for the recovery of a reasonable attorney fee or when a statute authorizes the clerk to enter such a fee. The court is not bound by local court schedules, however, and has discretion to allow a greater or lesser amount. See *Arsco Constr. Co. v Ocean View Estates* (1959) 169 CA2d 235, 337 P2d 146. Thus the prevailing party's attorney may be entitled to additional fees for additional or extraordinary services.

**NOTE:** In *Jaffe v Pacelli* (2008) 165 CA4th 927, 82 CR3d 423, the court held that the judgment creditor's attorney fees incurred in filing an adversarial proceeding and securing the dismissal of the debtor's bankruptcy proceedings were recoverable as postjudgment attorney fees under CCP §685.040 because the creditor's actions in the bankruptcy proceedings were necessary to maintain, preserve, and protect the enforceability of the judgment. The underlying promissory note provided for attorney fees, and the debtor filed bankruptcy to avoid paying the judgment. The court noted that the creditor could request fees in state court even though the bankruptcy court could have made an attorney fee award. See also *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 888, 88 CR3d 250 (when underlying judgment includes award of attorney fees, those fees are recoverable postjudgment as reasonable and necessary).

Counsel should check local court rules and policies to ascertain whether a fee schedule is in effect in the court in which

the case is pending. See, *e.g.,* Contra Costa Super Ct R 20(D), (F) (default and contested cases); Los Angeles Super Ct R 3.2(a) (default cases); San Diego Super Ct R 2.5.11 (default cases). Note that under these court rules an application for a fee exceeding the scheduled fee must be accompanied by an itemized statement of the services rendered or to be rendered.

Attorney fees fall outside the substantive demand of the complaint and have no effect on the jurisdictional limit of the court. *Babcock v Antis* (1979) 94 CA3d 823, 156 CR 673.

For further discussion of recovery of attorney fees, see California Trial Practice: Civil Procedure During Trial, chap 26 (3d ed Cal CEB 1995).

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### §7.39 2. Effect of Contract Provision

Civil Code §1717 transforms a unilateral attorney fee provision in a contract into a reciprocal provision. That is, when the contract provides that attorney fees and costs will be awarded either to a particular party or to the prevailing party, the prevailing party is entitled to recover attorney fees regardless of whether that party was the party specified in the contract. CC §1717(a). Whether or not the action proceeds to final judgment, a party can require the court by noticed motion to determine the party prevailing on the contract for purposes of CC §1717. CC §1717(b)(1).

If the action has been dismissed voluntarily or because of a settlement, there is no prevailing party for purposes of CC §1717. CC §1717(b)(2).

Except as provided in CC §1717(b)(2), the "party prevailing on the contract" is the party who recovered greater relief in the action *on the contract*. The court may also rule that no party has prevailed on the contract for purposes of the statute. In suits that include other causes of action, the party prevailing on the contract cause of action is entitled to recover attorney fees even though damages may be awarded against that party on other causes of action.

Whether a particular action is "on the contract" under CC §1717(b)(1) depends on the allegations in the plaintiff's complaint. Even when a breach of contract is not specifically pleaded, however, the action may still be considered "on the contract" when a contract claim is asserted at trial. *Walsh v New W. Fed. Sav. & Loan Ass'n* (1991) 234 CA3d 1539, 1547, 1 CR2d 35.

For further discussion of recovery of attorney fees, see California Trial Practice: Civil Procedure During Trial, chap 26 (3d ed Cal CEB 1995).

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## §7.40 3. Actions Based on Book Account

A successful party in an action on a book account may recover attorney fees limited to the lesser of $800 for book accounts maintained for consumer purposes, $1000 for commercial book accounts, or 25 percent of the principal obligation. CC §1717.5(a). In any event the fees awarded must be the lesser of the amount allowed under §1717.5(a), the amount of any default attorney fee schedule adopted by the court, or an amount otherwise provided by the court. CC §1717.5(b).

Section 1717.5 does not apply if there is a written agreement between the parties signed by the person to be charged, unless the agreement states that the prevailing party in an action between the parties is entitled to the fees under §1717.5. The statute also does not apply to any action in which an insurance company is a party; nor is any insurance company, surety, or guarantor liable under the statute for attorney fees and costs awarded to a party prevailing against its insured, without a specific contractual provision authorizing liability. In addition, the statute does not apply to any action in which certain specified kinds of banking institutions are parties. CC §1717.5(c).

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### §7.41 F. Interest

A party who is entitled to recover damages certain, or damages capable of being made certain by calculation, and whose right to recover is vested on a particular day, is also entitled to recover interest from that day, except for any period that the debtor is prevented by law or by the creditor's own actions from paying the debt. CC §3287(a).

A party entitled to receive damages based on a contract cause of action for an *unliquidated* amount may also recover prejudgment interest as the court may fix, but not for the period before the action was filed. CC §3287(b).

Any rate of interest specified in a contract is chargeable after its breach "until the contract is superseded by a verdict or other new obligation." CC §3289(a).

For a retail installment contract subject to the Unruh Act (CC §§1801-1812.20), the contracted finance charge is the legal rate of interest. CC §3289.5. Generally, interest may not be computed on accrued interest except by special statutory provision or by the parties' stipulation. *State v Day* (1946) 76 CA2d 536, 173 P2d 399.

If the contract (other than a note secured by a deed of trust on real property) does not specify any rate of interest after a breach, the legal rate of 10 percent per year applies. CC §3289(b).

Once the judgment is entered, interest accrues at the rate of 10 percent per year on the principal amount remaining unsatisfied. CCP §§685.010(a), 685.020(a). If a money judgment is payable in installments, interest starts to accrue on each installment on the date it becomes due, unless the judgment provides otherwise. CCP §685.020(b).

**NOTE:** The 10-percent interest rate provided in CCP §685.010(a) does not apply to judgments against local public entities under Govt C §970.1(b). Instead, the 7-percent interest rate specified in Cal Const art XV, §1 applies. *California Fed. Sav. & Loan Ass'n v City of Los Angeles* (1995) 11 C4th 342, 45 CR2d 279; *San Francisco Unified Sch. Dist. v San Francisco Classroom Teachers Ass'n* (1990) 222 CA3d 146, 272 CR 38.

Interest ceases to accrue on a judgment as provided in CCP §685.030. Code of Civil Procedure §685.030(a) provides that, if a money judgment is satisfied in full under a writ, interest ceases to accrue on the judgment on the date of levy if the proceeds are paid in a lump sum. Interest ceases to accrue on the date and in the manner provided in CCP §706.024 or §706.028 if the judgment is satisfied with an earnings withholding order. In any other case, interest ceases to accrue on the date the proceeds of sale or collection are actually received by the levying officer.

**NOTE:** A writ of execution on a money judgment in a limited civil case may be deemed "fully satisfied," and the court clerk may make such an entry in the Register of Actions, when the judgment amount has been fully collected and an interest deficit of less than $10 remains. CCP §685.030(e).

On interest to be satisfied in a levy under a writ, see CCP §685.050.

For discussion of interest on the judgment, see California Trial Practice: Civil Procedure During Trial §§27.112-27.127 (3d ed Cal CEB 1995).

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## §7.42 VI. VACATING JUDGMENT

A trial court may not open or vacate a judgment except as provided by statute (*e.g.,* under CCP §473 or §473.5, on a motion for new trial under CCP §§656-662.5, 914, or on a motion to set aside and vacate the judgment under CCP §§663-663.2), unless either the judgment is void on its face or equitable relief is warranted on the ground of extrinsic fraud or mistake.

On statutory motions after trial and procedure for vacating a judgment, see California Trial Practice: Civil Procedure During Trial, chap 25 (3d ed Cal CEB 1995). On motions to vacate default and judgment by default, including equitable motions based on fraud or mistake, or an independent action in equity to accomplish this, see California Civil Procedure Before Trial §§38.62-38.86 (4th ed Cal CEB 2004).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.43 VII. APPEAL

## §7.43 VII. APPEAL

The appeal of a debt collection judgment is governed by statutes and rules applicable to civil appeals generally. See California Civil Appellate Practice (3d ed Cal CEB 1996). Perfecting an appeal by filing a notice of appeal generally stays trial court proceedings, including enforcement of the judgment. CCP §916(a); Cal Rules of Ct 8.100(a). Unless an undertaking is given under CCP §917, however, the filing of an appeal does not stay enforcement beyond 10 days after the last date on which a notice of appeal could be filed. CCP §918(b).

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## VIII. STEPS TO ENFORCE JUDGMENT

### A. Entry of Judgment

### §7.44 1. In General

A judgment is not effective for any purpose until it is entered. CCP §664. On manner of entering judgment, see CCP §§668, 668.5. For purposes of a contested action other than a small claims court action or an action in which a prevailing party is not represented by counsel, the party submitting the judgment must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared and must file the original notice of entry and proof of service. CCP §664.5(a). When a prevailing party is not represented by counsel, the court clerk mails the notice of entry and executes a certificate of mailing. CCP §664.5(a).

On notice of entry of judgment in small claims court, see §7.87. The notice of entry of judgment by the clerk or counsel for any party fixes the time within which a motion for new trial (CCP §§656-662.5, 914) or a motion to set aside and vacate the judgment (CCP §§663-663.2) may be made. It also commences the time for filing a notice of appeal. See Cal Rules of Ct 8.104(a).

For a form for a notice of entry of judgment, see California Trial Practice: Civil Procedure During Trial §23.40 (3d ed Cal CEB 1995). For further discussion and requirement for entry of civil judgment generally, see Civ Proc During Trial §§23.19-23.28.

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## §7.45 2. Judgments Based on Sister-State Judgments

The procedure to obtain a judgment based on a sister-state judgment is set forth in CCP §§1710.10-1710.65. The judgment creditor must apply for entry of a judgment based on the sister-state judgment by filing an application under oath that includes the information required by CCP §1710.15. See Judicial Council Form EJ-105. The application must be filed in the county in which any judgment debtor resides. CCP §71710.20(b)(1). If no judgment debtor resides in the state, it may be filed in any county. CCP §1710.20(b)(2).

**PRACTICE TIP:** Recordation of a sister-state judgment will not, by itself, create a judgment lien on real property in California. The creditor first must reduce the sister-state judgment to a California judgment by complying with the Sister State Money Judgments Act (CCP §§1710.10-1710.65); *Kahn v Berman* (1988) 198 CA3d 1499, 244 CR 575.

The clerk must enter judgment based on the application for the total amount as shown in the application consisting of the unpaid balance under the sister-state judgment, interest, and the filing fee for the application. CCP §1710.25(a)(1)-(3). Notice of entry of judgment must be served promptly by the judgment creditor on the judgment debtor in the same manner as for service of a summons. CCP §1710.30. The notice of entry of judgment must be in a form prescribed by the Judicial Council (see Form EJ-110; reprinted in §7.47) and must inform the judgment debtor that the judgment debtor has 30 days in which to move to vacate the judgment. CCP §1710.30(a).

Except as otherwise provided in CCP §§1710-1710.65, a judgment entered under those sections has the same effect and may be enforced or satisfied in the same manner as an original money judgment of the court. CCP §1710.35. On the prohibition against issuing a writ of execution or enforcing a judgment by other means until at least 30 days after service of notice of entry of judgment and exceptions, see CCP §1710.45.

The award of fees in a sister-state judgment is enforceable under the full faith and credit clause of US Const art IV, §1. *Aspen Int'l Capital Corp. v Marsch* (1991) 235 CA3d 1199, 286 CR 921. California's statutory limitations on recovering attorney fees incurred in the enforcement of a judgment (CCP §685.040) do not apply to a sister-state judgment awarding such fees. However, in an action to enforce a sister-state judgment based on a contract containing an attorney fees provision, the prevailing party in California may not recover fees under CC §1717. The California action is not a prosecution of the contract but an action to enforce a judgment. *Hambrose Reserve, Ltd. v Faitz* (1992) 9 CA4th 129, 11 CR2d 638, overruled in part on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.46 a. Form: Application for Entry of Judgment on Sister-State Judgment (Judicial Council Form EJ-105)

## §7.46 a. Form: Application for Entry of Judgment on Sister-State Judgment (Judicial Council Form EJ-105)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br><br>DEFENDANT: | | CASE NUMBER: |
| **APPLICATION FOR ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT**<br>☐ **AND ISSUANCE OF WRIT OF EXECUTION OR OTHER ENFORCEMENT**<br>☐ **AND ORDER FOR ISSUANCE OF WRIT OR OTHER ENFORCEMENT** | | |

Judgment creditor applies for entry of a judgment based upon a sister-state judgment as follows:

1. Judgment creditor *(name and address)*:

2. a. Judgment debtor *(name)*:

   b. ☐ An individual *(last known residence address)*:

   c. ☐ A corporation of *(specify place of incorporation)*:

      (1) ☐ Foreign corporation
      ☐ qualified to do business in California
      ☐ not qualified to do business in California

   d. ☐ A partnership *(specify principal place of business)*:

      (1) ☐ Foreign partnership which
      ☐ has filed a statement under Corp C ~~15700~~ 15800
      ☐ has not filed a statement under Corp C ~~15700~~ 15800

3. a. Sister state *(name)*:

   b. Sister-state court *(name and location)*:

   c. Judgment entered in sister state on *(date)*:

4. **An authenticated copy of the sister-state judgment is attached to this application.** Include accrued interest on the sister-state judgment in the California judgment (item 5c).
   a. Annual interest rate allowed by sister state *(specify)*:

   b. Law of sister state establishing interest rate *(specify)*:

5. a. Amount remaining unpaid on sister-state judgment: . . . . . $
   b. Amount of filing fee for the application: . . . . . $
   c. Accrued interest on sister-state judgment . . . . . $

   d. Amount of judgment to be entered *(total of 5a, b, and c)*: . . . . . $ _____

*(Continued on reverse)*

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

6. ☐ Judgment creditor also applies for issuance of a writ of execution or enforcement by other means before service of notice of entry of judgment as follows:
   a. ☐ Under CCP 1710.45(b).
   b. ☐ A court order is requested under CCP 1710.45(c). Facts showing that great or irreparable injury will result to judgment creditor if issuance of the writ or enforcement by other means is delayed are set forth as follows:

☐ continued in attachment 6b.

7. An action in this state on the sister-state judgment is not barred by the statute of limitations.
8. I am informed and believe that no stay of enforcement of the sister-state judgment is now in effect in the sister state.
9. No action is pending and no judgment has previously been entered in any proceeding in California based upon the sister-state judgment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct except as to those matters which are stated to be upon information and belief, and as to those matters I believe them to be true.

Date:

. . . . . .
*(TYPE OR PRINT NAME)*

▶ _____
*(SIGNATURE OF JUDGMENT CREDITOR OR ATTORNEY)*



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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.47 b. Form: Notice of Entry of Judgment on Sister-State Judgment (Judicial Council Form EJ-110)

## §7.47 b. Form: Notice of Entry of Judgment on Sister-State Judgment (Judicial Council Form EJ-110)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | *FOR COURT USE ONLY* |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br><br>DEFENDANT: | | CASE NUMBER: |

**NOTICE OF ENTRY OF JUDGMENT ON SISTER-STATE JUDGMENT**

1. TO JUDGMENT DEBTOR *(name)*:

2. YOU ARE NOTIFIED
   a. Upon application of the judgment creditor, a judgment against you has been entered in this court as follows:
      (1) Judgment creditor *(name)*:
      (2) Amount of judgment entered in this court: $
   b. This judgment was entered based upon a sister-state judgment previously entered against you as follows:
      (1) Sister state *(name)*:
      (2) Sister-state court *(name and location)*:
      (3) Judgment entered in sister state on *(date)*:
      (4) Title of case and case number *(specify)*:

3. **A sister-state judgment has been entered against you in a California court. Unless you file a motion to vacate the judgment in this court within 30 DAYS after service of this notice, this judgment will be final.**

   **This court may order that a writ of execution or other enforcement may issue. Your wages, money, and property could be taken without further warning from the court.**

   **If enforcement procedures have already been issued, the property levied on will not be distributed until 30 days after you are served with this notice.**

Date: Clerk, by _____, Deputy

[SEAL]

4. ☐ NOTICE TO THE PERSON SERVED: You are served
   a. ☐ as an individual judgment debtor.
   b. ☐ under the fictitious name of *(specify)*:
   c. ☐ on behalf of *(specify)*:

   Under:
   - ☐ CCP 416.10 (corporation)
   - ☐ CCP 416.20 (defunct corporation)
   - ☐ CCP 416.40 (association or partnership)
   - ☐ other:
   - ☐ CCP 416.60 (minor)
   - ☐ CCP 416.70 (conservatee)
   - ☐ CCP 416.90 (individual)

***(Proof of service on reverse)***

Print

## PROOF OF SERVICE

***(Use separate proof of service for each person served)***

1. I served the Notice of Entry of Judgment on Sister-State Judgment as follows:
   a. on judgment debtor *(name)*:

   b. by serving ☐ judgment debtor ☐ other *(name and title or relationship to person served)*:

   c. ☐ by delivery ☐ at home ☐ at business
      (1) date:
      (2) time:
      (3) address:

   d. ☐ by mailing
      (1) date:
      (2) place:

2. Manner of service *(check proper box)*:
   a. ☐ **Personal service.** By personally delivering copies. (CCP 415.10)
   b. ☐ **Substituted service on corporation, unincorporated association (including partnership), or public entity.** By leaving, during usual office hours, copies in the office of the person served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(a))
   c. ☐ **Substituted service on natural person, minor, conservatee, or candidate.** By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of the office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left. (CCP 415.20(b)) ***(Attach separate declaration or affidavit stating acts relied on to establish reasonable diligence in first attempting personal service.)***
   d. ☐ **Mail and acknowledgment service.** By mailing (by first-class mail or airmail, postage prepaid) copies to the person served, together with two copies of the form of notice and acknowledgment and a return envelope, postage prepaid, addressed to the sender. (CCP 415.30) ***(Attach completed acknowledgment of receipt.)***
   e. ☐ **Certified or registered mail service.** By mailing to an address outside California (by first-class mail, postage prepaid, requiring a return receipt) copies to the person served. (CCP 415.40) ***(Attach signed return receipt or other evidence of actual delivery to the person served.)***
   f. ☐ Other *(specify code section)*:
      ☐ Additional page is attached.
3. The "Notice to the Person Served" was completed as follows:
   a. ☐ as an individual judgment debtor.
   b. ☐ as the person sued under the fictitious name of *(specify)*:
   c. ☐ on behalf of *(specify)*:
      under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor) ☐ other:
      ☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
      ☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (individual)
4. At the time of service I was at least 18 years of age and not a party to this action.
5. Fee for service: $
6. Person serving:
   a. ☐ California sheriff, marshal, or constable.
   b. ☐ Registered California process server.
   c. ☐ Employee or independent contractor of a registered California process server.
   d. ☐ Not a registered California process server.
   e. ☐ Exempt from registration under Bus. & Prof. Code 22350(b).
   f. Name, address and telephone number and, if applicable, county of registration and number:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
*(SIGNATURE)*

***(For California sheriff, marshal, or constable use only)***
I certify that the foregoing is true and correct.

Date:

▶ _____
*(SIGNATURE)*

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### §7.47A 3. Judgments Based on Foreign Money Judgments

The procedure to obtain a judgment based on a foreign money judgment is set forth in the Uniform Foreign-Country Money Judgments Recognition Act (CCP §§1713-1724). Unlike a sister-state judgment, a foreign money judgment is not simply a registration procedure; rather it is a new civil action with limited defenses. In this type of proceeding, the judgment creditor brings a new action based on the foreign money judgment. The action must be brought within 10 years of the time the foreign money judgment became final. CCP §1721.

A foreign money judgment is conclusive between the parties (CCP §1719(a)) with the exception of the grounds set forth in CCP §1716(c). These grounds test the foreign system to see that the due process rights that would have been available in a California action were available in the foreign action. The fewer rights afforded the defendant, the less conclusive the judgment will be in California. Code of Civil Procedure §§1716(b)(2), (b)(3) and 1717 provide similar guarantees based on the nature of the jurisdiction of the foreign court over the defendant.

**CAUTION:** There is a gap created by the definitions in the sister-state and foreign money judgment statutes. Under the former, a sister-state judgment is defined as a judgment of "a court of a state of the United States, other than California." CCP §1710.10(c). A foreign-country judgment, on the other hand, is defined as a judgment of a court of a foreign country (CCP §1714(b)), and a foreign country is defined as "any governmental unit other than the United States, or any state, district, commonwealth, territory, or insular possession of the United States" (CCP §1714(a)(1), (a)(2)). Thus judgments from the Commonwealth of Puerto Rico or Guam, among other places, fall into a gap and cannot be registered, nor are they entitled to a presumption of conclusiveness. In *Attorney General of Guam v Jesus Q. Torres* (9th Cir 2005) 419 F3d 1017, the Ninth Circuit said, "The relevant question is whether proceedings in Guam's courts may be treated as 'state judicial proceedings' and accordingly, in this case, triggered the application of *Younger* abstention. We conclude that the policies underlying the doctrine, statutory law, and this court's prior decisions support an affirmative response." 419 F3d at 1022. It appears that the District Courts of the District of Columbia fall into the same category, and the Ninth Circuit indicates that they are considered state courts for the purposes being discussed. Thus it seems that a good argument could be made challenging the exclusion of these courts under the sister-state judgment recognition scheme.

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## §7.48 B. Period of Judgment's Enforceability

Once a judgment is entered (see §7.44), it is enforceable under the Enforcement of Judgments Law (CCP §§680.010-724.260), except as otherwise provided by statute or in the judgment. CCP §683.010. A money judgment or a judgment for possession or sale of property is enforceable for 10 years after the date judgment is entered. CCP §683.020; see Comment to CCP §683.050. The 10-year period may be extended if the judgment is renewed in a timely manner. See §§7.65-7.70. Thus, unless the judgment is renewed or a statute provides otherwise, on expiration of the 10-year period the judgment cannot be enforced, all enforcement procedures under the judgment or a writ or order issued under the judgment must cease, and any lien created in enforcing the judgment (see §§7.50-7.53) is extinguished. CCP §683.020; see Comment to CCP §683.020.

**NOTE:** For money judgments payable in installments, the 10-year period of enforceability runs on each installment from the date the installment becomes due and runs on costs from the date the costs are added to the judgment under CCP §685.090. CCP §683.030.

A judgment creditor who applies for a writ for the enforcement of a judgment more than 10 years after the judgment was entered or renewed must accompany the application with a declaration stating facts that show why issuance of the writ is not barred under CCP §§683.010-683.050. CCP §683.040. For example, if the judgment is one for money payable in installments, the declaration "will be sufficient if it states that the 10-year limitation period ([CCP §]683.030) has not run as to the installment or installments covered by the application for the writ." See Comment to CCP §683.040.

The 10-year enforceability period of CCP §683.020 is not extended if enforcement of the judgment has been stayed or enjoined by court order or operation of law, or tolled for any other reason. See Comment to CCP §683.020. However, nothing in CCP §§683.010-683.320 prohibits a judgment creditor from bringing an action on the judgment within the 10-year period prescribed in CCP §337.5. CCP §683.050. The 10-year period under §337.5 begins to run when the judgment is final and the period may be tolled, *e.g.,* by the debtor's absence from the state or by the debtor being in bankruptcy and subject to a bankruptcy stay. See *Kertesz v Ostrovsky* (2004) 115 CA4th 369, 8 CR3d 907. See also Comment to CCP §683.050. Thus, a judgment creditor may be able to bring an action on the judgment after the 10-year enforceability period of CCP §683.020 has expired if the 10-year statute of limitations of CCP §337.5 has not elapsed. See Comment to CCP §683.020.

On use of a judgment as an offset although the 10-year period of enforceability under CCP §§683.020-683.030 may have elapsed, see CCP §431.70.

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## §7.49 C. Enforcement by Assignee of Judgment

An assignee of a judgment cannot enforce the judgment under CCP §§680.010-724.260 unless an acknowledgment of assignment of judgment to the assignee has been filed under CCP §673 or the assignee has otherwise become an assignee of record. CCP §681.020. Under CCP §673(a), an assignee of a judgment becomes an assignee of record by filing an acknowledgment of assignment of judgment with the court clerk where the judgment was entered. This acknowledgment must be made in the manner of an acknowledgment for the conveyance of real property, and it must be executed and acknowledged by the judgment creditor or the prior assignee of record, if any. CCP §673(c)(1)-(2). For required contents of acknowledgment of assignment of judgment, see CCP §673(b).

The filing of an acknowledgment of assignment of judgment is not alone sufficient to give the judgment debtor notice so as to invalidate payments made by the judgment debtor to the judgment creditor or a prior assignee of record. See Comment to CCP §673; CC §954.5(c). Thus, in addition to filing the acknowledgment, a copy should be served on the judgment debtor, and proof of service should be filed with the court clerk.

Assignment of only part of a judgment is unenforceable against a judgment debtor unless the judgment debtor consents to or ratifies the assignment, and the assignee ordinarily has no legal standing to sue. The reason is that if the creditor were permitted to split its claim into parts, the debtor might be subjected to the trouble and expense of numerous suits on each partial claim. See *Stein v Cobb* (1940) 38 CA2d 8, 10, 100 P2d 358. On a partial assignee's equitable right to bring all parties before the court to have his or her rights adjudged under the assignment, see *Gause v PG&E* (1923) 60 CA 360, 371, 212 P 922.

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## D. Perfecting Judgment Lien

### 1. Judgment Lien on Real Property

### §7.50 a. Lump Sum or Installment Judgment

The manner of creating a judgment lien on real property depends on whether the judgment is a lump sum money judgment or an installment judgment. A judgment lien on real property based on a lump sum money judgment is created by recording an abstract of money judgment with the county recorder where the real property is located. CCP §697.310(a). A lump sum money judgment includes one that is payable in installments entered under CCP §116.610 (small claims court judgment), or under Veh C §16380 (vehicle accident damage judgment), or that is entered on a workers' compensation award (CCP §§697.310(c), 697.330(a)(1)).

A judgment lien on real property based on a judgment for spousal or child support payable in installments, a judgment against a health care provider under CCP §667.7 requiring periodic payments, or a judgment payable in installments entered on a workers' compensation award is created by recording an abstract of judgment *or* a certified copy of the money judgment with the county recorder where the property is located. CCP §§697.320(a), 697.330(a)(2).

Code of Civil Procedure §674 specifies the contents required in an abstract of judgment. The Judicial Council has adopted an abstract of judgment form (Form EJ-001). See §7.51. When an abstract of judgment will be recorded, use of this form is mandatory. Cal Rules of Ct 1.31(a), (b). Counsel for the judgment creditor should complete the form and submit it to the clerk of the court where the judgment was entered for certification. CCP §674. The clerk will charge a small fee for issuing each abstract. To avoid delays, counsel should include a check in the appropriate amount with the abstracts.

Once an abstract of judgment or a certified copy of the judgment is recorded, the judgment becomes a lien on real property located in the county of recordation regardless of whether the property is owned by the judgment debtor at the time of recordation or is acquired later. CCP §697.340. See *Mercantile Collection Bureau v Roach* (1961) 195 CA2d 355, 15 CR 710.

**NOTE:** A judgment lien will not affect previously transferred prop. Thus, a recorded abstract of judgment does not attach to real property that has already been conveyed by an unrecorded quitclaim deed. CCP §697.340(a); *Casey v Gray* (1993) 13 CA4th 611, 16 CR2d 538.

The attorney for the judgment creditor should consider recording an abstract or a certified copy of the judgment in both the county in which the debtor resides and in any other county in which the debtor owns real property.

For a detailed discussion of judgment liens on real property, including lien creation and duration and lien priorities, see §§7.48, 7.51, 7.54-7.57.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.51 b. Form: Abstract of Judgment-Civil and Small Claims (Judicial Council Form EJ-001)

## §7.51 b. Form: Abstract of Judgment-Civil and Small Claims (Judicial Council Form EJ-001)



EJ-001

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, address, State Bar number, and telephone number)*:
Recording requested by and return to:

☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD

SUPERIOR COURT OF CALIFORNIA, COUNTY OF
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

*FOR RECORDER'S USE ONLY*

PLAINTIFF:

DEFENDANT:

CASE NUMBER:

**ABSTRACT OF JUDGMENT—CIVIL AND SMALL CLAIMS** ☐ **Amended**

*FOR COURT USE ONLY*

1. The ☐ judgment creditor ☐ assignee of record applies for an abstract of judgment and represents the following:
   a. Judgment debtor's
      Name and last known address
   b. Driver's license no. [last 4 digits] and state: ☐ Unknown
   c. Social security no. [last 4 digits]: ☐ Unknown
   d. Summons or notice of entry of sister-state judgment was personally served or mailed to *(name and address)*:

2. ☐ Information on additional judgment debtors is shown on page 2.
3. Judgment creditor *(name and address)*:
4. ☐ Information on additional judgment creditors is shown on page 2.
5. ☐ Original abstract recorded in this county:
   a. Date:
   b. Instrument No.:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF APPLICANT OR ATTORNEY)

6. Total amount of judgment as entered or last renewed:
   $
7. All judgment creditors and debtors are listed on this abstract.
8. a. Judgment entered on *(date)*:
   b. Renewal entered on *(date)*:
9. ☐ This judgment is an installment judgment.
10. ☐ An ☐ execution lien ☐ attachment lien is endorsed on the judgment as follows:
    a. Amount: $
    b. In favor of *(name and address)*:
11. A stay of enforcement has
    a. ☐ not been ordered by the court.
    b. ☐ been ordered by the court effective until *(date)*:
12. a. ☐ I certify that this is a true and correct abstract of the judgment entered in this action.
    b. ☐ A certified copy of the judgment is attached.

[SEAL]

This abstract issued on *(date)*:

Clerk, by _____, Deputy

Print

| PLAINTIFF: | CASE NUMBER: |
|---|---|
| DEFENDANT: | |

**NAMES AND ADDRESSES OF ADDITIONAL JUDGMENT CREDITORS:**

13. Judgment creditor *(name and address):*

14. Judgment creditor *(name and address):*

15. ☐ Continued on Attachment 15.

**INFORMATION ON ADDITIONAL JUDGMENT DEBTORS:**

16. Name and last known address

Driver's license no. [last 4 digits] and state: ☐ Unknown

Social security no. [last 4 digits]: ☐ Unknown

Summons was personally served at or mailed to *(address):*

17. Name and last known address

Driver's license no. [last 4 digits] and state: ☐ Unknown

Social security no. [last 4 digits]: ☐ Unknown

Summons was personally served at or mailed to *(address):*

18. Name and last known address

Driver's license no. [last 4 digits] and state: ☐ Unknown

Social security no. [last 4 digits]: ☐ Unknown

Summons was personally served at or mailed to *(address):*

19. Name and last known address

Driver's license no. [last 4 digits] and state: ☐ Unknown

Social security no. [last 4 digits]: ☐ Unknown

Summons was personally served at or mailed to *(address):*

20. ☐ Continued on Attachment 20.



*Comment:* Use of this form is mandatory. Cal Rules of Ct 1.31(a), (b). Counsel should be careful to supply all

information required by this form; otherwise, the abstract may be considered null. For example, the omission of the amount of the judgment nullifies the abstract of judgment, and its recording is a nullity. *Ellrott v Bliss* (1983) 147 CA3d 901, 195 CR 446.

Similarly, an abstract of judgment must include the last four digits of the judgment debtor's social security number and driver's license number, if known to the judgment creditor. If the judgment creditor does not know either or both of these sets of numbers, he or she must so indicate on the abstract of judgment. CCP §674(a)(6).

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## §7.52 2. Judgment Lien on Personal Property

For lump sum money judgments, a judgment lien on the following business personal property can be created by filing a notice of judgment lien in the office of the Secretary of State (CCP §§697.510(a), 697.530(a)):

- Accounts receivable;
- Tangible chattel paper (as defined in Com C §9102(a)(78));
- Equipment;
- Farm products;
- Inventory; and
- Negotiable documents of title.

The property must all be located within California. CCP §697.530(a)(1)-(6). Property that the judgment lien *cannot* attach is specified in CCP §697.530(d).

Except for money judgments payable in installments under CCP §§116.620, or Veh C §16380, a judgment lien on business personal property cannot be created under CCP §§697.510-697.670 for money judgments payable in installments, unless all the installments under the judgment are due and payable at the time the notice of judgment lien is filed. CCP §697.510(a).

The required contents of the notice of judgment lien are set forth in CCP §697.550.

The creditor must serve a copy of the notice on the judgment debtor, either personally or by mail, at the time it is filed or promptly thereafter. CCP §697.560. Failure to serve the notice on the debtor, however, does not affect the lien's validity. CCP §697.560.

The notice of judgment lien must be filed and indexed in the same manner as a financing statement when presented for filing with the appropriate filing fee ($20) to the office of the Secretary of State. CCP §697.570. The notice may not be filed with the Secretary of State if it is presented for filing more than 10 days after the date of the notice. CCP §697.570. A judgment lien on personal property continues for 5 years from the date of filing. CCP §697.510(b). It may be extended by filing a continuation statement within the 6-month period prior to the expiration of the 5-year period. See CCP §697.510(d)-(h).

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### §7.53 3. Perfecting Lien Involving Federal Judgment

A judgment rendered by a federal district court is a lien on property in that state to the same extent as a state court's judgment. 28 USC §1962. When state law requires a lien to be perfected in a certain manner and authorizes a lien under a federal judgment to be perfected in the same manner, state law must be complied with before the lien attaches. 28 USC §1962. California has such legislation, which is set forth in CCP §697.060.

Under CCP §697.060(a), an abstract of judgment or a certified copy of a federal court money judgment that is enforceable in California may be recorded to create a judgment lien on real property under CCP §§697.310-697.410. Similarly, a notice of judgment lien based on a federal court money judgment that is enforceable in this state may be filed to create a judgment lien on personal property under CCP §§697.510-697.670. CCP §697.060(b); see §7.52.

**NOTE:** A federal judgment is not enforceable in California until it has been entered or registered in a district court sitting in California. A federal judgment rendered in a district court that has become final by appeal or expiration of the time to appeal may be registered in any other district by filing a certified copy of the judgment in that district. When so registered, it has the same effect as a judgment of the district court of the district where registered. 28 USC §1963. Thus a judgment creditor cannot record an abstract or certified copy of a federal judgment from a district court in another state, or file a notice of judgment lien on personal property, unless the creditor first registers it with a federal court sitting in California.

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## 4. Release or Subordination of Judgment Liens Concerning Real Property

### §7.54 a. In General

Once a judgment becomes a lien on the real property that the judgment debtor owns in the county of recordation, the debtor may find it difficult to refinance a loan for which the property is security under a deed of trust. A lender is unlikely to lend further money against that property when there is a judgment lien against it, unless the lien is subordinated to the lien of the deed of trust or unless the judgment lien is released.

**PRACTICE TIP:** When real property values have escalated rapidly and there is sufficient equity, some lenders will loan money despite the fact that there is a recorded abstract of judgment. The only remedy is to levy on the property to foreclose the lien created by the abstract. Generally, the junior lender will advance sufficient money to avoid losing its secured position.

To pay the judgment, it may be necessary for the judgment debtor to borrow against the very property to which the lien has attached. Borrowing may be achieved through creating an escrow so that the judgment lien can be released or subordinated to the lender's trust deed simultaneously with the payment. Consideration must be given to the type of documents the judgment creditor will execute to accomplish this end.

For example, if the judgment will be only partially satisfied, the judgment creditor may, depending on the circumstances, execute (1) a release of lien, which releases the lien only as to that particular property while maintaining the judgment lien on all the debtor's other real property in the county, or (2) a subordination agreement, subordinating the judgment lien to a new lien.

If the judgment will be fully satisfied, the judgment creditor must execute an acknowledgment of satisfaction of judgment. See CCP §724.030.

The appropriate document executed by the judgment creditor should be forwarded to the escrow company with escrow instructions. If the judgment will be only partially satisfied, the instructions should authorize the escrow officer, on payment to the creditor, to record the release of lien or subordination agreement. If the judgment will be fully satisfied, the instructions should authorize the escrow officer on payment to the judgment creditor to file with the court and serve on the judgment debtor the acknowledgment of satisfaction of judgment. See CCP §§724.030-724.040.

**PRACTICE TIP:** Judicial Council Form EJ-100, Acknowledgment of Satisfaction of Judgment (see §7.76), does not on its face contain a certificate of acknowledgment. A document generally must contain such a certificate to be recordable. See CC §§1195, 1213; Govt C §27287. For forms of a certificate of acknowledgment, see CC §§1183.5, 1189, 1192. Thus, counsel should attach to Form EJ-100 a certificate of acknowledgment sworn to before a notary so that the form will be recordable. Because Form EJ-100 is one-sided, many firms place the notarial acknowledgment on the back of the form.

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## §7.55 b. Form: Subordination Agreement

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **SUBORDINATION** |
| **vs** | ) | **AGREEMENT** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**WHEREAS:**

**A judgment was duly entered in this case in favor of plaintiff,** _ _[*name*]_ _**, and against defendant,** _ _[*name*]_ _**, on** _ _[*date*]_ _**,** _ _[*in judgment book volume* _ _[*number*]_ _**,** *page* _ _[*number*]_ _]_ _**.**

[*If applicable, add one of the following options*]

[*Option 1: If judgment has been renewed*]

**An application for renewal of the judgment was filed in this court on** _ _[*date*]_ _**, and was entered in** _ _[*specify court records*]_ _**.**

[*Option 2: If judgment has been assigned (see §7.49)*]

**The judgment creditor,** _ _[*name*]_ _**, on** _ _[*date*]_ _**, assigned the judgment, including all** _ _[*his/her/its*]_ _ **rights under the judgment, to** _ _[*name*]_ _**.**

**The judgment creditor's assignee,** _ _[*name*]__**, served on the judgment debtor,** _ _[*name*]_ _**, on** _ _[*date*]_ _**, a copy of the acknowledgment of assignment of judgment, duly executed and acknowledged by the judgment creditor, and filed the original acknowledgment of assignment of judgment with the clerk of the court where the judgment was entered on** _ _[*date*]_ _**, under Code of Civil Procedure §§673 and 681.020.**

[*Continue*]

**Defendant is the owner of certain real property in** _ _[*name of county*]_ _ **County, California, described as follows:** _ _[*Describe property by legal description*]_ _**.**

**A judgment lien on that property was created by recording** _ _[*an abstract/a certified copy*]_ _ **of the judgment in the office of the county recorder of** _ _[*name of county*]_ _ **County on** _ _[*date*]_ _**, in volume** _ _[*number*]_ _ **of its official records on page** _ _[*number*]_ _**.**

**Defendant has applied to** _ _[*name of lender*]_ _ **for a loan in the sum of $**_ _[*amount*]_ _ **and desires to**

**execute a promissory note in favor of that lender, payment of which is to be secured by a deed of trust on the above-described real property.**

**The lender, _ _[*name of lender*]_ _, is unwilling to make the loan unless the judgment lien is subordinated to the lien of the proposed deed of trust.**

[*Add one of the following alternatives*]

[*Alternative 1*]

**The judgment creditor's name and address is _ _[*specify*]_ _, and the judgment debtor's name and address is _ _[*specify*]_ _.**

[*Alternative 2*]

**The judgment creditor's name and address is _ _[*specify*]_ _, the judgment creditor's assignee's name and address is _ _[*specify*]_ _, and the judgment debtor's name and address is _ _[*specify*]_ _.**

[*Continue*]

**THEREFORE, in consideration of payment to _ _[*name of judgment creditor/judgment creditor's assignee*]_ _ of the sum of $_ _[*amount*]_ _, _ _[*name of judgment creditor/judgment creditor's assignee*]_ _ agrees to subordinate _ _[*his/her/its*]_ _ judgment lien to the lien of that deed of trust, dated _ _[*date*]_ _, executed by _ _[*name of defendant*]_ _ to _ _[*name of trustee under deed of trust*]_ _ as trustee for _ _[*name of lender*]_ _, as security for the payment of a promissory note executed by _ _[*name of defendant*]_ _ in the sum of $_ _[*amount of loan*]_ _. That deed of trust is to be recorded in the office of the county recorder of _ _[*name of county*]_ _ County, and the _ _[*judgment creditor's/judgment creditor's assignee's*]_ _ judgment lien shall be subordinated to the lien of the deed of trust as if the deed of trust had been made, executed, and recorded before the recordation of the _ _[*abstract/certified copy*]_ _ of the judgment.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Judgment creditor/*
*Judgment creditor's assignee*]_ _

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*judgment creditor/judgment creditor's assignee*]_ _

[*Certificate of Acknowledgment*
*signed by notary public*]

*Copies:* Original (forwarded to escrow company for recordation); copies (two copies forwarded to escrow company, one for judgment debtor and one for lender on payment to judgment creditor); office copies.

*Comment:* The required contents of a subordination statement concerning real property are specified in CCP §697.370. If the judgment debtor has no interest of record in the real property, the subordination statement must show the name of the record owner. CCP §697.370(b)(1). The execution of a subordination statement does not subordinate the judgment lien as to a judgment debtor not named in the subordination statement. CCP §697.370(d). The subordination statement should contain a certification of acknowledgment signed by a notary public so that it may be recorded.

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## §7.56 c. Form: Letter of Demand to Escrow Company

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7.56-1 Letter of demand to escrow company

_ _[*Name of escrow company*]_ _
_ _[*Address*]_ _
**Re: Your escrow no. _ _**[*specify*]_ _

**Dear _ _ _ _ _ _:**

**On behalf of the judgment creditor, _ _**[*name*]_ _**, I deliver to you an agreement for subordination of lien, executed by _ _**[*him/her/it*]_ _ **and properly acknowledged.**

**You are hereby authorized to place this document on record when you transmit to me the sum of $_ _**[*amount*]_ _**. All costs of escrow and recordation of documents are to be borne by the judgment debtor, _ _**[*name*]_ _**.**

**If this escrow is not closed in 30 days, please return the document to me.**

**I am enclosing a duplicate copy of this letter and would appreciate your executing the statement at the bottom of it and returning it to me. A stamped return envelope is enclosed for your convenience.**

**Very truly yours,**

**Date: _ _ _ _ _ _** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for _ _**[*name of judgment creditor*]_ _

**Receipt of a duplicate of this letter is acknowledged, and we agree to comply with the instructions set forth.**

**Date: _ _ _ _ _ _** _ _[*Name of escrow company*]_ _
**By:** __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for _ _**[*name*]_ _

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.57 d. Form: Release of Judgment Lien

## §7.57 d. Form: Release of Judgment Lien

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **RELEASE OF JUDGMENT** |
| **vs** | ) | **LIEN** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**A judgment was rendered on** _ _[*date*]_ _**, in the above-named action in favor of plaintiff,** _ _[*name*]_ _**, and against defendant,** _ _[*name*]_ _**. The judgment was entered on** _ _[*date*]_ _**,** _ _[*in judgment book volume* _ _[*number*]_ _**,** *page* _ _[*number*]_ _]_ _**, and** _ _[*an abstract/a certified copy*]_ _ **of the judgment was recorded in the office of the county recorder of** _ _[*name of county*]_ _ **County, California, on** _ _[*date*]_ _**, in volume** _ _[*number*]_ _ **of its official records on page** _ _[*number*]_ _**.**

[*If applicable, add one or more of the following options*]

[*Option 1: If judgment has been renewed*]

**An application for renewal of the judgment was filed in this court on** _ _[*date*]_ _**, and was entered in** _ _[*specify court records*]_ _**.**

[*Option 2: If judgment has been assigned (see §7.49)*]

**The judgment creditor,** _ _[*name*]_ _**, on** _ _[*date*]_ _**, assigned the judgment, including all** _ _[*his/her/its*]_ _ **rights under the judgment to** _ _[*name*]_ _**.**

**The judgment creditor's assignee,** _ _[*name*]_ _**, served on the judgment debtor,** _ _[*name*]_ _**, on** _ _[*date*]_ _**, a copy of the acknowledgment of assignment of judgment, duly executed and acknowledged by the judgment creditor, and filed the original acknowledgment of assignment of judgment with the clerk of the court where the judgment was entered on** _ _[*date*]_ _**, under Code of Civil Procedure §§673 and 681.020.**

[*Continue*]

**The judgment has been** _ _[*fully paid and discharged/partially paid*]_ _ **in the sum of $**_ _[*amount*]_ _**.**

**The** _ _[*judgment creditor/judgment creditor's assignee*]_ _**,** _ _[*name*]_ _**, hereby releases** _ _[*describe property being released*]_ _ **from any lien or encumbrance that has attached to it by the recordation of the** _ _[*abstract/certified copy*]_ _ **of the judgment, as free and clear in all respects as though the judgment had not been rendered nor the** _ _[*abstract/certified copy*]_ _ **recorded.**

[*Add one of the following alternatives*]

[*Alternative 1*]

**The judgment creditor's name and address is _ _**[*specify*]**_ _, and the judgment debtor's name and address is _ _**[*specify*]**_ _.**

[*Alternative 2*]

**The judgment creditor's name and address is _ _**[*specify*]**_ _, the judgment creditor's assignee's name and address is _ _**[*specify*]**_ _, and the judgment debtor's name and address is _ _**[*specify*]**_ _.**

[*Continue*]

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Judgment creditor/ judgment creditor's assignee*]_ _

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*judgment creditor/judgment creditor's assignee*]_ _

[*Certificate of Acknowledgment signed by notary public*]

*Copies:* Original (signed by judgment creditor and delivered to escrow company for recordation with demand for payment or, if no escrow, to judgment debtor); copies (two forwarded to escrow company, one for judgment debtor and one for lender, if any; if no escrow, one for judgment debtor); office copies.

*Comment:* The required contents of a release concerning real property are specified in CCP §697.370. If the judgment debtor has no interest of record in the real property, the release must show the name of the record owner. CCP §697.370(b)(1). If all of the judgment debtor's real property subject to the lien is being released, or if the judgment debtor has no known interest in any real property in that county, the release must, "in lieu of containing a description of the property being released, contain a statement substantially as follows: 'This is a release from the judgment lien described herein of all of the interests in real property of the herein named judgment debtor subject to the lien.'" CCP §697.370(b)(1).

The execution of a release of a judgment lien does not release the lien as to judgment debtors not named in the release under CCP §697.370(b)(5). CCP §697.370(d).

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## IX. JOINT DEBTOR PROCEEDINGS

### §7.58 A. Statutory Authority

The statutory authority to conduct joint debtor proceedings is in CCP §§410.70, 989-994. When an action is against two or more defendants jointly or severally liable on a contract and the summons is served on one or more but not all of them, the plaintiff may proceed against those defendants served as if they were the only defendants. CCP §410.70. See *Hobgood v Class* (1958) 161 CA2d 208, 326 P2d 546.

When a judgment is recovered under CCP §410.70 against one or more of several persons jointly indebted on an obligation, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which the judgment was entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons. CCP §989. The proceedings apply only to persons jointly indebted on an obligation or bound by a joint contract (*Melander v Western Nat'l Bank* (1913) 21 CA 462, 478, 132 P 265) and do not apply to persons not named actually or fictitiously as parties to the original action (*Fried v Municipal Court* (1949) 94 CA2d 376, 210 P2d 883; *Iwanaga v Hagopian* (1919) 39 CA 584, 179 P 523 (unknown silent partners)). See *McRae v Bates* (1961) 196 CA2d 510, 16 CR 565.

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## B. Procedure

### §7.59 1. Instituting Proceedings

Joint debtor proceedings are instituted under CCP §§410.70, 989-994 as follows:

- The plaintiff, or the plaintiff's agent, representative, or attorney files a declaration stating that the judgment or part of it remains unsatisfied and stating the amount due on the judgment (CCP §991); then
- The clerk, on presentation of the affidavit or declaration, issues a special summons, as provided in CCP §990, requiring the party summoned to show cause why the party should not be bound by the judgment.

The summons in joint debtor proceedings may issue at any time after entry of the original judgment, but it must be returned within 90 days after the time for the return of the original summons. CCP §990. (Under CCP §583.210, the original summons or other proof of service should have been returned within 60 days after service on the defendant; the statute allows the plaintiff 3 years after the complaint is filed to serve the summons and complaint.)

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### §7.60 2. Defendant's Answer

A joint debtor may deny the judgment, set up any defense that may have arisen subsequently, or deny the defendant's liability on the obligation on which the judgment was recovered, based on any defense existing when the action was commenced. CCP §992.

When the defendant in the answer denies the judgment or sets up a defense that may have arisen after it was entered, the summons with the attached declaration and the answer constitute the written allegations in the case on which issue is joined. CCP §993.

However, if in the answer the defendant denies liability on the obligation on which judgment was recovered, the written allegations in the case on which the issue is joined consist of the original complaint and judgment, the summons with declaration attached, and the answer, subject to the parties' right to amend their pleading as in other cases. CCP §993.

If the defendant was named fictitiously in the original complaint, the complaint must be amended to show the defendant's true name before that person can be bound. *Fried v Municipal Court* (1949) 94 CA2d 376, 210 P2d 883. This procedure applies only when the alleged joint debtor was originally joined as a party and a cause of action was stated against him or her. See *McRae v Bates* (1961) 196 CA2d 510, 16 CR 565.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.61 3. Form: Judgment by Default by Court in Joint Debtor Proceeding

## §7.61 3. Form: Judgment by Default by Court in Joint Debtor Proceeding

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **JUDGMENT BY DEFAULT BY** |
| **vs** | ) | **COURT IN JOINT DEBTOR** |
| _ _[*Name(s)*]_ _, | ) | **PROCEEDING** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**In this matter defendant(s),** _ _[*name(s) of defendant(s) whose default is sought*]_ _**, having been regularly served with summons to show cause why** _ _[*he/she/it/they*]_ _ **should not be bound by the judgment entered in this action, accompanied by** _ _[*an affidavit/a declaration*]_ _ **of** _ _[*plaintiff/plaintiff's agent/plaintiff's representative/plaintiff's attorney*]_ _ **that $**_ _[*amount*]_ _ **is due on the judgment, and defendant(s) having failed to appear and answer the summons within the time required by law, and the default of defendant(s) having been duly entered, on application to the court, and after having heard the testimony and considered the evidence,**

**IT IS ORDERED that defendant(s),** _ _[*name(s) of defendant(s) to be bound by the judgment*]_ _**, be bound by the judgment entered in this action on** _ _[*date*]_ _, _ _[*in judgment book volume* _ _[*number*]_ _, *page* _ _[*number*]_ _]_ _**, in the same manner as though originally served with the summons, to the extent of the amount remaining unsatisfied on the original judgment: $**_ _[*amount*]_ _ **as principal; $**_ _[*amount*]_ _ **as interest accrued from the date of entry of the original judgment to the date of entry of this judgment; $**_ _[*amount*]_ _ **as costs of the joint debtor proceeding; and $**_ _[*amount*]_ _ **as costs accruing from the date of entry of the original judgment and claimed in the manner provided by Code of Civil Procedure §**_ _[*685.070/685.080*]_ _ **for a total sum of $**_ _[*amount*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

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## §7.62 4. Trial and Limit of Recovery

The issues formed in joint debtor proceedings may be tried as in other cases. CCP §994. When the defendant in its answer denies any liability on the obligation on which the judgment was rendered, however, a verdict against the defendant cannot exceed the total of the amount remaining unsatisfied on the original judgment, plus interest on that amount. See CCP §994.

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## §7.63 5. Contribution and Repayment

Statutory authority for contribution among joint debtors other than joint tortfeasors is in CCP §§881-883. When a judgment debtor has satisfied more than its due share of the judgment, either voluntarily or through enforcement procedures, the debtor may compel contribution from another judgment debtor who has satisfied less than his or her due proportion of the judgment. CCP §882(a).

If the joint judgment debtors are the principal and a surety, the surety, on paying a portion or all of the judgment, either voluntarily or through enforcement procedures, can compel repayment from the principal for the amount paid. CCP §882(b).

The procedure to compel contribution or repayment is set forth in CCP §883. The judgment debtor must apply on noticed motion to the court in which the judgment was entered for an order determining liability for contribution or repayment. CCP §883(a). The application can be made any time before the judgment is fully satisfied or within 30 days after full satisfaction of the judgment. CCP §883(a).

If the court grants the motion and issues an order determining liability for contribution or repayment, to the extent of that liability the judgment debtor is entitled to the benefit of the judgment to enforce the liability, including all remedies that the judgment creditor has against the persons liable. CCP §883(b). Thus, *e.g.,* the judgment debtor receives the priority of any liens created by the judgment creditor. See Comment to CCP §883(b).

The procedure specified in CCP §883 to compel enforcement of the right to contribution or repayment is not exclusive, and a judgment debtor entitled to contribution or repayment may pursue any other remedy that may exist to obtain it. CCP §883(c). For example, a joint judgment debtor may take an assignment of the judgment or bring an action to obtain a judgment for contribution. See Comment to CCP §883.

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### §7.64 6. Satisfaction by One Joint Debtor

As long as its intention is clearly indicated, a satisfaction of judgment may be entered for one of several joint judgment debtors, leaving the judgment in full force against the remaining joint debtors, less a credit for the sum received. See *Bank of America v Duer* (1941) 47 CA2d 100, 117 P2d 405. For the Judicial Council form for satisfaction of judgment, see §7.76. The form should specify that it is in full satisfaction of the judgment debtor's prorated liability only, without discharging the other judgment debtors from the balance due on the judgment.

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## X. RENEWAL OF JUDGMENT

### §7.65 A. Extends Period of Enforceability

The 10-year period in which a money judgment or a judgment for possession or sale of property may be enforced (see §7.48) may be extended by renewal of the judgment under CCP §§683.110-683.220. CCP §683.110(a). For procedure, see §§7.66-7.70. A judgment may be renewed even if there is a stay of enforcement of the judgment in effect. The renewal of the judgment, however, does not affect the stay of enforcement. CCP §683.210.

This does not apply to renewing a judgment that is stayed by a bankruptcy proceeding. There is a conflict between CCP §683.210 and Bankruptcy Code §108(c) (11 USC §108(c)). The Ninth Circuit has expressly not ruled on the issue (see *Spirtos v Moreno (In re Spirtos)* (9th Cir 2000) 221 F3d 1079, 1080), but a bankruptcy judge in the Central District of California has found that California's statutory scheme has the potential for judicial action and thus is a court proceeding that violates the automatic stay provisions of the Bankruptcy Code (11 USC §362). When there is a bankruptcy stay, the judgment creditor must wait until the bankruptcy case closes and then renew the judgment (assuming it survived the bankruptcy and was determined to be nondischargeable) during the 30-day window provided by Bankruptcy Code §108(c). *In re Lobherr* (2002) 282 BR 912.

A judgment cannot be renewed under CCP §§683.110-683.220 if an application for renewal has been filed within 5 years after the judgment was previously renewed under those sections. CCP §683.110(b). This restriction prevents a judgment creditor from renewing a judgment more frequently merely to compound the interest on the judgment. See Comment to CCP §683.110. As the Comment points out:

> Renewal has the effect of compounding the interest on the judgment, since interest accrues on the total amount of the judgment as renewed ([CCP §§680.300, 685.010(a), 695.210]) and the judgment as renewed includes accrued interest on the date of filing the application for renewal ([CCP §§683.150(b), 685.010(a), 695.210]).

Generally, the renewal provisions of CCP §§683.110-683.220 do not apply to judgments made, entered, or enforceable under the Family Code, or to money judgments against a public entity that is subject to Govt C §965.5 or §970.1. CCP §§683.310-683.320; see Comment to CCP §683.310.

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## B. Procedure

### §7.66 1. Filing Application

To renew a judgment, the judgment creditor must file an application for renewal with the court in which judgment was entered. CCP §683.120(a). The application must be executed under oath and must include the following (CCP §683.140):

- The title of the court in which judgment was entered and the case name and number;
- The entry date of the judgment and of any renewals and where entered in the court records;
- The judgment creditor's name and address and the judgment debtor's name and last known address;
- If a money judgment is involved, the information necessary to compute the amount of the judgment as renewed; and
- If a judgment for possession or sale of property is involved, a description of the performance remaining due.

For Judicial Council form, see §7.68. For time limitations for filing the application, see §7.67.

Unless otherwise provided in CCP §§683.110-683.220, on filing the application the judgment is renewed in the amount determined under CCP §683.150 and the judgment's enforceability is extended for 10 years after the date the renewal application was filed. CCP §683.120(b). This filing date is also deemed the date that the period for commencing an action on the renewed judgment begins to run under CCP §337.5. CCP §683.220. There is no limit on the number of times a judgment may be renewed. See Comment to CCP §683.130.

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### §7.67 2. Time Limitations

An application for renewal for a lump sum money judgment or judgment for possession or sale of property can be filed at any time before the 10-year period of enforceability provided in CCP §683.020 (see §7.48) has expired. CCP §683.130(a).

An application for renewal for a money judgment payable in installments can be filed at any time on past-due amounts that at the time of filing are not barred by the expiration of the 10-year period of enforceability under CCP §§683.020-683.030. CCP §683.130(b)(1). For purposes of enforcement or any later renewal, the amount of the judgment as renewed is treated as a lump sum money judgment entered on the date the application is filed. CCP §683.120(c). If a money judgment payable in installments has previously been renewed, a renewal application can be filed within the time period specified in CCP §683.130(a) as to the amount of the judgment as previously renewed. CCP §683.130. A renewal application for past-due amounts that became due and payable after the previous renewal can be filed at any time before the 10-year enforceability period expires. CCP §683.130(b)(2). Note that, if an installment judgment is renewed on past-due amounts, costs are included in the principal amount of the renewed judgment only if they are added to the judgment within that 10-year period. See Comment to CCP §683.130.

Once the application is filed, the clerk must enter the renewal of judgment in the court records. CCP §683.150(a). When a money judgment is involved, the entry of renewal must show the amount of the judgment as renewed. CCP §683.150(c). Except as provided in CCP §683.150(d)-(e), this amount is the amount required to satisfy the judgment on the date the application for renewal is filed and includes the filing fee for the application. CCP §683.150(c).

For the amount of a money judgment payable in installments not previously renewed, see CCP §683.150(d). For the amount of a money judgment payable in installments previously renewed, see CCP §683.150(e).

The entry of renewal must describe the performance remaining due when a judgment for possession or sale of property is involved. CCP §683.150(f).

On adding recovered costs to the principal amount of a judgment remaining unsatisfied, see CCP §685.090. On recovery of costs to enforce a judgment generally, see §§11.47-11.56.

Although the time to renew a judgment may have expired, the creditor is not without a remedy. A new action may be brought on an unsatisfied judgment. The statute of limitations for such an action is 10 years from the date the judgment became final. CCP §337.5. Since renewal of a judgment is based on the date of notice of entry of judgment and an action on an unsatisfied judgment is based on the date the underlying judgment became final, there will always be a window where a new action can be filed, even if a renewal is no longer timely.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.68 3. Form: Application for and Renewal of Judgment (Judicial Council Form EJ-190)

## §7.68 3. Form: Application for and Renewal of Judgment (Judicial Council Form EJ-190)



EJ-190

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address):* TEL NO.:

☐ Recording requested by and return to:

☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD

NAME OF COURT:
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

*FOR RECORDER'S USE ONLY*

CASE NUMBER:

PLAINTIFF:

DEFENDANT:

***FOR COURT USE ONLY***

## APPLICATION FOR AND RENEWAL OF JUDGMENT

☐ Judgment creditor
☐ Assignee of record
applies for renewal of the judgment as follows:

1. Applicant *(name and address):*

2. Judgment debtor *(name and last known address):*

3. Original judgment
   a. Case number *(specify):*
   b. Entered on *(date):*
   c. Recorded:
      (1) Date:
      (2) County:
      (3) Instrument No.:

4. ☐ Judgment previously renewed *(specify each case number and date):*

5. ☐ Renewal of money judgment
   a. Total judgment . . . . . $
   b. Costs after judgment . . . . . $
   c. Subtotal *(add a and b)* . . . . . $ _____
   d. Credits after judgment . . . . . $
   e. Subtotal *(subtract d from c)* . . . . . $ _____
   f. Interest after judgment . . . . . $
   g. Fee for filing renewal application . . . . . $
   h. **Total renewed judgment** *(add e, f, and g)* . $ _____

   i. ☐ The amounts called for in items a – h are different for each debtor. These amounts are stated for each debtor on Attachment 5.



Form Approved for Optional Use
Judicial Council of California
EJ-190 [Rev. January 1, 2002]

Print

| SHORT TITLE: | CASE NUMBER: |
|---|---|
| | |

6. ☐ Renewal of judgment for ☐ possession.
☐ sale.

a. ☐ If judgment was not previously renewed, terms of judgment as entered:

b. ☐ If judgment was previously renewed, terms of judgment as last renewed:

c. ☐ Terms of judgment remaining unsatisfied:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)



*Copies:* Original (filed with court clerk); copies for service (one attached to Notice of Renewal of Judgment (see

§7.70) for service on judgment debtor); office copies.

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### §7.69 4. Service of Notice of Renewal of Judgment

The judgment creditor must serve a notice of renewal prescribed by the Judicial Council (see §7.70) on the judgment debtor. Service may be by first-class mail. CCP §683.160(a). A proof of service must be filed with the court clerk. CCP §683.160(a). The notice must inform the judgment debtor that it has 30 days in which to move to vacate or to modify the renewal. CCP §683.160(a).

Until a proof of service of the notice of renewal is filed, no writ can be issued on the renewed judgment. CCP §683.160(b). Nor can enforcement proceedings be commenced to enforce the judgment except to the extent that the judgment is enforceable without being renewed. CCP §683.160(b).

The notice of renewal may be served after the 10-year period has expired if the application for renewal is timely filed, and the judgment is enforceable after proof of service of the notice of renewal is filed unless the renewal is vacated. See Comment to CCP §683.160.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.70 5. Form: Notice of Renewal of Judgment (Judicial Council Form EJ-195)

## §7.70 5. Form: Notice of Renewal of Judgment (Judicial Council Form EJ-195)



**EJ-195**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)* TELEPHONE NO.: | *FOR COURT USE ONLY* |
|---|---|
| ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **NOTICE OF RENEWAL OF JUDGMENT** | CASE NUMBER: |

TO JUDGMENT DEBTOR *(name)*:

1. **This renewal extends** the period of enforceability of the judgment until 10 years from the date the application for renewal was filed.
2. **If you object** to this renewal, you may make a motion to vacate or modify the renewal with this court.
3. You must make this motion within **30 days** after service of this notice on you.
4. A copy of the *Application for and Renewal of Judgment* is attached *(Cal. Rules of Court, rule 3.1900)*.

Date: Clerk, by _____, Deputy

[SEAL]

See CCP 683.160 for information on method of service



Form Adopted for Mandatory Use
Judicial Council of California
EJ-195 [Rev. January 1, 2007]

**NOTICE OF RENEWAL OF JUDGMENT**

Code of Civil Procedure, § 683.160
www.courtinfo.ca.gov

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### §7.71 C. Vacating Renewal

A judgment that has been renewed under CCP §§683.110-683.220 may be vacated on any ground that would be a defense to an action on a judgment, including the ground that the renewed judgment amount as entered is incorrect. CCP §683.170(a).

The renewal of a judgment must be vacated if the application for renewal was filed within 5 years after the judgment was previously renewed under CCP §§683.110-683.220. CCP §683.170(a).

A judgment debtor who desires to vacate a renewal may apply, within 30 days after service of the notice of renewal under CCP §683.160 (see §7.70), by noticed motion under CCP §683.170 for a court order vacating the renewal of the judgment. CCP §683.170(b). The notice of motion must be served either personally or by mail on the judgment creditor. CCP §683.170(b). If the motion is not timely made, the judgment remains enforceable in the amount stated in the entry of renewal. See Comment to CCP §683.170.

The court at the hearing on the motion may order the renewal vacated on any ground specified in CCP §683.170(a) and may order the entry of another or a different renewal. CCP §683.170(c). For example, the court may order renewal of the judgment in a different amount if the court finds that the amount of the judgment as renewed is incorrect. CCP §683.170(c); see Comment to CCP §683.170.

In *Goldman v Simpson* (2008) 160 CA4th 255, 72 CR3d 729, the court addressed whether the existence of personal jurisdiction over the judgment debtor in the original action and the existence of the original judgment satisfy the due process minimum contacts requirement and permit the court to exercise personal jurisdiction over a motion to renew the judgment. In *Goldman*, the judgment debtor moved to Florida after being found liable in a wrongful death action. The debtor then moved to vacate the statutory renewal of judgment, arguing that the renewal was void because the debtor had insufficient contacts with California to confer personal jurisdiction when the renewal was entered. The court concluded that the judgment debtor's motion to vacate was properly denied because the motion was untimely in that it was not filed within 30 days after service of the notice of renewal. See CCP §683.170(b). The motion to vacate was also properly denied because it was based on grounds (insufficient contacts with California to confer personal jurisdiction at the time of the renewal) that are unavailable under CCP §683.170(a). Lack of personal jurisdiction is a defense only in an independent action on the judgment. 160 CA4th at 261. The court concluded that it had continuing personal jurisdiction over the debtor to renew the judgment via the statutory procedure derived from the existing jurisdiction when the original judgment was entered. See CCP §410.50.

**NOTE:** The renewal of a judgment is not subject to attack on the basis that the judgment debtor lacks sufficient personal contacts with California to establish personal jurisdiction as of the time of the renewal. However, a debtor may contend that the court lacked personal jurisdiction at the time of the *initial* judgment by a §683.170(a) statutory motion to vacate the original judgment. 160 CA4th at 262. See *Fidelity Creditor Serv., Inc. v Browne* (2001) 89 CA4th 195, 201, 106 CR2d 854 (failure to serve process on defendant is defense to action on judgment that may be raised on a §683.170 motion).

**NOTE:** As a matter of first impression in California, the existence of personal jurisdiction over a judgment debtor in the original action and the existence of the original judgment satisfy the due process minimum contacts requirement and permit a court to exercise personal jurisdiction over that judgment debtor in an independent action to revive the judgment. *Cadle Co. II, Inc. v Fiscus* (2008) 163 CA4th 1232, 1238, 78 CR3d 238. Cases from other jurisdictions support the conclusion that the original judgment provides sufficient minimum contacts between the judgment debtor and the forum state to justify the exertion of personal jurisdiction over the judgment debtor in a revival action. See, *e.g., Huff v Pharr* (11th Cir 1984) 748 F2d 1553, 1554.

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## §7.72 D. Effect on Judgment Lien and Other Liens

The duration of a judgment lien on an interest in real property created under a money judgment is extended until 10 years after the filing date of the application for renewal under CCP §§683.110-683.220, as long as a certified copy of the renewal application is recorded with the county recorder of the county where the real property subject to the judgment lien is located before the judgment lien expires. CCP §683.180(a). If the certified renewal application is not recorded before the lien expires, the judgment creditor may record an abstract of judgment of the renewed judgment to obtain a new judgment lien dating from the recording of the abstract. See Comment to CCP §683.180.

When real property subject to a judgment lien is transferred, the lien is not extended under CCP §683.180(a) if the transfer is recorded before the renewal application is filed unless both of the following occur: (a) The transferee is personally served with a copy of the renewal application and (b) proof of personal service is filed with the court clerk within 90 days after the renewal application is filed. CCP §683.180(b). This points up the importance of checking the grantor and grantee records for transfers of the debtor's real property as part of the judgment renewal process, so any parties who may have acquired such property subject to the judgment lien are notified of the renewal in a timely manner to prevent the lien from expiring.

When a lien is created by an enforcement procedure under a judgment, other than an execution lien or a judgment lien on an interest in real property, and the judgment is renewed under CCP §§683.110-683.220, the lien's duration is extended, subject to any other limitations on its duration under CCP §§680.010-724.260, until 10 years after the date of the renewal application's filing if, before the lien expires, a certified copy of the renewal application is served on or filed with the same person and in the same manner as the notice or order that created the lien. CCP §683.190. The Comment to CCP §683.190 states in part:

> Under [CCP §683.190], a lien of limited duration, such as a judgment lien on personal property (five years), is not increased in duration but is permitted to continue past the 10-year period specified in [CCP §683.020]. See [CCP §697.510] (duration of judgment lien on personal property). A judgment lien on real property is continued by recording a certified copy of the application for renewal as provided in [CCP §683.180]. An execution lien is continued by filing with the levying officer under [CCP §683.200]. However, other liens governed by the general rule that the lien exists as long as the judgment is enforceable (see [CCP §697.030]) are increased in duration pursuant to [CCP §683.190]. (15 Cal L Rev Comm'n Reports 2001).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.73 E. Continuation of Enforcement Proceedings

## §7.73 E. Continuation of Enforcement Proceedings

Proceedings to enforce a judgment under the Enforcement of Judgments Law (CCP §§680.010-724.260), which would otherwise cease because the period for enforcing judgment has expired, may continue if CCP §683.200 is complied with. Under CCP §683.200, if a judgment is renewed, any enforcement proceeding previously commenced under the judgment or pursuant to a writ or an order issued under the judgment may be continued, subject to any other limitations in CCP §§680.010-724.260, if, before the 10-year period of enforceability expires, a certified copy of the application to renew the judgment is filed with the levying officer, receiver, or other officer acting under the writ or order or, in other cases, is filed in the enforcement proceeding. For example, an examination proceeding (see §§8.15-8.34) may continue if a certified copy of the renewal application is filed with the court that is conducting it. See Comment to CCP §683.200.

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## XI. SATISFACTION OF JUDGMENT

### §7.74 A. Filing Acknowledgment of Satisfaction

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When a money judgment is satisfied, the judgment creditor must immediately (1) file an acknowledgment of satisfaction of judgment with the court and (2) if an abstract of judgment has been recorded with any county recorder, serve personally or by mail an acknowledgment of satisfaction of judgment on the judgment debtor. CCP §§724.030-724.040.

Once a money judgment is satisfied, the judgment debtor, the owner of property subject to the judgment lien, or anyone having a security interest in or a lien on personal property subject to the judgment lien can serve, personally or by mail, a written demand on the judgment creditor that the creditor either file an acknowledgment of full satisfaction of judgment with the court, or execute, acknowledge, or deliver one to the person making the demand, or both. CCP §724.050(a). The demand must contain the following statement (CCP §724.050(b)):

***Important warning.*** **If this judgment has been satisfied, the law requires that you comply with this demand no later than 15 days after you receive it. If a court proceeding is necessary to compel you to comply with this demand, you will be required to pay my reasonable attorney fees in the proceeding if the court determines that the judgment has been satisfied and that you failed to comply with the demand. In addition, if the court determines that you failed without just cause to comply with this demand within the 15 days allowed, you will be liable for all damages I sustain because of such failure and will also forfeit one hundred dollars to me.**

On the required contents for an acknowledgment of full satisfaction of judgment, see CCP §724.060. On written demand for a partial satisfaction of judgment and the required contents of the acknowledgment of partial satisfaction, see CCP §§724.110-724.120. On written demand for an acknowledgment of satisfaction of matured installments under an installment judgment and the required contents of the acknowledgment of satisfaction of matured installments, see CCP §§724.210-724.260. The Judicial Council has prepared an acknowledgment of satisfaction of judgment, Form EJ-100, set out in §7.76, for use with full satisfaction, partial satisfaction, or satisfaction of matured installments.

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### §7.75 B. Motion to Compel Filing of Acknowledgment

The judgment creditor must comply with a demand to file an acknowledgment of satisfaction of judgment within 15 days after actually receiving it. CCP §724.050(c). If the judgment creditor does not do so, the person making the demand may apply to the court on noticed motion for an order requiring the judgment creditor to comply with the demand. CCP §724.050(d). The notice of motion must be served either personally or by mail on the judgment creditor. CCP §724.050(d). If the court rules that the judgment has been satisfied but the demand has not been complied with, the court must either (1) order the judgment creditor to comply with the demand or (2) order the court clerk to enter satisfaction of the judgment. CCP §724.050(d). If the court finds that the judgment creditor failed to comply with the demand without just cause, the judgment creditor is liable for all damages sustained by that failure plus $100. CCP §724.050(e).

If the judgment creditor intentionally conditions delivery of an acknowledgment of satisfaction of judgment on payment or performance in excess of the judgment amount (*i.e.*, attempts to get more from the debtor than full payment of the judgment), the judgment creditor is liable to the judgment debtor for all damages sustained because of such action or $250, whichever is greater. CCP §724.070(a). This section does not apply, however, when the judgment creditor has agreed to deliver an acknowledgment of satisfaction of judgment in consideration for the judgment debtor's agreement either to furnish security or to execute a promissory note, or both, the principal amount of which does not exceed the amount to which the judgment creditor is entitled under the judgment. CCP §724.070(b).

**NOTE:** A creditor must be cautious about the kind of property accepted in satisfaction of a judgment. In *Rettner v Shepherd* (1991) 231 CA3d 943, 282 CR 687, the court held that the antideficiency bar of CCP §580d applied when the creditor accepted a note and deed of trust on real property in satisfaction of the judgment.

The prevailing party in a proceeding to compel the filing of an acknowledgment of satisfaction of judgment is entitled to reasonable attorney fees. CCP §724.080.

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.76 C. Form: Acknowledgment of Satisfaction of Judgment (Judicial Council Form EJ-100)

## §7.76 C. Form: Acknowledgment of Satisfaction of Judgment (Judicial Council Form EJ-100)



**EJ-100**

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*
After recording return to:

TELEPHONE NO.:
FAX NO. *(Optional):*
E-MAIL ADDRESS *(Optional):*
ATTORNEY FOR *(Name):*

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF**
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

***FOR RECORDER'S OR SECRETARY OF STATE'S USE ONLY***

PLAINTIFF:

DEFENDANT:

CASE NUMBER:

## ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT

☐ **FULL** ☐ **PARTIAL** ☐ **MATURED INSTALLMENT**

***FOR COURT USE ONLY***

1. Satisfaction of the judgment is acknowledged as follows:
   a. ☐ Full satisfaction
      (1) ☐ Judgment is satisfied in full.
      (2) ☐ The judgment creditor has accepted payment or performance other than that specified in the judgment in full satisfaction of the judgment.
   b. ☐ Partial satisfaction
      The amount received in partial satisfaction of the judgment is $
   c. ☐ Matured installment
      All matured installments under the installment judgment have been satisfied as of *(date):*
2. Full name and address of judgment creditor:*
3. Full name and address of assignee of record, if any:
4. Full name and address of judgment debtor being fully or partially released:*
5. a. Judgment entered on *(date):*
   b. ☐ Renewal entered on *(date):*
6. ☐ An ☐ abstract of judgment ☐ certified copy of the judgment has been recorded as follows *(complete all information for each county where recorded):*

| COUNTY | DATE OF RECORDING | INSTRUMENT NUMBER |
|---|---|---|

7. ☐ A notice of judgment lien has been filed in the office of the Secretary of State as file number *(specify):*

**NOTICE TO JUDGMENT DEBTOR:** If this is an acknowledgment of full satisfaction of judgment, it will have to be recorded in each county shown in item 6 above, if any, in order to release the judgment lien, and will have to be filed in the office of the Secretary of State to terminate any judgment lien on personal property.

Date:

▶ _____
*(SIGNATURE OF JUDGMENT CREDITOR OR ASSIGNEE OF CREDITOR OR ATTORNEY**)*



*The names of the judgment creditor and judgment debtor must be stated as shown in any Abstract of Judgment which was recorded and is being released by this satisfaction. ** **A separate notary acknowledgment must be attached for each signature.**

Form Approved for Optional Use
Judicial Council of California
EJ-100 [Rev. January 1, 2005]

**ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT**

Code of Civil Procedure, §§ 724.060, 724.120, 724.250

*Copies:* Original (signed and acknowledged by judgment creditor, assignee of record, or attorney for judgment creditor or assignee of record and filed with court clerk with original proof of service; if abstract recorded, one served on

judgment debtor); copies for service (one for each attorney of record or unrepresented party); office copies.

*Comment:* If the acknowledgment of satisfaction of judgment is to be recorded, it should be signed before a notary public and a certificate of acknowledgment attached.

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## §7.77 D. Small Claims Actions

The judgment debtor has the option of paying the judgment either directly to the judgment creditor or to the court where the judgment was entered. CCP §116.840(a). For a detailed discussion of satisfying judgment in a small claims action, see §§7.90-7.91.

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## §7.78 E. Vacating Satisfaction

Entry of a satisfaction of judgment may be vacated either by motion in the original action or by an independent equitable action. *Kinnison v Guaranty Liquidating Corp.* (1941) 18 C2d 256, 115 P2d 450. See CCP §473, which provides for relief from an order or other proceeding and for vacating "any void judgment or order." Grounds for vacating entry of a satisfaction of judgment include fraud, mistake, or failure of consideration. See 8 Witkin, California Procedure, *Enforcement of Judgment* §392 (5th ed 2009). See also *Sullivan v Wellborn* (1948) 32 C2d 214, 195 P2d 787 (void execution and sale).

A proceeding to set aside the satisfaction of a judgment may be maintained by (1) a party of record; (2) a judgment creditor; (3) the judgment creditor's assignee (unless there has been a partial assignment of the judgment, in which case the judgment debtor must agree to or ratify the assignment); or (4) the assignee of the cause of action on which the judgment was rendered. *Thomas v Rock Island G. & S. Mining Co.* (1880) 54 C 578; *Clark v Johnston* (1920) 49 CA 315, 193 P 864. The judgment debtor must be served with a notice of motion if the motion procedure is used (see *Thompson v Cook* (1942) 20 C2d 564, 127 P2d 909) and must be made a party if an independent action is brought (see *Kinnison v Guaranty Liquidating Corp., supra*). See also *Brown v Brown* (1931) 117 CA 205, 3 P2d 580, in which the court held that a second assignee of a judgment was a necessary party to vacate a satisfaction of judgment made by the second assignee.

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## XII. SMALL CLAIMS PROCEEDINGS

### §7.79 A. Nature of Small Claims Proceedings

Small claims court is a special court where disputes are resolved quickly and inexpensively, the rules are informal (see CCP §116.510), and litigants are not represented by attorneys (see §7.81). Pleadings in small claims court are by statutory forms (see Judicial Council forms SC-100 to SC-150) and courts provide individual assistance to litigants without charge (see CCP §116.260), including a manual of court rules and procedures (see CCP §116.940). Discovery procedures are not permitted in small claims actions, including small claims appeals. *Bruno v Superior Court* (1990) 219 CA3d 1359, 269 CR 142. See CCP §116.310(b) (pretrial discovery procedures described in CCP §2019.010 are not permitted in small claims actions). On small claims appeals, see §7.88.

There is a small claims court in each superior court. CCP §116.210. Actions in small claims courts are governed by CCP §§116.110-116.950 and Cal Rules of Ct 3.2100-3.2120.

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## §7.80 B. Jurisdiction and Dollar Limits in Small Claims Court

**Claims subject to dollar limits.** Small claims courts generally have jurisdiction over actions (including binding and nonbinding attorney fee arbitration matters) for which the amount of the demand does not exceed $5000, and (with certain exceptions) for actions brought by a natural person when the amount does not exceed $7500. CCP §§116.220(a), 116.221. A plaintiff with claims for more than the jurisdictional amount may either sue in the civil division of the trial court or may sue in small claims court and waive the right to any amount over the limit. See CCP 116.220(d).

**Other claims.** The following types of claims may also be filed in small claims court (CCP §116.220(a), (e)):

- With certain exceptions, claims to enforce payment of delinquent unsecured personal property taxes up to $5000, if the defendant does not contest the legality of the tax;
- Claims to issue a writ of possession as authorized by CC §1861.5 and §1861.10, if the amount of the demand does not exceed $5000; and
- Claims to confirm, correct, or vacate a fee arbitration award of up to $5000 between an attorney and client that is binding, or to conduct a new hearing between an attorney and client after nonbinding arbitration of a fee dispute involving up to $5000.

In these actions, a small claims court may grant equitable relief in the form of rescission, restitution, reformation, or specific performance in lieu of, or in addition to, money damages. The court may also issue a conditional judgment. It retains jurisdiction until full payment and performance of any judgment or order. CCP §116.220(b).

**Actions against guarantors.** Small claims courts also have jurisdiction in actions against guarantors:

- By a natural person against the Contractors' State License Board as guarantor, if the amount of the demand does not exceed $7500 (CCP §§116.220(c)(1), 116.221);
- Against guarantors who do not charge a fee for their guarantor or surety services, if the amount of the demand does not exceed $2500 (CCP §116.220(c)(2));
- By a natural person against guarantors who charge a fee for their guarantor or surety services, if the amount of the demand does not exceed $6500 (CCP §116.220(c)(3)); and
- Brought by an entity other than a natural person against guarantors who charge a fee for their guarantor or surety services (or against the Registrar of the Contractors' State License Board as the guarantor) if the amount of the demand does not exceed $4000 (CCP §116.220(c)(4)).

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### §7.81 C. No Attorney Representation; Type of Assistance Permitted

Attorneys are not permitted to take part in the conduct or defense of small claims except as litigants. CCP §116.530(a)-(b). An attorney may, however, provide advice to a litigant, testify to matters of which he or she has personal knowledge, represent a party in an appeal to the superior court, or represent a party in connection with enforcement of a judgment. CCP §116.530(c).

Representatives of insurers and "other experts" (which are not defined) are also permitted to assist litigants, except in the conduct of the case, and to testify to matters on which they are competent witnesses. CCP §116.531. The court may permit another individual (not an attorney) to assist a party who does not speak English well enough to proceed without assistance. CCP §116.550(a).

Usually counsel becomes involved after a judgment has been rendered against a client in small claims court. The attorney may file a notice of appeal and appear on the client's behalf in the superior court in the appeal, which consists of a trial de novo. CCP §§116.530(c)(3), 116.770(c). On appeal of small claims judgments, see §7.88.

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### §7.82 D. Who May File Claim

A plaintiff must be at least 18 to bring an action in small claims court. CCP §116.410(a). Before filing, whenever possible, the plaintiff must first make a demand for payment from the debtor. See CCP §116.320(b). If the plaintiff wishes to sue a government agency, he or she must first file a claim directly with the agency itself.

A plaintiff incarcerated in a state prison may file an action in small claims court, but the plaintiff must allege in the complaint that he or she has exhausted administrative remedies against the Department of Corrections. CCP §116.220(e).

No person may file more than two small claims action within 1 calendar year in which the amount in controversy exceeds $2500. CCP §116.231.

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## §7.83 E. Venue for Small Claims Actions

Small claims must be filed in the court of the correct venue. Venue requirements are the same as for other civil actions (CCP §116.370(a)); venue lies, among other places, where the defendant lives or where the business involved is located. See CCP §§395 (residence of defendant), 395.5 (venue for corporations or associations), 396a (venue requirements for actions on installment or automotive sales). The court may dismiss a claim filed in the wrong court unless all the defendants are present at the hearing and agree that the claim may be heard. CCP §116.370(c)(1).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.84 F. Procedure for Filing Claim; Fees; Service of Process

### §7.84 F. Procedure for Filing Claim; Fees; Service of Process

To initiate a small claims action, the plaintiff files a claim, under oath, with the clerk of the small claims court. The plaintiff may file the claim in person, by mail, by fax if the court has a local rule authorizing fax filing (see CCP §1013, Cal Rules of Ct 2.300-2.306), or electronically as authorized by CCP §1010.6. CCP §116.320(a). The plaintiff must use Judicial Council form SC-100, Plaintiff's Claim and Order to Go to Small Claims Court. For an overview of the process, the plaintiff should first read Judicial Council form SC-150, Information for the Plaintiff (Small Claims).

The claim form includes space for the following information (CCP §116.320(b)):

- Defendant's name and address, if known;
- The amount and basis of the claim;
- That the plaintiff has made a demand for payment;
- That the defendant has refused to pay; and
- That the plaintiff understands that the judgment on his or her claim will be conclusive with no right to appeal. On appeals that are permitted on small claims judgments, see §7.88.

**NOTE:** In an action to enforce the payment of a debt, the statement of calculation of liability must separately state the original debt, each fee and charge added to the debt, each payment credited against the fees and charges, all other debits or charges to the account, and an explanation of the nature of the fees, charges, debits, and all other credits to the debt, by source and amount. CCP §116.222. If necessary, the plaintiff may attach a separate sheet to the claim form with this information.

The plaintiff must pay a filing fee based on the amount of the claim, as follows (CCP §116.230(b)):

- If the amount of the claim is $1500 or less, the filing fee is $30.
- If the claim is for between $1500 and $5000, the filing fee is $50.
- If the claim is for more than $5000 (see §7.88), the filing fee is $75.

Fees vary for amended claims and if the plaintiff has filed more than 12 small claims actions in the preceding year. See CCP §116.230(c)-(d).

When the claim is filed, the clerk schedules the case for hearing and issues an order directing the parties to appear with the witnesses and documents to prove their claims or defenses. The hearing must be scheduled on a date between 20 and 70 days from the date of the order. CCP §116.330(a). Alternatively, the clerk may mail a copy of the claim to the defendant, return receipt requested, then schedule the hearing when he or she receives proof that the defendant received the claim. CCP §§116.330(b), 116.340(a)(4).

If the clerk does not serve the defendant by mail in this manner, the plaintiff must serve the defendant and file proof of service with the clerk at least 5 days before the hearing. CCP §§116.340(a), (c). See Proof of Service (Judicial Council Form SC-104); Proof of Mailing (Substituted Service (Small Claims) (Judicial Council Form SC-104A); What is "Proof of Service" (Small Claims) (Judicial Council Form SC-104B); How to Serve a Business or Public Entity (Small Claims) (Judicial Council Form SC-104C).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.85 G. Legal Names of Plaintiff and Defendant

### §7.85 G. Legal Names of Plaintiff and Defendant

When preparing the claim form, the plaintiff must use the defendant's exact legal name. If the defendant is doing business under a fictitious business name (as defined in Bus & P C §17900), the court must inquire at the hearing into the defendant's correct legal name, and must correct the record, if necessary. The plaintiff may request the court at any time before or after the judgment to amend the claim or judgment, for good cause shown, to include both the correct legal name and the name or names actually used by the defendant. CCP §116.560.

If the *plaintiff* operates under a fictitious business name, he or she must include with the claim a declaration stating that he or she has complied with the fictitious business name laws by executing, filing, and publishing a fictitious business name statement. The court may dismiss a small claims action filed by a person who has not complied with the fictitious business name laws. CCP §116.430.

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## §7.86 H. Cross-Claims

A defendant may file a cross-claim against the plaintiff in the same lawsuit in small claims court, subject to the same limits on the amount of the claim that apply to the plaintiff. See §7.80. The cross-claim need not relate to the same subject or event. CCP 116.360(a); Cal Rules of Ct 3.2104.

The defendant's claim must be filed and served in the same manner as the plaintiff's. CCP §116.360(b). See CCP §§116.330, 116.340. See also §7.84. It must be served on the plaintiff at least 5 days before the trial, but if the defendant received the plaintiff's claim 10 days or less before the trial, then the cross-claim must be served at least 1 day before the trial. CCP 116.360(c). The court will hear both claims at the same time.

If the defendant has a claim against the plaintiff that exceeds the small claims court jurisdictional limits, and the defendant's claim relates to the same contract, transaction, or matter that is the subject of the plaintiff's claim, then the defendant may initiate an action in the correct court of competent jurisdiction, and ask the small claims court to transfer the small claim to that court. CCP §116.390.

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## §7.87 I. Trial of Small Claims Case

If the parties settle the case before trial, the plaintiff must file a dismissal with the clerk. Cal Rules of Ct 3.1385(a)(1).

Otherwise, the plaintiff is required to appear in person at the hearing in small claims court, unless the plaintiff is a corporation or other business entity. In that situation, an employee, officer, or director must act on the business entity's behalf. The person who appears on behalf of the corporation or business entity may not be employed or associated solely for the purpose of representing the entity. CCP §116.540(b)-(c). The employee, officer, or director who appears for the entity must file a declaration with the court in order to appear. See Authorization to Appear on Behalf of Party (Judicial Council Form SC-109).

A small claims trial is informal. CCP §116.510. The plaintiff must bring all witnesses, books, receipts, and other documents or items necessary to prove his or her case. See CCP §116.520. The plaintiff may ask the witnesses to come to court voluntarily or may request the clerk of the court to subpoena them. The plaintiff may also ask the clerk for a court order requiring the defendant to bring documents to the trial. See Small Claims Subpoena and Declaration (Judicial Council Form SC-107).

The court may give judgment for damages, equitable relief, or both, and may make other orders as are just and equitable. Cal Rules of Ct 3.2108. There is a mandatory form for notice of entry of judgment in small claims court: Notice of Entry of Judgment (Small Claims) (Judicial Council Form SC-130). Generally, the court clerk delivers or mails the notice of entry of judgment in small claims proceedings. See CCP §116.610(h).

The prevailing party is entitled to the costs of the action, including the cost of serving the defendant. CCP §116.610(g)(1).

Enforcement of the judgment is postponed until the time for appeal ends or until the appeal is decided. CCP §116.810(a). See §7.88.

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### §7.88 J. Appeal of Small Claims Case

Appeals of small claims cases are heard in the superior court. A plaintiff may not appeal his or her or claim (CCP §116.710(a)), but may appeal on a cross-claim (CCP §116.710(b)). A defendant may appeal only on a plaintiff's claim and not on any cross-claim. CCP §116.710(b); *Skaff v Small Claims Court* (1968) 68 C2d 76, 65 CR 65.

If either party appeals, there is a new trial on all the claims, before a judge other than the one who heard the action in the small claims division. CCP §116.770(a). Both parties may be represented by attorneys after judgment.

A party initiates an appeal by filing a notice of appeal on Notice of Appeal (Judicial Council Form SC-140), and paying the required fees within 30 days after the date the notice of entry of judgment was mailed or delivered to him or her. CCP §116.750.

The judgment rendered in the superior court after a trial de novo is final and not appealable. CCP §116.780(a). But the superior court appellate division can review a postjudgment order by petition for writ of mandate. See *General Elec. Capital Auto Fin. Servs., Inc. v Appellate Div.* (2001) 88 CA4th 136, 105 CR2d 552.

For more on appeals in small claims actions see California Civil Appellate Practice, chap 10 (3d ed Cal CEB 1996).

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### §7.89 K. Motions to Vacate

A defendant who fails to appear at a small claims hearing has no right to appeal but may file a motion to vacate the judgment for either lack of appearance or improper service, and may appeal a denial of the motion. See CCP §§116.730, 116.740. See also Motion to Vacate the Judgment (Judicial Council Form SC-135).

The defendant must file the motion in small claims court within 30 days after the notice of entry of judgment has been mailed. CCP §116.730(a). If the motion to vacate the judgment is for improper service, the defendant has 180 days from when he or she learned or should have learned about the judgment to file the motion. CCP §116.740(a).

If the motion to vacate the judgment is granted and all parties are present at the hearing on the motion and agree, the court may hear the case without rescheduling it. If the plaintiff is not present, the judge or clerk must reschedule the case and give notice under CCP §116.330. CCP §116.730(d).

If the court denies the motion, the defendant may appeal to the superior court only on the denial of the motion to vacate. CCP §116.730(e). If the superior court decides that the defendant's motion should have been granted, the court may hear the claims of all parties without rescheduling the matter, if they are all present, or the court may order the case transferred to small claims court for a hearing. CCP §116.730(f).

A plaintiff who fails to appear at the hearing in small claims court may move to vacate a default judgment entered for failure to appear. CCP §116.720. The motion must be filed within 30 days after the notice of entry of judgment is mailed. CCP §116.720(a). The earliest the clerk may schedule the hearing is 10 days after the clerk has mailed written notice to the parties. CCP §116.720(b). The motion may be granted on a showing of "good cause." If the defendant is absent from the hearing on the motion, the motion may be heard without the defendant. CCP §116.720(c). If the motion is granted and all parties are present and consent, the court may hear the case without recalendaring. If the motion to vacate the default judgment is granted in the defendant's absence, the matter will be reset and noticed under CCP §116.330. CCP §116.720(d).

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**Source:** Business Law/Debt Collection Practice in California/7 Obtaining, Renewing, and Satisfying Judgment/§7.90 L. Enforcing Judgment

## §7.90 L. Enforcing Judgment

The small claims court will not collect a money judgment or enforce it for a party. However, the judgment creditor has several options. See CCP §116.820(a). On the procedure for when the debtor is willing to pay the judgment, see §7.91. On the judgment creditor's options when the debtor does not or will not pay the judgment immediately, see §7.92.

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## §7.91 1. When Debtor Wishes to Pay Judgment

The judgment debtor has the option of paying the judgment either directly to the judgment creditor or to the court in which the judgment was entered. CCP §116.840(a). A debtor who chooses the latter option must pay a flat fee of $20, pay the judgment, including any accrued interest and costs, and file a Request to Make Payment (Judicial Council Form SC-145) with the court clerk. CCP §116.860(a)-(b), (h). The clerk then enters satisfaction of the judgment and remits payment to the judgment creditor. CCP §116.860(b). Once the judgment debtor complies with these procedures, the clerk must notify the creditor that the judgment has been satisfied and must explain how the creditor may obtain the amount paid in satisfaction. CCP §116.860(e).

If the payment is made directly to the judgment creditor or to the creditor's assignee of record, immediately on receipt of payment the creditor or assignee must file with the court an acknowledgment of satisfaction of judgment (see §§7.74-7.76). CCP §116.850(a). A creditor's refusal to file an acknowledgment of satisfaction of judgment, after written demand and without just cause, may result in liability for damages and a $50 penalty. CCP §116.850(b). At the judgment debtor's request, the court clerk must enter a satisfaction of judgment if the judgment debtor establishes a rebuttable presumption of full or partial payment under CCP §116.850(d) and complies with CCP §116.860(c). CCP §116.850(c).

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### §7.92 2. Options When Debtor Does Not Pay Judgment Immediately

**File writ of execution.** The judgment debtor may request a writ of execution from the court by filing Writ of Execution (Judicial Council Form EF-130) (see §9.5) and paying the required fee. The county marshall or other officer may then serve the writ and execute it.

**Request sanctions for failure to file statement of assets.** When the court enters judgment in a small claims court action, the clerk mails the judgment debtor a form containing questions about the nature and location of his or her assets. See Judgment Debtor's Statement of Assets (Judicial Council Form SC-133). The debtor is required to complete it and deliver it to the creditor within 30 days after entry of judgment. CCP §116.830(a)-(b). If the debtor does not pay the judgment, the creditor can use the form to determine what assets the debtor has available to pay the judgment. If the debtor willfully fails to deliver the statement of assets to the creditor, the creditor can request the court to award attorney fees, expenses, and other appropriate relief, including arrest on contempt of court. CCP §116.830(d). To obtain this relief, the judgment creditor should file with the court an Application and Order to Produce Statement of Assets and to Appear for Examination (Judicial Council Form SC-134).

**Require judgment debtor to appear for examination.** The judgment creditor may also require the debtor to appear in court to answer questions about his or her assets. To do this, the creditor should file and serve Application and Order for Appearance and Examination (Enforcement of Judgment) (Judicial Council Form EJ-125). The creditor may obtain the judgment debtor's financial records by filing a Small Claims Subpoena and Declaration (Judicial Council Form SC-107), or a Civil Subpoena Duces Tecum (Judicial Council Form SUBP-002).

**File abstract of judgment.** If the judgment debtor owns real property, the judgment creditor may place a lien on the property so he or she will be paid if the property is sold. To do so, the creditor can file an Abstract of Judgment (Judicial Council Form EJ-001) (see §7.51), with the county recorder in the county where the property is located.

The appellate division of the superior court has jurisdiction over appeals from small claims court postjudgment enforcement orders. *General Elec. Capital Auto. Fin. Servs., Inc. v Appellate Div.* (2001) 88 CA4th 136, 105 CR2d 552.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/Chapter Outline

# 8

# The Debtor's Property

**Richard L. Enkelis**
**Raymond R. Goldstein**

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## §8.1 I. IMPORTANCE OF PROPERTY

To enforce a judgment it is necessary to know the nature and location of a judgment debtor's property and income. As a rule, all property of the judgment debtor is subject to enforcement of a judgment. CCP §695.010(a). There is a distinction between the enforcement of a judgment, which is the generic term for all forms of enforcement, and execution on a judgment, which is a specific form of enforcement involving a writ of execution. See chap 9. Some property of the judgment debtor is subject to enforcement by methods other than the levy of a writ of execution. See chap 11. This chapter deals with resolving what property the debtor owns or has an interest in and where it is located.

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## II. PROPERTY LOCATION

### A. In California

### §8.2 1. What County

If the property is in California, it is necessary to know the county in which the property is located because a writ of execution is county specific and can be used only to reach property in the county to which the writ is directed.

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### §8.3 2. Private Place or Other Specific Location

Some property may be in a "private place," which generally is anywhere not directly accessible to the public. For instance, equipment in a construction yard, but behind a locked gate, is considered a private place.

It is important to know whether property is in a private place such as a home or some other specific location. It is possible to levy on personal property that is in a private place such as a home, but the procedure is a little different from a levy in a public place. The levying officer makes demand for delivery of the property sought and advises the judgment debtor that he or she may be liable for costs and attorney fees incurred in any further proceedings to obtain the property if it is not surrendered. If the property is not delivered to the levying officer, no further effort is made at that time, and the judgment creditor is notified of the failure to obtain the property.

The judgment creditor then applies to the court ex parte (often without notice) or by noticed motion if the court requires, for an order directing the levying officer to seize the property. This order includes the right to use force to enter the private place in a similar manner as a claim and delivery order. CCP §699.030. See §6.125.

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## §8.4 B. Outside in California

If property is not in California, it may be difficult to enforce the judgment. It is sometimes possible to enforce a judgment against property not in California by an assignment order. See §§11.21-11.32. For example, the debtor may be earning commissions from a source located outside California. The creditor can reach the commissions with an assignment order, but the order is actually effective only when the commission payments arrive in California in the debtor's hands.

There are no reported California cases in which a California debtor has been ordered to transfer an asset from out of state into California to make it subject to a California judgment. In California, other than in small claims court, no case or statutory law requires the debtor to pay judgments. Even in small claims court, the statute does not require that the judgment be paid. It only requires that if the judgment is not paid within 30 days, the judgment debtor must fill out and send to the judgment creditor a questionnaire concerning assets and liabilities. See CCP §§116.620, 116.830, discussed in §7.92.

One possible strategy would be to request an assignment order under which the judgment debtor assigns the bank account to the judgment creditor, but the question then arises whether the out-of-state bank would honor the assignment. A turnover order authorized by CCP §699.040 may be more effective for out-of-state property. A debtor personally served with a turnover order for, *e.g.,* certain bank funds, could be subject to contempt for failing to comply with the order.

Establishing a California judgment in a sister state is the only way to directly reach assets in that state. For a California attorney who is on a contingent fee, this is not a realistic way to enforce the judgment. To the extent that an asset can be reached through something like an assignment order for commissions from an out-of-state employer, the judgment can be enforced in California, otherwise, a collection attorney must be found in the sister state.

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## §8.5 III. TITLE TO PROPERTY

When property is not exclusively in the debtor's name, there are special considerations. Among them are whether the property is community property of the judgment debtor and spouse, property in which the judgment debtor is a tenant in common with a person who just happens to be the spouse, or property in which the judgment debtor is a joint tenant with a person who happens to be the spouse. Community property may be directly reached to satisfy a judgment (CCP §695.020), but the other property interests allow the judgment creditor to reach only the judgment debtor's interest in the property. Because it will be less than a 100-percent interest, it is difficult to find buyers at a levying officer's sale, making a levy on property in which the judgment debtor has a less than 100-percent interest difficult and less appealing than other types of levies.

Property that is not in the judgment debtor's name may be reachable to satisfy a judgment if the property is in the spouse's name. Because California is a community property state, the judgment debtor has an undivided one-half community property interest in the assets in the spouse's name. The difficulty may come for the judgment creditor to establish that the property is, in fact, community property rather than separate property of the nondebtor spouse. Usually, the judgment creditor levies on the property and the spouse files a third party claim asserting that the property was separate property, not community property. For further information on third party claims, see §§8.45-8.47.

If the property is in the name of the debtor and a third party and that third party is the debtor's spouse, California provides a convenient method of levy on a deposit account by a simple declaration stating that the property is the property of the debtor and the debtor's spouse. CCP §700.160(b). If the third party sharing title with the debtor is not the spouse, a separate court order is necessary for the levy. CCP §700.160(a). If the property is in the name of a third party alone it cannot be levied on. The creditor must then learn how the property got into the name of the third party.

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## IV. TRANSFERRED PROPERTY

### §8.6 A. For Value

If the debtor transfers property, it is crucial to know whether the property was transferred for fair value or was transferred for inadequate value. If the property was transferred for value and was not otherwise subject to any lien, the judgment creditor's only recourse is to try to locate the proceeds. If the property was subject to a lien, the judgment creditor can execute on the property in the transferee's hands because the lien would give the judgment creditor senior rights. See §8.17 on service of an order for examination creating a lien.

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### §8.7 B. For Inadequate Value

If the property transfer was not for fair value, it is presumed to be a fraudulent transfer. To establish an intentional fraudulent transfer, the judgment creditor may have to prove in an independent action that the purpose of the transfer was to hinder, delay, or defraud creditors. CC §3439.04(a)(1). Although CC §3439.07 states that the judgment creditor may ignore the transfer and instruct the levying officer to proceed with a levy when property was fraudulently transferred, the officer is unlikely to levy on property without a court order or judgment specifying that the property was fraudulently transferred.

If a judgment creditor must bring a fraudulent transfer action, the statute of limitations is generally 4 years for transfers intended to hinder, delay, or defraud, but that period may be extended for one year after the transfer or obligation was discovered or could reasonably have been discovered by the creditor. CC §3439.09(a). Transfers that are not made to hinder, delay, or defraud but that are made without receiving a reasonably equivalent value are subject to a 4-year statute of limitations if the debtor's remaining assets after the transfer were unreasonably small in comparison with the transaction or if the debtor incurs debts that are beyond the debtor's ability to pay or that the debtor should have known were reasonably beyond the debtor's ability to pay. CC §3439.09(b). Under any circumstances the action must be brought within 7 years of the date of the transfer, regardless of when the creditor discovered the transfer. CC §3439.09(c).

**PRACTICE TIP:** If the transfer is of real property and the deed was recorded, the statute of limitations runs from the date of the transfer or, at the latest, from the date of recordation, regardless of when the transfer is discovered, because the recordation of the deed is constructive notice to the world of the transfer.

For further discussion of fraudulent transfers, see §§12.66-12.66A.

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## V. SOURCES OF INFORMATION ON LOCATING ASSETS

### §8.8 A. Judgment Debtor

Speaking to the judgment debtor can be valuable if the debtor is cooperative. Payment arrangements can be made, and an informal judgment debtor examination may be done without the expense of serving a formal examination request. For information on judgment debtor examination proceedings, see §§8.15-8.53.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.9 B. Judgment Creditor

## §8.9 B. Judgment Creditor

Two sources of asset information that are often overlooked are the credit application and financial statements that the debtor may have given to the judgment creditor when an account was opened.

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## §8.10 C. Debtor's Acquaintances

The judgment creditor may have employees, salespeople, or others who regularly dealt with the judgment debtor. These people may have information on the debtor's assets or lifestyle that can aid in locating property. They may know whether the judgment debtor drives an expensive vehicle, has a vacation home or time share property, or regularly vacations where real property or other assets may exist.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.11 D. Public Records

## §8.11 D. Public Records

Public records can be a great source of information about the judgment debtor. Through these records the judgment creditor may be able to ascertain whether the debtor has multiple locations, which means more places for a possible levy. Information may also be available on the Internet. If the judgment debtor has a website, a search for links to other organizations or entities may lead to property that would be subject to enforcement of a judgment. Court records may disclose parties adverse to the debtor who could have relevant information about the debtor and be willing to disclose it (*e.g.,* former employees and former spouses, unpaid creditors, and the judgment debtor's debtors).

Research of public records should start with the Internet. Information may be gleaned about the judgment debtor from the websites of the county assessor, the county recorder, the county clerk, the Secretary of State, the State Board of Equalization, the Securities and Exchange Commission, and the Federal Aviation Administration. The State of California's website (http://www.ca.gov) also provides a wealth of other information, including license checks for real estate professionals and others. Typical locations for public records, and what they might disclose, are as follows:

| Source | Possible Information |
|---|---|
| Debtor's website | The judgment debtor's website may contain much information about how to contact the judgment debtor and property or assets it possesses or has interests in. In fact, a search as to who owns the website domain and its associated address can be very revealing. |
| Telephone directories | Although the debtor may be unlisted, the names of relatives (possible recipients of fraudulently transferred property) may be disclosed. Multiple addresses or telephone numbers might also lead to the disclosure of additional business interests of the debtor. |
| County assessor | Any property where the judgment debtor is receiving property tax bills. In general, people do not pay property taxes on property in which they do not have an interest. Private companies will also supply assessor's records on a statewide basis for a fee. |
| County recorder | Real property in the judgment debtor's name and sometimes limited partnership documents. |
| County clerk records | Registers of fictitious business name statements (also known as trade names or trade styles) are kept in alphabetical order by both the business name and the holder of the trade name. These records are maintained by the county clerk and are open to the public during normal business hours. A review of these records might lead counsel to other business enterprises operated by the debtor, which may in turn yield accounts receivable or other contract rights on which the judgment creditor could levy. |
| Civil action indexes | Records are maintained by the county clerk and alphabetically list the names of all plaintiffs and defendants filing or defending actions in the county court system. Plaintiffs' and defendants' records are maintained separately and indexed by the year of filing. This index is particularly useful for filed dissolution proceedings; even a cursory review of the pleadings in a dissolution proceeding may provide insights into the financial affairs of the debtor, the debtor's spouse, or both. The civil index may also be a |

| | |
|---|---|
| | source of asset identity in that the debtor may be the plaintiff in a civil action that is subject to a lien. There may be returns on levies in other cases in which another creditor has levied against this debtor. The debtor's adversaries such as a former spouse or employee may have valuable information on the debtor. |
| Probate index | The probate index is similar to the civil index and is maintained alphabetically by year, listing all probate cases initiated in the county. If the debtor has an unusual surname, it may lead to the discovery of a future inheritance or executor's fee to be derived from an existing probate estate. |
| Secretary of State | Corporate records will reveal whether the judgment debtor is a principal in any corporation. Limited partnership interests, limited liability partnership interests, and limited liability company interests are also filed with the Secretary of State. The UCC-1 index may reveal another business the debtor owns and other judgments against the debtor when another creditor has filed a personal property lien (J-1). |
| State Board of Equalization | Any resale permits held by the judgment debtor. This may lead to other businesses owned by the judgment debtor. Also, any license from the Department of Alcoholic Beverage Control will be listed. |
| Department of Motor Vehicles (DMV) | The Department of Motor Vehicles will supply, for a nominal fee, an abstract of ownership interests in registered vehicles. An account may also be opened with the DMV to expedite the process. Because the abstracts include legal ownership, a credit union membership or banking relationships may also be uncovered. This information may be ordered from the DMV's Sacramento office by telephone; the written abstract will follow the order in a few days. |
| Search and social networking sites | A complete Google search, including satellite and street views, is essential. Also, MySpace, Twitter, Facebook, LinkedIn, and other social and professional sites can lead to valuable information. |

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## §8.12 E. Asset Location Services

Private investigators and other asset-locating services are also available. These services are advertised on the Web in various legal publications and telephone directories under "investigators" or "asset location."

Because asset-locating services are private businesses, there is no uniformity in fees, which may range from $50 to several hundred or thousand dollars, depending on the investigator and what it is asked to do. These expenses are probably not recoverable as costs, which will be a factor in deciding whether to use an investigator. Another factor to consider is that an attorney may be liable for intentional torts committed by the private investigator in the course of the investigator's employment by the attorney. *Noble v Sears, Roebuck & Co*. (1973) 33 CA3d 654, 662, 109 CR 269.

**PRACTICE TIP:** In choosing an investigator, ask for a list of clients as references. Call some of them to learn whether the investigator has found useful information and whether the investigator stays in the background so the debtor does not become aware that someone is looking for assets.

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## VI. LEGAL PROCEEDINGS FOR LOCATING ASSETS

### §8.13 A. Service of Papers After Judgment

The discovery rules generally apply to postjudgment proceedings, with one notable exception. The major difference between postjudgment and prejudgment procedures is that the discovery cannot be served on the debtor's attorney; it *must* be served on the judgment debtor unless a valid consent has been filed and served. It may be served on the debtor's attorney if the judgment debtor has filed with the court and served the judgment creditor with a request that the debtor's attorney be served. The request must include the debtor's written consent to service. Service on the judgment creditor may be either personal or by mail. Either the debtor or the debtor's attorney may rescind the consent. CCP §684.020.

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## §8.14 B. Written Interrogatories

Written interrogatories and demands for production of documents are provided for by CCP §§708.020-708.030. There is no authority on whether the Economic Litigation Rules on discovery (CCP §§94-95; see §3.70) apply to postjudgment proceedings. To be safe, if using postjudgment interrogatories or document demands in the postjudgment context, it is better practice to follow the limitations of CCP §§94-95 than to violate them and encourage a motion for a protective order, which would slow down the enforcement process.

On service of interrogatories on the judgment debtor, see §8.13. The judgment debtor need not respond to interrogatories served within 120 days after having been examined or after having responded to a previous set of interrogatories. CCP §708.020(b). Note that service of interrogatories, unlike service of an order of examination (see §8.17), does not create a lien on the debtor's property. 16 Cal L Rev'n Comm'n Reports 1129 (1982).

If enforcement of the judgment is stayed on appeal by a sufficient undertaking under CCP §§916-936.1, all proceedings concerning written interrogatories under CCP §§708.010-708.020 are stayed. CCP §708.010(b). If enforcement of the judgment is stayed without a sufficient undertaking, however, all proceedings concerning written interrogatories are stayed unless the court expressly orders otherwise. CCP §708.010(b).

Written interrogatories must be answered by the judgment debtor in the manner and within the time provided by CCP §§2030.010-2030.410. CCP §708.020(a).

**PRACTICE TIP:** On a practical level, postjudgment discovery may be a right for which there is little remedy if a breach occurs. Many of the remedies available in a civil action have little meaning in a postjudgment collection setting. An order striking pleadings and entering a default is useless because a judgment has already been obtained. An order for additional monetary sanctions or attorney fees may be uncollectible and is not helpful in establishing where the judgment debtor's assets are located for enforcement purposes. Similarly, although the judgment debtor may be held in contempt for refusing to answer interrogatories, after being ordered by the court to do so (see CCP §2023.030(e)), it is no help in collecting the judgment.

**PRACTICE TIP:** If the judgment debtor is an attorney, interrogatories may make sense because a court is more likely to hold an attorney (who is, after all, supposed to know what to do with an interrogatory) in contempt for not answering interrogatories than just a random judgment debtor.

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## C. Order of Examination

### 1. Initiating Proceeding Against Judgment Debtor

### §8.15 a. Procedure; Timing

A judgment creditor may apply to a proper court (see §8.16) for an order requiring the judgment debtor's appearance at a specified time and place before the court or a court-appointed referee (see §8.30) to furnish information to aid in enforcement of the judgment. CCP §708.110(a). The court may issue an order to appear on ex parte application of the judgment creditor if the creditor has not caused the judgment debtor to be examined under CCP §708.110 within the preceding 120 days. CCP §708.110(b). The court may issue such an order even when the judgment debtor was required to answer written interrogatories under CCP §708.020 (see §8.14) within the 120-day period. See Comment to CCP §708.110.

If the creditor has caused the debtor to be examined under CCP §708.110 within the preceding 120 days, however, a showing of good cause by affidavit (or declaration; see CCP §2015.5) or otherwise is required for the court to issue such an order. CCP §708.110(c). The application in this instance must be made on noticed motion if the court so directs or if required by a court rule; otherwise, it may be made ex parte. CCP §708.110(c). See §8.19 for a form of declaration.

The court's order must contain the following statement in 14-point boldface type if printed or in capital letters if typed (CCP §708.110(e)):

**NOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may order you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.**

If a corporation, partnership, association, trust, or other organization is ordered to appear for examination and the order does not require a specified individual to appear, the order must advise the organization of its duty to designate one or more officers, directors, managing agents, or others familiar with its property or debts to appear and be examined. CCP §708.150(a), (c); see §8.25. Judicial Council Forms AT-138 and EJ-125 (which are the same) contain these notices. See §8.18. Despite this provision, some courts require that a natural person be named on the application. See, *e.g.*, Los Angeles Ct R 3.4(a)(1).

A judgment debtor may not be ordered to appear for an examination if the judgment is no longer enforceable. See CCP §683.020(b).

On subpoenaing documents, see §8.31.

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### §8.16 b. Proper Court for Examination

Except as otherwise provided in CCP §708.160, the proper court for examination of a judgment debtor (or a third person, see §§8.20-8.23) is the court in which the money judgment has been entered. CCP §708.160(a). A person sought to be examined may not be required to attend an examination before a court located outside the county in which the person resides or has a place of business unless the place of examination is less than 150 miles from the person's residence or place of business. CCP §708.160(b). If the person sought to be examined does not reside or have a place of business in the county where the judgment is entered, a proper court for the examination is a court of similar jurisdiction in the county where the person resides or has a place of business. CCP §708.160(c).

If the judgment creditor seeks to examine a person before a court other than the court in which the judgment was entered, then under CCP §708.160(d)(1)-(4) the creditor must do the following:

- File an abstract of judgment in the form prescribed by CCP §674 with the court from which the order is sought;
- Present to the court an affidavit (or declaration; see CCP §2015.5) supporting the application for the order stating the place of residence or place of business of the person sought to be examined; and
- Make any necessary affidavit, declaration, or showing for the examination as required by CCP §708.110 (judgment debtors), §708.120, or §708.130 (examination of third persons).

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### §8.17 c. Service of Order; Lien

The judgment creditor must personally serve a copy of the order of examination on the judgment debtor (*not* the debtor's attorney, see §8.13) 10 or more days before the date set for the examination. CCP §708.110(d). On who must make service in order to be able to hold the debtor in contempt for failure to appear, see CCP §708.170(a) (discussed in §8.48). It is a misdemeanor for anyone to willfully make an improper service of an order for an examination that results in the arrest of a person under CCP §708.170(a) for failure to appear. CCP §708.170(b). Counsel should consult local court rules and policies to ascertain any further requirements, such as filing the proof of service. See, *e.g.,* Los Angeles Super Ct R 3.4(b), which requires that a proof of service on the judgment debtor of the order to appear for examination be filed with the court clerk at least 3 days before the examination.

A lien is created on the judgment debtor's personal property by service of the order, even without a levy on the property. CCP §708.110(d); *Kipperman v Proulx (In re Burns)* (BAP 9th Cir 2003) 291 BR 846. The duration of the lien is for "one year from the date of the order unless extended or sooner terminated by the court." CCP §708.110(d). This lien arises without giving the public notice of the lien and is a secret lien because it is not recorded and there is no way for a bona fide purchaser to discover its existence. The Ninth Circuit upheld the constitutionality of this lien in *Southern Cal. Bank v Zimmerman (In re Hilde)* (9th Cir 1997) 120 F3d 950.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.18 d. Form: Application and Order for Appearance and Examination (Judicial Council Form AT-138, EJ-125)

## §8.18 d. Form: Application and Order for Appearance and Examination (Judicial Council Form AT-138, EJ-125)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **APPLICATION AND ORDER FOR APPEARANCE AND EXAMINATION**<br>☐ **ENFORCEMENT OF JUDGMENT** ☐ **ATTACHMENT (Third Person)**<br>☐ **Judgment Debtor** ☐ **Third Person** | CASE NUMBER: |

## ORDER TO APPEAR FOR EXAMINATION

1. TO *(name)*:
2. YOU ARE ORDERED TO APPEAR personally before this court, or before a referee appointed by the court, to
   a. ☐ furnish information to aid in enforcement of a money judgment against you.
   b. ☐ answer concerning property of the judgment debtor in your possession or control or concerning a debt you owe the judgment debtor.
   c. ☐ answer concerning property of the defendant in your possession or control or concerning a debt you owe the defendant that is subject to attachment.

| Date: | Time: | Dept. or Div.: | Rm.: |
|---|---|---|---|
| Address of court ☐ shown above ☐ is: | | | |

3. This order may be served by a sheriff, marshal, registered process server, **or** the following specially appointed person *(name)*:

Date:

JUDGE OR REFEREE

**This order must be served not less than 10 days before the date set for the examination.**

## IMPORTANT NOTICES ON REVERSE

## APPLICATION FOR ORDER TO APPEAR FOR EXAMINATION

4. ☐ Judgment creditor ☐ Assignee of record ☐ Plaintiff who has a right to attach order applies for an order requiring *(name)*: to appear and furnish information to aid in enforcement of the money judgment or to answer concerning property or debt.
5. The person to be examined is
   a. ☐ the judgment debtor.
   b. ☐ a third person (1) who has possession or control of property belonging to the judgment debtor or the defendant or (2) who owes the judgment debtor or the defendant more than $250. An affidavit supporting this application under Code of Civil Procedure section 491.110 or 708.120 is attached.
6. The person to be examined resides or has a place of business in this county or within 150 miles of the place of examination.
7. ☐ This court is **not** the court in which the money judgment is entered or *(attachment only)* the court that issued the writ of attachment. An affidavit supporting an application under Code of Civil Procedure section 491.150 or 708.160 is attached.
8. ☐ The judgment debtor has been examined within the past 120 days. An affidavit showing good cause for another examination is attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

(Continued on reverse)

Print

## APPEARANCE OF JUDGMENT DEBTOR (ENFORCEMENT OF JUDGMENT)

**NOTICE TO JUDGMENT DEBTOR** If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

## APPEARANCE OF A THIRD PERSON (ENFORCEMENT OF JUDGMENT)

**(1) NOTICE TO PERSON SERVED** If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.

**(2) NOTICE TO JUDGMENT DEBTOR** The person in whose favor the judgment was entered in this action claims that the person to be examined pursuant to this order has possession or control of property which is yours or owes you a debt. This property or debt is as follows *(Describe the property or debt using typewritten capital letters)*:

If you claim that all or any portion of this property or debt is exempt from enforcement of the money judgment, you must file your exemption claim in writing with the court and have a copy personally served on the judgment creditor not later than three days before the date set for the examination. You must appear at the time and place set for the examination to establish your claim of exemption or your exemption may be waived.

## APPEARANCE OF A THIRD PERSON (ATTACHMENT)

**NOTICE TO PERSON SERVED** If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court, and the court may make an order requiring you to pay the reasonable attorney fees incurred by the plaintiff in this proceeding.

## APPEARANCE OF A CORPORATION, PARTNERSHIP, ASSOCIATION, TRUST, OR OTHER ORGANIZATION

It is your duty to designate one or more of the following to appear and be examined: officers, directors, managing agents, or other persons who are familiar with your property and debts.



*Copies:* Original (signed by judge or commissioner and filed with court clerk with proof of personal service on

judgment debtor); copies for service (one on judgment debtor); office copies (one copy, if desired, for client).

*Comment:* Counsel should check local rules and practices to learn whether there are any particular requirements concerning the application and order and whether specific forms are required. On appearance at examination by organizations generally, see §8.25.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.19 e. Form: Declaration in Support of Motion for Examination (More Often Than Every 120 Days)

**§8.19 e. Form: Declaration in Support of Motion for Examination (More Often Than Every 120 Days)**

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **MOTION FOR EXAMINATION** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*specify, e.g., judgment creditor/agent for the judgment creditor*]_ _ **in this action.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3.** _ _[*I/The judgment creditor*]_ _ **recovered a judgment in this action, which was duly entered in the Judgment Book of this court. Under order of this court, an examination proceeding of the judgment debtor was conducted on** _ _[*date*]_ _**.**

**4. Although 120 days have not elapsed since that examination, good cause exists, as set forth below, for this court to issue an order that the judgment debtor again appear for examination at** _ _[*specify time and place*]_ _**.**

**5. I am informed and believe and therefore allege that the judgment debtor has** _ _[*e.g., acquired substantial new assets/failed to disclose the extent, nature, and location of certain assets/recently begun working for an unknown employer*]_ _**.**

**6. My information and belief are founded on these facts:** _ _[*Specify, e.g., Business associates of the judgment debtor have informed me that the judgment debtor has recently received a large inheritance and has opened bank accounts at several presently unknown locations/Previous employers have informed me that the judgment debtor is now gainfully employed in the construction trade and was working regularly for various presently unknown contractors*]_ _**.**

**7.** _ _[*I/The judgment creditor*]_ _ **must reexamine the judgment debtor to obtain information on the facts in paragraph 6 above, which information was unavailable at the time of the previous examination.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

*Copies:* One copy for attachment to each application and order for appearance. See §8.18.

*Comment:* When the judgment debtor has been examined under CCP §708.110 within the preceding 120 days, a showing of good cause is required for the court to issue an order requiring the judgment debtor's appearance at another examination. CCP §708.110(c). A declaration or affidavit establishing good cause should be attached to the application for the order. Counsel should check local court rules or practices to learn whether any special forms or procedures are required.

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## 2. Initiating Proceeding Against Third Person

### §8.20 a. When Available; Procedure

Under CCP §708.120, on ex parte application of the judgment creditor, a third person who has possession or control of property in which the judgment debtor has an interest or who is indebted to the judgment debtor for $250 or more may be ordered to appear before the court or a court-appointed referee at a time and place specified in the order to answer concerning such property or debt. Third parties who may be examined include a spouse, current and former corporate officers or employees, and former attorneys. Although there is no set procedure for anyone other than these individuals who may have knowledge of the judgment debtors' assets, CCP §708.130(a) provides that witnesses may be required to appear and testify in the same manner as they may be required to appear at trial. Although the right to call witnesses to these proceedings was affirmed by the California Supreme Court (*McCullough v Clark* (1871) 41 C 298), no specific procedure has ever been set up. See §8.21 on modifying an order to appear for examination to compel a third party to appear under CCP §708.130.

The ex parte application must be made to a proper court, but most often requires no personal appearance. See §8.16. To compel a third party's attendance, the application must be supported by affidavit or declaration (see CCP §2015.5; §8.23) or must otherwise establish to the court's satisfaction that the third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor for at least $250. CCP §708.120(a). The affidavit or declaration may be on information or belief. CCP §708.120(a). If a public entity is a debtor of the judgment debtor, the judgment creditor must follow the procedures in CCP §§708.710-708.795. See Comment to CCP §708.120.

The court's order must contain the following language in 14-point boldface type if printed or in capital letters if typed (CCP §708.120(e)(1)-(2)):

**(1) NOTICE TO PERSON SERVED. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney fees incurred by the judgment creditor in this proceeding.**

**(2) NOTICE TO JUDGMENT DEBTOR. The person in whose favor the judgment was entered in this action claims that the person to be examined pursuant to this order has possession or control of property which is yours or owes you a debt. This property or debt is as follows: (Description of property or debt). If you claim that all or any portion of this property or debt is exempt from enforcement of the money judgment, you must file your exemption claim in writing with the court and personally serve a copy on the judgment creditor not later than three days before the date set for the examination. You must appear at the time and place set for this examination to establish your claim of exemption or your exemption may be waived.**

The Judicial Council application and order for appearance contains this language. See §8.18.

In addition, if a corporation, partnership, association, trust, or other organization is ordered to appear for examination and the order does not require the appearance of a specified individual, the order must advise the organization of its duty to designate one or more officers, directors, managing agents, or others who are familiar with its property or debts to appear and be examined. CCP §708.150(a), (c); see §8.25. Despite this provision, some courts require that a natural person be named on the application. See, *e.g.*, Los Angeles Ct R 3.4(a)(1).

A third person may not be ordered to appear for an examination when the judgment is no longer enforceable. See CCP §683.020(b).

For form of declaration in support of an ex parte application for an order for the appearance of a third person, see §8.23.

On subpoenaing documents, see §8.31.

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### §8.21 b. Modifying Judicial Council Form AT-138, EJ-125

A witness may be compelled to appear at an examination even if that witness does not possess or control property in which the debtor has an interest over $250 or owe the debtor an amount over $250. CCP §708.130. Judicial Council Form AT-138 or EJ-125 (the forms are the same; see §8.18) may be modified to compel a third party to appear under CCP §708.130, which does not require that the examinee owe the judgment debtor money or control the judgment debtor's property. Item 2, on the lower half of the page, contains a paragraph that is designed for examinations under CCP §708.120. To use this form to compel attendance under CCP §708.130, cross out the printed language and substitute, "A third person who has knowledge of the judgment debtor's assets and liabilities. A declaration under CCP §708.130 is attached." Using the regular form causes less confusion for the clerks and the court. Attach a declaration to establish who is to be examined and why the attorney or judgment creditor believes that the person has knowledge of the judgment debtor's assets. See §8.23 for declaration. Also attach a memorandum in support of motion (commonly referred to as a memorandum of points and authorities) quoting CCP §708.130 and making the argument suggested above. See §8.24 for a form of memorandum in support of motion.

**PRACTICE TIP:** This method is a practical way to examine the debtor's spouse without having to establish that the spouse owes the debtor money or controls the debtor's property.

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### §8.22 c. Service of Order; Mileage Fee; Lien

The judgment creditor must serve a copy of the order for appearance and examination on both the third person and the judgment debtor not less than 10 days before the date set for the examination. CCP §708.120(b). The third person must be served personally, but the judgment debtor may be served personally or by mail. CCP §708.120(b)(1)-(2). On who must make service in order for the third person to be held in contempt for failure to appear, see CCP §708.170(a) (discussed in §8.48). It is a misdemeanor for a person to willfully make an improper service of an order for an examination that results in the arrest of a person under CCP §708.170(a) for failure to appear. CCP §708.170(b). Proof of service should be filed with the court. Counsel should check local rules for time requirements on filing the proof of service.

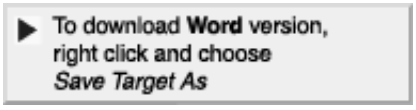
By requiring an affidavit describing the property and an order to appear for examination (ORAP), the third person is provided with procedural due process protections that allow creation of a lien on the judgment debtor's interest in property in the third party's possession. CCP §708.120(c); *Kipperman v Proulx* (*In re Burns)* (BAP 9th Cir 2003) 291 BR 846. The order is not effective unless the person serving the order on the third person at the time of service also tenders to the third person mileage fees for the number of miles necessary to travel from the third person's residence to the place of examination. CCP §708.120(f). The fee amount is the same as that generally provided to witnesses in civil proceedings in the court where the examination will be conducted. CCP §708.120(f).

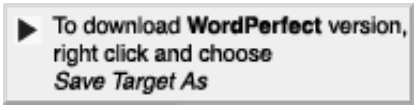
Service of the order on the third person creates a lien on the judgment debtor's interest in the property or on the debt if the affidavit (or declaration; see CCP §2015.5) or the application for the order describes the property in the third person's control or possession in which the judgment debtor has an interest, or on the debt owed by the third person to the judgment debtor, in a reasonably adequate manner to permit it to be identified. CCP §708.120(c). The duration of the lien is 1 year after the order's date unless the court extends or sooner terminates it. CCP §708.120(c).

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.23 d. Form: Declaration in Support of Ex Parte Application for Order for Appearance of Third Person

## §8.23 d. Form: Declaration in Support of Ex Parte Application for Order for Appearance of Third Person




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **EX PARTE APPLICATION FOR** |
| **Defendant(s)** | ) | **ORDER FOR APPEARANCE** |
| | ) | **OF THIRD PERSON** |
| _____ | ) | |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*specify, e.g., judgment creditor/agent for the judgment creditor*]_ _**.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3.** _ _[*I/The judgment creditor*]_ _ **recovered a judgment in this action, which was duly entered in the Judgment Book of this court.**

**4. I am informed and believe and therefore allege that** _ _[*name*]_ _ _ _[*has possession or control of the following property in which the judgment debtor has an interest/is indebted to the judgment debtor for over $250 as more particularly set forth*]_ _**:** _ _[*Describe property or debt in a reasonably adequate manner to permit it to be identified*]_ _**.**

**5. My information and belief is founded on the following facts:** _ _[*Specify*]_ _**.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

*Copies:* Original (filed with court clerk with original application and order); copies for service (one on judgment debtor); office copies (if desired, one copy for client).

*Comment:* A declaration or affidavit in support of the ex parte application for an order for appearance of the third person should be attached to the application for the order. On content generally, see §8.20. For form of application, see §8.18. On content required to create a lien, see §8.22. Counsel should check local court rules or practices to learn whether any special forms or procedures are required.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.24 e. Form: Memorandum in Support of Ex Parte Application for Order for Appearance of Third Person

## §8.24 e. Form: Memorandum in Support of Ex Parte Application for Order for Appearance of Third Person

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MEMORANDUM IN SUPPORT** |
| **vs** | ) | **OF EX PARTE APPLICATION** |
| _ _[*Name(s)*]_ _, | ) | **FOR ORDER FOR** |
| **Defendant(s)** | ) | **APPEARANCE AND** |
| | ) | **EXAMINATION OF** |
| _____ | ) | _ _[*NAME*]_ _ |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**1. The Enforcement of Judgments Law provides three different methods by which persons may be brought before the court for examination. Code of Civil Procedure §708.110 deals with the method for bringing the judgment debtor before the court. Code of Civil Procedure §708.120 deals with the method of bringing before the court third parties who have possession or control of property in which the judgment debtor has an interest or who are indebted to the judgment debtor in an amount exceeding $250. Code of Civil Procedure §708.130(a) states that witnesses may be required to appear and testify before the court or a referee in an examination proceeding under this article in the same manner as on the trial of an issue.**

**2. In the case of *McCullough v Clark* (1871) 41 C 298, the supreme court affirmed the right to call third party witnesses. The language of current Code of Civil Procedure §708.130(a) is substantially similar to the language of the Civil Practice Act in effect in 1871, which was taken from the Field Code of 1849 from New York. The method of compelling attendance of such a witness is by civil subpoena.**

[*If applicable, add the following option*]

**3. Code of Civil Procedure §708.130(b) provides that the marital privilege between a husband and a wife does not apply in an examination proceeding under the Enforcement of Judgments Law. Clearly, Code of Civil Procedure §708.130 contemplates compelling the appearance of a spouse.**

[*Continue*]

**[4.] Because of the confusion surrounding many postjudgment procedures, the judgment creditor requests that the court order the issuance of a standard Application and Order for Appearance and Examination (Judicial Council Form AT-138, EJ-125) directed to _ _[*name*]_ _, _ _[*spouse of the judgment debtor*]_ _. The form will be served with a copy of this Application and Points and Authorities so that it is clear that _ _[*name*]_ _ is being served as a person with knowledge of the debtor's assets and liabilities.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with original application and order); copies for service (one on judgment debtor); office copies (if desired, one copy for client).

*Comment:* This memorandum in support of motion (commonly referred to as a memorandum of points and authorities) should be suitably modified and submitted to the court when seeking the examination of a third party witness who is not known to be in control of property in which the judgment debtor has an interest or who does not owe the debtor more than $250. This may include the debtor's spouse.

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### §8.25 3. Appearance by Organization Served With Order to Appear for Examination

If a corporation, partnership, limited liability company, association, trust, or other organization is served with an order to appear for examination and the order requires the appearance of a specific individual, that individual must appear and may be accompanied by one or more officers, directors, managing agents, or other persons who are familiar with the organization's property or debts. CCP §708.150(b). If the order to appear for examination does not require a specific individual's appearance, the organization must designate one or more officers, directors, managing agents, or others who are familiar with the property or debts to appear and be examined. CCP §708.150(a). When the order does not require that a specific individual appear for examination, it must advise the organization of its duty to make such a designation under CCP §708.150(a). CCP §708.150(c). Some local court rules require the name of an individual despite this provision.

**NOTE:** If the order does not require a specified individual to appear, the corporation, partnership, association, trust, or other organization may be held in contempt for failure to appear. See Comment to CCP §708.150. When an individual is named to appear for the entity, a practical problem arises if no one appears: Whom do you have arrested? The author suggests seeking a warrant for the person who was actually served. On contempt, see §§8.49-8.52.

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### 4. Limitations on Examinations

#### §8.26 a. 120-Day Limit

A previous examination within the preceding 120 days may limit the availability of an examination. See §8.15.

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### §8.27 b. Protective Orders

The court on motion of a person to be examined may make protective orders as justice requires. CCP §708.200. Similarly, the court on its own motion may make such protective orders. CCP §708.200. On referee's power to make protective orders under CCP §708.200, see CCP §708.140(a) (discussed in §8.30).

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### §8.28 c. Asserting Judgment Debtor's Exemption Claim When Third Person to Be Examined

When a third person who has possession or control of property in which the judgment debtor has an interest or who is indebted to the judgment debtor for $250 or more is ordered to appear and be examined by the judgment creditor (see §§8.20-8.23), the debtor may claim that all or part of the property or debt is exempt from enforcement of a money judgment. The judgment debtor may make this claim by application to the court on noticed motion. CCP §708.120(d). This application (with proof of service) must be filed with the court and personally served on the judgment creditor no later than three days before the examination date. CCP §708.120(d). The application must be supported by an affidavit (or declaration; see CCP §2015.5) executed by the judgment debtor that includes all the matters required by CCP §703.520(b). CCP §708.120(d).

A notice of opposition to the exemption claim is not required if the claim is made under CCP §708.120(d). The court must rule on the claim. CCP §708.120(d).

A judgment debtor who fails to claim an exemption under CCP §708.120(d) is not precluded from claiming it later "unless the property or debt is described in the order in a manner reasonably adequate to permit it to be identified and the judgment debtor receives notice of the examination proceeding at least ten days before the date set for the examination." CCP §708.120(d). In this situation, the exemption is waived by the judgment debtor's failure to claim it under §708.120(d) unless the court under CCP §473 (for mistake, inadvertence, surprise, or excusable neglect) relieves the debtor from the waiver. See Comment to CCP §708.120. For the extent of a third person's duty to protect a debtor's exemption rights, see *Bowie v Union Bank* (1970) 11 CA3d 807, 815, 90 CR 103; *Agnew v Cronin* (1957) 148 CA2d 117, 126, 306 P2d 527; *Hing v Lee* (1918) 37 CA 313, 316, 174 P 356, cited in the Comment to CCP §708.120.

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### §8.29 d. Intervention

A person claiming an interest in the property or debt sought to be applied in the examination proceedings may be permitted to intervene in the proceedings and the court may decide the person's rights in the property under CCP §708.180. CCP §708.190. Thus, an early resolution of a third party claim to property that is the subject of an examination proceeding is permissible under CCP §708.190. See Comment to CCP §708.190.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.30 5. Appointment and Authority of Referee

### §8.30 5. Appointment and Authority of Referee

Under CCP §708.140(a), the court can appoint a referee to conduct the examination. A court-appointed referee can issue, modify, or vacate an order under CCP §708.205 (see §8.43), make protective orders under CCP §708.200 (see §8.27), and issue a warrant under CCP §708.170 (see §8.49). CCP §708.140(a). A court-appointed referee has the same power as the court to grant adjournments, preserve order, and subpoena witnesses to attend the examination. CCP §708.140(a). Only the court that ordered the referee, however, has power to do the following (CCP §708.140(a)):

- Punish for contempt for disobeying an order of the referee;
- Award attorney fees under CCP §708.170; or
- Decide a contested exemption claim or third party claim under CCP §708.180.

Only a member of the State Bar of California may be appointed as a referee. CCP §708.140(b). Nothing in CCP §708.140(a) limits the court's power to appoint a temporary judge under Cal Const art VI, §21. CCP §708.140(c).

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## 6. The Examination

### §8.31 a. Preparation by Judgment Creditor's Counsel

Inexperienced counsel sometimes presume that the judgment debtor examination is the starting point of the quest for assets to satisfy the judgment. The examination should not be limited to information gathering but should also be used to confirm the existence of the judgment debtor's assets so that they may be applied to satisfy the judgment. Thus, as far as practicable, counsel should investigate the debtor's assets and subpoena any documents showing ownership (*e.g.*, passbooks, deeds, accounts receivable ledgers, stock registers, and other forms of recordkeeping) into court at the time of examination. In addition, counsel should have a writ of execution issued before the examination so as to be in a position to enable execution by a levying officer to proceed rapidly against the judgment debtor's assets discovered during the examination. On the court's or a referee's ordering the debtor or a third person to deliver property or funds to the levying officer or to pay the creditor directly, see §8.43.

After conducting this investigation, counsel should prepare a general outline of the examination, tailored to the particular debtor's circumstances. For a sample questionnaire that may contain some useful questions see §8.36. Only relevant questions from the questionnaire should be incorporated into counsel's outline. With regard to transfers of property mentioned by the debtor at an examination, counsel should be prepared to ascertain to whom and from whom the transfer was made, the consideration, and other details and circumstances. On fraudulent transfers and conveyances, see CC §§3439-3449. On effect of transfer on a lien, see CCP §§697.390, 697.610.

At the examination, counsel should have a blank order requiring the examinee to relinquish assets. See §8.44 for order. By using this form, counsel can simply fill in, at the examination, the specific assets sought to be seized and can present the form to the judge or referee for immediate signature, thus providing a written record of the order. Some judges or referees may not be familiar with the statutory authority for issuance of such an order, and counsel should be prepared to cite that authority. See §8.43.

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### §8.32 b. Privileges and Scope of Examination

The scope of a judgment debtor examination is much broader than that of pretrial discovery. The judgment debtor must appear and must furnish information to aid in enforcement of the money judgment. CCP §708.110(a). The widest scope for inquiry into the judgment debtor's property and business affairs is permissible. See *Kyne v Eustice* (1963) 215 CA2d 627, 632, 30 CR 391. Judgment debtor examinations are intended to "leave no stone unturned in the search for assets which might be used to satisfy the judgment." *Jogani v Jogani* (2006) 141 CA4th 158, 172, 45 CR3d 792.

Thus, a debtor might be required to furnish information on future employment prospects (see Comment to CCP §708.110), future interests, contingent assets, and expected windfalls. In a judgment debtor examination, there are no privileges for such items as income tax records.

Although the privilege against self-incrimination does technically apply in a judgment debtor examination (*Coleman v Galvin* (1947) 78 CA2d 313, 177 P2d 606), it is very limited. The debtor may not successfully assert it by merely declaring that an answer will incriminate the debtor. The reason the debtor will be subject to self-incrimination if he or she answers a question or explains why it cannot be answered must be evident from the implications of the question and in the setting in which it is asked. *Troy v Superior Court* (1986) 186 CA3d 1006, 1014, 231 CR 108. A support judgment debtor cannot rely on his failure to pay support to invoke the Fifth Amendment to protect financial information that might be used to collect his arrearages. *In re Marriage of Sachs* (2002) 95 CA4th 1144, 1159, 116 CR2d 273.

Questions about settlement discussions are permissible in the examination. *Young v Keele* (1987) 188 CA3d 1090, 233 CR 850. Although Evid C §§1152 and 1154 generally preclude any trial examination regarding a party's settlement discussions, those sections are intended to encourage settlement before trial, which is irrelevant to an examination after judgment when the creditor is seeking to elicit full disclosure of the debtor's assets.

Witnesses may be required to appear and testify at the examination proceeding in the same manner as on the trial of an issue. CCP §708.130(a). The privilege under Evid C §§970-971 of one spouse not to testify against the other does not apply in an examination. CCP §708.130(b). "This is to prevent the privilege from being used as a collusive device for the spouse to conceal assets liable for the satisfaction of the judgment." 16 Cal L Rev'n Comm'n Reports 1128 (1982). The privilege that protects confidential marital communications (see Evid C §980) may be raised at the examination proceeding. 16 Cal L Rev'n Comm'n Reports 1128 n443 (1982).

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### §8.33 7. Counseling Debtor

Examination proceedings are most often used by judgment creditors to find the debtor's nonexempt assets. The debtor should be counseled on attending the hearing and on the applicable sanctions for failure to appear, including arrest, attorney fees, and costs. See CCP §708.170. The debtor should also be counseled on the effects of the lien created by service of the order of examination (CCP §708.110(d); see §8.17) and on the law regarding fraudulent transfers and conveyances. See CC §§3439-3449. See also CCP §§697.390, 697.610 on the effect of transfer on a lien.

The debtor must be counseled to answer all questions truthfully at the examination and should be advised against wearing expensive jewelry or carrying more than a minimum amount of cash or any other unnecessary items, including keys, credit cards, or anything that may provide financial information, unless required to bring a specific item under a subpoena duces tecum or court order. A decision should be made on whether counsel will attend the examination with the debtor. If information protected by the Fifth Amendment or any other privilege may be requested and the debtor intends to assert such a privilege at the examination, prudence would dictate that counsel attend the examination.

It may be possible and advisable to convert nonexempt assets to exempt assets. When a judgment debtor must appear for examination under CCP §708.110, the exemption claims and procedures under CCP §703.010 are available. On asserting the judgment debtor's claim of exemption when a third person is to be examined, see §8.28.

**PRACTICE TIP:** Counsel should discuss with the debtor his or her ability to pay the judgment. A judgment creditor may agree to forgo an examination if an arrangement with the debtor to pay the debt can be worked out.

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### §8.34 8. When Use of Certified Shorthand Reporter May Be Warranted

If the judgment debtor is represented by counsel or if counsel for the judgment creditor anticipates a lengthy examination (and assuming the amount in dispute warrants it), it may be wise to hire a certified shorthand reporter to create a transcript of the examination. A reporter may be needed if an examinee refuses to answer a question after being ordered to do so by a referee (or commissioner) and no judge is readily available to order the examinee to answer. See §8.42. Having a transcript of the examination will also eliminate the need to prepare a postexamination report or memorandum.

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## D. Questionnaire for Examination of Judgment Debtor

### §8.35 1. Use of Sample Questionnaire

Before beginning the questioning, the attorney should ask whether the debtor can pay the debt. If the answer is no, portions of the questionnaire in §8.36 can be used selectively, depending on the particular case.

*Introductory matter:* The first three lines of the questionnaire should be filled in by the attorney before the examination. The line "Judgment for: _____" provides space to indicate whether the debt was for necessaries, *e.g.*, doctor bills, grocery bills, clothing.

*Employment (questions 17-27):* Social security and employment testimony may be verified if the judgment debtor will agree to give counsel a letter addressed to the Social Security Administration, Department of Health and Human Services (nearest local office), requesting that the creditor's counsel be sent a transcript of the debtor's account over a stated period. This opportunity is increasing in importance with the expansion of social security laws covering self-employed persons.

*Cash and bank deposits (questions 28-41):* There are many kinds of bank accounts, *e.g.,* special checking, certificates of deposit, special savings or thrift accounts, credit union savings, mutual thrift or saving companies, savings and loan company savings and "share" accounts, and postal savings. Unless counsel asks exactly, the debtor may avoid giving a complete answer.

*Insurance (questions 42-47):* The loan value of unmatured life insurance policies up to $10,775 are exempt from execution. CCP §704.100. See CCP §703.150 (exempt amounts indexed for inflation). If the judgment debtor is married, each spouse is entitled to a separate exemption, which exemptions may be combined regardless of whether the policies belong to either or both spouses and regardless of whether the spouse of the judgment debtor is also a judgment debtor under the judgment. CCP §704.100(b). Benefits from matured life insurance policies are exempt to the extent reasonably necessary to support the judgment debtor and his or her spouse and dependents. CCP §704.100(c). Benefits from a disability or health insurance policy or program are exempt except for benefits paid or payable to cover the cost of health care when "the judgment creditor is a provider of health care whose claim is the basis on which the benefits are paid or payable." CCP §704.130(b). Annuities do not qualify as life insurance policies within the meaning of CCP §704.100. *Simpson v Burkart (In re Simpson)* (9th Cir 2009) 557 F3d 1010, 1014.

*Books, records, and tax returns (question 75):* Counsel should ascertain whether any items on the return were questioned by either the state or federal government and whether a refund is pending.

*Loans and obligations (question 81):* Loan applications should be examined if they can be located or subpoenaed. Applicants usually want to make their financial positions as strong as possible in such applications and they list assets that might not otherwise be disclosed.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.36 2. Questionnaire: Examination of Debtor

## §8.36 2. Questionnaire: Examination of Debtor

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QUESTIONNAIRE FOR EXAMINATION OF DEBTOR

Date of examination: _____

Set for hearing on: _____ Case No._____

Person to be examined:_____

Judgment for: _____ Date entered:_____

Balance due: $_____

A. Identity of Debtor

1. Name and address:_____

   _____

2. Telephone number:_____
3. Date of birth: _____ Place:_____
4. Are you married? _____ If so, give your spouse's first and maiden names and the date of marriage:
   _____
5. Do you have any children? _____ If so, give names, ages, and addresses:

   _____

   _____
6. Have you been married before? _____ Give names and addresses of former spouses, dates of marriage, and dates of divorce or death:

   _____

   _____

   _____
7. Do you live in an apartment or in a private home?_____
8. If you live in a private home, who owns it? _____ If it is owned by you or by a relative, state when it was bought, how much it cost, and whose money was used:
   _____

   _____
9. How many rooms do you occupy? _____
10. Do you have a lease? _____
11. Landlord's name and address:

    _____

    _____
12. How much is the rent? $ _____ per _____
13. Who pays the rent?_____
14. Is it paid by cash or check? _____
15. Are your rent payments up to date? _____
16. Do you have any boarders or subtenants? _____ If so, give their names and the amount of rent paid by each:

_____

_____

B. Employment

17. What is your occupation?_____
18. Are you employed or in business? _____ If so, give name, address, and phone number of your employer or business:

    _____

    _____
19. What is your social security number?_____
20. If you are currently employed, give full details of any contract of employment and the amount of salary, commissions, or other compensation you receive, pay periods, and the amount of any sums owed to you:
21. Do you have any part-time employment? _____ If so, please describe:
22. What, if any, are your hobbies?_____

    Have you received any income from them?_____
23. Are your spouse or any of your children employed or in business? _____ If so, give the name and address of such employment or business and the salary or income derived:_____

    _____
24. If you are not the sole support of your family, state the amount of contribution of each member of your family toward the support of your home:_____

    _____
25. If you are employed or in business, state whether you or any members of your family or other relatives are, or at any time were, proprietors, part owners, stockholders, directors, or officers of any such business:
26. State what business you conduct or have conducted and what positions you have held in the last five years, together with the income you received from the business or position:_____

    _____
27. Are you an officer, director, member, partner, or shareholder of any business entity? _____ If so, give full details:

    _____

C. Cash, Bank Deposits, Other Assets

28. Do you have, in your own name or jointly, any bank account—commercial, savings, credit union, or otherwise? _____ If so, state the institution's names, branch addresses where the accounts are located, and the amount of the balances:

    _____

    _____
29. Do you have a bank account subject to your sole control? ____ If so, please describe:
30. Can you write checks on any account? _____
31. When and where did you last have a bank account? ____
32. When did you make your last deposit? _____
33. When did you draw your last check? _____
34. Do you have power of attorney or other authority to sign checks or other instruments for the payment of money on any bank account? _____
35. Does your spouse have a bank account? _____ If so, state the name and address of the bank and the amount of the balance:

    _____
36. Explain the source of the money in your spouse's bank account.

    _____
37. Do you or your spouse have a safe deposit box? _____ If not, when did you last have one?

38. Give the name and address of any bank or safe deposit company in which a safe deposit box is or was maintained:

_____

39. Do you have the right of access to any safe deposit box? _____

40. How much cash do you have with you at this time? $_____

41. What property have you disposed of since the service on you of this order, either cash or other personal or real property?

_____

D. Insurance

42. Do you have any accident, health, disability, annuity or income, retirement, pension, or life insurance? _____ If so, answer the following questions:

(a) Name of each insurance company or insurer:

_____

(b) The amount, type, and date of issuance of each policy:

_____

_____

(c) Number of each policy:_____

_____

(d) Annual premium paid for each life insurance policy: $_____

_____

(e) Annual premium paid for disability insurance: $_____

(f) Annual premium paid for health insurance: $_____

(g) Particulars of any assignment or assignments of any insurance policy:

(h) Dates and amounts of any loans against such policies:_____

_____

43. If you have borrowed on any insurance policy, what did you do with the money?

44. Are you receiving or do you have any claim for disability payments on any insurance policy? _____ If so, state the company name, number and particulars of policy, and the amount:

_____

45. Do you have fire insurance on the contents of your home? _____ If so, state the amount, in whose name it is issued, and the name of the insurance company:_____

_____

46. Where do you keep your insurance policies?_____

47. Will you make the policies available for inspection at the adjournment of this examination? _____

E. Properties

48. Do you have a driver's license? _____ If so, supply license number and name of state:

A chauffeur's license? _____ If so, supply license number and name of state:

_____

49. Does your spouse have a driver's license? _____ If so, supply license number and name of state:

50. If you have a license, what car do you drive? State make, model, and year: _____ Do you own it?_____

If encumbered, state to whom and in what amount:_____

_____

51. Do you or your spouse own or have any interest in any of the following, either in California or elsewhere? _____

(a) Real estate, land, buildings, condominiums, etc.? If so, describe:

_____

(b) Stocks, bonds, or other securities of any description, either in your possession or held by someone else for you? If so, describe:

_____

_____

(c) Mortgages or trust deeds on real or personal property? if so, describe:

_____

_____

(d) Promissory notes, drafts, bills of exchange, or other commercial paper? If so, describe:

_____

(e) Judgments? If so, describe:_____

_____

(f) A watch, diamonds, other jewelry, or antiques of any character? If so, describe:

_____

(g) Stamp or coin collections? If so, describe:_____

_____

(h) Defense, war savings, or savings bonds? If so, describe:_____

_____

(i) Credit union accounts? If so, describe:_____

_____

(j) Any other automobiles or trucks? If so, describe:_____

_____

(k) Any other vehicles, livestock, or farm implements? If so, describe:

_____

(l) Patents, inventions, trade names, trademarks, or copyrights? If so, describe:

_____

(m) Joint ventures or other business enterprise? If so, describe:

_____

(n) Warehouse receipts, bills of lading, or other documents of title? If so, describe:

(o) Musical instruments? If so, describe:_____

_____

52. Do you or your spouse own any other property not enumerated above? _____ If so, give full details:

_____

53. If any such property is mortgaged, pledged, encumbered, or subject to any conditional bill of sale, give full details, including current status:_____

_____

54. Have you or your spouse any personal property in pawn? _____ If so, give full details:

_____

55. Have you or your spouse purchased or are you or your spouse purchasing any article on an installment plan? _____ If so, give full details on each purchase, the amount, and how installment payments are being made:

_____

56. Have you or your spouse any interest in the estate of any deceased person? _____ If so, give full details:

_____

57. Have you or your spouse inherited any money or property? _____ If so, give full details:

58. Are you the beneficiary of or do you have any interest in any will or insurance policy? _____ If so, give full details:

_____

59. Have you made a will? _____ If so, where is it?_____
Would you produce it for inspection after the adjournment of this hearing? _____

60. Have you any securities with any stockbrokerage firm? _____ If so, describe:

61. Have you any account with any stockbroker or commodity broker? _____ If so, give full details:

_____

62. When did you last have any such account? _____ Give full details:

63. Have you now or did you ever have power of attorney or authority over any other stock, bond, or other security or commodity account? _____ If so, give full details:_____

64. Within the past year, have you received any payments of money other than those already described? _____ If so, state when, the amounts, and all particulars, including what was done with the money:

_____

65. Have you assigned any cause of action, judgment, insurance policy, salary, income, or disability payments? _____ If so, describe what was assigned and give full details of any such assignment:

_____

_____

66. Have you transferred any other property within the past five years? _____. If so, describe the property and give full details of any such transfer:_____

67. Have you filed any trade name certificates or partnership certificates? _____ If so, under what name?

68. Do you belong to any organization, club, or union? ____ If so, please list:

_____

69. Has any kind of license, permit, or appointment been issued or granted to you by any state, city, county, or federal government agency or department? _____ If so, give full details:_____

_____

70. Are you entitled to any money from any state, city, county, or federal government agency or department? _____ If so, give full details:_____

_____

71. Does anyone owe you money? _____ If so, give full details:_____

_____

_____

72. Are you acting as executor, administrator, trustee, receiver, guardian, or in any other capacity under any will, agreement, or court appointment? _____ If so, give full details:_____

_____

_____

F. Books and Records; Tax Returns

73. What books and records showing your receipts and disbursements do you keep?

(a) Where do you keep them?_____

(b) Are you willing to produce these for inspection after the adjournment of this hearing?

74. Did you file federal or state income tax returns in the last 5 years? _____ If so, are those returns available for inspection at the adjournment of this hearing?_____

75. Do you have an accountant? _____ If so, what is his or her name and address?

G. Loans and Obligations; Judgments Against Debtor; Other Court Proceedings

76. What are your average monthly expenses, and how are they met?

_____

_____

77. Are you making any payments to any creditor? _____ If so, give full details:

78. What is the total of your liabilities, exclusive of this judgment? $_____ What are the names and addresses of your creditors?

    _____

    _____

79. When and for what purposes were these liabilities incurred?

    _____

80. Have you applied for a loan from any bank, finance company, or other lending institution in the last 5 years? _____ If so, what happened to such application?_____

81. If a loan was obtained, what did you do with the proceeds?

    _____

82. Have you in the past 5 years acted as a comaker, endorser, or guarantor of any loan? _____ If so, please give full details:

    _____

83. Have you issued any financial statement in the past 5 years? _____ If so, to whom, why, and when?

    _____

84. Are you unable to pay your debts? _____

85. Are you a party to any contract of any kind? _____ If so, please describe:

86. Have you ever been in bankruptcy? _____ If so, state when, where, and the disposition:

87. Have you ever made an assignment for the benefit of creditors? _____ If so, when and where?

88. Are you or your spouse the plaintiff or defendant in any court action or proceeding? _____ If so, give full details:

    _____

    _____

89. Are there any judgments of record against you? _____ If so, give dates, amounts, court where rendered, and name of judgment creditor:_____

    _____

90. Have you made any payments on any such judgments? _____ If so, give full details, including when payment was made and the amount paid:_____

91. Has a receiver of your property been appointed by the court?_____

92. Are there any outstanding executions, orders, or subpoenas in supplemental proceedings, garnishee executions, or orders for payment of money under any other judgment against you?

    _____

    If so, give full details:_____

    _____

93. How do you propose to satisfy this judgment?_____

    _____

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## §8.37 E. Production of Documents

If the judgment debtor is being examined, documents may be compelled under CCP §1987; if a third person is being examined, documents may be compelled by a subpoena duces tecum. See §8.38 for a form of notice to attend and produce documents at a debtor's examination. Although the attorney may issue the subpoena, when examining a third person under CCP §708.130 it may be better to see whether the clerk will issue the subpoena so that the person being served is aware it is a court order to produce documents, not merely a request from the judgment creditor's attorney. Clerks in some courts no longer issue subpoenas; check local rules.

**WARNING:** Although CCP §708.130(a) states that witnesses may be compelled "in the same manner as [at] trial," some specific bench officers will not allow a demand for documents under CCP §1987 and insist on the use of a subpoena duces tecum. The author is not aware of any cases on this point.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.38 1. Form: Notice to Attend and Produce Documents at Debtor's Examination

## §8.38 1. Form: Notice to Attend and Produce Documents at Debtor's Examination

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
_ _[_ _ _ _ _ _ *Judicial District*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | **NOTICE TO ATTEND AND** |
| **vs** | ) | **PRODUCE DOCUMENTS AT** |
| _ _[*Name(s)*]_ _, | ) | **DEBTOR'S EXAMINATION** |
| **Defendant(s)** | ) | **(CCP §1987(b))** |
| | ) | **Examination:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**To** _ _[*name of each party and attorney(s) of record*]_ _**:**

**PLEASE TAKE NOTICE that, under Code of Civil Procedure §1987(b), the judgment creditor,** _ _[*name*]_ _**, requires the attendance of the judgment debtor,** _ _[*name*]_ _**, at a debtor's examination in this matter set for the above date and time in the above department of this court, located at** _ _[*address*]_ _**.**

**NOTICE IS FURTHER GIVEN that, under Code of Civil Procedure §1987(c), the judgment creditor requires that the judgment debtor,** _ _[*name*]_ _**, bring with** _ _[*him/her*]_ _ **the following books, documents, and things that are in** _ _[*his/her*]_ _ **possession or under** _ _[*his/her*]_ _ **control:** _ _[*List exact materials or things required; see §8.39 for a list of documents*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (retain for filing with court clerk if, *e.g.,* judgment debtor does not appear); copies for service (one for each party); office copies.

*Comment:* This notice in lieu of a subpoena may be served with the application and order for appearance and examination to compel the judgment debtor to produce documents at an examination. A subpoena and a declaration for production of documents is necessary to compel a third party to produce documents at an examination. All or some of the documents listed in §8.39 should be described in the notice.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.39 2. Form: Documents to Be Produced at Examination

## §8.39 2. Form: Documents to Be Produced at Examination

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**The following described documents, which are believed to be in the possession of _ _[*name of judgment debtor/name of third party*]_ _ _ _[*and documents for the business known as* _ _[*debtor's business name*]_ _ ]_ _:**

**1. All books of account, including general ledger, cash journals, payroll, and accounts receivable and accounts payable ledgers.**

**2. All current financial statements.**

**3. All bank records for the past six months to include all bank statements and canceled checks.**

**4. Depreciation schedules for all assets.**

**5. All records reflecting or referring to loans made to or by the judgment debtor, individually, jointly, and/or severally.**

**6. The legal description and street address of all real property in which the judgment debtor has or claims a current interest, or has had or claimed an interest in since the date of service of the summons in this action, regardless of the name(s) in which the record title appears.**

**7. Copies of all deeds, notes, land sale contracts, mortgages, and deeds of trust on property in which the judgment debtor has or claims a current interest, or has had or claimed an interest since the date of service of the summons in this action, regardless of the name(s) in which the record title appears.**

**8. All bank, savings and loan, credit union, or other financial institution or money market fund records for the last six months for all deposit or checking accounts in which judgment debtor or spouse have an interest, whether or not in the name of judgment debtor or spouse, including all statements and canceled checks.**

**9. All receipts for cash purchases or payments for the last six months.**

**10. Monthly statements from all lenders, including banks, savings and loans, credit unions, finance companies, and mortgage companies for the last three months, showing loan balances.**

**11. All monthly statements for the last three months, showing balances for goods or services purchased on credit.**

**12. Copies of any summons and complaint in every action in which judgment debtor is named as a party, whether as plaintiff, defendant, cross-complainant, cross-defendant, petitioner, respondent, or any other designation.**

**13. Ledgers of rental receipts from all income property.**

**14. Copies of registration certificates for all vehicles owned by or regularly driven by judgment debtor or spouse.**

**15. Copies of any other registration certificates filed with the Department of Motor Vehicles.**

**16. Original share certificates in any and all corporations evidencing judgment debtor's interest.**

**17. Copies of the organizing documents for all partnerships, limited partnerships, limited liability**

**partnerships, limited liability companies, joint ventures, or tenancies in common in which the judgment debtor or spouse has or claims a current interest, or has had or claimed an interest since the date of service of the summons in this action.**

**18. Copies of all contracts, contingency fee agreements, or other commission agreements with any person or entity from whom judgment debtor or spouse receives, or is entitled to receive, commissions, contingency fees, or money.**

*Copies:* One for each notice in lieu of subpoena or declaration in support of subpoena duces tecum.

*Comment:* All or some of the categories of documents described here may be listed in the notice in lieu of subpoena (see §8.38) or declaration in support of subpoena to produce documents (see §8.41).

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.40 3. Form: Civil Subpoena for Personal Appearance at Trial or Hearing (Judicial Council Form SUBP-001)

## §8.40 3. Form: Civil Subpoena for Personal Appearance at Trial or Hearing (Judicial Council Form SUBP-001)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/ PETITIONER:<br>DEFENDANT/ RESPONDENT: | |
| **CIVIL SUBPOENA**<br>**For Personal Appearance at Trial or Hearing** | CASE NUMBER: |

**THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of witness, if known)*:**

1. **YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS you make an agreement with the person named in item 2:**

| | | | | | |
|---|---|---|---|---|---|
| a. Date: | Time: | ☐ Dept.: | ☐ Div.: | ☐ Room: | |
| b. Address: | | | | | |

2. **IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:**
   a. Name of subpoenaing party or attorney: b. Telephone number:

3. **Witness Fees:** You are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you request them at the time of service. You may request them before your scheduled appearance from the person named in item 2.

**DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.**

Date issued:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PERSON ISSUING SUBPOENA)

_____
(TITLE)

## Requests for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least 5 days before the date on which you are to appear. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410). (Civil Code, § 54.8.)

(Proof of service on reverse)



Form Adopted for Mandatory Use
Judicial Council of California
SUBP-001 [Rev. January 1, 2007]

**CIVIL SUBPOENA FOR PERSONAL APPEARANCE AT TRIAL OR HEARING**

CEB

Code of Civil Procedure, §§ 1985,1986,1987
*www.courtinfo.ca.gov*

Print

SUBP-001

| PLAINTIFF/PETITIONER:<br><br>DEFENDANT/RESPONDENT: | CASE NUMBER: |
|---|---|

**PROOF OF SERVICE OF CIVIL SUBPOENA FOR PERSONAL APPEARANCE AT TRIAL OR HEARING**

1. I served this *Civil Subpoena for Personal Appearance at Trial or Hearing* by personally delivering a copy to the person served as follows:
   a. Person served *(name)*:
   b. Address where served:
   c. Date of delivery:
   d. Time of delivery:
   e. Witness fees *(check one)*:
      (1) ☐ were offered or demanded and paid. Amount: . . . . . $ _____
      (2) ☐ were not demanded or paid.
   f. Fee for service: . . . . . $ _____
2. I received this subpoena for service on *(date)*:
3. Person serving:
   a. ☐ Not a registered California process server.
   b. ☐ California sheriff or marshal.
   c. ☐ Registered California process server.
   d. ☐ Employee or independent contractor of a registered California process server.
   e. ☐ Exempt from registration under Business and Professions Code section 22350(b).
   f. ☐ Registered professional photocopier.
   g. ☐ Exempt from registration under Business and Professions Code section 22451.
   h. Name, address, telephone number, and, if applicable, county of registration and number:

**I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

**(For California sheriff or marshal use only)**
**I certify** that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)



*Copies:* Original (retain for filing with court clerk if, *e.g.,* witness moves to quash subpoena); copies for service (one

for each party and for witness from whom production is sought); office copies.

*Comment:* A supporting affidavit or declaration must accompany a subpoena duces tecum. CCP §1987.5. See §8.41 for declaration.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.41 4. Form: Declaration Supporting Subpoena Duces Tecum

## §8.41 4. Form: Declaration Supporting Subpoena Duces Tecum

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ SUPPORTING** |
| _ _[*Name(s)*]_ _, | ) | **SUBPOENA DUCES TECUM** |
| **Defendant(s)** | ) | **(CCP §1985)** |
| | ) | **Examination:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**_ _[*Name*]_ _ declares:**

**1. I am the _ _[*plaintiff/defendant/attorney for plaintiff/attorney for defendant*]_ _ in this action.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. _ _[*Name*]_ _ is a judgment debtor as a result of a judgment recovered in this action, which was duly entered.**

**4. _ _[*Name*]_ _ is a third party who is possibly in possession or control of property in which the judgment debtor has an interest.**

**5. An examination of _ _[*name*]_ _ is set for _ _[*date*]_ _, at _ _[*time*]_ _ in Department _ _[*number*]_ _ of this court, located at _ _[*address*]_ _.**

**6. _ _[*Name of witness*]_ _ has in _ _[*his/her*]_ _ possession or under _ _[*his/her*]_ _ control _ _[*specify matters or things desired to be produced*]_ _.**

**7. Each item is material to the issues of whether _ _[*name*]_ _ is in possession or control of property in which the judgment debtor has an interest.**

**8. Good cause for production of the items exists because _ _[*give facts showing need for production*]_ _.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__

_ _[*Typed name*]_ _

*Copies:* Original (retain for filing with court clerk if, *e.g.,* witness moves to quash subpoena); copies for service (one for each party and for witness from whom production is sought); office copies.

*Comment:* A supporting affidavit or declaration must accompany a subpoena duces tecum. CCP §1987.5.

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## §8.42 F. Objections to Conducting Examination

Different courts regulate the conduct of judgment debtor examinations in different ways. Some courts have referees or commissioners to whom all such matters are regularly referred. See CCP §708.140. Other courts simply call the matters during the law and motion calendar and refer the parties and their counsel to the hallway or jury room to conduct the examination. In most cases, the court simply administers an oath to the examinee (or a room full of examinees) requiring him or her (or them) to answer all questions truthfully and then instructs the parties to retire from the courtroom and return only if a dispute arises.

Before proceeding with the examination, counsel should demand production of all documents previously subpoenaed (see §8.31) and, if a reporter is present, identify each document for the record. If the debtor fails to produce a subpoenaed document or objects to its production, counsel should consider immediately referring the matter to the judge or referee hearing disputes. If the failure to produce a document is inadvertent, counsel should proceed with the examination and continue the matter for further examination to avoid the necessity of a special application under CCP §708.110(c) to examine a judgment debtor who has been examined by the judgment creditor in the preceding 120 days. See §8.15.

If, during examination, the examinee objects to a question or refuses to answer, counsel should immediately suspend the examination and appear before the judge or referee assigned to hear the disputes. If objections go unchallenged until the examination is completed, areas of inquiry can be lost or counsel may fail to ask necessary follow-up questions that would have occurred naturally if a response had been received to the initial inquiry. This matter is one of tactics, however, and occasions may arise when counsel prefers to complete the examination before having the judge or referee hear the dispute.

If the examinee refuses to answer a question after being ordered to do so by a referee, and a judge is not readily available to order the examinee to answer, a continuance of the examination may be necessary to have the order and refusal to answer placed on the record before a court reporter (if a reporter is not present at the examination), so that a record will be available if counsel for the judgment creditor later wishes to institute contempt proceedings against the examinee (by filing a declaration and having the court issue an order to show cause in re contempt). Counsel should check local court rules and practices in the court in which the examination is being held to learn whether a specific procedure must be followed in this situation. On contempt for failure to appear at the examination, see §§8.49-8.52.

If property is identified during the examination and turned over to the levying officer (see §8.43), counsel should immediately deliver a writ of execution to the officer with instructions to execute against the property already in the officer's possession. It sometimes happens that, after successfully identifying property and forcing the debtor to relinquish it to the levying officer, counsel, in the flush of victory, omits this final step and the property is allowed to languish in the hands of the levying officer. Similarly, if property is identified during the examination that is not turned over to the levying officer, counsel should immediately deliver a writ of execution to the officer with instructions to execute against the property.

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## G. Order Applying Property on Debt Toward Satisfaction of Judgment; Lien

### §8.43 1. In General

At the conclusion of an examination proceeding, the court or referee may order the judgment debtor's interest in property in the judgment debtor's or third person's custody or control, or a debt owed by the third person to the judgment debtor, to be applied to satisfy the money judgment if the property is not exempt from enforcement of a money judgment. CCP §§708.140, 708.205(a). See *Palacio Del Mar Homeowners Ass'n, Inc. v McMahon* (2009) 174 CA4th 1386, 95 CR3d 445 (judgment debtor may not be ordered to turn over domain name to creditor to satisfy judgment because §708.205 does not authorize turning over property directly to judgment debtor). Such an order creates a lien on the property or debt (CCP §708.205(a)) and is enforceable by contempt (see Comment to CCP §708.205). On other sections also authorizing turnover orders, see CCP §§699.040, 714.030.

Under CCP §708.120(a) the court (or referee) may order the person being examined, whether it is the judgment debtor or a third person, to deliver property or funds to the levying officer or directly to the judgment creditor. See Comment to CCP §708.205. The court (or referee) may also appoint a receiver and may order the judgment debtor to make necessary assignments or deliveries to the receiver for the purpose of sale or collection. See Comment to CCP §708.205. Moreover, the court (or referee) may order that execution be issued to collect the sum due. See Comment to CCP §708.205. Property that is to be sold under CCP §708.205(a) will be sold by a levying officer, if a writ of execution is outstanding, or by a court-appointed receiver. See Comment to CCP §708.205.

Examination proceedings may be conducted by a referee appointed by the court. CCP §708.140(a). A challenge to the referee's authority must be raised in the lower court, and is deemed waived if raised for the first time on appeal. *Imperial Bank v Pim Elec.* (1995) 33 CA4th 540, 39 CR2d 432.

Under CCP §708.205(b), however, if a third person being examined under CCP §708.120 claims an interest in the property that is adverse to the judgment debtor or denies the debt and the court does not rule on the matter under CCP §708.180(a) (see §§8.45-8.47), the court (or referee) may not order the property or debt to be applied to satisfy the money judgment. Instead, the court may make an order under CCP §708.180(c) or (d) forbidding transfer or payment to the extent authorized by that section. CCP §708.205(b).

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.44 2. Form: Order to Deliver Specific Property

## §8.44 2. Form: Order to Deliver Specific Property

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER TO DELIVER** |
| **vs** | ) | **SPECIFIC PROPERTY** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**On** _ _[*date*]_ _, _ _[*name*]_ _**, the judgment creditor in this action, obtained a judgment in this court against** _ _[*name*]_ _**, the judgment debtor, for the sum of $**_ _[*amount*]_ _**, together with interest and costs totaling $**_ _[*amount*]_ _**.**

**It appears from the examination of** _ _[*name*]_ _, _ _[*the judgment debtor/a third person*]_ _**, that**

[*Add one of the following alternatives*]

[*Alternative 1: Judgment debtor has nonexempt interest*]

**the judgment debtor has an interest in the following property in the possession or under the control of** _ _[*the judgment debtor/a third person*]_ _ **that is not exempt from enforcement of the money judgment:** _ _[*Describe property*]_ _**.**

[*Alternative 2: Judgment debtor is owed a debt*]

**the third person owes to the judgment debtor the following amount: $**_ _[*amount*]_ _**.**

[*Continue*]

**IT IS ORDERED that** _ _[*name*]_ _, _ _[*the judgment debtor/a third person*]_ _, _ _[*immediately/within* _ _[*number*]_ _ *days after the date of this order*]_ _ **deliver to the** _ _[*judgment creditor/sheriff of* _ _[*name of county*]_ _ *County*]_ _ **the** _ _[*described property/sum of $*_ _[*amount*]_ _]_ _**, which is to be applied toward the satisfaction of the judgment.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
_ _[*Judge/Referee*]_ _

*Copies:* Original (signed by judge or referee and filed with court clerk with proof of service); copies for service (one on judgment debtor and one on third person, if applicable); office copies.

*Comment:* The examination in supplementary proceedings is not a trial in which the court must make written findings

as required by CCP §632. *Lyons v Marcher* (1897) 119 C 382, 51 P 559. If a debtor of the judgment debtor denies the debt to the judgment debtor or claims an interest in property adverse to the judgment debtor, the court, not a referee, has the authority under CCP §708.180 to decide the issue. See *Kapelus v Family Health Found.* (1969) 276 CA2d 181, 80 CR 763. On determination of third person's claimed interest in property or denial of debt, see §§8.45-8.47.

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## H. Third Person Claims Interest in Property or Denies Debt

### §8.45 1. Determination by Court

If a third person examined under CCP §708.120 denies owing a debt to the judgment debtor or claims an interest in the property adverse to the judgment debtor, the court, not a referee, on the judgment creditor's request, may determine the existence of the debt or the interests in the property. CCP §§708.140(a), 708.180(a). For this purpose the court may grant a continuance for a reasonable time for (a) discovery proceedings, (b) the production of evidence, or (c) other preparations for the hearing. CCP §708.180(a). The determination is conclusive on the parties and on the third person (CCP §708.180(a)), but an appeal may be taken from the determination (CCP §708.180(a)).

The court may not make the determination under CCP §708.180(b), however, if the third person's claim is made in good faith and if any of the following conditions under CCP §708.180(b) apply:

- The court would not be a proper court for the trial of an independent civil action (including a creditor's suit) to rule on the interests in the property or the existence of the debt, and the third person objects to the determination of the matter under CCP §708.180(a).
- At the time an order for examination under CCP §708.120 is served on the third person, a civil action (including a creditor's suit) is pending with respect to the interests in the property or the existence of the debt.
- The court finds that the interests in the property or the existence of the debt should be decided in a creditor's suit.

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## §8.46 2. Order Forbidding Transfer of Property or Payment of Debt; Procedure

If a third person examined under CCP §708.120 denies owing a debt to the judgment debtor or claims an interest in the property adverse to the judgment debtor, on ex parte application of the judgment creditor the court may make an order forbidding payment of the debt or transfer of the property to the judgment debtor until either the debt's existence or the interests in the property is determined under CCP §708.180(a) (see §8.45) or a creditor's suit is commenced and an order obtained under CCP §708.240. CCP §708.180(c). The court in its discretion may require an undertaking to be given. CCP §708.180(c). "The court may modify or vacate the order at any time with or without a hearing on such terms as are just." CCP §708.180(c). Counsel should consult local court rules and practices on ex parte applications. See also Cal Rules of Ct 3.1200-3.1207 (see §6.34).

Similarly, on application of the judgment creditor on noticed motion, if the court rules that the third person probably owes the debt to the judgment debtor or that the judgment debtor probably has an interest in the property, the court may make an order forbidding payment of the debt or transfer or other disposition of the property until the debt's existence or the interest in the property is determined under CCP §708.180(a) or until a creditor's suit is commenced and an order obtained under CCP §708.240. CCP §708.180(d). The court must require the judgment creditor to furnish an undertaking as provided in CCP §529. CCP §708.180(d). "The court may modify or vacate the order at any time after notice and hearing on such terms as are just." CCP §708.180(d).

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.47 3. Form: Order Forbidding Transfer of Property or Payment of Debt

## §8.47 3. Form: Order Forbidding Transfer of Property or Payment of Debt

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER FORBIDDING** |
| **vs** | ) | _ _[*TRANSFER OF* |
| _ _[*Name(s)*]_ _, | ) | *PROPERTY/PAYMENT OF* |
| **Defendant(s)** | ) | *DEBT*]_ _ |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**On** _ _[*date*]_ _, _ _[*name*]_ _**, the judgment creditor in this action, obtained a judgment in this court against** _ _[*name*]_ _**, the judgment debtor, for the sum of $**_ _[*amount*]_ _**, together with interest and costs totaling $**_ _[*amount*]_ _**.**

**The judgment is now in full force and** _ _[*remains unpaid/there is now due and owing the sum of $*_ _[*amount*]_ _ *with interest*]_ _**.**

_ _[*Name of third person*]_ _ **was ordered to appear before this court to be examined concerning**

[*Add one of the following alternatives*]

**any property in** _ _[*his/her/its*]_ _ **possession or under** _ _[*his/her/its*]_ _ **control belonging to** _ _[*name*]_ _**, the judgment debtor in this action.**

[*Alternative 2*]

_ _[*his/her/its*]_ _ **being indebted to the judgment debtor.**

[*Continue*]

**It appears from the examination of** _ _[*name of third person*]_ _ **that** _ _[*he/she/it*]_ _

[*Add one of the following alternatives*]

[*Alternative 1*]

**claims an interest in the following property adverse to the judgment debtor:** _ _[*Describe property and claimed interest*]_ _**.**

[*Alternative 2*]

**denies being indebted to the judgment debtor.**

[*Add one of the following alternatives*]

[*Alternative 1: If order requested under CCP §708.180(c)*]

**WHEREFORE you, _ _[*name of third person*]_ _, are hereby ordered not to _ _[*transfer the property/pay the debt*]_ _ to _ _[*name*]_ _, the judgment debtor, until the _ _[*interest in the property/existence of the debt*]_ _ is determined under Code of Civil Procedure §708.180(a) or until a creditor's suit may be commenced and an order obtained under Code of Civil Procedure §708.240.**

[*Add the following option if undertaking required*]

**IT IS FURTHER ORDERED that the judgment creditor, _ _[*name*]_ _, file an undertaking in the amount of $_ _[*amount*]_ _ to pay to the third person any damages arising from this order.**

[*Alternative 2: If order requested under CCP §708.180(d)*]

**WHEREFORE you, _ _[*name of third person*]_ _, are hereby ordered not to _ _[*transfer or make any other disposition of the property to any person/pay the debt*]_ _ until the _ _[*interest in the property/existence of the debt*]_ _ is determined under Code of Civil Procedure §708.180(a) or until a creditor's suit may be commenced and an order obtained under Code of Civil Procedure §708.240.**

[*Add if undertaking required*]

**IT IS FURTHER ORDERED that the judgment creditor, _ _[*name*]_ _, obtain an undertaking as provided in Code of Civil Procedure §529 in the sum of $_ _[*amount*]_ _.**

[*Continue*]

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

*Copies:* Original (to be signed by judge and filed with court clerk with proof of service); copies for service (one on judgment debtor and one on third person); office copies.

*Comment:* If applied for under CCP §708.180(c), the order may forbid the transfer of property to the judgment debtor only, but if it is applied for under CCP §708.180(d), the order may forbid the transfer or any other disposition of property to anyone. An undertaking is discretionary under §708.180(c), but it is mandatory under §708.180(d). See §8.46.

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## I. Failure to Appear

### §8.48 1. Subsequent Procedure; Attorney Fees

If a person fails to appear for an examination after being served with an order to appear by a sheriff, marshal, anyone specially appointed by the court in the order, or a registered process server, the court may either (CCP §708.170(a)(1)(A)-(B)):

- Pursuant to a warrant, have the person brought before the court, and hold him or her in contempt; or
- Issue a warrant for the arrest of the person pursuant to CCP §1993.

Many courts routinely issue warrants for a nonappearing person on payment of a sheriff's or marshal's fee and on filing of the original proof of service showing proper service, if proof of service of the order of examination was not previously filed. These courts often notify counsel for the judgment creditor when the nonappearing person is later present in court so that counsel may conduct the examination at that time. If counsel is unavailable, the court will order the person to appear for examination on another date. This process may be repeated in some courts unless counsel requests that contempt proceedings be instituted. See §§8.49-8.52.

Other courts, instead of issuing a warrant, may require that a declaration establishing the nonappearance be filed (accompanied by the original proof of service for the order to appear showing proper service, if not filed earlier) and that an order to show cause in re contempt be issued. For forms, see §§8.51-8.52.

Under a third procedure, courts issue what is generally called a "bench letter" or a "bench warrant letter," which is usually a letter signed by the presiding judge and mailed by the court clerk to the address at which the debtor was served with the examination which says, in effect:

**You were served with a court order to appear on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _, of the _ _[*name of court*]_ _, located at _ _[*address*]_ _. YOU FAILED TO APPEAR. The judgment creditor has asked for a warrant for your arrest for violation of the court order. You have one more chance to appear on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _, of the _ _[*name of court*]_ _, located at _ _[*address*]_ _. IF YOU FAIL TO APPEAR AGAIN, A WARRANT FOR YOUR ARREST WILL BE ISSUED.**

In some courts the letter is prepared by the attorney instead of the clerk, and it is then sent to the court for signature and mailing. Other courts have the attorney prepare and send the letter, or a similar one drafted by the court, and then file a proof of service with the clerk. Counsel should check local court rules and practices for the procedure in the court in which the examination will occur.

If the debtor again fails to appear, a bench warrant may be issued, requiring the debtor to post bail. Depending on the court, bail is another matter that varies widely. Some courts use a flat bail of $500, others set bail in the amount of the judgment plus costs for the arrest, and still others set a figure somewhere in between. Check with the clerk for the local court rules or the rules of the particular judge.

If the court finds that the person's failure to appear is without good cause, the court must award the judgment creditor reasonable attorney fees incurred in the examination proceeding. CCP §708.170(a)(2). Note that a referee cannot award attorney fees under CCP §708.170. CCP §708.140(a)(2).

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## 2. Contempt

### §8.49 a. Procedure in General

The court (not a referee or commissioner; see CCP §708.140(a)(1) and *Marcus v WCAB* (1973) 35 CA3d 598, 111 CR 101) may punish a nonappearing person for contempt. CCP §708.170(a)(1)(A). The courts' contempt power under CCP §§1209-1222 is not limited by CCP §708.170. See Comment to CCP §708.170.

The court may punish a person found in contempt by a fine of up to $1000, imprisonment of up to five days, or both. The court may award attorney fees and costs to a party initiating a contempt proceeding against anyone who is subject to a court order and is found guilty of contempt for violating that order. CCP §1218. When the contempt consists of nonperformance of an act that is still within the person's power to perform, the court may imprison the person until the act is performed. CCP §1219. On contempt proceedings under CCP §§1209-1222 generally, see California Trial Practice: Civil Procedure During Trial §§16.99-16.129 (3d ed Cal CEB 1995).

Some courts, at the request of counsel for the judgment creditor, initiate contempt proceedings by issuing a warrant to have the person brought before the court, on payment of a sheriff's or marshal's fee and on filing the original proof of service showing proper service (if not filed earlier). Other courts first send a letter advising the examinee that the judgment creditor requested issuance of a warrant and that, if the examinee does not appear for examination on a continued date, he or she will be arrested and brought before the court to answer for contempt. Still other courts require that the proceedings be instituted by the judgment creditor's filing of a declaration establishing the nonappearance (accompanied by the original proof of service for the order to appear showing proper service, if not filed earlier) and the court then issues an order to show cause in re contempt. Counsel should check local court rules and practices in the court in which the examination will occur to ascertain the proper procedure to follow if counsel wants to initiate proceedings.

The judgment and orders made in contempt cases are final and conclusive (CCP §1222) and nonappealable (CCP §§904.1(a)(1), 904.2(a)(2)). The judgment and orders may be reviewed, however, by certiorari, habeas corpus (see *In re Buckley* (1973) 10 C3d 237, 259, 110 CR 121), or prohibition (see *Charbonneau v Superior Court* (1974) 42 CA3d 505, 507 n1, 116 CR 153).

**PRACTICE TIP:** If a bench warrant is issued and bail set, and thereafter cash (or other property) belonging to the judgment debtor is posted for bail on his or her arrest, counsel for the judgment creditor should, on the hearing date, request that the bail be applied to the amount outstanding on the judgment. Some judges will do this.

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### §8.50 b. Defenses

Defenses that may be raised in contempt proceedings include:

- The order is void as exceeding jurisdiction. See *Finn v Butler* (1925) 195 C 759, 235 P 992; *Liberty Bank v Superior Court* (1925) 195 C 766, 235 P 995 (writ of prohibition issued to prevent further proceedings in excess of jurisdiction). On proper court for examination generally, see §8.16.
- The debtor had no knowledge or notice of the order alleged to have been violated.
- The debtor is unable to comply with the order. *Myers v Superior Court* (1920) 46 CA 206, 189 P 109 (debtor not in contempt for failing to deliver property not belonging to him or in possession of another).

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.51 c. Form: Order to Show Cause in re Contempt

**§8.51 c. Form: Order to Show Cause in re Contempt**

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER TO SHOW CAUSE IN** |
| **vs** | ) | **RE CONTEMPT** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**To** _ _[*name of person sought to be adjudged in contempt*]_ _**:**

**YOU ARE ORDERED to appear before this court on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, at the courtroom of** _ _[*e.g., Department* _ _[*number*]_ _]_ _ **at** _ _[*address*]_ _**, California, to show cause why you should not be adjudged in contempt of court and punished accordingly for willfully disobeying the order of this court made and entered on** _ _[*date*]_ _**, as more fully described in the attached supporting declaration of** _ _[*name*]_ _**.**

**IT IS ORDERED that the service of this order to show cause and a copy of the declaration of** _ _[*name*]_ _ **in support of this order be made on you at least** _ _[*number*]_ _ **days before the date and time set for the hearing on this order to show cause.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

*Copies:* Original (signed by judge and filed with court clerk with proof of service (see Comment) thereafter filed); copies (one for service on citee); office copies.

*Comment:* In courts that require the order to show cause procedure to be followed (see §8.49), on the filing of the declaration (see §8.52) the order issues ex parte. The order to show cause and a copy of the declaration must be served on the party to be charged in the same manner as for a summons, *i.e.,* usually by personal service. CCP §1016; *In re Morelli* (1970) 11 CA3d 819, 835, 91 CR 72. Service by mail on the attorney of the person who failed to appear is insufficient. *Cedars-Sinai Imaging Med. Group v Superior Court* (2000) 83 CA4th 1281, 1287, 100 CR2d 320. After copies of the order to show cause and the declaration have been served, proof of service should be filed with the court clerk.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.52 d. Form: Declaration in re Contempt for Failure to Appear

## §8.52 d. Form: Declaration in re Contempt for Failure to Appear

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION IN RE** |
| **vs** | ) | **CONTEMPT FOR FAILURE** |
| _ _[*Name(s)*]_ _, | ) | **TO APPEAR** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the attorney for the judgment creditor in this action.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. On** _ _[*date*]_ _**, the court issued its order for an examination of** _ _[*name of examinee*]_ _**,** _ _[*the judgment debtor/a third person*]_ _**, a copy of which is attached and incorporated by reference.**

**4.** _ _[*Name of examinee*]_ _ **had knowledge of the order in that the order was served on** _ _[*him/her*]_ _ **on** _ _[*date*]_ _**, by personal service. A copy of the proof of service is attached and incorporated by reference.**

**5. Declarant appeared on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, before this court at the place named in this order and remained there prepared to examine** _ _[*name of examinee*]_ _ **under the order.**

**6.** _ _[*Name of examinee*]_ _ **failed to appear at that time and place, nor did anyone appear for or on** _ _[*his/her*]_ _ **behalf.**

**7. At that time and place declarant caused the nonappearance of** _ _[*name of examinee*]_ _ **to be noted by the court clerk in the records in this action.**

**8. At no time did** _ _[*name of examinee*]_ _ **inform me or the judgment creditor that** _ _[*he/she*]_ _ **would be unable to attend the examination.**

**9. Declarant knows of no reason that would prevent** _ _[*name of examinee*]_ _ **from complying with the order of examination.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and**

**correct.**

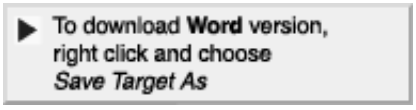
**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name of judgment creditor*]_ _

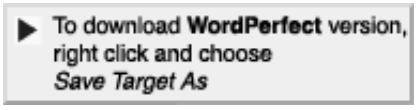
*Copies:* Original (filed with court clerk); copies (one attached to order to show cause for personal service on nonappearing person); office copies.

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**Source:** Business Law/Debt Collection Practice in California/8 The Debtor's Property/§8.53 e. Form: Declaration of Service

## §8.53 e. Form: Declaration of Service




_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF SERVICE** |
| **vs** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _ _[*Name(s)*]_ _, | ) | **Dep't:** _ _[*number*]_ _ |
| **Defendant(s)** | ) | **Hearing judge:** _ _[*if known*]_ _ |
| _____ | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**I was, on the date of service, over age 18 and not a party to the action; I served the foregoing Order to Show Cause in re Contempt in this action and the supporting declaration of _ _[*name*]_ _ on _ _[*name*]_ _ on _ _[*date*]_ _, by personally delivering to and leaving with _ _[*name*]_ _, on the above date, in _ _[*name*]_ _ County, California, a true copy of the order with a copy of the declaration referred to in the order, copies of which are attached.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Copies:* Original (filed with court clerk after service); copies (one attached to order to show cause for personal service on nonappearing person); office copies.

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# 9

# Writ Enforcement; Exemptions; Homesteads

**Richard L. Enkelis**
**Iain A. Macdonald**
**Raymond R. Goldstein**

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## §9.1 I. SCOPE

This chapter discusses enforcement of money judgments under a writ of execution, which generally involves taking possession of a judgment debtor's nonexempt property, and third party garnishments. Another commonly used tool is wage garnishment, which involves taking possession of wages. On wage garnishment, see chap 10. There is no requirement that resort be made to writ execution or garnishment before using other procedures set forth in the Enforcement of Judgments Law (CCP §§680.010-724.260). See 16 Cal L Rev'n Comm'n Reports 1019 (1982).

Also discussed in this chapter are exemptions from levy execution, including the homestead exemption, and the remedies available to a third person whose property is levied on in error.

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## II. EXECUTION

### §9.2 A. Statutory Authority

The customary means of enforcing a money judgment is by levying on the judgment debtor's nonexempt property under a writ of execution. Unless otherwise provided for by statute, CCP §§699.010-701.830 govern enforcement of a money judgment by a writ of execution. CCP §699.010.

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## B. Writ of Execution

### §9.3 1. Issuance; Limitation

A writ of execution may be issued at any time within 10 years after entry of a money judgment. CCP §§683.020, 699.510(a). The 10-year period may be extended by timely renewal of the judgment under CCP §§683.110-683.220. Each time a judgment is renewed, accrued postjudgment interest is incorporated into the principal of the renewed judgment, and the entire amount then bears interest at the legal rate. *OCM Principal Opportunities Fund, LP v CIBC World Mkts. Corp.* (2008) 168 CA4th 185, 192, 85 CR3d 350.

A writ of execution is issued by the clerk of the court in which the judgment was entered, on application of the judgment creditor and payment of an issuance fee. CCP §699.510(a). For the writ to be valid, it must be signed by the court clerk and stamped with the court seal. The writ is directed to the levying officer (see §9.13) in the county where the levy will be made or, if appropriate, to any registered process server (see §9.14). CCP §699.510(a). For a Judicial Council form, see §9.5. Since writs are "issued" and not filed, copies are generally not maintained in the court file.

**PRACTICE TIP:** Make sure that the court clerk has signed the writ of execution and stamped it with the court seal. For a declaration of accrued interest only, send a cover letter with the form reminding the clerk that a declaration of interest is not served on the debtor. Because use of the form is mandatory, a pleading for interest may no longer be used.

A separate writ must be issued for each of California's 58 counties where a levy will be made. CCP §699.510(a). If writs are issued for two or more counties, however, the judgment creditor has a duty to see that an excessive levy is not made. See Comment to CCP §699.510; *White Lighting Co. v Wolfson* (1968) 68 C2d 336, 347, 66 CR 697 (excessive attachment gives rise to cause of action for abuse of process).

Writs of execution may be issued successively until a money judgment is satisfied. CCP §699.510(a). A new writ may not be issued for a county, however, until 180 days after issuance of a prior writ for that county unless the earlier writ is first returned. CCP §699.510(a). After the 181st day, the court clerk may issue a new writ of execution to the same county, even if the prior writ has not yet been returned by the levying officer. On time limitations for levy, see §9.8.

**NOTE:** The same duty to avoid an excessive levy exists when one writ is retained after the 180-day period to complete a sale or continuing a collection and the judgment creditor obtains another writ to reach other property in the same county. See Comment to CCP §699.510.

A judgment creditor who seeks a writ of execution to enforce a judgment made, entered, or enforceable under the Family Code, in addition to the requirements of CCP §§699.510-699.560, must satisfy the requirements of any applicable provisions of the Family Code. In most counties, a local form entitled Application for Issuance of Writ of Execution is used when seeking a writ in family law matters, along with the Writ of Execution (Judicial Council Form EJ-130), which is a Judicial Council form. Clerks are required to give priority to applications for and issuance of writs for child and spousal support. CCP §699.510(a).

When a writ of execution is served, the levying officer also serves a notice of levy.

**PRACTICE TIP:** Although there is a Judicial Council form for a memorandum of costs, credits, or accrued interest after judgment (Judicial Council form MC-012), there are some problems with the form. Like many Judicial Council forms, the form contains a proof of service by mail portion. This can create confusion for the court clerk. If only accrued interest is being claimed, a declaration must be filed with the court, but it is not served on the debtor. By using the Judicial Council form, counsel runs a risk that a court clerk will refuse the declaration because it was not served on the judgment debtor. Of course, serving the declaration is a red flag to the debtor that a writ of execution is about to issue and provides the judgment debtor with an opportunity to transfer or move assets. Because Form MC-012 is mandatory, most courts will not accept a pleading as a declaration for interest. If a

problem occurs because of no proof of mailing, counsel should remind the clerk that an interest declaration is only filed, not served, on the debtor.

If a memorandum of costs is filed, the court clerk will not issue a writ of execution until the deadline allowing the judgment debtor to move to tax the costs has expired. If the memorandum of costs is for less than $100, the clerk may issue the writ of execution as long as it contains a warning that the costs are subject to a subsequent motion to tax and may be stricken. CCP §685.070(e).

There is no specific form for dealing with postjudgment interest. Generally, a payment is applied first to accrued postjudgment interest and the remainder is applied to the judgment balance. CCP §§701.810-701.830. In this way, the writ of execution does not show a negative amount, especially when the payments are applied to the judgment balance and postjudgment costs first rather than the interest.

**NOTE:** Judgments for child, spousal, and family support have their own application-of-payments statute. See CCP §695.221.

Some courts also require a completed application form in order to have a writ of execution issued. See, *e.g.,* Los Angeles Ct R 3.5 and Los Angeles Ct Form CIV 096.

**PRACTICE TIP:** When submitting a writ package to the court, include a copy of the judgment on which the writ is being requested and, if the judgment has been renewed, include a copy of the renewal as well. Though not required, this can expedite issuance. Remember to include fees for writs requested in other counties.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.4 2. Content

## §9.4 2. Content

Under CCP §699.520, a writ of execution directs the levying officer to enforce the money judgment. The writ must include the following information:

- The writ's issue date.
- The court's title where the judgment was entered and the case name and number of the action.
- The judgment creditor's name and address and the judgment debtor's name and last known address.
- The judgment's entry date and that of any subsequent renewals and where they were entered in the court's records.
- The total amount of the money judgment as entered or renewed, costs added to the judgment under CCP §685.090, and accrued interest on the judgment from the judgment's entry or renewal date, less any partial satisfactions and any amounts no longer enforceable.
- The amount required to satisfy the money judgment on the date the writ is issued.
- The amount of interest accruing daily on the principal amount of the judgment from the date the writ is issued.
- Whether anyone has requested notice of sale under the judgment, and if so, that person's name and mailing address.

**PRACTICE TIP:** If the writ is being issued for past-due support, make a note on the face of the writ, preferably above section 9 on Form EJ-130. See the Form EJ-130 set forth in §9.5.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.4A 3. Affidavit of Identity (CCP §680.135)

### §9.4A 3. Affidavit of Identity (CCP §680.135)

An affidavit of identity, a little-known and greatly underused tool, allows a creditor to have a writ or abstract issued against not only the judgment debtor's name as reflected on the judgment, but also against any and all of his or her aliases. By affidavit, the creditor or the creditor's attorney provides the other names by which the debtor is known. The other names may not include "the name or names of persons, including any corporations, partnerships, or any legal entities not separately named in the judgment in which the judgment debtor is a partner, shareholder, or member." CCP §680.135. Some counties have a local Affidavit of Identify form. See, *e.g.,* Los Angeles Ct Form CIV 198. Although CCP §680.135 states only that an affidavit is filed with the clerk, CCP §699.510(c)(1), regarding issuance of a writ of execution, states that "the court shall approve the affidavit of identity." It is unclear, and policies differ from county to county, as to whether that approval is ministerial or judicial. A Sample Affidavit of Identity, which anticipates use in a county that requires a judge's signature, is set forth in §9.4B.

**NOTE:** The affidavit may persuade some courts to identify a debtor's revocable trust as an alias. For the proposition that a trust is not a separate legal entity, see *Galdjie v Darwish* (2003) 113 CA4th 1331, 1343, 7 CR3d 178 (unlike corporation, trust is not legal entity, but "collection of assets and liabilities"); *Moeller v Superior Court (Sanwa Bank)* (1997) 16 C4th 1124, 1133, 69 CR2d 317 (trust is "a fiduciary relationship with respect to property," citing Restatement (Second) of Trusts §2 (1959)).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.4B 4. Form: Sample Affidavit of Identity (CCP §680.135)

## §9.4B 4. Form: Sample Affidavit of Identity (CCP §680.135)

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| **In re the Marriage of:** | **)** | |
| _ _[*Name*]_ _, | **)** | **Case No. _ _ _ _** |
| **Petitioner,** | **)** | **AFFIDAVIT OF IDENTITY** |
| **and** | **)** | **[CCP §680.135]** |
| _ _[*Name*]_ _, | **)** | |
| **Respondent** | **)** | |
| _____ | **)** | |
| | **)** | |
| | **)** | |

**I, _ _[*name*]_ _ , declare:**

**1. I am the Petitioner and judgment creditor in this matter.**

**2. On _ _[*date*]_ _, judgment was entered in favor of Petitioner and against Respondent and judgment debtor, _ _[*name*]_ _.**

**3. Respondent is also known by the additional name of _ _[*name*]_ _.**

**4. I am personally aware of Respondent's use of this additional name, because during our marriage of 18 years, Respondent would sometimes introduce himself as _ _[*name*]_ _, sign documents as _ _[*name*]_ _, and receive mail as _ _[*name*]_ _.**

**5. I have known Respondent to add, drop, or rearrange letters in this name in order to throw people off.**

**The foregoing is based on my personal knowledge, and if called as a witness, I could and would competently testify thereto.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**DATE: _ _ _ _** __[*Signature*]__

_ _[*Name*]_ _

**IT IS ORDERED that the term "judgment debtor" include the name or names in paragraph 4 above, which may be added to the writ of execution or abstract of judgment.**

**Date: _ _ _ _ _ _** __[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.5 5. Form: Writ of Execution (Judicial Council Form EJ-130)

## §9.5 5. Form: Writ of Execution (Judicial Council Form EJ-130)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number and address):* | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional):*<br>E-MAIL ADDRESS *(Optional):*<br>ATTORNEY FOR *(Name):*<br>☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **WRIT OF**<br>☐ **EXECUTION (Money Judgment)**<br>☐ **POSSESSION OF** ☐ **Personal Property** ☐ **Real Property**<br>☐ **SALE** | CASE NUMBER: |

1. **To the Sheriff or Marshal of the County of:**

   You are directed to enforce the judgment described below with daily interest and your costs as provided by law.
2. **To any registered process server:** You are authorized to serve this writ only in accord with CCP 699.080 or CCP 715.040.
3. *(Name):*
   is the ☐ judgment creditor ☐ assignee of record whose address is shown on this form above the court's name.
4. **Judgment debtor** *(name and last known address):*

   ☐ Additional judgment debtors on next page
5. **Judgment entered** on *(date):*
6. ☐ **Judgment renewed** on *(dates):*
7. **Notice of sale** under this writ
   a. ☐ has not been requested.
   b. ☐ has been requested *(see next page).*
8. ☐ Joint debtor information on next page.
9. ☐ See next page for information on real or personal property to be delivered under a writ of possession or sold under a writ of sale.
10. ☐ This writ is issued on a sister-state judgment.
11. Total judgment . . . . . $
12. Costs after judgment (per filed order or memo CCP 685.090) . . . . . $
13. Subtotal *(add 11 and 12)* . . . . . $
14. Credits . . . . . $
15. Subtotal *(subtract 14 from 13)* . . . . . $
16. Interest after judgment (per filed affidavit CCP 685.050) (not on GC 6103.5 fees). . . $
17. Fee for issuance of writ . . . . . $
18. **Total** *(add 15, 16, and 17)* . . . . . $
19. Levying officer:
    (a) Add daily interest from date of writ *(at the legal rate on 15)* (not on GC 6103.5 fees) of. . . . . $
    (b) Pay directly to court costs included in 11 and 17 (GC 6103.5, 68511.3; CCP 699.520(i)) . . . . . $
20. ☐ The amounts called for in items 11–19 are different for each debtor. These amounts are stated for each debtor on Attachment 20.

[SEAL]

Issued on *(date):* Clerk, by _____ , Deputy

**NOTICE TO PERSON SERVED: SEE NEXT PAGE FOR IMPORTANT INFORMATION.**



Form Approved for Optional Use
Judicial Council of California
EJ-130 [Rev. January 1, 2006]

**WRIT OF EXECUTION**

Code of Civil Procedure, §§ 699.520, 712.010, Government Code, § 6103.5
*www.courtinfo.ca.gov*

| PLAINTIFF:<br>DEFENDANT: | CASE NUMBER: |
|---|---|

— Items continued from page 1—

21. ☐ **Additional judgment debtor** *(name and last known address):*

22. ☐ **Notice of sale** has been requested by *(name and address):*

23. ☐ **Joint debtor** was declared bound by the judgment (CCP 989–994)
a. on *(date):*
b. name and address of joint debtor:

a. on *(date):*
b. name and address of joint debtor:

c. ☐ additional costs against certain joint debtors *(itemize):*

24. ☐ *(Writ of Possession* or *Writ of Sale)* **Judgment** was entered for the following:
a. ☐ Possession of real property: The complaint was filed on *(date):*
***(Check (1) or (2)):***
(1) ☐ The Prejudgment Claim of Right to Possession was served in compliance with CCP 415.46.
The judgment includes all tenants, subtenants, named claimants, and other occupants of the premises.
(2) ☐ The Prejudgment Claim of Right to Possession was NOT served in compliance with CCP 415.46.
(a) $ was the daily rental value on the date the complaint was filed.
(b) The court will hear objections to enforcement of the judgment under CCP 1174.3 on the following dates *(specify):*
b. ☐ Possession of personal property.
☐ If delivery cannot be had, then for the value *(itemize in 9e)* specified in the judgment or supplemental order.
c. ☐ Sale of personal property.
d. ☐ Sale of real property.
e. Description of property:

**NOTICE TO PERSON SERVED**

WRIT OF EXECUTION OR SALE. Your rights and duties are indicated on the accompanying *Notice of Levy* (Form EJ-150).
WRIT OF POSSESSION OF PERSONAL PROPERTY. If the levying officer is not able to take custody of the property, the levying officer will make a demand upon you for the property. If custody is not obtained following demand, the judgment may be enforced as a money judgment for the value of the property specified in the judgment or in a supplemental order.
WRIT OF POSSESSION OF REAL PROPERTY. If the premises are not vacated within five days after the date of service on the occupant or, if service is by posting, within five days after service on you, the levying officer will remove the occupants from the real property and place the judgment creditor in possession of the property. Except for a mobile home, personal property remaining on the premises will be sold or otherwise disposed of in accordance with CCP 1174 unless you or the owner of the property pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the premises.
► *A Claim of Right to Possession form accompanies this writ (unless the Summons was served in compliance with CCP 415.46).*



*Copies:* Original (delivered to levying officer); copies for service by levying officer (one copy for each levy; sufficient

copies for service on each judgment debtor, either personally or by mail (see §9.9), if required); office copies.

*Comment:* The writ of execution must show the county where the levy is to be made, and a separate writ must be issued for each such county. CCP §699.510(a). See §9.3.

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## C. Executing Writ

### §9.6 1. Delivery to Levying Officer With Written Instructions

The levying officer to whom the writ is directed must execute the writ in the manner prescribed by law when the writ is delivered to the levying officer with the judgment creditor's written instructions and payment of the required fee. CCP §§685.100(a)(1), 699.530(a). On time limitation for levy, see §9.8. On manner of levy prescribed by law, see §§9.17-9.40.

**NOTE:** Court-granted fee waivers will waive service of process and wage garnishment fees.

The instructions must be signed by the judgment creditor's attorney of record or, if none, by the judgment creditor. CCP §687.010(a). To comply with CCP §§680.010-724.260 (the Enforcement of Judgments Law), the instructions must contain the information the levying officer needs, or has requested, including an adequate description of the property to be levied on and its location, a statement of whether it is a dwelling, and, if so, whether it is real or personal property. CCP §687.010(a)(1)-(3). Sufficient information to enable the levying officer to complete the notice of levy required under CCP §§700.010-700.200 (see §9.9), *i.e.,* the name and address of each person to receive the notice, should also be included. CCP §684.130(a); see Comment to CCP §699.540. For a form of instructions to levying officer, see §9.7. The levying officer must follow the judgment creditor's instructions unless doing so would violate CCP §§680.010-724.260 or unless the levying officer has actual knowledge that the information in the instructions is incorrect. CCP §687.010(b).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.7 2. Form: Judgment Creditor's Instructions to Levying Officer

## §9.7 2. Form: Judgment Creditor's Instructions to Levying Officer

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9.7-1 Judgment creditor's instructions to levying officer

_ _[*Date*]_ _

**To the** _ _[*Sheriff/Marshal/Constable*]_ _ **of** _ _[*name of county*]_ _ **County**
_ _[*address*]_ _

**Attn: Civil Division**

**Re: Judgment Creditor's Written Instructions**

_ _[*Name*]_ _**, Plaintiff**

**vs**

_ _[*Name*]_ _**, Defendant**

**Case No.** _ _[*number*]_ _

**PLEASE TAKE NOTICE:**

**You are hereby instructed to levy on and** _ _[*sell/collect*]_ _ **by virtue of the accompanying writ of execution the following described property:** _ _[*Describe property*]_ _**.**

**The property described above is located at** _ _[*address*]_ _ **and is in the possession of or under the control of** _ _[*specify*]_ _**, who is located at the same address.**

[*If applicable, add the following option*]

**Please also serve a notice of levy on the following:** _ _[*List name and address of each person to be served.*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: Property is not a dwelling*]

**The property to be levied on Is not a dwelling.**

[*Alternative 2*: *Property is a dwelling*]

**The property to be levied on is a dwelling that is** _ _[*real/personal*]_ _ **property.**

[*Continue*]

**Enclosed is** _ _[*my/our*]_ _ **check for $**_ _[*amount*]_ _ **to be applied against your costs.**

**Date:** _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name of judgment creditor*]_ _

*Copies:* Original (delivered to levying officer); office copies.

*Comment:* The judgment creditor's written instructions are generally prepared in letter form. The content of the

instructions will depend on the nature of the property to be levied on. These sample instructions are meant as a guideline only and should be modified to meet the needs of the particular case. Depending on the nature and location of the property, a court order may be required before the levying officer can levy on or seize the property. See, *e.g.,* CCP §§699.030, 700.160 (discussed in §§9.17, 9.26, respectively). If real property or property that can be considered a dwelling (see §9.83) will be levied on, the instructions should state whether the property is a dwelling and, if so, whether it is real or personal property. CCP §687.010(a)(2)-(3). If the property to be levied on will be sold, the judgment creditor's counsel should consider inserting the following in the instructions: "Please send a copy of the notice of sale to the undersigned."

**NOTE:** Many levying officers now have websites with sample levy instructions. For the addresses of the levying officers' websites, *e.g.,* for Alameda County, Los Angeles County, and Orange County, see the Directory.

**PRACTICE TIP:** It is good practice for the judgment creditor's counsel to contact the levying officer to ascertain what information is needed in the instructions. This practice enables the levying officer to make the levy on the correct property, such as a levy on real property or if a complex levy on personal property (*e.g.,* a levy on tangible personal property of a going business; see §9.22) is involved.

The judgment creditor's counsel should check with the levying officer to ascertain the amount of the deposit required. On the requirement that the judgment creditor deposit with the levying officer a sufficient sum to pay the costs of performing his or her duty, see CCP §685.100(a)(1).

**PRACTICE TIP:** The judgment creditor's counsel should ask the levying officer whether logistical support is necessary to help the levying officer carry out his or her duties. For example, an officer may need assistance in arranging for the proper handling of fine art, such as paintings. Or, an officer levying on an aircraft may need assistance obtaining a pilot, fuel, a storage hangar, or liability insurance.

If the judgment creditor has no attorney of record, the instructions may be signed by the judgment creditor. See §9.6. Counsel should ascertain whether the levying officer in the county where the property is to be levied has specialized instruction forms. Many levying officers have their own printed forms for counsel to use for specific purposes, *e.g.*, designated forms for real property levies.

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### §9.8 3. Time Limitation for Levy

A writ of execution expires 180 days after the date the writ was issued. CCP §699.530(b). During the 180-day period, any number of levies are permitted on the same writ. See Comment to CCP §699.510. Although only one writ at a time authorizes a levy in a particular county, several writs in the county may be outstanding. Under CCP §699.560, a levying officer who has levied under a writ may retain the writ for 2 years after the date of its issuance to complete any sale of property or collection of a debt. Thus the judgment creditor has flexibility in that the levying officer may retain one writ after the 180-day period to complete a sale of property or continue collection while another writ may be issued in the same county to reach newly discovered property after the 180-day period for levy under the first writ has expired. See Comment to CCP §699.510. On return of writ of execution, see §9.41.

**NOTE:** While the law seems clear that a levy may be made until the final day of the writ's expiration, some levying officers will not accept instructions within a day of a writ's expiration. Therefore, the best practice is to avoid executions too near to a writ's expiration. Check with the appropriate levying officer regarding his or her procedures.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.9 4. Notice of Levy; Exemption List

## §9.9 4. Notice of Levy; Exemption List

Various methods of levy for certain types of property are specified in CCP §§700.010-700.200. Under CCP §700.010, at the time of levy or promptly thereafter, the levying officer must serve on the judgment debtor and other affected persons, either personally or by mail, a copy of the writ of execution, a notice of levy, and, if the judgment debtor is a natural person, a copy of the Judicial Council exemption list form (see §9.55) and the Judicial Council list of state law exemption amounts (see §9.55A). A copy of a notice of levy that is served on the judgment debtor or any other party is sufficient as a notice of levy to that person if the original was served on a third party holding property sought to be levied on. CCP §699.545. For the Judicial Council form, see §9.10.

**PRACTICE TIP:** The notice of levy is generally filled out by the levying officer, not by the attorney for the judgment creditor, but the attorney may have to fill out the notice when using a registered process server.

The notice of levy required under CCP §§700.010-700.200 must (CCP §699.540):

- Inform the person of the capacity in which he or she is being notified (*e.g.,* as judgment debtor, garnishee, or title holder of record);
- Describe the property levied on;
- Specify the person's duty under the levy; and
- Specify the person's rights under the levy, including the right to claim an exemption under CCP §§703.010-704.995 (see §§9.50-9.95) and the right to make a third party claim under CCP §§720.010-720.800.

On failure to serve a copy of the writ of execution and a notice of levy, or failure to serve a list of exemptions not affecting an execution lien created by levy, see §9.11. On methods of levy depending on the particular type of property, see §9.21-9.30, 9.37. See also §§9.17-9.18.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.10 5. Form: Notice of Levy (Judicial Council Form EJ-150)

## §9.10 5. Form: Notice of Levy (Judicial Council Form EJ-150)



EJ-150

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TEL NO.:

☐ Recording requested by and return to:

☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD

NAME OF COURT:
STREET ADDRESS:
MAILING ADDRESS:
CITY AND ZIP CODE:
BRANCH NAME:

*FOR RECORDER'S USE ONLY*

LEVYING OFFICER *(Name and Address)*:

PLAINTIFF:

DEFENDANT:

**NOTICE OF LEVY**
**under Writ of** ☐ **Execution (Money Judgment)** ☐ **Sale**

LEVYING OFFICER FILE NO.:

COURT CASE NO.:

**TO THE PERSON NOTIFIED** *(name)*:

1. The judgment creditor seeks to levy upon property in which the judgment debtor has an interest and apply it to the satisfaction of a judgment as follows:
   a. Judgment debtor *(name)*:
   b. The property to be levied upon is described
      ☐ in the accompanying writ of possession or writ of sale.
      ☐ as follows:

2. The amount necessary to satisfy the judgment creditor's judgment is:
   a. Total amount due (less partial satisfactions) ..... $
   b. Levy fee ..... $
   c. Sheriff's disbursement fee ..... $
   d. Recoverable costs ..... $
   e. **Total** *(a through d)* ..... $
   f. Daily interest ..... $

3. You are notified as
   a. ☐ a judgment debtor.
   b. ☐ a person other than the judgment debtor *(state capacity in which person is notified)*:

***(Read Information for Judgment Debtor or Information for Person Other Than Judgment Debtor on page two.)***

Notice of Levy was
☐ mailed on *(date)*:
☐ delivered on *(date)*:
☐ posted on *(date)*:
☐ filed on *(date)*:
☐ recorded on *(date)*:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

☐ Levying officer ☐ Registered process server



Form Approved for Optional Use
Judicial Council of California
EJ-150 [Rev. January 1, 2002]

**NOTICE OF LEVY**
**(Enforcement of Judgment)**

Code of Civil Procedure, § 699.540

Print

| SHORT TITLE: | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |
|---|---|---|
| | | |

## – INFORMATION FOR JUDGMENT DEBTOR –

1. The levying officer is required to take custody of the property described in item 1 in your possession or under your control.
2. You may claim any available exemption for your property. A list of exemptions is attached. **If you wish to claim an exemption for personal property, you must do so within 10 days after this notice was delivered to you or 15 days after this notice was mailed to you** by filing a claim of exemption and one copy with the levying officer as provided in section 703.520 of the Code of Civil Procedure. **If you do not claim an exemption, you may lose it and the property is subject to enforcement of a money judgment. If you wish to seek the advice of an attorney, you should do so immediately so that a claim of exemption can be filed on time.**
3. You are not entitled to claim an exemption for property that is levied upon under a judgment for sale of property. This property is described in the accompanying writ of sale. You may, however, claim available exemptions for property levied upon to satisfy damages or costs awarded in such a judgment.
4. You may obtain the release of your property by paying the amount of a money judgment with interest and costs remaining unpaid.
5. If your property is levied upon under a writ of execution or to satisfy damages and costs under a writ of possession or sale, the property may be sold at an execution sale, perhaps at a price substantially below its value. Notice of sale will be given to you. Notice of sale of real property (other than a leasehold estate with an unexpired term of less than two years) may not be given until at least 120 days after this notice is served on you. This grace period is intended to give you an opportunity to settle with the judgment creditor, to obtain a satisfactory buyer for the property, or to encourage other potential buyers to attend the execution sale.
6. All sales at an execution sale are final; there is no right of redemption.

## – INFORMATION FOR PERSON OTHER THAN JUDGMENT DEBTOR –

1. If the property levied upon is in your possession or under your control and you do not claim the right to possession or a security interest, you must deliver the property to the levying officer. If you do not deny an obligation levied upon or do not claim a priority over the judgment creditor's lien, you must pay to the levying officer the amount that is due and payable and that becomes due and payable during the period of the execution lien, which lasts two years from the date of issuance of the writ of execution. You must execute and deliver any documents needed to transfer the property.
2. You must complete the accompanying Memorandum of Garnishee.
3. If you claim ownership or the right to possession of real or personal property levied upon or if you claim a security interest in or lien on personal property levied upon, you may make a third-party claim and obtain the release of the property pursuant to sections 720.010–720.800 of the Code of Civil Procedure.
4. **Make checks payable to the levying officer.**



*Comment:* See §9.9.

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## §9.11 D. Execution Lien

A levy under a writ of execution creates an execution lien on the property levied on. The lien endures from the time of the levy until 2 years after the date of the writ's issuance unless the judgment is satisfied sooner. CCP §697.710.

Except for a sale by a superior lienholder, and subject to CCP §701.630 (see §9.39), if any interest in real property subject to an execution lien is transferred or encumbered, that interest remains subject to the lien. CCP §697.720. Similarly, except for a sale by a superior lienholder or a sale of tangible personal property of a going business made in the ordinary course of business while a keeper is in charge, and subject to CCP §701.630, tangible personal property in the levying officer's custody that is subject to an execution lien remains subject to the lien after its transfer or encumbrance. CCP §697.730. On personal property not in the levying officer's custody remaining subject to the lien on transfer or encumbrance and exceptions, see CCP §697.740. On growing crops, timber to be cut, or minerals or the like that are subject to an execution lien remaining subject to the lien after transfer or encumbrance and exceptions, see CCP §697.750.

Failure of a levying officer or registered process server (see §9.14) to post, serve on, or mail to the judgment debtor or other person a copy of the writ of execution and a notice of levy when required to do so does not affect the execution lien created by the levy. CCP §699.550. Similarly, the execution lien created by the levy is not affected by failure to serve on or mail to the judgment debtor a list of exemptions. CCP §699.550. For exemption lists, see §§9.55-9.55A.

For the purpose of lien priorities, an execution lien created while an earlier attachment lien is in effect on the same property under the same claim relates back to the date of the creation of the earlier attachment lien. CCP §697.020(a). Similarly, an execution lien created while any other enforcement lien that has been created under CCP §§695.010-709.030 in effect relates back to the date of creation of the earlier enforcement lien. CCP §697.020(b).

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## E. What Property May Be Levied On

### §9.12 1. Overview

Generally, all property of the judgment debtor is subject to enforcement of the judgment, unless otherwise provided by law. CCP §695.010. Such property includes community property interests of the judgment debtor. CCP §695.020.

Code of Civil Procedure §§695.010-695.070 specify the property that is subject to enforcement of a money judgment. Under CCP §695.010(a), all the judgment debtor's property is subject to enforcement of a money judgment except as otherwise provided by law. Property of the judgment debtor that has been attached in the action but transferred before entry of a money judgment in the judgment creditor's favor is included in the property subject to enforcement of a money judgment as long as the attachment lien remains effective. CCP §695.010(b). Some property that is not the judgment debtor's may also be subject to enforcement of a money judgment against the judgment debtor, *e.g.,* community property (see CCP §695.020). See Comment to CCP §695.010.

Examples of property subject to levy under execution include:

- A judgment debtor's interest in a promissory note (*Hoxie v Bryant* (1900) 131 C 85, 63 P 153) or in an agreement to purchase real property (*Hansen v d'Artenay* (1936) 13 CA2d 293, 57 P2d 202);
- A judgment debtor's interest as purchaser of personal property under an agreement of conditional sale (*Mercantile Acceptance Corp. v Pioneer Credit Indem. Co.* (1932) 124 CA 593, 12 P2d 988);
- A seller's title to property in the possession of a conditional buyer (*Escobar v Rogers* (1920) 182 C 603, 189 P 268); and
- A judgment debtor's interest in shares of stock of a corporation (CCP §700.130; Com C §8112).

Certain property is by law not subject to enforcement of a money judgment. For example, except as provided in CCP §708.630, which deals with alcoholic beverage licenses, a license to engage in a business, profession, or activity issued by a public entity is not subject to enforcement of a money judgment. CCP §695.060.

Similarly, property of the judgment debtor that cannot be assigned or transferred is not subject to enforcement of a money judgment except as otherwise provided by statute. CCP §695.030(a). Under CCP §695.030(b)(1)-(2), however, an interest in a trust, to the extent provided by law (see §11.18), and a cause of action for money or property that is the subject of a pending action or special proceeding are subject to enforcement of a money judgment, but not to execution. See §§11.12-11.18. There is also a specific section listing property that is *not* subject to execution but is subject to other forms of enforcement. See §9.15.

A money judgment against a public entity cannot be enforced under CCP §§695.010-709.030 against the public entity if the money judgment is subject to Govt C §§965-965.9 or §§970-971.2. CCP §695.050.

If property subject to a lien created under CCP §§695.010-709.030 remains subject to the lien after the property is transferred or otherwise encumbered, the money judgment may be enforced against the property in the same manner and to the same extent as if it had not been transferred or encumbered. CCP §695.070(a). If the judgment debtor dies after the transfer of property subject to the lien, the money judgment may still be enforced against the property, as in CCP §695.070(a). CCP §695.070(b).

For discussion of exempt property, see §9.16. On application of lessee's interest in real property to satisfy a money judgment, see CCP §695.035. On manner of levy on particular types of property, see §§9.21-9.30, 9.37. See also §§9.17-9.18.

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### §9.13 2. By Levying Officer

A levying officer is a sheriff or marshal. CCP §680.260. Some counties have both sheriffs and marshals consolidated in a single department. Other counties have separate entities, both of which are capable of serving civil process and enforcing judgments. All levies, regardless of whether made by a registered process server or a sheriff or marshall, require the action of the person designated as the levying officer. A levying officer, if authorized under a writ of execution and accompanying instructions (see §§9.3-9.10), can levy on all property that is subject to enforcement of a money judgment under CCP §§695.010-695.070, except as otherwise provided by law. CCP §699.710. The phrase "except as otherwise provided by law" recognizes that certain types of property, although subject to enforcement of a money judgment, cannot be levied on under a writ of execution. See Comment to CCP §699.710. For such types of property, see §9.15.

Possessory levies (*i.e.,* taking possession of nonexempt property) may be made by levying officers only. Nonpossessory levies may be made levying officers or registered process servers. See §9.14.

The levying officer makes a demand for delivery of the property sought and advises the judgment debtor that he or she may be liable for costs and attorney fees incurred in any further proceedings to obtain the property if it is not surrendered. If the property is not delivered to the levying officer, no further effort is made at the time and the judgment creditor is notified of the failure to obtain the property. The judgment creditor then applies to the court, ex parte or by noticed motion if the court requires, for an order directing the levying officer to seize the property. This seizure includes the right to use force to enter a private place. CCP §699.030(b). See §9.17 on applications for an order to seize property.

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### §9.14 3. By Registered Process Server; Special Requirements

A registered process server's authority under CCP §699.080(a) to levy on property is limited to cases in which the levy does not require taking immediate possession of the property. See Comment to CCP §699.080. After the levy is made, however, documents are filed with the levying officer to complete the levy.

The following types of property may be levied on by a registered process server under a writ of execution (CCP §699.080(a)(1)-(9)):

- Real property under CCP §700.015;
- Growing crops or timber to be cut under CCP §700.020;
- Minerals (including oil and gas) to be extracted, or accounts receivable resulting from their sale at the wellhead or minehead under CCP §700.020;
- Personal property in the levying officer's custody under CCP §700.050;
- Personal property used as a dwelling under CCP §700.080(a);
- Deposit accounts under CCP §700.140;
- Property in a safe deposit box under CCP §700.150;
- Accounts receivable or general intangibles under CCP §700.170;
- Final money judgments under CCP §700.190; and
- The judgment debtor's interest in personal property in a decedent's estate under CCP §700.200.

A registered process server, before levying under a writ of execution, must deposit a copy of the writ with the levying officer and pay the fee for the levy, generally $30. Govt C §§26720.9, 26721. The fee for serving an earnings withholding order is also $30. Govt C §26750. The levying officer will tend to all enforcement duties after the levy, including filing the original writ with the court after it is returned to the levying officer by the registered process server. CCP §699.080(b). A registered process server who levies on property under CCP §699.080(a) must comply with the applicable levy, posting, and service provisions of CCP §§700.010-700.200 and must request any third person served to give a garnishee's memorandum (see §9.33) to the levying officer on a form supplied by the registered process server. CCP §699.080(c)(1)-(2). Within 5 court days after a levy has been made under CCP §699.080, the following must be filed with the levying officer (CCP §699.080(d)):

- The original writ of execution (if not already in the levying officer's hands);
- A proof of service by the registered process server stating the manner of levy;
- Proof of service of the copy of the writ and notice of levy on other persons as required by CCP §§700.010-700.200; and
- The written instructions required by CCP §687.010.

If the fee required by Govt C §26721 has been paid, the levying officer must perform all other duties under the writ as if he or she had levied under the writ and must return the writ to the court. CCP §699.080(e). On return of writ, see §9.41. A levy is ineffective, however, if the registered process server does not comply with CCP §699.080(b), (d). CCP §699.080(e). In that event, the levying officer need not perform any duties under the writ and may issue a release for any property sought to be levied on. CCP §699.080(e).

The fee for services of a registered process server under CCP §699.080 is a recoverable cost. CCP §699.080(f). On recoverable costs for enforcing a judgment generally, see §§11.48-11.56.

**PRACTICE TIP:** Notwithstanding the fact that a registered process server will be performing the levy, many levying officers require levy instructions and an explicit authorization permitting the registered process server to serve the levy, *e.g.,* "I hereby authorize John Doe, a registered process server, California license No. 123456, to perform the aforementioned levy."

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### §9.15 4. Specific Types of Property Not Subject to Levy

The following types of property are not subject to levy under a writ of execution (CCP §699.720(a)):

- An alcoholic beverage license that is transferable under Bus & P C §§24070-24082;
- A partner's interest in a partnership when the partnership is not a judgment debtor;
- A cause of action that is the subject of a pending action or special proceeding;
- A judgment in the judgment debtor's favor before expiration of the time to appeal from the judgment or, if an appeal has been filed, before final determination of the appeal;
- A debt (other than earnings) that a public entity owes and has not paid;
- The loan value of an unmatured life insurance, endowment, or annuity policy;
- A franchise that a public entity has granted with all its rights and privileges;
- A trust beneficiary's interest (but see §9.30 on revocable trusts);
- A contingent remainder, executory interest, or other property interest that is not vested; and
- Property in a guardianship or conservatorship estate.

Although a money judgment cannot be enforced by execution against these types of property, the property might be reached by other enforcement procedures. See, *e.g.,* CCP §§708.310-708.320, which deal with obtaining charging orders against a partner's interest in partnership property or a member's interest in a limited liability company (discussed in §§11.7-11.10); CCP §§708.410-708.480, which deal with obtaining a lien in a pending action or proceeding (discussed in §§11.12-11.20); CCP §§708.510-708.560, which deal with obtaining assignment orders to reach payments such as rents, commissions, royalties, federal government wages, and payments due from patents or copyrights (discussed in §§11.21-11.32); CCP §708.630, which deals with appointment of a receiver to transfer an alcoholic beverage license (discussed in §11.34); and CCP §§708.710-708.795, which deal with collection of a judgment when a judgment debtor is a creditor of a public entity (discussed in §§11.36-11.41). For other examples, see Comment to CCP §699.720. For enforcement procedures other than execution and wage garnishment generally, see chap 11.

For types of property that are exempt from any procedure to enforce a money judgment, see §9.16.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.16 5. Exemptions

## §9.16 5. Exemptions

Unless a statute specifically provides otherwise, property that is described in CCP §§703.010-704.995 or in any other statute as exempt without making a claim is not subject to any procedure for enforcement of a money judgment. CCP §703.030(b). Property that is not subject to the enforcement of a money judgment should not knowingly be levied on or applied in any other manner to satisfy the judgment. CCP §695.040. If such property is levied on, it may be released under the claim of exemption procedure in CCP §§703.510-703.610. CCP §695.040.

Exempt property and the procedures for claiming exemptions after levy are discussed in §§9.50-9.81. On debtor's remedies against execution generally, see §§9.42-9.49. On claiming an exemption during other enforcement procedures, see §§8.28, 11.5, 11.18, 11.31, 11.40.

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## F. General Execution Procedures

### §9.17 1. Property Levied on in Private Place; Application for Order to Seize Property

If personal property levied on is located in a private place of the judgment debtor and the judgment debtor does not deliver the property, the levying officer cannot, without court authorization, make any further effort to obtain custody of the property and must notify the judgment creditor of the failure to obtain custody. CCP §699.030(a).

The levying officer is responsible for determining whether a particular location is a private place, and opinions vary from county to county and from deputy to deputy. While no published opinions discuss the issue, generally the factors considered include the debtor's reasonable expectation of privacy in a particular location.

**EXAMPLE:** When a jet ski sits on a debtor's front lawn, a levy would not likely require a private place order. However, if the jet ski were located in the debtor's unlocked, open garage, many levying officers would require a private place order.

Analogous criminal cases may provide guidance on what constitutes a "private place." Whether the location is enclosed may be important: A person has a reasonable expectation of privacy in an enclosed backyard or other outdoor enclosure. *Vidaurri v Superior Court* (1970) 13 CA3d 550, 91 CR 704. However, an expectation of privacy probably does not exist in an open field. *Hester v U.S.* (1924) 265 US 57, 68 L Ed 898, 44 S Ct 445. The proximity of the enclosure to the debtor's dwelling may be of little importance: A garage that is attached or adjacent to a home may give rise to an expectation of privacy (*People v Gomez* (2005) 130 CA4th 1008, 1014, 30 CR3d 662), as may a rented storage locker (*People v Bautista* (2004) 115 CA4th 229, 8 CR3d 862).

Whether other persons can be excluded, or the contents of an enclosure are kept hidden, may be significant factors. For example, the court in *People v Szabo* (1980) 107 CA3d 419, 165 CR 719, did not find a reasonable expectation of privacy in a garage for a 30-unit apartment building where there was no gate or sign restricting access, and the vehicle in question was visible from the street.

Under CCP §699.030(b), a judgment creditor may apply to the court ex parte, or on noticed motion if the court so directs or a court rule so requires, for an order directing the levying officer to seize the property in the private place, whether or not a writ has been issued or a demand has been made by the levying officer to the judgment debtor to deliver the property under CCP §699.030(a). On ex parte applications generally, see Cal Rules of Ct 3.1200-3.1207. See also §6.34. The application for the order must describe with particularity the property sought to be levied on and its location according to the judgment creditor's best knowledge, information, and belief. CCP §699.030(b). The court cannot issue the order unless the judgment creditor establishes that there is probable cause to believe that the property sought to be levied on is located in the place described. CCP §699.030(b). On procedure for levying officer to gain entrance thereafter, see CCP §699.030(b).

**PRACTICE TIP:** Although a writ of execution is not required to apply for or obtain a private place order, when the order is provided to the levying officer with instructions for levy, the officer will need a writ to carry out the levy. Therefore, counsel should obtain a writ prior to or contemporaneously with the application for the private place order.

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### §9.18 2. Application for Turnover Order

Once the writ of execution is issued, the judgment creditor may apply to the court, either ex parte or on noticed motion, if so directed by the court or required by court rule, for an order under CCP §699.040 directing the judgment debtor to transfer either or both of the following to the levying officer:

- Possession of the property on which the levy is attempted if the levy is made by taking possession of the property;
- Possession of documentary evidence of title to the property or debt.

The court may issue such an order under CCP §699.040 on a showing of need for the order. CCP §699.040(b).

The judgment debtor must be personally served with the order. CCP §699.040(c). The order must contain a notice that failure to comply may subject the judgment debtor to arrest and punishment for contempt of court. CCP §699.040(c).

The turnover order under CCP §699.040 may be used only to have the judgment debtor transfer tangible property to the levying officer. Thus, for example, §699.040 does not authorize an order that requires a judgment debtor to turn over a domain name directly to a judgment creditor. *Palacio Del Mar Homeowners Ass'n, Inc. v McMahon* (2009) 174 CA4th 1386, 95 CR3d 445.

However, a turnover order may be used effectively against shares of stock. Section 699.040(a)(2) allows the court, after a writ of execution is issued, to order the judgment debtor to transfer to the levying officer possession of documentary evidence of title to the property that is sought to be levied on. Further, Com C §8112 provides that a creditor may reach a debtor's interest in a security, as follows:

- For a certificated security, by actual seizure of the security certificate;
- For an uncertificated security, by legal process on the issuer at its chief executive office in the United States;
- For a debtor's interest in a security entitlement, by legal process on the securities intermediary with whom the debtor's securities account is maintained; and
- When a secured party has possession of a certificated security, or where an uncertificated security is registered in the name of a secured party, or when a security entitlement is maintained in the name of a secured party, by legal process served on the secured party.

Additionally, Com C §8112(e) provides that when the debtor owns a certificated security, uncertificated security, or security entitlement, the creditor is entitled to aid from a court by any means allowed in law or equity to reach those interests, if they cannot readily be reached by other legal processes. Thus a court can use equitable remedies, *e.g.,* appointing an elisor to execute the security instruments at issue to convert uncertificated securities into certificated securities.

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## §9.19 3. Release of Custody of Property; Extinguishment of Lien

The levying officer must release levied property in the officer's custody on receipt of:

- A written direction to release the property from the judgment creditor's attorney of record or, if none, from the judgment creditor; or
- A certified copy of a court order to release the property.

The release extinguishes any attachment or execution lien in the judgment creditor's favor on the released property. CCP §699.060(a).

The levying officer must release property not taken into custody under the levy by issuing a written notice of release and serving it, either personally or by mail, on the person who was served with a copy of the writ and notice of levy to create the lien. CCP §699.060(c). Similarly, if property has been levied on by recording or filing a copy of the writ and a notice of levy, the levying officer must release that property by recording or filing a written notice of release in the same office. CCP §699.060(d). For procedure for levying officer to follow in releasing property that has not been taken into custody, see CCP §699.060(b).

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## §9.20 4. Appointment of Receiver; Sale of Perishable Property

Under CCP §699.070(a), the court may appoint a receiver or may order the levying officer to take any action the court deems necessary to preserve the value of the property levied on. Such action includes selling the property if the court determines that it is perishable or will greatly deteriorate or greatly depreciate in value or if for some other reason the interests of the parties will be best served by the order. The judgment creditor, the judgment debtor, or anyone who has filed a third party claim under CCP §§720.010-720.800 may apply for such an order. CCP §699.070(a). The application may be made ex parte unless the court directs that it be made on noticed motion or court rules so require. CCP §699.070(a). On ex parte applications generally, see Cal Rules of Ct 3.1200-3.1207. See also §6.34.

If the levying officer determines before a court order can be obtained under CCP §699.070(a) that property levied on is extremely perishable or will greatly deteriorate or greatly depreciate, the levying officer can take any action he or she deems necessary to preserve the property's value, including selling the property. CCP §699.070(b).

The court must fix the daily fee for a receiver appointed under CCP §699.070(a) and may order that the judgment creditor pay the receiver's fees and expenses in advance or that all or a portion of the fees and expenses be paid from the proceeds of any sale of the property. CCP §699.070(d). Except as otherwise provided in CCP §699.070, the appointment, qualifications, powers, rights, and duties of a receiver appointed under CCP §699.070 are governed by CCP §§564-571. CCP §699.070(d).

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## G. Levy on Particular Types of Personal Property

### §9.21 1. In General; When No Method Specified by Statute

The methods of levying on particular types of property are set forth in CCP §§700.010-700.200. If no other method of levy is provided for in CCP §§700.010-700.200, levy on tangible personal property in the judgment debtor's possession or under the judgment debtor's control is made by the levying officer's taking custody of the property. CCP §700.030. The most common form of this levy involves seizing property from a going business. A levy on tangible personal property in the possession or under the control of a third person is made by the levying officer's personally serving the third person with a copy of the writ of execution and a notice of levy unless CCP §§700.010-700.200 provide for another method. CCP §700.040(a). A levy on personal property in the levying officer's custody (known as a paper levy or book levy) is made by the judgment creditor's delivering the writ to the levying officer having custody of the property if the writ is directed to that officer. CCP §700.050(a)(1). If the writ of execution is directed to a levying officer who does not have custody of the property, the officer must serve a copy of the writ and a notice of levy, either personally or by mail, on the levying officer who does have custody of the property. CCP §700.050(a)(2).

The discussions in §§9.22-9.30 are an illustrative but not exhaustive examination of methods of levy on specific kinds of personal property. Counsel desiring to verify whether a particular type of property requires a specific levy procedure should consult CCP §§700.010-700.200.

On the manner of levy for growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from their sale at wellhead or minehead, see CCP §700.020. After the crops are harvested, the timber is cut, or the minerals or the like are extracted, the property may be levied on as any other tangible personal property would be. See Comment to CCP §700.020.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.22 2. Going Business; Keepers

### §9.22 2. Going Business; Keepers

One way to levy on the tangible personal property of a going business under the judgment debtor's control is for the levying officer to take the property into custody. See CCP §700.030. This process is expensive and cumbersome, generally requiring inventory removal from the premises, storage, posting notice of sale, and serving notice of sale on the judgment debtor and on anyone else requesting such notice. On sale generally, see §9.36.

A less expensive and easier alternative is to have the levying officer place a keeper in charge of the judgment debtor's business under CCP §700.070. The keeper is an employee of the levying officer. Sometimes the levying officer installs one of his or her regular deputies as keeper; more often the keeper is a former, retired, or reserve deputy or peace officer.

While the keeper is in charge of the business, it may continue to operate as long as all sales are final and are for cash or its equivalent (a check). The sales may not be made with credit cards. CCP §700.070(a). For a detailed explanation of what keepers do, see California State Sheriffs' Association Civil Procedural Manual, chap 5 (4th ed rev 1994). (The manual is updated annually.) In brief, a keeper supervises operations and collects the sales proceeds to the extent necessary to satisfy the balance due on the writ, together with his or her fees and other costs of levy.

It is not necessary to install a keeper for any stated period, or at all, before proceeding with seizure and sale of business property. If a keeper is used, however, he or she may be installed for any period of time requested by the judgment creditor of up to 10 days. CCP §700.070(a), (b)(3). Normally, the time is specified in the instructions to the levying officer. The most common time periods are 8, 48, or 72 hours. Keepers generally work 8-hour shifts, and levying officers usually require that the specified period be one or more full shifts so that they can more easily budget and schedule operations. Many levying officers have their own printed forms for counsel's use. Thus, counsel should confirm that the levying officer has such forms.

The keeper must be removed if the judgment debtor objects to his or her being there. CCP §700.070(b)(1). Of course, on such objection, the property can be seized, removed, stored, and noticed for sale. The keeper may also be removed if the judgment creditor so requests. CCP §700.070(b)(2).

However, when a keeper is placed in a business for the purpose of taking into custody tangible personal property consisting solely of money or equivalent sales proceeds, the levying officer is authorized to take the property into his or her exclusive custody at the end of each daily keeper period. CCP §700.070(c). This is an exception to the rule in CCP §700.070(b)(1)-(3) on when the levying officer is to take tangible personal property into custody (*i.e.,* when the judgment debtor objects, when the judgment creditor so requests, or at the end of 10 days after the keeper is placed in charge of the business).

**PRACTICE TIP:** While the keeper is in place, the judgment creditor may meet the levying officer on the premises with the movers to identify what goods are subject to seizure in order to accurately estimate the cost of moving and storage. In addition, while the keeper is in place, the judgment debtor has some time in which to arrange for financing or otherwise negotiate settlement of the judgment.

Because of the requirement to operate on a cash basis, the use of a keeper may be ineffective if the judgment debtor is a manufacturer. Its products may have to remain on the manufacturer's loading dock without going to the end buyers.

Also, business cycles may affect the effectiveness of a keeper. For instance, a keeper levy on a florist on the day of or before Valentine's Day is more effective than on the day after. For a typical retail store, the day after Thanksgiving may be their largest day of sales and they will certainly have more merchandise in place by the day before Thanksgiving or the day after than they would otherwise have.

The presence of a keeper carries a high level of embarrassment for a judgment debtor who is in a service profession (*e.g.,* physicians, dentists, or lawyers), especially when a client of the debtor is advised to pay for the professional services to the keeper in the form of cash or is informed that insurance payments are not accepted. This may result in an earlier settlement. Many levying officers will not actually enforce the provision to not provide services without cash

payments when they are medical services, because the levying officer will not wish to be exposed to liability.

**PRACTICE TIP:** Another form of levy on a going business is the "till tap" method, which is an option available under the general section for tangible personal property of a going business. CCP §700.070. In this method, the levying officer enters the judgment debtor's business, serves a copy of the writ of execution and notice of levy, then takes possession of all the money in the cash register or other "tills" located on the premises.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.23 3. Vehicles, Manufactured Homes, Mobilehomes, and Boats

## §9.23 3. Vehicles, Manufactured Homes, Mobilehomes, and Boats

Unless the judgment debtor is the legal owner or a junior lienholder and is in possession of a vehicle, boat, manufactured home, mobilehome, or commercial coach, the levying officer must serve either personally or by mail at the time of the levy, or promptly thereafter, a copy of the writ of execution and a notice of levy on the legal owner or junior lienholder as shown on the certificate of ownership in effect issued by the Department of Motor Vehicles for a vehicle or boat, or as shown on a current certificate of title issued by the Department of Housing and Community Development for a manufactured home, mobilehome, or commercial coach. CCP §700.090. The levying officer may then proceed with removal, storage, notice, and sale.

**PRACTICE TIP:** If the property is a mobilehome that is attached to a foundation with proper permits, it is treated as a real property fixture. Health & S C §18551(e). Otherwise, a mobilehome is deemed personal property. Health & S C §18551(h). This distinction affects how the property is levied on and sold. Fishing boats and recreational vehicles are considered personal property even if used as dwellings by a debtor.

On sale generally, see §9.36. For service on judgment debtor, see CCP §700.010 (discussed in §9.9).

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### §9.24 4. Personal Property Used as a Dwelling

If a vehicle, mobilehome (whether occupied or not), boat, or other personal property levied on is used as a dwelling, the levying creditor has the additional problem of removing the occupant before the property can be sold. The levying officer must serve the writ of execution and notice of sale on an occupant who is a member of the occupant's family or household of suitable age and discretion. CCP §700.080(a). If an occupant is unavailable, service may be made by posting a copy of the writ and the notice of levy in a conspicuous place on the property. CCP §700.080(a). The judgment creditor may, on noticed motion, thereafter apply to the court for an order directing the levying officer to remove the occupants. CCP §700.080(c). The notice of motion must be served either personally or by mail on any legal owner, any junior lienholder who was served under CCP §700.090 (see §9.23), the occupant, and the judgment debtor if he or she is not the occupant. CCP §700.080(c). The court at the hearing on the motion must rule on the occupant's right to possession and can make any appropriate orders. CCP §700.080(c). Once the occupants are removed, the levying officer may proceed with notice of sale and the sale. On sale generally, see §9.36.

As an alternative to removing the occupants and selling the property, the judgment creditor may instruct the levying officer to place a keeper in charge of the property for a period requested by the judgment creditor (presumably to collect rents). CCP §700.080(b).

For service on judgment debtor, see CCP §700.010 (discussed in §9.9). For execution on homesteads, see §§9.82-9.95.

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### §9.25 5. Chattel Paper and Instruments

If chattel paper or an instrument is in the judgment debtor's possession, levy is made by the levying officer's taking it into custody. CCP §§700.100(a)(1), 700.110(a)(1). If it is in a third person's possession, levy is made by the levying officer's personally serving a copy of the writ of execution and a notice of levy on that person. CCP §§700.100(a)(2), 700.110(a)(2). On when a copy of the writ of execution and a notice of levy must also be served on an account debtor, see CCP §700.100(b) (chattel papers), and on when they must be served on the obligor, see CCP §700.110(b) (instrument). For service on the judgment debtor, see CCP §700.010 (discussed in §9.9).

A levy on chattel paper creates a lien on the judgment debtor's rights in the goods subject to that chattel paper. CCP §700.100(c).

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### §9.26 6. Deposit Accounts and Safe Deposit Boxes Not Exclusively in Judgment Debtor's Name

Subject to CCP §700.160, a deposit account or property in a safe deposit box may be levied on by the levying officer's personally serving a copy of the writ of execution and a notice of levy on the financial institution where the deposit account or safe deposit box is maintained or by personally serving the writ and notice to a centralized location within the state designated by the financial institution. CCP §§700.140(a), 700.150(a). See also CCP §684.110(c) about service on a financial institution. If the writ of execution is received at the designated central location, it applies to all deposit accounts held by the financial institution regardless of where the property is located. CCP §700.140(a).

The levying officer must also serve, either personally or by mail, any third person in whose name the deposit account or safe deposit box stands at the time of the levy or promptly thereafter with a copy of the writ and a notice of levy (so that the third person is on notice to protect his or her rights). CCP §§700.140(b), 700.150(b). For service on judgment debtor, see CCP §700.010 (discussed in §9.9).

Code of Civil Procedure §700.160 provides the following:

- If a deposit account or safe deposit box stands only in a name or names other than the judgment debtor, it is not subject to levy unless authorized by court order. The levying officer must serve a copy of the court order on the third person at the time the copy of the writ of execution and the notice of levy are served on the third person. CCP §700.160(a).
- If a deposit account or safe deposit box stands in the name of the judgment debtor, together with one or more third parties, it is subject to levy without a court order or an undertaking. CCP §700.160(b)(1).
- If a deposit account or safe deposit box stands in the name of the judgment debtor's spouse alone or together with other third persons, it is subject to levy without a court order, but at the time of levy an affidavit (or declaration; see CCP §2015.5), showing that the person in whose name the account or box stands is the spouse of the judgment debtor, must be delivered to the financial institution. CCP §700.160(b)(2). See the form of affidavit set forth in §9.26A.
- If a deposit account or safe deposit box stands in a fictitious business name, and an unexpired fictitious business name statement is on file showing that the owner of the business is the judgment debtor, the judgment debtor's spouse, or both (and no one else), the deposit account or safe deposit box is subject to levy without a court order. CCP §700.160(b)(3). See the form of affidavit set forth in §9.26B.

At the time of levy, a certified copy of the fictitious business name statement as provided in Bus & P C §17926 must be delivered to the financial institution, together with an affidavit (or declaration; see CCP §2015.5), if a person other than the judgment debtor is listed in the statement, showing that the other person is the judgment debtor's spouse. CCP §700.160(b)(3). Thus if a judgment is against John Doe doing business as Ajax Company, a levy on the Ajax Company account should be allowed without requiring delivery of the certificate under CCP §700.160(b)(3) to the financial institution, because the judgment has held that John Doe is the owner of the business. However, if the judgment is against John Doe without any reference to Ajax Company, such a certificate would be required to levy on an account standing in Ajax Company's name.

For a financial institution's obligations after levy, see CCP §§700.140-700.160. For a third party's duties and liabilities after levy generally, see §§9.31-9.35.

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## §9.26A 7. Form: Affidavit That Individual Named on Account Is Spouse of Judgment Debtor (CCP §700.160(b)(2))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | |
| **Plaintiff(s),** | ) | **No. _ _ _ _ _ _** |
| **vs** | ) | **AFFIDAVIT THAT INDIVIDUAL** |
| _ _[*Name(s)*]_ _, | ) | **NAMED ON ACCOUNT IS** |
| **Defendant(s)** | ) | **SPOUSE OF JUDGMENT** |
| **_____** | ) | **DEBTOR** |
| | ) | **[CCP §700.160(b)(2)]** |
| | ) | |

**TO THE LEVYING OFFICER, TO THE FINANCIAL INSTITUTION, TO THE SPOUSE OF THE JUDGMENT DEBTOR, AND TO THE JUDGMENT DEBTOR:**

**Judgment creditor, _ _[*name*]_ _, hereby elects to use the procedure provided in Code of Civil Procedure §700.160(b)(2) to levy on any deposit, checking, savings, or other account in the name of judgment debtor's spouse.**

**Pursuant to that code section, judgment creditor hereby instructs the levying officer to levy on all accounts in the name of judgment debtor, _ _[*name*]_ _, and judgment debtor's spouse, _ _[*name*]_ _, aka _ _[*name*]_ _.**

**Declarant is informed and believes and thereon alleges that _ _[*name*]_ _, aka _ _[*name*]_ _ is the current spouse of judgment debtor, _ _[*name*]_ _.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.26B 8. Form: Affidavit in Support of Execution Against Account Standing in Fictitious Business Name of Debtor (CCP §700.160(b)(3))

## §9.26B 8. Form: Affidavit in Support of Execution Against Account Standing in Fictitious Business Name of Debtor (CCP §700.160(b)(3))

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s),** | ) | **AFFIDAVIT IN SUPPORT OF** |
| **vs** | ) | **EXECUTION ) AGAINST** |
| _ _[*Name*]_ _, | ) | **ACCOUNT STANDING IN** |
| **Defendant(s).** | ) | **FICTITIOUS BUSINESS NAME** |
| _____ | ) | **OF DEBTOR** |
| | ) | **[CCP §700.160 (b)(3)]** |
| | ) | |

**TO THE LEVYING OFFICER, TO THE FINANCIAL INSTITUTION, AND TO THE JUDGMENT DEBTOR:**

**Judgment creditor _ _[*name*]_ _, hereby elects to use the procedure provided in CCP §700.160(b)(3) to levy on a deposit, checking, savings, or other accounts in the name of judgment debtor, _ _[*name*]_ _, and to levy on a deposit or other accounts in fictitious business names when those businesses are conducted by the judgment debtor. Pursuant to that code section, a certified copy of the Fictitious Business Name Statement is attached hereto.**

**Pursuant to that code section, Judgment Creditor hereby instructs the levying officer to levy on all accounts in the name of judgment debtor, _ _[*name*]_ _, and judgment debtor's fictitious business, named _ _[*name of business*]_ _.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

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### §9.27 9. Final Money Judgment

When the judgment debtor prevails in another action, it is possible to levy on the final money judgment in favor of the judgment debtor. The levying officer files a copy of the writ of execution and a notice of levy with the court that entered the judgment in the debtor's favor. CCP §700.190(c). The officer also serves the writ and notice of levy, either personally or by mail, on the judgment creditor's judgment debtor. CCP §700.190(c). For service on the judgment debtor, see CCP §700.010 (discussed in §9.9.) The court clerk entering the judgment in the judgment debtor's favor will endorse the existence of the creditor's execution lien and the time of its creation on the judgment itself, and any abstract issued under it will include a statement of the execution lien in the judgment creditor's favor. CCP §700.190(b).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.28 10. Interest in Personal Property in Decedent's Estate

### §9.28 10. Interest in Personal Property in Decedent's Estate

Levy on the judgment debtor's interest in personal property in a decedent's estate is made by personally serving a copy of the writ of execution and a notice of levy on the personal representative of the estate. CCP §700.200(a). Despite CCP §697.710, an execution lien created by a levy under CCP §700.200 continues for one year after the decree distributing the interest has become final unless the judgment is satisfied sooner. CCP §700.200(d). See CCP §700.200 for further provisions.

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## §9.29 11. Lottery Prizes

A judgment lien may attach to a lottery prize that is paid in annual installments. CCP §708.755. Once created, the lien continues in force and effect until the judgment is paid or expires. The judgment creditor must file an affidavit annually with the lottery, stating that the judgment has not been satisfied and the amount of the remaining unsatisfied judgment. The lien expires on failure to file the affidavit.

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### §9.30 12. Revocable Trusts

Property in a revocable living trust is subject to enforcement of a money judgment. Under Prob C §18200, the trust property is subject to the settlor's creditors' claims to the extent of the power of revocation during the lifetime of the settlor, if the settlor retains the power to revoke the trust in whole or in part. However, a question arises in the application of this provision. When the Enforcement of Judgments Law became effective, Prob C §18200 did not exist. Under the EJL, a levying officer may use only a levying method provided for in the code.

No problem would exist if Prob C §18200 had specified that trust property must be levied on in like manner to similar property held in the name of the judgment debtor. But because the law is unclear on the levy of property held by a revocable living trust, some levying officers act as if Prob C §18200 allows trust property to be levied in a manner similar to property held in the name of the judgment debtor. Other levying officers impose the levy only on the dwelling houses, probably the most common levy on property in a revocable living trust, because it involves a court hearing (Order to Show Cause Why Order Sale of Dwelling Should Not issue; see §9.89), in which competing claims against the judgment debtor's property interests may be asserted and adjudicated. Still other levying officers take the position that property held by a revocable living trust is similar to trust property as defined in CCP §§709.010-709.030. See §11.43 on levying against trust property.

The approach of treating property held by a revocable living trust in the same manner as trust property as defined in CCP §§709.010-709.030 is the least practical because no probate court has control of the trust, certainly while the settlor is alive. The judgment creditor has to decide how to start a probate proceeding to get an order applying the asset to satisfy a judgment. In each county the final decision on what a levying officer may do is made by that county's levying officer who looks to county counsel for legal advice. Because most county counsel have no experience in enforcement of judgments, they may not realize that a revocable living trust is a legal fiction created for estate tax reasons. Counsel may have to be made aware that a revocable living trust is actually the judgment debtor, given that Prob C §18200 comes into play only to the extent the trust is revocable and only while the settlor is alive to revoke it. Note that the settlor is entitled to claim the exemptions provided by CCP §§703.010-704.995. Prob C §18201.

Another approach is to attempt to use an Affidavit of Identity under CCP §680.135 by arguing that a revocable trust is essentially an alias for the judgment debtor by virtue of Prob C §18200.

**NOTE:** An irrevocable trust is not converted into a revocable trust by conduct of the settlor that is inconsistent with the trust provisions. *Laycock v Hammer* (2006) 141 CA4th 25, 44 CR3d 921. In *Laycock*, a third party creditor argued that he should be able to show that the debtor treated trust property as his own, thereby revoking the trust. However, the terms of the life insurance trust and the terms by which the settlor transferred the policy to the trust were unambiguous: the trust was irrevocable. Thus, the property belonged to the trust and not the settlor's estate.

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## H. Third Person's (Garnishee's) Duties and Liabilities After Levy

### §9.31 1. In General

On being served with a writ of execution and a notice of levy, a third person holding money or property that belongs to the judgment debtor or owing debts to the judgment debtor, or one who is a co-owner of property with the judgment debtor, acquires statutory duties and liabilities. See generally CCP §§701.010-701.070. Under CCP §701.010, unless there is good cause not to do so, the third party must (CCP §701.010(a)-(b)):

- Turn over to the levying officer the property levied on that is in the third person's possession or control at the time of the levy unless the third party claims the right to possession; and
- Pay, to the extent the third person does not deny the obligation levied on or claim a priority over the judgment creditor's lien, the amount due and payable to the judgment debtor under the obligation levied on at the time of the levy and all sums that become due and payable from the third person under the obligation levied on to the judgment debtor during the life of the execution lien.

Code of Civil Procedure §701.010 does not specify a time within which property must be turned over, but the garnishee must submit a garnishee's memorandum within 10 days after service of the writ unless the garnishee has already delivered the requested property or paid the amount due. See §9.33 on a garnishee's memorandum.

"Good cause" is defined in CCP §701.010(c) to include a showing that the third person did not know or have reason to know of the levy from all the facts and circumstances known to the third person.

If a third person who is required to deliver property or make payments to the levying officer under CCP §§701.010-701.070 fails or refuses to do so without good cause, the third person is liable to the judgment creditor for the lesser of (CCP §701.020(a)):

- The value of the judgment debtor's interest in the property or the amount of the payments required to be made, or
- The amount needed to satisfy the judgment under which the levy was made.

The third person may also become liable for the costs and reasonable attorney fees incurred by the judgment creditor in establishing the third person's liability. CCP §701.020(c).

The third person remains liable until the earliest of the following times: (1) when the property levied on is delivered or payments are made to the levying officer, (2) when the property levied on is released under CCP §699.060, or (3) when the judgment is satisfied or discharged. CCP §701.020(b).

What is reached by a garnishment is what is due at the time of the levy, plus what becomes due during the life of the execution lien (CCP §701.010(b)(2)(B)). An execution lien is for 2 years from the date of issuance of the writ (CCP §697.710), not from the date of the levy. There is an exception for a levy upon a deposit account, limiting its reach to what is in the account at the instant of the levy. CCP §700.140(a).

All forms of garnishment are dealt with in the same manner as the garnishment of bank accounts, discussed in §9.32. These may include levies on tangible personal property in possession of a third person (CCP §700.040), personal property in custody of a levying officer or "book levy" (CCP §700.050), bailed goods not covered by a negotiable document of title (CCP §700.060), chattel paper (CCP §700.100), instruments (CCP §700.110), negotiable documents of title (CCP §700.120), securities (CCP §700.130), accounts receivable and general intangibles (CCP §700.170), final money judgments (CCP §700.190), and interests in personal property in a decedent's estate (CCP §700.200).

On garnishment of wages, see chap 10.

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## §9.32 2. Levies on Banks

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The levy is made by serving the bank with a copy of a writ of execution and a notice of levy. These documents tell the bank who the judgment creditor and debtor are, the property being sought, the name and address of the levying officer and the levying officer's file number, and the name of the court and the case number. In garnishing a bank account, it is not necessary to specify the account number, because the judgment debtor may have multiple accounts in the branch and a specific account levied on may be overdrawn while others are not. The levying officer's instruction may include such language as the following:

**Any and all accounts receivable, general intangibles, or their proceeds, standing in the name of the judgment debtor(s) individually, or together with any third person(s), along with deposit accounts, including but not limited to account no. _ _[*number*]_ _ and safe deposit boxes.**

The timing on levying a judgment debtor's bank account is important. The amount reached by garnishing a bank account is what is in the bank at the instant of the levy; any amounts the judgment debtor deposits later in the day are not reached by the levy. However, what is in the bank at the moment of the levy may include deposits made by the judgment debtor before the levy but that have not yet been cleared through the banking system. Such uncollected funds are subject to the levy.

If the judgment debtor is a going business, the maximum amount of cash in the bank account is probably on the day employee wages are paid. Large deposits may also be available on April 15th and on other dates on which estimated tax payments are due. For individual debtors, the largest amount in the bank account may be 1 to 2 days after pay day.

**PRACTICE TIP:** Because of continuing changes in the banking industry, it is particularly important for a creditor to note the bank and branch of checks received from a judgment debtor or any customer of the debtor. In a bank merger or closure of branches, information from the checks may allow the bank to tell the creditor where the accounts have ended up.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/ 3. Garnishee's Response/§9.33 a. When Required; Content; Time Limitation; Liability

### 3. Garnishee's Response

### §9.33 a. When Required; Content; Time Limitation; Liability

When a copy of the writ of execution and a notice of levy is served on a third person (the garnishee), the levying officer requests the third person to give the levying officer a garnishee's memorandum under oath, providing information on the property levied on. See CCP §701.030.

Under CCP §701.030(f), a third person need not give a levying officer a garnishee's memorandum if the two following conditions are satisfied:

- All property sought to be levied on has been delivered to the levying officer by the third person, and
- The amount owed to the judgment debtor under any obligation levied on has been paid to the levying officer by the third person, and no additional amounts on the obligation will thereafter become payable.

Otherwise, the third person must mail or deliver that memorandum to the levying officer within 10 days after the request whether or not the levy is effective. CCP §701.030(a). The memorandum must be executed under oath and must contain the following information (CCP §701.030(b)):

- A description of any property levied on that the garnishee is not delivering to the levying officer and the reason for nondelivery;
- A description of any of the judgment debtor's property in the garnishee's possession or control at the time of levy that has not been levied on;
- A statement of the amount and terms of any obligation levied on that is owed by the garnishee to the judgment debtor and is due and payable at the time of levy but that is not being paid to the levying officer, and the reason it is not being paid;
- A statement of the amount and terms of any obligation owed by the garnishee to the judgment debtor at the time of levy that is not due or payable;
- A statement of the amount and terms of any obligation owed by the garnishee to the judgment debtor at the time of the levy that has not been levied on; and
- A description of the claims or rights of any other persons to the property or obligation levied on, if known to the garnishee, together with their names and addresses, if known.

For the Judicial Council form, see §9.34.

The levying officer, promptly on receiving a garnishee's memorandum, must mail or deliver a copy of it to the judgment creditor and attach the original to the writ when it is returned to court. CCP §701.030(c). The garnishee's memorandum may serve as an inexpensive alternative to an examination proceeding under CCP §708.120. On examination proceedings generally, see §§8.15-8.53. If the levying officer does not receive a garnishee's memorandum from the third person, the levying officer must so state in the return. CCP §701.030(c). On return, see §9.41. A third person who is required to give a garnishee's memorandum, but who fails to mail or deliver it to the levying officer within the 10-day period specified in CCP §701.030(a), may be liable for costs and reasonable attorney fees incurred in any proceedings to obtain the information required in the garnishee's memorandum. CCP §701.030(d).

Under CCP §701.030(e), a financial institution need not give a garnishee's memorandum to a levying officer if it fully complied with the levy when the deposit account or property in a safe deposit box was levied on. If the financial institution does not fully comply with the levy, a garnishee's memorandum is required, but it need only provide information on the property that is carried on the available records at the office or branch where the levy was made. CCP §701.030(e).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.34 b. Form: Memorandum of Garnishee (Judicial Council Form AT-167, EJ-152)

## §9.34 b. Form: Memorandum of Garnishee (Judicial Council Form AT-167, EJ-152)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | ***FOR RECORDER'S USE ONLY*** |
|---|---|---|
| ☐ Recording requested by and return to: | | |
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT: | | |
| STREET ADDRESS: | | |
| MAILING ADDRESS: | | |
| CITY AND ZIP CODE: | | |
| BRANCH NAME: | | |
| PLAINTIFF: | | |
| DEFENDANT: | | |
| **MEMORANDUM OF GARNISHEE (Attachment — Enforcement of Judgment)** | | LEVYING OFFICER *(Name and Address)*: |
| | | LEVYING OFFICER FILE NO.: / COURT CASE NO.: |

**NOTICE TO PERSON SERVED WITH WRIT AND NOTICE OF LEVY OR NOTICE OF ATTACHMENT: This memorandum must be completed and mailed or delivered to the levying officer within 10 days after service on you of the writ and notice of levy or attachment unless you have fully complied with the levy. Failure to complete and return this memorandum may render you liable for the costs and attorney fees incurred in obtaining the required information.**
**— RETURN ALL COPIES OF THIS MEMORANDUM TO THE LEVYING OFFICER —**

**This memorandum does *not* apply to garnishment of earnings.**

1. If you will not deliver to the levying officer any property levied upon, describe the property and the reason for not delivering it:

2. **For writ of execution only** Describe any property of the judgment debtor not levied upon that is in your possession or under your control:

3. If you owe money to the judgment debtor which you will not pay to the levying officer, describe the amount and terms of the obligation and the reason for not paying it to the levying officer:

*(Continued on reverse)*

Print

| SHORT TITLE: | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |
|---|---|---|
| | | |

4. Describe the amount and terms of any obligation owed to the judgment debtor that is levied upon but is not yet due and payable:

5. **For writ of execution only** Describe the amount and terms of any obligation owed to the judgment debtor that is not levied upon:

6. Describe any claims and rights of other persons to the property or obligation levied upon that are known to you and the names and addresses of the other persons:

## DECLARATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . *(TYPE OR PRINT NAME)*

▶ _____ *(SIGNATURE)*

**If you need more space to provide the information required by this memorandum, you may attach additional pages.**

☐ **Total number of pages attached:**



*Comment:* See §9.33.

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## §9.35 4. Secured Party

If property levied on is subject to a perfected security interest that attached before the levy, the security interest is entitled to priority over the execution lien and the security interest may be enforced without regard to levy unless the court orders otherwise on finding that the judgment creditor's lien has priority over the security interest or unless the property is in the levying officer's custody. CCP §701.040(a). If the property is in the levying officer's custody, then as a practical matter the secured creditor should file a third party claim to protect that interest. See §§9.50-9.56.

After the security interest is satisfied, the secured party must deliver any excess property and pay over any excess payments or proceeds to the levying officer for the purpose of the levy as provided in Com C §§9615-9616 unless the court or the levying officer directs otherwise. CCP §701.040(b).

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## §9.36 I. Sale of Personal Property

The mechanics of notice, posting, and sale are set forth in CCP §§701.510-701.830. Basically, the levying officer seizes the property; removes and stores it; posts notice of time and place of sale; mails notice of time and place of sale to the judgment debtor, the judgment creditor, and anyone else having requested such notice; and then sells the property, distributing the proceeds as provided in CCP §701.810. Certain preferred claims are paid from those proceeds even ahead of the costs of levy (*e.g.,* certain labor and tax claims; see CCP §701.810(a)-(d)).

On extinction of liens on sale, see CCP §701.630 (discussed in §9.39).

Under CCP §701.520(a), if the following property has been levied on, it must be collected rather than sold except as provided in CCP §701.520(b)-(d):

- Accounts receivable;
- Chattel paper;
- General intangibles;
- Final money judgments;
- Instruments not customarily transferred in an established market; and
- Instruments that represent an obligation arising from the sale or lease of property; a license to use property; furnishing of services; or the loan of money when the property sold, leased, or licensed for use, or the services furnished or money lent was used by an individual primarily for personal, family, or household purposes.

Under CCP §701.520(b), when the property is levied on, or thereafter, the judgment creditor may serve on the judgment debtor, either personally or by mail, a notice of intended sale of the property. A copy of the notice and proof of its service on the judgment debtor must be filed with the court and the levying officer. CCP §701.520(b). The notice of intended sale must describe the property and state that it will be sold at an execution sale unless, within the time allowed after service of the notice of intended sale, the judgment debtor applies to the court on noticed motion for an order that the property be collected rather than sold. CCP §701.520(b). The judgment debtor may apply to the court for such an order within 10 days after service of the notice of intended sale. CCP §701.520(c). This 10-day period is extended by the time specified in CCP §684.120 if the judgment debtor is served by mail. Thus, to avoid any objection's being sustained, the notice of intended sale should specify the 10-day period in which the judgment debtor may apply for such an order and the additional periods specified in CCP §684.120 when service of the notice is by mail.

A judgment debtor who desires to apply for an order that the property be collected rather than sold must, within the time allowed for the application, serve a copy of the notice of motion on the judgment creditor, either personally or by mail, and file a copy with the levying officer. CCP §701.520(c). The levying officer must proceed to sell the property if a copy of the notice of motion is not filed with him or her within the time allowed. If it is timely filed, the levying officer must still continue to collect the property until the court orders otherwise. CCP §701.520(c).

At the hearing, the court may order that the property be sold or collected. CCP §701.520(d). If the court orders that the property be collected, the court may condition its order on an assignment of the property by the judgment debtor to the judgment creditor under CCP §§708.510-708.560. CCP §701.520(d). On assignment orders generally, see §§11.21-11.32.

On procedure when levying officer knows of conflicting claims to all or part of the proceeds of sale or collection before distribution, see CCP §701.830. On extinction of liens on sale, see CCP §701.630 (discussed in §9.39).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/ J. Levy on Real Property; Sale/§9.37 1. Method of Levy

## J. Levy on Real Property; Sale

### §9.37 1. Method of Levy

Different types of real property require different procedures before a judgment creditor may sell a debtor's property. For example, commercial real property (such as a grocery store) may be sold without a court order. However, a court order for sale is required if the real property contains a dwelling.

If real property is unimproved, a levying officer may want a court's decision on whether a court order for sale is necessary. Property containing a dwelling that is personal property (such as a mobilehome not affixed to the land) is treated as personal property. See also CCP §§700.080, 704.740.

Generally, the judgment creditor's instructions to the levying officer must include an adequate legal description of the property and must state whether it is a dwelling. CCP §687.010(a). The description must include the property's street address if it has one.

Levy is made by the levying officer's recording in the county in which the property is located a copy of the writ of execution and a notice of levy that describes the property levied on, states the judgment debtor's interest in it, and, if the property stands in someone else's name, states that party's name as well. CCP §700.015.

**PRACTICE TIP:** Be sure to note the date the levying officer or registered process server serves the notice of levy, because the notice of sale cannot be served until 120 days after that date. CCP §701.545. Although the judgment creditor generally expects the levying officer to keep track of such dates, it is the creditor's responsibility.

When the levying officer makes the levy or promptly thereafter, the levying officer must serve a copy of the writ and a notice of levy on any third person in whose name the judgment debtor's interest in the real property stands in the county's records and on one occupant of the real property. CCP §700.015(b)-(c). If an occupant cannot be found, the levying officer may post the notice of levy in a conspicuous spot on the property. If there is a structure, posting is generally accomplished by tacking the notice to the front door, but it may be tied to a fence, a tree, a bush, or even a stake driven into the ground. On manner of service, see CCP §700.015(b)-(c). As with any other levy, a copy of the writ and a notice of levy must also be served on the judgment debtor. CCP §700.010(a)(1)-(2). If the judgment debtor is a natural person, he or she must also be served with a list of all exemptions provided by law (see §9.55) and a list of exemption amounts (see §9.55A). CCP §700.010(a)(3).

If the property contains a dwelling, the levying officer notifies the judgment creditor that the property will be released unless the creditor obtains a court order for sale. CCP §704.750(a). The purpose of the order is to have the court decide (1) whether the debtor is entitled to a homestead exemption and (2) the minimum bid and other procedures the levying officer must use to sell the property. See §9.88 on order for sale. The judgment creditor must also ascertain whether the judgment debtor has filed a homestead declaration and, if so, when it was filed and the amount of the homestead exemption. CCP §704.730. See §§9.82-9.95. The amount of this exemption, whether statutory or declared, must be subtracted to calculate equity.

**NOTE:** A judgment creditor may not avoid the statutory homestead exemption procedures by having a residential property sale conducted by a receiver. *Wells Fargo Fin. Leasing, Inc. v D & M Cabinets* (2009) 177 CA4th 59, 99 CR3d 97.

To learn whether there is any equity in the property, calculate the total amount of the liens on the property as compared with the fair market value. It is important to calculate all liens, even when executing against a joint tenant's or tenant in common's mere fractional interest. Although a judgment creditor may learn the actual amounts due by contacting the lenders, doing so may tip off the judgment debtor that a levy is being considered, and that may not be worth the risk. Accordingly, an estimate may be made from the recorded instruments that will indicate the likely maximum amount of the liens and encumbrances. Presumably, some portion of the loans has been paid off, at least to the extent of accruing interest. Many types of financing arrangements are available that might create a negative amortization and increase the original loan.

**PRACTICE TIP:** Notwithstanding the fact that a refinance occurring subsequent to recordation of a creditor's lien would be subject to that lien (CCP §697.390) under the judicially recognized doctrine of equitable subrogation, the junior lienholder may be able, at least partially, to leap far over the creditor's senior lien. Equitable subrogation provides that to the extent a junior refinance paid off some or all of an existing senior encumbrance, the later lender may be entitled to the priority position of the senior lien. See *Grant v de Otte* (1954) 122 CA2d 724, 265 P2d 952.

An independent appraiser can establish the market value of the property. The information is not necessary to make the levy, but it is required at court hearings that involve a dwelling house. Some counties, however, do not allow a property appraisal until after a judgment creditor has moved for an order of sale.

**PRACTICE TIP:** When levying on a fractional interest, be sure to use a qualified appraiser with experience in such matters. A fractional interest, say 50 percent, is rarely worth half of the whole. Rather, its value can be computed by taking the fractional interest amount of the whole, *e.g.,* 10 percent, and then further reducing that value by anywhere from 5 to 50 percent.

A litigation guaranty from a title insurance company provides the required information on ownership interests and liens and helps to determine whether to proceed with the levy. It also provides information that is necessary for the instructions to the levying officer and for the application for an order of sale if the property contains a dwelling.

If the debtor is a joint tenant or a cotenant, a judgment creditor may execute only against the debtor's interest in the real property. CCP §704.820. If the title in the judgment debtor is less than a fee simple title, two problems may arise: (1) how to find a buyer for the fractional interest; and (2) if the property is owned by a partnership, only a charging order may be obtained because the property cannot be sold.

**PRACTICE TIP:** There must only be enough equity in the real property to satisfy any portion of the judgment and the costs of the levy. CCP §704.780(b). If the real property is the debtor's home, the debtor usually has the incentive to find other ways to pay the judgment.

**PRACTICE TIP:** Consideration must be given as to when to execute against real property, especially when property is held in joint tenancy. If a judgment debtor owns property in joint tenancy and dies before the other joint tenants, any judgment lien against the debtor's interest in the property is eliminated by the debtor's death. *Zeigler v Bonnell* (1942) 52 CA2d 217, 220, 126 P2d 118. However, when the lien against the debtor attached while the debtor owned the property as a tenant in common, the lien survived the death of the debtor even though the tenants in common conveyed their interest to a joint tenancy before the debtor's death. *Dieden v Schmidt* (2002) 104 CA4th 645, 651, 128 CR2d 365.

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## 2. Sale

### §9.38 a. Statutory Authority; Notice of Sale; Timing

Statutory authority for the sale of real property after a levy on the property has been made is in CCP §§701.510-701.820. The notice of sale must be in writing and must state the date, time, and place of sale; describe the interest to be sold; and state the real property's legal description and street address or other common designation, if any. CCP §701.540(a). If there is no street address or other common designation, the notice of sale must state that the directions to its location can be obtained from the levying officer on oral or written request, or if the levying officer so desires he or she may give the directions in the notice of sale. CCP §701.540(a).

The levying officer must serve, mail, and post the notice of sale as required by CCP §701.540(c)-(f) at least 20 days before the sale date. CCP §701.540(b). In addition, the notice of sale must be published under Govt C §6063 at least 20 days before the sale date in a newspaper specified in CCP §701.540(g).

No earlier than 30 days after the date of levy, the judgment creditor must ascertain the names of all persons who on the date of levy had liens of record on the property in the county recorder's office. CCP §701.540(h). The judgment creditor must instruct the levying officer to mail the notice of sale to each such person at the address used by the county recorder to return the instrument creating the person's lien after recording. CCP §701.540(h). The levying officer must mail the notice at least 20 days before the sale date. CCP §701.540(h). Furthermore, except for a leasehold estate with an unexpired term at the time of levy of less than 2 years, a notice of sale of an interest in real property cannot be given under CCP §701.540 until 120 days after the judgment debtor is served with a notice of levy on the interest in real property. CCP §701.545; see §9.40.

On contents for notice of sale, see CCP §701.547. On procedure, before issuance of a writ or after levy, for a person to request notice of sale and the levying officer's duty to give such notice, see CCP §701.550. On judgment creditor's and judgment debtor's right to advertise the sale, see CCP §701.555.

For sale of real property with a dwelling, see §9.88.

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### §9.39 b. Sale; Extinction of Liens

The sale of the property must be held at the date, time, and place set forth in the notice of sale. CCP §701.570(a). On procedure for postponing the sale, see CCP §701.580. The sale must be made to the highest bidder at auction. CCP §701.570(b). No more property can be sold than will yield the amount necessary to satisfy the money judgment. CCP §701.570(e). See CCP §§701.590-701.620 on bidding, manner of payment, and procedure when a bidder defaults. After the sale, the levying officer must distribute the proceeds of sale in the order specified in CCP §701.810. On time limitations for distribution, see CCP §701.820. On procedure when there are conflicting claims to all or part of the proceeds, see CCP §701.830.

If a dwelling subject to a homestead exemption is to be sold, the sale is governed by CCP §§701.510-701.680, subject to CCP §§704.710-704.850. CCP §704.780(b). On the sale of such property, see §§9.88-9.95.

When property is sold under CCP §§701.010-701.070, the lien under which the property was sold, any subordinate liens, and any state tax liens (as defined in Govt C §7162) on the property are extinguished. CCP §701.630. The purchaser at an execution sale acquires any interest of the judgment debtor in the property sold that (1) is held on the effective date of the lien under which the property was sold or (2) is acquired between the effective date and the sale date. CCP §701.640. When community property is sold at an execution sale, the interest of the judgment debtor's spouse is also sold. See Comment to CCP §701.640.

**PRACTICE TIP:** If the property contains a dwelling, a problem may arise if there are both senior and junior liens. Although CCP §704.800 states that all liens must be satisfied, one court has interpreted it to mean only senior liens and encumbrances. *Rourke v Troy* (1993) 17 CA4th 880, 21 CR2d 660.

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### §9.40 c. No Right to Redemption; Exceptions

The former statutory right of redemption from execution sales of real estate has been abolished. See Comment to CCP §701.545. The law now provides that, except for a leasehold estate with an unexpired term at the time of levy of less than 2 years, no notice of sale can be given (and thus the sale cannot proceed) until 120 days after the date the notice of levy is served on the judgment debtor. CCP §701.545. This 120-day delay gives the judgment debtor an opportunity to settle with the judgment creditor, file any exemption claims, seek potential purchasers, or apply to the court for any other available relief. See Comments to CCP §§701.545, 701.680.

When an interest in real property is eventually sold and payment is made, the levying officer conducting the execution sale executes and delivers a deed of sale to the purchaser and records a duplicate in the county recorder's office. CCP §701.660.

**PRACTICE TIP:** Although the statutory right of redemption after the sale of property at an execution sale no longer exists under CCP §§701.510-701.680, other statutes may preserve the statutory right of redemption in other situations. For example, when a decree of foreclosure of a mortgage or deed of trust on real property under CCP §726 states that a deficiency judgment may be ordered against the defendant, the real property (other than a leasehold estate with an unexpired term of less than 2 years at the time of levy) is sold subject to the right of redemption as stated in CCP §§729.010-729.090. CCP §§726(e), 729.010(a).

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## §9.41 K. Return of Writ of Execution; Time Limitations

A levying officer to whom a writ of execution has been delivered must return the writ to the court, together with a report from the levying officer on the actions taken and an accounting of the amounts collected and costs incurred. CCP §699.560. Except as provided in CCP §699.560(b)-(c), the writ, report, and accounting must be returned to the court at the earliest of the following times under CCP §699.560(a):

- After all duties under the writ have been performed;
- When the judgment creditor requests return of the writ in writing;
- After the 180-day period has expired, if no levy was made under the writ within 180 days after it was issued;
- Two years after the date the writ was issued; or
- On expiration of the time to enforce the money judgment.

Under CCP §699.560(b), if a levy is made on an interest in personal property of a decedent's estate under CCP §700.200, the writ must be returned within the time prescribed in §700.200 (*i.e.,* no later than 1 year after the date the decree distributing the interest becomes final). Under CCP §699.560(c), if a levy is made under Fam C §5103 on a judgment debtor's right to the payment of benefits from an employee pension benefit plan, the writ must be returned within the time prescribed in Fam C §5103.

If a levy has been made under the Wage Garnishment Law (CCP §§706.010-706.154) and the earnings withholding order remains in effect, the writ of execution must be returned as provided in CCP §699.560(a). CCP §699.560(d). If the writ is returned before the earnings withholding order terminates, then on termination of the earnings withholding order the levying officer must make a supplemental return on the writ. The supplemental return must contain the same information as the original return under CCP §699.560. CCP §§699.560(d), 706.033.

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## L. Debtor's Remedies Against Enforcement

### §9.42 1. Claim of Exemption

Certain property of a judgment debtor is exempt from execution. On exemptions generally, see CCP §§703.010-704.995. Exempt property and the procedures for claiming an exemption when a writ of execution has issued are discussed in §§9.50-9.95. On claiming exemption when other enforcement procedures are used, see §§8.28, 11.5, 11.18, 11.31, 11.40.

Specific exemption amounts were increased as of April 1, 2007. Further, the Judicial Council must index the exempt amounts every 3 years. CCP §703.150. For a form setting forth the current exemption amounts, see §9.55A.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/ 2. Stay of Enforcement/§9.43 a. Statutory Authority

## 2. Stay of Enforcement

### §9.43 a. Statutory Authority

Statutory authority for stay of enforcement of a judgment is in CCP §§916-936.1. Generally, the perfecting of an appeal stays trial court proceedings on the judgment or order appealed from or on matters embraced in or affected by the judgment or order, including enforcement of the judgment or order, except as provided in CCP §§116.810, 917.1-917.9. CCP §916(a). Although authority for an automatic stay on perfecting an appeal under CCP §916(a) appears broad, CCP §§917.1-917.9 specify numerous instances of when the perfecting of an appeal does not stay enforcement of the judgment or order in the trial court unless an undertaking is given. For example, an undertaking is required for a stay during the appeal period if the judgment or order:

- Is for money or directs the payment of money (CCP §917.1);
- Directs the assignment or delivery of personal property, including documents (CCP §917.2);
- Directs the sale, conveyance, or delivery of possession of real property (CCP §917.4; see, *e.g., First Fed. Bank of Calif. v Fegen* (2005) 131 CA4th 798, 31 CR3d 853 (debtor's appeal of enforcement of judgment order for sale of real property dismissed when he failed to post undertaking)); or
- Appoints a receiver (CCP §917.5).

The trial court may stay the enforcement of any judgment or order without requiring an undertaking. CCP §918(a). However, if enforcement of the judgment or order is stayed on appeal only by the giving of an undertaking, the trial court may stay its enforcement only for a period not to exceed 10 days beyond the last date on which a notice of appeal could be filed unless the adverse party consents to a longer period. CCP §918(b). The court may grant a stay under CCP §918 whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed. CCP §918(c). Thus, *e.g.,* a stay may be granted under §918 to allow time to perfect the appeal if one is to be taken or to give the judgment debtor time to arrange for the payment of the judgment. 16 Cal L Rev'n Comm'n Reports 1164 (1982).

Similarly, the trial court has discretion to stay enforcement of a judgment or order when the judgment debtor has another action pending on a disputed claim against the judgment creditor. CCP §918.5(a). On factors a court considers in exercising its discretion, see CCP §918.5(b).

**PRACTICE TIP:** If an adverse judgment or verdict is rendered in open court and counsel for the adversely affected party believes that grounds may exist for posttrial motions or an appeal, it is good practice for counsel for that party to make an oral motion, on the record, for the court to stay enforcement of the judgment under CCP §918 from the date of its entry until 10 days after the last date on which a notice of appeal can be filed. The motion may be based on the ground that time is needed to analyze whether posttrial motions will be made and, if so, to prepare and make them, and that time is also needed to determine whether an appeal will be taken and, if so, to perfect the appeal.

If the judge grants the motion, counsel should prepare a written stay order for the judge's signature. For form of order, see §9.45. If counsel has not made an oral motion for a stay order in open court, counsel for the adversely affected party should try to obtain a stipulation for a stay order from the prevailing party. If a stipulation cannot be arranged, counsel can move ex parte for a stay order under CCP §918 based on the grounds stated above. The ex parte application should be in declaration form or accompanied by a declaration. The declaration should, at a minimum, specify the nature of the judgment, the date of its entry, the date of notice of entry, the period requested for stay of enforcement of the judgment, and the grounds for the motion, and it should otherwise comply with Cal Rules of Ct 3.1200-3.1207. See §6.34.

If a decision is made to appeal, counsel must:

- Move, by noticed motion, for a stay of enforcement of the judgment pending determination of the appeal;

- Obtain an undertaking if required under CCP §§917.1-917.9; and
- Have the court rule on the motion and issue its order before expiration of the period for the stay order obtained earlier under CCP §918.

It is proper for the trial court to use the lump sum present value of a judgment when determining the proper amount of the bond required for a stay on appeal. *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 85 CR3d 203.

On format of papers, requirement for a memorandum in support of motion (commonly referred to as a memorandum of points and authorities) to accompany the noticed motion, and the hearing generally, see Cal Rules of Ct 3.1110-3.1312.

For detailed discussion of stay orders and procedure and forms, see California Civil Appellate Practice, chap 6 (3d ed Cal CEB 1996).

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## §9.44 b. Extinguishment of Enforcement Liens; Exceptions

When enforcement of a judgment is stayed on appeal by giving a sufficient undertaking (see §9.43), existing enforcement liens created under CCP §§695.010-709.030 are extinguished and no new liens under those sections may be created during the period of the stay. CCP §697.040(a). Similarly, if enforcement of a judgment is stayed under Fam C §4853 (foreign support order or foreign order for assignment of wages for support) or under CCP §1710.50 (sister-state judgment), existing enforcement liens created under CCP §§695.010-709.030 are extinguished, and no new liens under those sections may be created during the stay unless the court orders otherwise. CCP §697.040(c).

On the other hand, a stay of enforcement of a judgment under CCP §918 does not extinguish or prevent the creation of a judgment lien on real property under CCP §§697.310-697.410 or a judgment lien on personal property under CCP §§697.510-697.670 unless the court orders otherwise. CCP §697.040(b). No other enforcement liens may be created or continued under CCP §§695.010-709.030 during the stay of enforcement unless the court orders otherwise. CCP §697.040(b).

**NOTE:** A lien created against a debtor's existing joint tenancy interest is extinguished on the death of the debtor. See *Grothe v Cortlandt Corp.* (1992) 11 CA4th 1313, 15 CR2d 38. However, when a lien has been created, and the debtor later acquires a joint tenancy interest in new property, it should be possible to argue that the joint tenancy interest with its inherent right of survivorship component is subject to the preexisting lien.

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## §9.45 c. Form: Ex Parte Order Staying Enforcement of Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **EX PARTE ORDER STAYING** |
| **vs** | ) | **ENFORCEMENT OF** |
| _ _[*Name(s)*]_ _, | ) | **JUDGMENT (CCP §918)** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**On the application of _ _[*name*]_ _, and good cause appearing:**

**IT IS ORDERED that enforcement of the _ _[*judgment/order*]_ _ of this court entered on _ _[*date*]_ _, _ _[*insert terms of order, e.g., is stayed for a period not to exceed ten days beyond the last date on which a notice of appeal can be filed*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

*Copies:* Original (filed with court); copies for service (one for each attorney of record and unrepresented party); office copies.

*Comment:* Under CCP §918(b), if an undertaking is required to stay enforcement of the judgment on appeal, the trial court can only grant a stay order not to extend more than 10 days beyond the last date on which a notice of appeal can be filed unless the adverse party consents to a longer period. See §8.15 on notice requirements for ex parte motions.

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### 3. Recalling and Quashing Writ of Execution

#### §9.46 a. When Motion Available

A motion to recall and quash a writ of execution is based on the court's inherent power to control its process. See *Montgomery v Meyerstein* (1924) 195 C 37, 47, 231 P 730 (void writ of execution). See also *Erickson v Municipal Court* (1934) 219 C 737, 29 P2d 192 (motion to quash proper remedy when court's process is void or merely voidable and is proper remedy to correct any errors or unauthorized acts of its ministerial officers). Thus, execution may be recalled and quashed when the plaintiff is shown to have falsely represented the amount due from the defendant. See *Bryant v Bryant* (1958) 161 CA2d 579, 326 P2d 898. Similarly, a motion to recall and quash will lie when a writ has been issued on a judgment not enforceable by writ of execution (*Montgomery v Meyerstein, supra*) or when the judgment has been satisfied (see *Salveter v Salveter* (1936) 11 CA2d 335, 53 P2d 381). Also similarly, a motion to recall and quash a writ of execution is proper to correct an irregularity or defect in the writ. See *Erickson v Municipal Court, supra*.

It is not a proper ground for a motion to recall and quash a writ of execution that the judgment on which the writ was based is irregular or erroneous. Such a judgment is only voidable and, until corrected, is enforceable as entered and will support an execution. The basis for the motion is that the writ itself was improperly or inadvertently issued. Unless, the judgment is void, the court cannot review errors or irregularities in the judgment on which the writ is based by a motion to recall and quash the writ. *Hayward v Pimental* (1895) 107 C 386, 40 P 545.

If property has been levied on but not yet sold, the motion should be not only to recall and quash the writ but also to quash the levy. See *Wellborn v Wellborn* (1942) 55 CA2d 516, 131 P2d 48. If the property has been levied on and sold at an execution sale, the remedy is to proceed under CCP §701.680 (discussed in §§9.48-9.49), not a motion to recall or quash. On motion or independent action in equity to set aside an execution sale when a purchaser who is guilty of unfairness, or who has taken undue advantage, has paid a grossly inadequate purchase price, see 8 Witkin, California Procedure, *Enforcement of Judgment* §§164-165 (5th ed 2009).

A motion to recall and quash a writ is not proper to challenge irregularities in proceedings taken to enforce the writ when the writ itself is valid. See *Roth v Insley* (1890) 86 C 134, 140, 24 P 853, in which the court noted that a levy on exempt property could not be the basis for recalling the writ.

If exempt property has been levied on, the proper remedy is to claim the exemption under CCP §§703.510-703.610. If the property levied on does not belong to the judgment debtor, the proper remedy is for the owner to make a third party claim under CCP §§720.110-720.170. See §§9.50-9.56.

An order quashing execution is self-executing, and no further process is necessary to enforce it. A sheriff continuing in possession of property in violation of such an order does so unlawfully and without right. *Hulse v Davis* (1927) 200 C 316, 253 P 136.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.47 b. Form: Order Recalling and Quashing Writ of Execution

## §9.47 b. Form: Order Recalling and Quashing Writ of Execution

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER RECALLING AND** |
| **vs** | ) | **QUASHING WRIT OF** |
| _ _[*Name(s)*]_ _, | ) | **EXECUTION** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**The motion of _ _[*defendant/plaintiff*]_ _, _ _[*name*]_ _, for an order recalling and quashing the writ of execution came on regularly this day for hearing. _ _[*Name*]_ _ appeared as attorney for plaintiff, _ _[*name*]_ _, and _ _[*name*]_ _ appeared as attorney for defendant, _ _[*name*]_ _. On proof being made to the satisfaction of the court, and good cause appearing,**

**IT IS ORDERED that the writ of execution issued on _ _[*date*]_ _, be recalled and quashed and that the writ be returned at once.**

**IT IS FURTHER ORDERED that the property levied on under the writ be restored to _ _[*name*]_ _, the levy being hereby quashed, vacated, discharged, and set aside.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

*Copies:* Original (filed with court clerk); copies for service (one for each attorney of record and unrepresented party); office copies.

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### 4. Remedies After Execution Sale

### §9.48 a. Restitution After Reversal of Judgment

When a judgment debtor appeals but does not obtain a stay of enforcement of the judgment, the judgment creditor may levy on the judgment debtor's property despite the appeal. On stays of enforcement, see §§9.43-9.45. If the judgment is reversed, vacated, or otherwise set aside on appeal, the judgment debtor may recover from the judgment creditor the proceeds of a sale under the judgment with interest at the rate on money judgments to the extent the proceeds were applied to satisfy the judgment. CCP §701.680(b).

See CCP §908 for reviewing court's right to order restitution and direct entry of a money judgment sufficient to compensate for property or rights not restored after reversing or modifying an order. "This appellate power is rarely exercised; the normal procedure is relief in the trial court either by motion or an independent action." 8 Witkin, California Procedure, *Enforcement of Judgment* §166(1) (5th ed 2009).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.49 b. Setting Aside Improper Execution Sale; Damages

### §9.49 b. Setting Aside Improper Execution Sale; Damages

A sale of property under CCP §§701.510-701.680 is absolute and cannot be set aside for any reason except as provided in CCP §701.680(c). CCP §701.680(a). Under CCP §701.680(c)(1), when an execution sale is improper because of irregularities in the proceedings, or because the property sold was not subject to execution or for any other reason, and the purchaser at the sale is the judgment creditor, then the judgment debtor or the judgment debtor's successor in interest may, within 90 days after the sale date, commence an action to set aside the sale. If the sale is set aside, any liens extinguished by the sale of the property are revived and reattach to the property with the same priority and effect as if the sale had not been made. CCP §701.680(c)(1). The judgment creditor is entitled to interest on the amount of the revived judgment. CCP §701.680(c)(1).

Under CCP §701.680(c)(2), the judgment debtor or the judgment debtor's successor in interest may also recover damages caused by such impropriety. Damages recovered against the judgment creditor must be offset against the judgment to the extent the judgment is not satisfied. CCP §701.680(c)(2). Similarly, damages recovered against the levying officer must be applied to the judgment to the extent the judgment is not satisfied. CCP §701.680(c)(2).

For purposes of CCP §701.680(c), a purchaser of property at an execution sale is not deemed a "successor in interest." CCP §701.680(d).

**PRACTICE TIP:** In an appropriate case concerning a wrongful execution, the judgment debtor may be able to allege tort causes of action, such as abuse of process, slander of title, or conversion. See cases decided before enactment of the Enforcement of Judgments Law, discussed in 8 Witkin, California Procedure, *Enforcement of Judgment* §167 (5th ed 2009).

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## M. THIRD PARTY CLAIMS

### §9.49A 1. In General

Occasionally property will be levied on when a claim is made that the property is not that of the judgment debtor. Common occurrences would be a bank levy when the money is alleged to be the separate property of the nondebtor spouse, or a tangible asset, such as an item of personal property, in which ownership is claimed by someone other than the judgment debtor. The remedy is for the property owner to file a third party claim. CCP §§720.010-720.800. The claim may be based on either ownership of the property or a senior security interest in the property.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.49B 2. Third Party Claim of Ownership or Possession

### §9.49B 2. Third Party Claim of Ownership or Possession

A third party who claims either ownership or a right to possession of the asset levied on may file a third party claim for either real or personal property. It may be filed whether the property is levied on under a writ of attachment, writ of execution, writ of sale, or prejudgment or postjudgment writ of possession. CCP §720.110.

The claim is filed with the levying officer who made the levy before the officer either sells the property, delivers possession of the property to the creditor, or pays over the proceeds of collection to the creditor. CCP §720.120. The third party claim must be executed under oath and contain the name of the third person and a California address where service by mail may be made on the third person. It must also contain a description of the property in which an interest is claimed; a description of the interest claimed, including a statement of the facts on which the claim is based; and an estimate of the market value of the interest claimed. A copy of any writing on which the claim is based must be attached. At a hearing on the third party claim, the court may exclude from evidence any writing or copy of a writing that was not attached to the third party claim. CCP §720.130.

**PRACTICE TIP:** These papers constitute the pleadings of the third party claimant for a nonjury trial that will determine rights to the property being levied on. Make sure the claim meets all statutory requirements and would stand generally on its own as an independent lawsuit over ownership of the asset levied on.

No later than 5 days after receipt, the levying officer serves a copy of the third party claim on the levying creditor. The levying officer also serves a statement indicating whether an undertaking has been filed, and if so, a notice that the property will be released unless the creditor objects to the undertaking within the time specified in the notice. If the third party claimant has not filed an undertaking, the levying officer must serve notice on the creditor that the property will be released unless the creditor files with the levying officer an undertaking that satisfies the requirements of §720.160 within the time specified in the notice. CCP §720.140(a).

**PRACTICE TIP:** There may be strategic reasons for the third party to file or not file an undertaking. See CCP §720.160 for the particulars on the amount of the undertaking and the effects of filing or not filing.

Once a third party claim has been filed, the levying officer may not sell or deliver possession of the property to the creditor, or pay over the proceeds of collection to the creditor. CCP §720.150(b). Although failure to file a third party claim does not affect the third party's interest in the property (CCP §720.150(b)), it may make it impossible to recover the tangible asset if the asset is sold by the levying officer to a bona fide purchaser without notice for value.

If the levying creditor fails to object to an undertaking filed by the third party or to post an undertaking of its own, the property is released to the person making the third party claim. See §§9.49F-9.49G.

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### §9.49C 3. Third Party Claim of Security Interest or Lien

A third party who claims either a security interest in or a lien on the asset levied on may file a third party claim for either real or personal property, whether the property has been levied on under a writ of attachment, writ of execution, writ of sale, or prejudgment or postjudgment writ of possession. CCP §720.210.

A third party with a security interest that claims losses due to the creditor's enforcement action is not limited to recovering the amount of an undertaking given by the creditor, but may recover actual damages beyond that amount. *Franke v BAM Bldg. Co.* (2009) 172 CA4th 224, 230, 91 CR3d 212.

The claim must be filed with the levying officer before the officer sells or delivers possession of the property to the creditor or pays over the proceeds of collection to the creditor. CCP §720.220. The third party claim must be executed under oath. It must contain the name of the secured party or lienholder and a California address where service by mail may be made on the secured party or lienholder; a description of the personal property in which a security interest or lien is claimed; a detailed description of the security interest or lien claimed, including a statement of the facts on which it is based; and a statement of the total amount due or to accrue under the security interest or lien and the applicable rate of interest on those amounts. CCP §720.230(a).

No later than 5 days after receiving the claim, the levying officer serves a copy of the third party claim on the creditor. The officer also serves a statement indicating whether an undertaking has been filed, and if so, a notice that the property will be released unless the creditor objects to the undertaking within the time specified in the notice. If the third person has not filed an undertaking, the officer serves a notice that the property will be released unless, within the time specified in the notice, the creditor files with the levying officer an undertaking that satisfies the requirements of CCP §§720.260 and 720.240(a).

Once a third party claim has been filed, the levying officer may not sell the property, deliver possession of the property to the creditor, or pay over the proceeds of collection to the creditor. CCP §720.250(a). Although failure to file a third party claim does not affect the third party's interest in the property (CCP §720.250(b)), it may make it impossible to recover the tangible asset if it is sold by the levying officer to a bona fide purchaser without notice for value.

If the levying creditor fails to object to an undertaking filed by the third party or to post an undertaking of its own, the property is released to the person making the third party claim.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.49D 4. Hearing on Third Party Claim

### §9.49D 4. Hearing on Third Party Claim

Timing becomes critical in dealing with third party claims. Not later than 15 days after the third-party claim is filed with the levying officer under CCP §§720.120 or 720.220, or 15 days after filing an undertaking under §720.610, either the creditor or the third party may petition the court for a hearing to determine the validity of the third party claim and the proper disposition of the property that is the subject of the claim. CCP §720.310(a).

**PRACTICE TIP:** Note that these times run from when the levying officer was served with the third party claim, not when the levying officer served the notice on the levying creditor. This time may be extended by 5 days if the levying officer serves the levying creditor by mail.

The hearing may be held whether or not an undertaking has been filed but not if a deposit has been made under CCP §720.260.

The hearing shall be held within 20 days after the filing of the petition unless continued by the court for good cause shown. CCP §720.310(c).

**NOTE:** The general notice statute for a motion or other hearing requires 16 days notice plus an additional 5 days if served by mail. CCP §§1005(b), 1013.

Once the hearing date is set, the requesting party, who may be either the levying creditor or the third party, serves the other party, the judgment debtor, and the levying officer. CCP §720.320. The levying officer files the original third party claim and supporting documents. These papers constitute the pleadings of the third party claimant. CCP §720.350(a)(1), (2). The burden of proof is on the third party claimant. CCP §720.360. Although the Enforcement of Judgments Law is silent about who has the burden of going forward with the evidence, the Evidence Code provides that the burden of producing evidence for a particular fact is initially on the party with the burden of proof for that fact. Evid C §550(b).

Once a hearing has been requested, the requesting party may not dismiss the proceedings without the consent of the nonrequesting party. CCP §720.370. The court may enter an order staying the sale or other disposition of the property until the rights of the parties are determined by the hearing. CCP §720.380.

The court is required to give a judgment at the conclusion of the hearing. CCP §720.390. No findings are required (CCP §720.400); there is no right to a jury trial (CCP §720.410). A judgment from a third party claim hearing is appealable. CCP §720.420.

**NOTE:** A third party proceeding is summary in nature. The creditor must anticipate all evidentiary needs and adequately prepare, as no leave for discovery will be permitted. *Whitehouse v Six Corp.* (1995) 40 CA4th 527, 535, 48 CR2d 600.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.49E 5. Creditor's Demand for Third Party Claim by Secured Party or Lienholder

### §9.49E 5. Creditor's Demand for Third Party Claim by Secured Party or Lienholder

A levying creditor may know of or believe that there is a secured lienholder but may wish to proceed anyway, *e.g*., with a levy on an expensive vehicle that is believed to be mostly paid off. If, after the levy is made, no claim is filed by a lienholder, the levying creditor may demand that such a claim be filed. CCP §§720.510-720.550. Once the demand is made, the secured party has 30 days in which to make the third party claim. If no such claim is made, the secured party or lienholder loses his priority as related to the levying creditor but retains his position regarding all other secured parties or lienholders.

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### §9.49F 6. Third Party Undertaking to Release Property

When a third party claim is filed, the third party is not required to file an undertaking. If no undertaking is filed, the property will be released to the third party claimant unless the levying creditor posts an undertaking (see §9.51). If such an undertaking is filed, the levying officer retains the property levied on until after a hearing has been held. However, the third party may file a undertaking of its own to have the property released. CCP §720.620.

The contents of the undertaking are prescribed by CCP §720.630(b)-(c).

**PRACTICE TIP:** There is a trap in CCP §720.630(d), which provides that if the levying creditor has posted a bond, the release bond need not be in a greater amount. For example, a bank levy is made and $80,000 is taken under the levy. A third party claim of ownership is filed with no undertaking. The levying creditor then posts an undertaking in the amount of $10,000 under CCP §720.160 or §720.260. At this point the $80,000 in cash will be held until the hearing resolves ownership. Now, the third party files a release undertaking under CCP §720.630(d) in the amount of $10,000. The $80,000 in cash is now released to the third party and the $10,000 release undertaking is held pending the hearing. At the hearing the levying creditor prevails, but receives only the release undertaking of $10,000; the other $70,000 is gone.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.49G 7. Undertakings

## §9.49G 7. Undertakings

The Bond and Undertaking Law (CCP §995.010-996.560) applies to undertakings under the enforcement of judgments law (CCP §§680.010-724.210). For further information on that law see Enforcing Civil Money Judgments (Cal CEB Action Guide November 2008); Enforcing Security Interests in Personal Property (Cal CEB Action Guide June 2007).

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## III. EXEMPTIONS FROM LEVY OF EXECUTION

### §9.50 A. General Principles

A judgment debtor or property owner who has been served with a notice of levy under a writ of execution (see §§9.9-9.10) may take steps to exempt from the levy certain of the property described in the notice. Generally, a claim of exemption is filed with the levying officer, using a Judicial Council form, under the procedure specified in CCP §§703.510-703.610. See §§9.56-9.67 for procedures and forms.

Special procedures apply to claiming exemptions for earnings (see chap 10) and for homesteads (see §§9.88-9.95). Claiming exemptions in attachment proceedings is discussed in §§6.24-6.29. On claiming an exemption when other enforcement procedures are used, see §§8.28, 11.5, 11.18, 11.31, 11.40. Exemptions for social security deposit accounts are covered in CCP §704.080(a).

Judicial Council Form EJ-155 lists assets that may be exempt from levy, citing for each item listed the relevant California and federal statutes. This list is substantially reproduced in §9.55. A list of state law exemptions and the amounts of the exemptions is reproduced in §9.55A.

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## §9.51 1. Dates for Determining Exemptions and Procedures

Determinations of whether property is exempt and of the amount of an exemption are based on the exemption statutes in effect at the time the judgment creditor's lien was created or, if the judgment creditor's lien is the latest in a series of overlapping liens created when an earlier lien in favor of the judgment creditor was in effect, at the time the earliest lien was created. CCP §703.050(a). The code thus rejects the rule of prior case law that the debtor is bound by the exemptions in effect when the obligation was incurred. See, *e.g., In re Rauer's Collection Co.* (1948) 87 CA2d 248, 196 P2d 803.

The procedures to follow in a levy of execution and in claiming, processing, or determining exemptions, or in paying exemption proceeds, are governed by the law in effect when the property is levied on. CCP §703.050(c).

The legislature has the right to repeal, alter, or add exemptions and the procedures used to determine them. Any such changes will apply to both existing and future money judgments. CCP §703.060.

Whether a particular item is exempt is determined under the circumstances existing at the earliest of (CCP §703.100):

- The time of levy;
- The time court proceedings to apply the property to satisfy a money judgment begin; or
- The time an attachment lien or judgment lien was created.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.52 2. Construing Exemption Provisions; Public Policy Considerations

## §9.52 2. Construing Exemption Provisions; Public Policy Considerations

Exemption statutes are enacted on the ground of public policy to protect debtors and their families. The general rule of California courts is to construe any provision that seems to limit the exemption liberally in favor of the party claiming an exemption. See, *e.g., Newport Nat'l Bank v Adair* (1969) 2 CA3d 1043, 83 CR 1; *Independence Bank v Heller* (1969) 275 CA2d 84, 79 CR 868. The debtor must be careful to comply with the statute granting the exemption, particularly its description of the type of property that may be exempt.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.53 3. Foreclosures; Consensual Liens

## §9.53 3. Foreclosures; Consensual Liens

The exemption laws do not protect property from foreclosure of a mortgage, a deed of trust, or other types of consensual liens. Property is exempt only from the enforcement of involuntary liens, such as judgment or attachment liens. CCP §703.010(b).

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## §9.54 4. Property Not Subject to Levy

Some types of property may not be levied because they are described by statute as "not subject to enforcement of a money judgment." CCP §695.060. See generally CCP §§695.010-695.070. Other types of property are protected from levy because they are described by statute as "not subject to execution." See CCP §§699.710-699.720.

Examples include an alcoholic beverage license, a partner's interest when the partnership is not a judgment debtor, the unpaid debt of a public entity (other than earnings), the interest of a trust beneficiary, and the loan value of an unmatured life insurance policy. CCP §699.720(a). However, such restriction does not necessarily shield the property from application to satisfy a money judgment under a procedure other than levy. CCP §699.720(b).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.55 B. Exemptions From Enforcement of Judgments

## §9.55 B. Exemptions From Enforcement of Judgments

The following is a list of types of property and applicable statutes issued by the Judicial Council. See Judicial Council Form EJ-155; CCP §681.030(c). The levying officer must serve a copy of Form EJ-155 with each writ of execution and notice of levy. CCP §700.010.

| Type of Property | Code and Section |
|---|---|
| Accounts (see Deposit Accounts) | |
| Appliances | CCP §704.020 |
| Art and Heirlooms | CCP §704.040 |
| Automobiles | CCP §704.010 |
| Benefit Payments: | |
| BART District Benefits | CCP §704.110<br>Pub Util C §28896 |
| Charity | CCP §704.170 |
| Civil Service Retirement Benefits (Federal) | 5 USC §8346 |
| County Employees Retirement Benefits | CCP §704.110<br>Govt C §31452 |
| Disability Insurance Benefits | CCP §704.130 |
| Fire Service Retirement Benefits | CCP §704.110<br>Govt C §322.10 |
| Fraternal Organization Funds Benefits | CCP §704.130<br>CCP §704.170 |
| Health Insurance Benefits | CCP §704.130 |
| Irrigation System Retirement Benefits | CCP §704.110 |
| Judges Survivors Benefits (Federal) | 28 USC §376(n) |
| Legislators Retirement Benefits | CCP §704.110<br>Govt C §9359.3 |
| Life Insurance Benefits: | |
| Group | CCP §704.100 |
| Individual | CCP §704.100 |
| Lighthouse Keepers Widows Benefits | 33 USC §775 |
| Longshore & Harbor Workers Compensation or Benefits | 33 USC §916 |
| Military Benefits: | |
| Retirement | 10 USC §1440 |
| Survivors | 10 USC §1450 |
| Municipal Utility District Retirement Benefits | CCP §704.110<br>Pub Util C §12337 |

| | |
|---|---|
| Peace Officers Retirement Benefits | CCP §704.110<br>Govt C §31913 |
| Pension Plans (and Death Benefits): | |
| Private | CCP §704.115 |
| Public | CCP §704.110 |
| Public Assistance | CCP §704.170<br>Welf & I C §17409 |
| Railroad Retirement Benefits | 45 USC §231m |
| Railroad Unemployment Insurance | 45 USC §352(e) |
| Relocation Benefits | CCP §704.180 |
| Retirement Benefits and Contributions: | |
| Private | CCP §704.115 |
| Public | CCP §704.110 |
| Segregated Benefit Funds | Ins C §10498.6 |
| Social Security Benefits | 42 USC §407 |
| Strike Benefits | CCP §704.120 |
| Transit District Retirement Benefits (Alameda and Contra Costa Counties) | CCP §704.110<br>Pub Util C §25337 |
| Unemployment Benefits and Contributions | CCP §704.120 |
| Veterans Benefits | 38 USC §3101 |
| Veterans Medal of Honor Benefits | 38 USC §1562 |
| Welfare Payments | CCP §704.170<br>Welf & I C §17409 |
| Boats | CCP §704.060<br>CCP §704.710 |
| Books | CCP §704.060 |
| Building Materials (Residential) | CCP §704.030 |
| Business: | |
| Licenses | CCP §695.060<br>CCP §699.720(a)(1) |
| Tools of Trade | CCP §704.060 |
| Cars and Trucks (including proceeds) | CCP §704.010 |
| Cash | CCP §704.070 |
| Cemeteries | |
| Land Proceeds | Health & S C §7925 |
| Plots | CCP §704.200 |
| Charity | CCP §704.170 |
| Claims, Actions, and Awards: | |
| Personal Injury | CCP §704.140 |
| Workers Compensation | CCP §704.160 |

| | |
|---|---|
| Wrongful Death | CCP §704.150 |
| Clothing | CCP §704.020 |
| Condemnation Proceeds | CCP §704.720(b) |
| Damages (See Personal Injury Actions or Damages) | |
| Deposit Accounts: | |
| Escrow or Trust Funds | Fin C §17410 |
| Social Security Direct Deposits | CCP §704.080 |
| Direct Deposit Account—Social Security | CCP §704.080 |
| Dwelling House | CCP §704.740 |
| Earnings | CCP §704.070<br>15 USC §1673(a) |
| Educational Grant | Ed C §21116 |
| Employment Bonds | Lab C §404 |
| Financial Assistance: | |
| Charity | CCP §704.170 |
| Public Assistance | CCP §704.170<br>Welf & I C §17409 |
| Student Aid | CCP §704.190 |
| Welfare (See Public Assistance) | |
| Fire Service Retirement | CCP §704.110<br>Govt C §32210 |
| Fraternal Organizations Funds and Benefits | CCP §704.130<br>CCP §704.170 |
| Fuel for Residence | CCP §704.020 |
| Furniture | CCP §704.020 |
| General Assignment for Benefit of Creditors | CCP §1801 |
| Health Aids | CCP §704.050 |
| Home: | |
| Building Materials | CCP §704.030 |
| Dwelling House | CCP §704.740 |
| House Trailer | CCP §704.710 |
| Mobilehome | CCP §704.710 |
| Homestead | CCP §704.720<br>CCP §704.730 |
| Household Furnishings | CCP §704.020 |
| Insurance: | |
| Disability Insurance | CCP §704.130 |
| Fraternal Benefit Society | CCP §704.110 |
| Group Life | CCP §704.100 |

| | |
|---|---|
| Individual | CCP §704.100 |
| Insurance Proceeds—Motor Vehicle | CCP §704.010 |
| Jewelry | CCP §704.040 |
| Licenses | CCP §695.060 |
| Military Personnel—Property | 50 USC §532(b) |
| Motor Vehicle (including proceeds) (used in exercise of trade, business, or profession | CCP §704.010<br>CCP §704.060 |
| Personal Effects | CCP §704.020 |
| Personal Injury Actions or Damages | CCP §704.140 |
| Prisoners Funds | CCP §704.090 |
| Property Not Subject to Enforcement of Money Judgments | CCP §704.210 |
| Prosthetic and Orthopedic Devices | CCP §704.050 |
| Provisions (for Residence) | CCP §704.020 |
| Public Employees: | |
| Death Benefits | CCP §704.110 |
| Pension | CCP §704.110 |
| Retirement Benefits | CCP §704.110 |
| Vacation Credits | CCP §704.113 |
| Servicemembers Property | 50 USC §532(b) |
| Student Aid | CCP §704.190 |
| Tools of Trade | CCP §704.060 |
| Travelers Check Sales Proceeds | Fin C §1875 |
| Uniforms | CCP §704.060 |
| Vacation Credits (Public Employees) | CCP §704.113 |
| Veterans Benefits | 38 USC §3101 |
| Veterans Medals of Honor Benefits | 38 USC §1562(c) |
| Wages | CCP §704.070<br>CCP §706.050<br>CCP §706.051 |
| Welfare Payments | CCP §704.170<br>Welf & I C §17409 |
| Workers Compensation Claims or Awards | CCP §704.160 |
| Wrongful Death Actions or Damages | CCP §704.150 |

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.55A C. Form: Current Dollar Amounts of Exemptions From Enforcement of Judgments (Administrative Office of the Courts)

## §9.55A C. Form: Current Dollar Amounts of Exemptions From Enforcement of Judgments (Administrative Office of the Courts)



**CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS**
**Code of Civil Procedure sections 704.010 et seq. and 703.140(b)**

## EXEMPTIONS UNDER SECTION 704.010 et seq.

The following lists the current dollar amounts of exemptions from enforcement of judgment under title 9, division 2, chapter 4, article 3 (commencing with section 704.010) of the Code of Civil Procedure.

These amounts are effective April 1, 2007. They will be adjusted at each three-year interval, ending on April 1. The amount of the adjustment is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code of Civ. Proc., § 703.150(c).)

| Code of Civ. Proc. Section | Type of Property | Amount of Exemption |
|---|---|---|
| 704.010 | Motor vehicle (any combination of aggregate equity, proceeds of execution sale, and proceeds of insurance or other indemnification for loss, damage, or destruction) | $ 2,550 |
| 704.030 | Material to be applied to repair or maintenance of residence | $ 2,700 |
| 704.040 | Jewelry, heirlooms, art | $ 6,750 |
| 704.060 | Personal property used in debtor's or debtor's spouses's trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed $4,850) | $ 6,750 |
| 704.060 | Personal property used in debtor's and spouse's common trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed $9,700) | $ 13,475 |
| 704.080 | Deposit account with direct payment of social security or public benefits (exemption without claim, section 704.080(b))[1] | |
| | • Public benefits, one depositor is designated payee | $ 1,350 |
| | • Social security benefits, one depositor is designated payee | $ 2,700 |
| | • Public benefits, two or more depositors and designated payees[2] | $ 2,025 |
| | • Social security benefits, two or more depositors are designated payees[2] | $ 4,050 |
| 704.090 | Inmate trust account | $ 1,350 |
| | Inmate trust account (restitution fine or order) | $ 300[3] |
| 704.100 | Aggregate loan value of unmatured life insurance policies | $ 10,775 |

[1] The amount of deposit account that exceeds exemption amounts is also exempt to the extent it consists of payments of public benefits or social security benefits. (Code of Civ. Proc., § 704.080(c).)

[2] If only one joint payee is a beneficiary of the payment, the exemption is in the amount available to a single designated payee. (Code of Civ. Proc., § 704.080(b)(3) and (4).)

[3] This amount is not subject to adjustments under Code of Civ. Proc., § 703.150.



Administrative Office of the Courts
[Rev. April 1, 2007]

Print

**CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS**
**Code of Civil Procedure sections 704.010 et seq. and 703.140(b)**

## EXEMPTIONS UNDER SECTION 703.140(b)

The following lists the current dollar amounts of exemptions from enforcement of judgment under Code of Civil Procedure section 703.140(b).

These amounts are effective April 1, 2007. They will be adjusted at each three-year interval, ending on April 1. The amount of the adjustment is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest $25. (See Code of Civ. Proc., § 703.150(c).)

| Code of Civ. Proc., § 703.140(b) | Type of Property | Amount of Exemption |
|---|---|---|
| (1) | The debtor's aggregate interest in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as residence, or in a burial plot for the debtor or a dependent of the debtor | $ 20,725 |
| (2) | The debtor's interest in one motor vehicle | $ 3,300 |
| (3) | The debtor's interest in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor (value is of any particular item) | $ 525 |
| (4) | The debtor's aggregate interest in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor | $ 1,350 |
| (5) | The debtor's aggregate interest, plus any unused amount of the exemption provided under paragraph (1), in any property | $ 1,100 |
| (6) | The debtor's aggregate interest in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor | $ 2,075 |
| (8) | The debtor's aggregate interest in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent | $ 11,075 |
| (11)(D) | The debtor's right to receive, or property traceable to, a payment on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent | $ 20,725 |



*Comment:* This form, prepared by the Administrative Office of the Courts at the direction of the Judicial Council,

provides a current list of the dollar amounts of exemptions from enforcement of judgments. The amounts are effective for 3 years beginning April 1, 2007. See CCP §703.150(a).

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### D. Procedure

### §9.56 1. Time to File; Waiver

Ordinarily, a written claim of exemption must be filed with the levying officer within 10 days after the date of service of the notice of levy. CCP §703.520(a). It appears that the time for filing an exemption claim is extended by the time periods specified in CCP §1013 when the notice of levy is served by mail. See Notice of Levy, page 2, Information for Judgment Debtor, Item 2, in §9.10.

Failure to file a claim within the permitted time may waive the exemption. CCP §703.030(a). However, a debtor who fails to file a timely claim may apply to the court for relief under CCP §473. The time limit appears not to apply to property described by a statute as "exempt without making a claim" (CCP §703.030(b)) or as "not subject to enforcement of a money judgment" (CCP §704.210).

A prior agreement not to claim a statutory exemption or a contractual waiver is against public policy and void. CCP §703.040.

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## §9.57 2. Who May File

A written claim of exemption may be signed and filed by (CCP §703.020(b)):

- The judgment debtor;
- Anyone acting on the judgment debtor's behalf; or
- For community property, the judgment debtor's spouse, whether or not the spouse is also a debtor under the same judgment.

Because the exemptions in CCP §§703.010-704.995 apply only to the property of a natural person (CCP §703.020(a)), ordinarily only a natural person may claim them. However, the trustees of a revocable living trust are entitled to claim a declared homestead exemption. *Fisch, Spiegler, Ginsburg & Ladner v Appel* (1992) 10 CA4th 1810, 1813, 13 CR2d 471. It is unclear whether the trustees could also claim exemptions for other property held in the trust, but there is no logical reason they should not be able to.

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### §9.58 3. How to File

A written claim of exemption and a copy of the claim must be filed with the levying officer, not with the court. CCP §703.520(a). The levying officer's name and address must appear on the notice of levy along with the file number by which the levying officer has identified the procedure.

Presumably, the claim may be filed by mailing the claim form to the levying officer, although the date of filing is apparently the date that the officer receives the claim form, not the date of mailing. A safer way to avoid waiving the exemption claim is to hand deliver the form to the office of the levying officer.

**PRACTICE TIP:** A duplicate copy of the claim form should be date-stamped by the levying officer for counsel's records.

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## §9.59 4. Form of Claim and Financial Statement

Exemptions may be claimed by filing with the levying officer the appropriate Judicial Council form. Most exemption claims are made with Form EJ-160 (Claim of Exemption (Enforcement of Judgment)). See §9.60. Use of this form is optional; it must be accepted for filing if properly filled in and timely filed (Cal Rules of Ct 1.35(a)-(c)), but a typewritten exemption claim meeting the requirements of CCP §703.520(b) may also be used.

If the extent of the exemption is based on the needs of the judgment debtor and of his or her spouse and dependents, a financial statement must be filed with the exemption claim. CCP §§703.520(b)(4), 703.530. The printed Judicial Council Financial Statement form (which has the dual identity numbers of WG-007 and EJ-165) is reprinted in §9.61. In nongarnishment situations requiring a financial statement, a judgment debtor may file either the printed form, EJ-165, or a typewritten version that meets the requirements of CCP §703.530(b).

If the debtor claims an exemption for certain types of property, such as a motor vehicle, tools of the trade, or life insurance, the debtor must list all other property of the same type he or she owns so that the court can determine to which property the exemption should apply. CCP §703.520(b)(3).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.60 a. Form: Claim of Exemption (Enforcement of Judgment) (Judicial Council Form EJ-160)

## §9.60 a. Form: Claim of Exemption (Enforcement of Judgment) (Judicial Council Form EJ-160)



*[NOT FOR WAGE GARNISHMENT]*
*RETURN TO LEVYING OFFICER. DO NOT FILE WITH COURT*

EJ-160

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR LEVYING OFFICER USE ONLY (Levying Officer Name and Address)* |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/PETITIONER:<br>DEFENDANT/RESPONDENT: | LEVYING OFFICER FILE NUMBER: |
| **CLAIM OF EXEMPTION**<br>**(Enforcement of Judgment)** | *FOR COURT USE ONLY* |
| | CASE NUMBER: |

***Copy all the information required above (except the top left space) from the* Notice of Levy*. The top left space is for your name or your attorney's name and address. The original and one copy of this form must be filed with the levying officer.***
***DO NOT FILE WITH THE COURT.***

1. My name is:
2. Papers should be sent to:
   - ☐ me.
   - ☐ my attorney (I have filed with the court and served on the judgment creditor a request that papers be sent to my attorney and my attorney has consented in writing on the request to receive these papers.)

   at the address ☐ shown above ☐ following *(specify)*:

3. ☐ I am not the judgment debtor named in the notice of levy. The name and last known address of the judgment debtor *is (specify)*:

4. The property I claim to be exempt is *(describe)*:

5. The property is claimed to be exempt under the following code and section *(specify)*:

6. The facts which support this claim are *(describe)*:

7. ☐ The claim is made pursuant to a provision exempting property to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor. **A Financial Statement form is attached to this claim.**
8. ☐ The property claimed to be exempt is
   - a. ☐ a motor vehicle, the proceeds of an execution sale of a motor vehicle, or the proceeds of insurance or other indemnification for the loss, damage, or destruction of a motor vehicle.
   - b. ☐ tools, implements, materials, uniforms, furnishings, books, equipment, a commercial motor vehicle, a vessel, or other personal property used in the trade, business or profession of the judgment debtor or spouse.
   - c. all other property of the same type owned by the judgment debtor, either alone or in combination with others, is *(describe)*:

9. ☐ The property claimed to be exempt consists of the loan value of unmatured life insurance policies (including endowment and annuity policies) or benefits from matured life insurance policies (including endowment and annuity policies). All other property of the same type owned by the judgment debtor or the spouse of the judgment debtor, either alone or in combination with others, is *(describe)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____

*(TYPE OR PRINT NAME)* *(SIGNATURE OF DECLARANT)*



Form Approved by the Judicial Council of California
EJ-160 [Rev. January 1, 2009]

**CLAIM OF EXEMPTION**
**(Enforcement of Judgment)**

CEB
Code of Civil Procedure, § 703.520
www.courtinfo.ca.gov

*Copies:* Original and one copy (file both with levying officer); office copies.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.61 b. Form: Financial Statement (Judicial Council Form WG-007/EJ-165)

## §9.61 b. Form: Financial Statement (Judicial Council Form WG-007/EJ-165)



| SHORT TITLE: | LEVYING OFFICER FILE NO. | COURT CASE NO. |
|---|---|---|
| | | |

# FINANCIAL STATEMENT

**(Wage Garnishment—Enforcement of Judgment**

**NOTE: If you are married, this form must be signed by your spouse unless you and your spouse are living separate and apart. If this form is not signed by your spouse, check the applicable box on the reverse in item 9.**

1. The following persons other than myself depend, in whole or in part, on me or my spouse for support:

| | NAME | AGE | RELATIONSHIP TO ME | MONTHLY TAKE-HOME INCOME & SOURCE |
|---|---|---|---|---|
| a. | | | Spouse | |
| b. | | | | |
| c. | | | | |
| d. | | | | |
| e. | | | | |

**2. My monthly income**

a. My gross monthly pay is: . . . . . 2a. $ _____

b. My payroll deductions are *(specify **purpose** and amount):*

(1) Federal and state withholding, FICA, and SDI. . . . . $ _____

(2) _____ $ _____

(3) _____ $ _____

(4) _____ $ _____

My TOTAL payroll deduction amount is *(add (1) through (4)):* ..... b. $ _____

c. My monthly take-home pay is *(a minus b):* ..... c. $ _____

d. Other money I get each month from *(specify source):*

_____ is ..... d. $ _____

**e. TOTAL MONTHLY INCOME** *(c plus d)* ..... e. $ _____

**3. I, my spouse, and my other dependents own the following property:**

a. Cash ..... 3a. $ _____

b. Checking, savings, and credit union accounts *(list banks):*

(1) _____ $ _____

(2) _____ $ _____

(3) _____ $ _____ b. $ _____

c. Cars, other vehicles, and boat equity *(list make, year of each):*

(1) _____ $ _____

(2) _____ $ _____

(3) _____ $ _____ c. $ _____

d. Real estate equity ..... d. $ _____

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.) *(list separately):*

e. $ _____



Form Adopted by the Judicial Council of California
WG-007/EJ-165 [Rev. January 1, 2007]



Code of Civil Procedure, §§ 706.124, 703.530
www.courtinfo.ca.gov

CEB

| SHORT TITLE: | LEVYING OFFICER FILE NO. | COURT CASE NO. |
|---|---|---|
| | | |

4. **The monthly expenses for me, my spouse, and my other dependents**

| | | |
|---|---|---|
| a. Rent or house payment and maintenance | 4 a. $ | |
| b. Food and household supplies | b. $ | |
| c. Utilities and telephone | c. $ | |
| d. Clothing | d. $ | |
| e. Medical and dental payments | e. $ | |
| f. Insurance (life, health, accident, etc.) | f. $ | |
| g. School, child care | g. $ | |
| h. Child, spousal support (prior marriage) | h. $ | |
| i. Transportation & auto expenses (insurance, gas, repair) *(list car payments in item 5)* | i. $ | |
| j. Installment payments *(insert total and itemize below in item 5)* | j. $ | |
| k. Laundry and cleaning | k. $ | |
| l. Entertainment | l. $ | |
| m. Other *(specify):* | m. $ | |
| n. **TOTAL MONTHLY EXPENSES** *(add a through m):* | n. $ | |

5. **I, my spouse, and my other dependents owe the following debts:**

| CREDITOR'S NAME | FOR | MO. PAYMENTS | BALANCE OWED | OWED BY *(State person's name)* |
|---|---|---|---|---|
| | | | | |

6. Other facts which support this Claim of Exemption (i.e., unusual medical needs, school tuition, expenses for recent family emergencies, or other unusual expenses to help your creditor and the judge understand your budget) *(describe): (If more space is needed, attach page labeled Attachment 6.)*

7. ☐ An earnings withholding order is now in effect with respect to my earnings or those of my spouse or dependents named in item 1 (specify *each person's name and monthly amount):*

8. ☐ A wage assignment for support is now in effect with respect to my earnings or those of my spouse or dependents named in item 1 (specify *each person's name and monthly amount):*

9. ☐ My spouse has signed below.
   ☐ I have no spouse.
   ☐ My spouse and I are living separate and apart.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

**Date:**

_____ *(TYPE OR PRINT NAME)*

_____ *(SIGNATURE)*

_____ *(TYPE OR PRINT NAME OF SPOUSE)*

_____ *(SIGNATURE OF SPOUSE)*



*Copies:* Original and one copy (attach both to claim of exemption and file with levying officer); office copies.

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### §9.62 5. Levying Officer's Responsibilities; Notice to Creditor

On receiving the exemption claim, the levying officer serves on the creditor, either personally or by regular mail, a copy of the claim and a notice of claim of exemption stating that the levying officer will release the property to the debtor unless, within the time specified in the notice, the creditor files with the levying officer a copy of both the notice of opposition to the claim of exemption and the notice of motion for an order determining the exemption claim. CCP §703.540.

The levying officer files the claim with the court only on receiving timely filed notices of opposition and hearing. CCP §703.550.

Except as otherwise provided by statute or order of the court, the levying officer must not release, sell, or dispose of the property until an appeal is waived, time to file an appeal has expired, or a final determination on the exemption has been made. CCP §703.610(a). Exceptions are specified in CCP §§685.100 (release for failure to pay levying officer's costs), 699.060 (release in general), 699.070 (sale to preserve value of property), and 720.660 (release under third person's undertaking).

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### §9.63 6. Opposition to Exemption Claim

A creditor who wishes to contest the debtor's claim of exemption must, within 10 days after service (by the levying officer) of the notice of claim of exemption, file with the court a notice of opposition to the claim (see Judicial Council form in §9.64) and a notice of hearing on claim of exemption (see Judicial Council form in §9.65). The creditor must also file a copy of each document with the levying officer, who then files the claim with the court. If the creditor does not file the appropriate papers with the levying officer within the specified time, the property that is claimed to be exempt must be released immediately. CCP §703.550. The hearing notice must designate a hearing date within 20 days after the date it is filed with the court unless the court continues the hearing for good cause. CCP §703.570(a).

The judgment creditor must also, at least 10 days before the hearing, serve a copy of the notices of opposition and hearing, personally or by mail, on the person claiming the exemption and, if a different person, on the judgment debtor. CCP §703.570(b).

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.64 a. Form: Notice of Opposition to Claim of Exemption (Judicial Council Form EJ-170)

## §9.64 a. Form: Notice of Opposition to Claim of Exemption (Judicial Council Form EJ-170)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br><br>DEFENDANT: | | |
| **NOTICE OF OPPOSITION TO CLAIM OF EXEMPTION**<br>**(Enforcement of Judgment)** | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |

***— DO NOT USE THIS FORM FOR WAGE GARNISHMENTS —***

**The original of this form and a Notice of Hearing on Claim of Exemption must be filed with the court.**

**A copy of this Notice of Opposition and the Notice of Hearing *must* be filed with the levying officer.**

**A copy of this Notice of Opposition and the Notice of Hearing must be served on the judgment debtor and other claimant at least 10 days *before* the hearing.**

TO THE LEVYING OFFICER:

1. Name and address of judgment creditor

2. Name and address of judgment debtor

Social Security Number *(if known)*:

3. ☐ Name and address of claimant *(if other than judgment debtor)*

4. The notice of filing claim of exemption states it was mailed on *(date)*:

5. The item or items claimed as exempt are
   a. ☐ not exempt under the statutes relied upon in the Claim of Exemption.
   b. ☐ not exempt because the judgment debtor's equity is greater than the amount provided in the exemption.
   c. ☐ other *(specify)*:

6. The facts necessary to support item 5 are
   ☐ continued on the attachment labeled Attachment 6.
   ☐ as follows:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . *(TYPE OR PRINT NAME)*

▶ _____ *(SIGNATURE OF DECLARANT)*



*Copies:* Original (file with court clerk); one copy (file with levying officer); one copy to be served on judgment debtor; one copy to be served on the person claiming the exemption (if different from judgment debtor); office copies.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.65 b. Form: Notice of Hearing on Claim of Exemption (Judicial Council Form WG-010/EJ-175)

## §9.65 b. Form: Notice of Hearing on Claim of Exemption (Judicial Council Form WG-010/EJ-175)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | TELEPHONE NO.: | *FOR COURT USE ONLY* |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT, JUDICIAL DISTRICT OR BRANCH COURT, IF ANY | | |
| PLAINTIFF:<br>DEFENDANT: | | |
| **NOTICE OF HEARING ON CLAIM OF EXEMPTION (Wage Garnishment—Enforcement of Judgment)** | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |

1. TO:

Name and address of levying officer

Name and address of judgment debtor

☐ Claimant, if other than judgment debtor *(name and address)*:

☐ Judgment debtor's attorney *(name and address)*:

2. **A hearing to determine the claim of exemption of**
   - ☐ judgment debtor
   - ☐ other claimant

   will be held as follows:

| a. date: | time: | ☐ dept.: | ☐ div.: | ☐ rm.: |
|---|---|---|---|---|

b. address of court:

3. ☐ **The judgment creditor will not appear at the hearing and submits the issue on the papers filed with the court.**

Date:

.....
*(TYPE OR PRINT NAME)*

▶ _____
*(SIGNATURE OF JUDGMENT CREDITOR OR ATTORNEY)*

*If you do not attend the hearing, the court may determine your claim based on the Claim of Exemption, Financial Statement (when one is required), Notice of Opposition to Claim of Exemption, and other evidence that may be presented.*



Form Approved by the Judicial Council of California
WG-010/EJ-175 [Rev. January 1, 2007]

**NOTICE OF HEARING ON CLAIM OF EXEMPTION**
**(Wage Garnishment—Enforcement of Judgment)**

Code of Civil Procedure, § 703.550, 706.107
*www.courtinfo.ca.gov*

Print



| SHORT TITLE: | LEVYING OFFICER FILE NO. | COURT CASE NO. |
|---|---|---|
| | | |

## PROOF OF SERVICE BY MAIL

I am over the age of 18 and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is *(specify):*

I served the attached Notice of Hearing on Claim of Exemption and the attached Notice of Opposition to Claim of Exemption by enclosing true copies in a sealed envelope addressed to each person whose name and address is given below and depositing the envelope in the United States mail with the postage fully prepaid.

(1) Date of deposit: (2) Place of deposit *(city and state):*

**NAME AND ADDRESS OF EACH PERSON TO WHOM NOTICE WAS MAILED**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

..... ▶ _____

*(TYPE OR PRINT NAME)* *(SIGNATURE OF DECLARANT)*

## PROOF OF SERVICE—PERSONAL DELIVERY

I am over the age of 18 and not a party to this cause. My residence or business address is *(specify):*

I served the attached Notice of Hearing on Claim of Exemption and the attached Notice of Opposition to Claim of Exemption by personally delivering copies to the person served as shown below.

**PERSONS SERVED**

| **Name** | **Delivery At** | | |
|---|---|---|---|
| | Date: | Time: | Address: |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

*(TYPE OR PRINT NAME)* *(SIGNATURE OF DECLARANT)*



*Copies:* Original (file, together with notice of opposition, with court clerk); one copy (file with levying officer); one copy

to be served on judgment debtor; one copy to be served on the person claiming the exemption (if different from judgment debtor); office copies.

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### §9.66 7. Hearing; Orders

The claim of exemption and notice of opposition to the claim constitute the pleadings, which can be amended with the court's permission. CCP §703.580(a). The exemption claimant has the burden of proof. CCP §703.580(b).

During pendency of the proceedings, the court may make any orders proper under the circumstances of the case and may modify or vacate those orders. CCP §703.610(b).

After the court rules on whether the property is exempt, the court clerk transmits a certified copy of the order to the levying officer, who then, depending on the order, either releases the property or applies it to satisfy the judgment. CCP §703.580(e). Under CCP §703.610, however, the levying officer may not dispose of the property until the exemption's final determination, *i.e.,* until all appeals have been exhausted or waived. If the exemption is not determined within the time limits set forth in CCP §703.570, the property must be released. CCP §703.580(f).

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### §9.67 8. Appeal

Any order issued under the procedure for claiming exemptions after levy may be appealed. CCP §703.600. If an appeal from the ruling on the exemption claim is taken, notice is given to the levying officer who must then hold, release, or dispose of the property in accordance with CCP §§916-923, which govern enforcement pending appeal. CCP §703.610(c).

Sometimes, a problem arises if the underlying judgment is a small claims court judgment. An appeal of a small claims *judgment* may be had via a de novo hearing in the superior court. See CCP §116.770, discussed in §7.88. On the other hand, due to trial court unification, *postjudgment rulings* from small claims court are appealed to the appellate department of the superior court. See *General Elec. Capital Auto. Fin. Servs., Inc. v Appellate Div.* (2001) 88 CA4th 136, 105 CR2d 552.

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## E. Particular Property and Situations

### §9.68 1. Motor Vehicles and Mobilehomes

Equity of up to $2550 in one motor vehicle or in an aggregate of motor vehicles is exempt from levy. CCP §704.010(a). See CCP §703.150 (exempt amounts indexed for inflation). "Equity" is defined as the difference between the fair market value of the interest of the judgment debtor (and spouse, if community property) and all liens and encumbrances senior to the judgment creditor's lien. CCP §680.190. The exemption also applies to proceeds from an execution sale and the proceeds of insurance for loss, damage, or destruction of a motor vehicle. CCP §704.010(a)(2)-(3). These proceeds are exempt for 90 days after their receipt by the debtor. CCP §704.010(b).

If the debtor's only motor vehicle is sold at an execution sale, $2550 of the proceeds is exempt without the need to file a claim. CCP §704.010(d). See CCP §703.150 (exempt amounts indexed for inflation). However, consensual liens and encumbrances, liens for labor and materials that are subordinate to the judgment creditor's lien, and state tax liens (if notice of the tax lien was filed with the levying officer before the officer received the proceeds) are paid from the debtor's $2550. CCP §701.810(d).

The levying officer may not sell the vehicle for a bid below $2550 plus the amount of any preferred labor claims, superior state tax liens, and deposits made under CCP §720.260. CCP §701.620.

A mobilehome is a "dwelling" under CCP §740.710, subject to the provisions of CCP §§704.710-704.990 relating to homesteads. However, when a debtor claims an exemption in a dwelling that is personal property, such as a mobilehome or a boat, the claim is made and decided under CCP §§703.510-703.610, the procedure applicable to non-homestead exemptions. CCP §704.740(b)(2).

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### §9.69 2. Tools; Property Used to Earn Livelihood

A debtor may exempt equity of up to $6750 in tools of the trade or other personal property "reasonably necessary to and actually used by" the debtor to earn a livelihood. CCP §704.060. See CCP §703.150 (exempt amounts indexed for inflation). "Equity" is defined as it is for vehicles. CCP §680.190. See §9.68. In calculating the amount of a debtor's equity in property, courts will consider only perfected liens and encumbrances. See, *e.g., Mirolla v Mendez* (1980) 111 CA3d 518, 168 CR 735, in which the debtor and the intervenor attempted to exempt the debtor's truck, based on the debtor's affidavit stating, among other things, that the seller, the intervenor, had retained a security interest to secure the purchase payments, that the debtor still owed $7900, and that the fair market value, estimated at under $10,000, did not exceed $2500 over the $7900 lien. The court held that the seller's lien was invalid for ruling on the debtor's exemption claim because the seller had failed to perfect its security interest by complying with the Uniform Commercial Code filing requirements of former CCP §690.4 (now Com C §9302).

An additional $6750 exemption is available if the judgment debtor's spouse is in the same business or profession as the judgment debtor. CCP §704.060(a)(3). See CCP §703.150 (exempt amounts indexed for inflation).

Proceeds of an execution sale, insurance, or other indemnification for lost, damaged, or destroyed business or trade property are exempt for 90 days after their receipt by the judgment debtor and his or her spouse. The exemption amount is $6750 or, if the spouse also qualifies under either CCP §704.060(a)(2) or (3), $6750 less the aggregate equity of any other property to which the exemption under CCP §704.060(a) has already been applied. CCP §704.060(b). See CCP §703.150 (exempt amounts indexed for inflation).

If a judgment debtor has already claimed an exemption for a motor vehicle under CCP §704.010 and the vehicle is "reasonably adequate" for use in the judgment debtor's business or profession, the debtor may not claim an additional motor vehicle exemption under CCP §704.060. CCP §704.060(c).

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### 3. Jointly Owned Property

### §9.70 a. Joint or Common Tenancy

An exempt interest in property remains exempt when the debtor owns an undivided interest in common with a third party. *Servanti v Lusk* (1872) 43 C 238. If property is jointly owned by two judgment debtors but only one has an exemption, the interest of the other may be levied on and sold under execution. *Stanton v French* (1890) 83 C 194, 23 P 355. In determining the extent of a debtor's homestead, a distinction is made between joint and community property. See §9.71.

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### §9.71 b. Community Property

Express provisions for marital property exemptions are in CCP §703.110. If property exempt under a particular statute is limited to a specified dollar amount, the spouses are entitled to only one exemption between them up to that amount. All exemptions apply to all property subject to enforcement of a money judgment, including the nondebtor spouse's interest in community property. CCP §703.110(a).

When the exemption is based on the needs of the judgment debtor, all marital property is taken into account, whether or not the property is subject to enforcement of a money judgment. CCP §703.115.

If the exemption must be applied first to property not before the court, the exemption must be applied to both spouses' separate and community property, whether or not the property is subject to enforcement of a money judgment. CCP §703.110(b). If a judgment debtor and spouse claim different property for the same exemption, and if the property of only one spouse is exempt, only one claim will be allowed, and the exemption will be applied as the spouses agree or, if they cannot agree, as the court directs. CCP §703.110(c). In addition, CCP §703.020(b)(2) expressly permits a judgment debtor's spouse to claim an exemption for community property, whether or not the spouse is also a judgment debtor under the judgment.

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### §9.72 c. Partnership Property

A partner's interest in specific partnership property, as well as a limited liability company member's interest, is not subject to attachment or execution except on a claim against the partnership. CCP §699.720(a)(2). The Uniform Partnership Act of 1994 (RUPA) (Corp C §§16100-16962) governs all California partnerships after 1998. Corp C §16111. Under RUPA the partnership is an entity distinct from the partners. Corp C §16201. Because partnership property does not belong to any partner individually, no partner can claim to have any part of the partnership property set apart for him or her as exempt from execution on a partnership liability. *Cowan v Their Creditors* (1888) 77 C 403, 19 P 755. On charging orders, see §§11.7-11.10.

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### §9.73 d. Tracing Exempt Funds

Under CCP §703.080, any exempt funds remain exempt to the extent they can be traced to a deposit account or cash or its equivalent. The person claiming the exemption has the burden of tracing exempt funds. CCP §703.080(b). The amount of exempt funds traceable into a deposit account is normally determined according to the "lowest intermediate balance" rule. CCP §703.080(c). Under this rule, the amount that will be allowed as exempt may not exceed the lowest balance occurring at any time between the deposit of the money claimed exempt and the time of levy. New deposits do not replenish the original exempt fund, although they may themselves be exempt. See *Republic Supply Co. v Richfield Oil Co.* (9th Cir 1935) 79 F2d 375, 379.

**EXAMPLE:** Suppose that a debtor's deposit account has a balance of $400, composed of nonexempt funds, and the debtor then deposits $400 of exempt funds (balance of $800), withdraws $600 (balance of $200), and deposits $300 of nonexempt funds (balance of $500). Although the total of exempt funds deposited was $400, the lowest balance after that deposit was $200, which was thus the maximum exempt amount.

With respect to paid earnings that can be traced to deposit accounts, 75 percent of the earnings are exempt unless, prior to their payment to the employee, they were subject to an earnings withholding order or a wage assignment for support, in which case they are fully exempt. CCP §704.070. The 75 percent exemption is determined based on the balance in the deposit account on the date of the levy. *Ford Motor Credit Co. v Waters* (2008) 166 CA4th Supp 1, 23, 83 CR3d 826.

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### §9.74 4. Judgment for Child or Spousal Support

Property described by statute as "exempt without making a claim" cannot be used to satisfy a child or spousal support judgment. CCP §703.070(b). Statutory exemptions otherwise apply to these judgments (CCP §703.070(a)) except that on noticed motion by the judgment creditor the court may order that exempt property that is not in the category of property that is "exempt without making a claim" shall be applied to satisfy the judgment (CCP §703.070(c)).

To determine the extent to which otherwise exempt property will be applied to satisfy the judgment, the court must consider the needs of the judgment creditor, the needs of the judgment debtor, the needs of all persons supported by the judgment debtor, and all other relevant circumstances. CCP §703.070(c).

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## F. Bankruptcy

### §9.75 1. General Procedure

**NOTE:** The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stats 23) made major changes in bankruptcy laws. Some relevant changes are noted in the following sections. For discussion of the BAPCPA and bankruptcy considerations generally in debt collection, see chap 12.

Under the general scheme of the Bankruptcy Code (Title 11 USC), the commencement of a bankruptcy case creates an estate including all of the debtor's legal and equitable interests in property as of the commencement of the case. 11 USC §541(a). See *Ziemski v Ziemski (In re Ziemski)* (BAP 8th Cir 2006) 338 BR 802, 804. The debtor exempts property by claiming exemptions in the schedules filed at the commencement of the case. 11 USC §522(b); Fed R Bankr P 4003(a). If the debtor fails to make a timely exemption claim, a dependent of the debtor may file the scheduled exemptions. Fed R Bankr P 4003(a). If no objection to the exemption claim is filed within 30 days after the conclusion of a meeting of creditors held under Fed R Bankr P 2003(a) or if no amendment to the list or supplemental schedules is filed under Fed R Bankr P 1007(h), the exemptions are confirmed unless the court grants further time. Fed R Bankr P 4003(b).

**NOTE:** A trustee may file an objection to a claim of exemption for up to a year after the case is closed if the debtor fraudulently asserted the claim of exemption. Fed R Bankr P 4003(b)(2). The objecting party has the burden of proving that the exemptions are not properly claimed. Fed R Bankr P 4003(c).

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### §9.76 2. Electing Alternative State Exemptions

In a bankruptcy case, the debtor may choose the exemptions allowable under either CCP §703.140(b) or CCP §§703.010-704.995 (excepting CCP §703.140(b)). See CCP §703.140(a). The 703-series exemptions resemble the federal exemptions in 11 USC §522(d). The debtor's choice of exemptions will affect his or her ability to exempt certain assets.

**NOTE:** To be eligible to claim a particular state's exemptions, the debtor must reside in that state for 730 days (2 years) preceding the bankruptcy filing. 11 USC §522(b)(3)(A). If the debtor does not meet the residency requirements for any state, he or she may elect federal exemptions. 11 USC §522(b)(3). How this would apply to a debtor in a state such as California that has opted out of the federal exemptions is not certain.

**PRACTICE TIP:** Some amendments to the Bankruptcy Code enacted by the BAPCPA may be particularly relevant to a debtor's choice of exemption schemes. For example, under 11 USC §522(b)(3)(C), added by the BAPCPA, certain retirement funds are exempt irrespective of their treatment under the state exemption scheme. See §9.77. Under former bankruptcy law, an IRA exemption was available only to debtors electing California's exemption scheme. *Rousey v Jacobway* (2005) 544 US 320, 161 L Ed 2d 563, 125 S Ct 1561.

Married debtors may claim only one set of exemptions. CCP §703.110. This prohibition of exemption stacking was upheld as constitutional in *In re Talmadge* (9th Cir 1987) 832 F2d 1120.

All the exemptions under CCP §§703.010-704.995 are available to the debtor, regardless of whether a money judgment against the debtor is the subject of a bankruptcy action or is being enforced by execution sale or other procedure. *Kendall v Pladson (In re Pladson)* (9th Cir 1994) 35 F3d 462. Federal district courts in the Ninth Circuit are split on the extent to which Chapter 7 debtors can elect state exemptions in place of those provided in 11 USC §522. See *In re Applebaum* (Bankr D Or, Apr. 17, 2009, No. 08-63391-fra7) 2009 Bankr Lexis 1064; *In re Regevig* (Bankr D Ariz 2008) 394 BR 498, 500.

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### §9.77 3. Retirement Plans

A debtor may exempt the following plans:

- Profit-sharing plans designed and used for retirement purposes;
- Private retirement plans; and
- Self-employed retirement plans and IRAs.

Under former law, self-employed retirement plans and individual retirement accounts (IRAs) were exempt only to the extent necessary to provide for the support of the judgment debtor in retirement. See *Rousey v Jacobway* (2005) 544 US 320, 161 L Ed 2d 563, 125 S Ct 1561 (three-part test for IRAs to be exempt under 11 USC §522(d) for cases filed before October 17, 2005). However, amendments to the Bankruptcy Code enacted by the BAPCPA expanded protection for IRAs. The BAPCPA expanded the exemption for retirement funds in accounts exempt from taxation under IRC §401, §403, §408, §408A, §414, §457, or §501(a), irrespective of their treatment under state law. 11 USC §522(b)(3)(C). IRAs up to a maximum of $1 million are now exempt, although the amount may be increased "if the interests of justice so require." 11 USC §522(n). IRA rollovers, however, are excluded from the $1 million limit, and are presumably exempt in an unlimited amount. See 11 USC §522(n).

An ERISA-qualified pension plan is not the property of the debtor's bankruptcy estate under Bankruptcy Code §541(c)(2). *Patterson v Shumate* (1992) 504 US 753, 119 L Ed 2d 519, 112 S Ct 2242. Settling a long-standing dispute, the United States Supreme Court reasoned that the phrase "applicable nonbankruptcy law" in §541(c)(2) included the antialienation and antiassignment provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461). But exclusion of the debtor's interest in an ERISA-qualified pension plan from the property of the bankruptcy estate is permissive rather than mandatory. *Rains v Flinn (In re Rains)* (9th Cir 2005) 428 F3d 893. In *Rains,* the debtor agreed in a settlement agreement that if he did not make timely cash payment to the trustee, his exemption claim to his retirement plan would be denied up to the amount of $250,000. He later contended that his interest in the retirement plan should be excluded from the bankruptcy estate. But by ceding his claim of exemption in the settlement agreement, the debtor necessarily agreed to include the retirement plan funds in the bankruptcy estate and he could not then seek to exclude funds from the estate that he previously agreed were included in it. Thus, the bankruptcy court acted within its jurisdiction when it ordered the debtor to withdraw $250,000 in plan funds and remit that amount to the trustee. 428 F3d at 906.

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### §9.78 4. Converting Nonexempt to Exempt Property

Legislative history makes it clear that it is acceptable to convert nonexempt property to exempt property on the eve of filing bankruptcy. HR Rep No. 595, 95th Cong, 1st Sess 361 (1977), reprinted in 1978 US Code Cong & Ad News 5963, 6317. Doing so is a common practice. However, such a conversion is allowed only if it is not, in and of itself, a fraud on creditors. See *In re Dudley* (SD Cal 1947) 72 F Supp 943, in which the debtor used $1000 of nonexempt funds to purchase exempt stock in a building and loan association (exempt under former CCP §690.21); the court allowed the deliberate conversion of assets from nonexempt to exempt absent a showing of extrinsic fraud. In similar cases, courts have held that debtors may make mortgage payments on exempt homesteads in contemplation of bankruptcy, thereby maximizing their amount of equity free from creditors' claims. *In re Wilson* (9th Cir 1903) 123 F 20.

The situation in which the purchase of exempt assets is accompanied by actual fraud must be distinguished. See, *e.g., In re White* (ND Cal 1963) 221 F Supp 64, in which the debtors' claim of exemption for money received from the sale of goods purchased on credit, but not paid for, was disallowed; the goods had been purchased with the intention of terminating business and commencing bankruptcy proceedings. Because the fraud on the suppliers of the goods was committed to enable the debtors to take advantage of state exemption laws, the bankruptcy trustee was permitted to seize the funds in the exempt accounts.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.79 5. Exemption of Fraudulently Transferred Property

## §9.79 5. Exemption of Fraudulently Transferred Property

California law differs from the Bankruptcy Code in the exemption of fraudulently transferred property. Under the Bankruptcy Code, a debtor may not exempt such property unless it was transferred involuntarily and the debtor did not conceal the property (11 USC §522(g)), but California allows an exemption to survive a fraudulent transfer (*In re Dudley* (SD Cal 1947) 72 F Supp 943, 945). For discussion of fraudulent transfers, see §§12.66-12.66A.

When a debtor purports to convey property belonging to the bankruptcy estate, title to the property will again vest in the debtor when the bankruptcy case closes if the property was not administered in bankruptcy. However, a quitclaim deed does not convey after-acquired title. *Johnson v E-Z Ins. Brokerage, Inc.* (2009) 175 CA4th 86, 95 CR3d 782.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.80 6. Liens Against Exempt Property

### §9.80 6. Liens Against Exempt Property

A debtor may obtain a Bankruptcy Court order avoiding a lien against exempt property to the extent that the lien impairs the exemption if the lien consists of (11 USC §522(f)):

- A judicial lien, or
- A nonpossessory, nonpurchase money security interest in certain statutorily specified classes of exempt property.

Thus, if a debtor's residence worth $80,000 is subject to a $40,000 judicial lien, the $75,000 homestead exemption reduces the lien to $5,000. See CCP §704.730. A debtor, even one who has no equity interest in the property, can avoid having a judicial lien placed on the property if that avoidance allows enjoyment of a 11 USC §522(b) exemption. See *In re Brown* (2d Cir 1984) 734 F2d 119, 125. Also, if a lien is subject to avoidance under 11 USC §522(f), but the debtor pays it off before filing a motion to avoid the lien, it may still be possible to avoid it. See *Wilding v Citifinancial Consumer Fin. Servs. (In re Wilding)* (1st Cir 2007) 475 F3d 428.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.81 G. Exemptions in Federal Statutes

## §9.81 G. Exemptions in Federal Statutes

Federal law provides exemptions in several situations, including:

- **Banks.** National banking associations are exempt until final judgment. 12 USC §91.
- **Seamen.** See particular provisions of 46 USC §§11108-11109. The federal exemption statute covers both execution and attachment. *Wilder v Inter-Island Steam Nav. Co.* (1908) 211 US 239, 53 L Ed 164, 29 S Ct 58. A master of a ship is included in the federal exemption granted to "seamen." A seaman's earnings levied on under an execution issued on a judgment or an order for support of a wife or minor children are not exempt under federal or California law. See 46 USC §11109(a). Limitations to California exemptions have been made by judicial interpretation. See, *e.g., Avilla v Avilla* (1947) 81 CA2d 210, 183 P2d 668.
- **Veterans.** Veterans' disability benefits are exempt from attachment or execution under 38 USC §5301(a). Social security benefits are exempt under 42 USC §407. The benefits are "deemed exempt until they are expended or invested," and the exemption continues after a warrant or check issued by the Veterans Administration is cashed and the proceeds are deposited in a bank. *Lawrence v Shaw* (1937) 300 US 245, 251, 81 L Ed 623, 627, 57 S Ct 443. But if a veteran's benefit payments are expended on a home or other permanent investment, they are no longer immune from levy. *Carrier v Bryant* (1939) 306 US 545, 83 L Ed 976, 59 S Ct 707. California cases interpreting these exemptions include *Gaskins v Security-First Nat'l Bank* (1939) 30 CA2d 409, 86 P2d 681, and *Culp v Webster* (1937) 25 CA2d Supp 759, 70 P2d 273.

Under state law, a veteran's disability payments may be seized to satisfy child support obligations. Such a law is consistent with both federal law and congressional intent that a veteran's disability payments be used to support both the veteran and the veteran's family. *Rose v Rose* (1987) 481 US 619, 95 L Ed 2d 599, 107 S Ct 2029.

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## IV. HOMESTEADS

### §9.82 A. General Principles

A judgment debtor served with a notice of levy under an order of sale (see §§9.37-9.40) may claim the homestead exemption by asserting a previously recorded declaration of homestead (see generally CCP §§704.910-704.990) or claim the statutory exemption (see CCP §§704.710-704.850) at the hearing on the sale.

The homestead exemption allows a judgment debtor to keep some of the proceeds from the sale of a dwelling (see CCP §§704.710-704.720) that is where the debtor lives and is the principal dwelling in which the debtor or debtor's spouse lived on the date the judgment creditor's lien attached to the dwelling. The debtor or debtor's spouse must have lived there continuously from the date the lien attached until the court hearing on the application for sale of the property.

A recorded declaration of homestead has an advantage over the statutory exemption in that it avoids attachment of a subsequently recorded abstract or certified copy of a judgment against the judgment debtor. CCP §704.950(a). Such an abstract creates only an inchoate lien and may be totally avoided by the debtor in any subsequent bankruptcy proceeding. *Thomas v Speck* (1941) 47 CA2d 512, 118 P2d 365. See *Swearingen v Byrne* (1977) 67 CA3d 580, 136 CR 736. Without a previously recorded homestead declaration, the debtor may avoid a judicial lien only to the extent that the lien impairs the debtor's exemption; *i.e.,* the lien cannot be avoided on the surplus over the amount of the exemption claimed. 11 USC §522(f)(1). See §9.80.

Generally, in an involuntary sale of a homestead, the proceeds of a statutory homestead or declared homestead are exempt for 6 months and any new home purchased during that time is also a homestead. CCP §§704.710(c), 704.720(b), 704.960. The proceeds from a voluntary sale of a statutory homestead are not exempt (compare CCP §704.720(b) with CCP §704.960), while the proceeds from a declared homestead are exempt for 6 months, and a new home purchased during that time may also be declared a homestead. CCP §704.960.

The amount of the homestead exemption is:

- $175,000 if the judgment debtor, or his or her spouse, residing in the homestead is 65 years of age or older at the time of the attempted sale, or is physically or mentally disabled so as to be unable to engage in substantial gainful employment (this exemption also applies to persons 55 years of age or older with a gross annual income of no more than $15,000 or, if the judgment debtor is married, a gross annual income, including the gross annual income of the judgment debtor's spouse, of no more than $20,000 when the sale is involuntary) (CCP §704.730(a)(3));
- $100,000 if the judgment debtor, or his or her spouse, resides in the homestead at the time of the attempted sale, is a member of a family unit, and there is at least one member of the family unit who owns no interest in the homestead or whose only interest in the homestead is a community property interest with the judgment debtor (CCP §704.730(a)(2)); or
- $75,000 in all other cases (CCP §704.730(a)(1)).

Operating expenses from the debtor's rental properties could be deducted from gross rental receipts to calculate the debtor's gross annual income for purposes of qualifying for the enhanced homestead amount. *In re Dowling* (Bankr ND Cal, Jan. 5, 2009, No. 04-57297-MM) 2009 Bankr Lexis 688.

"Family unit" as defined in CCP §704.710(b) includes the judgment debtor and his or her spouse if they reside together in the household, or the judgment debtor and a person listed in that section that the judgment debtor cares for or maintains in the homestead, *e.g.,* a minor child, father, mother, grandmother, or grandfather.

Transfer of a home's title to a revocable living trust does not void an otherwise valid homestead exemption. *Fisch, Spiegler, Ginsburg & Ladner v Appel* (1992) 10 CA4th 1810, 13 CR2d 471. On the other hand, transferring title of one's home to a corporation will make that home ineligible for a homestead exemption. *California Coastal Comm'n v Allen* (2008) 167 CA4th 322, 83 CR3d 906.

The homestead exemption applies only if the lien on the property is an enforcement lien. See Comment to CCP

§704.720.

The amount of the homestead exemption is set at the time a judgment lien is obtained, not at the time the levy of execution is made on the property. CCP §703.050(a); *Berhanu v Metzger* (1992) 12 CA4th 445, 15 CR2d 191.

**NOTE:** When the debtor acquired his property after a lien had been recorded, and could not show that the funds used for the purchase were from sale proceeds of a prior homestead, the debtor was not entitled to a homestead exemption. *SBAM Partners, LLC v Wang* (2008) 164 CA4th 903, 79 CR3d 752.

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## B. Declared Homestead

### §9.83 1. Definition

A "declared homestead" is a dwelling described in the homestead declaration. CCP §704.910(a). The dwelling may be any interest in real property as defined in CCP §704.710 except for a leasehold estate with an unexpired term of less than 2 years or the interest of a trust beneficiary. CCP §704.910(c). For purposes of the homestead exemption, CCP §704.710(c) defines '"homestead" as a dwelling where a person actually resides and includes, among other types of residences:

- A house, its land, and any outbuildings;
- A mobilehome, appurtenant land, and any outbuildings;
- A boat;
- A condominium;
- A "planned development" as defined in Bus & P C §11003;
- A "stock cooperative" as defined in Bus & P C §11003.2; and
- A "community apartment project" as defined in Bus & P C §11004.

A declared homestead may not require actual or continuous residence in the homestead. *Webb v Trippet* (1991) 235 CA3d 647, 286 CR 742. The burden is on the creditor to prove the debtor's subsequent residency elsewhere. See *Webb v Trippet*, *supra*. In an effort to balance the competing interests of debtor and creditor, however, the *Webb* court ruled that the exemption will be lost after 5 years if the debtor does not return to inhabit the homestead property within that time or is shown in the meantime to have established another dwelling as his or her principal residence. However, in *California Coastal Comm'n v Allen* (2008) 167 CA4th 322, 83 CR3d 906, the court stated that continuous presence is a requirement, seeming to distinguish *Webb* on the basis that, in that case, a declared homestead had been recorded, which was not true in *Allen.*

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### §9.84 2. Immunity From Levy; Selection and Valuation

A judgment lien under CCP §§697.310-697.410 will not attach to a declared homestead if the homestead declaration (CCP §704.950(a)):

- Was recorded before the abstract or certified copy of the judgment was recorded; and
- Names the judgment debtor or the debtor's spouse as a declared homestead owner.

Declared homesteads have no immunity, however, when the lien is based on a judgment for child or spousal support. CCP §704.950(b).

If the judgment lien was recorded before the declaration of homestead, the lien attaches to the amount over the sum of all other liens and encumbrances at the time the judgment lien was created plus the amount of the homestead exemption under CCP §704.730. CCP §704.950(c) (which means that the debtor's declared homestead is treated as a junior lien). Even if the judgment lien was recorded after the declaration of homestead, the judgment creditor can still levy by writ of execution on the homeowner's equity in excess of the sum of the homestead exemption under CCP §704.730 plus all other existing liens and encumbrances (*i.e.,* the declared homestead is "senior"). CCP §704.970(a).

The procedure for levy under a writ of execution for declared homesteads is the same as for undeclared homesteads. CCP §704.970(b). On appropriate levy procedure, see §§9.88-9.95. On plaintiff's right to obtain an attachment lien on property subject to a declared homestead, see CCP §487.025.

If a declared homestead is voluntarily sold, the sale proceeds are exempt in the amount specified by CCP §704.730 (see §9.82) for 6 months after the date of sale. CCP §704.960(a). The date of a homestead declaration for a replacement dwelling relates back to the date of the declaration for the original dwelling if the proceeds are invested in a new dwelling (CCP §704.960(b)):

- Within 6 months after the voluntary sale; or
- Within 6 months after proceeds are received if:
- Insurance or other indemnification was received for damage or destruction or
- The dwelling was sold by execution.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.85 3. Form: Declaration of Homestead

## §9.85 3. Form: Declaration of Homestead

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9.85-1 Declaration of homestead

**DECLARATION OF HOMESTEAD**

[*Add one of the following alternatives*]

[*Alternative 1*]

_ _[*Name*]_ _ **declares:**

[*Alternative 2*]

_ _[*Name*]_ _ **and** _ _[*name of spouse*]_ _**, husband and wife, declare:**

[*Continue*]

**The dwelling that is** _ _[*my/our*]_ _ **principal dwelling, in which** _ _[*I/we*]_ _ **now reside, and that** _ _[*I/we*]_ _ **hereby claim and declare as a homestead for** _ _[*my/our*]_ _ **benefit is:** _ _[*Describe dwelling, e.g., the* _ _[*house/mobilehome*]_ _ *and outbuildings at* _ _[*address*]_ _ *and the land on which they are situated described as* _ _[*use legal description*]_ _*/waterborne vessel described as* _ _[*specify*]_ _]_ _**.**

[*The following paragraph is optional even if a former declaration of homestead has been made; see §9.86*]

**A former declaration of homestead was made by** _ _[*me/us*]_ _ **on** _ _[*describe former dwelling*]_ _**, which was filed on** _ _[*date*]_ _**, as Instrument No.** _ _[*number*]_ _**, Book No.** _ _[*number*]_ _, **page** _ _[*number*]_ _**, Official Records of** _ _[*name of county*]_ _ **County, California, and it was abandoned before the execution of this declaration of homestead by** _ _[*conveyance of that property/filing a declaration of abandonment of homestead*]_ _ **on** _ _[*date*]_ _**, as Instrument No.** _ _[*number*]_ _**, Book No.** _ _[*number*]_ _**, page** _ _[*number*]_ _**, Official Records of** _ _[*name of county*]_ _ **County, California.**

[*Continue*]

_ _[*I/We*]_ _ **declare under penalty of perjury under the laws of the State of California that the facts stated above are known to** _ _[*me/us*]_ _ **to be true as of** _ _[*my/our*]_ _ **personal knowledge.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

*Copies:* Original (recorded in recorder's office in county where dwelling is located); copies for declarants; office copies.

*Comment:* Conveying or encumbering a married person's homestead property no longer requires the signatures of both husband and wife. Under CCP §704.940, the homestead declaration does not restrict or limit the right to convey or encumber homestead property.

The guardian or conservator of either the declared homestead owner or the owner's spouse can execute, acknowledge, and record a homestead declaration without court authorization. The declaration can also be executed and acknowledged by a person acting under power of attorney or otherwise authorized to act on behalf of the homestead owner or spouse. CCP §704.930(b). If a guardian, conservator, or someone acting under power of attorney

or in some other representative capacity executes the declaration, it must contain a statement that the person has the authority to act on behalf of the homestead owner or spouse and must state the source of that authority. CCP §704.930(c).

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## §9.86 4. Abandonment of Homestead

The homestead owner can abandon the homestead by filing a declaration of abandonment as prescribed in CCP §704.980. Also, if a new homestead declaration is filed, the old homestead is deemed abandoned by operation of law if the new declaration describes property different from that in the first declaration and if the declared homestead owners are the same as those in the original declaration. CCP §704.990. Thus, a new homestead declaration need not specify that a former declaration was made and abandoned. Nonetheless, to avoid confusion as to which property the declarations apply, it can be useful to include such a paragraph. See form in §9.85.

A homestead is not deemed abandoned by virtue of a conveyance of the property, even if the conveyance is fraudulent and for the purpose of frustrating creditors. *Oppenheim v Goodley* (1957) 148 CA2d 325, 306 P2d 944.

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### §9.87 C. Married Person's Separate Homestead

As long as a current or former spouse has an interest in a dwelling in which he or she actually resides, the dwelling can be declared a homestead. CCP §704.920. The combined homestead exemptions of spouses on the same judgment is limited to the amounts listed in §9.82, regardless of whether the homestead consists of community property, separate property, or both. CCP §704.730(b).

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### D. Sale Procedure for Homesteaded Property

### §9.88 1. Notice of Levy and Application for Order for Sale

Promptly after a dwelling has been levied on, the levying officer must serve notice on the judgment creditor that the levy has been made but the property will be released unless the judgment creditor follows the procedure required by CCP §704.750. The judgment creditor must apply to the court for an order of sale of the dwelling within 20 days after service of the notice. See §9.90 for form of application. A copy of the application must be filed with the levying officer; if it is not filed, the levying officer must release the dwelling. CCP §704.750.

**PRACTICE TIP:** Time deadlines are very short on a dwelling levy and it may be wise to prepare the application for an order of sale at the same time as the levying officer's instructions if a hearing will be necessary. This method will avoid missing the short deadline to apply for an order of sale after the levying officer serves the notice that property contains a dwelling and the creditor needs an order of sale.

If the dwelling is in a county other than the one in which judgment was entered, the judgment creditor must apply to a court of similar jurisdiction in the county where the dwelling is located to obtain the order of sale. CCP §704.750(b)(1).

The following must be included in the application to obtain an order for sale of a dwelling (CCP §704.760):

- A legal description of the property (generally obtained from the title report);
- Whether the tax assessor's records show any homeowner's exemptions or disabled veteran's exemptions on the property (probably in title report or obtained from assessor's office directly);
- Whether the debtor has recorded a homestead exemption declaration (probably in title report);
- Any liens on the property, including the name and address of lienholders, the current principal balance of the lien, and the interest accrued and rate of accrual (*i.e.,* amount of interest accrued each day);
- Whether the dwelling is a homestead and, if so, the amount of the homestead exemption.

A copy of the abstract of judgment (or, if the judgment provides for support in installments, a certified copy of the judgment) must be filed with the application for an order for sale. CCP §704.750(b)(2). It is good practice to include a brief memorandum in support of the application, *e.g.,* the reasons the debtor is not entitled to a homestead exemption.

**PRACTICE TIP:** To assist the court in setting the fair market value of the dwelling, the judgment creditor may file a copy of the appraisal report. However, counsel should check local court rules because some courts require a declaration from an appraiser while other courts may appoint an appraiser afterwards. CCP §704.780(d). If there is no specific local rule, it is better practice to file the appraisal.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.89 2. Form: Order to Show Cause Why Order for Sale of Dwelling Should Not Issue

## §9.89 2. Form: Order to Show Cause Why Order for Sale of Dwelling Should Not Issue

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER TO SHOW CAUSE** |
| **vs** | ) | **WHY ORDER FOR SALE OF** |
| _ _[*Name(s)*]_ _, | ) | **DWELLING SHOULD NOT** |
| **Defendant(s)** | ) | **ISSUE** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**Good cause appearing in the declaration of _ _[*name*]_ _ in the application for order for sale of a dwelling commonly known as _ _[*address*]_ _,**

**IT IS ORDERED that:**

**1. At the above-stated time and place, defendant, _ _[*name*]_ _, show cause, if any, why plaintiff's application for an order for sale of a dwelling commonly known as _ _[*address*]_ _ should not be granted.**

**2. Copies of this order, the application of _ _[*name*]_ _ for an order for sale of a dwelling commonly known as _ _[*address*]_ _, and the accompanying memorandum in support of the application, be served on all parties no later than _ _[*date*]_ _.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Judge of the _ _[*name*]_ _ Court**

*Copies:* Original (filed with court); copies (one filed with levying officer; one for judgment debtor, one for occupant or posting; copies for third parties; office copies.

*Comment:* The hearing must be held no later than 45 days after the application is filed unless the court orders a later time.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.90 3. Form: Application for Order for Sale of Dwelling

## §9.90 3. Form: Application for Order for Sale of Dwelling

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **APPLICATION FOR ORDER** |
| **vs** | ) | **FOR SALE OF DWELLING** |
| _ _[*Name(s)*]_ _, | ) | **(CCP §§704.750-704.770)** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*specify, e.g., plaintiff and judgment creditor/president of plaintiff and judgment creditor,* _ _[*name*]_ _*/attorney for plaintiff and judgment creditor,* _ _[*name*]_ _]_ _**.**

**2. Plaintiff and judgment creditor hereby applies for an order for the sale of all right, title, and interest of judgment debtor(s),** _ _[*name(s)*]_ _**, in and to the dwelling and real property located at** _ _[*address*]_ _**, California, and more fully described as follows:** _ _[*Insert legal description*]_ _**.**

**3. The property stands of record in the name of** _ _[*name*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1*]

**4. The records of the tax assessor of** _ _[*name of county*]_ _ **County indicate that there Is no current homeowner's exemption or disabled veteran's exemption for that dwelling.**

[*Alternative 2*]

**4. The records of the tax assessor of** _ _[*name of county*]_ _ **County indicate that there is a current** _ _[*homeowner's/disabled veteran's*]_ _ **exemption for the dwelling, and the person(s) who claimed the exemption** _ _[*is/are*]_ _ _ _[*specify name(s)*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1*]

**5. The dwelling is not a homestead. The records of the Recorder of** _ _[*name of county*]_ _ **County indicate that no homestead declaration under Article 5 (Code of Civil Procedure §§704.910-704.995) that describes this dwelling has been filed by the judgment debtor or the spouse of the judgment debtor.**

[*Alternative 2*]

**5. On information and belief, the dwelling is a homestead and the amount of the homestead exemption is $_ _[*amount*]_ _. The records of the Recorder of _ _[*name*]_ _ County indicate that a homestead declaration under Article 5 (Code of Civil Procedure §§704.910-704.995) describing this dwelling has been filed by the _ _[*judgment debtor/spouse of the judgment debtor*]_ _.**

[*Continue*]

**6. The name and address of each person having a lien or encumbrance on the dwelling and the amount of each such lien or encumbrance is as follows:**

**a. _ _[*Specify*]_ _. This lien accrues interest at the rate of _ _[*percent*]_ _ per day.**

**b. _ _[*Specify*]_ _. This lien accrues interest at the rate of _ _[*percent*]_ _ per day.**

**WHEREFORE, applicant requests that this court set a time and place for hearing and order the judgment debtors to show cause why an order should not be made under this application.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

*Copies:* Original (filed with court); copies (one filed with levying officer; one for judgment debtor, one for occupant or posting); office copies.

*Comment:* The application must be made under oath. CCP §704.760. If there is any doubt about whether the court will find sufficient equity to support a sale, the exact loan balances and daily interest rates should be listed if they can be obtained. See §9.93 on need for sufficient equity.

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### §9.91 4. Notice of Hearing

The hearing to consider the application must be held within 45 days after the application is filed. This time may be extended on a showing of good cause. CCP §704.770.

At least 30 days before the hearing, the judgment creditor must serve a copy of the order to show cause (see §9.89), a copy of the application for order for sale (see §9.90), and a copy of the notice of hearing on the judgment debtor (see §9.92). Service on the judgment debtor may be made personally or by mail, but personal service of each document must be made on an occupant of the dwelling. If there is no occupant present when service is attempted, a copy of each document must be posted in a conspicuous place at the dwelling. CCP §704.770.

**PRACTICE TIP:** In practical terms, only 15 days remain after filing the application to serve the documents because the court hearing must be set 45 days after the application is filed (see CCP §704.770(a)), while the application and other documents must be served 30 days before the hearing (see CCP §704.770(b)). If the judgment debtor lives out of the state or out of the country, the judgment creditor must petition the court for a later hearing date to allow for the minimum times for service by mail to out-of-state or out-of-country debtors. See CCP §1013 for time extensions granted when a document is served by mail.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.92 5. Form: Notice of Hearing on Right to Homestead Exemption (Judicial Council Form EJ-180)

## §9.92 5. Form: Notice of Hearing on Right to Homestead Exemption (Judicial Council Form EJ-180)



| SHORT TITLE: | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |
|---|---|---|
| | | |

# NOTICE

## IMPORTANT LEGAL NOTICE TO HOMEOWNER

1. YOUR HOME IS ABOUT TO BE SOLD TO PAY OFF YOUR DEBTS.
2. YOU MAY BE ABLE TO STOP THE SALE OR KEEP SOME OF THE MONEY FROM THE SALE. Before your home is sold, the court will have a hearing to let you prove that you or your family live there. YOU OR YOUR SPOUSE SHOULD COME TO THIS HEARING.

| DATE, TIME, AND PLACE OF THE HEARING |
|---|
| Date: |
| Time: |
| Place:* |

3. READ THE PAPERS THAT CAME WITH THIS NOTICE. At the hearing you will be asked about the statements in those papers.
4. The only purpose of the hearing is to decide if your home should be sold and if you qualify for a homestead exemption on the money from the sale. The purpose is NOT to decide if you owe the debts. That has already been decided.
5. You are not required to bring an attorney with you to the hearing. For your own protection, you may want to ask an attorney for advice right away.
6. If you do not own this home, this notice is not for you. PLEASE GIVE THIS NOTICE TO YOUR LANDLORD IMMEDIATELY.

# AVISO

## AVISO LEGAL IMPORTANTE PARA EL PROPIETARIO DE CASA

1. SU CASA ESTA A PUNTO DE VENDERSE PARA PAGAR SUS DEUDAS.
2. USTED PUEDE DETENER LA VENTA O RECIBIR PARTE DEL DINERO DE LA VENTA. Antes de la venta de su casa, habrá una audiencia en la corte para permitirle que pruebe que usted o su familia vive allí. USTED O SU CONYUGE DEBE ASISTIR A LA AUDIENCIA.

| FECHA, HORA Y LUGAR DE LA AUDIENCIA |
|---|
| Fecha *(date)*: |
| Hora *(time)*: |
| Lugar *(place)*:* |

3. LEA LOS DOCUMENTOS QUE LLEGARON CON ESTE AVISO. En la audiencia se le harán preguntas relacionadas con las declaraciones contenidas en estos documentos.
4. La audiencia tiene solamente el propósito de decidir si su casa debe venderse y si usted es elegible a la exención de bienes de familia sobre el dinero de la venta. La audiencia NO es para decidir si usted es responsable de las deudas. Esto ya fue decidido.
5. Usted no está obligado a venir a la audiencia con un abogado. Para su propia protección, es posible que usted quiera consultar con un abogado de inmediato.
6. Si usted no es el propietario de esta casa, este aviso no es para usted. POR FAVOR, ENTREGUESELO INMEDIATAMENTE A SU ARRENDADOR.

*Specify location from Order to Show Cause.

Form Approved by the
Judicial Council of California
EJ-180 [New January 1, 1985]
**Form Approved for Optional Use**

**NOTICE OF HEARING ON RIGHT TO HOMESTEAD EXEMPTION (Enforcement of Judgment)**

CCP 704.770

*Copies:* Original (for filing with court); copies for service or posting (one for judgment debtor, one for service on occupant of dwelling or for posting at the dwelling); office copies.

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### §9.93 6. Hearing

The burden of proof at the hearing is determined by whether the county tax assessor's records indicate that either a current homeowner's exemption is filed under Rev & T C §218 or a disabled veteran's exemption is filed under Rev & T C §205.5 for the dwelling claimed by the judgment debtor or debtor's spouse. If either exemption has been filed with the assessor, the judgment creditor has the burden of proving that the dwelling is not a homestead. If county tax records show that neither exemption has been claimed, however, the burden of proving that the dwelling is a homestead is on the person claiming the exemption. CCP §704.780. Note that the homeowner's exemption claimed under Rev & T C §218 is not the same as the homestead declaration discussed in §§9.83-9.86.

The court decides whether the dwelling is exempt and, if it is, the amount of the exemption and the fair market value of the dwelling. The court orders the sale of the property subject to the exemption. CCP §704.780(b). However, the court may not order a sale of the dwelling if it finds that the sale is unlikely to produce a bid sufficient to satisfy any part of the amount due on the judgment under CCP §704.800. The court must state in the order how proceeds will be distributed (see CCP §704.850) and the names and addresses of all persons entitled to any proceeds from the sale.

If the application included the principal balances and interest figures, the court will find it easier to calculate the amount that should be paid to each lienholder. If the court finds that the sale of a dwelling is unlikely to produce a bid sufficient to satisfy any part of the amount due over the exemptions, then the court is not required to make the order of sale even though there is some apparent equity. Therefore, it is important for judgment creditor's counsel to determine what the actual lien balances are to convince the court that a substantial portion of the judgment will be satisfied by this method in order to obtain the court's order of sale.

Code of Civil Procedure §704.730(b) provides for apportionment of the homestead exemption between the spouses on the basis of their proportionate interests. This section probably modifies the rule of *Schoenfeld v Norberg* (1970) 11 CA3d 755, 760, 90 CR 47, which held that, if the levy was on community property, the entirety would be subject to execution for the husband's debt, but if the property was held in joint tenancy, the wife's interest, being her separate property, would not be liable for the husband's debt, and only the husband's interest could be sold. Under *Schoenfeld,* the homestead exemption could not be apportioned between the debtor and nondebtor spouse for purposes of determining whether any surplus could be applied to satisfy the judgment. The entire amount of the homestead and the full amount of the liens and encumbrances against the property were to be deducted from half the value of the property to determine whether a surplus could be realized for the benefit of the judgment creditor. 11 CA3d at 765. The *Schoenfeld* rule was based on the premise that both the homestead exemption and the encumbrances of record were nonapportionable and thus were to be fully satisfied from the debtor's half interest before a surplus could be found to exist. Encumbrances continue to be nonapportionable, and the distinction between joint and community property thus remains significant.

The court clerk will transmit a certified copy of the order for sale (CCP §704.780(c)) to the levying officer, and, if another court entered the judgment, to the clerk of the court in which judgment was entered.

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### §9.94 7. Right to Rehearing After Nonappearance

After an order for sale of a dwelling is issued at a hearing at which neither the judgment debtor, the spouse, nor the attorney for either appears, the judgment creditor must serve, within 10 days after the order, a copy of the order and a notice of the order personally or by mail on the judgment debtor and the spouse, as well as on the occupant of the dwelling; the order and notice must be posted in a conspicuous place at the dwelling if no occupant is present when service is attempted. CCP §704.790(b). The notice of the order is part of the form in §9.95.

**PRACTICE TIP:** After service is made, be sure to file proof of service with the court. CCP §704.790(c). Check local rules for the time in which service must be filed.

Within 10 days after service of notice of the order, the judgment debtor or the spouse may file with the levying officer a declaration stating that the failure to appear was due to mistake, inadvertence, surprise, or excusable neglect and that the judgment debtor or the spouse wishes to claim the homestead exemption. See Judicial Council Form EJ-182, Declaration for Rehearing on Homestead Exemption, reproduced in §9.95.

If the debtor files such a declaration, the levying officer must transmit the declaration to the court, which will set a hearing date to determine whether to modify its earlier order. The rehearing must be set no later than 20 days after receipt of the declaration. CCP §704.790(d). If the debtor does not file the declaration, the levying officer may proceed with the sale.

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**Source:** Business Law/Debt Collection Practice in California/9 Writ Enforcement; Exemptions; Homesteads/§9.95 8. Form: Declaration for Rehearing on Homestead Exemption (Judicial Council Form EJ-182)

## §9.95 8. Form: Declaration for Rehearing on Homestead Exemption (Judicial Council Form EJ-182)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | LEVYING OFFICER *(Name and Address)*: |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT, JUDICIAL DISTRICT OR BRANCH COURT, IF ANY: | | |
| PLAINTIFF: | | |
| DEFENDANT: | | LEVYING OFFICER FILE NO.: |
| **DECLARATION FOR REHEARING ON HOMESTEAD EXEMPTION** | | COURT CASE NO.: |

## IMPORTANT LEGAL NOTICE TO HOMEOWNER
## *AVISO LEGAL IMPORTANTE PARA EL PROPIETARIO DE CASA*
*(Véase el reverso para la versión en español de este aviso)*

1. THE COURT HAS ORDERED YOUR HOME TO BE SOLD TO PAY YOUR DEBTS.
2. YOU MAY STILL BE ABLE TO STOP THE SALE OR KEEP SOME OF THE MONEY FROM THE SALE.
3. You were notified to come to a hearing to prove that you or your family live in the home. You did not come. If you have a good excuse, you can get another hearing.
4. THE COURT WILL HAVE ANOTHER HEARING IF YOU OR YOUR SPOUSE RETURNS THIS FORM IMMEDIATELY.
5. You are not required to bring an attorney with you to the hearing. For your own protection, you may want to ask an attorney for advice right away.
6. READ THE PAPERS THAT CAME WITH THIS NOTICE. At the hearing you will be asked about the statements in those papers.
7. You will be notified when and where the new hearing will be held if you or your spouse returns this form right away.
8. SIGN AND DATE THIS FORM AND RETURN IT BY THE DATE SHOWN IN THE BOX BELOW. Either you or your spouse may sign.

NO LATER THAN *(date)*:*

RETURN THIS FORM TO:

Name of levying officer:
Title:
Address:

Telephone: ( )

**If you do not own this home, this notice is not for you. Please give this notice to your landlord immediately.**

## DECLARATION

I declare that I did not appear at the hearing about the sale of my house because I had a legally acceptable excuse. I, or my spouse, live in the house ordered to be sold. I want another hearing so that I can claim my homestead exemption. I understand that I will be notified of the time and place for this hearing if I return this form immediately. I also understand that I must attend this hearing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ .....

(Type or print name)

▶ _____

(Your signature or spouse's signature)

*(Véase el reverso para la versión en español de este aviso)* (See reverse for Spanish version)

*Specify date no later than 10 days after date of service or 15 days if service is by mail in this state.

Print

| SHORT TITLE: | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |
|---|---|---|
| | | |

## AVISO LEGAL IMPORTANTE PARA EL PROPIETARIO DE CASA
*(See reverse for English version)*

1. LA CORTE HA ORDENADO LA VENTA DE SU CASA PARA PAGAR SUS DEUDAS.
2. ES POSIBLE QUE USTED TODAVIA PUEDA DETENER LA VENTA O QUE RECIBA PARTE DEL DINERO DE LA VENTA.
3. A usted se le notificó que viniera a una audiencia para probar que usted o su familia vive en la casa. Usted no se presentó. Si tiene una buena excusa, puede obtener otra audiencia.
4. LA CORTE CELEBRARA OTRA AUDIENCIA SI USTED O SU CONYUGE DEVUELVE ESTE FORMULARIO INMEDIATAMENTE.
5. Usted no está obligado a venir a la audiencia con un abogado. Para su propia protección, es posible que usted quiera consultar con un abogado de inmediato.
6. LEA LOS DOCUMENTOS QUE LLEGARON CON ESTE AVISO. En la audiencia se le harán preguntas relacionadas con las declaraciones contenidas en estos documentos.
7. A usted se le notificará cuándo y dónde se celebrará la nueva audiencia, si usted o su cónyuge devuelve este formulario de inmediato.
8. FIRME Y FECHE ESTE FORMULARIO Y DEVUELVALO A MAS TARDAR EN LA FECHA INDICADA EN EL CUADRO SIGUIENTE. Usted o su cónyuge puede firmar.

A MAS TARDAR EL *(date)*:*

DEVUELVA ESTE FORMULARIO A:

Name of levying officer:
Title:
Address:

Telephone: ( )

Si usted no es el propietario de esta casa, este aviso no es para usted. Por favor, entrégueselo inmediatamente a su arrendador.

## DECLARACION

Declaro que no me presenté a la audiencia celebrada sobre la venta de mi casa porque tenía una excusa legalmente aceptable. Yo vivo, o mi cónyuge vive, en la casa cuya venta ha sido ordenada. Deseo otra audiencia de manera que pueda hacer mi reclamo de exención de bienes de familia. Entiendo que se me notificará la hora y el lugar de esta audiencia si devuelvo este formulario inmediatamente, y entiendo también que tengo que presentarme en esta audiencia.

Declaro bajo pena de perjurio según las leyes del Estado de California que la declaración anterior es verdadera y correcta.
Fecha:

. . . . . .
(Nombre escrito a máquina o en letra de molde)

▶ _____
(Su firma o la firma de su cónyuge)

Si usted fecha, firma y devuelve el formulario en español a tiempo, éste tendrá la misma fuerza y efecto que la ejecución y devolución a tiempo del formulario en inglés.

If you date, sign, and return the Spanish language form on time, it will have the same force and effect as timely completion and return of the English language form.

(See reverse for English version) *(Véase el reverso para la versión en inglés de este aviso)*

*Specify date no later than 10 days after date of service or 15 days if service is by mail in this state.



*Copies:* Original (for filing with court); copies for service (one for judgment debtor, one for debtor's spouse, if any,

and one for service on occupant or posting at dwelling); copy for filing with levying officer (with proof of service); office copies.

*Comment:* Although this form does not specifically mention mistake, surprise, or excusable neglect, it seems designed to satisfy the CCP §704.790(d) requirement that one of those factors be shown by declaration filed with the levying officer. See §9.94.

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# 10

# Wage Garnishment

**Richard L. Enkelis**
**Iain A. Macdonald**
**Raymond R. Goldstein**

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  - 4. Form: Order Determining Claim of Exemption (Judicial Council Form WG-011) §10.34

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## I. WAGE GARNISHMENT

### §10.1 A. Statutory Authority; Definitions

Statutory authority for wage garnishments is covered in CCP §§706.010-706.154, which are known as the Wage Garnishment Law. CCP §706.010.

The term "earnings" in the Wage Garnishment Law is defined as (CCP §706.011(a)):

> Compensation payable by an employer to an employee for personal services performed by such employee, whether denominated as wages, salary, commission, bonus, or otherwise.

The term "employee" is defined as any individual or public officer who performs services subject to the employer's right to control both what will be done and how it will be done. CCP §706.011(b). An "employer" means a person, defined to include an individual, corporation, partnership, or other unincorporated association, a limited liability company, and a public entity, for whom an individual performs services as an employee. CCP §706.011(c), (g). For other definitions, see CCP §706.011.

Sections 10.2-10.17 discuss wage garnishments by judgment creditors other than a state agency that is attempting to collect a state tax liability. Wage garnishments by the state to collect a state tax liability are discussed in §10.18.

For garnishment of property other than wages, see chap 9.

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## B. Earnings Withholding Orders

### 1. Procedure

### a. Obtaining Earnings Withholding Order

**§10.2 (1) Judgment Creditor's Application**

Under CCP §706.102(a), if a writ of execution has been issued to the county where service will be made on the judgment debtor's employer, and the time to levy on property under the writ has not expired under CCP §699.530(b) (see §9.8), the judgment creditor may apply for issuance of an earnings withholding order by filing an application with the levying officer of that county, who must promptly issue it. The Application for Earnings Withholding Order (Judicial Council Form WG001) is a type of sheriff instruction form, designed for a specialized purpose. Comparable authority for a registered process server to issue an earnings withholding order on application by the judgment creditor is in CCP §706.108. The procedure specified in CCP §706.102(a) does not apply to earnings withholding orders for taxes. On earnings withholding orders for taxes, see §10.18.

The practice in many counties is for the judgment creditor to deliver a current writ of execution, an Application for Earnings Withholding Order (Judicial Council Form WG-001) (see §10.3), and the $30 fee required by Govt C §26750 to the levying officer or a registered process server. The officer or process server then prepares and serves the order and all other documents required to be served on the employer. Counsel should ascertain the procedures the officer or process server follow in the county where the order is to be served. On a registered process server's duty to file with the levying officer, see §10.4.

**PRACTICE TIP:** An earnings withholding order may be issued only against the community property earnings of a judgment debtor's spouse and only upon noticed motion by court order. CCP §706.109.

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.3 (2) Form: Application for Earnings Withholding Order (Judicial Council Form WG-001)

## §10.3 (2) Form: Application for Earnings Withholding Order (Judicial Council Form WG-001)

Print

**WG-001**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: TELEPHONE NO.: | LEVYING OFFICER *(Name and Address)*: | |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT, JUDICIAL DISTRICT, OR BRANCH COURT, IF ANY: | | |
| PLAINTIFF:<br>DEFENDANT: | | |
| **APPLICATION FOR EARNINGS WITHHOLDING ORDER (Wage Garnishment)** | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |

TO THE SHERIFF OR ANY MARSHAL OR CONSTABLE OF THE COUNTY OF
OR ANY REGISTERED PROCESS SERVER

1. The judgment creditor *(name)*:

requests issuance of an Earnings Withholding Order directing the employer to withhold the earnings of the judgment debtor (employee).

Name and address of employer

Name and address of employee

Social Security Number *(if known)*:

2. The amounts withheld are to be paid to
   a. ☐ The attorney (or party without an attorney) named at the top of this page.
   b. ☐ Other *(name, address, and telephone)*:

3. a. Judgment was entered on *(date)*:
   b. Collect the amount directed by the Writ of Execution unless a lesser amount is specified here:
   $
4. ☐ The Writ of Execution was issued to collect delinquent amounts payable for the **support** of a child, former spouse, or spouse of the employee.
5. ☐ Special instructions *(specify)*:

6. ***(Check a or b)***
   a. ☐ I have not previously obtained an order directing this employer to withhold the earnings of this employee.
   —*OR*—
   b. ☐ I have previously obtained such an order, but that order *(check one)*:
      ☐ was terminated by a court order, but I am entitled to apply for another Earnings Withholding Order under the provisions of Code of Civil Procedure section 706.105(h).
      ☐ was ineffective.

*(TYPE OR PRINT NAME)* *(SIGNATURE OF ATTORNEY OR PARTY WITHOUT ATTORNEY)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

. . . . . .
*(TYPE OR PRINT NAME)* *(SIGNATURE OF DECLARANT)*



Form Adopted by the Judicial Council of California
WG-001 [Rev. January 1, 2007]

**APPLICATION FOR EARNINGS WITHHOLDING ORDER (Wage Garnishment)**

Code Civ. Procedure, § 706.121
www.courtinfo.ca.gov

*Copies:* Original (filed with levying officer); office copies.
*Comment:* Use of this Judicial Council form is mandatory. CCP §706.120; Cal Rules of Ct 1.31(a)-(c).

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### §10.4 b. Manner of Levy; Papers Served on Employer

Under CCP §§706.103(a), 706.108(c), the levying officer or registered process server (who issues the earnings withholding order; see §10.2) must serve the employer with the original and one copy of the earnings withholding order, a form the employer must return to the levying officer, a notice to the employee of the earnings withholding order, and a copy of the employer's instructions from CCP §706.127. The levying officer may serve the order by personal service or by registered or certified mail. CCP §706.101(b). For Judicial Council forms, see §§10.5-10.8. When amounts payable under a judgment for support of a judgment debtor's child, spouse, or former spouse are sought to be collected, a special order, designated a "withholding order for support," must be served. See CCP §706.030(a) (discussed in Comment to §10.6). Note that an earnings withholding order cannot be served on the employer beyond 180 days after the issuance of the writ of execution (see §9.8). CCP §§706.103(c), 706.108(c). See CCP §699.530(b).

A registered process server must deposit with the levying officer a copy of the writ of execution, the application for issuance of the earnings withholding order, a copy of the earnings withholding order, and the $30 fee required by Govt C §26750 before serving the documents on the employer unless it was the levying officer who initially issued the earnings withholding order. CCP §706.108(b); see Comment to CCP §706.108. Within 5 days after serving the employer with the required documents, the process server must file with the levying officer the writ of execution (if not already in the levying officer's hands), proof of service of the required documents on the employer, and the judgment creditor's written instructions required by CCP §687.010. CCP §706.108(d).

If the registered process server complies with CCP §706.108(b), (d), the levying officer must perform all the duties required under CCP §§706.010-706.154 as if the levying officer had served the earnings withholding order. If the process server fails to comply with CCP §706.108(b) and (d), service of the earnings withholding order is ineffective, and the levying officer need not perform any duties under it and may terminate the order and release any earnings held under it to the judgment debtor. CCP §706.108(e).

**PRACTICE TIP:** As with all levies performed by a registered process service, it is always a good idea, and often a requirement, to include in the levy paper work an explicit authorization directed to the levying officer, authorizing the levy to be performed by the registered process server and reflecting the process server's name and license number.

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.5 (1) Form: Earnings Withholding Order (With Employer's Instructions) (Judicial Council Form WG-002)

## §10.5 (1) Form: Earnings Withholding Order (With Employer's Instructions) (Judicial Council Form WG-002)



| ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, State Bar number, and address*): TELEPHONE AND FAX NOS.: | | LEVYING OFFICER (*Name and Address*): |
|---|---|---|
| ATTORNEY FOR (*Name*): | | |
| NAME OF COURT, JUDICIAL DISTRICT, AND BRANCH COURT, IF ANY: | | |
| PLAINTIFF:<br>DEFENDANT: | | |
| **EARNINGS WITHHOLDING ORDER (Wage Garnishment)** | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |

**EMPLOYEE:** *KEEP YOUR COPY OF THIS LEGAL PAPER.* **EMPLEADO:** *GUARDE ESTE PAPEL OFICIAL.*

**EMPLOYER: Enter the following date to assist your recordkeeping.**
**Date this order was received by employer (specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed):**

**TO THE EMPLOYER REGARDING YOUR EMPLOYEE:**

Name and address of employer

Name and address of employee

Social Security Number *(if known)*:

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee (*see instructions on reverse of this form)*. Pay the withheld sums to the **levying officer** *(name and address above*).
   If the employee works for you now, you must **give the employee a copy of this order and the *Employee Instructions*** (form WG-003) within 10 days after receiving this order.
   **Complete both copies of the form *Employer's Return*** (form WG-005) and **mail them to the levying officer** within 15 days after receiving this order, whether or not the employee works for you.
2. The total amount due is: $
   Count 10 calendar days from the date when you received this order. If your employee's pay period ends before the tenth day, ***do not*** withhold earnings payable for that pay period. ***Do*** withhold from earnings that are payable for any pay period ending on or after that tenth day.

   Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.
3. The judgment was entered in the court on (*date*):
   The judgment creditor *(if different from the plaintiff*) is (*name*):
4. The *INSTRUCTIONS TO EMPLOYER* on the reverse tell you how much of the employee's earnings to withhold each payday and answer other questions you may have.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

(Employer's Instructions on reverse)



Form Adopted by the Judicial Council of California WG-002 [Rev. July 24, 2009]

**EARNINGS WITHHOLDING ORDER (Wage Garnishment)**

CEB

Code of Civil Procedure, §§ 706.022, 706.108, 706.125
www.courtinfo.ca.gov

Print

## INSTRUCTIONS TO EMPLOYER ON EARNINGS WITHHOLDING ORDERS

**WG-002**

The instructions in paragraph 1 on the reverse of this form describe your early duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period*.

The withholding period is the period covered by the *Earnings Withholding Order* (this order). The withholding period begins ten (10) calendar days after you receive the order and continues until the total amount due, plus additional amounts for costs and interest (which will be listed in a levying officer's notice), is withheld.

It may end sooner if (1) you receive a written notice signed by the levying officer specifying an earlier termination date, or (2) an order of higher priority (explained on the reverse of the *EMPLOYER'S RETURN)* is received.

You are entitled to rely on and must obey all written notices signed by the levying officer.

The *Employer's Return* (form WG-005) describes several situations that could affect the withholding period for this order. If you receive more than one *Earnings Withholding Order* during a withholding period, review that form *(Employer's Return)* for instructions.

If the employee stops working for you, the *Earnings Withholding Order* ends after no amounts are withheld for a continuous 180-day period. If withholding ends because the earnings are subject to an order of higher priority, the *Earnings Withholding Order* ends after a continuous two-year period during which no amounts are withheld under the order. **Return the Earnings Withholding Order to the levying officer with a statement of the reason it is being returned.**

### WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within 10 days after the close of the pay period.

Be sure to mark each *check with* the case number, *the levying officer's file number, if different, and the employee's name so the money will be applied to the correct account.*

### WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

***THE CHART BELOW AND THESE INSTRUCTIONS APPLY UNDER NORMAL CIRCUMSTANCES. THEY DO NOT APPLY TO ORDERS FOR THE SUPPORT OF A SPOUSE, FORMER SPOUSE, OR CHILD.***

**The chart below shows *HOW MUCH TO WITHHOLD* when the federal minimum wage is $7.25 per hour.**
**If the *FEDERAL* minimum wage changes in the future, the levying officer will provide a chart showing the new withholding rates.**

### COMPUTATION INSTRUCTIONS

State and federal law limits the amount of earnings that can be withheld. The limitations are based on the employee's disposable earnings, which are different from gross pay or take-home pay.

To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), compute the employee's *disposable earnings*.

(A) Earnings include any money (whether called wages, salary, commissions, bonuses, or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earnings since they are not paid by the employer.

(B) *Disposable earnings* are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employee retirement systems. Disposable earnings will change when the required deductions change.

After the employee's *disposable earnings* are known, use the chart below to determine what amount should be withheld. In the column listed under the employee's pay period, find the employee's disposable earnings. The amount shown below that is the amount to be withheld. For example, if the employee is paid disposable earnings of $500 twice a month (semi-monthly), the correct amount to withhold is 25 percent each payday, or $125.

The chart below is based on the minimum wage that became effective July 24, 2009. It will change when the minimum wage changes. Restrictions are based on the minimum wage effective at the time the earnings are payable.

Occasionally, the employee's earnings will also be subject to a *Wage and Earnings Assignment Order,* an order available from family law courts for child, spousal, or family support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order.

### — IMPORTANT WARNINGS —

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF *EARNINGS WITHHOLDING ORDERS* FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single indebtedness (no matter how many debts are represented in that judgment), the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN *EARNINGS WITHHOLDING ORDER* BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE *EARNINGS WITHHOLDING ORDER* TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer who will pay the money in accordance with the law that applies to this case.

*IF YOU VIOLATE ANY OF THESE LAWS YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!*

### FEDERAL MINIMUM WAGE: $7.25 per hour (Beginning July 24, 2009.)

| PAY PERIOD | Daily | Weekly | Every Two Weeks | Twice a Month | Monthly |
|---|---|---|---|---|---|
| DISPOSABLE EARNINGS | $0-$217.50 | $0-$217.50 | $0-$435.00 | $0-$475.25 | $0-$942.50 |
| WITHHOLD | None | None | None | None | None |
| DISPOSABLE EARNINGS | $217.51-$290.00 | $217.51-$290.00 | $435.01-$580.00 | $475.26-$628.33 | $942.51-$1,256.66 |
| WITHHOLD | Amount above $217.50 | Amount above $217.50 | Amount above $435.00 | Amount above $475.25 | Amount above $942.50 |
| DISPOSABLE EARNINGS | $290.01 or more | $290.01 or more | $580.01 or more | $628.34 or more | $1,256.67 or more |
| WITHHOLD | Maximum of 25% of Disposable Earnings | Maximum of 25% of Disposable Earnings | Maximum of 25% of Disposable Earnings | Maximum of 25% of Disposable Earnings | Maximum of 25% of Disposable Earnings |



*Copies:* See §10.4.

*Comment:* Use of this form is mandatory. CCP §706.120; Cal Rules of Ct 1.31(a)-(c). On use of earnings withholding order for support in lieu of this form, see Comment in §10.6.

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.6 (2) Form: Earnings Withholding Order for Support (With Employer's Instructions) (Judicial Council Form WG-004)

## §10.6 (2) Form: Earnings Withholding Order for Support (With Employer's Instructions) (Judicial Council Form WG-004)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* TELEPHONE NO.: | LEVYING OFFICER *(Name and Address):* |
|---|---|
| ATTORNEY FOR *(Name):* | |
| NAME OF COURT, JUDICIAL DISTRICT, OR BRANCH COURT, IF ANY: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **EARNINGS WITHHOLDING ORDER FOR SUPPORT (Wage Garnishment)** | LEVYING OFFICER FILE NO.: / COURT CASE NO.: |

***EMPLOYEE:*** *KEEP YOUR COPY OF THIS LEGAL PAPER.* ***EMPLEADO:*** *GUARDE ESTE PAPEL OFICIAL.*

**EMPLOYER: Enter the following date to assist your record keeping.**

**Date this order was received by employer (specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed):**

**TO THE EMPLOYER REGARDING YOUR EMPLOYEE:**

Name and address of employer

Name and address of employee

Social Security Number (if known):

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee *(see instructions on reverse of this form).* Pay the withheld sums to the **levying officer** *(name and address above).*

   If the employee works for you now, you must **give the employee a copy of this order and the Employee Instructions** within 10 days after receiving this order.

   **Complete both copies of the form Employer's Return and mail them to the levying officer** within 15 days after receiving this order, whether or not the employee works for you.

2. The total amount due is $

   Count 10 calendar days from the date when you received this order. If your employee's pay period ends before the tenth day, **do not** withhold earnings payable for that pay period. **Do** withhold from earnings that are payable for any pay period ending on or after that tenth day.

   Continue withholding until
   (1) the total amount due has been withheld; or
   (2) you receive a court order or an order from the levying officer telling you to stop the withholding earlier.

3. The judgment was entered in the court shown above. The judgment creditor is *(name):*

4. The EMPLOYER'S INSTRUCTIONS on the reverse tell you how much of the employee's earnings to withhold each payday. Follow those instructions unless you receive a court order or order from the levying officer giving you other instructions.

Date:

..... *(TYPE OR PRINT NAME)*

▶ _____ *(SIGNATURE)*

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

*The **EMPLOYER'S INSTRUCTIONS** on the reverse contain special rules that apply to Earnings Withholding Order For Support. Read the instructions carefully.*

*(Employer's Instructions on reverse)*



Form Adopted by the Judicial Council of California WG-004 [Rev. January 1, 2007]

**EARNINGS WITHHOLDING ORDER FOR SUPPORT (Wage Garnishment)**

CEB

Code of Civil Procedure, §§ 706.030, 706.108, 706.052
www.courtinfo.ca.gov

Print

## EMPLOYER'S INSTRUCTIONS
## (EARNINGS WITHHOLDING ORDERS FOR SUPPORT)

These instructions apply *only* to Earnings Withholding Orders for Support. Applicable instructions appear on the reverse of the other types of Earnings Withholding Orders.

The instructions in paragraph 1 on the reverse of this form describe your early duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period*.

The usual *withholding period* begins ten (10) calendar days after you receive the Earnings Withholding Order. In the case of an Earnings Withholding Order for Support (this Order) the *withholding period continues* until one of two things happens: (1) the total amount specified in the Order, plus any amounts listed in a notice from the levying officer, has been withheld,or (2) you receive a court order or notice signed by the levying officer specifying a termination date.

You are entitled to rely on and should obey all written notices signed by the levying officer.

The form Employer's Return describes several situations that could affect the withholding period for this order. If you receive more than one Earnings Withholding Order during a withholding period, review that form (Employer's Return) for instructions.

Your duty to withhold does not end merely because the employee no longer works for you. Withholding for an Earnings Withholding Order for Support does not automatically terminate until one year after the employment of the employee by the employer ends.

### WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within ten (10) days after the close of the pay period.

*Be sure to mark each check with the case number, the levying officer's file number, if different, and the employee's name so the money will be applied to the correct account*

### WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

### COMPUTATION INSTRUCTIONS

State and federal law limits the amount of earnings that can be withheld. The limitations are based on the employee's disposable earnings, which are different from gross pay or take-home pay.

To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), compute the employee's *disposable* earnings.

(A) Earnings include any money, (whether called wages, salary, commissions, bonuses or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earning since they are not paid by the employer.

(B) *Disposable earnings* are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employees' retirement systems. Disposable earnings will change when the required deductions change.

After the employee's disposable earnings are known, WITHHOLD FIFTY (50) PERCENT of the *disposable earnings* for the Withholding Order for Support. For example, if the employee has monthly disposable earnings of $1,432, the sum of $716 would be withheld to pay to the levying officer on account of this order.

Occasionally, the employee's earnings will also be subject to a Wage and Earnings Assignment Order, an order available for child support or spousal support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order. For example, if the employee is subject to a Wage and Earnings Assignment Order and the employer is required to withhold $300 per month to pay on that order, when the employer receives this Earnings Withholding Order for Support, the employer should deduct the $300 for the Wage and Earnings Assignment Order from the $716 and pay the balance to the levying officer each month for this order.

### IMPORTANT WARNINGS

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF EARNINGS WITHHOLDING ORDERS FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to judgment (no matter how many debts are represented in that judgment) the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN EARNINGS WITHHOLDING ORDER BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE EARNINGS WITHHOLDING ORDER TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer who will pay the money in accordance with the laws that apply to this case.

***IF YOU VIOLATE ANY OF THESE LAWS, YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!***



*Copies:* See §10.4.

*Comment:* A withholding order for support is an earnings withholding order issued on a writ of execution to collect delinquent amounts payable under a judgment for the support of a debtor's child, spouse, or former spouse. CCP §706.030(a). Use of this form is mandatory when attempting to collect such amounts. CCP §§706.030(a), 706.120; Cal Rules of Ct 1.31(a)-(c). A withholding order for support must be denoted as such on its face. CCP §706.030(a).

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.7 (3) Form: Employer's Return (Judicial Council Form WG-005)

## §10.7 (3) Form: Employer's Return (Judicial Council Form WG-005)

Print

**WG-005**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | LEVYING OFFICER *(Name and Address)*: |
|---|---|
| TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/PETITIONER:<br>DEFENDANT/RESPONDENT: | CASE NUMBER: |
| **EMPLOYER'S RETURN**<br>**(Wage Garnishment)** | LEVYING OFFICER FILE NO.: |

**EMPLOYER:** You must complete both copies of this form and mail them to the levying officer within 15 days. *Please correct any errors* in the mailing information above and provide any missing information, including the name of the person to whom notices should be directed.

**FAILURE TO COMPLETE AND RETURN THESE FORMS MAY SUBJECT YOU TO PAYMENT OF ATTORNEY FEES AND OTHER CIVIL PENALTIES.**

***Name and address of employer***

***Attn:***
*(Insert name above)*

***Name and address of employee***

**Social Security Number *(if known)*:**

1. I received the Earnings Withholding Order on *(date)*:

2. The employee is
   a. ☐ not employed by this employer *(if not employed, omit items 2b through 6 and proceed to the declaration at the end of this form)*.
   b. ☐ now employed by this employer and in the last pay period had gross earnings of $ :

3. The employee's pay period is
   a. ☐ daily b. ☐ weekly c. ☐ every two weeks
   d. ☐ twice a month e. ☐ monthly f. ☐ other *(specify)*:

***(IF YOU HAVE RECEIVED NO OTHER ORDERS THAT PRESENTLY AFFECT THIS EMPLOYEE'S EARNINGS, OMIT ITEMS 4, 5 AND 6, AND PROCEED TO THE DECLARATION AT THE END OF THIS FORM. )***

(Continued on reverse)



Form Adopted by the
Judicial Council of California
WG-005 [Rev. July 1, 2007]

**EMPLOYER'S RETURN**
**(Wage Garnishment)**

Code of Civil Procedure, § 706.126
*www.courtinfo.ca.gov*

Print

**WG-005**

| SHORT TITLE: | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |
|---|---|---|
| | | |

**If you have received other orders that presently affect this employee's earnings, another order may have priority over this one. The following list indicates the priority of orders:**

Wage and Earnings Assignment Order (For Support) _____ First priority
Earnings Withholding Order for Support _____ Second priority
Earnings Withholding Order for Taxes _____ Third priority
Earnings Withholding Order _____ Fourth priority

**If two or more orders have the same priority, comply with the one received first. If both were received on the same date, comply with the one with the earlier date of judgment. If the dates of judgment are the same, you may select which order you choose to comply with.**

4. ☐ This order appears to have higher priority than any other order. Earnings will be withheld for this order in accord with the EMPLOYER'S INSTRUCTIONS *(on reverse of Earnings Withholding Order)*.

5. ☐ The employer has received another order affecting the employee's earnings and earnings are being withheld for the other order because:
   a. ☐ The other order was received first. The other order was received on (date):
   b. ☐ This order does not have higher priority.
   c. ☐ A copy of the other order is attached *(retain original for your records. If a copy is not attached, complete item d.)*
   d. ☐ A copy of the other order is NOT attached. *Describe the other order by providing the following information:*
      (1) Court name, address, and case number:

      (2) Levying officer name and address and file number:

      (3) Total amount to be withheld: $

6. ☐ This order is not effective for the reason shown in item 5. It is returned to the levying officer with this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

***If an Earnings Withholding Order is not effective when served, for any reason, do not hold it. Return it to the levying officer with this return.***

**FAILURE TO COMPLETE AND RETURN THIS FORM MAY SUBJECT AN EMPLOYER TO CIVIL PENALTIES AND ATTORNEY FEES.**



*Copies:* See §10.4.
*Comment:* Use of this form is mandatory. CCP §706.120; Cal Rules of Ct 1.31(a)-(c).

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.8 (4) Form: Employee Instructions (Judicial Council Form WG-003)

## §10.8 (4) Form: Employee Instructions (Judicial Council Form WG-003)

Print

WG-003

### EMPLOYEE INSTRUCTIONS

**-NOTICE-**

IMPORTANT LEGAL NOTICE TO EMPLOYEE
**ABOUT EARNINGS WITHHOLDING ORDERS**
(Wage Garnishment)

The **Earnings Withholding Order** requires your employer to pay part of your earnings to the sheriff or other levying officer. The levying officer will pay the money to a creditor who has a court judgment against you. The information below may help you protect the money you earn.

**-NOTICIA-**

NOTICIA LEGAL IMPORTANTE RESPECTO
**A LAS ÓRDENES DE RETENCIÓN DE SUELDO**

La **Orden de Retención de Sueldo** requiere que su empleador pague una parte de su sueldo a un oficial de embargo. El oficial le pagará el dinero retenido a su acreedor que ha conseguido una decisión judicial en contra de usted. Pida usted que un amigo o su abogado le lea este papel oficial. Esta información le puede ayudar a proteger su sueldo.

#### CAN YOU BE FIRED BECAUSE OF THIS?

**NO.** You cannot be fired unless your earnings have been withheld before for a different court judgment. If this is the first judgment for which your wages will be withheld and your employer fires you because of this, the California Labor Commissioner, listed in the phone book of larger cities, can help you get your job back.

#### HOW MUCH OF YOUR PAY WILL BE WITHHELD?

The reverse of the Earnings Withholding Order (abbreviated in this notice as EWO) that applies to you contains Employer Instructions. These explain how much of your earnings can be withheld. Generally, the amount is about 25% of your take home pay until the amount due has been withheld. The levying officer will notify the employee of an additional assessment charged for paying out money collected under this order and that amount will also be withheld.

If you have trouble figuring this out, ask your employer for help.

#### IS THERE ANYTHING YOU CAN DO?

**YES**. There are several possibilities.

1. See an attorney. If you do not know an attorney, check with the lawyer referral service or the legal aid office in your county (both are listed in the yellow pages under "Attorneys").

   An attorney may be able to help you make an agreement with your creditor, or may be able to help you stop your earnings from being withheld. You may wish to consider bankruptcy or asking the bankruptcy court to help you pay your creditors. These possibilities may stop your wages from being withheld.

   An attorney can help you decide what is best for you. Take your **EWO** to the attorney to help you get the best advice and the fastest help.

2. Try to work out an agreement yourself with your creditor. Call the creditor or the creditor's attorney, listed on the **EWO**. If you make an agreement, the withholding of your wages will stop or be changed to a smaller amount you agree on. *(See item 4 on the reverse for another way to make an offer to your creditor.)*

3. You can ask for an EXEMPTION. An exemption will protect more, or maybe even all of your earnings. You can get an exemption if you need your earnings to support yourself or your family, **but you cannot get an exemption if**

   a. You use some of your earnings for luxuries and they aren't really necessary for support; ***OR***
   b. The money you owe is for food, clothing, medical care, or housing; ***OR***
   c. You owe the debt for past due child support or spousal support (alimony); ***OR***
   d. You owe the debt to a former employee for wages.

#### HOW DO YOU ASK FOR AN EXEMPTION?

*(See the reverse of this form for instructions about claiming an exemption.)*



Approved by the
Judicial Council of California
WG-003 [Rev. July 1, 2008]

**EMPLOYEE INSTRUCTIONS**
**(Wage Garnishment)**

CEB

Code of Civil Procedure, § 706.122
*www.courtinfo.ca.gov*

Print



## HOW DO YOU ASK FOR AN EXEMPTION?

1. Call or write the levying officer for three (3) copies each of the forms called "Claim of Exemption" and "Financial Statement." These forms are free. The name and address of the levying officer are in the big box on the right at the top of the **EWO**.

2. Fill out both forms. On the forms are some sentences or words which have boxes ☐ in front of them. The box means the words which follow may not apply to your case. If the words do apply, put a check in the box.

   Remember, it is ***your*** job to prove with the Financial Statement form that your earnings are needed for support. Write down the details about your needs.

3. For example, if your child has special medical expenses, tell which child, what illnesses, who the doctor is, how often the doctor must be visited, the cost per visit, and the costs of medicines. These details should be listed in item 6. If you need more space, put "See attachment 6" and attach a typed 8½ by 11 sheet of paper on which you have explained your expenses in detail.

4. You can use the Claim of Exemption form to make an offer to the judgment creditor to have a specified amount withheld each pay period. Complete item 3 on the form to indicate the amount you agree to have withheld **each pay day during the withholding period.** (Be sure it's less than the amount to be withheld otherwise.) If your creditor accepts your offer, he will not oppose your claim of exemption. (See (1) below. )

5. Sign the Claim of Exemption and Financial Statement forms. Be sure the Claim of Exemption form shows the address where you receive mail.

6. Mail or deliver two (2) copies of each of the two forms to the levying officer. Keep one copy for yourself in case a court hearing is necessary.

Do not use the Claim of Exemption and Financial Statement forms to seek a modification of child support or alimony payments. These payments can be modified only by the family law court that ordered them.

*FILE YOUR CLAIM OF EXEMPTION AS SOON AS POSSIBLE FOR THE MOST PROTECTION.*

## ONE OF TWO THINGS WILL HAPPEN NEXT

(1) The judgment creditor will not oppose (object to) your claim of exemption. If this happens, after 10 days the levying officer will tell your employer to stop withholding or withhold less from your earnings. The part (or all) of your earnings needed for support will be paid to you or paid as you direct. And you will get back earnings the levying officer or your employer were holding when you asked for the exemption.

*—OR—*

(2) The creditor will oppose (object to) your claim of exemption. If this happens, you will receive a Notice of Opposition and Notice of Hearing on Claim of Exemption, in which the creditor states why your exemption should not be allowed. A box in the middle of the Notice of Hearing tells you the time and place of the court hearing which will be in about ten days. Be sure to go to the hearing if you can.

If the judgment creditor has checked the box in item 3 on the Notice of Hearing on Claim of Exemption, the creditor will not be in court. If you are willing to have the court make its decision based on your Financial Statement and the creditor's Notice of Opposition, you need not go to the hearing.

The Notice of Opposition to Claim of Exemption will tell you why the creditor thinks your claim should not be allowed. If you go to the hearing, take any bills, paycheck stubs, cancelled checks, or other evidence (including witnesses) that will help you prove your Claim of Exemption and Financial Statement are correct and your earnings are needed to support yourself or your family.

Perhaps you can even prove the Notice of Opposition is wrong. For example, perhaps the Notice of Opposition states that the judgment was for a common necessary of life. This term is generally taken by courts to mean only the essentials that everyone needs to live; sometimes a court will have to decide the matter. For example, while coat may be a "common necessary, a fur coat may not be.

If the judge at the hearing agrees with you, your employer will be ordered to stop withholding your earnings or withhold less money. The judge can even order that the **EWO** end before the hearing (so you would get some earnings back).

If the judge does not agree with you, the withholding will continue unless you **appeal to** a higher court. The rules for appeals are complex so you should see an attorney if you want to appeal.

If you have one court hearing, you should not file another Claim of Exemption about the same **EWO** unless your finances have gotten worse in an important way.

If your **EWO** is to be changed or ended, the levying officer must sign the notice to your employer of the change. He may give you permission to deliver it to the employer, or it can be mailed.

## WHAT HAPPENS TO YOUR EARNINGS IF YOU FILE A CLAIM OF EXEMPTION?

Your employer must continue to hold back part of your earnings for the **EWO** until he receives a notice signed by the levying officer to change the order or end it early.

The levying officer will keep your withheld earnings until your Claim of Exemption is denied or takes effect. At that time your earnings will be paid according to the law that applies to your case.

## REGARDING CHILD SUPPORT

If you are obligated to make child support payments, the local child support agency may help you to have an Order Assigning Salary or Wages entered. This order has the top priority claim on your earnings. When it is in effect, little or no money may be available to be withheld for an **EWO**. And, if the local child support agency is involved in collecting this support from you, it may agree to accept less money if this special order is entered.

## WHAT IF YOU STILL HAVE QUESTIONS?

If you cannot see an attorney, or don't want to see an attorney, you might be able to answer some of your questions by reading the law in a law library. Ask the law librarian to help you find sections 706.050 and 706.105 of the California Code of Civil Procedure. Other sections of the code, beginning with section 706.010 may also answer some of your questions.

Also, the office of the Wage and Hour Division of the U.S. Department of Labor may be able to answer some of your questions. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.



*Copies:* See §10.4.

*Comment:* This form constitutes the notice to employee of earnings withholding order specified in CCP §§706.103(a), 706.108(c). See §10.4. Use of this form is mandatory. CCP §706.120; Cal Rules of Ct 1.31(a)-(c).

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### §10.9 2. Lien Created by Service of Earnings Withholding Order

Service of an earnings withholding order on the employer creates a lien on the judgment debtor's earnings that are required to be withheld under the order and on all the employer's property subject to the enforcement of a money judgment in the amount required to be withheld under the order. CCP §706.029. The lien endures for 1 year after the date the judgment debtor's earnings became payable unless the amount required to be withheld under the order is paid as required by law. CCP §706.029.

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### 3. Employer's Duties After Being Served With Earnings Withholding Order

#### §10.10 a. Notification to Employee; Employer's Return; Time Limitations

Within 10 days after service of an earnings withholding order, the employer must deliver to the judgment debtor employee a copy of the earnings withholding order and the notice to employee of earnings withholding. CCP §706.104(a). The employer need not do so if the judgment debtor is no longer employed by the employer and the employer owes no earnings to him or her. CCP §706.104(a). The employer's failure to comply with CCP §706.104(a) does not subject the employer to civil liability, but it may subject the employer to contempt. CCP §706.104(a). Contempt is appropriate if the employer fails to give the employee notice out of malice or willful neglect, but it is not appropriate if the employer inadvertently failed to give the notice. See Comment to CCP §706.104.

Within 15 days after the date of service of the order, the employer must complete the employer's return and mail it first-class, postage prepaid, to the levying officer. CCP §706.104(b). If the earnings withholding order is ineffective for any reason (see §10.12), the employer must return the order and say in the employer's return that the order will not be complied with and give the reasons for noncompliance. CCP §706.104(b).

For special provisions on the time for delivery to the judgment debtor of a copy of the earnings withholding order and the notice to employee of earnings withholding when the order is a withholding order for taxes, see CCP §706.075(b). On earnings withholding order for taxes generally, see §10.18.

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### §10.11 b. Duration of Withholding Period; Payment to Levying Officer

Unless a statute provides otherwise, an employer served with an earnings withholding order must withhold the amount required by the order from all the employee's earnings payable for the pay period that ends during the withholding period. CCP §706.022(b). The "withholding period" is defined in CCP §706.022(a) as the period beginning on the 10th day after service of the earnings withholding order on the employer until the earliest of the following dates:

- The date the employer has withheld the full amount specified in the order;
- The date specified in a court order served on the employer to terminate the withholding order;
- The termination date specified in a notice of termination (see §§10.15-10.16); or
- The termination date of a dormant or suspended earnings withholding order under CCP §706.032.

Under CCP §706.024, the amount required to satisfy the order is the total amount required to satisfy the writ of execution on the date the order is issued, with the following additions and subtractions:

- Subtraction of the amount of any partial satisfactions.
- Additions:
- The statutory fee for service of the order and any other statutory fees for performing duties under the order;
- Costs added to the order under CCP §685.090; and
- Daily interest accruing after issuance of the order, as adjusted for partial satisfactions.

An employer is not liable for any amounts paid over to the levying officer under an earnings withholding order before service on the employer of a court order terminating the order or a notice of termination. CCP §706.022(c).

An employer's duty to withhold under an earnings withholding order, other than an earnings withholding order for support, is suspended by the service of an order for the collection of state taxes. After an order for collection of state taxes has been satisfied, the earnings withholding order is reinstated if the withholding period has not expired. If the employee was laid off, discharged, or suspended and then rehired or returns to work during the withholding period, the earnings withholding order is still effective. See Comment to CCP §706.022. On priority of earnings withholding orders, see §§10.12-10.13.

The employer must pay the amount required to be withheld under the earnings withholding order at least monthly to the levying officer no later than the 15th day of each month. On amount of each payment, see CCP §706.025(a). Under CCP §706.025(b), the employer may elect to pay the withheld amounts more often than monthly to the levying officer, but if the employer does so, the payments must be made within 10 days after the close of the pay period. CCP §706.025(b).

The levying officer must pay over amounts received to the person entitled to them at least once every 30 days. CCP §706.026.

At least once every 2 years, the levying officer must file an account with the court for all amounts collected under the earnings withholding order, including costs and interest added to the amount due. CCP §706.026(b).

If withholding under an earnings withholding order stops because the judgment debtor's employment has terminated, the earnings withholding order terminates at the end of a continuous 180-day period during which no amounts are withheld under the order. CCP §706.032(a)(1). If withholding under the withholding order stops because the judgment debtor's earnings are subject to an order or assignment with higher priority, the earnings withholding order terminates at the end of a continuous 2-year period during which no amounts are withheld under the order. CCP §706.032(a)(2). In either of these circumstances, the employer must return the earnings withholding order to the levying officer with a statement of the reasons for returning it. CCP §706.032(b).

If the writ is returned before the earnings withholding order terminates, the levying officer, on termination of the order, must make a supplemental return on the writ. The supplemental return must contain the same information as an original return under CCP §699.560. CCP §706.033.

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### c. Priority

### §10.12 (1) When Multiple Earnings Withholding Orders Served

Unless otherwise provided for by statute, an employer must comply with the first earnings withholding order served on the employer. CCP §706.023(a). If two or more orders are served on the employer on the same day, the employer must comply with the order issued under the judgment first entered. CCP §706.023(b). If two or more orders are served on the employer on the same day based on judgments entered on the same day, the employer may choose which order to comply with. CCP §706.023(b). If an employer is complying with an earnings withholding order and is later served with another order on the same employee's wages, the latter order is ineffective and the employer need not withhold wages under it. CCP §706.023(c). On specifying in the employer's return that the order will not be complied with and the reasons, see CCP §706.104(b) (discussed in §10.10).

For exceptions to these priority rules, see CCP §§706.030 (withholding order for support, discussed in §10.14), 706.077 (withholding orders for taxes, discussed in §10.19). On priority of wage assignments for support, see §10.13.

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### §10.13 (2) Earnings Assignment Order for Support

An earnings assignment order for support has priority over any earnings withholding order, including an earnings withholding order for support (see §10.14). CCP §706.031(b); see Comment to CCP §706.031. Nothing in the Wage Garnishment Law affects an earnings assignment order for support. CCP §706.031(a). An employer served with an earnings assignment order must withhold and pay over the employee's earnings under the wage assignment for support despite an earnings withholding order. CCP §706.031(b). If an earlier earnings withholding order is completely superseded by a supervening earnings assignment order for support, the employer must notify the levying officer who served the earnings withholding order that a supervening earnings assignment order for support is in effect. CCP §706.031(b); see Comment to CCP §706.031.

The employer must withhold the employee's earnings under both an earnings assignment order and an earnings withholding order subject to CCP §706.031(b), (d)-(e). CCP §706.031(c). Under CCP §706.031(b), (d), when an earnings assignment order is in effect, the amount withheld from the debtor's earnings under any earnings assignment order is deducted from the amount that would otherwise be withheld under CCP §706.050 in an earnings withholding order to enforce an ordinary money judgment or that would otherwise be withheld when a portion of the debtor's earnings are exempt under CCP §706.051. For an example, see Comment to CCP §706.031. The amount to be withheld under an earnings withholding order for taxes is dealt with in CCP §706.031(e).

An employer who willfully fails to withhold and forward support under a currently valid assignment order entered and served on the employer is liable for the amount of support not withheld or paid to the obligee, as well as interest on the withheld support. Fam C §5241(a), (b). In addition, an employer's willful failure to comply with an assignment order is punishable as contempt under CCP §1218. Fam C §5241(c).

**PRACTICE TIP:** Wages withheld under an earnings assignment order for spousal support are not exempt from levy under a writ of execution to enforce a money judgment against the supported spouse. *Vineyard v Sisson* (1990) 223 CA3d 931, 272 CR 914. An employer who is simultaneously bound by an earnings assignment order for spousal support and a writ of execution against the supported spouse's interest in the supporting spouse's wages must pay to the supported spouse all the supporting spouse's wages subject to the assignment, unless the judgment creditor can get a court order altering the statutory priority. 223 CA3d at 939.

The federally promulgated form designed for child support enforcement, as modified by California, is the Income Withholding for Support (Judicial Council Form FL-195) (formerly known as an Order/Notice to Withhold). This form should not be confused with the Earnings Withholding Order for Support (Judicial Council Form WG-004) (see §10.6) based on a writ of execution. Form FL-195 follows all the same rules of an earnings assignment order as discussed above. However, the FL-195 may be issued as a court order and may also be issued by an attorney if an underlying order states that a dollar amount is payable and that a wage assignment or Form FL-195 may issue. When Form FL-195 is not issued by a court (or administrative government agency), service on the employer must be accompanied by a copy of the underlying order. See Judicial Council Form FL-196 for instructions.

On earnings assignment orders for support, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§20.2-20.15 (Cal CEB Annual).

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### §10.14 (3) Earnings Withholding Order for Support

An earnings withholding order for support is an earnings withholding order issued on a writ of execution to collect delinquent amounts payable under a judgment for support of the debtor's child, spouse, or former spouse. It has priority over all other earnings withholding orders except an earnings assignment order for support (see §10.13) or an earnings withholding order for taxes (see §10.18). CCP §§706.030(a), (c)(2); see Comment to CCP §706.030. An employer who is served with a withholding order for support must withhold and pay over the employee's earnings under the order despite the requirements of another earnings withholding order. CCP §706.030(c)(2). Subject to §706.030(c)(2) and the restrictions on earnings withheld in CCP §§706.050-706.052, if nonexempt earnings are sufficient, an employer must withhold earnings simultaneously under both a withholding order for support and an earnings withholding order. CCP §706.030(c)(3).

Under CCP §706.030(c)(1), an employer must continue to withhold under a withholding order for support until the earliest of:

- The date the full amount specified in the order is withheld by the employer;
- The date specified for termination in a court order served on the employer; or
- The date for termination specified in a notice of termination (see §§10.15-10.16) served by the levying officer on the employer.

However, a withholding order for support automatically terminates 1 year after the employee's employment by the employer terminates. CCP §706.030(c)(1). Thus, for example, if an employee returns to work for the same employer within this 1-year period, the employer must continue to withhold under a withholding order for support, but the employer need not do so if the employee returns to work after the 1-year period. See Comment to CCP §706.030.

**NOTE:** Concerning wage garnishments for support, creditor's counsel must be aware of two quirks in the current legislative scheme. First, the California State Disbursement Unit (SDU) (see §13.34E) was developed to process stand-alone child support garnishments or combined child and spousal support garnishments. However, CCP §706.030(c)(6) inartfully redirects *all* earnings withholding orders for support to be paid to the SDU, thus including stand-alone spousal support garnishments with no child support component at all.

Second, as fully discussed in chap 9, writs of execution are issued for monies past due and not for sums that have yet to accrue. Nonetheless, CCP §706.030(c)(7) requires that earnings withheld pursuant to an earnings withholding order *must* be credited toward satisfaction of a support judgment as specified in CCP §695.221. That section requires that monies be applied first to that month's current support obligation, next to accrued interest, and then to the principal amount of the judgment remaining unsatisfied. Therefore, when a current support obligation continues to accrue, instead of crediting interest followed by principal, as would normally be the case, current support may need to be credited possibly leaving the ironic scenario of having to apply for a subsequent writ covering the exact same period of time, notwithstanding the fact that significant recoveries may have been made.

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### 4. Judgment Creditor's Duty When Judgment Satisfied Before Earnings Withholding Order Terminates

#### §10.15 a. Notice of Termination

When a judgment is satisfied but an earnings withholding order issued under it has not terminated under CCP §706.022 (see §10.11), the judgment creditor must promptly notify the levying officer of the judgment's satisfaction. CCP §706.027. The levying officer must then promptly terminate the order by serving the employer with a notice of termination. CCP §706.027. For Judicial Council Form WG-012), Notice of Termination or Modification of Earnings Withholding Order, see §10.16. If the employer is aware that the judgment has been satisfied by virtue of having withheld the amount necessary to satisfy the judgment, CCP §706.027 does not apply and the levying officer need not serve the employer with a notice of termination.

A judgment creditor who fails to perform the duty imposed under CCP §706.027 may be liable in an action for abuse of process. See Comment to CCP §706.027.

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.16 b. Form: Notice of Termination or Modification of Earnings Withholding Order (Judicial Council Form WG-012)

## §10.16 b. Form: Notice of Termination or Modification of Earnings Withholding Order (Judicial Council Form WG-012)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: TELEPHONE NO: | LEVYING OFFICER *(Name and Address)* |
|---|---|
| ATTORNEY FOR *(Name)*: | |
| NAME OF COURT, JUDICIAL DISTRICT, OR BRANCH COURT, IF ANY: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **NOTICE OF TERMINATION OR MODIFICATION OF EARNINGS WITHHOLDING ORDER** | LEVYING OFFICER FILE NO.: / COURT CASE NO.: |

1. **TO EMPLOYER: You are given notice that the Earnings Withholding Order is modified as follows:**

   Name and address of employer _____ Name and address of employee _____

   Attn: _____ Social Security Number *(if known)*: _____

   *(Insert name above)*

2. THE EARNINGS WITHHOLDING ORDER IS
   - a. ☐ terminated for all earnings payable on or after *(date)*:
   - b. ☐ modified for all earnings payable on or after *(date)*: , as follows:
     - (1) ☐ The sum to be withheld is *(specify amount/weekly, monthly, etc.)*: $

       **The amount withheld must not exceed the maximum permitted by law, as explained in the Employer's instructions.**
     - (2) ☐ The sum necessary for the support of the judgment debtor and family is *(specify amount/weekly, monthly, etc.)*: $

       All disposable earnings exceeding that amount are to be withheld, **but the amount withheld must not exceed the maximum permitted by law, as explained in the Employer's Instructions.**
   - c. ☐ Other orders *(specify)*:

3. Withheld earnings presently in your possession should be paid in accordance with the terms of this notice.

Date:

Levying Officer, by _____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE)

**CREDITOR'S INSTRUCTION TO TERMINATE OR MODIFY EARNINGS WITHHOLDING ORDER**

**To the levying officer:** You are directed to terminate or modify the Earnings Withholding Order as indicated above.

Date:

_____ ▶ _____
*(TYPE OR PRINT NAME)* (SIGNATURE)



Form Adopted by the Judicial Council of California
WG-012 [Rev. January 1, 2007]

**NOTICE OF TERMINATION OR MODIFICATION OF EARNINGS WITHHOLDING ORDER (Wage Garnishment)**

Code of Civil Procedure, §§ 706.105(f), 706.105
www.courtinfo.ca.gov

*Copies:* Prepared by levying officer.
*Comment:* Use of this form is mandatory. CCP §706.120; Cal Rules of Ct 1.31(a)-(c).

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### §10.17 5. Additional Earnings Withholding Order for Recovery of Cost and Interest

Costs and interest may accrue after the judgment creditor's application for an earnings withholding order. If so, after payment of the amount stated as owed in that earnings withholding order and, subject to CCP §706.023 on priorities, the judgment creditor may apply for another earnings withholding order covering such costs and interest. CCP §706.028. This additional earnings withholding order is designated "final earnings withholding order for costs and interest" and is issued only after the earlier earnings withholding order has been satisfied. CCP §706.028(a). The final withholding order for costs and interest is enforced in the same manner as other earnings withholding orders. CCP §706.028(c).

Interest stops accruing on the date the final withholding order is issued. Other costs may not be added after that date, except for the statutory fee for service of the order and any other statutory fees for performing duties under the order. CCP §706.028(d).

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### §10.18 C. Earnings Withholding Order for Taxes

When the state seeks to collect a state tax liability by garnishing an employee's wages, the state must proceed under CCP §§706.070-706.084 except as those section provide otherwise. See CCP §706.073. A levy on an employee's earnings held by an employer is ineffective unless it is made in accordance with CCP §§706.070-706.084. CCP §706.071.

The Judicial Council has prepared the following forms:

- Application for Earnings Withholding Order for Taxes (see §10.3);
- Earnings Withholding Order for Taxes (With Employer's Instructions) (see §10.5); Notice of Hearing—Earnings Withholding Order for Taxes; and
- Temporary Earnings Holding Order for Taxes.

The use of these forms, and the use of additional forms prepared by the state in connection with a withholding order for taxes, is mandatory. CCP §§706.081, 706.120; Cal Rules of Ct 1.31(a)-(c).

An earnings withholding order for taxes has priority over any earlier withholding order except a withholding order for support or a prior withholding order for taxes. See Comment to CCP §706.077.

**PRACTICE TIP:** Federal law controls the collection of federal taxes, whose collection cannot be limited by state law. See Comment to CCP §706.071.

For amount of employees' wages subject to be withheld based on a withholding order for taxes, see CCP §§706.074, 706.076-706.077. See §10.21 on computing exempt earnings.

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## II. EXEMPTION FROM WAGE GARNISHMENT

### §10.19 A. General State and Federal Provisions

The amount of a judgment debtor's earnings exempt from levy is calculated under both federal and state statutes and may vary, depending on whether the levy is made under a general earnings withholding order, an earnings withholding order for support, or an earnings withholding order for taxes. California wage garnishment principles and procedures are covered in CCP §§706.010-706.154. Procedures for obtaining earnings withholding orders are discussed in §§10.1-10.18.

The federal statute, 15 USC §1673(a), limits the amount of earnings subject to garnishment to, basically, 25 percent of disposable earnings or the amount by which the individual's disposable earnings for that week exceed 30 times the federal minimum hourly wage, whichever is less, unless the debt is for support or taxes. See §10.20 on disposable earnings and §§10.22-10.24 on computing the amount that may be withheld. California law refers to the federal limits and permits an additional exemption in some cases for amounts needed to support the debtor or the debtor's family. See §10.25.

An employee may claim an exemption for funds in a deposit account, or funds in cash or its equivalent, that can be traced back to earnings paid to the employee during the 30-day period ending on the date of levy. CCP §704.070. (If the judgment creditor seeks to subject paid earnings to enforcement of a money judgment other than by levy, the date the earnings were subjected to such enforcement is deemed to be the levy date. CCP §704.070(a)(2).) All earnings that were subject to an earnings withholding order or wage assignment for support (see CCP §706.011(b)) before payment to the employee are exempt, as are 75 percent of earnings that were not.

An employer may not, before judgment, deduct amounts from an employee's wages to satisfy a debt owed to the employer unless the employee consents. Such a deduction would violate CCP §487.020(c), which precludes attaching a debtor's earnings. *Barnhill v Robert Saunders & Co.* (1981) 125 CA3d 1, 177 CR 803.

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### §10.20 1. Disposable Earnings; Self-Employment Earnings

"Disposable earnings" are all the sums paid to an employee for services (including wages, salary, commissions, bonuses, vacation and sick pay, and payments to a pension or retirement program, but not, *e.g.,* tips) less amounts required by law to be withheld from earnings (including federal and state income taxes, social security tax, state disability insurance, and payments to a public employee retirement system). See 15 USC §1672 and Computation Instructions on page 2 of Judicial Council Form WG-002), Earnings Withholding Order, in §10.5.

The earnings exemption under CCP §706.050, protecting wages from garnishment, does not apply to the earnings of a self-employed person. See *Moses v DeVersecy* (1984) 157 CA3d 1071, 203 CR 906, in which the court refused to apply the exemption to a self-employed certified public accountant. That the accountant performed services for clients was irrelevant; he managed and controlled his practice.

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## §10.21 2. Computing Amount of Exempt Earnings

The amount of a debtor's earnings that are protected from levy varies according to the type of earnings withholding order under which the levy is sought. There are general earnings, support, and state tax withholding orders. See §§10.22-10.24.

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### §10.22 a. "General" Earnings Withholding Order

A debtor whose earnings are being withheld under a "general" earnings withholding order (*i.e.,* one not for support or state taxes) may object to the withholding of any amount over 25 percent of disposable earnings. CCP §706.050; 15 USC §1673. Federal law states the maximum part of aggregate disposable earnings subject to garnishment, and CCP §706.050 declares the remainder to be exempt from the levy of an earnings withholding order. (Note that only weekly disposable earnings that exceed 30 times the federal minimum hourly wage are subject to garnishment. 15 USC §1673(a). See chart on page 2 of Judicial Council Form WG-002), Earnings Withholding Order, reproduced in §10.5.)

The amount an employer is entitled to withhold from earnings under an earnings withholding order is reduced by the amount deducted from the judgment debtor's earnings under an earnings assignment order for support (defined in CCP §706.011(b)). See CCP §706.031(d). For example, if the debtor has earnings of $600 per week subject to a $60 per week order assigning wages, the employer should not withhold more than $90 per week under the earnings withholding order (25 percent of $600 is $150, less $60 is $90).

The judgment debtor may further reduce the amount withheld from earnings by claiming a CCP §706.051 exemption for earnings needed to support the debtor or the debtor's family. See §10.25.

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### §10.23 b. Earnings Withholding Order for Support

A judgment debtor whose earnings are being withheld under an earnings withholding order for support (see form in §10.6) may object to any amount over 50 percent of disposable earnings being withheld. CCP §706.052. As under a general order (see §10.22), the amount withheld under a support order is reduced by any amount mandatorily deducted from the debtor's earnings under a wage assignment for support. CCP §706.052(a).

A judgment debtor, although not entitled to claim the CCP §706.051 exemption for earnings needed to support the debtor or the debtor's family (CCP §706.051(c)(3)), may file with the court and serve a noticed motion for an equitable division of the debtor's earnings that considers the needs of everyone the debtor is required to support (see CCP §706.052(b)). An order dividing earnings may authorize the withholding of up to 60 percent of disposable earnings if the debtor is not supporting a spouse or dependent children other than those who sought the earnings withholding order for support, or up to 65 percent if support payments are more than 12 weeks overdue. CCP §706.052(c); 15 USC §1673(b)(2).

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### §10.24 c. Earnings Withholding Order for Taxes

A judgment debtor whose earnings are being withheld under an earnings withholding order for state taxes (see §10.18) must first ascertain whether the order was issued by the state itself (see CCP §706.074(a)) or whether it was issued by a court of record in the county of the debtor's residence (see CCP §706.076(b)).

The amount being withheld under a state-issued order may not exceed the percentage of disposable earnings that may be withheld under a general earnings withholding order. See §10.22. CCP §706.074(b). This amount, normally 25 percent of disposable earnings, must be reduced, as under a general order, by the amount withheld under a wage assignment for support. See CCP §706.031(e). Although the CCP §706.051(b) exemption for earnings needed to support the debtor and the debtor's family is not available (CCP §706.051(c)(4); see §10.25), the debtor may request an administrative hearing on the amount withheld from earnings; the hearing authority is subject to the CCP §706.051(b) limit. CCP §706.075(c).

Under a court-issued earnings withholding order for taxes, a greater amount of the debtor's earnings may be withheld. CCP §706.076(b). It appears that the amount withheld must be at least as great as the amount that may be withheld under a general earnings withholding order, and it may be as great as all the debtor's earnings, reduced only by the amount that the debtor proves under CCP §706.051 is necessary to support the debtor and the debtor's family. See CCP §706.076(e).

The debtor asserts an exemption at a court hearing by filing a claim of exemption and financial declaration (wage garnishment—state tax liability). See §10.27. The taxpayer's tax liability may not be reviewed at the court hearing. CCP §706.082.

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### §10.25 3. Earnings Necessary to Support Debtor and Family

The judgment debtor may claim an exemption from levy for the portion of earnings that the debtor proves is necessary to support the debtor or the debtor's family. CCP §706.051. Under this exemption, the debtor's family includes the debtor's spouse or former spouse.

This exemption does not apply when the debt (CCP §706.051(c)):

- Was incurred for the common necessaries of life (see §10.26);
- Was incurred for the personal services of an employee or former employee;
- Is based on a withholding order for support; or
- Is for state taxes (but see CCP §706.075(c), discussed in §10.24).

See §§10.27-10.34 for procedure for applying for exemptions.

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### §10.26 4. Common Necessaries of Life

A judgment debtor may not claim the CCP §706.051 exemption for earnings necessary to support the judgment debtor or the debtor's family if the debt was incurred for the common necessaries of life for the judgment debtor or his or her family. CCP §706.051(c)(1).

Courts strictly construe "common necessaries of life" to mean only essentials all persons commonly require to sustain life, regardless of a person's employment or status (*e.g.,* food, clothing, medical care, light, and heat, but not, say, a wristwatch). An automobile is not a common necessary of life. *Ratzlaff v Portillo* (1971) 14 CA3d 1013, 92 CR 722. An attorney fee awarded to the wife's attorneys for securing spousal support is a necessary of life and is not exempt. *Marriage of Pallesi* (1977) 73 CA3d 424, 140 CR 842. Hospital services furnished to the debtor or the debtor's family are common necessaries of life under CCP §706.051. *J.J. MacIntyre Co. v Duren* (1981) 118 CA3d Supp 16, 173 CR 715.

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## B. Procedure

### §10.27 1. Filing Claim

The exemption for earnings necessary to support the judgment debtor or the debtor's family is claimed by filing with the levying officer (not with the court) an original and one copy of the debtor's claim of exemption, together with a copy of the debtor's financial statement. CCP §706.105(b). See §9.61 for a financial statement form. However, an exemption claim in a proceeding to garnish wages to pay a state tax liability is filed with the court because there is no separate levying officer when state taxes are involved (see form in §10.28).

The exemption may be claimed if (CCP §706.105(a)):

- No prior hearing has been held on the earnings withholding order; or
- A material change in circumstances has occurred since the latest hearing.

The claimant must file Judicial Council Form WG-006), Claim of Exemption (Wage Garnishment) (see §10.28). CCP §706.120; Cal Rules of Ct 1.31(a)-(c). The required accompanying form is Judicial Council Form WG-007), Financial Statement (which is identical to the printed form (EJ-165) that may be used in other situations). See §9.61. If the exemption is claimed in a state tax liability situation, Judicial Council Form WG-026), Claim of Exemption and Financial Declaration, which incorporates its own financial statement (see §10.29), must be used. Cal Rules of Ct 1.31(a)-(c). See CCP §706.081.

A description of procedures for filing exemption claims, written for laypersons, should already have been given by the employer to the employee. See CCP §706.122 for required contents of notice to employee, and §§10.8, 10.10 for discussion and form.

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.28 a. Form: Claim of Exemption (Wage Garnishment) (Judicial Council Form WG-006)

## §10.28 a. Form: Claim of Exemption (Wage Garnishment) (Judicial Council Form WG-006)

Print

*RETURN TO LEVYING OFFICER. DO NOT FILE WITH COURT* WG-006

| | |
|---|---|
| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:<br><br>TELEPHONE NO.: FAX NO. *(Optional)*:<br>E-MAIL ADDRESS *(Optional)*:<br>ATTORNEY FOR *(Name)*: | *FOR LEVYING OFFICER USE ONLY*<br>*(Levying Officer Name and Address)* |
| **SUPERIOR COURT OF CALIFORNIA, COUNTY OF**<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| PLAINTIFF/PETITIONER:<br><br>DEFENDANT/RESPONDENT: | LEVYING OFFICER FILE NUMBER: |
| **CLAIM OF EXEMPTION**<br>(Wage Garnishment) | *FOR COURT USE ONLY* |
| | CASE NUMBER: |

**READ *EMPLOYEE INSTRUCTIONS* (FORM WG-003) BEFORE COMPLETING THIS FORM**

***Copy all the information required above (except the top left space) from the* Earnings Withholding Order*. The top left space is for your name or your attorney's name and address. The original and one copy of this form with the Financial Statement attached must be filed with the levying officer.***
***DO NOT FILE WITH THE COURT.***

1. My name is :
2. I need the following earnings to support myself or my family *(check a or b)*:
   a. ☐ All earnings.
   b. ☐ $ each pay period.
3. Please send all papers to
   ☐ me.
   ☐ my attorney
   at the address ☐ shown above ☐ following *(specify)*:
4. I am willing for the following amount to be withheld from my earnings **each pay period** during the withholding period. **I understand that the judgment creditor can accept this offer by not opposing the Claim of Exemption, which will result in the following sum being withheld each pay period** *(check a or b)*:
   a. ☐ None
   b. ☐ Withhold $ each pay period.
5. I am paid
   ☐ daily ☐ every two weeks ☐ monthly
   ☐ weekly ☐ twice a month ☐ other *(specify)*:

**NOTE: You must attach a properly completed Financial Statement form to this Claim of Exemption.**
The Financial Statement form is available without charge from the levying officer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

*(TYPE OR PRINT NAME)* *(SIGNATURE OF DECLARANT)*



Form Approved by the Judicial Council of California
WG-006 [Rev. January 1, 2009]

**CLAIM OF EXEMPTION**
**(Wage Garnishment)**

CEB
Code of Civil Procedure, § 706.124
www.courtinfo.ca.gov

*Copies:* Original and one copy (file both with levying officer); office copies.

**© The Regents of the University of California**

**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.29 b. Form: Claim of Exemption and Financial Declaration (Wage Garnishment--State Tax Liability) (Judicial Council Form WG-026)

## §10.29 b. Form: Claim of Exemption and Financial Declaration (Wage Garnishment—State Tax Liability) (Judicial Council Form WG-026)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO: FAX NO.:<br>ATTORNEY FOR STATE TAXPAYER/RESPONDENT: | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | |
| APPLICATION OF *(Name)*:<br>TAXPAYER/RESPONDENT | |
| **CLAIM OF EXEMPTION AND FINANCIAL DECLARATION** | CASE NUMBER: |
| NAME OF STATE TAX AGENCY: | TAX AGENCY NUMBER: |

***(Copy the information required above from the* Application for Earnings Withholding Order for Taxes *(form WG-020). The top left space is for your or your attorney's name and address.)***

1. I need the following earnings to support myself or my family *(check and complete item a or b)*:
   a. ☐ All earnings. b. ☐ $ each pay period.
2. Please send all papers to ☐ me ☐ my attorney at the address ☐ shown above ☐ following *(specify)*:

3. In addition to the 25 percent minimum withholding, I am willing for the following amount to be withheld from my earnings during the withholding period:
   a. ☐ None b. ☐ Withhold: $ each pay period.
4. a. I am paid ☐ daily ☐ weekly ☐ every two weeks ☐ twice a month ☐ monthly.
   b. My gross pay is: $ per pay period.
   c. My take-home pay is: $ per pay period.
   d. My payroll deductions are *(item and amount)*:

5. The following persons depend, in whole or in part, on me for support:

| | Name | Age | Relationship to me | Monthly income and its source |
|---|---|---|---|---|
| a. | | | Myself | |
| b. | | | | |
| c. | | | | |
| d. | | | | |
| e. | | | | |

6. ☐ The earnings of others listed in item 5 are now subject to wage assignments and Earnings Withholding Orders as follows *(specify)*:



Form Adopted for Mandatory Use
Judicial Council of California
WG-026 [Rev. January 1, 2007]

**CLAIM OF EXEMPTION AND FINANCIAL DECLARATION**
**(Wage Garnishment-State Tax Liability)**

Code of Civil Procedure, §§ 706.051, 706.076
www.courtinfo.ca.gov

Print

| APPLICATION OF *(Name)*: TAXPAYER/RESPONDENT | CASE NUMBER |
|---|---|
| | |

7. My monthly expenses are as follows:
   a. Rent or house payment and maintenance . . . . . $
   b. Food and household supplies . . . . . $
   c. Utilities and telephone . . . . . $
   d. Clothing . . . . . $
   e. Laundry and cleaning . . . . . $
   f. Medical and dental payments . . . . . $
   g. Insurance (life, health, accident, etc.) . . . . . $
   h. School, child care . . . . . $
   i. Child, spousal support (prior marriage) . . . . . $
   j. Entertainment and incidentals . . . . $
   k. Transportation and auto expenses (insurance, gas, repair) . . . . . $
   l. Installment payments *(insert total and list below in item 8)* . . . . . $
   m. Other *(specify)*: . . . . . $

   TOTAL MONTHLY EXPENSES *(add a through m)* . . . . . $

8. List payments on installment and other debts. ☐ Continued on Attachment 8.

| Creditor's name | For | Monthly payment | Balance |
|---|---|---|---|
| | | | |

9. What do you own? *(State value.)*
   a. Cash . . . . . $
   b. Checking, savings and credit union accounts, etc. *(list institutions)*:
      (1) _____ $
      (2) _____ $
      (3) _____ $
      (4) _____ $
   c. Cars, other vehicles, and boat equity *(list make, year of each)*:
      (1) _____ $
      (2) _____ $
      (3) _____ $
   d. Real estate equity *(addresses)*: . . $
   e. Other personal property *(jewelry, furniture, furs, stocks and bonds, etc. **List separately**)*:

      Total for item e: . . . $

10. ☐ An Order Assigning Salary and Wages (for support) is now in effect as to my earnings. The amount payable under that order is: $ monthly.
11. Other facts that support this *Claim of Exemption* are *(describe unusual medical needs, school tuition, expenses for recent family emergencies, or other unusual expenses to help the judge understand your budget)*: ☐ Continued on Attachment 11.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF TAXPAYER)

**File this form with the clerk of the court and mail a copy to the tax agency as soon as possible. Keep a copy and take it with you to the court hearing. If you wish to obtain the advice of an attorney, you should do so at once.**



*Copies:* Original (file with court clerk); one copy (serve on tax agency by mail); office copies.

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### §10.30 2. Opposing Claim

On receiving a claim of exemption for earnings, the levying officer must promptly send to the judgment creditor a notice of filing of claim of exemption (see §10.31), together with copies of the judgment debtor's claim and financial statement forms. CCP §706.105(c). The notice and a copy of the claim are sent by first-class mail to the judgment creditor's address stated on the application for the earnings withholding order.

To oppose an exemption claim, the judgment creditor must take three actions:

- File a notice of opposition to claim of exemption (see §10.32) with the levying officer within 10 days after the notice of claim of exemption was mailed;
- File a notice of hearing on the claim (see §9.65) with the court to obtain such a hearing within 10 days after the notice of claim of exemption was mailed (CCP §706.105(d)-(e)); and
- Give a copy of the notice of hearing to the levying officer within 10 days after filing the notice of opposition (CCP §706.105(f)).

Unless it is continued for good cause, the hearing will take place within 30 days after the hearing request is filed. CCP §706.105(e). At least 15 days before the hearing, the judgment creditor must give notice of the hearing to the levying officer, to the judgment debtor, and, if requested in the claim of exemption, to the debtor's attorney. Service may be by first-class mail and is complete on deposit in the mail. The levying officer files with the court the notice of the hearing, the exemption claim, and the notice of opposition. CCP §706.105(e).

If the levying officer does not receive both a notice of opposition within 10 days after the notice of claim of exemption is filed *and* a notice of hearing within 10 days after the notice of opposition is filed, the levying officer will serve the employer either with notice that the original withholding order has been terminated (if the debtor has claimed all wages to be exempt) or with a modified earnings withholding order (if only a portion was claimed to be exempt). CCP §706.105(f).

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.31 a. Form: Notice of Filing of Claim of Exemption (Judicial Council Form WG-008)

## §10.31 a. Form: Notice of Filing of Claim of Exemption (Judicial Council Form WG-008)

Print

**WG-008**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | LEVYING OFFICER (Name *and Address)*: |
|---|---|
| TELEPHONE NO.: FAX NO.:<br>ATTORNEY FOR *(Name)*: | |
| NAME OF COURT, JUDICIAL DISTRICT, AND BRANCH COURT, IF ANY: | |
| PLAINTIFF:<br>DEFENDANT: | |
| **NOTICE OF FILING OF CLAIM OF EXEMPTION (Wage Garnishment)** | LEVYING OFFICER FILE NUMBER: |
| **TO THE JUDGMENT CREDITOR:** *(Name and address)* | COURT CASE NUMBER: |

1. This notice was mailed on

   *(date)*: at *(place)*: , California.

2. The judgment debtor (employee) has filed the attached *Claim of Exemption and Financial Statement*. The *Earnings Withholding Order* will be terminated or modified to reflect the amount of earnings claimed to be exempt by the debtor in the *Claim of Exemption* ***unless you oppose the Claim of Exemption***. *To* oppose the *Claim of Exemption,* you must schedule a court hearing and follow the procedures described below.

**Levying Officer,** by

(TYPE OR PRINT NAME) (SIGNATURE)

**— INSTRUCTIONS TO JUDGMENT CREDITOR —**

3. You must complete all of the following steps **within 10 days of the mailing date shown above in item 1:**

**HOW DO I OPPOSE THE CLAIM OF EXEMPTION?**

a. Obtain at least **five** copies each of the following printed forms:
(1) *Notice of Opposition to Claim of Exemption* (form WG-009), and (2) *Notice of Hearing on Claim of Exemption* (form WG-010/EJ-175). These forms are available from the clerk of the court.

b. Complete all five copies of both forms.

c. Contact the clerk of the court about setting a hearing date, time, and place. You must file your *Notice of Hearing on Claim of Exemption* with the court within 10 days of the date shown in item 1. The date of the **hearing must be not more than 30 days after the date you file your paper with the court.**



Form Adopted for Mandatory Use
Judicial Council of California
WG-008 [Rev. January 1, 2007]



CEB
Code of Civil Procedure, § 706.105
www.courtinfo.ca.gov

Print

WG-008

| PLAINTIFF:<br>DEFENDANT: | LEVYING OFFICER FILE NO.: | COURT CASE NUMBER: |
|---|---|---|

**— INSTRUCTIONS TO JUDGMENT CREDITOR —**

3. *(Continued)*

**WHAT DO I FILE WITH THE LEVYING OFFICER?**

d. Give the following documents to the LEVYING OFFICER whose name and address are on the front of this form:
(1) The **original** *Notice of Opposition to Claim of Exemption* with **original** signature, and
(2) A copy of the *Notice of Hearing on Claim of Exemption*.
**The levying officer must receive the *Notice of Opposition to Claim of Exemption* within 10 days of the mailing date in item 1 on the front of this form, or the *Earnings Withholding Order* will be released or changed as requested in the *Claim of Exemption.***

**WHAT DO I FILE WITH THE COURT?**

e. File the **original** *Notice of Hearing on Claim of Exemption* with **original** signature with the COURT:
Make sure that the Proof of Service on the reverse has been completed as indicated in item 3g below and that the necessary signature on the Proof of Service is original.
**The court must receive this document within 10 days of the mailing date shown in item 1 on the front of this form.**
Before the hearing, **the levying officer** will file the original *Claim of Exemption* and the original *Notice of Opposition to Claim of Exemption* with the court.

**WHAT DO I SERVE ON THE JUDGMENT DEBTOR?**

f. Have one copy each of the
(1) *Notice of Opposition to Claim of Exemption,* and
(2) *Notice of Hearing on Claim of Exemption*
served on the judgment debtor (employee) or the debtor's attorney at the address shown in item 2 on the *Claim of Exemption*. They must be served at least 21 calendar days before the hearing if they are personally served. If they are sent by fax, express mail, or other method of overnight delivery, the required 21-day notice period shall be increased by 2 days. If they are served by mail from and to an address within California, they must be mailed at least 26 calendar days before the hearing. For more information on the time to serve the notices, you should see Code of Civil Procedure sections 706.105(e) and 1005.
**Complete the Proof of Service as shown in item 3g below.**

g. Service of the *Notice of Opposition to Claim of Exemption* and *Notice of Hearing on Claim of Exemption* must be made by first class mail or personal delivery. Service must be made by someone **not** a party to the action (not the judgment creditor). After the notices are served, the person making the service must complete and sign the appropriate Proof of Service on the reverse of the signed **original** *Notice of Hearing on Claim of Exemption,* which will be filed with the court.

4. Take a copy of each form and the *Claim of Exemption* with you to the court hearing.

***If you will not attend the court hearing*, check item 3 on the *Notice of Hearing on Claim of Exemption*.**



*Copies:* Original (send to judgment creditor); copy for judgment debtor; copy for levying officer's files.

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.32 b. Form: Notice of Opposition to Claim of Exemption (Wage Garnishment) (Judicial Council Form WG-009)

## §10.32 b. Form: Notice of Opposition to Claim of Exemption (Wage Garnishment) (Judicial Council Form WG-009)



WG-009

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: | *FOR COURT USE ONLY* |
|---|---|
| TELEPHONE NO.:<br>ATTORNEY FOR (*Name*): | |
| NAME OF COURT, JUDICIAL DISTRICT OR BRANCH COURT, IF ANY: | |
| PLAINTIFF:<br>DEFENDANT: | |

| **NOTICE OF OPPOSITION TO CLAIM OF EXEMPTION (Wage Garnishment)** | LEVYING OFFICER FILE NO.: | COURT CASE NO.: |
|---|---|---|

TO THE LEVYING OFFICER:

1. Name and address of judgment creditor

2. Name and address of employee

Social Security Number (*if known*):

3. The Notice of Filing Claim of Exemption states it was mailed on *(date)*:

4. The earnings claimed as exempt are
   a. ☐ not exempt.
   b. ☐ partially exempt. The amount not exempt per month is $

5. The judgment creditor opposes the claim of exemption because
   a. ☐ the judgment was for the following common necessaries of life *(specify)*:
   b. ☐ the following expenses of the debtor are not necessary for the support of the debtor or the debtor's family *(specify)*:
   c. ☐ other *(specify)*:

6. ☐ The judgment creditor will accept $ per pay period for payment on account of this debt.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

*(TYPE OR PRINT NAME)* *(SIGNATURE OF DECLARANT)*



Form Approved by the Judicial Council of California
WG-009 [Rev. January 1, 2007]

**NOTICE OF OPPOSITION TO CLAIM OF EXEMPTION (Wage Garnishment)**

Code of Civil Procedure, § 706.128
www.courtinfo.ca.gov

*Copies:* Original (file with levying officer); copies for service (one for debtor with notice of hearing, and, if requested, one for debtor's attorney); office copies.

*Comment:* The original must be filed with the levying officer within 10 days after the notice of claim of exemption is mailed. A copy of the notice of opposition must be served on the debtor at least 15 days before the hearing on the exemption claim. Service may be by first-class mail. CCP §706.105(e). Notice may be sent at the same time as the notice of hearing. See §9.65 for a notice of hearing form.

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### §10.33 3. Hearing; Orders

At the hearing on the exemption claim, the court may continue, terminate, or modify the original earnings withholding order. If the order is modified or terminated, the court clerk promptly sends the order to the levying officer (see §10.34 for form), who then serves a notice terminating or modifying the earnings withholding order on the employer. See §10.16 for form.

The earnings withholding order may be terminated retroactively. The court has the power to direct the employer, judgment creditor, or levying officer, as appropriate, to deliver to the judgment debtor any exempt wages previously withheld or garnished. CCP §706.105(g), (i).

The court's order may be appealed, but an appeal by the judgment creditor on an order modifying or terminating an earnings withholding order does not stay the modification or termination. CCP §706.105(j).

If the earnings withholding order is denied, the judgment creditor may not apply for a subsequent earnings withholding order directed to the same employer within the later of 100 days after service of the original earnings withholding order or 60 days after termination of the order, unless a material change of circumstances has occurred. CCP §706.105(h).

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**Source:** Business Law/Debt Collection Practice in California/10 Wage Garnishment/§10.34 4. Form: Order Determining Claim of Exemption (Judicial Council Form WG-011)

## §10.34 4. Form: Order Determining Claim of Exemption (Judicial Council Form WG-011)

Print

**WG-011**

| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: TELEPHONE NO: | *FOR COURT USE ONLY* | |
|---|---|---|
| ATTORNEY FOR *(Name)*: | | |
| NAME OF COURT, JUDICIAL DISTRICT OR BRANCH COURT, IF ANY: | | |
| PLAINTIFF:<br>DEFENDANT: | | |
| **ORDER DETERMINING CLAIM OF EXEMPTION (Wage Garnishment)** | LEVYING OFFICER FILE NO: | COURT CASE NO.: |

1. The application of *(name)*:
   for an order determining the Claim of Exemption of *(name)*:
   was heard on *(date)*:
   *(Check boxes to indicate personal presence)*
   ☐ Judgment Creditor *(name)*: ☐ Attorney *(name)*:
   ☐ Judgment Debtor *(name)*: ☐ Attorney *(name)*:

2. The court considered the evidence in support of and in opposition to the Claim of Exemption.
3. IT IS ORDERED
   a. ☐ The judgment debtor's Claim of Exemption is denied.
   b. ☐ The judgment debtor's Claim of Exemption is granted.
   c. ☐ The levying officer is directed to release any earnings held to the **judgment debtor.**
   d. ☐ The levying officer is directed to release any earnings held to the **judgment creditor** for payment on the judgment.
   e. ☐ Other orders *(specify)*:
   f. The clerk shall transmit a certified copy of this order to the levying officer. The levying officer shall notify the employer of any change in the Earnings Withholding Order and release any retained sums as provided in this order.

Date: ▶ _____
*(SIGNATURE OF JUDGE)*

*[SEAL]*

**CLERK'S CERTIFICATION**

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy



Form Adopted by the Judicial Council of California
WG-011 [Rev. January 1, 2007]

**ORDER DETERMINING CLAIM OF EXEMPTION (Wage Garnishment)**

CEB
Code of Civil Procedure, § 706.105
www.courtinfo.ca.gov

*Copies:* Original (for court file); copies for service (one for levying officer, one for other party, and, if requested, one for debtor's attorney); office copies.

*Comment:* See §10.16 for form of notice of termination or modification of earnings withholding order (Judicial Council Form WG-012).

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# 11

# Miscellaneous Remedies

**Richard L. Enkelis**
**Raymond R. Goldstein**

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- B. Statute of Limitations §11.2
- C. Joinder of Judgment Debtor; Venue; Lien §11.3
- D. Restraining Order; Preliminary Injunction §11.4
- E. Judgment Debtor's Claim of Exemption §11.5
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- H. Modifying or Setting Aside Assignment Order; Procedure §11.32

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- B. Special Rule on Alcoholic Beverage Licenses §11.34

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# I. CREDITORS' SUITS

## §11.1 A. Nature of Proceedings

A judgment creditor may bring an action against a third person who has possession or control of property in which the judgment debtor has an interest or who is indebted to the judgment debtor to have the debtor's interest or debt applied to satisfy the judgment creditor's money judgment. CCP §708.210. Normally, judgment creditors prefer less expensive and less cumbersome enforcement procedures than a creditor's suit to obtain satisfaction of the judgment. Bringing a creditor's suit may be desirable, however, if (see Comment to CCP §708.210):

- A third person has failed to perform the duties of a garnishee (see CCP §§701.010-701.070);
- The court does not rule on disputed ownership of the property or the existence of the debt when a third party asserts an adverse claim under CCP §708.180;
- The judgment creditor believes for some other reason that the third person will not cooperate; or
- The judgment creditor wishes to have full trial proceedings instead of the summary proceedings afforded under third party proceedings. See *Whitehouse v Six Corp.* (1995) 40 CA4th 527, 48 CR2d 600. On third party claim of ownership proceedings, see §9.49.

The judgment creditor need not first levy under a writ of execution, examine the third person, or resort to any procedures for satisfaction of the judgment before bringing suit. See Comment to CCP §708.210. There is no right to a jury trial in such actions. CCP §708.270.

On determination during examination of a third person's claimed interest in property or denial of the debt, see §§8.45-8.47.

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## §11.2 B. Statute of Limitations

Under CCP §708.230(a)(1)-(2), a creditor's suit must be instituted before expiration of the later of the following:

- The time when the judgment debtor may bring an action against the third person concerning the property or debt; or
- One year after creation of a lien on the property or debt under CCP §§680.010-724.260 if the lien is created at the time the judgment debtor may bring an action against the third person concerning the property or debt.

Examples of enforcement liens that may extend the time under CCP §708.230(a)(2) to institute suit include execution liens, judgment liens on personal property, and liens created by service of an order of examination on the third person (see §8.17).

A creditor's suit cannot be commenced in any event after expiration of the period for enforcement of the money judgment. CCP §708.230(b). If a creditor's suit is instituted within the period provided for in CCP §708.230(a), however, the suit may be prosecuted to judgment despite CCP §683.020, *i.e.*, even if the money judgment is no longer enforceable against the original judgment debtor. CCP §708.230(c). Any judgment in the creditor's suit may be enforced within the 10-year period of enforceability (subject to renewal) under CCP §683.020. See Comment to CCP §708.230.

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## §11.3 C. Joinder of Judgment Debtor; Venue; Lien

The judgment debtor should be joined as a party to the action but is not an indispensable party. CCP §708.220.

Venue in a creditor's suit is the same as if the judgment debtor had brought the action against the third person. The judgment debtor's residence cannot be considered to determine proper venue unless provided otherwise by contract between the judgment debtor and the third person. CCP §708.220.

When the third person is served with a summons, a lien is created on the judgment debtor's interest in the judgment debtor's property or on the debt owed to the judgment debtor that is the subject of the action. CCP §708.250.

**NOTE:** Be aware that in joining additional parties, including the judgment debtor, the newly-joined parties will have the opportunity to disqualify the assigned judicial officer via a CCP §170.6 peremptory challenge.

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## §11.4 D. Restraining Order; Preliminary Injunction

The judgment creditor may apply to the court in which the creditor's suit is pending for an order restraining a third person from (CCP §708.240(a)):

- Transferring to the judgment debtor the property in which it is claimed the debtor has an interest; or
- Paying the alleged debt to the judgment debtor.

The application for such an order may be made ex parte (see Cal Rules of Ct 3.1200-3.1207; see also §6.34) unless the court directs or a court rule requires that the application be made on noticed motion. CCP §708.240(a). The court in its discretion may require that an undertaking be given. CCP §708.240(a). The order remains effective until judgment in the creditor's suit is entered unless the court orders that it expire at a specified earlier time. CCP §708.240(a). The court may vacate or modify the order at any time on such terms as are just with or without a hearing. CCP §708.240(a).

In addition, or as an alternative, the judgment creditor may apply to the court in which the creditor's suit is pending for a temporary restraining order, preliminary injunction, or both, to prevent the third person from transferring to any person or otherwise disposing of the property in which it is claimed that the judgment debtor has an interest. CCP §708.240(b). On obtaining such orders, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004). The court may make, dissolve, and modify such orders. CCP §708.240(b).

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## §11.5 E. Judgment Debtor's Claim of Exemption

In a creditor's suit, a judgment debtor may assert a claim that all or a part of the property or debt is exempt from enforcement of the money judgment. CCP §708.260. The procedure for the judgment debtor is to claim an exemption by application to the court on noticed motion. The noticed motion must be filed with the court and served, either personally or by mail, on the judgment creditor within 30 days before the date set for trial. CCP §708.260. If service is by mail, the 30-day notice of motion period is extended under CCP §684.120 (*e.g.,* an additional 5 days are required if the address is in California). See Comment to CCP §708.260. The motion must be supported by an affidavit (or declaration; see CCP §2015.5) that includes all the matters listed in CCP §703.520(b) (*e.g.,* a description of the property claimed exempt, a statement of facts supporting the claim). CCP §708.260(a).

Notice of opposition to the exemption claim is not required. CCP §708.260(a). The court must rule on any exemption claim made in the action. CCP §708.280(a).

A judgment debtor who has not been named as a party in the creditor's suit may obtain an order under CCP §389 that the judgment debtor be made a party. CCP §708.260(a). The judgment debtor's failure to claim an exemption in a creditor's suit waives the exemption unless both of the following conditions are met (CCP §708.260(b)):

- The judgment debtor has not been served with process that contains a reasonably adequate description of the property or debt to enable it to be identified; and
- The judgment debtor lacks actual notice of the pendency of the creditor's suit and the identity of the property or the nature of the debt at issue.

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## §11.6 F. Judgment in Creditor's Suit; Costs

The judgment rendered in a creditor's suit will depend on the creditor's establishing that the third person is indebted to the judgment debtor or has property in which the judgment debtor has an interest. If the court rules that the third person is indebted to the judgment debtor, the judgment will, in effect, be a money judgment against the third person. 16 Cal L Rev'n Comm'n Reports 1132 n463 (1982). Any money collected will be applied toward satisfaction of that judgment and, as ordered by the court, toward satisfaction of the judgment creditor's original judgment against the judgment debtor. See CCP §708.280(b); 16 Cal L Rev'n Comm'n Reports 1132 n463 (1982).

If the court finds that the third person has property in which the judgment debtor has an interest, judgment will be rendered accordingly. CCP §708.280(b). Only that property (or its value if the property cannot be found) may be applied toward satisfaction of judgment and as ordered by the court toward satisfaction of the judgment creditor's original judgment against the judgment debtor. See CCP §708.280(b); 16 Cal L Rev'n Comm'n Reports 1132 n463 (1982). The court may restrain the third person from transferring the property until it can be levied on or otherwise applied to satisfy the judgment. CCP §708.280(c).

If the court finds that the third person has transferred property that was subject to a lien in the judgment creditor's favor, or has paid the debt or transferred property contrary to a court order of which the third person had notice, the court must render judgment under CCP §708.280(d) against the third person for the lesser of the following amounts:

- The value of the judgment debtor's interest in the property or the amount of the debt.
- The amount of the judgment creditor's judgment against the judgment debtor remaining unsatisfied.

If the court finds that the property or debt is exempt from enforcement of a money judgment, the court must render judgment to that effect and may not make any of the orders on the application of value or transfer of property referred to in CCP §708.280(b)-(d). CCP §708.280(a).

Costs incurred by or taxed against the judgment creditor in a creditor's suit under CCP §§708.210-708.290 are not recoverable from the judgment debtor as a cost of enforcing the judgment. CCP §708.290. On costs of enforcement generally, see §§11.47-11.56.

**PRACTICE TIP:** When a creditor suspects that a third party holds property of, or is indebted to, the judgment debtor, it may be prudent to obtain and serve a third party examination, such that a lien is created against all specifically identified property. CCP §708.120(c). By doing so, a lien may be created more expeditiously, pending the preparation, filing, and service of a creditor's suit. On third party examinations, see §8.20.

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## II. CHARGING ORDERS

### §11.7 A. When Available; Procedure; Lien

If a money judgment has been rendered against a partner but not against the partnership, or against a member but not the limited liability company, the judgment creditor may have the judgment debtor's interest in the partnership or limited liability company applied toward satisfaction of the judgment by an order charging the judgment debtor's interest under Corp C §16504 (partnerships), Corp C §15673 (limited partnerships), or Corp C §17302 (limited liability companies). CCP §708.310. Such a charging order is the usual means by which a judgment debtor's interest in a partnership is reached to satisfy a money judgment against the partner when the partnership itself is not liable. See Comment to CCP §708.310. Indeed, both Corp C §16504 and Corp C §17302 provide that a charging order is the exclusive remedy by which a judgment creditor of a partner or LLC member may satisfy its judgment from the partner's or LLC member's interest in the entity.

**CAUTION:** A charging order is not enforceable against partnership or LLC assets, but only against the individual partner's or LLC member's "assignable" or "transferable" interest in the partnership or LLC. See Corp C §§15673, 16504(b), 17302(b). Theoretically, an assignable or transferable interest could be a membership interest with full voting rights if the agreement provides that the interest is assignable without consent of the other members or if the other members consent to admission of the judgment creditor. More commonly, however, the interest subject to the charging order will be an economic interest only, entitlingthe holder only to receive distributions and allocations of income and losses. See Corp C §§15672, 16503, 17301(a).

Although a charging order is usually obtained through a motion to charge a partner's or LLC member's interest, it may be obtained by stipulation. See *Raiton v G & R Prop. (In re Raiton)* (BAP 9th Cir 1992) 139 BR 931.

A lien on the judgment debtor's assignable or transferable interest in the partnership or limited liability company is created on service of a notice of motion for a charging order on the judgment debtor (see §8.17) and on the other partners or the partnership or the other members of the limited liability company. CCP §708.320(a). The lien created under CCP §708.320(a) continues under the terms of the order. CCP §708.320(b). If the court denies issuance of the charging order, however, the lien is extinguished. CCP §708.320(b).

**NOTE:** Although CCP §708.320(b) permits service of a charging order on the partners "*or* the partnership" or on LLC members "*or* the limited liability company" to create a lien, partnerships and LLCs are legal entities distinct from their partners or members. See Corp C §§16201, 17050. Although no California law currently interprets the effect under the Uniform Partnership Act of 1994 (RUPA) (Corp C §§16100-16962) of service of a charging order on the partners, it is probably safer to serve the partnership rather than the partners. On serving a partnership, see California Civil Procedure Before Trial §17.22 (4th ed Cal CEB 2004). The same caveat applies to an LLC.

Charging orders do not deprive general or limited partners or LLC members of the benefit of any exemption laws applicable to their interests in the partnership or LLC. Corp C §§15673, 16504(e), 17302(d).

A motion for a charging order may be, and often is, coupled with an application for the appointment of a receiver of the judgment debtor's share of the profits and any other money due or to become due to the judgment debtor from the partnership or LLC. See Corp C §§16504(a), 17302(a). A copy of the charging order and any order appointing a receiver should be served on the judgment debtor, the partnership or LLC, and other partners or LLC members to put them on notice of the receiver's appointment.

**PRACTICE TIP:** The Enforcement of Judgments Law itself does not provide for exemptions from charging orders as it does from earnings withholding orders. As noted above, however, the Corporations Code provides that exemptions should be available. Many judges prefer to treat the charging order on a partnership draw as the equivalent of an earnings withholding order and will limit the collection to 25 percent (or 50-65 percent in support matters) of the draw or other distribution, although nothing in the Enforcement of Judgments Law supports this

result. In any event, a judgment creditor should be cautious about the amount collected if that could compel the judgment debtor to file for bankruptcy.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.8 B. Form: Notice of Motion for Order to Charge Partner's Interest and Appoint Receiver

## §11.8 B. Form: Notice of Motion for Order to Charge Partner's Interest and Appoint Receiver

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., judgment creditor*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION FOR** |
| **vs** | ) | **ORDER TO CHARGE** |
| _ _[*Name(s)*]_ _, | ) | **PARTNER'S INTEREST AND** |
| **Defendant(s)** | ) | **APPOINT RECEIVER** |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | |
| | ) | |

**To** _ _[*name*]_ _**, the judgment debtor,** _ _[*partnership name*]_ _**, and to the judgment debtor's partner(s)** _ _[*list name(s)*]_ _**:**

**PLEASE TAKE NOTICE that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of this court, at** _ _[*address*]_ _**, California, plaintiff-judgment creditor,** _ _[*name*]_ _**, will move this court under Code of Civil Procedure §§708.310-708.320 and Corporations Code §16504 for an order charging the interest of defendant-judgment debtor,** _ _[*name*]_ _**, in the partnership known as** _ _[*firm name*]_ _ **with payment of the** _ _[*wholly/partially*]_ _ **unsatisfied amount of the judgment entered in this action, which with accrued interest totals $**_ _[*amount*]_ _ **plus interest at the legal rate for each day after the date of this notice, and appointing a receiver with the necessary powers to collect defendant's share of the profits and any other money due or to become due to defendant from the partnership. This motion is made on the grounds that the judgment entered in this action against defendant,** _ _[*name*]_ _**, has become final and remains** _ _[*wholly/partially*]_ _ **unsatisfied in the amount indicated above, that** _ _[*name(s)*]_ _ **and defendant-judgment debtor are partners in** _ _[*firm name*]_ _**, which does business at** _ _[*address*]_ _**, and that defendant-judgment debtor partner has an interest in that partnership.**

**This motion is based on this notice, the pleadings, records, and files in this action, the memorandum in support of motion, the declaration of** _ _[*name*]_ _**, and on such evidence that may be presented at the hearing.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for judgment debtor, partnership, and each partner); office copies.

*Comment:* A memorandum in support of motion (commonly referred to as a memorandum of points and authorities) must accompany the motion (see §11.9A). See Cal Rules of Ct 3.1113(a), 3.1114(a). When drafting the memorandum, the attorney should base it on the specific facts of the case and the relevant authorities. See Cal Rules of Ct 3.1113(b). A supporting declaration should also accompany the motion; a form of declaration is set forth in §11.9.

On the requirement of a receiver to execute an undertaking, see Comment to §11.10. On charging a limited

partnership interest, see Corp C §15673.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.9 C. Form: Declaration in Support of Motion for Order to Charge Partner's Interest and Appoint Receiver

## §11.9 C. Form: Declaration in Support of Motion for Order to Charge Partner's Interest and Appoint Receiver

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **MOTION FOR ORDER TO** |
| **Defendant(s)** | ) | **CHARGE PARTNER'S** |
| | ) | **INTEREST AND APPOINT** |
| _____ | ) | **RECEIVER** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am** _ _[*e.g., the plaintiff-judgment creditor*]_ _**.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. On** _ _[*date*]_ _**, a judgment was entered in this case in favor of plaintiff,** _ _[*name*]_ _**, and against defendant,** _ _[*name*]_ _**, for the sum of $**_ _[*amount*]_ _**. A certified copy of the judgment is attached and incorporated in this declaration. The time for appeal has expired and the judgment has become final. The judgment has not been stayed by stipulation or any order of this court and is in full force and effect.**

[*Add one of the following alternatives*]

[*Alternative 1: Judgment has not been paid*]

**4. The judgment remains wholly unsatisfied and unpaid in the amount of $**_ _[*amount*]_ _**, which includes accrued interest and postjudgment costs from the date of the judgment's entry until the date of execution of this declaration.**

[*Alternative 2: Judgment has been partially paid*]

**4. The amount of $**_ _[*amount*]_ _ **has been paid on the judgment, and the unsatisfied amount of the judgment, including postjudgment costs and accrued interest from the date of the judgment's entry until the date of execution of that declaration, is $**_ _[*amount*]_ _**.**

[*Continue*]

**5. The judgment debtors, _ _[*name*]_ _ and _ _[*name(s)*]_ _, are partners in _ _[*firm name*]_ _, which does business at _ _[*address*]_ _. The judgment debtor partner has an interest in that partnership.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

*Copies:* See §11.8.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.9A D. Form: Memorandum in Support of Motion for Order to Charge Partner's Interest and Appoint Receiver

## §11.9A D. Form: Memorandum in Support of Motion for Order to Charge Partner's Interest and Appoint Receiver

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MEMORANDUM IN SUPPORT** |
| **vs** | ) | **OF MOTION FOR ORDER TO** |
| _ _[*Name(s)*]_ _, | ) | **CHARGE PARTNER'S** |
| **Defendant(s)** | ) | **INTEREST AND APPOINT** |
| | ) | **RECEIVER** |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**1. Code of Civil Procedure §708.310 provides that when a money judgment is rendered against a partner or member, but not against the partnership or limited liability company, the judgment debtor's interest in the partnership or limited liability company may be applied toward the satisfaction of the judgment by an order charging the judgment debtor's interest under Corporations Code §§15673, 16504, and 17302.**

**2. Code of Civil Procedure §708.320 provides that a lien on a judgment debtor's interest in a partnership or limited liability company is created by service of a notice of motion for a charging order on (1) the judgment debtor, and (2) all partners or the partnership or all members or the limited liability company. If a charging order is issued, the lien created pursuant to Code of Civil Procedure §708.320(a) continues under the terms of the order. If the issuance of the charging order is denied, the lien is extinguished.**

**3. Corporations Code §15673 provides that the court may charge the limited partnership interest of a partner with payment of any unsatisfied amount of the judgment with interest, on proper application by any judgment creditor of a partner. To the extent so charged, the judgment creditor has only the rights of an assignee of the limited partnership interest. Corporations Code §15673 does not deprive any partner of the benefit of any exemption laws applicable to the partner's limited partnership interest.**

**4. Corporations Code 16504(a) permits a court of competent jurisdiction to charge the transferable interest of the judgment debtor to satisfy the judgment on application by a judgment creditor of a partner or of a partner's transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership, and may make all other orders, directions, accounts, and inquiries that the judgment debtor might have made or that the circumstances of the case may require. Corporations Code 16504(b) provides that a charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee. Corporations Code 16504(c) provides that, at any time before foreclosure, an interest charged may be redeemed by any of the following methods: (1) by the judgment debtor; (2) with property other than partnership property, by one or**

**more of the other partners; (3) with partnership property, by one or more of the other partners with the consent of all of the partners whose interests are not so charged. A partner is not deprived of a right under exemption laws with respect to the partner's interest in the partnership. Corp C §16504(d). Corporations Code 16504 provides the exclusive remedy by which a judgment creditor of a partner or partner's transferee may satisfy a judgment out of the judgment debtor's transferable interest in the partnership. Corp C §16504(e).**

**5. Corporations Code 17302(a) permits a court of competent jurisdiction to charge the assignable membership interest of the judgment debtor to satisfy the judgment on application by a judgment creditor of a member or of a member's assignee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor from the limited liability company, and may make all other orders, directions, accounts, and inquiries that the judgment debtor might have made or that the circumstances of the case may require. A charging order constitutes a lien on the judgment debtor's assignable membership interest. The court may order a foreclosure on a membership interest subject to a charging order at any time. A purchaser at a foreclosure sale has the rights of an assignee. Corp Code §17302(b). At any time before foreclosure, a charged membership interest may be redeemed (1) by the judgment debtor; (2) with property other than property of the limited liability company by one or more of the other members; or (3) with property of the limited liability company by one or more of the other members, with the consent of all of the members whose membership interests are not so charged. Corp Code §17302(c). Corporations Code 17302 does not deprive any member (or assignee of a membership interest) of the benefit of any exemption laws applicable to the membership interest. Corp Code §17302(d). Corporations Code 17302 provides the exclusive remedy by which a judgment creditor of a member (or of a member's assignee) may satisfy a judgment out of the judgment debtor's membership interest. Corp Code §17302(e).**

**6. Charging orders on partnership interests have replaced levies of execution as the remedy for reaching such interests. *Baum v Baum* (1959) 51 C2d 610, 335 P2d 481, 483. This procedure is specifically required as the method of reaching the judgment debtor's economic and distributable interests in the partnership under Code of Civil Procedure §708.310.**

**7. Code of Civil Procedure §564 provides that a receiver may be appointed by the court in which an action or proceeding is pending in any case in which that court is empowered by law to appoint a receiver.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with original application and order); copies for service (one on judgment debtor); office copies (if desired, one copy for client).

*Comment:* This memorandum in support of motion (commonly referred to as a memorandum of points and authorities) should be submitted to the court when seeking a charging order. It may modified as appropriate.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.10 E. Form: Order to Charge Partner's Interest and Appoint Receiver

## §11.10 E. Form: Order to Charge Partner's Interest and Appoint Receiver

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER TO CHARGE** |
| **vs** | ) | **PARTNER'S INTEREST AND** |
| _ _[*Name(s)*]_ _, | ) | **APPOINT A RECEIVER** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**The motion of judgment creditor, _ _[*name*]_ _, for an order to charge partner's interest and to appoint a receiver, came on regularly for hearing before this court on _ _[*date*]_ _, after notice given according to law. The court having considered the motion, and good cause appearing:**

**IT IS ORDERED that defendant _ _[*name*]_ _'s interest in the partnership known as _ _[*firm name*]_ _ located at _ _[*address*]_ _ is hereby charged with the unsatisfied amount of the judgment entered in this case, in the sum of $_ _[*amount*]_ _ and any draw available to _ _[*name*]_ _ from partnership funds shall be applied to the unsatisfied amount of the judgment entered in this case.**

**IT IS FURTHER ORDERED that _ _[*name*]_ _ be appointed as receiver of the judgment debtor's share of the profits of the partnership and of any other money due or to become due to defendant-judgment debtor from the partnership, on qualifying in the manner required by law and posting a bond in the sum of $_ _[*amount*]_ _ on condition that _ _[*he/she*]_ _ will faithfully discharge _ _[*his/her*]_ _ duties as receiver and will obey all orders of this court.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

*Copies:* See §11.8.

*Comment:* The receiver must take an oath and execute an undertaking to the State of California in a sum fixed by the court. The receiver is allowed the cost of the undertaking. CCP §567. The order appointing the receiver is appealable. CCP §§904.1(a)(7), 904.2(h). See CCP §917.5 on stay of enforcement of order.

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## §11.11 F. Foreclosure of Lien; Redemption Rights

A charging order creates a lien on a partnership or LLC membership interest. That lien may be foreclosed. See Corp C §§16504(b), 17302(b). The court may appoint a receiver for the distributions due or that may become due to the judgment debtor, and may make other orders as the circumstances of the case require. Corp C §§16504(a), 17302(a).

At any time before foreclosure, the interest subject to the charging order may be redeemed, either (1) by the judgment debtor, (2) by one or more of the other partners or LLC members using property that is not property of the entity, or (3) by one or more of the other partners or LLC members using property of the entity, so long as all other partners or LLC members consent. Corp C §§16504(c), 17302(c).

Two cases have dealt with the conditions that must be satisfied before a court may authorize the foreclosure and sale of a debtor partner's partnership *interest,* as distinct from partnership *assets*. In *Crocker Nat'l Bank v Perroton* (1989) 208 CA3d 1, 255 CR 794, the court of appeal specified three conditions that must be met to reach the partnership interest:

- The creditor has obtained a charging order;
- The judgment remains unsatisfied;
- All partners other than the debtor have consented to the sale of the interest.

In the other case, *Hellman v Anderson* (1991) 233 CA3d 840, 284 CR 830, the court generally agreed with *Perroton* except that the court held that the consent of nondebtor partners to the sale is not an essential condition as long as foreclosure does not unduly interfere with partnership business. The effect of foreclosure on the partnership must be evaluated on a case-by-case basis by the trial court in connection with its equitable power of foreclosure. 233 CA3d at 851. The *Hellman* court placed on the partner debtor the burden of proving the effect of foreclosure on the partnership. 233 CA3d at 853. Like the court in *Perroton,* the *Hellman* court emphasized that foreclosure and sale is permissible only on a partner's "interest in the partnership," meaning only the partner's share of profits and surplus. A partner's interest subject to foreclosure and sale does not include the partner's right in specific partnership property nor the right to participate in management. 233 CA3d at 846.

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## III. LIEN IN PENDING ACTION OR PROCEEDING

### §11.12 A. In General

A lien in a pending action or proceeding is available when the judgment debtor has filed a complaint or cross-complaint seeking affirmative relief against another party. A judgment creditor who has obtained a money judgment against a judgment debtor who is a party to a pending action or a special proceeding may obtain a lien under CCP §§708.410-708.480 to the extent necessary to satisfy the money judgment. CCP §708.410(a). The lien attaches to both (CCP §708.410(a)):

- Any of the judgment debtor's causes of action for money or property that are the subject of the action or proceeding; and
- The judgment debtor's rights to money or property under any judgment obtained later in the action or proceeding.

A lien created under CCP §§708.410-708.480 is ineffective once the time for enforcing the judgment creditor's money judgment has elapsed. See Comment to CCP §708.410. The lien's duration may be extended as provided in CCP §683.190. See Comment to CCP §708.410.

If property that is the subject of a pending action or proceeding is real property, growing crops, timber to be cut, minerals or the like (including oil and gas) or accounts receivable resulting from their sale at the wellhead or minehead, tangible personal property in the possession of the judgment debtor or a levying officer, or the interest of an heir, devisee, or legatee in personal property in the estate of a decedent, the judgment creditor may levy on the property under a writ of execution. See CCP §700.180. This remedy can be used as an alternative to the lien or in addition to the lien. See Comment to CCP §708.410.

A lien for attorney fees in a commercial tort action had priority over a judgment lien asserted by a bank in the same action when the security interest underlying the bank's lien did not extend to the tort causes of action. *Waltrip v Kimberlin* (2008) 164 CA4th 517, 79 CR3d 460.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.13 B. Obtaining Lien; Notice of Lien

## §11.13 B. Obtaining Lien; Notice of Lien

To obtain a lien under CCP §§708.410-708.480, the judgment creditor must file in the pending action or special proceeding a notice of lien and an abstract or a certified copy of the money judgment. CCP §708.410(b). For form of abstract of judgment, see §7.51. For purposes of CCP §§708.410-708.480, an action or a special proceeding is deemed "pending" until the time for appeal has expired or, if an appeal has been filed, until final determination of the appeal. CCP §708.410(d).

At the time the notice of lien is filed, or promptly thereafter, the judgment creditor must serve, either personally or by mail, a copy of the notice of lien and a statement of the date when the notice of lien was filed in the action or special proceeding on all parties who have appeared in the action or special proceeding. CCP §708.410(c). Failure to serve all parties with a copy of the notice of lien and statement does not affect the lien created by the filing under CCP §708.410(b)-(c). Until a party has notice of the lien, however, the party's rights are not affected by the lien. CCP §708.410(c). Thus the rights of a party who makes a settlement, dismissal, compromise, or satisfaction without notice of the existence of the lien are not affected. See Comment to CCP §708.410.

Under CCP §708.420, the notice of lien must contain all the following:

- A statement that a lien has been created under CCP §§708.410-708.480;
- The title of the court and the cause and number of the pending action or proceeding in which the notice of lien was filed;
- The name and last known address of the judgment debtor;
- The name and address of the judgment creditor;
- The title of the court where the judgment creditor's money judgment is entered and the cause and number of the action, the date of entry of the judgment, the date of any subsequent renewals, and where it was entered in the court records;
- A statement of the amount required to satisfy the judgment creditor's money judgment at the time the notice of lien is filed in the action or proceeding;
- A statement that the lien attaches to any cause of action of the judgment debtor that is the subject of the action or proceeding and to the judgment debtor's rights to money or property under any judgment subsequently procured in the action or proceeding.
- A statement that the judgment debtor may claim an exemption for all or any part of the money or property within 30 days after the judgment debtor has notice of the creation of the lien and that the exemption is waived if it is not claimed within that time;
- A statement that no compromise, dismissal, settlement, or satisfaction of the pending action or proceeding or any of the judgment debtor's rights to money or property under any judgment procured therein may be entered into by or on behalf of the judgment debtor, and that the judgment debtor may not enforce the judgment debtor's rights to money or property under any judgment procured in the action or proceeding by a writ or otherwise, unless one of the following requirements is satisfied:
- The prior approval by order of the court in which the action or proceeding is pending has been obtained;
- The written consent of the judgment creditor has been obtained or the judgment creditor has released the lien;
- The money judgment of the judgment creditor has been satisfied.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.14 1. Form: Notice of Lien (Judicial Council Form AT-180, EJ-185)

## §11.14 1. Form: Notice of Lien (Judicial Council Form AT-180, EJ-185)



| ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: | TELEPHONE NO.: | ***FOR COURT USE ONLY*** |
|---|---|---|
| ATTORNEY FOR LIEN CLAIMANT: | | |
| NAME OF COURT:<br>STREET ADDRESS:<br>MAILING ADDRESS:<br>CITY AND ZIP CODE:<br>BRANCH NAME: | | |
| PLAINTIFF:<br><br>DEFENDANT: | | CASE NUMBER: |

**NOTICE OF LIEN**
**(Attachment—Enforcement of Judgment)**

ALL PARTIES IN THIS ACTION ARE NOTIFIED THAT

1. A lien is created by this notice under
   a. ☐ Article 3 (commencing with section 491.410) of Chapter 11 of Title 6.5 of Part 2 of the Code of Civil Procedure.
   b. ☐ Article 5 (commencing with section 708.410) of Chapter 6 of Title 9 of Part 2 of the Code of Civil Procedure.
2. The lien is based on a
   a. ☐ right to attach order and an order permitting the creation of a lien (copies attached).
   b. ☐ money judgment.
3. The right to attach order or the money judgment is entered in the following action:
   a. Title of court *(specify)*:
   b. Name of case *(specify)*:
   c. Number of case *(specify)*:
   d. ☐ Date of entry of judgment *(specify)*:
   e. ☐ Dates of renewal of judgment *(specify)*:
4. The name and address of the judgment creditor or person who obtained the right to attach order are *(specify)*:
5. The name and last known address of the judgment debtor or person whose property is subject to the right to attach order are *(specify)*:
6. The amount required to satisfy the judgment creditor's money judgment or to secure the amount to be secured by the attachment at the time this notice of lien is filed is
   $
7. The lien created by this notice attaches to any cause of action of the person named in item 5 that is the subject of this action or proceeding and to that person's rights to money or property under any judgment subsequently procured in this action or proceeding.
8. No compromise, dismissal, settlement, or satisfaction of this action or proceeding or any of the rights of the person named in item 5 to money or property under any judgment procured in this action or proceeding may be entered into by or on behalf of that person, and that person may not enforce any rights to money or property under any judgment procured in this action or proceeding by a writ or otherwise, unless one of the following requirements is satisfied:
   a. the prior approval by order of the court in this action or proceeding has been obtained;
   b. the written consent of the person named in item 4 has been obtained or that person has released the lien; or
   c. the money judgment of the person named in item 4 has been satisfied.

**NOTICE The person named in item 5 may claim an exemption for all or any portion of the money or property within 30 days after receiving notice of the creation of the lien. The exemption is waived if it is not claimed in time.**

Date:

. . . . . ▶ _____

*(TYPE OR PRINT NAME)* *(SIGNATURE OF LIEN CLAIMANT OR ATTORNEY)*



*Copies:* Original (filed in pending action or special proceeding); copies for service (one for each party that has appeared in the action or special proceeding, together with a statement of the date when lien was filed in the action or

special proceeding); office copies.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.15 2. Form: Statement of Filing of Notice of Lien

## §11.15 2. Form: Statement of Filing of Notice of Lien

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **STATEMENT OF FILING** |
| **vs** | ) | **NOTICE OF LIEN** |
| _ _[*Name(s)*]_ _, | ) | **Lien Filed:** _ _[*date*]_ _ |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*judgment creditor/attorney for the judgment creditor*]_ _**.**

**2. On** _ _[*date*]_ _**, a Notice of Lien was filed in this case in favor of judgment creditor,** _ _[*name*]_ _**, and against** _ _[*name*]_ _**, who is a judgment debtor in the action described in the accompanying Notice of Lien.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Copies:* Original (filed in pending action or special proceeding); copies for service (one for each party that has appeared in the action or special proceeding, together with a statement of the date when lien was filed in the action or special proceeding); office copies.

*Comment:* Code of Civil Procedure §708.410(c) requires that the parties to an action be served with a statement of the date when the notice of lien was filed. It should be sufficient to serve a conformed copy of the notice of lien with the filing date stamped on it. This form may be used if conformed copies are not available.

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## §11.16 C. Judgment Creditor's Intervention in Pending Action or Proceeding

The court in which the action or special proceeding is pending may permit a judgment creditor who has obtained a lien under CCP §§708.410-708.480 to intervene under CCP §387. CCP §708.430(a). Even if a judgment creditor does not intervene under §708.430(a), the judgment creditor is deemed a party to the action or special proceeding for the purpose of the judgment debtor's exemption claim (CCP §708.450; see §11.18), and may oppose such a claim (CCP §708.430(b); see Comment to CCP §708.430).

Similarly, a nonintervening judgment creditor under CCP §708.430(a) is deemed a party to the action or special proceeding for the purpose of prohibiting the transfer of property in which the judgment debtor has an interest (CCP §708.470; see §11.19), and may seek an order applying such money or property to the satisfaction of the judgment creditor's judgment (CCP §708.430(b); see Comment to CCP §708.430).

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.17 D. Compromise, Dismissal, Settlement, or Satisfaction of Action, Proceeding, or Judgment

## §11.17 D. Compromise, Dismissal, Settlement, or Satisfaction of Action, Proceeding, or Judgment

When the judgment creditor has obtained a lien in a pending action or proceeding, the judgment debtor may not enforce, by writ or otherwise, any recovery unless the judgment creditor's money judgment is first satisfied or the judgment creditor's lien is released. CCP §708.440(a). Moreover, without the judgment creditor's written consent or a court-ordered authorization under CCP §708.440(b), the judgment debtor may not enter into any compromise, dismissal, settlement, or satisfaction of the pending action or special proceeding or the judgment obtained. CCP §708.440(a). The rights of a party who makes a settlement, dismissal, compromise, or satisfaction without notice of the lien under CCP §708.410 are unaffected by the lien. CCP §708.440(a); see Comments to CCP §§708.410, 708.440.

On application by the judgment debtor by noticed motion, the court in which the action or special proceeding is pending, or in which the judgment is entered, may in its discretion and after a hearing issue an order authorizing a compromise, dismissal, settlement, or satisfaction on such terms and conditions as the court deems necessary (despite the judgment creditor's opposition). CCP §708.440(b); see Comment to CCP §708.440. The notice of motion must be served on the judgment creditor either personally or by mail. CCP §708.440(b).

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## §11.18 E. Claim of Exemption by Judgment Debtor

If a lien is created in a pending action or a special proceeding, the judgment debtor may claim that all or part of the money or property that the judgment debtor may recover is exempt from enforcement of a money judgment. CCP §708.450(a). The judgment debtor's failure to make a claim of exemption under CCP §708.450 waives the claim. CCP §708.450(a). The judgment creditor is not required to give notice of opposition to the claim.

The claim of exemption must be made to the court in which the action or special proceeding is pending by application on noticed motion. CCP §708.450(a). The notice of motion must be filed and served on the judgment creditor, either personally or by mail, no later than 30 days after the judgment debtor has notice of the creation of the lien. CCP §708.450(a). Along with the notice of motion, the judgment debtor must execute an affidavit or declaration in support of the application (CCP §2015.5) that includes all the matters set forth in CCP §703.520(b) relating to the exemption claim. CCP §708.450(a).

The court may rule on the exemption claim at any time before entry of judgment. Alternatively, the court may consolidate the exemption hearing with the hearing on a motion under CCP §708.470 to have the judgment debtor's rights to money or property under the judgment applied to satisfy the lien. CCP §708.450(b).

If the judgment debtor establishes to the court's satisfaction that the debtor's rights to money or property under the judgment is all or partially exempt from enforcement of a money judgment, the court must order the lien terminated on the exempt portion of the money or property. CCP §708.450(c).

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## F. Enforcement of Lien

### §11.19 1. Under Court Order

Once a judgment creditor obtains a lien in a pending action or special proceeding, the court clerk must endorse on the judgment recovered a statement of the existence of the lien and the time it was created. CCP §708.460(a). Similarly, any abstract issued on the judgment must include a statement of the lien in the judgment creditor's favor. CCP §708.460(b).

On application of any party to the action or special proceeding, the court may order that the judgment debtor's rights to money or property under the judgment recovered in the action or proceeding be applied toward satisfaction of the lien created under CCP §§708.410-708.480. CCP §708.470(a). The judgment creditor is deemed a party for purposes of CCP §708.470(a). See Comment to CCP §708.470. The application for an order must be made on noticed motion. CCP §708.470(a). The notice of motion must be served on all parties, either personally or by mail. CCP §708.470(a).

Liens on a pending action are strictly construed. To be effective, all of the warnings specified in CCP §708.420 must be included; otherwise the lien will not attach. *Casa Eva I Homeowners Ass'n v Ani Constr. & Tile, Inc.* (2005) 134 CA4th 771, 778, 36 CR3d 401.

If the court finds that the judgment debtor has an interest in property, the court may prohibit the party having custody or control of the property from transferring the property until it can be levied on or otherwise applied toward satisfaction of the lien. CCP §708.470(b). If the court determines that a party having notice of the lien, other than the judgment debtor, has already transferred property subject to the lien or has paid an amount subject to the lien to the judgment debtor, the court must render judgment against that party in an amount equal to the lesser of (CCP §708.470(c)(1)-(2)):

- The value of the judgment debtor's interest in the property or the amount paid the debtor; or
- The amount of the judgment creditor's lien.

**NOTE:** In some circumstances, a division of community property in a marital dissolution proceeding may constitute a transfer of property under CCP §708.470(c). *Marriage of Katz* (1991) 234 CA3d 1711, 286 CR 495 (transfer to spouse in course of marital dissolution proceeding of more than half of undivided community property interest supported liability to creditor under CCP §708.470(c)). Also, note that property and marital settlement agreements incident to a dissolution matter may be subject to the Uniform Fraudulent Transfer Act (CC §§3439-3439.12). See *Mejia v Reed* (2003) 31 C4th 657, 3 CR3d 390.

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## §11.20 2. After Final Judgment

After a judgment subject to the lien has been entered and the time for appeal has expired, a lien created under CCP §§708.410-708.480 may be enforced by any applicable procedure. CCP §708.480(a); see Comment to CCP §708.480. These procedures may include levy on the judgment under a writ of execution, and sale or collection under the levy. If an appeal from a judgment subject to the lien has been filed, the lien may be enforced by any applicable procedure after final determination of the appeal. CCP §708.480(b).

**NOTE:** If the judgment creditor obtains a writ of execution and levies on a money judgment obtained by the judgment debtor in the action or proceeding, the execution lien on the judgment obtained by the levy of execution relates back to the lien created under CCP §§708.410-708.480. See Comment to CCP §708.480.

Generally speaking, property subject to a pending action or special proceeding may not be levied on before final judgment in the action or proceeding. The following property interests, however, may be levied on before final judgment (CCP §700.180):

- Real property;
- Growing crops, timber to be cut, or certain mineral, oil, or gas interests;
- Tangible personal property in the possession or under the control of the judgment debtor or in the custody of a levying officer; and
- The interest of a judgment debtor in personal property in the estate of a decedent.

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## IV. ASSIGNMENT ORDERS

### §11.21 A. When Available

A judgment creditor may apply to the court for an order that the judgment debtor assign to the judgment creditor, or to a receiver appointed under CCP §§708.610-708.630, "all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments," unless otherwise provided by law. CCP §708.510(a). An assignment order also provides an optional procedure for reaching assignable forms of property that are subject to levy, such as accounts receivable, general intangibles, judgments, and instruments. See Comment to CCP §708.510. A judgment creditor may use the assignment order procedure alone or in conjunction with other enforcement procedures, such as execution (see chap 9), orders in examination proceedings (see chap 8), creditors' suits (see §§11.1-11.6), and receivers (see §§11.33-11.34), to reach the judgment debtor's rights to payment (see Comment to CCP §708.510).

Types of payments that may be subject to an assignment order include (CCP §708.510(a)):

- Rents;
- Royalties;
- Payments due from patents or copyrights;
- Loan values of insurance policies; and
- Commissions.

**NOTE:** Not all commissions are subject to an assignment order. Commissions that are "earnings" as defined in the Wage Garnishment Law (CCP §§706.010-706.154) are subject to an earnings withholding order. On the other hand, a real estate salesperson who receives a percentage of the sales price as a commission may not be an employee, and the earnings will not be wages. Many judges, however, treat such commissions as wages and do not allow a greater percentage of the commission to be taken than would be permitted under an earnings withholding order.

Certain forms of property that cannot be reached by levy under a writ of execution may be reached by an assignment order, *e.g.,* the nonexempt loan value of an unmatured life insurance, endowment, or annuity policy. See Comment to CCP §708.510 (see CCP §§699.720, 704.100 for types of property that are not subject to execution). The assignment order may be the strongest tool in the judgment creditor's arsenal because it can be used to reach contingent assets. Reaching rent owed to a landlord judgment debtor is impractical by any other method. A good way to think of an assignment order is as an involuntary UCC-1.

**PRACTICE TIP:** At the time the Enforcement of Judgments Law was passed, federal wages were not subject to an earnings withholding order. Federal wages are still described in CCP §708.510 as being subject to an assignment order but this procedure is much more cumbersome than an earnings withholding order, which is now permitted by 5 USC §5520(a).

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## §11.22 B. Limitations on Use

A "right to payment" assignment order may be issued only to the extent necessary to satisfy the money judgment. CCP §708.510(d). In addition, if the subject of the assignment order is earnings or periodic payments under a pension or retirement plan, the amount of earnings or periodic payments assigned cannot exceed the amount that may be withheld from a like amount of earnings under the Wage Garnishment Law (CCP §§706.010-706.154). CCP §708.510(e). See §10.19 on withholding limits. Similarly, when another statute exempts a specific amount of the payment or payments to be assigned, the amount assigned under CCP §708.510(a) cannot exceed the amount by which the payment or payments exceed the exempt amount. CCP §708.510(f). Finally, the right to an assignment order under CCP §708.510(a) is conditioned by the introductory language "[e]xcept as otherwise provided by law."

Assignment of the right to certain types of payment may be prohibited or limited by other statutes. See, *e.g.,* 5 USC §8346 (federal government employees' retirement benefits), 45 USC §231m (railroad employees' annuities).

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.23 C. Procedure

### §11.23 C. Procedure

An application for an assignment order must be made on noticed motion. CCP §708.510(a). The notice of motion must be served on the judgment debtor, either personally or by mail. CCP §708.510(b).

**PRACTICE TIP:** Service on the judgment debtor's attorney may be worthwhile, though not necessary. It may prevent the judgment debtor from arguing that the motion should be taken off calendar because the judgment debtor thought his or her attorney would be served.

The court, in determining the amount of an assignment or whether to order an assignment at all, may consider all relevant factors, including (CCP §708.510(c)):

- If the judgment debtor is an individual, his or her reasonable requirements and those of persons he or she supports in whole or in part;
- Payments that the judgment debtor must make or that are deducted to satisfy other judgments and wage assignments;
- The balance remaining on the money judgment; and
- The amount being or to be received in satisfaction of the right to payment that may be assigned.

**PRACTICE TIP:** To ensure compliance with an assignment order, the judgment creditor may consider requesting the court to order the judgment debtor to report or account periodically on the payments received or due. See CCP §639. The judgment creditor may also consider the appointment of a receiver. See §§11.33-11.34.

**PRACTICE TIP:** Though not stated explicitly in any statute, nor ever addressed in a published opinion, a logical argument can be made that the statutory scheme concerning assignment orders should be interpreted as allowing the court to *order* the requested assignment, as opposed to merely ordering the judgment debtor to effectuate the assignment. In support of this proposition, the court may be invited to examine other language in Chapter 6, Article 6 of the Code of Civil Procedure, beyond the mere first paragraph of §708.510(a). For example, the language of §§708.510(c) ("in determining whether to order an assignment"), 708.510(e) ("[w]hen earnings … are assigned"), and, possibly most convincing, 708.540 ("[t]he rights of an obligor are not affected by an order assigning the right to payment until …"). Additionally, the attorney may suggest to the court that an order to a recalcitrant debtor to make an assignment will likely be met with similar disregard by the debtor as was the original judgment to make payment.

The sample forms included in this book are based on a strict statutory interpretation, which is not intended to dissuade the attorney from crafting pleadings and proposed orders consistent with the above alternative argument.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.24 1. Form: Notice of Motion for Assignment Order

## §11.24 1. Form: Notice of Motion for Assignment Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION FOR** |
| **vs** | ) | **ASSIGNMENT ORDER** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | |
| | ) | |

**To _ _[*name*]_ _, the judgment debtor:**

**PLEASE TAKE NOTICE that on _ _[*date set for hearing*]_ _, at _ _[*time*]_ _, or as soon thereafter as the matter can be heard, in Department _ _[*number*]_ _ of this court, at _ _[*address*]_ _, California, the plaintiff-judgment creditor, _ _[*name*]_ _ will move this court under Code of Civil Procedure §§708.510-708.560 for an order directing that the defendant-judgment debtor, _ _[*name*]_ _, assign to the judgment creditor, to the extent necessary to fully pay and satisfy the judgment with all accrued interest and postjudgment costs, the rights to payment due or to become due to the judgment debtor from _ _[*specify*]_ _ and to account monthly to the judgment creditor for all funds the judgment debtor receives in connection with the obligation that is the subject of this assignment. This motion is made on the grounds that the judgment entered in this action against defendant, _ _[*name*]_ _, has become final and remains _ _[*wholly/partially*]_ _ unsatisfied in the amount of $_ _[*amount*]_ _, which includes accrued interest to the date of this notice, and that the judgment debtor has assignable rights to the payments specified above.**

**This motion is based on that notice, the pleadings, records, and files in this action, the memorandum in support of motion, the declaration of _ _[*name*]_ _, and such evidence as may be presented at the hearing.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for judgment debtor and if desired, one for judgment debtor's attorney); office copies.

*Comment:* A memorandum in support of motion, commonly referred to as a memorandum of points and authorities, must accompany the motion. See Cal Rules of Ct 3.1113(a), 3.1114(a). When drafting the memorandum, the attorney should base it on the specific facts of the case and the relevant authorities. See Cal Rules of Ct 3.1113(b). A supporting declaration should also accompany the motion; a form of declaration is set forth in §11.25.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.25 2. Form: Declaration in Support of Motion for Assignment Order

## §11.25 2. Form: Declaration in Support of Motion for Assignment Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **MOTION FOR ASSIGNMENT** |
| **Defendant(s)** | ) | **ORDER** |
| _____ | ) | |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am** _ _[*e.g., the plaintiff/judgment creditor*]_ _**.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. On** _ _[*date*]_ _**, a judgment was entered in this case in favor of plaintiff,** _ _[*name*]_ _**, and against defendant,** _ _[*name*]_ _**, for the sum of $**_ _[*amount*]_ _**. A certified copy of the judgment is attached and incorporated herein. The time for appeal has expired and the judgment has become final. The judgment has not been stayed by stipulation or any order of this court and is in full force and effect.**

[*Add one of the following alternatives*]

[*Alternative 1: Judgment remains unpaid*]

**4. The judgment remains wholly unsatisfied and unpaid in the amount of $**_ _[*amount*]_ _**, which includes accrued interest from the date of the judgment's entry until the date of execution of this declaration.**

[*Alternative 2: Judgment has been partially paid*]

**4. The amount of $**_ _[*amount*]_ _ **has been paid on the judgment, and the unsatisfied amount of the judgment, including accrued interest from the date of the judgment's entry until the date of execution of this declaration, is $**_ _[*amount*]_ _**.**

[*Continue*]

**5. I am informed and believe and on that basis declare that rights to payment are now due or will become due to the judgment debtor from** _ _[*specify*]_ _**.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Copies:* See §11.24.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.25A 3. Form: Memorandum in Support of Motion for Assignment Order

## §11.25A 3. Form: Memorandum in Support of Motion for Assignment Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MEMORANDUM IN SUPPORT** |
| **vs** | ) | **OF MOTION FOR ORDER** |
| _ _[*Name(s)*]_ _, | ) | **ASSIGNING RIGHT TO** |
| **Defendant(s)** | ) | **PAYMENT** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**1. THE COURT MAY ORDER THE JUDGMENT DEBTOR TO ASSIGN A RIGHT TO PAYMENT TO THE JUDGMENT CREDITOR**

**Code of Civil Procedure §708.510 authorizes a court to issue an order directing the judgment debtor to assign to a judgment creditor all or part of a right to payment due or to become due, including wages due from the federal government that are not subject to withholding under an earnings withholding order, rents, commissions, royalties, payments due from a patent or copyright, insurance policy loan value, accounts receivable, general intangibles, judgments and instruments. Although the court may consider all relevant factors, the sole constraints placed on the court are that the right to payment be assigned only to the extent necessary to satisfy the creditor's money judgment and that, when part of the payments are exempt, the amount of the payments assigned should not exceed the difference between the gross amount of the payments and the exempt amount. CCP §708.510(c)-(f).**

**2. THE RIGHT TO PAYMENT MAY BE ASSIGNED UP TO THE FULL AMOUNT DUE ON THE JUDGMENT**

**As shown in the accompanying declaration, the current balance due on the judgment is $_ _[*amount*]_ _. This balance, of course, accrues interest at the rate of 10 percent per annum. CCP §685.010(a). Therefore, the court may order assignment of the right to payment in an amount necessary to satisfy the judgment in full, including accrued interest and approved costs.**

**3. AN ASSIGNMENT ORDER MAY BE ISSUED BECAUSE THE JUDGMENT MAY BE ENFORCED**

**Because the judgment was entered and/or renewed less than 10 years ago, and because no order exists staying enforcement of the judgment, this court is authorized to issue an assignment order.**

**4. THE COURT CAN RESTRAIN THE JUDGMENT DEBTOR FROM TRANSFERRING OR CHANGING THE RIGHT TO PAYMENT**

**Code of Civil Procedure §708.520 authorizes the court to restrain the judgment debtor from assigning or**

**otherwise disposing of the right to payment sought to be assigned on a showing of need. Such a showing of need is set forth in the declaration that accompanies this memorandum. Consequently, the debtor must be restrained so that the right to payment sought to be assigned will be available to be applied to the judgment creditor's judgment.**

**5. THE COURT CAN ORDER AN ACCOUNTING**

**Although Code of Civil Procedure §708.510 does not expressly provide for an accounting, the court has the inherent power to make orders as necessary to enforce its orders. CCP §187. The only way to determine if payments have become due and were paid over pursuant to the assignment order would be to examine the judgment debtor and then to continuously re-examine the judgment debtor every 120 days. This is a significant waste of court time and resources. By ordering the debtor to file and serve an accounting every 30 days the same result will be obtained.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with original application and order); copies for service (one on judgment debtor); office copies (if desired, one copy for client).

*Comment:* This memorandum in support of motion (commonly referred to as a memorandum of points and authorities) must accompany the motion. See Cal Rules of Ct 3.1113(a), 3.1114(a). When drafting the memorandum, the attorney should base it on the specific facts of the case and the relevant authorities. See Cal Rules of Ct 3.1113(b).

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## §11.26 4. Form: Assignment Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ASSIGNMENT ORDER (CCP** |
| **vs** | ) | **§708.510)** |
| _ _[*Name(s)*]_ _, | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**The motion of the judgment creditor, _ _[*name*]_ _, for an assignment order, came on regularly for hearing before this court on _ _[*date*]_ _, after notice given according to law. The court having considered the motion and good cause appearing:**

**IT IS ORDERED that judgment debtor, _ _[*name*]_ _, forthwith assign to judgment creditor, _ _[*name*]_ _, the following rights to payment to the extent necessary to fully pay and satisfy the judgment in this matter, with all accrued interest and costs: _ _[*Specify*]_ _.**

**IT IS FURTHER ORDERED that judgment debtor deliver an accounting of all funds subject to this assignment order to judgment creditor _ _[*e.g., monthly*]_ _ _ _[*and file copies with the court*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

*Copies:* See §11.24.

*Comment:* Serve the judgment debtor with a copy of the order as soon as possible. Serve a copy of the assignment order on the source of the payments to the debtor such as an escrow company or real estate broker, or even an out-of-state source of commission payments. The payment source is more likely to comply with the order to pay directly to the judgment creditor than is the judgment debtor. If possible, get the court to directly order the payment source to send the money. Even if the court has no direct jurisdiction over an out-of-state payment source, most big companies do not want to be in violation of any court orders of which they are aware.

The optional concluding language of this form requires the judgment debtor to file accountings with the court. This requirement may have a greater impact on the debtor because the debtor is doing something for the court, rather than the judgment creditor. It may also make a contempt motion easier to win if the debtor does not comply.

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## §11.27 D. Priority of Assignments

Except as provided in CCP §708.530(b), CC §955.1 governs the effect and priority of an assignment order. CCP §708.530(a). The assignee of a right to payment (*i.e.,* the judgment creditor) is deemed a bona fide assignee for value under CC §955.1 for the purpose of setting priority. CCP §708.530(a). Thus, under CC §955.1 and CCP §708.530(a), a judgment creditor who has obtained an assignment order has priority over another assignee of the same right for value and without notice only if the judgment creditor first gives notice to the obligor. See Comment to CCP §708.530.

Under CCP §708.530(b), an assignment of the right to future rent is recordable as an instrument affecting real property. Priority of such an assignment is governed by CC §1214. The assignment order should be recorded in the county where the property is located. CCP §708.530(b).

Despite CC §§955 and 955.1, the assignee of a nonnegotiable instrument takes the instrument subject to all defenses and equities existing in favor of the obligor before notice of the assignment. *Royal Bank Export Fin. Co. v Bestways Distrib. Co.* (1991) 229 CA3d 764, 280 CR 355. Sections 955 and 955.1 control only the effect and priority of the assignment order.

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## §11.28 E. Restraining Orders

When the judgment creditor applies for the assignment order or thereafter, he or she may also apply to the court for an order restraining the judgment debtor from assigning or otherwise disposing of the right to payment that is sought to be assigned. CCP §708.520(a). The application may be made ex parte unless a court rule requires or the court directs that it be made on noticed motion. Regarding ex parte applications, see Cal Rules of Ct 3.1200-3.1207.

The court may issue a restraining order on a showing of need for the order and may, in its discretion, require the judgment creditor to provide an undertaking. CCP §708.520(b). If the court issues an order, it may modify or vacate it on such terms as are just at any time, with or without a hearing. CCP §708.520(c). A restraining order issued under CCP §708.520 must be *personally served* on the judgment debtor and must contain a notice that "failure to comply with the order may subject the judgment debtor to being held in contempt of court." CCP §708.520(d).

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## F. Obligor's Rights

### §11.29 1. In General

An obligor's rights are not affected by an order assigning the right to payments until the obligor receives notice of the order. CCP §708.540. Under §708.540, an obligor is a person who is or may become obligated to make payments to the judgment debtor.

**PRACTICE TIP:** Once the obligor receives notice of the order, the creditor should receive payment directly from the obligor. Therefore, the obligor should be served with the order as soon as it is issued. To ensure compliance with an assignment order, the judgment creditor may consider requesting the court to order the obligor to report or account periodically on payments received or due, if the obligor is subject to the jurisdiction of the court issuing the order. See CCP §639.

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## §11.30 2. Form: Notice of Assignment Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF ASSIGNMENT** |
| **vs** | ) | **ORDER (CCP §708.540)** |
| _ _[*Name(s)*]_ _, | ) | |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**NOTICE IS HEREBY GIVEN that, by court order, a copy of which is attached, this court has ordered _ _[*name*]_ _ to assign to _ _[*name of judgment creditor*]_ _, whose address is _ _[*specify c/o judgment creditor's attorney's address or judgment creditor's address if preferable*]_ _, all payments due or to become due from you to _ _[*name of judgment debtor*]_ _ to the extent necessary to satisfy this judgment, with all accrued interest and postjudgment costs.**

**The amount now necessary to satisfy this judgment, with all accrued interest is $_ _[*amount*]_ _.**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for each obligor (see §11.29); one for judgment debtor); office copies.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.31 G. Claim of Exemption by Judgment Debtor; Procedure

## §11.31 G. Claim of Exemption by Judgment Debtor; Procedure

The judgment debtor may claim that all or part of the right to payment is exempt from enforcement of a money judgment. CCP §708.550(a). The court must rule on any exemption claim at the hearing for issuance of the assignment order. CCP §708.550(c). The judgment debtor's failure to claim an exemption under CCP §708.550 waives the exemption. CCP §708.550(a).

The claim of exemption must be made to the court by application on noticed motion. CCP §708.550(a). The notice of motion must be filed with the court and personally served on the judgment creditor at least 3 days before the date set for the hearing on the judgment creditor's application for an assignment order. CCP §708.550(a)-(b). The judgment debtor must execute an affidavit or declaration in support of the application (CCP §2015.5) that includes all matters set forth in CCP §703.520(b) relating to the exemption claim. CCP §708.550(a).

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.32 H. Modifying or Setting Aside Assignment Order; Procedure

## §11.32 H. Modifying or Setting Aside Assignment Order; Procedure

A judgment creditor or a judgment debtor may apply to the court for an order to modify or set aside an assignment order. The application must be made on noticed motion (CCP §708.560(a)), which must be served on the other party either personally or by mail (CCP §708.560(a)).

The court must order that the assignment order be modified or set aside if the party requesting relief shows that a material change in circumstances has occurred since the previous hearing on the assignment order. CCP §708.560(b). The court may, as necessary, order a reassignment of the right to payments and must state in its order whether and to what extent the order applies to payments already made. CCP §708.560(b).

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## V. RECEIVER TO ENFORCE JUDGMENT

### §11.33 A. When Available; Required Showing

The general receiver provisions of CCP §§564-571 govern the appointment, qualifications, powers, rights, and duties of a receiver appointed to enforce a judgment. CCP §708.610. The court may appoint such a receiver on a showing by the judgment creditor that, "considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment." CCP §708.620.

Thus, a receiver may be appointed when a writ of execution cannot reach certain property and other remedies appear inadequate. See Comment to CCP §708.620. Similarly, on the requisite showing, a receiver may be appointed in examination proceedings (see §8.43) or to enforce a charging order against a partnership under Corp C §15028 (see §§11.7-11.10). For other examples of when a receiver may be appointed, see Comment to CCP §708.620.

**PRACTICE TIP:** The appointment of a receiver may be a costly procedure. The creditor may need to pay a retainer and guaranty. These are recoverable costs if the judgment can be collected.

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## §11.34 B. Special Rule on Alcoholic Beverage Licenses

When the judgment creditor seeks to apply the judgment debtor's interest in an alcoholic beverage license toward the satisfaction of a money judgment, the use of a receiver under CCP §708.630 is mandatory. CCP §708.630(a). The court may appoint a receiver to transfer the judgment debtor's interest in an alcoholic beverage license that is transferable under Bus & P C §§24070-24082 unless the judgment debtor in the proceeding to appoint the receiver shows that the amount of delinquent taxes described in Bus & P C §24049 and the claims of creditors with priority over the judgment creditor under Bus & P C §24074 exceed the probable sale price of the license. CCP §708.630(b). Generally, receivers auction alcoholic beverage licenses under Bus & P C §24074.

The receiver may exercise the powers of the licensee "as necessary." CCP §708.630(c). In exercising those powers, the receiver must comply with the applicable provisions of Bus & P C §§23000-25664 and applicable regulations of the Department of Alcoholic Beverage Control. CCP §708.630(c). An application must be filed to transfer the license to the receiver and, during the pendency of the transfer, a temporary retail permit must be obtained. CCP §708.630(c).

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## §11.35 VI. COLLECTING FROM LOCAL PUBLIC ENTITIES

Judgments against local public entities are enforced under the terms of Govt C §§970-978.8, not under the terms of the Enforcement of Judgments Law. The term "local public entity" includes counties, cities, districts, public authorities, public agencies, and any other political subdivisions or public corporations. It does not include the Regents of the University of California, the state, or the state's officers, departments, divisions, bureaus, boards, or commissions. Claims against the latter entities are paid by warrants drawn by the Controller. Govt C §970.

Judgments must be enforced within 10 years after the judgment becomes final or, if payable in installments, within 10 years after the final installment became due. Govt C §970.1. There is no provision for a renewal of a judgment for a subsequent 10-year period.

In general, local public entities must pay off judgments with interest in the fiscal year during which the judgment becomes final unless it would create an undue hardship on the local public entity. A portion of the judgment may be paid in the second fiscal year if paying the entire judgment in the first fiscal year would work a hardship on the local public entity. The local public entity also has the option of paying the judgment in installments by adopting an ordinance or resolution that it will suffer an undue hardship. After such an ordinance or resolution is adopted, the court issuing the judgment, after a hearing, may then order the judgment paid in up to ten equal installments. Govt C §§970.4, 970.6.

Local public entities are required to provide funds sufficient to pay judgments (Govt C §970.8) and limitations on taxes, assessments or rates, charges, and indebtedness levels do not apply if the funds are needed to satisfy judgments resulting from nondiscretionary acts (Govt C §971). If necessary, a local public entity may issue bonds under Govt C §§975-978.8 to pay judgments.

If a local public entity does not pay a judgment, a writ of mandate is used to compel payment. Govt C §970.2. See California Civil Writ Practice, chaps 3-4 (4th ed Cal CEB 2008) on writs of mandate.

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## VII. ENFORCEMENT OF JUDGMENT WHEN JUDGMENT DEBTOR IS CREDITOR OF PUBLIC ENTITY

### §11.36 A. Exclusive Statutory Procedure

Code of Civil Procedure §§708.710-708.795 provide the exclusive procedure by which a judgment creditor may have money that a public entity owes to a judgment debtor applied toward satisfaction of the money judgment against the judgment debtor. These sections do *not* apply to earnings of a public officer or employee, or to a public entity's obligation to pay money to a judgment debtor that is the subject of a pending action or proceeding. Except as expressly provided by law, a public officer's or employee's earnings may be withheld for the payment of a money judgment against a judgment debtor only under CCP §§706.010-706.154 (the Wage Garnishment Law; see chap 10). CCP §708.720(b). Similarly, the payment of a public entity's obligation that is the subject of a pending action or special proceeding may be applied to satisfy a money judgment against a judgment debtor only as provided in CCP §§708.410-708.480 (see §§11.12-11.20). CCP §708.720(c).

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## §11.37 B. Filing Requirements; Lien

To collect money that a public entity owes to the judgment debtor, the judgment creditor must file with the public entity an abstract or certified copy of the money judgment and an affidavit or declaration. CCP §708.730(a). The affidavit or declaration must state that the judgment creditor desires the relief provided in CCP §§708.710-708.795. It must also state the exact amount required to satisfy the judgment. CCP §708.730(a). The judgment creditor may state in the affidavit or declaration any facts tending to establish the judgment debtor's identity. CCP §708.730(a).

**State agencies.** If the public entity that owes money to the judgment debtor is a state agency, the abstract or certified copy of the judgment and the affidavit or declaration must be filed with the agency owing the money before the agency presents the judgment debtor's claim to the controller. CCP §708.740(a). A state agency is defined as "a state office, officer, department, division, bureau, board, commission or agency claims against which are paid by warrants drawn by the Controller." CCP §708.710(d).

**Other public entities.** If a public entity other than a state agency owes money to the judgment debtor, the abstract or certified copy of the judgment and the affidavit or declaration must be filed with the public entity's auditor or, if none, with the official whose duty corresponds to that of auditor. CCP §708.750. A public entity is defined as "the state, a county, city, district, public authority, public agency, and any other political subdivision in the state." CCP §708.710(b).

Filing the abstract or certified copy of the judgment creates a lien on the money owed by the public entity to the judgment debtor in an amount equal to the amount that may properly be applied to satisfy the judgment under CCP §§708.710-708.795. CCP §708.780. The judgment creditor must pay a $6 filing fee to the public entity when filing the abstract or certified copy of the judgment and the affidavit or declaration. CCP §708.785(a). Promptly after the abstract or certified copy of the judgment and the affidavit or declaration are filed with the public entity, the judgment creditor must serve notice of the filing, either personally or by mail, on the judgment debtor. CCP §708.730(b).

To discharge the claim, the controller if a state agency, or the auditor or other official if a public entity other than a state agency, must deposit an appropriate amount (see §11.38) in court. CCP §§708.740(c), 708.750.

**Special rule for support obligations.** To collect a support obligation or related cost from a public entity, the judgment creditor must file the abstract or certified copy of the judgment with the Department of Child Support Services of the county in which the support judgment is entered or registered if:

- A state agency owes the judgment debtor money as a result of lottery winnings, or a tax, penalty, or interest overpayment; and
- The Department of Child Support Services is enforcing the support obligation under former Welf & I C §11475.1. CCP §708.740(e).

The Department of Child Support Services will then file the claim under CCP §708.730(c). CCP §708.740(e). For lien amount and duration of lien when the Department of Child Support Services files the required affidavit or declaration under CCP §708.730(c), see CCP §708.780(b).

**NOTE:** Welfare and Institutions Code §11475.1 was repealed effective January 1, 2000. However, CCP §708.740 does not reflect this change. The repeal concerned the transfer of child support enforcement duties to the newly created county departments of child support services. See Fam C §§17304, 17305, 17400. Family Code §17305 established a transition period for the transfer, which began on January 1, 2001, and ended January 1, 2003. Due to the sunsetting provision (effective Dec. 31, 2000) of CCP §708.730(d), it is unclear to what extent a support creditor may, without having a government case open, obtain a lien on monies owed by a state agency.

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## §11.38 C. Discharge of Claim; Deposit With Court; Notice of Deposit

Once an abstract or certified copy of a money judgment and a supporting affidavit or declaration has been filed with a public entity that owes money to the judgment debtor, the public entity may discharge the judgment debtor's claim by making a deposit with the court.

**State agencies.** To discharge the judgment debtor's claim, the controller must deposit with the court the amount due the judgment debtor to fully, or to the greatest extent possible, satisfy the judgment as shown by the affidavit or declaration less a sufficient amount "to reimburse the state for any amounts advanced to the judgment debtor or owed by the judgment debtor to the state." CCP §708.740(c).

**Other public entities.** The auditor or other official whose duty corresponds to that of auditor must also follow this procedure to discharge a judgment debtor's claim. CCP §708.750.

Promptly after the controller, auditor, or other official whose duty corresponds to that of auditor deposits the amount due with the court, except as provided in CCP §708.770(g) (enforcement of support obligation by district attorney), the court clerk must cause a notice of deposit to be served, either personally or by mail, on the judgment debtor. CCP §708.770(a).

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### §11.39 D. Deposit With Court When Judgment Debtor Is a Contractor on Public Works

When a judgment debtor named in the abstract or certified copy of the judgment is a contractor on a public work whose costs are paid from public money voted, appropriated, or otherwise set aside for that purpose, CCP §708.760 applies. Only the portion of the contract price that remains payable on the completion of the contractor's contract, under its terms, after deducting sums due and to become due to persons described in CC §3181, is deemed "owing and unpaid" to the judgment debtor within the meaning of CCP §708.740 or §708.750. CCP §708.760(a). In calculating the sums due or to become due to such persons, only claims filed in accordance with CC §§3179-3214 against the money due or to become due to the judgment debtor may be applied. CCP §708.760(a).

The controller, auditor, or other public disbursing officer whose duty it is to make payments under the contract provisions generally may not deposit an amount with the court to discharge the claim under CCP §§708.710-708.795 until completion of the contract. CCP §708.760(b). There is one exception: An amount to satisfy the judgment debtor's claim may be deposited with the court before the payments specified in CCP §708.760(a) have been made, as long as a sufficient amount is retained to satisfy the claims of persons described in CC §3181. CCP §708.760(b). Thus, under CCP §708.760(b), a judgment creditor may be paid without the need to wait for the resolution of other contractors' payment disputes. See Comment to CCP §708.760.

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## §11.40 E. Exemption Claim by Judgment Debtor

Within 10 days after service of a notice of deposit by the court clerk (see §11.38), a judgment debtor may file a claim of exemption and a notice of motion for an order ruling on the exemption claim with the court and serve copies of them together with a notice of hearing on the motion, either personally or by mail, on the judgment creditor. CCP §708.770(b). The claim must include all matters required by in CCP §703.520(b). CCP §708.770(b)(1). The hearing on the motion must be held within 30 days after filing the notice of motion unless the court continues the hearing for good cause. CCP §708.770(c).

Within 10 days after being served with the notice of motion, the judgment creditor may oppose the judgment debtor's motion by filing with the court a notice of opposition to the exemption claim and serving a copy of it, either personally or by mail, on the judgment debtor. CCP §708.770(d). The notice of opposition must be executed under oath and must include all matters required by CCP §703.560. CCP §708.770(d)(1).

Code of Civil Procedure §§703.580, 703.590, and 703.600 apply to an exemption claim under CCP §708.770. CCP §708.770(e). The judgment debtor's failure to make a claim of exemption under CCP §708.770 waives the exemption. CCP §708.770(f).

On the procedure for a judgment debtor to claim an exemption when the Department of Child Support Services is enforcing a support obligation by proceeding under CCP §708.730(c) to collect an amount owed by a state agency to the judgment debtor, see CCP §708.770(g).

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## §11.41 F. Payment by Court

After the time has expired for the judgment debtor to claim an exemption under CCP §708.770 (see §11.40), or after the determination of a timely claim of exemption under CCP §708.770, the court must pay to the judgment creditor the nonexempt portion of the money deposited with the court to which the judgment creditor is entitled. CCP §708.775. Any remaining balance must be paid to the judgment debtor unless another disposition is required by law. CCP §708.775.

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## VIII. OTHER ENFORCEMENT PROCEDURES

### §11.42 A. Against Franchise Granted by Public Entity

When a public entity grants a franchise, other than the franchise of being a corporation (see CCP §708.910), the court may, in its discretion, order the franchise applied to the satisfaction of a money judgment on application by the judgment creditor on noticed motion (CCP §§708.910-708.920).

**NOTE:** Private franchises are governed by the general rules relating to application of property to satisfy a money judgment, not by CCP §§708.910-708.930. See Comment to CCP §708.910.

The notice of motion must be served, either personally or by mail, on both the judgment debtor and the public entity that granted the franchise. CCP §708.920(a). In determining whether application of the franchise to the satisfaction of the judgment is proper, the court must consider all the circumstances, including but not limited to the nature of the franchise, whether the franchise is by its terms transferable, and the likelihood that application of the franchise to satisfy the judgment will yield a substantial amount. CCP §708.920. Such an order is subject to all applicable statutory and administrative regulations. CCP §708.930.

**NOTE:** A public franchise is not subject to levy and sale under execution. See Comment to CCP §708.920.

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### §11.43 B. Against Judgment Debtor's Interest as Beneficiary of Trust

The judgment creditor may petition the court to enforce the judgment, using the judgment debtor's interest as a beneficiary of a trust. CCP §709.010. The court has some discretion to order the trustee to withhold and pay to the judgment creditor all or a part of the amount that would otherwise be paid periodically to the debtor from the trust. CCP §709.010(b). This enforcement procedure "applies only to written, voluntary, express trusts (testamentary or inter vivos) and not to such trusts as Totten trusts, investment trusts, and deeds of trust." See Comment to CCP §709.010.

When the Enforcement of Judgments Law (CCP §§680.010-724.260) was written, most trusts were subject to probate proceedings. Modern revocable family trusts do not go through probate, which leaves no forum in which to bring the appropriate motion. As a creditor of the beneficiary of the trust, and not a creditor of the trust itself, the judgment creditor has no standing to open a probate proceeding. The solution seems to be to bring a motion for an assignment order under CCP §708.510 for an assignment of the beneficiary's interest under the trust and to serve it on the trustees of the trust as well as the beneficiary.

**NOTE:** The judgment debtor's interest as a beneficiary of a trust is not subject to execution. CCP §699.720(a)(8).

Code of Civil Procedure §709.010 is subject to the limitations on the enforcement of a money judgment against the judgment debtor's interest in a trust under Prob C §§15300-15309. CCP §709.010(c).

See §9.30 on levying against a settlor's interest in a revocable trust using a writ of execution.

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## §11.44 C. Against Judgment Debtor's Contingent Remainder, Executory Interest, or Other Nonvested Property Interest

The judgment creditor may apply to the court for an order to have a contingent remainder, executory interest, or other nonvested property interest of the judgment debtor applied toward the satisfaction of a money judgment. CCP §709.020. The application must be made by noticed motion. The judgment debtor's interest may be applied to the judgment's satisfaction "by such means as the court, in its discretion, determines are proper to protect the interests of both the judgment debtor and judgment creditor, including but not limited to the imposition of a lien on or the sale of the judgment debtor's interest." CCP §709.020.

Although these interests are not subject to execution (see CCP §699.720(a)(9)), the court may fashion an appropriate remedy to prevent a sacrifice sale of the judgment debtor's interest while preserving the creditor's rights. See Comment to CCP §709.020.

**PRACTICE TIP:** It may also be appropriate to use an assignment order to reach the contingent remainder, executory interest, or other nonvested property interest of the judgment debtor. See §11.21.

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### §11.45 D. Against Judgment Debtor's Property in Guardian or Conservatorship Estate

The judgment creditor may apply to the court in which a guardianship or conservatorship proceeding is pending under Prob C §§1400-3925 for an order requiring payment of the judgment from the property that is part of the guardianship or conservatorship estate. CCP §709.030. A judgment debtor's property that is part of a guardianship or conservatorship estate is not subject to enforcement of a money judgment under CCP §§695.010-709.020. CCP §709.030.

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## §11.46 IX. ENFORCEMENT AFTER DEATH OF JUDGMENT CREDITOR OR JUDGMENT DEBTOR

If a judgment creditor dies before the judgment is fully satisfied, the judgment creditor's executor, administrator, or successor in interest may enforce the judgment as provided in the Enforcement of Judgments Law (CCP §§680.010-724.260). CCP §686.010. If the judgment debtor dies, however, enforcement of the judgment is governed by the Probate Code. CCP §686.020. See Prob C §§9300-9304. See also California Decedent Estate Practice §§14.85-14.89 (2d ed Cal CEB 2009).

If a judgment debtor owns property in joint tenancy and dies before the other joint tenants, any judgment lien against the debtor's interest in the property is eliminated by the debtor's death. *Zeigler v Bonnell* (1942) 52 CA2d 217, 220, 126 P2d 118. On the other hand, when the lien against the debtor attached while the debtor owned the property as a tenant in common, the lien survived the death of the debtor although the tenants in common had conveyed their interest to a joint tenancy before the debtor's death. *Dieden v Schmidt* (2002) 104 CA4th 645, 651, 128 CR2d 365.

**Insurance policies.** If the judgment creditor takes out a life insurance policy on the judgment debtor, naming itself as beneficiary, on the debtor's death the creditor may not collect more than the amount of the debt, plus the premiums paid on the policy, and the interest on both those amounts. *Jimenez v Protective Life Ins. Co.* (1992) 8 CA4th 528, 540, 10 CR2d 326.

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## §11.47 X. ENFORCEMENT COSTS

A judgment creditor is entitled to recover reasonable and necessary costs of enforcing a judgment. CCP §685.040.

**NOTE:** Specific statutes sometimes prohibit the recovery of costs, *e.g.,* CCP §§703.090, 704.840, 708.290. See Comment to CCP §685.040.

Attorney fees incurred in enforcing a judgment are not collectible costs under CCP §685.040 unless otherwise provided by law. CCP §685.040; see Comment to CCP §685.040. Attorney fees incurred in enforcing a judgment may be claimed as costs, however, if the underlying judgment includes an award of fees based on a contract between the judgment creditor and the judgment debtor. CCP §§685.040, 685.070(a)(6), 1033.5(a)(10)(A).

A judgment creditor's attorney fees incurred in filing an adversarial proceeding and securing the dismissal of the debtor's bankruptcy proceedings are recoverable as postjudgment attorney fees under CCP §685.040 because the creditor's actions in the bankruptcy proceedings were necessary to maintain, preserve, and protect the enforceability of the judgment. *Jaffe v Pacelli* (2008) 165 CA4th 927, 82 CR3d 423 (underlying promissory provided for attorney fees, and debtor filed bankruptcy to avoid paying judgment). Attorney fees expended on appeal may be recovered by a prevailing party under CCP §1034. *Alan S. v Superior Court* (2009) 172 CA4th 238, 259, 91 CR3d 241.

When an underlying judgment includes an award of attorney fees, they are recoverable as reasonable and necessary fees incurred in enforcing the judgment. *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 888, 88 CR3d 250. The judgment creditor may also recover attorney fees incurred in defending against a separate action brought by judgment debtors, when the separate action was brought in response to the creditor's efforts to enforce a judgment against the judgment debtors. *Globalist Internet Technols. v Reda* (2008) 167 CA4th 1267, 1275, 84 CR3d 725.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.48 A. Specific Costs Allowable Under CCP §685.070

## §11.48 A. Specific Costs Allowable Under CCP §685.070

A judgment creditor may claim the following costs of enforcing a judgment under CCP §685.070(a):

- Statutory fees for preparing, issuing, recording, and indexing an abstract of judgment or a certified copy of a judgment;
- Statutory filing fees for a notice of judgment lien on personal property;
- Statutory fees for issuing a writ for the enforcement of the judgment to the extent they are not satisfied under CCP §685.050;
- Statutory fees for the levying officer's costs for performing duties under a writ to the extent they are not satisfied under CCP §685.050;
- Statutory fees for the levying officer's performing the duties under the Wage Garnishment Law (CCP §§706.010-706.154) to the extent it has not been satisfied by wage garnishment; and
- Costs incurred in connection with any proceeding under CCP §§708.010-709.030 that the judge or referee has approved as to amount, reasonableness, and necessity.

On the procedure for recovery and use of local court forms if available, see §§11.49-11.56.

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## B. Procedure

### §11.49 1. Memorandum of Costs; Time Limitation

A judgment creditor who claims costs under CCP §685.070 must file a memorandum of costs with the court clerk and serve a copy, either personally or by mail, on the judgment debtor before the judgment has been fully satisfied but no later than 2 years after the costs were incurred. CCP §685.070(b). The memorandum must be executed under oath by a person having knowledge of the facts and must state "that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied." CCP §685.070(b). See §§7.31-7.36 on costs.

**NOTE:** The memorandum of costs must contain the following statement: "The fees sought under this memorandum may be disallowed by a court upon a motion to tax filed by the debtor notwithstanding the fees having been included in the writ of execution." CCP §685.070(e).

If the judgment debtor does not move to tax costs within the time set in CCP §685.070(c), the costs claimed in the memorandum will be allowed. CCP §685.070(d).

A Judicial Council form entitled "Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest" (MC-012) must be used. See §9.3 for further discussion of the form.

If a memorandum of costs for the statutory costs specified in CCP §685.070(a) is filed with an application for a writ of execution, the costs not already allowed by the court may be included in the amount specified in the writ of execution (but not to exceed $100), subject to a later disallowance as ordered by the court under a motion to tax.

A noticed motion to recover supplemental attorney fees and costs incurred in enforcing a judgment must be served on all judgment debtors, including default judgment debtors. *Karton v Dougherty* (2009) 171 CA4th 133, 147, 89 CR3d 506.

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## §11.50 2. Motion to Tax Costs; Time Limitations

A judgment debtor may apply to the court on noticed motion within 10 days after being served with the memorandum of costs to have the costs taxed by the court. CCP §685.070(c). The notice of motion must be served, either personally or by mail, on the judgment creditor. CCP §685.070(c). The court must then allow or disallow the costs to the extent justified under the circumstances. CCP §685.070(c).

The costs claimed in the judgment creditor's memorandum are allowed if no motion to tax costs is made within the 10-day period. CCP §685.070(d).

On moving to tax costs, see California Trial Practice: Civil Procedure During Trial §§27.103-27.111 (3d ed Cal CEB 1995).

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### 3. Motion to Recover Costs

#### §11.51 a. Procedure; Time Limitations

A judgment creditor may claim costs authorized under CCP §685.040 by noticed motion. CCP §685.080(a). The motion must be made before the judgment has been fully satisfied, but no later than 2 years after the costs were incurred. CCP §685.080(a). The costs claimed under CCP §685.080 may include but are not limited to costs that may be claimed under CCP §685.070 and costs incurred but not approved by the court or a referee in a proceeding under CCP §§708.010-709.030. CCP §685.080(a). See §11.48 on permitted enforcement costs.

The notice of motion must describe the costs claimed and state their amount. CCP §685.080(b). It must be supported by an affidavit or declaration (CCP §2015.5) of someone having knowledge of the facts (CCP §685.080(b)). The affidavit or declaration must state "that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied." CCP §685.080(b). The notice of motion must be served, either personally or by mail, on the judgment debtor. CCP §685.080(b). Thereafter, the court is required to make an order allowing or disallowing such costs to the extent justified under the circumstances. CCP §685.080(c).

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.52 b. Form: Notice of Motion for Order Fixing Costs of Enforcement of Judgment

## §11.52 b. Form: Notice of Motion for Order Fixing Costs of Enforcement of Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
_ _[_ _ _ _ _ _ *Judicial District*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No.** _ _ _ _ _ _ |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION FOR** |
| **vs** | ) | **ORDER FIXING COSTS OF** |
| _ _[*Name(s)*]_ _, | ) | **ENFORCEMENT OF** |
| **Defendant(s)** | ) | **JUDGMENT (CCP §685.080)** |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | |
| | ) | |

**To** _ _[*name*]_ _**, the judgment debtor,** _ _[*and to* _ _[*his/her/its*]_ _ *attorney of record*]_ _**:**

**PLEASE TAKE NOTICE that on** _ _[*date*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of the above-named court at** _ _[*address*]_ _**, California,** _ _[*name*]_ _**, the judgment creditor, will move the court for its order approving the necessity, reasonableness, and amount of the costs incurred by the judgment creditor in enforcing the judgment in this action, as set forth in the declaration of** _ _[*name of declarant*]_ _ **a copy of which is attached, and for the allowance of costs, and for such other and further relief as the court may consider proper.**

**This motion is based on this notice, the supporting declaration of** _ _[*name of declarant*]_ _**, the memorandum in support of motion, and the pleadings and records on file in this action.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name of judgment creditor*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies (one for service on judgment debtor); office copies.

*Comment:* A memorandum in support of motion, commonly referred to as a memorandum of points and authorities, must accompany the motion. See Cal Rules of Ct 3.1113(a), 3.1114(a). When drafting the memorandum, the attorney should base it on the specific facts of the case and the relevant authorities. See Cal Rules of Ct 3.1113(b). A supporting declaration should also accompany the motion; a form of declaration is set forth in §11.53.

The notice of motion must be served on the judgment debtor, not on the judgment debtor's attorney, unless the judgment debtor has filed with the court and served on the judgment creditor a request that service be made on the judgment debtor's attorney and the requirements of CCP §684.020(b) have been met. If opposition papers are filed, however, subject to CCP §§283-286 and Fam C §215, the judgment debtor must serve those papers on the attorney of record for the judgment creditor. CCP §684.010.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.53 c. Form: Declaration in Support of Motion for Order Fixing Costs of Enforcement of Judgment

## §11.53 c. Form: Declaration in Support of Motion for Order Fixing Costs of Enforcement of Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **MOTION FOR ORDER FIXING** |
| **Defendant(s)** | ) | **COSTS OF ENFORCEMENT** |
| _____ | ) | **OF JUDGMENT** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | |

_ _[*Name*]_ _ **declares:**

**1. I am the** _ _[*e.g., judgment creditor/attorney for the judgment creditor*]_ _ **in this action.**

**2. On** _ _[*date*]_ _, _ _[*name*]_ _**, the judgment creditor, obtained a judgment in this court against** _ _[*name*]_ _**, the judgment debtor, for the sum of $**_ _[*amount*]_ _ _ _[*together with costs of $*_ _[*amount*]_ _]_ _**.**

**3. The judgment was duly entered on** _ _[*date*]_ _**, and an outstanding balance of $**_ _[*amount*]_ _ **remains on the judgment.**

**4. The judgment creditor has incurred the following costs in enforcing the judgment:** _ _[*Set forth in detail all fees, expenses, and disbursements, indicating for each the amount, the date it was incurred, and what it was for*]_ _**.**

**5. To the best of my knowledge and belief these costs are correct, are reasonable and necessary, and have not been satisfied.**

**6. No previous motion for these costs paid by the judgment creditor has been made.**

**I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Copies:* See §11.52.

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## §11.54 d. Form: Order Fixing Costs of Enforcement of Money Judgment

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **ORDER FIXING COSTS OF** |
| **vs** | ) | **ENFORCEMENT OF MONEY** |
| _ _[*Name(s)*]_ _, | ) | **JUDGMENT** |
| **Defendant(s)** | ) | |
| _____ | ) | |
| | ) | |
| | ) | |

**The motion of _ _[*name*]_ _, the judgment creditor in this action, for an order fixing costs for enforcing the judgment in this cause having been regularly heard on _ _[*date*]_ _; the declaration of _ _[*name*]_ _ in support of the motion requesting that the judgment creditor's costs of enforcing the judgment in this action having been fixed and allowed by this court; due notice of this application having been given to the judgment debtor; at the hearing _ _[*name*]_ _ having appeared as counsel for judgment creditor in support of the application and _ _[*the judgment debtor having appeared/_ _[name*]_ _ *having appeared as counsel for the judgment debtor*]_ _ in opposition; and the matter having been submitted to the court:**

**IT IS ORDERED that there be allowed to _ _[*name*]_ _, the judgment creditor, for costs incurred in enforcing the judgment in this action, the sum of $_ _[*amount*]_ _.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the _ _[*title of court*]_ _**

*Copies:* See §11.52.

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**Source:** Business Law/Debt Collection Practice in California/11 Miscellaneous Remedies/§11.55 4. Adding Recovered Costs to Principal Amount of Judgment Remaining Unsatisfied

## §11.55 4. Adding Recovered Costs to Principal Amount of Judgment Remaining Unsatisfied

Costs may be added to and may become part of the judgment either (CCP §685.090(a)):

- When an order allowing costs is filed; or
- If a memorandum of costs is filed under CCP §685.070, when the time for moving to tax costs has expired if no such motion has been made.

The costs added to the judgment under CCP §685.090 are included in the principal amount of the judgment remaining unsatisfied. CCP §685.090(b).

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## §11.56 5. Outstanding Writs and Earnings Withholdings Orders

A writ or an earnings withholding order may be outstanding when costs are added to a judgment under CCP §685.090. If so, the levying officer must add those costs to the amount to be collected under the writ or earnings withholding order if, before the writ is returned, the officer receives (CCP §685.090(c)):

- A certified copy of the court order allowing the costs; or
- A certificate from the court clerk that costs have been added to the judgment after a memorandum of costs has been filed under CCP §685.070 and no motion to tax has been made within the time allowed for making the motion.

The levying officer must include these costs in the amount of the sale or collection distributed to the judgment creditor only if the officer receives the certified copy of the court order or the clerk's certificate *before* the distribution is made. CCP §685.090(d).

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# 12

# Bankruptcy Considerations

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## §12.1 I. INTRODUCTION

Debt collection is substantially affected when the debtor files bankruptcy. Because the number of bankruptcy filings has increased and the effects of bankruptcy law on other areas of the law have grown, a general practitioner or a specialist in another area must have a basic familiarity with the fundamentals of bankruptcy law. This chapter provides an overview of bankruptcy law and practice. It discusses the fundamentals of bankruptcy law that the practitioner involved in a debt collection matter will need to understand to recognize and define bankruptcy issues. For debtor's counsel, the chapter provides a guide to determine the appropriateness of bankruptcy; the selection of the proper type of bankruptcy case; the strategies to be employed in preparing for and timing the filing; and the effect of bankruptcy on the debtor, creditors, and third parties. The chapter will likewise discuss the impact of bankruptcy on the creditor, prepare creditor's counsel for what to expect, offer guidance on how to respond, and suggest steps to protect the creditor's rights, meet deadlines, and undertake commonly used offensive strategies.

Both debtor's and creditor's counsel are cautioned that bankruptcy is a highly specialized area with many sophisticated issues and nuances. Thus, in-depth research or consultation with a specialist is recommended.

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## II. SOURCES OF BANKRUPTCY LAW AND PROCEDURE

### §12.2 A. The Bankruptcy Code

The Bankruptcy Code is set forth in Title 11 of the United States Code. All Bankruptcy Code sections have the same numbers as corresponding sections in Title 11, and are properly cited as 11 USC §___.

The first three chapters of the Bankruptcy Code contain definitions, and provisions relating to case administration and the relations of the parties. These chapters apply to all types of bankruptcy cases unless otherwise indicated in the chapter governing the particular type of case.

The six distinct types of bankruptcy cases are contained in the following Chapters of the Bankruptcy Code:

(1) Chapter 7 (Liquidation);

(2) Chapter 9 (Municipalities);

(3) Chapter 11 (Reorganization);

(4) Chapter 12 (Family Farmer and Fisherman);

(5) Chapter 13 (Adjustment of Debts of Individuals); and

(6) Chapter 15 (Ancillary and Other Cross Border Cases).

The provisions of each of these chapters apply only to cases filed under the respective chapters.

The Bankruptcy Code frequently receives both major and minor amendments. Major amendments to the Code were made in 1984, 1994, and 2005. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stat 23), generally effective October 17, 2005, made comprehensive changes to the Code, discussed throughout this chapter. In an effort to prevent abuse of the bankruptcy process, the BAPCPA imposed new requirements intended to force individuals with meaningful future earning capacity to pay more of their debts in bankruptcy cases. As a result, individuals who can afford to fund Chapter 11 or 13 plans are no longer permitted to file Chapter 7 cases. See §§12.14-12.14C.

The BAPCPA also enacted provisions intended to protect consumers from abusive creditor practices, and provisions designed to enhance protection for creditors who are beneficiaries of domestic support obligations. Other changes include amendments to the small business bankruptcy provisions, permanent reenactment of Chapter 12 relating to family farmers and family fishermen, and the enactment of Chapter 15, relating to ancillary and other cross-border cases.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.2A B. Bankruptcy Terminology

## §12.2A B. Bankruptcy Terminology

In bankruptcy parlance, "case" refers to the bankruptcy action commenced by filing a bankruptcy petition, and "proceeding" refers to a specific matter, such as an adversary proceeding, that arises within the bankruptcy case. The "debtor" is the party that either filed a voluntary bankruptcy petition or that had an involuntary petition filed against it. In Chapter 11 cases, a debtor that is still operating its business affairs is called the "debtor in possession." 11 USC §1101. The debtor in possession generally has all the rights, powers, and duties of a trustee in a Chapter 11 case. 11 USC §1107. If a trustee has been appointed in the Chapter 11 case, however, the trustee operates the debtor's business and there is no debtor in possession. See 11 USC §1104. A trustee is always appointed in Chapter 7 and Chapter 13 cases.

The trustee, if any, must be distinguished from the United States Trustee, who is a presence in every bankruptcy case. The United States Trustee Program is a component of the United States Department of Justice, which supervises the administration of bankruptcy cases. Generally, a United States Trustee and several assistant United States Trustees and staff attorneys work in each district office, and each bankruptcy case is assigned to an individual assistant trustee or staff attorney. The United States Trustee has specific duties in bankruptcy cases under his or her watch; essentially these duties amount to an oversight function.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.3 C. Federal Rules of Bankruptcy Procedure

## §12.3 C. Federal Rules of Bankruptcy Procedure

The Federal Rules of Bankruptcy Procedure (Fed R Bankr P) govern procedure in all cases under Title 11 of the United States Code. The Bankruptcy Rules are usually amended following the enactment of amendments to the Bankruptcy Code. The rules do not track the numbering system of the Bankruptcy Code.

The following are the important procedures that contribute to the uniqueness of bankruptcy practice and of which counsel should be particularly aware:

**"After notice and a hearing."** Many Code sections require notice to interested parties and a hearing before the court will grant the relief sought. Nevertheless, Bankruptcy Code §102(1) provides that the court may authorize an act *without a hearing* if notice has been given and no timely objection made. Federal Rules of Bankruptcy Procedure 2002 fixes the notice periods and defines the parties entitled to receipt of notice. Local rules, discussed in §12.8, broaden the scope of and refine this procedure. Rule 2002 also enumerates the many situations in which a debtor or trustee must give notice before performing a certain act. Although a creditor or other party in interest may file a Request for Notice*,* such a request does not entitle the requesting party to receive anything more than the notices that are otherwise served; it does not obligate parties to serve pleadings or other documents filed. The filing of a request is good practice, however.

**Adversary proceedings.** Much bankruptcy litigation is conducted in adversary proceedings. An adversary proceeding is begun by filing and serving a complaint in the bankruptcy case. The bankruptcy court assigns an adversary proceeding number and maintains a separate docket for each adversary proceeding.

Federal Rules of Bankruptcy Procedure 7001 provides that adversary proceedings are governed by Part VII of the Bankruptcy Rules and enumerates the types of relief that may be sought only in an adversary proceeding. Part VII tracks the Federal Rules of Civil Procedure by using parallel numbers, *e.g.,* Fed R Bankr P 7030 governs depositions and makes Fed R Civ P 30 applicable in its entirety. Federal Rules of Bankruptcy Procedure 7004 governs service of process and, although it incorporates much of Fed R Civ P 4, it contains certain unique provisions, most notably Fed R Bankr P 7004(b), allowing service of a summons and complaint within the United States by first-class mail.

**Contested matters.** Contested matters are those that do not rise to the level of an adversary proceeding but nevertheless may involve a substantial controversy, *e.g.,* a proceeding to avoid a lien. Fed R Bankr P 9014. Such matters are frequently brought before the court quickly by a noticed motion and can be traps for those unfamiliar with bankruptcy practice. Although certain of the Part VII rules apply, there is often uncertainty, even among bankruptcy practitioners and judges, about whether an issue should be raised as a contested matter or an adversary proceeding. Because of this, it is the area of bankruptcy practice most addressed by local rules.

**Rule 2004 exam.** Federal Rules of Bankruptcy Procedure 2004 permits what is known as the "2004 exam," providing that on application and order, a party may examine any entity relating to the "acts, conduct, or property, or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Fed R Bankr P 2004(b). Because of the breadth of the Rule, and the ease with which such an order is issued (often by the clerk), it is subject to abuse. Although it may be used to allow a trustee or party to gather information to determine whether suit should be filed, it may not be used as a substitute for formal discovery once an adversary proceeding is commenced. See, *e.g., In re Dinubilo* (ED Cal 1993) 177 BR 932.

In addition to the definitions in 11 USC §101, Fed R Bankr P 9001 contains several definitions, most notably an extremely broad definition of "debtor" for purposes of imposing responsibility for those who must perform the duties of the debtor required by the Bankruptcy Rules.

**Time periods/deadlines.** Federal Rules of Bankruptcy Procedure 2002 sets forth the amount of notice to be provided in specified situations, the identity of those entitled to notice, and the required content of notices. Time periods and deadlines are found throughout the Bankruptcy Rules. Examples include Fed R Bankr P 1007(c) (14 days to file schedules and statement of affairs), Fed R Bankr P 3002(c) (time for filing proof of claim), Fed R Bankr P 4003(b)(1)-(2) (30 days for party in interest to file objections to debtor's exemptions; up to 1 year after closing of case for trustee if exemptions fraudulently claimed), and Fed R Bankr P 4007 (60 days following 11 USC §341 meeting to file complaint to

determine dischargeability of debt).

**NOTE:** Effective December 1, 2009, deadlines in the Bankruptcy Rules were amended as follows:

- 5-day periods became 7-day periods;
- 10-day periods became 14-day periods;
- 15-day periods became 14-day periods;
- 20-day periods became 21-day periods; and
- 25-day periods became 28-day periods.

If a party suffers a default judgment as a result of failure to timely perform an obligation, Fed R Bankr P 9024 makes Fed R Civ P 60 (Relief From Judgment or Order) applicable in cases under the Code; in addition, Fed R Bankr P 7055 makes Fed R Civ P 55 applicable to defaults. The standard under Fed R Civ P 55(c) is "good cause," which is more lenient than the "excusable neglect" standard of Fed R Civ P 60(b). *Educational Credit Mgmt. Corp. v Bernal (In re Bernal*) (BAP 9th Cir 1998) 223 BR 542, aff'd (9th Cir 2000) 207 F3d 595. For application of the excusable neglect standard to tardily-filed proofs of claim, see §12.55.

The Bankruptcy Rules require explicit notice of the provisions of a Chapter 11 plan proposing to enjoin conduct of a third party that is not otherwise enjoined by the Bankruptcy Code. Federal Rules of Bankruptcy Procedure 2002(c)(3) requires that notice of the hearing of plan confirmation give conspicuous notice of the plan provisions; Fed R Bankr P 3016(c) requires both the plan and disclosure statement to describe the injunction in "specific and conspicuous" language; Fed R Bankr P 3017(f)(1) requires 28 days' notice to the third party of the plan confirmation hearing; and Fed R Bankr P 3020(c) requires the plan confirmation order to provide detailed and specific notice relative to the injunction.

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## §12.4 D. Official Forms

The Official Forms are part of the Bankruptcy Rules. Chief among them are the voluntary petition (see Official Form 1), schedules (see Official Form 6), and statement of financial affairs (see Official Form 7). These may be downloaded from most bankruptcy court websites. For the websites of the four bankruptcy courts in California, see the Directory.

Certain bankruptcy courts have implemented their own versions of the Official Forms and have adopted both mandatory and optional forms covering various situations. Thus, before using the Official Forms or drafting pleadings, practitioners should check with each court to ascertain whether the court has its own forms. Forms are not always available from the clerk of the bankruptcy court, although many local bankruptcy court websites provide downloadable forms. For links to bankruptcy court websites, see the Directory.

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## E. Bankruptcy Courts and Jurisdiction

### §12.5 1. Original Jurisdiction

The federal district courts have original and exclusive jurisdiction of all cases under Title 11 of the United States Code (28 USC §1334(a)) and original but not exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under Title 11 (28 USC §1334(b)). Actions instituted in nonbankruptcy courts over which the bankruptcy court has jurisdiction under §1334 may be removed to bankruptcy court. 28 USC §1452.

The bankruptcy court may abstain from particular proceedings on a discretionary or a mandatory basis. Under the doctrine of discretionary abstention, the bankruptcy court may, in the interest of justice or in the interest of comity with state courts or respect for state law, abstain from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11. 28 USC §1334(c)(1). Under the mandatory abstention doctrine, the bankruptcy court must abstain from a proceeding if the following seven factors exist (28 USC §1334(c)(2); *Schulman v California State Water Resources Control Bd. (In re Lazar)* (Bankr CD Cal 1996) 200 BR 358, 370; *World Solar Corp. v Stinbaum (In re World Solar Corp.)* (Bankr SD Cal 1988) 81 BR 603):

(1) A timely motion by a party;
(2) A purely state law question;
(3) A "non-core" proceeding (see 28 USC §157(b)(1), discussed below);
(4) A lack of independent federal jurisdiction absent the petition under Title 11;
(5) That an action is commenced in a state court;
(6) That the state court action may be timely adjudicated; and
(7) A state forum of appropriate jurisdiction.

Bankruptcy judges have the power to decide all cases arising under Title 11 and all core proceedings. 28 USC §157(b)(1). The term "core proceedings" generally refers to all proceedings either based on bankruptcy law or directly related to bankruptcy. 28 USC §157(b)(2). The bankruptcy court may hear a noncore proceeding but must submit its proposed findings of fact and conclusions of law to the district court, which then enters the final order (unless the parties consent to the bankruptcy judge's entry of the final order or judgment). 28 USC §157(c)(1)-(2).

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### §12.5A 2. States' Waiver of Sovereign Immunity

In two cases, the United States Supreme Court answered significant questions that had previously bred conflicting circuit court opinions regarding the jurisdiction of bankruptcy courts over states and their agencies. In *Central Va. Community College v Katz (In re Wallace's Book Store, Inc.*) (2006) 546 US 356, 163 L Ed 2d 945, 952, 126 S Ct 990, the Supreme Court held that the Bankruptcy Clause of the United States Constitution (Art I, §8, cl 4) grants Congress the authority to subject states to suit with respect to bankruptcy matters. Finding a limited subordination of state sovereign immunity in the bankruptcy area by virtue of the inclusion of the Bankruptcy Clause in the plan of the Constitutional Convention, the Court specifically held that a suit by a bankruptcy trustee to recover preferential transfers made by the debtor to a state agency is not barred by sovereign immunity. In so holding, the Court dismissed as dicta contrary statements in *Seminole Tribe of Fla. v Florida* (1996) 517 US 44, 134 L Ed 2d 252, 116 S Ct 1114*,* previously relied on by the several Circuit Courts in insulating states from affirmative suit in bankruptcy court. See, *e.g., Montana v Goldin (In re Pegasus Gold Corp.)* (9th Cir 2005) 394 F3d 1189. However, *Katz* does not apply to the federal government, and only the limited waiver of sovereign immunity found in §106 of the Bankruptcy Code applies to actions against the federal government. *In re Supreme Beef Processors, Inc.* (5th Cir 2006) 468 F3d 248. This ruling came on the heels of a Supreme Court opinion holding that a state agency may not assert sovereign immunity as a defense in an adversary proceeding brought to adjudicate the dischargeability of a student loan. *Tennessee Student Assistance Corp. v Hood (In re Hood)* (2004) 541 US 440, 158 L Ed 2d 764, 124 S Ct 1905. After these two cases, it should be undisputed that states are bound by the debtor's discharge, and the bankruptcy court has jurisdiction to enforce a discharge, even as against a state agency.

The Ninth Circuit has held that when a state or an arm of the state (see §12.5B) files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence (see §12.5C) as the state's claim. *Schulman v California (In re Lazar)* (9th Cir 2001) 237 F3d 967, cert denied (2001) 534 US 992.

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### §12.5B a. Arm of State Determination

For purposes of determining whether the state waives its Eleventh Amendment immunity with regard to a bankruptcy estate's claims that arise from the same transaction or occurrence when an arm of the state files a proof of claim in a bankruptcy proceeding, the Ninth Circuit has set forth five factors for determining whether an entity is an "arm of the state" (*Schulman v California (In re Lazar)* (9th Cir 2001) 237 F3d 967, cert denied (2001) 534 US 992):

(1) Whether a money judgment would be satisfied out of state funds;

(2) Whether the entity performs central government functions;

(3) Whether the entity may sue or be sued;

(4) Whether the entity has power to take property in its own name or only in the name of the state; and

(5) The corporate status of the entity.

In *Franceschi v State Bar of Cal. (In re Franceschi)* (BAP 9th Cir 2001) 268 BR 219, aff'd (9th Cir 2002) 43 Fed Appx 87, the Bankruptcy Appellate Panel of the Ninth Circuit held that the State Bar was an "arm of the state" under the *Lazar* test and was therefore immune from prosecution of an adversary proceeding brought by the debtor seeking a determination that a disciplinary proceeding violated the discharge injunction. The panel also held that the bankruptcy court had jurisdiction to enjoin the State Bar's chief trial counsel under the doctrine of *Ex parte Young* (1908) 209 US 123, 52 L Ed 714, 28 S Ct 441, but that exercise of jurisdiction would run afoul of the abstention doctrine set forth in *Younger v Harris* (1971) 401 US 37, 91 S Ct 746, 27 L Ed 2d 669, under which a federal court may not, absent extraordinary circumstances, interfere with pending proceedings in a state court if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff with an adequate opportunity to litigate federal claims.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.5C b. Same Transaction or Occurrence Requirement

### §12.5C b. Same Transaction or Occurrence Requirement

To determine whether the same transaction or occurrence requirement is met, and that therefore the state waives its Eleventh Amendment immunity with regard to a bankruptcy estate's claims, courts apply the logical relationship test delineated in *Pinkstaff v U.S. (In re Pinkstaff)* (9th Cir 1992) 974 F2d 113. *California v Harleston (In re Harleston)* (9th Cir 2003) 331 F3d 699. Under this test, a logical relationship exists when a counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts on which the claim rests activates additional legal rights otherwise dormant in the defendant. *Pinkstaff,* 974 F2d at 115. See *California v Harleston (In re Harleston), supra* (subsequent adversary proceeding to clarify scope of bankruptcy proceeding, that debt was actually discharged, is logically related to bankruptcy proceeding). See also *Montana v Goldin (In re Pegasus Gold Corp.)* (9th Cir 2005) 394 F3d 1189, 1195 (no waiver when debtors' breach of settlement agreement claims against state did not arise out of same transaction or occurrence as state's proofs of claims seeking environmental compliance).

**NOTE:** The First Circuit has held that the filing of a proof of claim (invoking the bankruptcy court's jurisdiction) affirmatively waives the state agencies' immunity from claims related to their proof of claim. Further, the waiver encompasses the entire scope of the agencies' compulsory counterclaims, even when those claims could require an affirmative recovery rather than merely defensive recoupment. *Arecibo Community Health Care, Inc. v Commonwealth of Puerto Rico* (1st Cir 2001) 270 F3d 17, 26, cert denied (2002) 537 US 813.

In *Goldberg v Ellet (In re Ellet)* (9th Cir 2001) 254 F3d 1135, cert denied (2002) 534 US 1127, the Ninth Circuit held that a bankruptcy court may enjoin a state tax official from collecting taxes that were discharged in a bankruptcy proceeding in which the state did not participate.

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## §12.6 F. Removal and Remand

Title 28 USC §1452 provides that any claim or cause of action is subject to removal to the bankruptcy court, regardless of whether the lawsuit of which the claim is a part was pending when the bankruptcy case was filed. Ordinary removal of state court civil litigation to federal district court is governed by 28 USC §1441, which provides for removal of "any civil action."

Federal Rules of Bankruptcy Procedure 9027 sets forth the process for removal. The decision to remove is based on whether a party feels that the bankruptcy court is a more appropriate forum to hear the matter. Removal does not have any effect on the automatic stay. An action against the debtor is stayed after removal until the stay is modified. The parties may not proceed further in the court from which the action was removed unless the claim is remanded. Fed R Bankr P 9027(c).

Once a claim or cause of action has been removed, any nonremoving party to the litigation may file a motion for remand under 28 USC §1452(b). This section is a grant of broad jurisdiction to the court to remand the claim or cause of action back to the court in which it originated on "any equitable ground."

A state waives its sovereign immunity when it removes a case to federal court. See §12.5A. *Lapides v Bd. of Regents of Univ. Sys. of Ga.* (2002) 535 US 613, 624, 152 L Ed 2d 806, 122 S Ct 1640 (removal invokes federal court jurisdiction over suit).

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## §12.7 G. Appeals

In the Ninth Circuit, decisions of bankruptcy courts are appealed to either the district court or the Bankruptcy Appellate Panel. Thereafter, appeals go to the Ninth Circuit Court of Appeals and, following that, to the Supreme Court.

Appeals in the Ninth Circuit are initially directed to the Bankruptcy Appellate Panel. A party may elect to have the appeal heard by the district court. 28 USC §158(c)(1). A final order is appealable as of right, but an interlocutory order is appealable only with the consent of the appellate tribunal. See *Cunningham v Hamilton Co.* (1999) 527 US 198, 144 L Ed 2d 184, 119 S Ct 1915 (order imposing discovery sanctions against attorney was not "final decision" for purposes of appeal, even if attorney no longer represented litigant in case; rather, award of sanctions would become appealable only after entry of final decision on merits of underlying litigation); *Stanley v Woodford* (9th Cir 2006) 449 F3d 1060, 1063 (extending *Cunningham*; no jurisdiction over prejudgment appeal of order imposing sanctions under 28 USC §1927 and inherent authority on non-party attorney no longer representing any party); *Preblich v Battley* (9th Cir 1999) 181 F3d 1048 (bankruptcy court order denying debtor's claim of exemption was final order for purposes of appeal). However, an order imposing sanctions in the main bankruptcy case, as opposed to an order entered in the course of a separate adversary proceeding, may be treated as a final order. *In re Stasz* (BAP 9th Cir 2008) 387 BR 271.

**PRACTICE TIP:** Because the 10-day period for filing the notice of appeal runs from the date of entry of the judgment or order appealed from, and not the date of notice of entry thereof, counsel must monitor the docket and not rely on opposing counsel or the clerk to timely serve notice of entry of the judgment or order.

An extraordinary and seldom used means for seeking review of a bankruptcy court order is a petition of writ of mandamus. It is used to seek review of a bankruptcy judge's order deciding a recusal motion. See, *e.g., Lopez v Behles (In re American Ready Mix Inc.)* (10th Cir 1994) 14 F3d 1497, 1499, cert denied (1994) 513 US 818 (citing *Alexander v Primerica Holdings, Inc.* (3rd Cir 1993) 10 F3d 155, 162).

The court of appeals may accept direct review on certification of a lower court or the parties themselves in certain circumstances, *e.g.,* when a question of law requires resolution of conflicting decisions or involves a matter of public importance. 28 USC §158(d)(2).

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## §12.8 H. Local Rules

Each of California's four bankruptcy districts has promulgated extensive local rules. These generally tend to fill gaps in the Federal Rules of Bankruptcy Procedure. The local rules are readily obtainable from the clerk of the bankruptcy court or on the courts' websites, listed in the Directory.

**PRACTICE NOTE:** Counsel must be familiar with the local rules of each bankruptcy district, because they create traps for the unwary.

The authority to promulgate local bankruptcy rules is conferred by Fed R Bankr P 9029(a)(1). That rule also provides that "a local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

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## §12.9 I. Additional Sources

There are many bankruptcy treatises, including, *e.g.,* Collier on Bankruptcy (15th ed 1996). There are also several excellent websites. The American Bankruptcy Institute, a national organization of bankruptcy practitioners, treats a number of subjects and provides an excellent legislative watch. Each of California's four bankruptcy districts maintains a website containing local rules, information regarding local procedure, and judges' unpublished decisions.

Certain local divisions within the district have their own websites. For example, the Santa Rosa Bankruptcy Court maintains its own website. For its website, as well as that of the American Bankruptcy Institute, and the four California bankruptcy districts, see the Directory.

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## III. REPRESENTING INSOLVENT DEBTORS

### §12.10 A. Whether to File for Bankruptcy Relief

Because the focus of this book is on debt collection by creditors against debtors who owe on claims, an in-depth discussion of debtor representation is beyond its scope. However, collection counsel must be familiar with the basic issues of eligibility for bankruptcy and the uses of the various bankruptcy chapters.

Much of the discussion in the following sections describes what is generally expected of an individual debtor's attorney, but the well-informed creditor's attorney will use this information to effectively represent creditors.

Although an attorney counseling a consumer debtor regarding bankruptcy usually may assume that the debtor has looked for an alternative and is considering bankruptcy as a last resort, the attorney should explore the client's options to prevent a later complaint that the client did not want to file bankruptcy or was not fully advised of the consequences. The decision to file bankruptcy is a personal business decision to be made by the client.

The client's options include doing nothing, negotiation, or litigation with the creditors and payment plans that can be set up by consumer counseling agencies, who are in a position to intervene and negotiate on the debtor's behalf. Negotiation is possible when the debtor's problem stems from one large creditor; litigation is possible when the debts are primarily credit card or other consumer claims. In either event, the search for an alternative is sometimes appropriate, if only to ease the debtor's conscience about the decision to file bankruptcy. However, bankruptcy is and should remain the last resort.

The social policy of bankruptcy is embodied in the fresh start doctrine: A debtor should not be enslaved by past debts, but should be able to discharge them and return to productivity and self-support, planning for the future in order to avoid being a burden on society.

Bankruptcy is usually appropriate when the amount of debt in relation to the debtor's resources is simply too great to be paid. Counsel must analyze the totality of the circumstances.

**PRACTICE TIP:** Collection counsel must always be alert to the potential for bankruptcy filing and explore the consequences of it as a part of an evaluation of various collection strategies. It is not wise to pursue collection aggressively without informing the creditor client of the risk that the debtor will decide to petition for bankruptcy.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.11 1. Checklist: Should Client File a Bankruptcy Case?

## §12.11 1. Checklist: Should Client File a Bankruptcy Case?

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

The following are examples of the issues to be analyzed and discussed with the individual consumer debtor to determine the appropriateness of bankruptcy and the type of bankruptcy case to file:

___ 1. Why is client considering bankruptcy?

___ a. Is it for a valid, good faith reason?

___ b. Is it for a problem that can be solved by alternative means, such as negotiation?

___ c. If it is to prevent a foreclosure or other creditor action, will the automatic stay (11 USC §362) apply? See §§12.35-12.37.

___ 2. Obtain schedule of all assets and analyze. On what constitutes the bankruptcy estate, see 11 USC §541.

___ a. Is the schedule complete? Debtor may sometimes believe that an asset located in a foreign jurisdiction, or an asset in which he or she has a remote or contingent interest, does not need to be disclosed. Advise debtor of broad scope of 11 USC §541 and question debtor about assets he or she may neglect to mention. It is extremely important to perform all necessary due diligence, much more so that was required under prior law. Under current law, the debtor's attorney is actually required to certify information provided as being accurate. See 11 USC §707(b)(4)(C), (D).

___ b. Is there a possibility that the client may acquire any property by inheritance, insurance, or marital settlement in the next 6 months? 11 USC §541(a)(5).

___ c. Value assets at fair market value, in light of what trustee may reasonably expect to receive if it were to sell, *i.e.,* real property is generally listed for sale with a broker and exposed to the open market; automobiles are generally sold at wholesale to a dealer; personal property should not be valued at cost because there is usually significant depreciation.

___ d. Ascertain status of liens and encumbrances against each asset to calculate equity.

___ 3. Obtain schedule of all liabilities and analyze. Are all debts listed?

___ a. Debtor may wish to omit an obligation for various reasons (family debt, good relation with creditor, collateral debtor wishes to retain); the declaration under penalty of perjury recites that all creditors have been listed. Advise debtor that he or she may reaffirm the debt or freely pay it if debtor should acquire resources in the future.

___ b. Analyze debts for dischargeability issues and confirm your advice to debtor regarding nondischargeability. The existence of a significant amount of nondischargeable debts may mitigate against filing bankruptcy or mandate consideration of Chapter 13, although the super discharge provided for under prior law has been abolished. See 11 USC §1328.

___ c. Amount of debt: Does it justify bankruptcy? If it is consumer debt within Chapter 13 jurisdiction, will there be an 11 USC §707(b) objection from the United States Trustee? Is the debtor eligible for the chapter of relief you are discussing?

___ d. Number of creditors: If the number of creditors is small, is it possible to negotiate payment arrangements as an alternative to bankruptcy?

___ e. The means test: Is debtor even eligible for Chapter 7? Adoption of the means test, in the BAPCPA, greatly altered the bankruptcy landscape. For discussion of the means test, see §§12.14-12.14C. BAPCPA also imposed additional requirements on individual consumer debtors, some of which must be completed prior to filing bankruptcy, *e.g.,* credit counseling. See 11 USC §§109(h), 521(b).

___ 4. Debtor's income and expenses (Schedules I and J) must be accurate: analyze debtor's income and expenses to ascertain whether there may be substantial disposable income, prompting 11 USC §707(b) objection from the United States Trustee, which will trigger means test issues.

___ 5. Analyze impact on third parties.

___ a. Debtor needs to be advised of the impact of his or her bankruptcy on third parties such as guarantors or preference recipients because it may affect the decision to file or the timing of filing.

___ b. Identify parties who have guaranteed (or cosigned) obligations of the debtor. In cases other than Chapter 13, guarantors will not be protected by the automatic stay and will be pursued by the creditor holding the guaranty.

___ c. Identify creditors to whom client has made payments on account of antecedent debts. The trustee may avoid payments under 11 USC §547(b) as preferences.

___ d. Identify parties who have received gifts or transfers without consideration, such as family members. Such transfers may be avoided by the trustee as fraudulent transfers if made within 2 years of the petition under 11 USC §548 or from 4 to 7 years under CC §3439.09, made applicable to bankruptcy cases by 11 USC §544(b)(1).

___ e. If the debtor is a corporation, has there been conduct or transfers that will cause the trustee to file lawsuits against the principals of the corporation?

___ a. Analyze assets in light of the two statutory exemption schemes and select the most beneficial. See §12.28.

___ b. Protect nonexempt assets by lawfully converting to exempt assets, but note enhanced prohibitions against exemption counseling contained in current law. See 11 USC §§522(o), (q), 526. §12.30.

___ c. Ensure that all steps have been taken to comply with the terms of the exemption statute. Carefully evaluate timing and considerations relative to exempt assets.

___ 7. Consider whether reorganization or liquidation is appropriate.

___ a. Analyze eligibility for relief under Chapter 13 and determine whether it is a more appropriate alternative to Chapter 7, *i.e.,* nonexempt assets; disposable income; nondischargeable debts. In some situations, use of Chapter 11 or Chapter 12 may be appropriate.

___ b. Consider Chapter 11 if debtor is not eligible for Chapter 13. After BAPCPA, it is expected there will be more Chapter 11 filings.

___ 8. Discuss issues of spouse joining in petition.

___ a. Title 11 USC §302 permits a single petition to be filed on behalf of the debtor and the individual's spouse, known as a "joint case."

___ b. It is not always necessary for the spouse to join in the petition. Analyze whether spouse is personally liable for any of the debt, or whether the spouse owns substantial separate property.

___ c. Be aware of issues respecting separate and community property. See §12.34.

___ d. Determine if debtor has any rights in retirement benefits (military or otherwise) of spouse.

___ 9. Determine appropriate fee based on complexity of anticipated issues. Document what is covered by the fee. This is especially important because of disclosure and fee documentation requirements mandated by the BAPCPA. See 11 USC §528(a).

___ 10. Consider any personal obstacles to bankruptcy or the attorney/client relationship, *e.g.,* is client candid and likely to cooperate, or are there likely to be issues of fraud, nondisclosure, or dishonesty? The latter will create considerable additional work because the trustee will not adjourn meeting of creditors (11 USC §341) until all information is produced; trustee may retain counsel to conduct Fed R Bankr P 2004 examination; trustee may file motions to compel cooperation; dischargeability and/or discharge issues may arise. Are there former-spouse issues? Consider the fact that the debtor's attorney must certify the schedules and the accuracy of the information. See §12.13.

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### §12.12 2. When to File Bankruptcy Case

Timing is frequently an important consideration with respect to the filing of a bankruptcy case. When the debtor has made a transfer to or for the benefit of an insider, the debtor may wish to wait until the expiration of the 1-year preference period of 11 USC §547(b)(4)(B) (see §12.64), the 2-year statute of limitations of 11 USC §548, or the 4- or 7-year period applicable under state law (CC §3439.09) and 11 USC §544. When the debtor owes state or federal income taxes, the debtor may wish to wait until the 3-year nondischargeability period of 11 USC §507(a)(8)(A)(i) has passed. See §12.40.

If the debtor is under considerable pressure from creditors, however, the debtor may not be able to control the timing of the filing. Other time periods are often not within the debtor's control, but the debtor should be alerted to them, *e.g.,* an inheritance likely to be received within the 180-day period following the filing of the petition will become property of the estate (see 11 USC §541(a)(5)(A)). In such circumstances, the debtor may be able to take steps to disclaim the inheritance or suggest to the benefactor that the bequest be left to another party, such as the debtor's children. In *Wood v Bright (In re Bright)* (BAP 9th Cir 1999) 241 BR 664, the Ninth Circuit held that a disclaimer does not result in a fraudulent conveyance for bankruptcy purposes. The Ninth Circuit noted in *Bright* that this same conclusion has been reached in the three federal circuit courts that have considered the issue and is consistent with the great majority of state court decisions in fraudulent conveyance cases. The Ninth Circuit Court of Appeals has confirmed that disclaimers of inheritances are not avoidable transfers. *Gaughan v Edward Dittlof Revocable Trust (In re Costas)* (9th Cir 2009) 555 F3d 790. A disclaimer may not, however, be effective in all such circumstances. In *Drye v U.S.* (1999) 528 US 49, 145 L Ed 2d 466, 120 S Ct 474, the court held that a disclaimer, although valid under state law, could not be used to escape a federal tax lien, as a federal tax lien survives bankruptcy and remains a lien even on assets that the debtors claims as exempt.

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## §12.13 3. Selecting Proper Chapter; Consumer Debt

Three types of bankruptcy relief are generally available for individuals and business entities, referred to by their assigned chapter in the Bankruptcy Code: Chapters 7, 11, and 13. Chapter 7 (11 USC §§701-784) results in liquidation of the debtor's assets and is often called straight bankruptcy. Chapter 11 (11 USC §§1101-1174) permits business reorganization under a creditor-approved plan. Chapter 13 (11 USC §§1301-1330) allows an individual debtor with a regular income to adjust debts under a court-approved plan.

Chapter 12 is sometimes an option, but it applies only to family farmers and fishermen.

Before an individual whose debts are primarily consumer debts commences a case, the court clerk must give written notice indicating the chapters of the Bankruptcy Code under which the individual may proceed. 11 USC §342(b)(1). Consumer debts are debts incurred by an individual primarily for a personal, family, or household purpose. 11 USC §101(8). Official Bankruptcy Form 1 (voluntary petition) includes a recital to the effect that the petitioner is aware of the options of Chapter 7 and Chapter 13. When the debtor is represented by an attorney, the court will not give the notice; rather, the attorney must execute the declaration contained with the voluntary petition stating that he or she has informed the debtor of the availability of Chapter 7 and Chapter 13. In practice, this supplants the notice required by 11 USC §342(b).

All debtors must include, with their list of creditors and schedules, statements of current monthly income (Form 22A, 22B, or 22C), and schedules of current income and expenditures Forms 6I and 6J (Schedules I and J). 11 USC §521(a)(1)(B)(ii). These schedules must be completed carefully because they allow the United States Trustee and the court to decide whether an individual debtor whose debts are primarily consumer debts is entitled to the benefits of Chapter 7 and whether the means test has been met. See §§12.14-12.14C. The debtor's attorney must certify the accuracy of the information contained in the schedules. 11 USC §707(b)(4)(D).

Under some circumstances, 11 USC §707(b) allows the court to dismiss, on its own motion or the motion of others, after notice and a hearing, a case filed by an individual whose debts are primarily consumer debts. The use of §707(b) is expected to be more pervasive under bankruptcy legislation enacted in the BAPCPA.

Under this provision, the court can police an abusive filing by a Chapter 7 debtor who has enough income to make meaningful payments to creditors. As issues relative to the means test are fleshed out, the BAPCPA amendments to the Bankruptcy Code will put to the test what justifies conversion to Chapter 13.

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### §12.14 a. Liquidation—Chapter 7 and the Means Test

Chapter 7 is the bankruptcy relief most often sought. On filing, all assets pass to an estate administered by a trustee, who liquidates all nonexempt assets of value. Creditors are invited to file claims against the estate, and the claims are paid in accordance with the priorities set forth in the Code. See 11 USC §507. If the debtor is an individual, the debtor receives a discharge of all debts, other than debts declared nondischargeable under 11 USC §523, unless a creditor can establish a basis under 11 USC §727 to deny the debtor's discharge.

The debtor's eligibility for Chapter 7 relief is governed primarily by the means test of 11 USC §707(b) and the credit counseling and other requirements of 11 USC §109. The credit education provisions require that an individual receive a briefing on available credit counseling opportunities and assistance in performing a budget analysis from an approved, non-profit budget and credit counseling agency during the 180 days before the filing of the bankruptcy petition. 11 USC §109(h). In addition, before a discharge may be entered, the debtor must complete an instructional course concerning personal financial management. 11 USC §727(a)(11); Fed R Bankr P 4004(c)(1)(H).

The means test, which is intended to further a "need based" bankruptcy system, is applicable to individual debtors with primarily consumer debt. Under the test, a debtor may not proceed under Chapter 7 if an objective, formula-based analysis of the debtor's income and expenses indicates that he or she will be able to repay some or all of what he or she owes to unsecured creditors. See 11 USC §707(b).

A business debtor's desire to continue business operations and an individual's desire to retain nonexempt assets or avoid dischargeability problems are the chief reasons to consider filing under Chapter 11 or Chapter 13, each of which permits the debtor to retain possession and control of assets and the business. 11 USC §§1101-1174, 1301-1330. See §§12.15-12.19.

**PRACTICE TIP:** A Chapter 7 debtor may convert the case to one under Chapter 11 or Chapter 13 at any time, provided that the case has not been previously converted under 11 USC §§1112 or 1307. 11 USC §706(a). The right to convert is not absolute, however. Resolving a split in the circuits, the United States Supreme Court decided in *Marrama v Citizens Bank of Mass. (In re Marrama)* (2007) 549 US 365, 166 L Ed 2d 956, 127 S Ct 1105, that bankruptcy courts may deny a motion to convert if the debtor's request was made in bad faith or constitutes an attempt to abuse the bankruptcy process. The decision has been applied to attempts to convert to Chapter 11 and Chapter 13. *In re Broad Creek Edgewater, LP* (Bankr D SC 2007) 371 BR 752, 757; *In re George Love Farming, LC* (Bankr D Utah 2007) 366 BR 170, 177. The Ninth Circuit Court of Appeals has extended *Marrama* to apply to a motion to dismiss a Chapter 13 case, holding that the right to dismiss a Chapter 13 case is also subject to an exception for requests made in bad faith. *In re Rosson* (9th Cir 2008) 545 F3d 764.

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### §12.14A (1) Presumption of Abuse

The means test takes the form of a presumption of abuse that, if unrebutted, requires the dismissal of a Chapter 7 case or its conversion, with the debtor's consent, to Chapter 13. 11 USC §707(b). A debtor may rebut the presumption of abuse only by showing special circumstances, such as a serious medical condition or a call to active military duty, but only to the extent the special circumstances justify adjustments to the debtor's income or expenses for which there are no reasonable alternatives that reduce disposable income below the statutory triggering points. 11 USC §707(b)(2)(B). On the income and expense calculations, see §12.14B.

The means test does not apply when the annual current income of the debtor and the debtor's spouse is equal to or less than the median income for a person of the same family size in the debtor's state as determined by the Census Bureau and as adjusted to the current year by applying the Consumer Price Index for All Urban Consumers. See 11 USC §101(39A) (definition of "median family income").

The means test also does not apply to a debtor who is a disabled veteran whose debts were incurred primarily when the debtor was on active duty or performing a homeland defense activity. 11 USC §707(b)(2)(B)(i).

The few courts that have considered whether the means test applies to a case converted from Chapter 13 to Chapter 7 have reached different conclusions. The courts in *In re Kellett* (Bankr D Or 2007) 379 BR 332, *In re Perfetto* (Bankr D RI 2007) 361 BR 27, and *In re Kerr* (Bankr WD Wash, July 18, 2007, No. 06-12302) 2007 Bankr Lexis 2474, held that a debtor whose case is converted from Chapter 13 to Chapter 7 is subject to the means test after conversion of the case. The courts in *In re Dudley* (Bankr WD Va 2009) 405 BR 790, *In re Ryder* (Bankr ND Cal, Aug. 18, 2008, No. 07-40192) 2008 Bankr Lexis 2220, and *In re Fox* (Bankr D NJ 2007) 370 BR 639 reached the opposite conclusion.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.14B (2) Income and Expense Calculations

### §12.14B (2) Income and Expense Calculations

Under the Chapter 7 means test, the debtor's current monthly income determines whether the presumption of abuse arises. The current monthly income is calculated using the average income from all sources over the 6 months before the start of the case, after reductions for certain permitted expenses. Income includes gifts and contributions but excludes Social Security and certain payments to victims of war crimes, crimes against humanity, and terrorism. *Blausey v United States Trustee (In re Blausey)* (9th Cir 2009) 552 F3d 1124 (current monthly income not equivalent to gross income as defined by tax code). The presumption of abuse arises if the current monthly income, when multiplied by 60, is greater than the lesser of (11 USC §707(b)(2)(A)(i)) the following:

- The greater of 25 percent of general unsecured claims or $6000; or
- $10,000.

Therefore, the presumption arises under the means test if:

- The debtor has disposable income of more than $166.67 per month; or
- The debtor has total unsecured debt between $24,000 and $40,000; and
- The debtor's disposable income will pay 25 percent of the unsecured debt over 60 months; or
- The debtor's unsecured debt is less than $24,000 and the debtor's disposable income is more than $100 per month.

The statute does not look to a debtor's actual or historical expenses to determine ability to pay. Rather, the amount of expenses set forth in the Internal Revenue Services National Standards and Local Standards and the amount of the debtor's actual expenses that meet the IRS's Other Necessary Expenses standards are deducted from the current monthly income. 11 USC §707(b)(2)(A)(ii). See the Financial Analysis Handbook, IRS Manual §§5.15.1.8-5.15.10. For access via the Internet, see the Directory. The National Standards set amounts for food, housekeeping supplies, clothing, personal care, and miscellaneous expenses. The Local Standards set amounts for housing (by county) and transportation, including ownership and operation of up to two motor vehicles (by region). Other Necessary Expenses specifically include reasonably necessary health and disability insurance, health savings accounts for the debtor and dependents, and expenses for protection from family violence. In addition, the IRS Manual permits other expenses that provide for the health and welfare of the taxpayer and his or her family or for the production of income.

An issue on which courts have split is whether, in applying the means test to determine whether a Chapter 7 case was presumptively subject to being dismissed as an abuse, the debtor is entitled to deduct from current monthly income the standard ownership deductions even though the debtor does not actually have such expenses; for example, when a debtor owns a vehicle outright and makes no payments. Compare *Babin v Wilson (In re Wilson)* (BAP 8th Cir 2008) 383 BR 729, *In re Canales* (Bankr CD Cal 2007) 377 BR 658, 655 (Chapter 7 debtor must "make some lease or loan payment on a vehicle" in order to claim deduction for transportation ownership expenses), *In re Bennett* (Bankr CD Cal 2007) 371 BR 440 (Chapter 13 debtor), and *In re Slusher* (Bankr D Nev 2007) 359 BR 290, with *In re Tate* (5th Cir 2009) 571 F3d 423 (debtor with no loan or lease payment may deduct vehicle expense), *Ross-Tousey v Neary (In re Ross-Tousey)* (7th Cir 2008) 549 F3d 1148 (same), *Morse v Rudler (In re Rudler)* (BAP 1st Cir 2008) 388 BR 433 (monthly mortgage payment deduction allowed notwithstanding debtor's intent to surrender real property), *In re Wilkins* (Bankr CD Cal 2007) 370 BR 815 (same), *In re Swan* (Bankr ND Cal 2007) 368 BR 12, and *In re Fowler* (Bankr D Del 2006) 349 BR 414.

The Ninth Circuit has determined that a debtor may not deduct vehicle ownership expenses for a vehicle owned free and clear in the context of confirmation of a Chapter 13 plan. *Ransom v MBNA Am. Bank (In re Ransom)* (9th Cir, Aug. 14, 2009, No. 08-15066) 2009 US App Lexis 18179. See §12.14C.

**NOTE:** The IRS Manual provides considerable discretion to tax collection agents in applying the national, local, and other necessary expense standards and also, in the context of tax collection activities, allows only the lower of actual expenses or the applicable IRS standard. Whether the procedures set forth in the IRS Manual will apply to

the implementation of the means test will be determined judicially. Some courts have accepted IRS materials as persuasive. See, *e.g., In re Bennett* (Bankr CD Cal 2007) 371 BR 440; *In re Hardacre* (Bankr ND Tex 2006) 338 BR 718; *In re McGuire* (Bankr WD Mo 2006) 342 BR 608; *In re Carlin* (Bankr D Or 2006) 348 BR 795. Other courts have rejected arguments based on IRS materials. See, *e.g., In re Swan* (Bankr ND Cal 2007) 368 BR 12; *In re Fowler* (Bankr D Del 2006) 349 BR 414. See also *In re Young* (Bankr D Mass 2008) 392 BR 6 (collecting cases).

The Bankruptcy Code also allows additional expenses up to 5 percent of the IRS national standard for food and clothing (11 USC §707(b)(2)(A)(ii)(I)), up to a maximum of $1500 per year per child for tuition (11 USC §707(b)(2)(A)(ii)(IV)), and additional amounts for housing and utilities if the debtor establishes that the amounts are reasonable and necessary (11 USC §707(b)(2)(A)(ii)(V)). Further, the Bankruptcy Code specifically permits the debtor to deduct actual expenses for the reasonable and necessary care and support of an elderly, chronically ill, or disabled household or family member. 11 USC §707(b)(2)(A)(ii)(II). The debtor, if eligible for Chapter 13, may deduct actual administrative expenses of a Chapter 13 plan, up to a maximum of 10 percent of plan payments.

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### §12.14C (3) Secured and Priority Claims

The Chapter 7 means test formula allows for the deduction of an average monthly payment for secured debts. The payment is calculated as the total of all contractually due amounts for each of the next 60 months plus all amounts necessary to retain in a Chapter 13 plan the debtor's residence, vehicle, or other collateral necessary for the debtor and dependent support (that is, arrearages) divided by 60. 11 USC §707(b)(2)(A)(iii). Similarly, the formula allows for the deduction of the total of all priority claims (including taxes and domestic support obligations) divided by 60. 11 USC §707(b)(2)(A)(iv). However, the Ninth Circuit has held that a loan from the debtor's 401(k) plan is not a secured debt within the meaning of the Bankruptcy Code and, therefore, repayments of the loan cannot be deducted. *Egebjerg v Anderson (In re Egebjerg)* (9th Cir 2009) 574 F3d 1045.

**NOTE:** Whether secured debt payments for automobile and housing loans are to be deducted from the IRS standards for housing and transportation (see §12.14B), which include acquisition costs, is unclear pending court determinations. Initial trial level decisions have not permitted such double counting. See, *e.g., In re Meek* (Bankr D Idaho 2007) 370 BR 294; *In re Hardacre* (Bankr ND Tex 2006) 338 BR 718.

Another disputed issue is whether a debtor may deduct mortgage payments from current monthly income as "amounts scheduled as contractually due to secured creditors," even though the debtor intends to surrender the mortgage property. A few courts have held that these hypothetical amounts should be deducted. *In re Wilkins* (Bankr CD Cal 2007) 370 BR 815. See also *Fokkena v Hartwick* (D Minn 2007) 373 BR 645. See §12.14B.

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### §12.14D (4) Other Basis for Dismissal

A court also may dismiss a case filed by an individual whose debts are primarily consumer debts if the means test presumption of abuse does not apply or is rebutted, or if the court determines that granting relief under Chapter 7 would be an abuse (11 USC §707(b)(1)), or that the petition was filed in bad faith (11 USC §707(b)(3)). Dismissal under §707(b)(3) requires the court to examine the totality of the circumstances on a case-by-case basis. *Hebbring v U.S. Trustee* (9th Cir 2006) 463 F3d 902.

Early bankruptcy court decisions and at least one circuit court decision indicate that Congress did not intend adoption of the means test to exclude income and expense factors from a bankruptcy court's consideration of motions to dismiss under §707. The debtor's ability to repay his or her debts, even though satisfying the means test, may be considered as part of this analysis. See *Perlin v Hitachi Capital Am. Corp.* (3rd Cir 2007) 497 F3d 364; *In re Baeza* (Bankr ED Cal 2008) 398 BR 692; *In re Pak* (Bankr ND Cal 2006) 343 BR 239; *In re Paret* (Bankr D Del 2006) 347 BR 12. In addition, postpetition events may be considered. *Cortez v Cortez (In re Cortez)* (5th Cir 2006) 457 F3d 448 (decided under pre-BAPCPA law). But see *In re Hayes* (Bankr D Mass 2007) 376 BR 55; *In re Kelvie* (Bankr D Idaho 2007) 372 BR 56, 62 ("focusing on postpetition events defeats the function of the means test as an objective, formulaic analysis at the time of the filing of the petition").

However, in a non-abuse situation, in determining whether a case may be dismissed for cause under 11 USC §707(a), the court may not consider circumstances that are addressed by other provisions of the Bankruptcy Code. *Sherman v SEC (In re Sherman*) (9th Cir 2007) 491 F3d 948.

Other failings by debtors to comply with requirements under the BAPCPA have been dealt with by bankruptcy courts on a case-by-case basis, sometimes applying equitable principles. For example, when a debtor commenced a case without undergoing the required prepetition credit counseling or a waiver, rather than dismiss the case, the court ordered the debtor to undergo credit counseling, holding, "[n]owhere in Title 11 is there a provision setting forth the remedy for failure to comply with the credit counseling requirement, while the remedy of dismissal is specifically provided for in other situations." *In re Manalad* (Bankr CD Cal 2007) 360 BR 288, 295. See also *In re Meza* (ED Cal 2007) 2007 US Dist Lexis 48430. Similarly, in a case involving a debtor's motion to dismiss her own case for failure to undergo credit counseling after the trustee uncovered an asset, the Bankruptcy Appellate Panel held that pre-bankruptcy credit counseling is not a jurisdictional prerequisite and the failure to comply with the statute is subject to the doctrines of waiver and estoppel. *In re Mendez* (BAP 9th Cir 2007) 367 BR 109.

The Ninth Circuit held that a bankruptcy court has the power to deny a dismissal request by a debtor for failure to comply with the pre-filing credit counseling requirements and the financial reporting requirements in 11 USC §521, notwithstanding language in that section that such a failure will result in an automatic dismissal of the case. *Wirum v Warren (In re Warren)* (9th Cir 2009) 568 F3d 1113. See also *In re Acosta-Rivera* (1st Cir 2009) 557 F3d 8.

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### §12.15 b. Adjustment of Debts of an Individual With Regular Income—Chapter 13

Chapter 13 (11 USC §§1301-1330) allows an individual or a married couple with regular income to propose a plan for paying their debts. The court will enjoin collection actions while the debtor pays the debts under the plan.

Chapter 13 debtors are entitled to retain possession of their property while the plan is in effect. As of 2008, to be eligible for Chapter 13, debtors must have noncontingent, liquidated, unsecured debts of not more than $336,900 and secured debts of not more than $1,010,650. 11 USC §109(e). These limits are subject to periodic adjustments. If an individual has a regular income, he or she need not be a wage earner. *In re Taylor* (Bankr D Ariz 1981) 15 BR 596 (income from child support payments). Also, a debtor must undergo a briefing from an approved nonprofit budget- and credit-counseling agency before filing the case. 11 USC §109(h)(1). Chapter 13 is not available to corporations or to partnerships.

The determination of the debtor's eligibility is made at the time the petition is filed, with reference to the debtor's originally filed schedules, if the debtor submitted them in good faith. Even if debt is listed on the schedules as secured, the bankruptcy court may treat it as unsecured if the schedules provide sufficient certainty to show that a lien can be avoided in the bankruptcy case. *Scovis v Henrichsen (In re Scovis)* (9th Cir 2001) 249 F3d 975.

Debtors must file all tax returns for tax years within 4 years before the petition date, and they must be filed by the first date set for the §341(a) meeting. The §341(a) meeting can be delayed for up to 120 days to allow the filings. 11 USC §1308. The court must dismiss or convert a Chapter 13 case if the debtor fails to file the required tax returns. 11 USC §521(j).

Within 14 days after the petition is filed, the debtor must file a plan that specifies how he or she will pay the debts from future income or existing assets. 11 USC §§1321-1322; Fed R Bankr P 3015(b). Generally, the plan will provide for payments to be made over a period of up to 3 years; with leave of court, it may extend to 5 years. 11 USC §1322(d). The debtor's plan is not permitted to modify the rights of a creditor whose claim is secured only by the debtor's residence. 11 USC §1322(b)(2). Chapter 13 also provides for an automatic stay of actions to collect the debtor's consumer debts from a codebtor. 11 USC §1301.

The debtor's plan must submit future earnings or income to the court's jurisdiction and provide for payments to a trustee, who pays the creditors. 11 USC §1322(a). The plan must provide for payment in full of all priority claims and must classify other claims for payment. Within 30 days after filing a Chapter 13 plan, the debtor must begin making payments to the Chapter 13 trustee unless the court orders otherwise. 11 USC §1326(a)(1). If the plan is confirmed, the trustee will apply the payments in accordance with that plan; if the plan is not confirmed and the case is dismissed or converted to Chapter 7, the trustee must return the funds to the debtor or the Chapter 7 trustee, as the case may be, after deducting allowed administrative expenses under 11 USC §503(b). 11 USC §1326(a)(2). If a Chapter 13 case is converted to Chapter 7 rather than dismissed, the debtor should be able to claim applicable exemptions. See §§12.27-12.30. All claims in a particular class must receive the same treatment.

The Chapter 7 means test discussed in §§12.14-12.14C is incorporated into 11 USC §1325(b) for purposes of determining the debtor's disposable income. Loan payments to employer-sponsored pension or other retirement plans are not included in calculating disposable income. Interest must be paid on all claims that are nondischargeable under 11 USC §1328(a) if the debtor has sufficient disposable income. 11 USC §1322(b)(10).

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## §12.15A (1) Provisions for Unsecured and Secured Creditors; Cramdown

The plan must provide that the amount of cash or value of property distributed to unsecured creditors is not less than the value the unsecured creditors would receive in a liquidation. This is the so-called "best interests of creditors" test. 11 USC §1325(a)(4). In *Lawrence Tractor Co. v Gregory (In re Gregory)* (9th Cir 1983) 705 F2d 1118, the court held that a Chapter 13 plan, proposing to pay unsecured creditors nothing, might still meet this test. The court also held that an unsecured creditor's failure to object to confirmation of the plan or to appeal from the confirmation order precluded it from challenging the plan on grounds of lack of good faith.

In dealing with secured creditors, the plan must provide for one of three possible treatments with respect to the secured claims (11 USC §1325(a)):

(1) That the holder of a secured claim accept the plan;

(2) That the debtor surrender the secured property; or

(3) That debtor can bifurcate the claim into a reduced secured portion equal to the present value of the collateral and an unsecured portion equal to the excess of the claim, and can then receive a "cramdown" of the reduced secured claim on the creditor.

Under the cramdown option, the debtor is permitted to keep the property over the objection of the creditor, the creditor retains the lien securing the claim, and the debtor must provide the creditor with payments over the life of the plan that will total the present value of the allowed secured claim, *i.e.,* the present value of the collateral. *Associates Commercial Corp v Rash* (1997) 520 US 953, 138 L Ed 2d 148, 117 S Ct 1879.

To prevent perceived abusive use of the "cramdown" option in the purchase of motor vehicles, BAPCPA added a provision to §1325(a)(5), known as the "hanging paragraph," which provides that cramdown does not apply to a claim if (1) the purchase money security interest security the debt; (2) the debt was incurred within 910 days preceding the filing of the petition; (3) and the collateral for the debt is a motor vehicle.

Whether this provision protects against cramdown of the negative equity in a trade-in vehicle is the subject of a split among various courts. See, *e.g., In re Watson* (Bankr ED Cal, Sept. 27, 2007, No. 07-23632-D-13L) 2007 Bankr Lexis 3394; *In re Cohrs* (Bankr ED Cal 2007) 373 BR 107 (creditor's purchase money security interest encompasses all components of new vehicle purchase, including negative equity). But see, *e.g., In re Wear* (Bankr WD Wash, Jan. 23, 2008, No. 07-42537) 2008 Bankr Lexis 208 (certain components of loan, including negative equity in trade-in vehicle, do not constitute purchase money security interest). The only circuit court to decide the issue to date has held that, under the circumstances, the debtor's negative equity in his pickup was part of the purchase price of the vehicle, the creditor held a purchase money security interest on the entire amount, and the debt could not be bifurcated. *In re Graupner* (11th Cir 2008) 537 F3d 1295. However, the Bankruptcy Appellate Panel for the Ninth Circuit has held that the portion of the secured claim representing the financing of the negative equity in a trade in is not protected by the "hanging paragraph." *In re Penrod* (9th Cir BAP 2008) 392 BR 835.

Chapter 13 does not require that secured or unsecured creditors vote on or consent to the plan; if the court finds that the plan meets the confirmation requirements of 11 USC §1325(a)-(b), the court will confirm the plan and will bind all creditors provided for in the plan.

The plan cannot be confirmed over the objection of a party in interest or the trustee unless either creditors (or at least the objecting creditor) are paid in full (11 USC §1325(b)(1)(A)) or the debtor's entire disposable income for the applicable commitment period is devoted to paying the claims under the plan (11 USC §1325(b)(1)(B)). For the definition of "disposable income," see 11 USC §1325(b)(2). See also *Maney v Kagenveama (In re Kagenveama)* (9th Cir 2008) 541 F3d 868 (calculating projected disposable income under §1325).

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### §12.15B (2) Advantages of Filing Under Chapter 13

Chapter 13 relief may be more attractive than liquidation in Chapter 7 to a debtor with substantial assets or a generally viable business. Occasionally, when certain debts are likely to be declared nondischargeable, the broader discharge provisions may be sufficient cause for a debtor to choose Chapter 13. For a debtor whose debts are small enough to qualify, Chapter 13 may be more attractive than Chapter 11 because of the fewer procedural requirements for confirmation of a plan, particularly the absence of a requirement that creditors vote to confirm the Chapter 13 plan. When consumer debts are guaranteed by individuals, *e.g.,* a relative, the codebtor stay referred to above may also tip the scales in favor of Chapter 13. A unique feature of Chapter 13 is the debtor's absolute right to dismiss the case at any time if the case has not been previously converted from another chapter. 11 USC §1307(b). *Beatty v Traub (In re Beatty)* (BAP 9th Cir 1994) 162 BR 853. But see *In re Jacobsen* (Bankr ED Tex 2007) 378 BR 805 (denying motion to dismiss filed after trustee's motion to convert). However, an exception to the absolute right to dismiss exists in circumstances when bad faith is established. See §12.14.

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### §12.15C (3) Good Faith of Chapter 13 Filing

A fertile ground for litigation has been whether the Chapter 13 plan is filed in good faith. The question of good faith often arises in the context of a motion to dismiss the case because of serial filings by the debtor or a challenge to the adequacy of the proposed repayment under the plan. In *Eisen v Curry (In re Eisen)* (9th Cir 1994) 14 F3d 469, the court held that a petition filed in bad faith may be dismissed for cause under 11 USC §1307(c). The standard is the same as that used by courts to determine whether the plan is proposed in good faith. In ruling on good faith, the bankruptcy court must consider the totality of the circumstances. *Goeb v Heid (In re Goeb)* (9th Cir 1982) 675 F2d 1386. The bankruptcy court must make findings of fact to support a finding of good faith. *550 W. Ina Rd. Trust v Tucker (In re Tucker)* (9th Cir 1993) 989 F2d 328.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.16 (4) Discharge Under Chapter 13

### §12.16 (4) Discharge Under Chapter 13

Debts excepted from discharge under Chapter 13 include the following:

- Secured debts payable in installments that extend beyond the length of the plan (see 11 USC §1322(b)(5));
- Trust fund taxes (see 11 USC §507(a)(8)(C));
- Nonpriority taxes for which a tax return was not filed within 2 years before the date of the petition (see 11 USC §523(a)(1)(B);
- Taxes with respect to which the debtor made a fraudulent return, or willfully attempted to evade or defeat such tax (see 11 USC §523(a)(1)(C));
- Debts obtained by false pretense, false representation, or fraud (see 11 USC §523(a)(2));
- Debts not listed nor scheduled under §521(a)(1) (see 11 USC §523(a)(3));
- Debts for fraud or defalcation while acting as a fiduciary, for embezzlement, or for larceny (see 11 USC §523(a)(4));
- Debts for domestic support obligations (see 11 USC §523(a)(5));

**NOTE:** Domestic support obligations, as priority claims under 11 USC §507, must be paid before discharge may proceed. 11 USC §1328(a).

- Student loans, unless excepting such debts would impose an undue hardship (see 11 USC §523(a)(8));
- Liabilities for personal injury or death resulting from the unlawful operation of a motor vehicle, vessel, or aircraft while intoxicated (see 11 USC §523(a)(9));
- Debts for restitution or a criminal fine included in a debtor's sentence following a criminal conviction; and
- Debts for restitution or damages awarded in a civil action against the debtor for personal injury or death to another person.

By excepting seven additional categories of debt from discharge under Chapter 13 (see 11 USC §1328(a)), the BAPCPA eliminated the "super discharge" formerly available. A debtor is not entitled to a discharge in a Chapter 13 case if he or she received a discharge in a Chapter 7, 11, or 12 case filed within the prior 4 years (11 USC §1328(f)(1)), or received a discharge in a Chapter 13 case filed within the prior 2 years (11 USC §1328(f)(2)).

A debtor must complete an instructional course in personal financial management before obtaining a discharge. 11 USC §1328(g)(1).

Chapter 13 allows a debtor both to reinstate a defaulted mortgage by curing any default (11 USC §1322(b)(3)) and to cure a default on a claim when the last payment is due after the final payment is due under the plan (11 USC §1322(b)(5)). Because of this provision and the Bankruptcy Code's pervasive automatic stay of creditor actions (11 USC §362), Chapter 13 is frequently used by debtors seeking protection from imminent foreclosure on their homes. See *Bear Stearns & Co. v Kurdoghlian (In re Kurdoghlian)* (BAP 9th Cir 1983) 30 BR 500.

The court has discretion to grant a discharge to a much narrower range of debts when the debtor does not complete the plan (the "hardship" discharge). The court may exercise its discretion if (11 USC §1328(b)):

- Failure to pay is due to circumstances beyond the debtor's control;
- The debtor, as of the plan's effective date, has paid at least as much as the creditors would have received in a liquidation proceeding; and
- Modification of the plan is impracticable.

The hardship discharge is essentially the same as the Chapter 7 discharge.

**PRACTICE TIP:** Counsel should be aware of certain limitations in Chapter 13, *e.g.,* 11 USC §1322(b)(2) prohibits confirmation of a Chapter 13 plan that modifies the rights of a secured creditor whose collateral is the debtor's principal residence. See *Seidel v Larson (In re Seidel)* (9th Cir 1985) 752 F2d 1382.

**PRACTICE TIP:** When a debtor's Chapter 13 confirmed plan explicitly provides that any attorney fees remaining unpaid

at the completion of the case would be paid directly by the debtor after entry of the discharge, any remaining unpaid fees are not discharged. *Wolff v Jophnson (In re Johnson)* (BAP 9th Cir 2006) 344 BR 104.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.17 (5) Confirmation, Modification, and Dismissal or Conversion

### §12.17 (5) Confirmation, Modification, and Dismissal or Conversion

Confirmation of a plan under Chapter 13 is governed by 11 USC §§1324-1325. The court holds a noticed hearing on the plan at which any party in interest may object to its confirmation. 11 USC §1324.

The plan may be modified before or after confirmation. 11 USC §§1323, 1329. The issue often arises in bankruptcy proceedings as to whether a court should permit the modification of a post-confirmation Chapter 13 plan, or instead allow the secured creditor to repossess its security because the value of the security under the modified plan would fall faster than the creditor receives payments. In *Americredit Fin. Servs., Inc. v Nichols (In re Nichols)* (6th Cir 2006) 440 F3d 850, the court permitted modification because the creditor was completely secured (albeit by a small amount) at the time of modification.

**NOTE:** Courts are divided on whether a change in circumstances is a prerequisite for modifying a plan. Compare, *e.g., In re Murphy* (4th Cir 2007) 474 F3d 143 (substantial and unanticipated postconfirmation change of circumstances necessary for modification) and *In re Anderson* (9th Cir 1994) 21 F3d 355, 358 (same) with, *e.g., Barbosa v Soloman* (1st Cir 2000) 235 F3d 31, 41, *Powers v Savage (In re Powers)* (BAP 9th Cir 1996) 202 BR 618, 622 (changed circumstances not prerequisite to modification), and *In re Witkowski* (7th Cir 1994) 16 F3d 739, 744 (no threshold requirement for modification). However, the Bankruptcy Appellate Panel for the Sixth Circuit has held that a plan confirmation order has a binding effect and may not be modified to address issues that were or could have been decided at the time the plan was originally confirmed. *Storey v Pees (In re Storey)* (BAP 6th Cir 2008) 392 BR 266.

Revocation of confirmation procured by fraud is possible at any time within 180 days after entry of an order of confirmation at the request of any interested party after a noticed hearing. 11 USC §1330. After the revocation, the court must set a time within which the plan may be modified and reconfirmed. 11 USC §1307. Otherwise, the case will be either converted to a liquidation under Chapter 7 or dismissed.

Absent bad faith, the debtor has the ability to have the case converted to a Chapter 7 liquidation proceeding at any time. 11 USC §1307(a). It may be dismissed at the debtor's request if it has not been converted to a Chapter 7 or Chapter 11 proceeding. 11 USC §1307(b). But see *In re Jacobsen* (Bankr ED Tex 2007) 378 BR 805 (denying motion to dismiss filed after trustee's motion to convert). The Bankruptcy Appellate Panel for the Ninth Circuit rejected the *Jacobsen* holding in *Beatty v Traub (In re Beatty)* (BAP 9th Cir 1994) 162 BR 853. However, the remaining vitality of *Beatty* is in some doubt after the decision in *Marrama v Citizens Bank of Mass. (In re Marrama)* (2007) 549 US 365, 166 L Ed 2d 956, 127 S Ct 1105. See *In re Rosson* (9th Cir 2008) 545 F3d 764. See also §12.14.

Before confirmation, any party in interest may move, on noticed hearing, to convert the case to a Chapter 11 proceeding. 11 USC §1307(d). The case may be dismissed or converted to a Chapter 7 proceeding on a finding of cause after a noticed hearing. 11 USC §1307(c). The causes for dismissal or conversion under this subsection include but are not limited to:

- Unreasonable delay by the debtor that prejudices creditors;
- Nonpayment of bankruptcy fees and costs;
- Failure to file the plan in a timely manner under 11 USC §1321;
- Failure to make timely payments under 11 USC §1326;
- Denial of confirmation of the plan (11 USC §1325) and denial of additional time to file a new or modified plan;
- The debtor's material default in the performance of a confirmed plan;
- Revocation of confirmation (11 USC §1330) and denial of a modified plan (11 USC §1329);
- Termination of a confirmed plan by an event specified in the plan; and
- The debtor's failure to pay any domestic support obligation that first becomes payable after the filing date of the petition.

Many courts have held that a debtor who surrenders collateral postconfirmation may not amend the plan to reclassify

the deficiency still owing to the secured party as an unsecured claim. See, *e.g., In re Adkins* (6th Cir 2005) 425 F3d 296, 302; *Chrysler Fin. Corp. v Nolan (In re Nolan)* (6th Cir 2000) 232 F3d 528. However, a number of cases have reached a contrary decision. See *In re Disney* (Bankr D Colo 2008) 386 BR 292 (allowing recharacterization of secured claim after foreclosure or surrender of collateral postconfirmation); *In re Lane* (Bankr D Kan 2007) 374 BR 830. When property that is "stripped down" in value by the debtor's plan is sold postconfirmation for more than its stripped-down value, the Chapter 13 trustee may move to amend the plan to increase the dividend payable on unsecured claims to 100 percent on the grounds that the estate owned the sales proceeds. *Barbosa v Soloman* (1st Cir 2000) 235 F3d 31.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.18 (6) Revocation of Chapter 13 Discharge [Deleted]

## §12.18 (6) Revocation of Chapter 13 Discharge [Deleted]

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.19 c. Reorganization--Chapter 11

### §12.19 c. Reorganization—Chapter 11

A Chapter 11 case is generally referred to as a business reorganization, although an individual is also eligible and Chapter 11 can be used for a controlled liquidation. *Toibb v Radloff* (1991) 501 US 157, 115 L Ed 2d 145, 111 S Ct 2197. The debtor is normally permitted to retain possession of property and to continue business operations. Unlike Chapters 7 and 13, a trustee is not automatically appointed when the petition is filed. To have a trustee appointed, a creditor must show gross mismanagement or fraud. See 11 USC §1104(a)(1). As in Chapter 13, the debtor may file a plan, although there is no time limit for doing so (as in a Chapter 13 case). 11 USC §1121(a). After an initial 120-day period (the exclusivity period), when only the debtor can file a plan, a creditor can also file a plan. 11 USC §1121(b). If a Chapter 11 trustee has been appointed, there is no exclusivity period, and a creditor can file a plan at any time. 11 USC §1121(c). During the exclusivity period, the debtor may ask that the period be extended, but extensions are limited: The maximum extended exclusive period permitted to a debtor within which to file a plan is 18 months, and the maximum time within which the debtor may be permitted to obtain acceptances of a plan is 20 months. 11 USC §1121(d).

Before soliciting votes for a plan or seeking plan confirmation in Chapter 11, the debtor must file and obtain approval of a disclosure statement providing creditors with sufficient information to enable them to make an informed judgment as to how to vote. 11 USC §1125. Generally, confirmation requires a showing that creditors who have not accepted the plan are being treated fairly and will not be worse off than they would be under Chapter 7. 11 USC §1124.

Amendments to the Bankruptcy Code enacted by the BAPCPA imposed a host of new provisions on Chapter 11 debtors, including the following:

- Property of the estate in individual Chapter 11 cases now includes postpetition personal service income of the debtor until the case is closed, dismissed, or converted. 11 USC §1115(a)(2).
- To confirm a plan, an individual debtor must be current with all domestic support payments that came due postpetition. 11 USC §1129(a)(14).
- If the holder of an allowed unsecured claim objects to confirmation of the plan of an individual debtor, either the plan must pay the claim in full or the debtor must dedicate all of his or her projected disposable income for 5 years (or longer if the plan so provides), beginning on the date the first payment is due under the plan, to make payments to unsecured creditors. 11 USC §1129(a)(15).
- Generally, individual debtors are no longer entitled to a discharge until all plan payments have been made. 11 USC §1141(d)(5).
- Debtors must decide whether to assume or reject leases of nonresidential real property within 210 days. 11 USC §365(d)(4).

On the complex set of requirements for confirmation of a Chapter 11 plan, see *In re Victory Constr. Co.* (Bankr CD Cal 1984) 42 BR 145. Confirmation of the Chapter 11 plan has a res judicata effect. In *Knupfer v Wolfberg (In re Wolfberg)* (BAP 9th Cir 2000) 255 BR 879, the debtors' confirmed Chapter 11 plan required the sale of their residence with all proceeds to be used to pay creditors, but the debtors had failed to claim a homestead exemption on either their schedules or in their disclosure statement. The debtors were not allowed to amend their schedules to claim the homestead exemption because the plan was a res judicata bar against it. In *Carey v Flintridge Lumber Sales, Inc. (In re RJW Lumber Co.)* (Bankr ND Cal 2001) 262 BR 91, the confirmed Chapter 11 plan stated that no claims for causes of action were waived or released. When the plan failed and the case was converted to Chapter 7, the trustee was allowed to pursue preference actions because, under the express language of the plan, no creditor could be deceived into thinking that confirmation waived claims. But see *Alary Corp. v Sims (In re Associated Vintage Group, Inc.)* (BAP 9th Cir 2002) 283 BR 549, 563 (plan may provide for postconfirmation litigation of particular causes of action or categories of causes of action; plan that merely provided for payment according to Bankruptcy Code did not bar preference action and objection to creditor's secured proof of claim).

Confirmation of the plan revests property of the estate in the debtor. In *Cusano v Klein* (9th Cir 2001) 264 F3d 936,

Vinnie Vincent, the lead guitarist of the band "KISS," scheduled his song rights with an unknown value, and confirmed a plan with a $40,000 cash payment to creditors. He was entitled to keep the appreciation value in the song rights because the song rights were scheduled and, under Bankruptcy Code §1141(b), confirmation of the plan revested in Vincent all property of the estate. But in *Pioneer Liquidating Corp. v U.S. Trustee (In re Consolidated Pioneer Mortgage Entities)* (9th Cir 2001) 264 F3d 803, because the Chapter 11 plan created a liquidating corporation to administer the estate for creditors, when the case converted to Chapter 7, the property revested in the bankruptcy estate because the liquidating corporation was a fiduciary for creditors.

**NOTE:** A debtor will usually not face a choice between Chapter 13 or Chapter 11. An individual debtor with debts small enough to qualify will almost always choose Chapter 13 for economy's sake. Thus, the primary choice for a debtor with substantial debts is between Chapter 7 or Chapter 11. This decision should be based on whether it is likely that the debtor's problems can be solved, given time and the means test. On the means test, see §§12.14-12.14C.

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## §12.20 B. Accuracy of Schedules

Statements and schedules submitted to the court with the bankruptcy petition must be complete and accurate. Omissions of either assets or creditors may have serious consequences for the debtor and the debtor's counsel. See *Diamond Z Trailer, Inc. v JZ LLC (In re JZ LLC)* (BAP 9th Cir 2007) 371 BR 412 (unscheduled property of estate in Chapter 7 does not revert to debtor but remains property of estate after case is closed). If assets are purposely not listed, the debtor may be denied a discharge. If a creditor is not listed and does not learn of the bankruptcy case in time to file a proof of claim, that creditor's debt may not be discharged. *Ellett v Stanislaus* (9th Cir 2007) 506 F3d 774 (erroneous social security number rendered notice to Franchise Tax Board insufficient, precluding discharge of tax debt). Because the consequences of error are so serious, debtor's counsel must be careful. Debtor's counsel is required to certify the accuracy of the information. 11 USC §707(b)(4)(D).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.21 C. Payment of Debtor's Attorney Fees [Deleted]

## §12.21 C. Payment of Debtor's Attorney Fees [Deleted]

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## §12.22 1. Chapter 7 [Deleted]

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## §12.23 2. Chapter 11 [Deleted]

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.24 3. Chapter 13 [Deleted]

## §12.24 3. Chapter 13 [Deleted]

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.25 4. Disclosure of Fees [Deleted]

## §12.25 4. Disclosure of Fees [Deleted]

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.26 D. Legal Services Agreement for Representation of Chapter 7 Debtor [Deleted]

## §12.26 D. Legal Services Agreement for Representation of Chapter 7 Debtor [Deleted]

This section has been deleted.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.27 E. Bankruptcy Estate and Debtor's Exemption Rights

### §12.27 E. Bankruptcy Estate and Debtor's Exemption Rights

The commencement of a bankruptcy case under any chapter creates an estate comprising (with only very limited exceptions) all the debtor's legal or equitable interests in property, wherever located and by whomever held. 11 USC §541(a)(1). Property of the estate includes interests that the trustee recovers, all community property of the debtor and the debtor's spouse, and proceeds, profits, and rents from property of the estate. 11 USC §541(a)(2)-(4), (6). The estate also includes any property the estate subsequently acquires and inheritances to which the debtor becomes entitled within 180 days after the commencement of the case. 11 USC §541(a)(5), (7). The extent of property of the estate is important in defining many of the workings of the bankruptcy system. It is crucial to determining the scope of the automatic stay, the availability of the trustee's avoiding powers, and the property to be dealt with in a plan or liquidated in a Chapter 7 case.

In beginning a bankruptcy case, the individual debtor may file a list of property that he or she claims is exempt from creditors and from the bankruptcy proceeding. See 11 USC §522; Schedule C of Official Form 6. If the debtor does not file such a list, a dependent of the debtor may do so or may claim property as exempt from estate property on the debtor's behalf. 11 USC §522(*l*); Fed R Bankr P 4003(a).

Unless a party in interest objects, the property claimed as exempt on the list (Schedule C of Official Form 6) will be considered exempt, even if the exemption claim would not have been allowed had there been a timely objection. 11 USC §522(*l*); Fed R Bankr P 4003(b); *Taylor v Freeland & Kronz* (1992) 503 US 638, 118 L Ed 2d 280, 112 S Ct 1644. Objections to the debtor's exemptions normally must be filed within 30 days after the conclusion of the meeting of creditors. Fed R Bankr P 4003(b)(1). However, pursuant to a 2008 amendment to the Federal Rules of Bankruptcy Procedure, an objection to a fraudulently asserted claim of exemption may now be filed by a trustee at any time prior to 1 year after the closing of the case. Fed R Bankr P 4003(b)(2).

There is a split of authority concerning whether a new time period begins on conversion of a case to Chapter 7. Compare, *e.g., In re Ferretti* (Bankr SD Fla 1999) 230 BR 883, 891, *aff'd* (11th Cir 2001) 268 F3d 1065 (Chapter 13 trustee's failure to object bars objection after conversion), with *In re Campbell* (BAP 10th Cir 2004) 313 BR 313, 318 (time to object recommences on conversion) and *In re Alexander* (8th Cir 2001) 236 F3d 431, 432.

In addition, there is an undecided issue as to whether a claim of exemption as to the full scheduled value of an asset serves as a claim of exemption of the asset or just the scheduled value should the asset prove subsequently to be of greater value than scheduled. Compare *Olson v Anderson (In re Anderson)* (BAP 6th Cir 2007) 377 BR 865 and *Allen v Green (In re Green)* (11th Cir 1994) 31 F3d 1098, with *Stoebner v Wick (In re Wick)* (8th Cir 2002) 276 F3d 412 and *Hyman v Plotkin (In re Hyman)* (9th Cir 1992) 967 F2d 1316. The Supreme Court has granted review of a case raising this issue. *Schwab v Reilly* (3rd Cir 2008) 534 F3d 173, cert granted (2009) ___ US ___, 173 L Ed 2d 1131, 129 S Ct 2049.

It is not sufficient that the objection be served on the debtor; it must be filed within the required time. *Towers v Boyd (In re Boyd*) (ND Cal 2000) 243 BR 756. The trustee may extend the time for objecting to the exemptions by continuing the creditors meeting from time to time. The meeting is deemed concluded when the trustee, even though adjourning the meeting "until further notice," fails to announce the adjourned date and time of the continued meeting. *Smith v Kennedy (In re Smith)* (9th Cir 2000) 235 F3d 472. If the trustee does not make an announcement regarding the continued date and time, however, but notices a continued meeting within 30 days, the time for filing objections to exemptions is kept alive. *Chubb & Son, Inc. v Clark (In re Clark)* (BAP 9th Cir 2001) 262 BR 508. But see *Peres v Sherman (In re Peres)* (5th Cir 2008) 530 F3d 375, 377 (case-by-case approach preferred in determining when meeting concluded; meeting not automatically deemed concluded if trustee has not announced specific continuation date within 30 days of adjournment).

Federal Rules of Bankruptcy Procedure 1009(a) is liberal in allowing a debtor leave to amend the schedules "as a matter of course" at any time before the case is closed, absent a showing of bad faith or prejudice to third parties. *White v White (In re White)* (WD Wash 1986) 61 BR 388; *In re Andermahr* (BAP 9th Cir 1983) 30 BR 532. Chapter 7 debtors may amend their exemptions after their case has been closed and reopened; for these purposes, there is no

difference between a never-closed case and a reopened case. *Goswami v MTC Distrib. (In re Goswami)* (BAP 9th Cir 2003) 304 BR 386. With respect to amending exemptions, one court has noted that delay alone is not bad faith, nor does it constitute prejudice absent economic loss to creditors. *Arnold v Gill (In re Arnold)* (BAP 9th Cir 2000) 252 BR 778. However, when the debtors concealed assets at an initial 11 USC §341 meeting, the initial schedules actively misrepresented the debtors' assets, and the debtors only amended their schedules on the eve of a continued §341 meeting, the court sustained the trustee's objection to the exemption. *In re Salvucci* (Bankr ED Mass 2006) 339 BR 279, 282. In addition, a debtor's concealment of assets or failure to cooperate with the trustee in administering assets may result in a surcharge on the debtor's exemption. *In re Onubah* (BAP 9th Cir 2007) 375 BR 549; *Latman v Burdette* (9th Cir 2004) 366 F3d 774.

The Bankruptcy Code invalidates any waiver of a debtor's substantive or procedural rights under 11 USC §522. Under 11 USC §522(e), the debtor may avoid judicial liens that impair exemptions and nonpossessory, nonpurchase money security interests in household goods. As a result, a judgment creditor who has recorded an abstract of judgment against a debtor, or a finance company that has taken a security interest in all the debtor's household goods, may discover that the debtor, after a discharge in bankruptcy, will keep the exempt property free and clear of the creditor's lien. 11 USC §522(f).

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## §12.28 1. Election of California or "Cal-Fed" Exemptions

California has opted out of the Bankruptcy Code exemptions found at 11 USC §522(d); therefore, these exemptions must not be used in a case filed in California. California debtors have two sets of options:

- The general state and federal exemptions available to nonbankruptcy debtors (found primarily at CCP §§703 and 704-704.990 and favored for the broad exemptions provided for the homestead (CCP §704.710) and the private retirement plan (CCP §704.115)); and
- The special set of bankruptcy exemptions in CCP §703.140, known as the Cal-Fed (California-Federal) exemptions.

**NOTE:** A single-premium annuity is not exempt property, either as insurance or as a private retirement plan. *Simpson v Burkart (In re Simpson)* (9th Cir 2009) 557 F3d 1010.

Although the Cal-Fed exemptions do not contain the broad exemptions for the homestead or private retirement plan, they contain a wild-card exemption of up to $18,350 that may be used to supplement a specific Cal-Fed exemption or to exempt any other asset. See CCP §703.140(b)(5).

**PRACTICE TIP:** As noted above, California has opted out of the federal exemption scheme. A split exists concerning whether or not the federal homestead exemption cap of $125,000 applies. *In re McNabb* (Bankr D Ariz 2005) 326 BR 785 holds that the cap applies only in states where the debtor can choose between state and federal exemptions. However, the majority of cases have rejected this analysis. See *In re Rasmussen* (Bankr MD Fla 2006) 349 BR 747, 752 (limitation applies to debtors in both opt-out and non-opt-out states); *In re Summers* (Bankr D Ariz 2006) 344 BR 108, 111 (Congress intended cap to apply to all debtors); *In re Kane* (Bankr D Nev 2006) 336 BR 477, 481 (cap applies to all debtors despite "drafters' unfortunate choice of words"); *In re Virissimo* (Bankr D Nev 2005) 332 BR 201, 206 (statute's plain meaning will be rebutted when contrary legislative intent clearly expressed). The issue remains open in California.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.29 2. Chart of California State and Cal-Fed Exemptions [Deleted]

## §12.29 2. Chart of California State and Cal-Fed Exemptions [Deleted]

This section has been deleted. The chart of exemptions has been moved to §9.55A.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.29A 3. Evaluation of Claimed Exemptions

## §12.29A 3. Evaluation of Claimed Exemptions

Creditors seeking to collect from debtors should pay close attention to the exemptions claimed by debtors. Because they change periodically, whether they are state or Cal-Fed exemptions, it is necessary to review the exemptions then in existence. Creditor's counsel should work to evaluate the claimed exemptions and timely file any objections to questionable claims. The BAPCPA amendments to the Bankruptcy Code have expanded the protection of some assets, such as pension plans and IRAs and certain education funds, but have imposed rules on timing and valuations that have not yet been litigated. See generally 11 USC §522.

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## §12.30 4. Converting Nonexempt Property to Exempt

In general, in the Ninth Circuit, there is no prohibition against converting nonexempt property to exempt property just before filing a bankruptcy case, although other circuits may consider it a fraudulent transfer. This type of transfer should be clearly distinguished from that of transferring assets to a spouse or friend to try to shield them from creditors' claims. The latter transfer may not only be avoidable as a fraudulent transfer (11 USC §548), it may also be grounds to deny the discharge. 11 USC §727(a)(2). Debtor's counsel may well have an obligation to recommend such planning in order to maximize exemptions; however, the BAPCPA amendments to the Bankruptcy Code limit the advice a debtor's counsel may give to his or her client.

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## §12.31 F. Meeting of Creditors

In every bankruptcy case, the debtor must appear at a meeting of creditors, known as the "341 hearing" (see 11 USC §341(a)). Shortly after the bankruptcy petition is filed, the bankruptcy court will notify all creditors of the time and place of this meeting. The bankruptcy judge does not attend this meeting. The meeting is held at the Office of the United States Trustee and is open to the public. Counsel should alert the debtor to the fact that there will be others present at the meeting when the debtor testifies.

The court has authority to excuse the debtor. *In re Bergeron* (Bankr ND Cal 1999) 235 BR 641 (debtor did not have mental acuity to attend).

At the creditors' meeting in Chapter 11 cases, the debtor or the debtor's attorney may wish to summarize the events that caused the debtor's financial difficulties and, if possible, how the debtor plans to reorganize. The meeting is conducted by an attorney-adviser of the United States Trustee, who will focus on administrative issues, such as insurance coverage, as well as on the completeness of the schedules and statement of financial affairs. Because it is the trustee who frequently moves to convert or dismiss a Chapter 11 case for failure to prosecute, the attorney-adviser will also focus on the debtor's prospects and timetable for reorganization.

In a Chapter 7 case, the Chapter 7 trustee conducts the meeting, and the primary focus is inquiry about any items in the statement of financial affairs or schedules of assets and liabilities that seem incomplete, confusing, or suspicious. The Chapter 7 trustee is most interested in assets of value; therefore, the debtor should be prepared to explain, and provide documents regarding, any and all such property. The trustee will also inquire about prepetition transfers that may be preferential or fraudulent.

The Chapter 13 standing trustee conducts the Chapter 13 creditors' meeting and is primarily interested in resolving any confirmation issues respecting the debtor's plan, as well as the status of any outstanding information requests.

In cases under all chapters, the debtor may be required to return to a continued 341 hearing if further information is desired by the examining officer. It has become the practice in Chapter 7 cases for the trustee to continue the meeting from time to time to receive further information from the debtor. This has the effect of holding open the time for objecting to the debtor's exemptions under Fed R Bankr P 4003(b), but does not postpone the deadlines for filing adversary proceedings under 11 USC §§523(c) and 727. Fed R Bankr P 4004(a), 4007(c).

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## §12.32 G. Reaffirmation

A debtor may wish to affirm a debt that would otherwise be discharged in a bankruptcy case. The Bankruptcy Code permits a debtor to reaffirm a specific debt as long as the debtor was not pressured into reaffirmation without understanding its consequences.

Enforceable reaffirmation is difficult to obtain under the code. A discharge serves to enjoin any act to collect a dischargeable debt as the debtor's personal liability "*whether or not discharge of such debt is waived.*" (Emphasis added.) 11 USC §524(a)(1).

The Bankruptcy Code provides for reaffirmation of a debt if the conditions of 11 USC §524(c)-(d), (k) are met. For an agreement to be enforceable, a valid reaffirmation requires the following conditions:

- The agreement was made before the discharge was granted.
- The agreement is filed with the court.
- The agreement explicitly states that the debtor may rescind it, by providing notice to the creditor, at any time before discharge or within 60 days after the agreement is filed with the court.
- The debtor received disclosures set forth in §524(k) before signing the agreement.
- If the debtor was represented by counsel in the agreement's negotiation, the debtor's attorney must file an affidavit or declaration with the agreement filed with the court, which states that:
- The agreement represents a fully informed and voluntary agreement of the debtor;
- The agreement does not impose undue hardship on the debtor or his or her dependents; and
- The debtor was informed of the legal effect of the agreement and the consequences of default.
- If the debtor is unrepresented, the court must find that the reaffirmation does not present an undue hardship and is in the debtor's best interests.

Regardless of whether a prebankruptcy debt is reaffirmed, the debtor may pay it if he or she chooses. However, under the BAPCPA, applicable to filings after October 17, 2005, the debtor is required to provide a statement of intention to surrender the item, redeem it, or reaffirm the debt, and the debtor must perform the stated intention shortly thereafter. 11 USC §521(a)(2).

For a form of reaffirmation agreement, see §12.72.

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### §12.33 H. Denial of Discharge

Because the debtor's primary reason for filing a bankruptcy case is to be discharged from his or her debts, counsel must advise the debtor that discharge can be denied in certain circumstances. A corporation or partnership will not receive a discharge in a Chapter 7 case or in a Chapter 11 case in which its assets are liquidated and it ceases operations. 11 USC §1141(d)(3). Even when a corporation or partnership continues in business and is entitled to a discharge, it will not be discharged from certain tax and custom duties not properly reported. See 11 USC §1141(d)(6).

An individual discharge under Chapter 11 may be delayed until all payments under the plan are made and no criminal proceeding relating to corporate misdeeds is pending. 11 USC 1141(d)(5). An individual Chapter 7 debtor will not receive a discharge if he or she has received a discharge in a bankruptcy case filed within the preceding 8 years. 11 USC §727(a)(8)-(9).

The following are grounds for denial of discharge in a Chapter 7 liquidation proceeding (11 USC §727(a)(1)-(12)):

- The debtor transferred, destroyed, or concealed property within 1 year before the petition was filed with the intent to hinder, delay, or defraud.
- The debtor concealed, destroyed, falsified, or failed to keep adequate financial records. See, *e.g., Buckeye Retirement Co. v Swegan (In re Swegan)* (6th Cir 2008) 383 BR 646 (debtor who falsely stated he had not received insurance proceeds and falsely denied owning his own insurance "concealed" assets).
- The debtor knowingly and fraudulently withheld recorded information from an officer of the estate, received or gave an advantage or promise of money for acting or forbearing to act, made a false oath or account, or presented or used a false claim.
- The debtor failed to satisfactorily explain a loss or deficiency of assets.
- The debtor refused to obey a lawful court order except an order to answer a material question or to testify when the debtor properly invoked a privilege against self-incrimination.
- The debtor committed an act specified in previous categories within1 year before the date the petition was filed or during the case in connection with another case concerning an insider (see 11 USC §101(31), discussed in §§12.65-12.65G).
- The debtor is not an individual.
- The debtor was granted a discharge under the liquidation or reorganization provisions in a case begun within 8 years before the petition in the current case was filed.
- The debtor was granted a discharge under a wage earner's plan or Chapter 13 in a case begun within 6 years before the petition in the current case was filed.
- The debtor failed to complete a course in personal financial management after filing the petition.
- The court finds that charges under 11 USC §522(q)(1) are applicable or are pending against the debtor.

The court may approve a written waiver of discharge executed by the debtor after the order for relief. 11 USC §727(a)(10).

Even if the debtor is not denied a discharge under 11 USC §727, certain debts are nondischargeable. See §§12.40-12.47.

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## §12.34 I. Married Debtors and the Joint Petition

A married couple may file a joint petition under 11 USC §302(a). This unique procedure does more than simply save the expense of filing two separate petitions. Counsel should carefully consider whether to recommend that both spouses file bankruptcy and should analyze the circumstances and need for bankruptcy of each spouse because it is not always necessary that both spouses file. For example, if one spouse has limited personal liability for the debt of the other, or has significant separate property, then that spouse should not join in the petition. Counsel should look to the nature of the assets held by the husband and wife to determine whether both spouses should file and to advise the clients of the impact of bankruptcy on the nondebtor spouse. Community property comes into the estate of a bankrupt spouse in full (11 USC §541(a)(2)), whereas only one-half of joint tenancy property is property of the estate. This is because joint tenancy property is a unity of separate property interests. *Schoenfeld v Norberg* (1970) 11 CA3d 755, 90 CR 47. Although a trustee may establish that property held in joint tenancy is actually community property, the joint tenancy deed creates a rebuttable presumption that is not rebutted solely by evidence concerning the source of the funds used to purchase property. *In re Summers* (9th Cir 2003) 332 F3d 1240, 1244. The trustee must present additional evidence establishing the owners' intent that the property is a community asset.

Separate property of a nondebtor spouse is not part of the debtor spouse's bankruptcy estate and is not liable for the debts of the debtor spouse, except debts incurred for common necessities of life while living together or by agreement between spouses living separately. Fam C §§914, 4302. The statement of joint income need not include separate property of the nonfiling spouse. However, a contribution to household expenditures is included regardless. 11 USC §521(g)(1)(A)-(C).

When a nondebtor spouse subsequently decides to file bankruptcy, it is not permissible to amend the petition of the debtor spouse in an attempt to commence a joint case. *Olson-Ioane v Derham-Burk (In re Olson)* (BAP 9th Cir 2000) 253 BR 73. The nonfiling spouse must start a new case and then seek joint administration of the two related cases involving husband and wife as provided by Fed R Bankr P 1015(b)(1).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/ J. Relief Available to Debtors/§12.35 1. Automatic Stay

## J. Relief Available to Debtors

### §12.35 1. Automatic Stay

The filing of the bankruptcy petition (whether voluntary or involuntary) operates as an automatic stay, or injunction, against two categories of acts that might otherwise be taken: acts against the debtor and acts respecting property of the bankruptcy estate. 11 USC §362(a).

This is one of the greatest benefits of bankruptcy and is frequently the primary purpose of the filing of a bankruptcy petition. It is one of the fundamental debtor protections because it gives the debtor a breathing spell from creditors, stopping all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that led to bankruptcy.

The automatic stay also provides comprehensive creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would be paid, to the exclusion of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which creditors are treated equally; the automatic stay furthers that policy. See H Rep No. 95-595, 95th Cong, 2d Sess (1978), reprinted in 1978 US Code Cong & Ad News 6296.

The automatic stay statute (11 USC §362(a)) distinguishes between prepetition and postpetition claims and between property of the estate and property of the debtor. Any act to enforce or collect a prepetition claim is stayed, whether it is against the debtor, property of the debtor, or property of the estate. 11 USC §362(a)(6). The automatic stay does not apply to postpetition claims except to the extent an act violates 11 USC §362(a)(3) or (4), which is designed to prevent any interference with property of the estate or property held by the estate.

**NOTE:** The 2005 amendments to the Bankruptcy Code enacted by the BAPCPA include numerous provisions to except from the automatic stay various defensive actions typically undertaken by lessors and secured creditors, particularly in the case of serial or abusive filers. See 11 USC §362(b)(20)-(23), (d)(4), (h)(1). On defensive tactics, see §§12.59-12.69.

Several cases have disposed of apparent automatic-stay violations by finding that the asset at issue was not property of the estate. In *McCarthy, Johnson & Miller v North Bay Plumbing (In re Pettit)* (9th Cir 2000) 217 F3d 1072, a judgment creditor's postpetition receipt of funds held in the district court's registry as judgment security did not violate the automatic stay because, on entry of judgment, the funds ceased to be property of the debtor; the funds therefore did not become property of the estate when the bankruptcy was filed. In *Lee v Baca* (1999) 73 CA4th 1116, 86 CR2d 913, cert denied (2000) 529 US 1020, the state court held that the automatic stay did not restrain the enforcement of a writ of possession by the sheriff following judgment in an unlawful detainer action because the debtor, and hence the estate, no longer had an interest in the premises. In *Westside Apartments v Butler (In re Butler)* (CD Cal 2002) 271 BR 867, 875, however, the federal bankruptcy court declined to follow *Baca*, holding that the scope of the automatic stay was a federal question and that the tenant's possession of the property at the time of the filing constituted an equitable interest, *i.e.*, a property interest under 11 USC §541(a)(1). In *Bebensee-Wong v Federal Nat'l Mortgage Ass'n (In re Bebensee-Wong)* (BAP 9th Cir 2000) 248 BR 820, the recordation of a trustee's deed following a foreclosure sale was not stayed by the filing of a bankruptcy before the recordation of the deed because of CC §2924h(c), which allows the recordation of a deed to relate back to 8 a.m. on the date of the sale. In *Ziemski v Ziemski (In re Ziemski)* (BAP 8th Cir 2006) 338 BR 802, the court concluded that a former wife was not entitled to a share of military retirement benefits at the time of filing as determined under state law. Therefore, the benefits were not part of the bankruptcy estate, and the former husband did not violate the stay by receiving the benefits. These decisions underscore the importance of properly timing the filing of the bankruptcy petition to obtain the desired protection for the debtor.

**PRACTICE TIP:** The bankruptcy petition must be filed *before* the debtor loses important rights under state law, such as possession of leased or rented premises, or retirement benefits. In an eviction proceeding, in order to stay an eviction and to require the lessor to move for relief from the stay, the debtor must file the bankruptcy petition

before the entry of judgment in the eviction proceeding.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.35A a. Exceptions to Automatic Stay

### §12.35A a. Exceptions to Automatic Stay

The attorney must keep in mind the many exceptions to the automatic stay. The sweep of the automatic stay is so broad and its impact so great that each revision of the Bankruptcy Code lengthens the number of exceptions in 11 USC §362(b). After the 2005 amendments, the list contains 28 exceptions. See 11 USC §362(b)(1)-(28).

Noteworthy exceptions to the automatic stay include the following:

- Proceedings seeking the establishment of paternity or the modification of an order for alimony, maintenance, or support (11 USC §362(b)(2));
- Provisions permitting a secured creditor to maintain the perfection of its security interest by an act such as the filing of a UCC Article 9 continuation statement (11 USC §362(b)(3));
- Provisions allowing tax authorities to conduct tax audits, make demands for tax returns, and make certain assessments for tax liabilities and issue notice and demand for payment of these assessments (11 USC §362(b)(9));
- Provisions allowing for the creation or perfection of ad valorem property tax liens during the stay (11 USC §362(b)(18));
- Criminal actions (11 USC §362(b)(1));
- Police and regulatory actions (11 USC §362(b)(4));
- Actions that relate back to before the filing of the bankruptcy petition (11 USC §§362(b)(3), 546(b)), including the following:
- The recordation of a mechanic's lien (see CC §3134), or
- The recordation of a trustee's deed following foreclosure (see CC §2924h(c)).

**NOTE:** Under the "ministerial act exception," adopted by the Ninth Circuit in *McCarthy, Johnson & Miller v North Bay Plumbing (In re Pettit)* (9th Cir 2000) 217 F3d 1072, clerical acts, such as recordation or entry on the docket following a court order, do not themselves violate the stay even if taken after bankruptcy.

- Proceedings before the Social Security Administration and licensing authorities (11 USC §362(b)(2)(D)-(G));
- Withholding income from the debtor or estate for payment of domestic support obligations (11 USC §362(b)(2)(C));
- Collection of amounts from wages to satisfy ERISA loans (11 USC §362(b)(19));
- Enforcement of liens on property involved in previous cases (11 USC §362(b)(20)-(21));
- Continuance of unlawful detainer and eviction actions (11 USC §362(b)(22)-(23));
- Actions by securities self-regulating organizations (11 USC §362(b)(25)); and
- Tax set-off claims (11 USC §362(b)(26)).

**NOTE:** Under the BAPCPA, corporate debtors' tax proceedings are no longer exceptions to the automatic stay. See 11 USC §362(a)(8).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.35B b. Duration of Automatic Stay

### §12.35B b. Duration of Automatic Stay

The duration of the automatic stay differs between the debtor and the estate. The stay of acts against the debtor or property of the debtor generally terminates when the debtor receives the discharge, or under the other circumstances set forth in 11 USC §362(c)(2). The debtor may delay the entry of discharge for 30 days or longer under Fed R Bankr P 4004(c)(2), thereby prolonging the effect of the automatic stay. The stay for property of the estate is not dependent on the debtor's discharge; rather, it continues in effect until the property no longer belongs to the estate, or the case is closed. 11 USC §362(c). The BAPCPA contains numerous "anti-repeat filer" provisions, including amendments to 11 USC §362(c), which limit the protection of the automatic stay for repeat filers.

**NOTE:** The dismissal of a bankruptcy case ordinarily terminates the automatic stay. 11 USC §349(b)(3), 362(c). See *Lomagno v Salomon Bros. Realty Corp. (In re Lomagno)* (1st Cir 2005) 429 F3d 16, 17 (foreclosure sale occurring after dismissal of Chapter 13 petition but before reversal of dismissal is valid; reversal of dismissal does not retroactively restore stay); but see *In re Krueger* (BAP 9th Cir 1988) 88 BR 238, 240 (order dismissing case was void for lack of due process; automatic stay thus continuously in effect and intervening foreclosure sale was void). A debtor may seek a stay pending appeal. Fed R Bankr P 8005. Reinstatement of the bankruptcy case restores the automatic stay, usually prospectively. See*, e.g., Lomagno v Salomon Bros. Realty Corp. (In re Lomagno)* (1st Cir 2005) 429 F3d 16. The bankruptcy court has discretion to determine whether a reinstatement order is effective when signed or when entered. *Sewell v MGF Funding, Inc. (In re Sewell)* (BAP 9th Cir 2006) 345 BR 174 (bankruptcy court may retroactively grant relief from stay but whether or in what circumstances it may retroactively impose stay is unclear). But see *In re AVI, Inc*. (BAP 9th Cir 2008) 389 BR 721 (annulment of dismissal order such that postdismissal transfer was avoidable in reinstated case was not abuse of discretion).

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### §12.35C c. Enforcement of Automatic Stay

Counsel representing a debtor who is subjected to postpetition creditor action must immediately put the creditor on notice of the bankruptcy, warning the creditor that the implications of the offensive conduct may be an action seeking damages for violation of the stay. Counsel must be careful in giving such notice to use the correct address. In many situations the violation is inadvertent because the creditor simply has not learned of the bankruptcy, and a simple letter will suffice to end the offending conduct. For a suggested form of letter to the offending creditor, see §12.74. In other situations, a dispute may exist regarding whether the stay applies, or the scope of the stay, and it will be necessary to file an adversary proceeding in the bankruptcy court.

**PRACTICE TIP:** A creditor who knowingly retains possession of property of the estate is in violation of the automatic stay. *California Employment Dev. Dep't v Taxel (In re Del Mission Ltd.)* (9th Cir 1996) 98 F3d 1147, 1151. A creditor who wishes to retain possession should promptly seek a court determination of its rights. *Citizens Bank of Md. v Strumpf* (1995) 516 US 16, 20, 133 L Ed 2d 258, 264, 116 S Ct 286 (refusal to immediately turn over bank account to debtor was not setoff under §362(a)(7) and hence did not violate automatic stay when bank's refusal to pay was temporary while it sought relief from automatic stay).

There is a distinction between an action for violation of the automatic stay and an action to enforce the discharge injunction. The automatic stay terminates when the discharge is entered (11 USC §362(d)), and is replaced by the injunction to protect the debtor's discharge. 11 USC §524(d). In the latter situation, the appropriate remedy is to bring an adversary proceeding to declare the debt discharged and to recover damages. See §12.39.

The decision of a state administrative law judge regarding the scope of the automatic stay may be reviewed by a bankruptcy court. *Contractors' License Bd. v Dunbar (In re Dunbar)* (9th Cir 2001) 245 F3d 1058. The automatic stay does not prevent an attorney who files bankruptcy from being sanctioned for prosecuting a frivolous appeal. See 11 USC §362(b)(4). *Berg v Good Samaritan Hosp. (In re Berg)* (9th Cir 2000) 230 F3d 1165.

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### §12.36 d. Protection of Secured Creditor During Stay

When a bankruptcy petition is filed, most creditor actions against the debtor are immediately restrained by the automatic stay (11 USC §362; see §§12.35-12.38), including the secured creditor's efforts to foreclose on the security. Postpetition interest on unsecured claims is paid only to the extent funds remain after payment of all other claims. 11 USC §726(a)(5). A secured creditor, however, is entitled to contractual interest or other charges that accrue after the filing of the bankruptcy petition to the extent that the collateral's value is sufficient to cover those charges. 11 USC §506(b). A fully secured creditor thus will be able to recover postpetition interest and charges. In a Chapter 11 sale context, this may include interest at a default rate. *GE Capital Corp. v Future Media Prods., Inc.* (9th Cir 2008) 530 F3d 1178, amended (9th Cir 2008) 547 F3d 956 (Bankruptcy Code does not prevent oversecured creditor from collecting interest at default rate pursuant to prepetition contract where debtor pays creditor's claim out of proceeds from sale of collateral outside plan).

An undersecured creditor is entitled to protection of the present value of its interest in collateral. This protection is necessary because to the extent that the debtor in bankruptcy can prevent the secured creditor (by virtue of the automatic stay) from enforcing its rights against collateral while the debtor benefits from the creditor's money, the debtor and his or her unsecured creditors receive a windfall at the expense of the secured creditor. *Crocker Nat'l Bank v American Mariner Indus. (In re American Mariner Indus.*) (9th Cir 1984) 734 F2d 426, 435. See 11 USC §361. At one time, this statement was interpreted to mean that the debtor must pay the undersecured creditor interest on the value of its collateral; otherwise, the creditor would foreclose. This interpretation, granting interest payments to undersecured creditors in exchange for keeping the automatic stay in effect, was reversed by the United States Supreme Court in *United Sav. Ass'n v Timbers of Inwood Forest Assocs.* (1988) 484 US 365, 98 L Ed 2d 740, 108 S Ct 626. The Court reasoned that *American Mariner*'s requirement of compensation was inconsistent with 11 USC §§362(d), 506(a)-(b), and 552. Most bankruptcy courts in the Ninth Circuit interpret *Timbers* to mean that relief (*i.e.,* cash payments to compensate the creditor for the delay in enforcing its rights and the effects of the case on its collateral), or the lifting of the automatic stay, will be granted only if the value of the collateral is decreasing, the amount of the senior liens is increasing, or there is no prospect of the debtor's rehabilitation within a reasonable time. After the BAPCPA amendments, at least in single asset real estate cases, the debtor must either file a feasible plan of reorganization capable of being confirmed, or begin monthly payments at the applicable nondefault rate. 11 USC §362(d)(3)(B)(ii).

*Timbers,* especially the requirement of a reasonable likelihood that there will be a successful reorganization in a reasonable time, appears to be partially codified in 11 USC §362(d)(3). However, the market-interest-payment requirement of 11 USC §362(d)(3)(B) looks suspiciously like the return of *American Mariner* and is now codified by the BAPCPA amendments. See 11 USC §362(d)(3)(B)(ii).

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### §12.37 e. Effect on Actions Against Third Parties

Virtually all litigation against a debtor who files in bankruptcy is automatically stayed, as are efforts to enforce liens on estate property. 11 USC §362. However, the automatic stay does not affect actions to collect from persons other than the debtor, such as guarantors, nor does it protect the property of such third parties. See, *e.g., Nevada Nat'l Bank v Casgul of Nev., Inc. (In re Casgul of Nev., Inc.)* (BAP 9th Cir 1982) 22 BR 65. In the case of multiparty litigation in which a defendant files bankruptcy, the plaintiff should dismiss the debtor from the suit and file a claim against the estate if the claim appears to be dischargeable. If the plaintiff believes the claim is nondischargeable, however, and the plaintiff wishes to litigate the matter in state court, the plaintiff should move for relief from the stay.

**PRACTICE TIP:** In this situation, the plaintiff must also timely file a dischargeability complaint because the filing of the motion for relief from stay will not be enough to prevent the claim from being discharged. *Allred v Kennerley (In re Kennerley)* (9th Cir 1993) 995 F2d 145.

The stay, however, does not protect a debtor from complying with discovery requests in a multidefendant case in which the debtor was a defendant, as long as the discovery requests are framed as discovery pertaining only to the creditor's claims against another, nondebtor defendant. The debtor may be required to provide discovery in such a third party action even if the information can later be used in a case against the debtor. *Groner v Miller (In re Miller)* (BAP 9th Cir 2001) 262 BR 499.

The Bankruptcy Court may enjoin actions against third parties, particularly in a Chapter 11 case. However, when a debtor applies under 11 USC §105(a) for a preliminary injunction to stay a proceeding in which the debtor is not a party, the bankruptcy court must apply the usual preliminary injunction standard, balancing the debtor's likelihood of success in reorganization against the relative hardship of the parties, as well as considering the public interest, if warranted. *Solidus Networks, Inc. v Excel Innovations, Inc. (In re Excel Innovations, Inc.)* (9th Cir 2007) 502 F3d 1086, 1094, cert denied (2008) ___ US ___, 170 L Ed 2d 816, 128 S Ct 2080.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.38 f. Damages for Violation of Stay

### §12.38 f. Damages for Violation of Stay

In the situation of an individual debtor, 11 USC §362(k) provides broad relief to an individual injured by any willful violation of the automatic stay. The court *shall* award actual damages, including costs and attorney fees, as well as punitive damages. Violations of the automatic stay directed against a nonindividual debtor are generally punished by use of the court's contempt power. However, under the BAPCPA amendments, stay violations taken by a creditor in good faith are subject only to an award of actual damages. 11 USC §362(k)(2).

The right of a debtor to recover actual damages for a violation of the automatic stay under 11 USC §362 includes the right to collect emotional distress damages. *Dawson v Washington Mut. Bank (In re Dawson)* (9th Cir 2004) 390 F3d 1139, 1148, cert denied (2005) 546 US 927 (Chapter 13 debtors may recover emotional distress damages caused by violation of stay). See *Aiello v Providian Fin. Corp.* (7th Cir 2001) 239 F3d 876, 879 (barring damages for purely emotional injury). In *Dawson v Washington Mut. Bank,* the Ninth Circuit acknowledged that the statutory language permitting debtors to recover actual damages does not define "actual damages." However, the court found a "contextual clue" supporting an award of emotional distress damages in the fact that Congress chose the term "individual" to describe those eligible to claim actual damages under former 11 USC §362(h) (now §362(k)). By limiting the availability of actual damage relief to individuals, Congress signaled its special interest in redressing harms unique to human beings. One such harm is emotional distress. 390 F3d at 1146. However, concerned by the prospect of frivolous claims, the Ninth Circuit holds that an award of emotional distress damages requires that the individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay. 390 F3d at 1149.

**PRACTICE TIP:** Most circuit courts addressing the issue agree that the use of the term "actual damages" in 11 USC §362 is ambiguous. See, *e.g., Aiello v Providian Fin. Corp.* (7th Cir 2001) 239 F3d 876, 879 (resolving ambiguous language of former §362(h) by looking to structure and purpose of automatic stay and historical context of its enactment); *Dawson*, 390 F3d at 1148 (resolving ambiguous language by looking to legislative history). However, the split of authority concerns the differing interpretations of the ambiguous terms. The First and Ninth Circuits have squarely held that emotional distress damages are recoverable under former §362(h). *Fleet Mortg. Group, Inc. v Kaneb* (1st Cir 1999) 196 F3d 265, 269; *Dawson*, 390 F3d at 1148. The Sixth Circuit has joined the Seventh in holding that former §362(h) only authorizes compensation for tangible or economic injuries. *U.S. v Harchar* (Bankr ND Ohio 2005) 331 BR 720; *Aiello v Providian Fin. Corp.* (7th Cir 2001) 239 F3d 876, 879.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.39 2. Effect of Discharge on Collection of Judgments

### §12.39 2. Effect of Discharge on Collection of Judgments

Strictly speaking, the discharge does not wipe out a creditor's claim; the claim remains in order to allow the creditor to enforce its rights against third parties or look to insurance coverage. In *Forsyth v Jones* (1997) 57 CA4th 776, 67 CR2d 357, the court held that a creditor may proceed against a discharged debtor solely to recover from the debtor's insurer. Because the discharge did not wipe out the creditor's claim, the debtor could not avail himself of the injunctive relief provided under 11 USC §524. The creditor did not need relief from the 11 USC §524 discharge injunction because it did not apply to such an action. But see *Boyer v Jensen* (2005) 129 CA4th 62, 77, 28 CR3d 124 (limiting *Forsyth* in holding that party should not be able to continue action against debtor in order to reach third party unless it is necessary to join debtor to establish liability against third party) is necessary to establish third party's liability).

The effect of the discharge is to enjoin the collection of the debt. A discharge voids any judgment to the extent that the judgment is a ruling on the debtor's personal liability. The discharge also serves as an injunction against commencing or continuing an action or employing process or any act to collect the debt. 11 USC §524(a). It is intended to enjoin a wide variety of collection practices such as dunning, harassment, and threats of repossession. S 989, 95th Cong, 2d Sess (1978), reprinted in 1978 US Code Cong & Ad News 5787, 5866. Under the BAPCPA amendments, real estate-secured debts under certain circumstances when in rem relief is sought are excepted from discharge. 11 USC §524(j). On entry of discharge, the automatic stay of 11 USC §362 terminates as to the debtor and property of the debtor and is replaced by the discharge injunction. 11 USC §§362(c)(2)(C), 524(a).

The scope of the discharge differs among the various chapters. Although the difference is slighter after the BAPCPA amendments to the Bankruptcy Code, Chapter 13 provides the broadest discharge, with exceptions for such items as domestic support obligations, defaults on claims on which the last payment is due after the end of the Chapter 13 plan, student loans, criminal fines and restitution orders, fraud, luxury goods, and intentional injury torts. 11 USC §1328(a). See §12.16. Although all taxes are dischargeable in Chapter 13, if a tax claim is entitled to priority, it must be paid in full under the Chapter 13 plan, but only if the tax authority files a claim. Under the BAPCPA amendments, a Chapter 13 discharge is delayed until after the plan payments are completed. 11 USC §1328(a).

Even after the BAPCPA amendments, the exceptions to discharge in a Chapter 7 case remain more numerous. See §§12.40-12.47. Consequently, the attorney should discuss Chapter 13 with a debtor who may face dischargeability problems. A Chapter 13 discharge does not include debts incurred by the debtor after the beginning of the case, but it does include postpetition taxes and certain consumer debt, if provided for in the plan.

The scope of a Chapter 7 discharge involves consideration of both 11 USC §523(a), which itemizes the specific debts that are not included in the discharge, and 11 USC §727(c), which defines the circumstances under which the debtor may be denied a discharge entirely (see §12.33). The latter section has no counterpart in Chapter 11 or 13 and may be reason to seek relief under one of those chapters. The discharge is entered automatically by the court after expiration of the time for filing objections under 11 USC §727, *i.e.,* 60 days after the date first set for the meeting of creditors (Fed R Bankr P 4004(a)), unless such objections were filed and are pending (Fed R Bankr P 4004(c)(1)(B)); the debtor is not an individual (corporations, partnerships, and other such entities do not receive a discharge in Chapter 7 (11 USC §727(c)(1); Fed R Bankr P 4004(c)(1)(A)); the debtor has waived the discharge; or there is a pending motion to dismiss the case for substantial abuse under 11 USC §707(b).

**PRACTICE TIP:** Because a backlog in the clerk's office may delay the entry of discharge, counsel may need to request that the discharge be processed promptly. On the other hand, there are instances when counsel may wish to defer entry of the discharge, such as to maintain the automatic stay in effect, to negotiate a reaffirmation agreement, or to move to dismiss the case when circumstances underlying the need for bankruptcy relief have changed. Fed R Bankr P 4004(c)(2).

In Chapter 11, the discharge of an individual debtor must await completion of all plan payments (11 USC §1141(d)(5)(A)), while a corporation's Chapter 11 discharge typically is entered on confirmation of the plan. It is similar in scope to the Chapter 7 discharge because it excludes all debts described in 11 USC §523. It includes debts incurred

after the filing of the petition and before confirmation of the plan. 11 USC §1141(d)(1). No discharge is entered in a Chapter 11 case when the plan provides for the liquidation of all or substantially all of the property of the estate, unless the debtor is an individual who engages in business after consummation of the plan. 11 USC §1141(d)(3).

The debtor may waive the discharge under 11 USC §727(a)(10). The waiver must be in writing and approved by the court.

**NOTE:** The First Circuit has held that emotional distress damages are available for violations of the discharge injunction. *In re Feldmeier* (Bankr D Ore. 2005) 335 BR 807, 813.

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## §12.40 3. Nondischargeable Debts

There are 16 categories of debt that are automatically excluded from the debtor's discharge, and 3 categories that may be excluded if the creditor timely files a complaint to determine the debt to be nondischargeable. See 11 USC §523(a), (c)(1), discussed in §12.51A. (The latter categories are fraud, fiduciary misconduct, and willful and malicious injury.)

The most significant issues that lead to nondischargeability of debt include taxes, fraud and false financial statements, unscheduled creditors, fiduciary misconduct, domestic support obligations, willful and malicious conduct, and student loans. Pursuant to the BAPCPA, exceptions to dischargeable debts also include obligations arising from election fraud, homeowners' association fees, and ERISA loans. 11 USC §523(a).

**NOTE:** In enacting the BAPCPA, Congress actually lowered the limits of debts for incurrence of luxury goods and lengthened the period of incurrence. 11 USC §523(a)(2)(C)(i). Consistent with many provisions of the BAPCPA, both provisions are punitive to debtors.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.41 a. Taxes

### §12.41 a. Taxes

All taxes entitled to priority under 11 USC §507(a)(8) are nondischargeable. 11 USC §523(a)(1). The following are the two most important instances (11 USC §507(a)(8)):

- Income taxes for which a return was last due within 3 years before the filing of the bankruptcy or that were assessed within 240 days of the bankruptcy; and
- Trust fund taxes, such as employee withholding, sales, and use taxes.

In addition, the following taxes are not dischargeable (11 USC §523(a)(1)):

- Taxes for which a return was not filed within two years preceding the bankruptcy; and
- Taxes involving fraud.

In a Chapter 7 or 11 estate in which there are assets, it is recommended that the debtor file a claim on behalf of a tax entity to ensure that a nondischargeable tax is paid. 11 USC §501(a); Fed R Bankr P 3006(a).

It is frequently necessary for the debtor to initiate an adversary proceeding, by filing a complaint to determine the dischargeability of a debt, because the tax authority may not note the discharge on its records or agree that it is applicable to the tax in question. Such a complaint should be filed before the case is closed, although the complaint may be filed after closing without reopening the case. *Menk v Lapaglia (In re Menk)* (BAP 9th Cir 1999) 241 BR 896. Reopening a case is not a jurisdictional prerequisite to filing a postclosing adversary proceeding relating to the dischargeability of a debt.

**PRACTICE TIP:** Counsel should carefully calculate the period of nondischargeability and time the filing of the bankruptcy accordingly because the case cannot be dismissed and refiled if an error is made in the timing. *In re Leach* (BAP 9th Cir 1991) 130 BR 855. Accordingly, it is prudent to obtain a transcript of the debtor's taxes from the taxing authority to determine the exact date of tax assessment and the date that the debtor's return was filed.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.42 b. Fraud and False Financial Statements

### §12.42 b. Fraud and False Financial Statements

In interpreting "actual fraud," the Supreme Court has instructed the courts to look to the common law definition as it was understood in 1978. *Grogan v Garner* (1991) 498 US 279, 112 L Ed 2d 755, 111 S Ct 654.

There is considerable litigation in this area related to credit card debt. To determine fraudulent intent, a court will examine the totality of the circumstances. In *Citibank v Dougherty* (*In re Dougherty*) (BAP 9th Cir 1988) 84 BR 653, the court specified 12 nonexclusive factors for consideration:

(1) The length of time between the charges made and the filing of bankruptcy;
(2) Whether an attorney had been consulted concerning the filing of bankruptcy before the charges were made;
(3) The number of charges made;
(4) The amount of the charges;
(5) The financial condition of the debtor at the time the charges were made;
(6) Whether the charges were above the credit limit of the account;
(7) Whether the debtor made multiple charges on the same day;
(8) Whether the debtor was employed;
(9) The debtor's prospects for employment;
(10) The financial sophistication of the debtor;
(11) Whether there was a sudden change in the debtor's buying habits; and
(12) Whether the purchases were made for luxuries or necessities.

The Ninth Circuit has held that the court is not limited to the 12 *Dougherty* factors and may consider other evidence, such as the debtor's subjective intent. See *Household Credit Servs., Inc. v Ettell (In re Ettell)* (9th Cir 1999) 188 F3d 1141; *Anastas v American Sav. Bank (In re Anastas)* (9th Cir 1996) 94 F3d 1280.

In a decision that greatly expands the scope of the fraud exception, the Supreme Court held that 11 USC §523(a)(2)(A) bars the discharge of all liability arising from fraud, including any punitive damages and attorney fees to which a defrauded plaintiff may be entitled under applicable nonbankruptcy law. *Cohen v De La Cruz* (1998) 523 US 213, 140 L Ed 2d 341, 118 S Ct 1212. Before *Cohen v de la Cruz* the amount of the nondischargeable debt was limited to the creditor's actual out-of-pocket loss. Because the court read 11 USC §523(a)(2) together with other nondischargeability sections, the full amount of the debt will be nondischargeable in those sections as well. *Roussos v Michaelides* (*In re Roussos)* (BAP 9th Cir 2000) 251 BR 86.

Misrepresentations of a debtor's coshareholder will not be imputed to the debtor. *Tobin v Sans Souci Ltd. Partnership (In re Tobin)* (BAP 9th Cir 2001) 258 BR 199. In a partnership, however, an innocent partner's vicarious fraud liability is nondischargeable. *Deodati v M.M. Winkler & Assocs. (In re M.M. Winkler & Assocs.)* (5th Cir 2001) 239 F3d 746 (relying on *Strang v Bradner* (1885) 114 US 555, 29 L Ed 248, 5 S Ct 1038). See also *Tsurukawa v Nikon Precision, Inc.* (*In re Tsurukawa)* (BAP 9th Cir 2002) 287 BR 515.

There is no imputation of fraud based solely on marital status, even when the debtor participated significantly in the nondebtor spouse's business and enjoyed the benefits of the spouse's fraudulent activity in operating the business. *Tsurukawa v Nikon Precision, Inc. (In re Tsurukawa)* (BAP 9th Cir 2001) 258 BR 192. However, when spouses were found to be business partners, an imputation of fraud was appropriate. *Tsurukawa v Nikon Precision, Inc.* (*In re Tsurukawa)* (BAP 9th Cir 2002) 287 BR 515 (appeal after remand).

Further expansion of the fraud exception is occurring in the direction of allowing the creditor to recover its attorney fees incurred in litigating the exception. In *AT&T Universal Card Servs. Corp. v Pham (In re Pham)* (BAP 9th Cir 2000) 250 BR 93, the Bankruptcy Appellate Panel vacated the bankruptcy court's denial of attorney fees and remanded for a determination of whether, under California law, the creditor's card member agreement would support an award of attorney fees in a fraud action based on that agreement.

However, in *Galam v Carmel (In re Larry's Apartment, LLC)* (9th Cir 2001) 249 F3d 832, the Ninth Circuit reversed fees that were awarded as a sanction under an Arizona law providing for attorney fees and damages when a party defends a claim using delay or harassment as a strategy. The court held that the fee award was procedural and thus a

matter of federal law. Similarly, in *Hassen Imports Partnership v KWP Fin. VI (In re Hassen Imports Partnership)* (BAP 9th Cir 2000) 256 BR 916, a Chapter 11 debtor was not entitled to an award of prevailing party's attorney fees under CC §1717 because the issues were governed by federal bankruptcy law. The debtor could not invoke state reciprocity provisions to support a fee award in its favor.

The continued vitality of these decisions is open to debate following the Supreme Court's decision in *Travelers Cas. & Sur. Co. of Am. v PG&E* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199, which held that a creditor was not precluded from filing an unsecured claim for contractual attorney fees merely because the fees sought were incurred litigating issues of federal bankruptcy law (abrogating *In re Fobian* (9th Cir 1991) 951 F2d 1149). The scope of the Supreme Court's decision remains to be determined, and the case was remanded to the Ninth Circuit Court of Appeals for further proceedings. For a discussion of competing arguments, see *Centre Ins. Co. v SNTL Corp. (In re SNTL Corp.)* (BAP 9th Cir 2007) 380 BR 204, aff'd (9th Cir 2009) 571 F3d 826. After the Supreme Court decision in *Travelers*, the California Court of Appeal held that postjudgment fees and costs permitted by California law were recoverable even after dismissal of the bankruptcy case and expiration of the automatic stay. *Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp.* (2008) 170 CA4th 868, 88 CR3d 250.

In the context of litigating divorce issues under Bankruptcy Code §523(a)(15), though, fees are recoverable under a hold harmless provision in the parties' divorce decree. *Renfrow v Draper* (9th Cir 2000) 232 F3d 688.

The manner in which fraud litigation is resolved before a bankruptcy filing may affect the dischargeability of a claim based on fraud. In *Archer v Warner* (2003) 538 US 314, 155 L Ed 2d 454, 123 S Ct 1462, the Supreme Court held that a debt arising from the settlement of a fraud case may be nondischargeable under §523(a)(2)(A) even absent a specific admission of fraud. In *Archer,* the creditors sued the debtors for fraud arising out of the sale of a business. The parties settled, and in the settlement agreement the creditors released the debtors from all rights and claims the creditors had against the debtors, except those arising out of the settlement agreement. The settlement agreement further provided that the parties did not admit any liability or wrongdoing. 538 US at 317, 155 L Ed 2d at 460.

Subsequently, the debtors defaulted on the promissory note issued in connection with the settlement, and filed a bankruptcy case. The creditors sought a judgment declaring the liability under the note nondischargeable pursuant to Bankruptcy Code §523(a)(2)(A).

The Supreme Court found, in essence, that settling a claim based on prepetition fraud without an admission or finding of fraud does not cleanse the resulting debt of the taint of fraud, although the creditor will have to show that fraud was present in the underlying transaction in §523(a)(2)(A) proceedings. The same is true of consent decrees arising out of prepetition stipulations between parties involved in litigation based on allegations of fraud. See *Brown v Felson* (1979) 442 US 127, 60 L Ed 2d 767, 99 S Ct 2205.

A debtor's prebankruptcy stipulation that a particular debt was nondischargeable under 11 USC §523(a)(2)(A) is not binding in the subsequent bankruptcy case. *Hayhoe v Cole (In re Cole)* (BAP 9th Cir 1998) 226 BR 647. The court held that the stipulation was nothing more than a prepetition partial waiver of the debtor's general discharge and that such waivers were unenforceable. The opinion suggests that the result may have been different if the debtor had stipulated to the truth of specific facts that would be sufficient under the doctrine of collateral estoppel to exclude the debt from a future discharge.

**PRACTICE TIP:** A creditor wishing to obtain a prebankruptcy stipulation for nondischargeability should attempt to obtain the debtor's stipulation to the ultimate facts of fraud, which can then be used as collateral estoppel in a nondischargeability action.

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### §12.43 c. Unscheduled Creditors

If a distribution is made to creditors in the bankruptcy case, a debt that has not been scheduled in time for the creditor to file a proof of claim is nondischargeable. 11 USC §523(a)(3)(A). A debt is also not dischargeable if it has not been scheduled in time for the creditor to seek a determination of dischargeability under 11 USC §523(a)(2), (4), or (6). 11 USC §523(a)(3)(B).

It is well settled in the Ninth Circuit that, if a creditor's right to a distribution is not affected because the case is a no-asset case, and no deadline of the filing for proofs of claim was established, the debt is discharged despite the debtor's failure to schedule it. *White v Nielsen (In re Nielsen)* (9th Cir 2004) 383 F3d 922, 925; *Beezley v California Land Title Co. (In re Beezley)* (9th Cir 1993) 994 F2d 1433. See *White v Nielsen (In re Nielsen)* (9th Cir 2004) 383 F3d 922, 925 (reaffirming "established Ninth Circuit law on the effect of failure to list a creditor in a no-assets, no-bar-date Chapter 7 bankruptcy. We previously held in *In re Beezley* that such a failure does not justify revocation of the discharge.… We follow the holding of that opinion and adopt the reasoning of the concurrence"). At least two other circuits have rejected this approach. See *Colonial Sur. Co. v Weizman* (1st Cir 2009) 564 F3d 526 and *In re Stark* (7th Cir 1983) 717 F2d 322.

Similarly, if the debt is not of the kind specified in 11 USC §523(a)(2), (4), or (6), the debt is discharged in a no-asset case despite the debtor's failure to schedule it.

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### §12.44 d. Fiduciary Misconduct

Title 11 USC §523(a)(4) excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Although the general rule is that the creditor bears the burden of proof, the Ninth Circuit has held that, once the creditor establishes that a fiduciary relationship exists, common law principles apply and the burden shifts to the debtor to account for the property entrusted to the debtor by the creditor. The debtor-fiduciary has the burden of establishing that the defalcation did not occur. *Auto v Niles (In re Niles)* (9th Cir 1997) 106 F3d 1456.

To establish fiduciary capacity, the creditor must prove the existence of an express or technical trust, as distinguished from a trust that is imposed by law as a remedy, also known as a trust *ex maleficio.* Whether a relationship is a fiduciary one within the meaning of 11 USC §523(a)(4) is an issue of federal law. *Lewis v Scott (In re Lewis)* (9th Cir 1996) 97 F3d 1182. The determination hinges on whether the requisite trust relationship exists under state law. *Abrams v Sea Palms Assocs. (In re Abrams)* (BAP 9th Cir 1999) 229 BR 784, aff'd (9th Cir 2000) 242 F3d 380. For example, in *Ragsdale v Haller* (9th Cir 1986) 780 F2d 794, the court ruled that, although California statutory law did not impose a fiduciary duty between partners, California *case* law did impose such a duty, making partners fiduciaries within the meaning of 11 USC §523(a)(4). And in *Lovell v Stanifer (In re Stanifer)* (BAP 9th Cir 1999) 236 BR 709, involving a suit by a debtor's former wife to except from discharge a debt owed to her as a result of the debtor's failure to pay her a portion of his pension benefits, the court held that the California Family Code and California case law impose a fiduciary duty on spouses and former spouses with regard to community property within the narrow meaning of 11 USC §523(a)(4).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.45 e. Debts for Support or Arising From Divorce or Separation

### §12.45 e. Debts for Support or Arising From Divorce or Separation

Debts for a domestic support obligation are not dischargeable. 11 USC §523(a)(5). Other debts to a spouse, former spouse, or child of the debtor incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other court order are also not dischargeable. 11 USC § 523(a)(15). Thus, the former distinction between the dischargeability of debts arising from a division of property and the nondischargeability of support payments has been eliminated. In addition, BAPCPA eliminated the exception in 11 USC §523(a)(15) which permitted a judge to render nonsupport obligations dischargeable on a finding of inability to pay. BAPCPA also added to the Bankruptcy Code a definition of "domestic support obligation." The term is defined as a debt "[o]wed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian or responsible relative; or a governmental unit … in the nature of alimony, maintenance or support." 11 USC §101(14A). In addition to being nondischargeable, domestic support obligations have first priority in right of payment from the estate and are entitled to certain other protections. See, *e.g.,* 11 USC §§507(a)(1), 1112(b)(4)(P), 1129(a)(14).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.46 f. Willful and Malicious Conduct

### §12.46 f. Willful and Malicious Conduct

Any debt resulting from willful and malicious injury by the debtor to another entity or to the property of another entity may not be discharged. 11 USC §523(a)(6) (overruling *Tinker v Colwell* (1904) 193 US 473, 48 L Ed 754, 24 S Ct 505). But a debtor's reckless or negligent misconduct does not come within the dischargeability exception, even if the debtor performed the act intentionally. To be nondischargeable, the debtor must intend to cause injury. *Kawaauhau v Geiger* (1998) 523 US 57, 140 L Ed 2d 90, 118 S Ct 974. *Kawaauhau* represents a major change to the law previously in effect in the Ninth Circuit, which did not require evidence of intent to injure for the debt to be nondischargeable under 11 USC §523(a)(6). Instead, it was sufficient if the debtor intended to commit the act that caused the injury. *Impulsora del Territorio Sur, S.A v Cecchini (In re Cecchini)* (9th Cir 1986) 780 F2d 1440, overruled by *Kawaauhau v Geiger* (1998) 523 US 57, 140 L Ed 2d 90, 118 S Ct 974. In holding that recklessly or negligently inflicted injuries do not rise to intentional tort status, *Kawaauhau* left open the issue of the level of intent required for nondischargeability of intentional torts. In *Baldwin v Kilpatrick (In re Baldwin)* (BAP 9th Cir 2000) 245 BR 131, aff'd (9th Cir 2001) 249 F3d 912, the Bankruptcy Appellate Panel adopted the analysis of *Miller v J.D. Abrams, Inc. (In re Miller)* (5th Cir 1998) 156 F3d 598, 606, cert denied (1999) 526 US 1016:

> We hold that the label "intentional tort" is too elusive to sort intentional acts that lead to injury from acts intended to cause injury. Rather, either objective substantial certainty or subjective motive meets the Superior Court's definition of "willful … injury" in §523(a)(6).

See also *Markowitz v Campbell (In re Markowitz)* (6th Cir 1999) 190 F3d 455.

In *Petralia v Jerchich (In re Jerchich)* (9th Cir 2001) 238 F3d 1202, the Ninth Circuit rejected the argument that *Kawaauhau v Geiger, supra,* requires a showing by the plaintiff that the debtor had the specific intent to cause the injury. A plaintiff can show that the injury was "willful" by proving either that the debtor desired the injury or that the debtor acted deliberately with the knowledge that the act was substantially certain to cause injury. In *Su v Carillo (In re Su)* (BAP 9th Cir 2001) 259 BR 909, aff'd (9th Cir 2002) 290 F3d 1140, the court held that under *Jerchich,* application of an objective standard does not meet the *Kawaauhau* test of willfulness. To prevail, the creditor must show that the debtor actually believed that its conduct was substantially certain to cause injury. See *Nahman v Jacks (In re Jacks)* (BAP 9th Cir 2001) 266 BR 728, 741 (noting that *Su* explicitly adopted Restatement's subjective standard and rejected objective standard of *Miller*).

In *Peklar v Ikerd (In re Peklar)* (9th Cir 2001) 260 F3d 1035, a judgment for conversion under California law did not, without more, establish that the debtor committed a willful and malicious injury. The conversion judgment established only that the debtor engaged in the wrongful exercise of dominion over the plaintiff's property, and that the debtor's act was knowingly or intentionally done, but it did not necessarily follow that the resulting injury was willful and malicious. See also *Lee-Benner v Gergely (In re Gergely)* (9th Cir 1997) 110 F3d 1448 (medical malpractice not willful and malicious injury and therefore is dischargeable).

**NOTE:** The Ninth Circuit analyzes the willful and malicious prongs of the dischargeability test separately. *Jett v Sicroff (In re Sicroff)* (9th Cir 2005) 401 F3d 1101, as amended, 2005 US App Lexis 5919 (9th Cir, Apr. 11, 2005, No. 03-15610), cert denied (2005) 545 US 1139, 162 L Ed 2d 888, 125 S Ct 2964 (court did not address willfulness issue under *Kawaauhau v Geiger, supra,* because debtor explicitly conceded that behavior was "willful and intentional"). An injury is malicious, as that term is used in §523(a)(6), when it is: (1) a wrongful act, (2) done intentionally, (3) that necessarily causes injury, and (4) done without just cause or excuse. Thus, it is clear that it is the wrongful act that must be committed intentionally, rather than the injury itself. Further, the court confirmed that the "just cause and excuse" element survives in the Ninth Circuit after the Supreme Court's opinion in *Kawaauhau v Geiger, supra*; *Jett v Sicroff, supra.*

In *Lockerby v Sierra* (9th Cir 2008) 535 F3d 1038, the court held that an intentional breach of contract does not qualify for the "willful and malicious injury" dischargeability exception of §523(a)(6) unless it involves conduct that constitutes a tort under state law.

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### §12.47 g. Student Loans

A student loan or benefit may be discharged only if it constitutes undue hardship. 11 USC §523(a)(8). In *Rifino v U.S. (In re Rifino)* (9th Cir 2001) 245 F3d 1083, the Ninth Circuit affirmed the district court's reversal of the bankruptcy court's finding of "undue hardship." The court held that, while the bankruptcy court was correct in finding that the Chapter 7 debtor's standard of living would fall below a minimal level if she were required to repay her student loans, the court erred in finding that her state of affairs was likely to persist for a significant portion of the student loan's repayment period.

Before October 7, 1998, government-funded education loans could be discharged if the debtor's repayment obligation first became due more than 7 years before the date of the filing of the petition. As a result of changes made by Congress, it is no longer possible to discharge a student loan in such a manner. The elimination of the "seven-year rule" applies to all cases beginning after October 7, 1998. Pub L 105-244, §971(a), 112 Stat 1837.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.48 K. Revocation of Discharge

## §12.48 K. Revocation of Discharge

The following are grounds for revoking a discharge (11 USC §727(d)):

- The discharge was obtained through fraud by the debtor, and the party requesting the discharge did not know of the fraud at the time of the discharge;
- The debtor became entitled to property or acquired property that would be the property of the estate and knowingly and fraudulently failed to report it or to deliver or surrender the property to the trustee;
- The debtor failed to satisfactorily explain a material misstatement in an audit to the United States Trustee; or
- The debtor failed to obey a lawful court order.

For the first ground, the revocation must be sought within 1 year after the discharge was granted; for the second or third ground, the revocation must be sought by the later of either the date the case was closed or 1 year after the discharge was granted. These time limits are strictly construed, and the doctrine of equitable tolling is not allowed to excuse the untimely filing of a complaint to revoke discharge. *Towers v Boyd (In re Boyd)* (ND Cal 2000) 243 BR 756 (debtor's fraud in concealing an asset did not give trustee reason to file complaint to revoke discharge more than 1 year after case closed because doctrine of equitable tolling is inconsistent with text of statute).

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## IV. REPRESENTING UNSECURED CREDITORS IN BANKRUPTCY CASE

### A. Offensive Tactics

### §12.49 1. Creditor's Choices

A debtor who commences a bankruptcy proceeding poses serious problems for the creditor and the creditor's attorney. The creditor may wish to move quickly to preserve its position by (a) refusing performance under an unexecuted or a partly executed contract, (b) seizing goods delivered but not paid for, or (c) insisting on cash payment for the goods.

The protection afforded by the Bankruptcy Code, however, may preclude any or all of these actions. The automatic stay (11 USC §362(a)), for example, may be violated if the creditor stops goods in transit, which Com C §2702(1) and (3) otherwise permits.

The creditor must use the remedies available under the Bankruptcy Code, including motions under 11 USC §503(a) and (b)(9), reclamation under 11 USC §546(c) (see §12.54), proof of claim (see §12.55), examination of the debtor (Fed R Bankr P 2004-2005), participation at the meeting of creditors (see Fed R Bankr P 2003; §12.53), and negotiation with the trustee.

The creditor may also object to discharge or the dischargeability of its debt (11 USC §§523(c), 727(c)(1); Fed R Bankr P 4001-4008; see §12.36), ask for reaffirmation (see §12.32), or seek revocation of the debtor's discharge (see §12.48).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.50 2. Notice and Hearing [Deleted]

## §12.50 2. Notice and Hearing [Deleted]

This section has been deleted.

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## §12.51 3. Complaint to Determine Dischargeability and Objection to Discharge

A complaint to obtain a determination of the dischargeability of a debt or an objection to discharge must be raised through an adversary proceeding governed by the Federal Rules of Bankruptcy Procedure 7001-7087. The scope of relief differs considerably between the two types of action. A complaint to obtain a determination of the dischargeability of a debt seeks to exclude only the particular creditor's claim from the discharge. 11 USC §523. The debtor's discharge will otherwise be granted, subject to the resolution of the adversary proceeding. See §12.51A. On the other hand, an objection to a discharge seeks to block the debtor's discharge entirely, *i.e.,* no debts will be discharged. 11 USC §727. See §12.51B.

**PRACTICE TIP:** The decision to file a complaint to obtain a determination of the dischargeability of a debt or a complaint objecting to a discharge must be taken very seriously and the practical advantages must be weighed. Whereas a §523(a) dischargeability action benefits only the creditor filing the complaint, a §727(a) discharge action benefits all creditors. Thus, the creditor cannot unilaterally move to dismiss a complaint objecting to discharge, but must obtain court approval after notice to all creditors. Also, a debtor is entitled to be compensated for emotional distress suffered as a result of the creditor's violation of the discharge injunction. See *In re Feldmeier* (Bankr D Ore. 2005) 335 BR 807, 812; *Davis v Par Wholesale Auto, Inc. (In re Tucker)* (Bankr D Ariz. 2005) 329 BR 291.

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### §12.51A a. Complaint to Determine Dischargeability

A creditor is required to file a complaint to determine the dischargeability of a debt if the claim is based on the debtor's false statements, fraud, fiduciary misbehavior, or willful and malicious injury to another entity or property. 11 USC §523(a)(2), (4), (6). See §12.40. For purposes of Chapter 7, 11, and 13 proceedings, the complaint must be filed within 60 days following the first date set for meeting the creditors under 11 USC §341. Fed R Bankr P 4007(c). In contrast to objections to exemptions, a continuance or other postponement of the 341 meeting does not extend the deadline. *Kelly v Gordon (In re Gordon)* (BAP 9th Cir 1993) 988 F2d 1000.

**PRACTICE TIP:** There are helpful tools provided by the Bankruptcy Code and Rules to assist in determining the dischargeability of a debt. Counsel should consider attending the §341 meeting of creditors to question the debtor regarding his or her conduct. Also, examinations under Fed R Bankr P 2004 are frequently used to conduct discovery before filing the adversary proceeding. Should counsel need more time, an extension of the 60-day deadline is available, but that motion must be made before the expiration of the period. Fed R Bankr P 4007(c). Because the decision to grant the extension is discretionary, counsel must move promptly, given that the 60-day deadline is not tolled while the extension is being sought. Moreover, "excusable neglect" is not available to a creditor seeking relief from the 60-day deadline. See *Kelly v Gordon, supra*; Fed R Bankr P 9006(b)(3).

In actions in which the filing of a complaint by the creditor is not required by 11 USC §523(c), frequently the debtor may find it necessary to commence the dischargeability of a debt action. This is particularly true when taxes are owed because the tax entity often proceeds to collect the debt and not recognize the discharge. The debtor may file the complaint at any time; a case may be reopened for the purpose of filing such a complaint. It is considered advantageous to bring the issue of the dischargeability of a tax claim before the bankruptcy court if counsel is unable to achieve a satisfactory resolution with the tax collector's agent. The matter will probably then be assigned to the tax collector's counsel, who may be more conversant with dischargeability issues. Also, the court provides a ready forum for resolving the dispute. However, counsel should keep in mind the issues of sovereign immunity discussed in §§12.5A-12.5C if the suit is to be filed against a state taxing authority.

Counsel should be mindful that a motion for relief from stay or the remand of a pending state court suit is not a substitute for the timely filing of a dischargeability complaint. Although a creditor may obtain leave of the court to have the claim liquidated in another forum, the creditor is not relieved of the obligation to file a dischargeability action in the bankruptcy court. *Schmidt v Goscicki (In re Goscicki)* (BAP 9th Cir 1997) 207 BR 893, aff'd (9th Cir 1998) 162 F3d 1168, cert denied (1998) 526 US 1099.

The Supreme Court upheld a bankruptcy court's award of attorney fees in a §523(a)(2) proceeding when the award was based on a state statute. *Cohen v de la Cruz* (1998) 523 US 213, 140 L Ed 2d 341, 118 S Ct 1212. Ninth Circuit decisions have also awarded attorney fees to successful plaintiffs in dischargeability actions. See *AT&T Universal Card Servs. Corp. v Pham (In re Pham)* (BAP 9th Cir 2000) 250 BR 93 (bankruptcy court's denial of attorney fees vacated); *Younie v Gonya (In re Younie*) (BAP 9th Cir 1997) 211 BR 367, aff'd (9th Cir 1998) 163 F3d 609 (allowing attorney fees for damages that flowed from debtor's intentional misrepresentation); *Ford v Baroff (In re Baroff)* (9th Cir 1997) 105 F3d 439 (partial attorney fees awarded based on settlement agreement as contract authorizing attorney fees to prevailing party).

However, attorney fees are not available if the dischargeability action is not one in which fees would be awarded under state law. *Redwood Theaters, Inc. v Davison (In re Davison)* (BAP 9th Cir 2003) 289 BR 716, 723 (if bankruptcy court did not need to determine whether contract was enforceable, dischargeability claim not an action on contract under CC §1717); *American Express Travel Related Servs. Co. Inc. v Hashemi (In re Hashemi)* (9th Cir 1996) 104 F3d 1122, cert denied (1997) 520 US 1230.

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### §12.51B b. Objection to Discharge

The grounds for an objection to a discharge are enumerated in 11 USC §727(a). The relief being sought is much broader in scope than a complaint to determine dischargeability, because the debtor will discharge none of his or her debts if the creditor prevails.

In a Chapter 7 case, there is a 60-day deadline for filing the objection. See Fed R Bankr P 4004(a). However, the debtor forfeits the right to rely on the 60-day time limitation if the debtor does not raise it before the bankruptcy court reaches the merits of the creditor's objection to discharge. *Kontrick v Ryan* (2004) 540 US 443, 157 L Ed 2d 867, 124 S Ct 906. In a Chapter 11 case, the suit objecting to discharge may be brought at any time up to the confirmation hearing. *Dominguez v Miller (In re Dominguez*) (9th Cir 1995) 51 F3d 1502.

Because a Chapter 11 discharge is extremely broad, an objection to discharge action will be appropriate in a Chapter 11 case only when the plan provides for liquidation. Otherwise, the debtor will receive a discharge. To successfully deny a Chapter 11 debtor a discharge, the following elements must be established (11 USC §1141(d)(3); *Williams v U.S. (In re Williams)* (D RI 1998) 227 BR 589):

- The debtor is not an individual;
- The debtor does not engage in business after confirmation of the plan; and
- The debtor is guilty of the conduct described in 11 USC §727(a).

In addition, when the debtor is an individual, confirmation of a reorganization plan does not discharge him or her until the court grants a discharge on completion of all payments under the plan. 11 USC §1141(d)(5)(A). However, the court may, after notice and hearing, grant a discharge to an individual debtor who has not completed payments under the plan if the value of the payment actually distributed is not less than what would have been distributed if the debtor had been liquidated under Chapter 7 and modification of the plan under 11 USC §1127 is not practicable. 11 USC §1141(d)(5)(B).

Furthermore, the individual debtor will receive a discharge only if after notice and hearing not more than 10 days before the date of entry of the order granting the discharge, the court further finds that there is no reason to believe that 11 USC §522(q)(1) (dealing with felony convictions that demonstrate the filing of the Chapter 11 petition was abuse of Title 11) is applicable to the debtor and that no proceeding is pending regarding securities law violations or criminal acts, intentional torts, or reckless misconduct that caused serious physical injury or death. 11 USC §1141(d)(5)(C).

Finally, a corporate debtor is not discharged from any debt for a tax or custom duty for which the debtor made a fraudulent return or willfully attempted to evade, or from a debt for money obtained by false pretenses or using a false written statement owed to a governmental unit or to any person as a result of an action filed under 31 USC §3721 (claims against United States government for damages to property or person) or any similar state statute.

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### §12.52 4. Involuntary Bankruptcy

Occasionally, it may be to a creditor's benefit to have a debtor file bankruptcy. If the debtor does not appear likely to do so voluntarily, the creditor may wish to file an involuntary petition.

A creditor should be cautioned to consider seriously the risks to filing an involuntary petition. If the involuntary petition is unsuccessful, the court may enter a judgment against the creditor for the debtor's costs and attorney fees. In certain circumstances, the court may also award the debtor additional damages, including punitive damages. 11 USC §303(i). In exercising its broad discretion under §303(i) to award costs and fees, the court must consider the totality of the circumstances, including the relative culpability and the motives of the individual petitioners. *Michael N. Sofris, APC v Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.)* (9th Cir 2009) 556 F3d 742. In *Adell v John Richards Homes Bldg. Co., LLC (In re John Richards Homes Bldg. Co., LLC)* (6th Cir 2006) 439 F3d 248, the court awarded $4.1 million in compensatory damages, an additional $2 million in punitive damages, and approximately $300,000 in attorney fees against a creditor that filed an involuntary petition in bad faith. Further, the Ninth Circuit has held that §303(i) completely preempts state law tort causes of action for damages predicated on the filing of an involuntary bankruptcy petition. *Miles v Okun (In re Miles)* (9th Cir 2005) 430 F3d 1083, 1091. Once filed, moreover, an involuntary petition can be dismissed only after notice to all creditors and a hearing. 11 USC §303(j). An interim trustee, whose interests differ from the creditor's, may be appointed. 11 USC §303(g).

If the involuntary petition contains false or fraudulent statements, the debtor is an individual, and the petition is dismissed, the court on motion by the alleged debtor must seal all records and all references to the petition. 11 USC §303(*l*)(1). Further, the court may enter an order prohibiting all consumer reporting agencies from making any reports containing any information relating to the petition. On motion of the debtor, the court, after the lapse of a prescribed period of time, also may expunge any records relating to the petition. 11 USC §303(*l*)(3).

The creditor should file an involuntary petition only if a specific benefit can be obtained that would be unavailable except for the bankruptcy. For example, if the creditor suspects another creditor received a preference (see 11 USC §547; see also §§12.65-12.65G), the creditor may wish to file an involuntary petition before expiration of the preference period, to permit the preference to be recovered as part of the bankruptcy estate. The debtor may be refraining from filing bankruptcy because of the timing issues discussed in §12.12.

A creditor who wishes to file an involuntary petition must find two other creditors to join in the petition unless the debtor has fewer than 12 creditors. 11 USC §303(b). Also, the debts owed the petitioner must total at least $13,475 and be noncontingent and undisputed. The burden is on the petitioning creditors to show that no bona fide dispute exists. *In re Rubin* (9th Cir 1985) 769 F2d 611, 615. The bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute concerning the validity of the debt. *In re Vortex Fishing Sys., Inc.* (9th Cir 2002) 277 F3d 1057, 1064. BAPCPA amended §303(b) to specify that the claims of the petitioning creditors must be claims not subject to a bona fide dispute concerning either liability or amount. Therefore, it is unclear whether prior case law such as *Chicago Title Ins. Co. v. Seko Inv., Inc. (In re Seko Inv., Inc.)* (9th Cir 1998) 156 F3d 1005, cert denied (1999) 526 US 1066, and *Focus Media, Inc. v NBC (In re Focus Media, Inc.)* (9th Cir 2004) 378 F3d 916 remains valid. See *In re Bimini Island Air, Inc.* (Bankr SD Fla 2007) 370 BR 408.

Except when a trustee or receiver has already been appointed under state law to take possession of the debtor's property, a creditor must prove that the debtor is generally not paying debts as they become due. 11 USC §303(h). In *Basin Elec. Power Coop. v Midwest Processing Co.* (8th Cir 1985) 769 F2d 483, cert denied (1986) 474 US 1083, the court held that filing a one-creditor involuntary petition, knowing that there are more than 12 creditors, constitutes bad faith and subjects the creditor to punitive damages. See also *In re Kidwell* (Bankr ED Cal 1993) 158 BR 203 (punitive damages awarded, but petition not dismissed, declining to adopt bar-to-joinder doctrine).

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### §12.53 5. Creditors' Committees

A debtor who files for relief under Chapter 11 must also file a list of the debtor's 20 largest unsecured creditors, excluding insiders. See 11 USC §101(31). From this list, the United States Trustee will solicit creditors to serve on a creditors' committee. 11 USC §1102(a)(1). Ideally, the committee will have between 7 and 11 members and will consist of creditors with a variety of claims that are representative of those held by creditors in general. Often, there are not enough interested creditors to meet the 7-member minimum. If so, a creditor interested in sitting on the committee should ask to be appointed even though it was not solicited. In addition, any party in interest may request that the court order the United States Trustee to change the membership of a committee. The court will order the change if it determines that the change is necessary to ensure adequate representation of creditors or equity security holders. 11 USC §1102(a)(4). When the committee is filled to capacity, however, interested creditors are often permitted to attend as ex officio members. If the interests of a group of creditors appear unlikely to be represented adequately, the court may order additional committees to be appointed. 11 USC §1102(a)(2). At the request of a party in interest, the court may order the Trustee to change the membership of the committee to assure adequate representation of creditors. 11 USC §1102(a)(4).

Usually, a creditor will not want to take the time and trouble to sit on a creditors' committee. Although a creditor cannot be compensated for the time in doing so, he or she may be reimbursed for out-of-pocket expenses. 11 USC §503(b)(3)(F). Also, as a committee member, the creditor is a fiduciary for the creditors in general and will be expected to act in their interests, not only for the creditor's own benefit.

There are, however, some advantages to sitting on a creditors' committee. An active committee can influence the outcome of a Chapter 11 case. The committee is entitled to hire an attorney and an accountant, who are paid by the estate. The committee is expressly directed to consult with the debtor on the administration of the case and to participate in formulating a plan. 11 USC §1103(c). The committee will have greater access to information and will frequently be listened to with more interest by the court than will an individual creditor. When it appears important to a creditor's recovery that the Chapter 11 case develop in a particular way, it may be worth the creditor's trouble to serve on a committee.

The court may dispense with a committee in a case in which the debtor is a small business debtor. 11 USC §1102(a)(3). "Small business debtor" is defined in 11 USC §101(51D) as a person engaged in business (other than one that primarily owns and operates real estate) whose debts do not exceed $2 million.

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### §12.54 6. Reclamation

When a creditor has sold goods to a debtor just before the debtor files a bankruptcy petition, the creditor may be able to recover the goods by acting promptly. 11 USC §546(c). Section 546(c) is similar but not identical to Com C §2702, which provides remedies to a seller on discovering a buyer's insolvency.

"Insolvent," as used in 11 USC §546(c), refers to the definition of insolvent in 11 USC §101(32), rather than to the definition in Com C §1201. Therefore, a seller seeking to reclaim goods must show the debtor's balance sheet insolvency, not merely that the debtor has ceased to pay debts. *Ametek, Inc. v Storage Technol. Corp. (In re Storage Technol. Corp.*) (D Colo 1985) 48 BR 862.

The creditor must demand in writing the return of the goods within 45 days after the debtor receives them. 11 USC §546(c)(1)(A). If the 45-day period expires after the date the case was begun, the reclaiming seller has 20 days after the case commences to make the written demand. 11 USC §546(c)(1)(B); *Davis v Par Wholesale Auto, Inc. (In re Tucker)* (Bankr D Ariz. 2005) 329 BR 291. Even a seller that fails to provide statutory notice may assert a priority claim under 11 USC §503(b)(9) for the value of the goods received by the debtor within 20 days before the case commences. 11 USC §546(c)(2). The trustee or debtor in possession may return the goods to the creditor, following notice and a hearing (and with the creditor's consent), to offset the price of the goods against the creditor's claim. 11 USC §546(g). The entitlement to a priority claim under 11 USC §503(b)(9) is available to secured as well as unsecured creditors but, unlike most administrative claims, it is subject to setoff against other prepetition obligations. *In re Brown & Cole Stores, LLC* (BAP 9th Cir 2007) 375 BR 873.

Property converted by the bankrupt, held by the bankrupt as trustee, or obtained fraudulently may be recovered by the rightful creditor in a reclamation proceeding. *Murphy v John Hofman Co.* (1909) 211 US 562, 53 L Ed 327, 29 S Ct 154; *Bank of Cal. v Brainard* (9th Cir 1925) 3 F2d 3; *In re Oswegatchie Chem. Prods. Co.* (2d Cir 1922) 279 F 547, cert denied sub nom *Abbott Factory v Bancroft* (1922) 259 US 580.

Reclamation proceedings are adversary proceedings. The complaint should be filed as early as possible, and the property to be reclaimed must be positively identified. The costs in a reclamation proceeding to recover property in the possession of the bankrupt may be imposed on the bankrupt's estate when the claimant is successful. Fed R Bankr P 7001, 7054(b). The creditor's right to reclaim may be defeated by the debtor's resale of the goods to third persons.

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### §12.55 7. Proofs of Claim

The unsecured creditor should file a proof of claim (see 11 USC §501) promptly, unless the case has been noticed as a "no asset" case under Fed R Bankr P 2002(e), which provides that the notice of the meeting of creditors may tell creditors not to file claims. The creditor should not file a proof of claim when the creditor anticipates a counterclaim from the debtor. If the creditor files a proof of claim, the debtor will have a ready forum for filing the counterclaim, and the creditor will be deemed to have waived the right to a jury trial.

A proof of claim is deemed allowed unless a party in interest objects under 11 USC §502(a); the claim constitutes *prima facie* evidence of its validity and amount. Fed R Bankr P 3001(f). It is therefore unnecessary for the creditor to take further action after filing the claim unless and until an objection is made. On objection, the proof of claim provides "some evidence as to its validity and amount" and is strong enough to carry over a mere formal objection without more. *Wright v Holm (In re Holm)* (9th Cir 1991) 931 F2d 620, 623. The objecting party has the burden of producing evidence sufficient to negate one or more of the sworn facts in the proof of claim, in which case the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. *Lundell v Anchor Constr. Specialists, Inc. (In re Lundell)* (9th Cir 2000) 223 F3d 1035. Counsel should therefore take care in the preparation of the proof of claim form. Although the form appears fairly simple, and experienced creditors routinely prepare and file their own claims, there are many subtleties involved and the attorney should oversee the process, looking ahead to a possible objection and the burden of proof.

There is no statutory deadline for filing proofs of claim in Chapter 11 cases; if no local rule exists to set a deadline, the court sets a deadline appropriate to the case. Fed R Bankr P 3003(c)(3). In Chapter 7 and Chapter 13 cases, a creditor must file within 90 days after the first date set for the meeting of creditors unless the court extends the time. Fed R Bankr P 3002(c).

Deadlines for filing claims are strictly enforced. Tardiness is a ground for disallowance of a claim, except as provided in 11 USC §726(a)(1), (2), or (3). 11 USC §502(b)(9). In Chapter 7 and Chapter 13 cases, the court has only limited discretion to extend the deadline for filing proofs of claim. Fed R Bankr P 9006. Any claim whose proof is filed after the deadline may be time-barred under a Chapter 7 liquidation until all timely filed nonpenalty claims have been fully paid. 11 USC §726(a)(3).

If a request for an extension of time to file a proof of claim is made *before* the deadline, the bankruptcy court may grant the request on a showing of cause. If the request is made *after* the deadline, the request can be granted only on a showing of excusable neglect. *Dix v Johnson (In re Dix)* (BAP 9th Cir 1988) 95 BR 134. The court in *Dix* stated that excusable neglect should be liberally construed to avoid precluding trial of a claim on its merits. The court listed five factors to consider in deciding whether there was excusable neglect (95 BR at 138):

- Whether granting the delay will prejudice the debtor;
- The length of the delay and its impact on efficient court administration;
- Whether the delay was beyond the reasonable control of the person whose duty it was to perform;
- Whether the creditor acted in good faith; and
- Whether clients should be penalized for their counsel's neglect.

The claim of excusable neglect must be substantiated and weighed against the prejudice to the debtor and the other creditors caused by the delay.

The factors outlined above were approved by the United States Supreme Court in *Pioneer Inv. Servs. Co. v Brunswick Assocs. Ltd. Partnership* (1993) 507 US 380, 123 L Ed 2d 74, 113 S Ct 1489, for the purpose of determining excusable neglect. The Court also held that neglect can include an inadvertent or even a negligent omission. The creditors in *Pioneer* relied on their lawyer to file their proof of claim, but the lawyer missed the bar date, even though the notice was in both the lawyer's and the clients' files. Emphasizing the lack of prejudice to the debtor and the other creditors, the Court allowed the late claim. The 5-4 decision included a substantial dissent.

To ameliorate the harshness of the rules on filing proofs of claim, some courts allow an informal proof of claim, *i.e.,* some form of predeadline communication with the bankruptcy trustee by which the creditor can be deemed to have

made a timely informal proof of claim that can later be amended or perfected by filing a proper proof of claim. The case of *Dicker v Dye (In re Edelman)* (BAP 9th Cir 1999) 237 BR 146 is illustrative: The Northridge earthquake prevented counsel from gaining access to his office on the last day to file a proof of claim. He had previously telephoned the United States Trustee to discuss his client's claim. The late claim was disallowed because there was no writing that brought the claim to the attention of the court, the court explaining that it was not necessary for the attorney to have filed a formal proof of claim; he instead could have written a letter or filed some other form of written document. See also *Sambo's Restaurants, Inc. v Wheeler (In re Sambo's Restaurants, Inc.)* (9th Cir 1985) 754 F2d 811 (lawsuit brought in violation of automatic stay deemed sufficient to establish informal claim); *County of Napa v Franciscan Vineyards, Inc. (In re Franciscan Vineyards, Inc.)* (9th Cir 1979) 597 F2d 181, cert denied (1980) 445 US 915 (county sent letter enclosing tax bills to bankruptcy trustee before deadline). See also affirmation of the rule of liberality in amendments in *Franciscan Vineyards.*

To qualify as an informal claim, a document must "state an explicit demand showing the nature and amount of the claim against the estate," and "evidence an intent to hold the debtor liable." *In re Holm* (9th Cir 1991) 931 F2d 620, 622, quoting *In re Anderson-Walker Indus., Inc.* (9th Cir 1986) 798 F2d 1285, 1287.

The proof of claim must be sent to the clerk of the bankruptcy court where the case is pending. Fed R Bankr P 5005(a). However, when the creditor's attorney erroneously sent the claim to the United States Trustee, and the trustee returned it to the attorney rather than forwarding it to the court as the trustee was required to do (see Fed R Bankr P 5005(c)), the claim was considered to be timely filed when the trustee first received it. *Hi-Tech Communications Corp. v Poughkeepsie Bus. Park, LLC (In re Wheatfield Bus. Park, LLC)* (BAP 9th Cir 2004) 308 BR 463.

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### §12.56 8. Trustees and Examiners

In a Chapter 11 case, it is presumed that the debtor will keep control and possession of the debtor's property after the petition has been filed, becoming what is known as a debtor-in-possession. A creditor who doubts the debtor's honesty, competence, or incentive to formulate a reorganization plan in a reasonable time may find this option inappropriate. In that event, the creditor's remedy is to move for the appointment of a trustee. See 11 USC §1104(a). In addition, the United States Trustee is required to move for the appointment of a trustee if there are reasonable grounds to suspect that the debtor's chief officers or governing body or those who selected the governing body participated in fraudulent or dishonest conduct. 11 USC §1104(e).

If the court does not appoint a trustee, the creditor may request appointment of an examiner to investigate the debtor. 11 USC §1104(c). The criterion for appointment is whether it is in the creditors' interest. 11 USC §1104(c)(1).

In *Beck v Fort James Corp. (In re Crown Vantage, Inc.)* (9th Cir 2005) 421 F3d 963, 970, the Ninth Circuit held that a liquidating trustee appointed pursuant to a confirmed Chapter 11 plan, just as a bankruptcy trustee, cannot be sued in another forum without the permission of the bankruptcy court in which the Chapter 11 case was pending.

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### §12.57 9. Setoff

Occasionally, a creditor holds property of the debtor, such as a security deposit or a bank account, against which the creditor is entitled to set off claims under state law. This right is preserved by the Bankruptcy Code. 11 USC §553. Under setoff, mutual debts cancel each other. These debts may arise either from separate transactions or a single transaction, but they must be incurred before the filing of the bankruptcy petition. See 11 USC §553(a). Once a bankruptcy case is filed, the automatic stay (see §§12.35-12.38) prohibits a creditor from exercising this right of setoff. The creditor, however, is not required to turn the property over to the debtor unless the debtor gives the creditor adequate protection for the creditor's claim. 11 USC §363. A creditor in this situation can take the offensive by seeking relief from the automatic stay or waiting for the debtor to file a request that the property be turned over.

Although the automatic stay generally prevents a creditor from setting off mutual prepetition debts, the creditor can nevertheless institute an administrative freeze and refuse to pay its obligation to the debtor in order to maintain the status quo and preserve the creditor's rights under 11 USC §506(a) as a secured creditor entitled to adequate protection. *Citizens Bank of Md. v Strumpf* (1995) 516 US 16, 20, 133 L Ed 2d 258, 264, 116 S Ct 286. See also *Bank of America v Edgins (In re Edgins)* (BAP 9th Cir 1984) 36 BR 480 (bank's administrative freeze of account does not violate stay). Moreover, under BAPCPA, a number of additional exemptions to the automatic stay provisions of 11 USC §362(a) were enacted, many designed to give protection to participants in financial transactions. See 11 USC §362(b)(27).

A creditor with a claim entitled to setoff does not lose its setoff rights by failing to file a proof of claim before confirmation of the debtor's plan. See *Carolco Television, Inc. v National Broadcasting Co. (In re De Laurentiis Entertainment Group, Inc.)* (9th Cir 1992) 963 F2d 1269, cert denied (1992) 506 US 918. The court held that the creditor's right of setoff survived the debtor's discharge under 11 USC §1141 because 11 USC §553 takes precedence over §1141. But see *U.S. v Arkison (In re Cascade Rds., Inc.)* (9th Cir 1994) 34 F3d 756, in which the bankruptcy court prevented the United States from asserting a setoff of the debtor's tax liability against its liability to the debtor. The court of appeals affirmed, holding that setoff is permissive, not mandatory, and the government's dilatory litigation tactics warranted denial of setoff.

The doctrine of recoupment should be distinguished from setoff. Recoupment does not owe its legitimacy to anything in the Bankruptcy Code; it is an equitable doctrine that exempts a debt from the automatic stay when the debt is inextricably tied up in a postpetition claim. Unlike setoff, recoupment is not limited to prepetition claims and may thus be employed to recover a postpetition obligation. The claims or rights giving rise to recoupment must arise from the same transaction or occurrence that gave rise to the liability sought to be enforced by the bankruptcy estate. See *Sims v U.S. Dep't of Health & Human Servs. (In re TLC Hospitals)* (9th Cir 2000) 224 F3d 1008, in which a government agency was permitted to deduct prepetition overpayments to the debtor from amounts owing to the debtor for postpetition services.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.58 10. Other Offensive Tactics

## §12.58 10. Other Offensive Tactics

Other tactics besides those described in §§12.49-12.57 are available to the creditor. For example, a creditor may move to dismiss the case. See 11 USC §§1112(b), 1208(c), 1307(c). A creditor who is a party to an executory contract with the debtor may file a motion to compel the debtor to assume or reject the contract. A creditor may also file a creditor's Chapter 11 plan. For offensive tactics available to secured creditors, see Secured Transactions in California Commercial Law Practice, chap 6 (2d ed Cal CEB 2001).

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## B. Defensive Tactics

### 1. Relief From Stay

### §12.59 a. Notice and Hearing

A dramatic consequence of filing a bankruptcy case is the automatic stay of any act directed toward enforcing a creditor's claims. 11 USC §362(a); see §12.35. A creditor may, however, ask for relief from the automatic stay. 11 USC §362(d). On motion, after notice and a hearing, the court may grant relief for cause, including lack of adequate protection of the creditor's property interest (11 USC §362(d)(1)) or when the debtor has no equity in the property and the property is not necessary for an effective reorganization (11 USC §362(d)(2)). A court also may grant retroactive relief from an automatic stay when the debtor has acted in bad faith. *Mataya v Kissinger* (*In re Kissinger)* (9th Cir 1995) 72 F3d 107, 109 (affirming retroactive annulment of stay when debtor lawyer filed for bankruptcy in bad faith during 2-day recess in malpractice trial); *In re Arnold* (9th Cir 1986) 806 F2d 937, 939 ("debtor's lack of good faith in filing a bankruptcy petition has often been used as cause for removing the automatic stay").

See *Bright v Washington Mutual Bank, F.A. (In re Bright)* (BAP 1st Cir 2006) 338 BR 530 (failure to disclose real property interest while simultaneously asserting claim to sale proceeds and waiting two years to invoke stay as bad faith; bad faith constituted "unusual and unusually compelling" circumstances warranting retroactive relief). Although Ninth Circuit precedent uses restrictive language when deciding whether to annul a bankruptcy stay, essentially the courts apply a balancing test determine whether annulment is equitable; no one fact or circumstance is determinative. *Fjeldsted v Lien (In re Fjeldsted)* (BAP 9th Cir 2003) 293 BR 12, 23; *National Envt'l Waste Corp. v City of Riverside (In re National Envt'l Waste Corp.)* (9th Cir 1997) 129 F3d 1052, 1055, cert denied (1998) 524 US 952.The court may terminate, annul, modify, or condition the stay when granting relief from it. 11 USC §362(d). See *Stewart v Gurley* (9th Cir 1984) 745 F2d 1194. An annulment of the stay effectively provides retroactive relief to validate prior actions. *In re Bright, supra*.

Under the BAPCPA, the stay in regard to property of an individual terminates 60 days after a request for relief from stay is made. 11 USC §362(e)(2). The abbreviated stay greatly benefits personal property vendors because it terminates automatically if the debtor fails to surrender or redeem the property within 30 days. 11 USC §362(h)(1).

In *Johnson v Righetti (In re Johnson)* (9th Cir 1985) 756 F2d 738, cert denied (1985) 474 US 828, the court of appeals held that an action under 11 USC §362(d) is based solely on a federal statute, and state law (in this instance CC §1717(a)) is inapplicable. However, the decision in *Travelers Cas. & Sur. Co. of Am. v PG&E* (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199, may change the outcome of cases such as Johnson, at least to the extent of permitting a claim for attorney fees.

**NOTE:** Most requests for relief from the automatic stay are made by secured creditors, and the grounds for relief are directed primarily to their concerns (*e.g.,* enforcement of their security interests on the basis that the creditor's interest in the collateral is not adequately protected or that the debtor has no equity in the collateral). Relief may be granted to an unsecured creditor for cause, for example, to permit the creditor to proceed with a case pending in state court that is better tried in a nonbankruptcy court because of that court's expertise in the type of action or because the other parties to the action are not subject to the bankruptcy court's jurisdiction.

**PRACTICE TIP:** The automatic stay does not apply to litigation initiated by the debtor. Adverse parties to such suits are free to seek and obtain dismissal or judgment without running afoul of the stay. *Wright v City of Santee* (*In re Wright*) (BAP 9th Cir 1995) 186 BR 700.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.60 b. Relief Without Hearing

### §12.60 b. Relief Without Hearing

On request of a party in interest, the court, without a hearing, may grant relief from the automatic stay if necessary to prevent irreparable damage to the interest of an entity in property that would occur before an opportunity arises for notice and hearing under 11 USC §362(d) or (e). 11 USC §362(f). However, neither the court nor an administrative agency may extend the automatic stay if one of the exceptions applies. 11 USC §362(o).

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### §12.61 c. Codebtor in Chapter 13 Cases

Codebtors of Chapter 13 debtors who enjoy the benefits of the codebtor stay of 11 USC §1301 are vulnerable to relief from the stay if the debtor's plan does not propose full payment of the claims of creditors who can look to those codebtors. Under 11 USC §1301(c)(2), a creditor whose claim will not be paid in full under a Chapter 13 plan may file a request for relief from the stay and, under 11 USC §1301(d), will be entitled to that relief automatically if the debtor or the codebtor, within 20 days after filing the request, fails to file and serve a written objection to the proposed action.

Codebtors must act promptly in response to creditors' attempts to obtain relief from the codebtor stay on this ground. Once the codebtor files the objection, the court will consider the request for relief from stay in the normal fashion.

As a trade-off for the simplified procedure for obtaining relief from the codebtor stay, 11 USC §1322(b)(1) permits a Chapter 13 plan to separately classify consumer debts of the Chapter 13 debtor for which an individual is also liable on the consumer debt. Thus, the cases that prohibited separate classifications of debts for which family members and friends have cosigned have been overruled; the debtor can protect individuals who have obligated themselves for debts of the Chapter 13 debtor despite a less favorable treatment of other unsecured debts.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.62 2. Executory Contracts and Unexpired Leases

### §12.62 2. Executory Contracts and Unexpired Leases

Title 11 USC §365 governs the rights of a trustee or debtor in possession to assume or reject an executory contract. "Executory contract" is not defined in the Bankruptcy Code. In the context of determining whether an option contract was an executory contract, the Ninth Circuit Court of Appeals stated that to determine whether a contract is executory, courts must (*Unsecured Creditors' Comm. v Southmark Corp. (In re Robert L. Helms Constr. & Dev. Co.)* (9th Cir 1998) 139 F3d 702, 706)

> look to outstanding obligations at the time the petition for relief is filed and ask whether both sides must still perform.… The question thus becomes: At the time of filing, does each party have something it must do to avoid materially breaching the contract?

In the absence of substantial performance remaining due on both sides, the contract obligation is a unilateral one, and the contract is not an executory contract. The nondebtor's claim arising from the debtor's nonperformance, if any, will generally constitute a mere unsecured claim. If, on the other hand, the nondebtor is the party whose performance remains outstanding, the nondebtor's obligation is an asset of the estate and that party is bound to perform.

The reason the debtor may seek to reject an executory contract is to avoid an obligation that is burdensome to the estate. However, the nondebtor party to the contract is allowed to file a claim for damages resulting from the rejection, which is effectively a breach. 11 USC §365. On the other hand, the debtor will want to assume contracts that provide a benefit to the estate. The Bankruptcy Code authorizes the debtor to pick and choose which contracts it wishes to assume and those it wishes to reject. The debtor must, however, assume a contract or unexpired lease in its entirety; the debtor may not shed unfavorable provisions of a contract or lease while retaining the benefits of favorable provisions.

Section 365 treats executory contracts and unexpired leases differently depending on the chapter under which the case is pending. The Bankruptcy Code also distinguishes the treatment of unexpired leases on the basis of whether the leased property is residential or nonresidential property, real or personal property, and whether the debtor is the lessee or the lessor. For example, a lease of residential real property or personal property is deemed rejected if not assumed within 60 days (or any additional time fixed by the court before expiration of the 60 days) after the order for relief in a Chapter 7 case. 11 USC §365(d)(1). This time limitation does not apply to executory contracts and unexpired leases of residential real property or personal property in cases pending under Chapters 9, 11, 12, or 13. 11 USC §365(d)(2).

The BAPCPA changed the Code provision regarding the time within which the debtor must assume or reject an unexpired lease of nonresidential real property under which it is the lessee. The debtor now has until the earlier of 120 days after the date of the order for relief or the date of the entry of an order confirming a plan to decide whether to assume a lease of nonresidential real property. The court may, before expiration of the 120-day period, extend the time within which to assume or reject for an additional 90 days. The court lacks the authority to extend the period further without the consent of the lessor. Failure to timely act on a lease before the deadline results in automatic rejection of the lease. 11 USC §365(d)(4).

The BAPCPA also added provisions relating to leases of personal property. They provide that if a lease of personal property is rejected or not timely assumed, the leased property ceases being property of the estate and the automatic stay of 11 USC §362 is automatically terminated. 11 USC §365(p)(1). A Chapter 7 individual debtor may assume a lease by notifying the lessor in writing that he or she desires to assume the lease even if the trustee failed to timely assume it. 11 USC §365(p)(2)(A). The lessor may condition the debtor's assumption on cure of outstanding defaults under the lease and negotiate with the debtor regarding such cure without violating the automatic stay. 11 USC §365(p)(2)(A), (C). If the debtor, within 30 days after providing the notice described in subsection §365(p)(2)(A), notifies the lessor in writing that the lease is assumed, the liability under the lease is assumed by the debtor individually, not the estate. 11 USC §365(p)(2)(B). If an individual debtor's case is pending under Chapter 11 or 13 and a lease of personal property is not assumed in the plan, the lease is deemed rejected at the conclusion of the hearing on confirmation of the plan, and any stay in effect with respect to the property is automatically terminated. 11 USC §365(p)(3). When an executory contract is neither assumed nor rejected, is not deemed rejected under §365, and not

specifically provided for in a plan, the contract may "ride through" and be revested in the debtor on confirmation. *Diamond Z Trailer, Inc. v JZ LLC (In re JZ LLC)* (BAP 9th Cir 2007) 371 BR 412.

Under §365(f)(1), the trustee or debtor may assume and assign an executory contract or unexpired lease notwithstanding a clause prohibiting or restricting the assignment. For example, a prepetition parking agreement providing that the debtor's parking and management rights would terminate if there was a change in debtor's ownership of the building was an invalid antiassignment clause because the change in ownership clause was so "interwoven" with the parking clause. *Crow Winthrop Dev. Ltd. Partnership v Jamboree LLC (In re Crow Winthrop Operating Partnership)* (9th Cir 2001) 241 F3d 1121.

When the trustee rejects an executory contract under which the debtor is the licensor of intellectual property, the licensee may elect either to treat the contract as terminated or to retain its rights to the intellectual property. 11 USC §365(n). A seller of technology who was entitled to a license if the buyer/debtor defaulted was held to have only an unsecured claim and was not entitled to the protection of §365(n) because, on the date of bankruptcy, the seller had merely a contingent right to exercise a remedy that was an alternative to payment and the license had not then begun. *In re Storm Technol.* (Bankr CD Cal 2001) 260 BR 152.

Under §365(d)(3), which applies to leases of nonresidential real property, the trustee or debtor must timely perform all obligations under the lease that arise from and after the order for relief. In one case, a lease required the debtor-tenant to pay rent and also pay certain monthly sums "as further rent" that were actually intended to retire the debtor's obligation on promissory notes. The lease effectively made the note payments part of the rent, and they were therefore entitled to priority under §365(d)(3). *Cukierman v Uecker (In re Cukierman)* (9th Cir 2001) 265 F3d 846. The case also held that the attorney fees incurred by the landlord postpetition and after the lease was rejected were not covered by §365(d)(3) and were not priority claims. Nor was the landlord's claim for interest under CC §3289(b) because interest was not an obligation under the lease.

A subtenant's claim against the sublessor-debtor for failing to obtain a nondisturbance agreement from the master landlord is not subject to the requirement that a debtor timely perform all obligations under the sublease, because §365(d)(3) applies only when the *debtor* is the lessee, not the lessor. *Einstein/Noah Bagel Corp. v Smith (In re BCE West, LP)* (9th Cir 2003) 319 F3d 1166, 1171.

Unpaid rent under §365(d)(3) is not entitled to superpriority over Chapter 7 administrative expenses so as to entitle a landlord, who had obtained relief from stay, to levy on the debtor's bank accounts. The relief from stay order, however, properly permitted the landlord to recover possession of the premises and obtain a writ of possession. *In re LPM Corp.* (Bankr SD Cal 2000) 253 BR 914, aff'd (9th Cir 2002) 300 F3d 1134.

**NOTE:** Rejection of an executory contract entitles the non-debtor party to file a claim for its damages arising from the breach. Fed R Bankr P 3002(c)(4). The claim is deemed to be a pre-petition claim, even though the rejection occurred post petition. 11 USC §502(g)(1). A landlord's claim for damages arising from termination of a lease of real property is subject to a statutory cap. 11 USC §502(b)(6). However, damages incidental to a lease and not related to its termination, such as damages for waste, are not subject to the statutory cap. *Saddleback Valley Community Church v El Toro Materials Co.* (*In re El Toro Materials Co. Inc.)* (9th Cir 2007) 504 F3d 978, cert denied (2008) ___ US ___, 170 L Ed 2d 746, 128 S Ct 1875.

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### §12.63 3. Plan of Reorganization

The purpose of filing under Chapter 11 is to obtain confirmation of a plan providing how and to what extent the debtor's debts are to be paid. Creditors in a Chapter 11 case are divided into classes under a plan. A favorable vote by a majority in number and two-thirds in amount of allowed claims in each impaired class is required to accept a plan. 11 USC §1126(c). A class whose interest is not impaired by the plan is deemed to accept it. 11 USC §1126(f). For a definition of impairment, see 11 USC §1124.

If the plan is likely to be followed by liquidation or further reorganization that is not a part of the plan, the court may not confirm it. 11 USC §1129(a)(11).

If the plan is confirmed, it establishes the creditors' rights against the debtor even if the creditors voted against the plan. The court may confirm a plan without the acceptance of creditors whose claims are not impaired, because those creditors are conclusively presumed to have accepted the plan. 11 USC §1126(f). If a class of impaired creditors rejects the plan, the court may still confirm it if it does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan. 11 USC §1129(b)(1). This mechanism is often referred to as "cram-down." What is fair and equitable depends on whether the nonaccepting class of claims is unsecured (see 11 USC §1129(b)(2)(B)) or secured (see 11 USC §1129(b)(2)(A)).

The best-interests test looks at whether impaired claimants will fare as well under the plan as they would if the debtor were liquidated. 11 USC §1129(a)(7). Each individual claimholder has a right to raise the best-interest test in an objection to confirmation, regardless of whether its claim is in a class that voted to accept the plan.

A creditor may object to confirmation of the debtor's plan or, after the end of the period of exclusivity in which only the debtor may file a plan (11 USC §1121(b)), file a creditor's plan. To attack the debtor's plan, the creditor must show that the plan does not meet one of the required tests. See §12.13. The plan can also be attacked as not feasible. The preparation and filing of a creditor's plan by an individual creditor is an ambitious proposition. Because of the creditors' committee's right to employ counsel and other professionals at the expense of the estate, a creditors' committee is more likely to file a plan than is an individual. The BAPCPA, through amendments to 11 USC §1121, substantially limited the circumstances in which a bankruptcy court may extend a debtor's exclusive right to file and confirm a plan.

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## §12.64 4. Trustee's and Debtor's Avoiding Powers

The trustee has the power to set aside certain transfers made before the petition was filed. These include preferences (see §§12.65-12.65G), fraudulent transfers (see §§12.66-12.66A), statutory liens (see §12.67), and judicial liens (see §12.68). Generally, only the trustee (or a debtor in possession in a chapter 11 case) has standing to assert causes of action based on these avoiding powers. *Estate of Spirtos v One San Bernardino County Superior Court (In re Estate of Spirtos)* (9th Cir 2006) 443 F3d 1172. In addition, the debtor may avoid certain liens that impair exemptions (see §12.69).

Provided the case has not been closed or dismissed, actions to avoid transfers may be brought until the later of the following (11 USC §546(a)):

- Two years after the entry of the order for relief; or
- One year after election or appointment of the first trustee in the case, if the election or appointment occurs within 2 years after entry of the order for relief.

The legislative history indicates that tolling agreements are permitted and that equitable tolling based on fraud is still available to extend the time periods.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.65 a. Preferences

## §12.65 a. Preferences

A preference is a transfer of the debtor's property that allows a creditor to receive payment of a greater percentage of its claim against the debtor than it would have received if the transfer had not been made and it had participated in the distribution of the assets of the bankruptcy estate. *Knauer v Enlow (In re Enlow)* (Bankr SD Ind 1982) 20 BR 480, 482. Preferences may be attacked only if they took place within 90 days before bankruptcy or within 1 year, if to an insider. The definition of "insider" can include directors, partners, business entities, and related individuals. 11 USC §101(31). Under 11 USC §547(b), trustees in bankruptcy have the right to avoid a transfer of the debtor's property that (all conditions must apply):

- Is made to or for the benefit of a creditor;
- Is made for or on account of an antecedent debt;
- Is made while the debtor was insolvent;
- Is made within 90 days before the date the bankruptcy petition was filed (or within 1 year in regard to insiders); and
- Enables the creditor to receive more than he or she would receive in a bankruptcy liquidation had the transfer not occurred.

**PRACTICE TIP:** A creditor should be advised that nothing is wrong with accepting a preference, but that the payment or property may have to be returned if bankruptcy is filed within 90 days after its receipt.

Preferences are far too complex a subject to treat thoroughly in this chapter. However, some key principles to keep in mind in advising creditors are discussed in §§12.65A-12.65G.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.65A (1) Payments on Fully Secured Debt

### §12.65A (1) Payments on Fully Secured Debt

Payments to secured creditors with unavoidable liens on a fully secured debt are not preferences. 11 USC §547(b)(5). Payment on a secured debt does not deplete the prospective estate available to unsecured creditors.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.65B (2) Perfection of Security Interest

### §12.65B (2) Perfection of Security Interest

Perfection of a security interest is considered a transfer separate from the transfer of a security interest. Thus, perfection of a security interest for an antecedent debt within 90 days before bankruptcy (or within 1 year, if to an insider) could render the transfer preferential. As long as the security interest is perfected within 30 days after its transfer, however, the perfection will be deemed to relate back in time to the date of the transfer. 11 USC §547(e)(2)(A).

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### §12.65C (3) Transfer in Ordinary Course of Business

The trustee may not avoid as a preference a transfer made in payment of a debt incurred in the ordinary course of business if the payment is either in the ordinary course of business of the debtor and the creditor or if the payment is made according to ordinary business terms. 11 USC §547(c)(2). Payments on long-term debt, as well as on short-term debt, can qualify for the ordinary course of business exception. *Union Bank v Wolas* (1991) 502 US 151, 116 L Ed 2d 514, 112 S Ct 527. Likewise, a payment can qualify for the ordinary course of business defense even if the transaction is a restructuring agreement and both the underlying debt and the restructuring agreement are the first such transactions between the debtor and creditor. *Wood v Stratos Prod. Dev., LLC (In re Ahaza Sys.)* (9th Cir 2007) 482 F3d 1118. The creditor bears the burden of proving that the transfer accords with normal practices within the industry (the "objective standard") or of proving the subjective prong of §547(c)(2), which requires proof that the payment was ordinary in regard to the parties. In *Breeden v Northeast Binding Sys. (In re Bennett Funding Group, Inc.)* (Bankr ND NY 2000) 253 BR 316, 319, the fact that the debtor's business may have been a Ponzi scheme did not prevent the creditor from asserting the ordinary course of business defense as long as the transaction at issue was not related to the "illegal scheme."

The general principles enunciated in these cases should still be applicable after the 2005 amendments to the Bankruptcy Code. However, the defense based on ordinary course of business has been made easier to establish in cases commenced after the effective date of the new law because, under the amendments, a creditor need prove only one prong of the test, whereas prior law required proof of both prongs. The defense may now be established by a showing either that the payment satisfies the objective test of having been made in accordance with normal standards in the industry or that it meets the subjective test that is was made in the normal course of the business of the debtor and creditor. See 11 USC §547(c)(2).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.65D (4) New-Value Offsets

### §12.65D (4) New-Value Offsets

A creditor may offset against any preference liability any new unsecured credit extended to the debtor after the preference occurs that has not been repaid other than by a transfer that would itself be avoidable but for a new-value offset. 11 USC §547(c)(4).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.65E (5) Domestic Support Obligations

### §12.65E (5) Domestic Support Obligations

A bona fide payment of a domestic support obligation is immunized from recovery as a preference whether paid to a spouse, former spouse, child or child's guardian, or to a government entity. 11 USC §547(c)(7).

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### §12.65F (6) Dollar Limitations

In a bankruptcy case filed by an individual whose debts are primarily consumer debts, the trustee may not recover a preference when the aggregate value of all property that constitutes or is affected by the transfer is under $600. 11 USC §547(c)(8). In cases in which the debts are not primarily consumer debts, the trustee may not recover a preference when the aggregate value of all preferences to the creditor is less than $5000. 11 USC §547(c)(9). In addition, actions by a trustee to recover a money judgment or property worth less than $1000, on consumer debts less than $15,000, or on nonconsumer debts against noninsiders of less than $10,000 must be filed in the district court of the district in which the defendant resides. 28 USC §1409(b). These venue provisions apply not just to preference actions but to any action by a trustee seeking a monetary recovery.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.65G (7) Alternative Repayment Program Payments

### §12.65G (7) Alternative Repayment Program Payments

Payments made as part of an alternative repayment schedule created by an approved nonprofit budget and credit-counseling agency are not avoidable as preferences. 11 USC §547(h).

Under 11 USC §547(g), the trustee must prove the avoidability of the transfer under 11 USC §547(b), and the creditor or other party in interest against whom the trustee seeks recovery must prove the applicability of any exceptions under 11 USC §547(c).

**PRACTICE TIP:** If a transfer is determined to be avoidable and is recovered, the disgorging creditor has 30 days after the judgment becomes final to file a claim for the amount disgorged, even if the bar date for filing claims has already passed. 11 USC §502(h); Fed R Bankr P 3002(c)(3).

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### b. Fraudulent Transfers

### §12.66 (1) Under Federal Law

The trustee may avoid transfers made in fraud of creditors under two separate provisions of the Bankruptcy Code, 11 USC §§544 and 548. A fraudulent conveyance for these purposes includes the following:

- A transfer of property of the debtor made with actual intent to hinder, delay, or defraud creditors (11 USC §548(a)(1)(A));
- A transfer of property made for less than reasonably equivalent value at a time when the debtor was insolvent or rendered insolvent (11 USC §548(a)(1)(B)(ii)); or
- A transfer for less than reasonable consideration to insiders under employment contracts that are not in the ordinary course of business, regardless of the solvency or insolvency of the debtor at the time of the transfer (11 USC §548(a)(1)(B)(ii)(IV)).

**PRACTICE TIP:** The requirement that the debtor be insolvent or that the transfer caused the debtor to become insolvent is extremely broad. As a result, it is difficult to assure a creditor that a transaction that will diminish the assets available to creditors will not be held to be a fraudulent transfer. The transfer of nonexempt assets into exempt assets, even just before bankruptcy, will generally not be set aside as fraudulent. See §12.30.

Fraudulent transfers may be avoided by a trustee or debtor in possession as long as the transfer occurred within 2 years before the petition was filed and while the debtor was insolvent (or the transfer caused the debtor to become insolvent). 11 USC §548(a)(1).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.66A (2) Under California Law

### §12.66A (2) Under California Law

In addition to the trustee's avoidance rights under 11 USC §548 (see §12.66) by virtue of rights granted under 11 USC §544(b), the trustee may use a creditor's state law rights to avoid a fraudulent transfer under CC §§3439-3439.12 (Uniform Fraudulent Transfer Act) (UFTA), which allows the trustee to reach back as far as 7 years. CC §3439.09(c).

Under the UFTA, a transfer of assets is considered fraudulent regarding the transferor's existing and future creditors if it is made in either of the following ways:

- With actual intent to defraud any creditor, in which case, however, the transfer is not voidable against a bona fide purchaser (or that purchaser's successors) who paid a "reasonably equivalent value" for the assets (CC §§3439.04(a)(1), 3439.08(a)); or
- Without the debtor receiving a "reasonably equivalent value," and either (CC §3439.04(a)(2)):
- The debtor's remaining assets were unreasonably small in relation to the debtor's existing (or anticipated) business or a transaction in which the debtor was, or was about to become, engaged, or
- The debtor intended to incur, or reasonably should have believed that he, she, or it would incur, debts beyond the debtor's ability to pay as they became due.

In deciding "actual intent" under CC §3439.04(a)(1), consideration may be given, among other factors, to any or all of a series of factors, including whether (CC §3439.04(b)):

- The transfer or obligation was to an insider;
- The debtor retained possession or control of the property transferred after the transfer;
- The transfer or obligation was disclosed or concealed;
- Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- The transfer was of substantially all the debtor's assets;
- The debtor absconded;
- The debtor removed or concealed assets;
- The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- The transfer occurred shortly before or shortly after a substantial debt was incurred; or
- The debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor (see §12.65C).

Alternatively, a transfer of assets is considered fraudulent as to the transferor's existing creditors if the transferor did not receive a "reasonably equivalent value" in exchange and was insolvent at that time or became insolvent as a result of the transfer. CC §3439.05.

For these purposes, "asset" includes shares of stock (CC §3439.01(a)), and "debtor" includes individuals, partnerships, corporations, limited liability companies, and other designated entities (CC §3439.01(e), (g)). Creditors' remedies are specified in CC §3439.07.

A regularly conducted foreclosure sale of real property is not a fraudulent transfer and irrebuttably establishes that a fair price was received for the property. *BFP v Resolution Trust Corp.* (1994) 511 US 531, 128 L Ed 2d 556, 114 S Ct 1757. Similarly, the Ninth Circuit Court of Appeals held that a judgment of dissolution of a marriage that follows from a regularly conducted, contested divorce proceeding conclusively establishes "reasonably equivalent value" in the absence of fraud, collusion, or violation of state law. *Batlan v Bledsoe (In re Bledsoe)* (9th Cir 2009) 569 F3d 1106, 1112.

When bankruptcy intervenes, any state law fraudulent transfer claim becomes property of the estate, to be pursued on behalf of its creditors.

Once it is established that the debtor operated a Ponzi scheme, payments received by investors that exceed the

amount of the purported investment, *i.e.,* "profits," are deemed to be fraudulent transfers as a matter of law. *Santa Barbara Capital Mgmt. v Neilson (In re Slatkin)* (9th Cir 2008) 525 F3d 805; *In re AFI Holding, Inc.* (9th Cir 2008) 525 F3d 700.

**PRACTICE TIP:** When a trustee lacks the resources or desire to pursue recovery of a fraudulent conveyance, under certain circumstances the bankruptcy court may authorize a creditor to use its own counsel to pursue the avoiding action in the trustee's name. *In re Godon, Inc.* (Bankr ED CA 2002) 275 BR 555. See also *Estate of Spirtos v One San Bernardino County Superior Court* (*In re Estate of Spirtos)* (9th Cir 2006) 443 F3d 1172.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.67 c. Statutory Liens

### §12.67 c. Statutory Liens

The trustee has the power to avoid certain types of liens created by statutory law:

- A lien on the debtor's property that, under state law, does not become effective until the debtor files a bankruptcy petition, becomes insolvent, or fails to meet some other test geared to financial condition (11 USC §545);
- A lien that is not enforceable against a bona fide purchaser when the bankruptcy petition is filed (11 USC §§544(a)(3), 545(2)); and
- A lien for unpaid rent (11 USC §545(3)).

These provisions are designed to nullify what is seen as the state's attempt to create its own system of priorities for certain claims in contravention to the priorities established by bankruptcy law. See 11 USC §507. Regardless, a trustee may not avoid—so as to defeat the rights of a bona fide purchaser, such as mechanics' lienholder rights—a lien that under state law at the time of the bankruptcy filing remains subject to perfection that relates back to a date before the filing. 11 USC §546(b). The Bankruptcy Code provides a notice procedure that these lienholders must follow to preserve their rights. In addition, the trustee may not avoid a warehouseman's lien rights. 11 USC §546(i)(1).

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### §12.68 d. Trustee as Creditor or Purchaser Under State Law

The trustee is given the power to avoid transfers that could be avoided by certain creditors under state law, *i.e.,* a judicial lien creditor, an execution lien creditor, or a bona fide purchaser of real property. 11 USC §544(a). This power does not depend on whether such a creditor exists; thus, the trustee is said to have the status of a hypothetical lien creditor.

The trustee may also avoid transfers that could be avoided by an unsecured creditor under state law, *e.g.,* fraudulent transfers under state law, as long as such a creditor exists. 11 USC §544(b). If a creditor claiming a lien has failed to perfect its rights in property before the debtor's bankruptcy or has received a transfer of the type referred to above, the creditor cannot prevent the trustee from avoiding the lien or transfer. Attorneys counseling a secured creditor who anticipates that a debtor will file for bankruptcy should make sure that the creditor's rights have been perfected correctly.

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### §12.69 5. Liens That Impair Exemptions

The debtor is empowered to avoid two types of liens that impair the debtor's exemptions (11 USC §522(f)):

(1) A judicial lien; and

(2) A nonpossessory, nonpurchase money security interest in most consumer items, health aids, or tools of one's trade or profession.

With respect to the second type of lien, the 2005 amendments to the Bankruptcy Code specifically define which household goods are subject to lien avoidance and which are not. Nonpossessory, non-purchase money security interests can be avoided on clothing, furniture, appliances, one radio, one television, one VCR, linens, china crockery, kitchenware, educational materials, medical equipment and supplies, personal effects, and one computer and related equipment. 11 USC §522(f)(4)(A). Such liens cannot be avoided on works of art, electronic entertainment equipment with an aggregate value over $500 (except a single radio, TV, and VCR), antiques with an aggregate value over $500, jewelry (except wedding rings) with an aggregate value over $500, computer equipment (except the single computer and related equipment), or motor vehicles. 11 USC §522(f)(4)(B).

To avoid a judicial lien (*e.g.,* a judicial lien that impairs a homestead exemption), the debtor must prove that the value of the dwelling does not exceed the senior encumbrances, plus the exempt amount, by enough to permit the lien to attach without impairing the exemption. A creditor may defend against an avoidance action of this type by obtaining an appropriate appraisal of the property in question. In addition, a creditor can defend an attack on a lien on household goods by showing that the collateral is not one of the types specified above.

A judicial lien impairs an exemption when the sum of the following items exceeds the value of the debtor's interest in the absence of any liens (11 USC §522(f)(2)):

- The lien;
- All other liens on the property; and
- The amount of the debtor's exemption if there were no liens.

Before 11 USC §522(f) may be used to avoid a lien, an exemption must exist to which the debtor would have been entitled. An exemption that is valid only because the creditor failed to object does not satisfy this requirement. *Morgan v FDIC (In re Morgan)* (BAP 9th Cir 1993) 149 BR 147. The debtor in *Morgan* claimed a homestead exemption against property that was subject to a judicial lien. The creditor failed to file a timely objection to the exemption. Relying on *Taylor v Freeland & Kronz* (1992) 503 US 638, 118 L Ed 2d 280, 112 S Ct 1644, the debtor argued that, because the objection was time barred and the lien impaired the claimed exemption, the lien could be avoided. The court rejected this argument, reasoning that an exemption obtained by default under 11 USC §522(*l*) does not necessarily entitle the debtor to the exemption under 11 USC §522(b).

For co-owned property, consensual liens against the entire fee must be netted out before computing the value of a debtor's fractional interest for purposes of avoiding judgment liens on which the co-owner is not liable. *All Points Capital Corp. v Meyer (In re Meyer)* (BAP 9th Cir 2007) 373 BR 84.

A statutory lien may not be avoided under 11 USC §522(f). See 11 USC §545.

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/ V. FORMS/§12.70 A. Form: Client's Declaration of Understanding [Deleted]

## V. FORMS

### §12.70 A. Form: Client's Declaration of Understanding [Deleted]

This form has been deleted as no longer relevant under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stat 23).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.71 B. Form: Legal Services Agreement [Deleted]

## §12.71 B. Form: Legal Services Agreement [Deleted]

This form has been deleted as no longer relevant under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stat 23).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.72 C. Form: Reaffirmation Agreement and Order

## §12.72 C. Form: Reaffirmation Agreement and Order



Form 240A - Reaffirmation Agreement (1/07)

☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
(Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement.)

# UNITED STATES BANKRUPTCY COURT

**_____District of_____**

In re _____, Debtor

Case No._____
Chapter_____

## REAFFIRMATION AGREEMENT

*[Indicate all documents included in this filing by checking each applicable box.]*

☐ Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5)

☐ Part B: Reaffirmation Agreement

☐ Part C: Certification by Debtor's Attorney

☐ Part D: Debtor's Statement in Support of Reaffirmation Agreement

☐ Part E: Motion for Court Approval

*[**Note:** Complete Part E only if debtor was not represented by an attorney during the course of negotiating this agreement. **Note also:** If you complete Part E, you must prepare and file Form 240B - Order on Reaffirmation Agreement.]*

**Name of Creditor:**_____

☐ *[Check this box if]* Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

## PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

### 1. DISCLOSURE STATEMENT

***Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:***

**SUMMARY OF REAFFIRMATION AGREEMENT**

This Summary is made pursuant to the requirements of the Bankruptcy Code.

**AMOUNT REAFFIRMED**

The amount of debt you have agreed to reaffirm: $_____

***The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.***

**ANNUAL PERCENTAGE RATE**

*[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]*

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

*--- And/Or ---*

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$_____@_____%;
$_____@_____%;
$_____@_____%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed,

the amount of each balance and the rate applicable to it are:
$ _____ @ _____%;
$ _____ @ _____%;
$ _____ @ _____%.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

| Item or Type of Item | Original Purchase Price or Original Amount of Loan |
|---|---|

*Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:*

**Repayment Schedule:**

Your first payment in the amount of $_____ is due on _____(date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

*— Or —*

Your payment schedule will be: _____(number) payments in the amount of $_____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ ( week, month, etc.), unless altered later by mutual agreement in writing.

*— Or —*

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

Print



## 2. INSTRUCTIONS AND NOTICE TO DEBTOR

**Reaffirming a debt is a serious financial decision.** The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

## YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

**Frequently Asked Questions:**

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ''lien'' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

**NOTE:** When this disclosure refers to what a creditor ''may'' do, it does not use the word "may'' to give the creditor specific permission. The word ''may'' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

**PART B: REAFFIRMATION AGREEMENT.**

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

_____

(Print Name)

_____

(Signature)

Date: _____

Co-borrower, if also reaffirming these debts:

_____

(Print Name)

_____

(Signature)

Date: _____

Accepted by creditor:

_____

(Printed Name of Creditor)

_____

(Address of Creditor)

_____

(Signature)

_____

(Printed Name and Title of Individual Signing for Creditor)

Date of creditor acceptance:

_____

**PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).**

*[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]*

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ *[Check box, if applicable and the creditor is not a Credit Union.]* A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

**PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT**

*[Read and complete sections 1 and 2, **OR**, if the creditor is a Credit Union and the debtor is represented by an attorney, read section 3. Sign the appropriate signature line(s) and date your signature. If you complete sections 1 and 2 **and** your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]*

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt.

I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____

_____

_____.

**(Use an additional page if needed for a full explanation.)**

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

*— Or —*

*[If the creditor is a Credit Union and the debtor is represented by an attorney]*

3. I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

## PART E: MOTION FOR COURT APPROVAL

*[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]*

### MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (*check all applicable boxes)*:

☐ 11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

☐ 11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed:_____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

Print

**Form 240B - Order on Reaffirmation Agreement (1/07)**

# United States Bankruptcy Court

_____District of _____ ____

In re _____, Debtor

Case No._____

Chapter _____

## ORDER ON REAFFIRMATION AGREEMENT

The debtor(s) _____ (Name(s) of debtor(s)) has (have) filed a motion for approval of the reaffirmation agreement dated _____ (Date of agreement) made between the debtor(s) and _____ (Name of creditor). The court held the hearing required by 11 U.S.C. § 524(d) on notice to the debtor(s) and the creditor on _____ (Date).

COURT ORDER:

☐ The court grants the debtor's motion under 11 U.S.C. § 524(c)(6)(A) and approves the reaffirmation agreement described above as not imposing an undue hardship on the debtor(s) or a dependent of the debtor(s) and as being in the best interest of the debtor(s).

☐ The court grants the debtor's motion under 11 U.S.C. § 524(k)(8) and approves the reaffirmation agreement described above.

☐ The court does not disapprove the reaffirmation agreement under 11 U.S.C. § 524(m).

☐ The court disapproves the reaffirmation agreement under 11 U.S.C. § 524(m).

☐ The court does not approve the reaffirmation agreement.

BY THE COURT

Date: _____

_____
*United States Bankruptcy Judge*

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.73 D. Form: Request for Special Notice [Deleted]

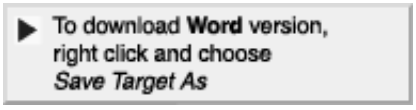
## §12.73 D. Form: Request for Special Notice [Deleted]

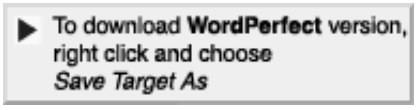
This form has been deleted as no longer relevant under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (Pub L 109-8, 119 Stat 23).

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**Source:** Business Law/Debt Collection Practice in California/12 Bankruptcy Considerations/§12.74 E. Form: Letter to Creditor Regarding Violation of Automatic Stay

## §12.74 E. Form: Letter to Creditor Regarding Violation of Automatic Stay




_ _[*Date*]_ _

_ _[*Address*]_ _

**Re: In re** _ _[*debtor's name*]_ _**, Debtor**

**Bankruptcy Case No.** _ _[*case no.*]_ _

**Dear** _ _[*Sir/Madam*]_ _ **:**

**This office represents the above-named debtor in connection with the voluntary Chapter 7 case pending in the United State Bankruptcy Court for the Northern District of California, filed on** _ _[*date*]_ _**.**

**We have been advised by our client that you have continued collection efforts notwithstanding the filing of the bankruptcy. The purpose of this letter is to provide notice to you of the filing of the bankruptcy and that you are automatically restrained, under Bankruptcy Code section 362(a), from taking any steps whatsoever to collect or enforce your claim against the debtor. If you continue your actions following the receipt of this letter, we will have no alternative but to file a lawsuit against you in the Bankruptcy Court, which may subject you to damages, including attorney fees.**

**Please do not hesitate to contact the undersigned if you have any questions regarding this matter. Otherwise, I assume that you will comply with this request.**

[*or*]

**Please contact the undersigned immediately on receipt of this letter to confirm that you will comply with this request.**

**A copy of the first page of the file-endorsed petition is enclosed for your reference.**

**Very truly yours,**

**Date:** _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

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# 13

# Debt Collection and Family Law

**Richard L. Enkelis**
**Raymond R. Goldstein**

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.1 I. INTRODUCTION

## §13.1 I. INTRODUCTION

A major area of judgment enforcement that often goes unexamined is the interplay between collection issues and family law issues. A comprehensive discussion of family law is beyond the scope of this chapter; rather, it aims to highlight some of the problem areas and provide some suggestions for dealing with the issues. For a more thorough discussion of the family law issues raised in this chapter, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual).

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## II. NATURE OF COMMUNITY ESTATE

### A. Definitions

### §13.2 1. Community Property

Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in California is community property. Fam C §760. Community property transferred to a revocable trust remains community property. Fam C §761(a). On community property in revocable trusts, see generally Drafting California Revocable Trusts (4th ed Cal CEB 2003).

A husband and wife may also hold property as "community property with a right of survivorship." On the death of one spouse, the property passes to the survivor without administration, just as joint tenancy property. CC §682.1(a); Fam C §750.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.3 2. Quasi-Community Property

## §13.3 2. Quasi-Community Property

"Quasi-community property" means all real or personal property, wherever situated, that was acquired (Fam C §125):

- By either spouse while domiciled elsewhere that would have been community property if the acquiring spouse had been domiciled in California when he or she acquired the property; or
- In exchange for real or personal property, wherever situated, that would have been community property if the acquiring spouse had been domiciled in California when he or she acquired the property.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.4 3. Separate Property

## §13.4 3. Separate Property

Separate property includes (Fam C §770(a)):

- All property owned by the person before marriage;
- All property acquired by the person after marriage by gift, bequest, devise, or descent; and
- The rents, issues, and profits of separate property.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.5 B. Management of Community Property

## §13.5 B. Management of Community Property

Either spouse may enter into any transaction with the other, or with any other person, respecting property that either could if unmarried. Fam C §721(a). Either spouse may manage and control the community personal property just as he or she may manage his or her separate estate. Fam C §1100(a). A spouse who is operating or managing a business that is community property has the primary management and control of the business. Fam C §1100(d). This means that he or she may act alone in all transactions, but must give the other spouse prior written notice of any sale, lease, exchange, or encumbrance of the business. Fam C §1100(d).

Both spouses are subject to the general rules governing fiduciary relationships with respect to the management of community property. Fam C §§721(b), 1100(e). Neither spouse may make a gift of community property or dispose of it for less than fair value without the written consent of the other spouse. Fam C §1100(b).

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## C. Presumptions

### §13.6 1. General Community Property Presumption

Except as otherwise provided by statute, community property consists of all property, real or personal, wherever located, acquired by a married person during the marriage while he or she is domiciled in California. Fam C §760.

However, for the purpose of dividing property on the parties' dissolution or legal separation, property acquired by the parties during marriage either in joint form (tenancy in common, joint tenancy, or tenancy by the entirety) or as community property is presumed to be community property. Fam C §2581. The community property presumption may be rebutted by (Fam C §2581(a), (b)):

- A statement in the deed or other evidence of title that the property is separate and not community property, or
- A written agreement between the parties that the property is separate property.

This presumption applies only to the spouses. With respect to a creditor, property held in joint tenancy is not community property (unless there is overriding evidence that the title should not be determinative). See Fam C §2581. See also Comment to Fam C §2581.

**NOTE:** It is important to note that the method of taking title to property has one result when a marriage is dissolved and a different result when viewed from the perspective of a creditor with a judgment against only one spouse.

The standard of proof to overcome the community property presumption of Fam C §760 has been stated differently in different cases. The courts in some cases have held that the standard is clear and convincing evidence. See, *e.g.*, *Weingarten v Superior Court* (2002) 102 CA4th 268, 277, 125 CR2d 371; *Gagan v Gouyd* (1999) 73 CA4th 835, 86 CR2d 733, disapproved on other grounds in *Mejia v Reed* (2003) 31 C4th 657, 669 n2, 3 CR3d 390. Other courts have found that the standard is the preponderance of the evidence. See, *e.g., Marriage of Ettefagh* (2007) 150 CA4th 1578, 59 CR3d 419. This is consistent with Evid C §115, which requires that, when not otherwise provided by law, the appropriate standard of proof is preponderance of the evidence. In *Resolution Trust Corp. v Rowe* (ND CA, Nov. 20, 2007, No. C 90-20114 FMS (WDB)) 2007 US Dist Lexis 89263, *12, the court extensively discussed the split in California authority and applied the preponderance of evidence standard as stated in *Ettefagh*.

On the other hand, some cases say that simply tracing the source of the funds used to purchase the particular property can overcome this presumption (in contrast to the title presumption discussed in §§13.10-13.13). In *Marriage of Haines* (1995) 33 CA4th 277, 290, 39 CR2d 673, the court stated, "Since this general community property presumption is not a title presumption, virtually any credible evidence may be used to overcome it, including tracing the asset to a separate property source, showing an agreement or clear understanding between parties regarding ownership status and presenting evidence the item was acquired as a gift." See also *Marriage of Mix* (1975) 14 C3d 604, 122 CR 79 (tracing used to overcome presumption). For a discussion of tracing, see §13.14.

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### §13.7 2. Title Presumption

The owner of legal title to property is presumed to be the beneficial owner of the property. This presumption may be rebutted only by clear and convincing proof. Evid C §662. Whether the evidence rebuts this presumption is a question of fact for the trial court. *In re Marriage of Orchard* (1990) 224 CA3d 155, 161, 273 CR 499.

In *Marriage of Lucas* (1980) 27 C3d 808, 166 CR 853, the California Supreme Court stated that the title presumption can be overcome only by a clear agreement or understanding between the parties. Unlike the general community property presumption (see Fam C §760, discussed in §13.9), the title presumption cannot be overcome by tracing.

**NOTE:** The court in *Lucas* also held there was no reimbursement to the separate property contributing spouse, although this holding has been superseded by Fam C §2640. Under §2640, in the context of marital dissolution, a party making a separate property contribution to the acquisition of the property is not presumed to have made a gift (unless it is shown that the parties agreed in writing that it was a gift) but is entitled to reimbursement for the separate property contribution at dissolution of marriage. See *Marriage of Cochran* (2001) 87 CA4th 1050, 104 CR2d 920.

The confidential relationship between the spouses causes the general community property presumption of Fam C §760 to overcome the title presumption of Evid C §662 when there is evidence of fraud or duress. *Marriage of Haines* (1995) 33 CA4th 277, 292, 39 CR2d 673. This conclusion does not apply to creditors, but only as between the spouses. 33 CA4th at 294.

Several courts have held that when a change in title does not meet the standards of the transmutation statute, the title presumption also fails. See §13.12.

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## §13.8 3. Multiple Party Accounts Presumption

There is a rebuttable presumption that all deposit accounts of certain types are community property. Prob C §5305(a). Such deposit accounts include joint accounts, pay-on-death (POD) accounts, and Totten trusts. See Prob C §§5100-5407 (California Multiple-Party Accounts Law). The presumption can be overcome by tracing or a written agreement. Prob C §5305(b). See *Marriage of Braud* (1996) 45 CA4th 797, 825, 53 CR2d 179 (appellate court affirmed finding that husband had separate property interest in funds withdrawn from joint account based on tracing of bank records). Other property (*e.g.*, retirement benefits) may also exist but may be exempt from the enforcement of judgments.

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## D. Transmutation

### §13.9 1. Definition

A transmutation of property is a change in the characterization of property. See *Marriage of Cross* (2001) 94 CA4th 1143, 114 CR2d 839. Changes of ownership of property by married persons are permitted by California law by agreement or transfer, with or without consideration, to accomplish any of the following (Fam C §850):

- Transmute community property to separate property of either spouse;
- Transmute separate property of either spouse to community property; or
- Transmute separate property of one spouse to separate property of the other spouse.

A transmutation of real property is not effective as to third parties without notice unless recorded. Fam C §852(b).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.10 2. Writing Requirement

### §13.10 2. Writing Requirement

An express written declaration is required to transmute real or personal property. Fam C §852(a). For example, a gift of a valuable diamond ring from one spouse to the other did not constitute a transmutation in the absence of a writing. *Marriage of Steinberger* (2001) 91 CA4th 1449, 111 CR2d 521. However, the writing requirement does not apply to gifts of personal property between the spouses that are not substantial in value considering the circumstances of the marriage. Fam C §852(c).

The California Supreme Court has held that a writing signed by the adversely affected spouse is not an "express declaration" for purposes of the transmutation statute (see §13.13), "*unless* it contains language which expressly states that the characterization or ownership of the property is being changed." *Estate of MacDonald* (1990) 51 C3d 262, 272, 272 CR 153. The court also held that extrinsic evidence may not be used to interpret the writing. 51 C3d at 273. See also *In re Marriage of Holtemann* (2008) 166 CA4th 1166, 83 CR3d 385.

In *MacDonald*, the court determined that merely by signing certain adoption documents regarding community property IRA accounts, which designated the husband's trust as beneficiary of the IRAs, the wife had not adequately expressed her intention to change the characterization of the community property to separate property of the husband. The court noted that there is no particular magic language required to satisfy the statutory requirement of an express declaration, but suggested that language including the terms "transmutation," "community property," or "separate property" or "I give to … any interest I have in … [the subject property]" would qualify. 51 C3d at 273. See also *Marriage of Benson* (2005) 36 C4th 1096, 32 CR3d 471 (Fam C §852(a) does not operate like general statute of frauds (CC §1624(a)) in which basic writing requirement is subject to implied exception for "part performance;" although wife may have intended to relinquish community property interest in husband's retirement accounts in return for full conveyance by husband to wife of family home, no written transmutation agreement expressly so stated as required by Fam C §852(a)).

Another court held that estoppel is not an exception to the writing requirement of the statute nor to the "no extrinsic evidence" conclusion of the *MacDonald* decision. *Marriage of Campbell* (1999) 74 CA4th 1058, 88 CR2d 580.

A grant deed signed by a husband transferring his separate property interest in real property to himself and his wife as joint tenants satisfied the "express declaration" requirement. *Estate of Bibb* (2001) 87 CA4th 461, 104 CR2d 415. In addition, a quitclaim deed generally satisfies the presumption. See *Marriage of Broderick* (1989) 209 CA3d 489, 257 CR 397 (quitclaim deed transfers whatever title or interest grantor possesses).

**NOTE:** Before 1985 (the effective date of Fam C §852), transmutations could be by oral agreement between the spouses. This was sometimes referred to as "pillow talk community property" and was effectively impossible for a creditor to overcome. The requirements of Fam C §852 still do not apply to a transmutation of property made before January 1, 1985; the law in effect before that date continues to apply to transmutations made before 1985. Fam C §852(e).

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### §13.11 3. Effect of Fraudulent Transfer Rules

A transmutation is subject to the laws governing fraudulent transfers. Fam C §851. For example, a husband who transferred his community property interest in real property to his wife "to protect property from other parties" engaged in a fraudulent transfer. *Reddy v Gonzalez* (1992) 8 CA4th 118, 10 CR2d 55. A transmutation of the future earnings of nondebtor spouse into her separate property was also a fraudulent transfer. *State Bd. of Equalization v Woo* (2000) 82 CA4th 481, 98 CR2d 206.

On the relationship between marital settlement agreements and fraudulent conveyances, see §13.32.

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### §13.12 4. Effect of Title Presumption

Even if legal title to property is held by one spouse, if a transfer document does not satisfy the transmutation rules of Fam C §852(a), title does not control the characterization. In *Marriage of Barneson* (1999) 69 CA4th 583, 81 CR2d 726, a husband signed requests to "transfer" and "journal" stock into his wife's name. The court found that nothing in the documents expressly stated that the characterization or ownership of property was being changed. It held that "the more specific rules governing transmutations of property in transactions between spouses should control over the more general presumption of ownership from title created by Evid C §662." 69 CA4th at 593. More interestingly, the court concluded that the term "transfer" is not the equivalent of transmutation. 69 CA4th at 590.

The presumption that title to property is held by one spouse as reflected by the deeds in question can only be overcome by clear and convincing evidence, and cannot be overcome solely by tracing the funds used to purchase the property. The initial acquisition of property does not constitute a transmutation. *In re Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 189, 86 CR3d 624.

An unsigned computer printout entitled "DMV Vehicle Registration Information," reflecting that an automobile, which was previously registered in the husband's name alone, was re-registered in the names of the husband *or* the wife, did not satisfy the requirements for a valid transmutation under Fam C §852. *Estate of Bibb* (2001) 87 CA4th 461, 104 CR2d 415.

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## §13.13 5. Purchase of Separate Property With Community Property Funds

Married couples may, of course, transmute community property to the separate property of either spouse (Fam C §850(a)), provided they meet the requirements for a valid transmutation (Fam C §852(a); see §§13.9-13.10). However, the court in *Marriage of Cross* (2001) 94 CA4th 1143, 1147, 114 CR2d 839, concluded that there was no transmutation when the separate property of one spouse was improved with the separate property of the other because an improvement cannot stand alone and, therefore, use of the funds to make an improvement could not be considered a potential transmutation. In dicta, the court also compared this fact pattern to the hypothetical purchase of a car by a spouse for the other spouse with community property funds—which, the court noted, would be a potential transmutation of the community property funds that could not be sustained because it would not be in writing.

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## E. Tracing and Commingling

### §13.14 1. Use in Overcoming Community Property Presumption

The presumption that property acquired during marriage is community property (see §13.6) is controlling only when it is impossible to trace the source of specific property. *Gudelj v Gudelj* (1953) 41 C2d 202, 210, 259 P2d 656.

Commingling of separate and community property does not change the property's character if the property can be traced. In *Hicks v Hicks* (1962) 211 CA2d 144, 27 CR 307, the court stated that the commingling of separate funds with community funds in a bank account does not destroy the character of the former if the amount of the separate funds can be ascertained. In *Hicks,* the court reversed the portion of the judgment that decreed that all property not specifically described constituted the separate property of the party in possession because the character of the funds used to purchase the property was unknown. If the property cannot be traced, the entire commingled fund will be deemed community property pursuant to the general community property presumption of Fam C §760. *In re Marriage of Mix* (1975) 14 C3d 604, 611, 122 CR 79. There are two common tracing methods for untangling commingled assets, as discussed below.

**Direct tracing method.** Under the "direct tracing" method, specific records of each separate and community deposit and each separate and community payment, are necessary. *In re Marriage of Braud* (1996) 45 CA4th 797, 823, 53 CR2d 179; *In re Marriage of Frick* (1986) 181 CA3d 997, 1012, 226 CR 766. This method requires that at the time of each alleged separate property payment, there was, in fact, sufficient separate property from which to source the payment. Further, one must prove that the intent of the payor was to draw funds from the separate property portion of the commingled account. If either intent, or sufficiency of separate property funds cannot be proven for each particular payment, the tracing will fail and the community property presumption will prevail. *See v See* (1966) 64 C2d 778, 51 CR 888.

**Family living expense method.** The second method of tracing is called the "family living expense" or "recapitulation" method. *In re Marriage of Braud*, *supra,* discusses this method as follows:

> [I]t is assumed that family living expenses are paid out of community property funds. (*Beam v Bank of America* (1971) 6 C3d 12, 20 [98 CR 137, 490 P2d 257]; *In re Marriage of Frick, supra,* 181 Cal.App.3d at p. 1010.) Payments may be traced to a separate property source by showing community income at the time of the payments or purchase was exhausted by family expense, so that the payments or purchase necessarily must have been made with separate property funds. (*See v See* (1966) 64 C2d 778, 783 [51 CR 888, 415 P2d 776]; *Estate of Murphy* (1976) 15 C3d 907, 918-919 [126 CR 820, 544 P2d 956].) The recapitulation must be sufficiently exhaustive to establish not only that separate property funds were available to make the payments, but that they were actually used. (*Estate of Murphy, supra*, 15 Cal.3d at pp. 918-919.) As with direct tracing, the record must demonstrate that community income was depleted at the time the particular asset was acquired.

This method must examine each individual transaction, as it occurs in time. It is insufficient to show that over a period of time, *total* expenditures exceed *total* available community property funds.

The adequacy of tracing to community or separate property is always a question of fact which findings will not be disturbed on appeal if based on substantial evidence. *In re Marriage of Mix, supra*.

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### §13.15 2. Community Payments on Separate Property

When community funds are used to make payments on property purchased by one spouse before marriage, the rule developed through case law in California is that the community has a pro tanto interest in the property in the same ratio that the payments made with community funds bear to the payments. For example, when community funds are used to make loan payments on property purchased by one spouse before marriage, California law affords the community a pro tanto community property interest in that property. *Marriage of Moore* (1980) 28 C3d 366, 168 CR 662; see *In re Marriage of Marsden* (1982) 130 CA3d 426, 436, 181 CR 910. Courts have applied this so-called *Moore/Marsden* rule not only when the parties use community funds to make mortgage payments, but also when they use community funds to make improvements to a residence purchased by one of the parties before marriage and those improvements increase the property's equity value. *In re Marriage of Sherman* (2005) 133 CA4th 795, 799, 35 CR3d 137; *Marriage of Allen* (2002) 96 CA4th 497, 116 CR2d 887; *Bono v Clark* (2002) 103 CA4th 1409, 128 CR2d 31; *Marriage of Wolfe* (2001) 91 CA4th 962, 110 CR2d 921; *In re Marriage of Branco* (1996) 47 CA4th 1621, 1625, 55 CR2d 493 (*Moore/Marsden* rule applies when parties refinanced separate residential mortgage during marriage); *In re Marriage of Frick* (1986) 181 CA3d 997, 1007, 226 CR 766 (*Moore/Marsden* rule applies to cases involving separate commercial property).

In the mortgage/improvement context, another issue arises with respect to the proper valuation date for the community property interest in the residence: the date of the parties' separation or the date of trial. In *In re Marriage of Sherman, supra,* the court concluded that the community should share in the post-separation increase in value of an asset that is not attributable solely to the efforts of one spouse. Therefore, the *Sherman* court held that the correct time for the valuation was as of, or as close to, the date of trial as possible. 133 CA4th at 800. But see *Bono*, 103 CA4th at 1427 (in calculating community property interest in residence purchased by one spouse before marriage, valuation is as of date of separation).

Family Code §2552(a) provides that for the purpose of dividing the community estate on dissolution of marriage or legal separation, the court must value the assets and liabilities as near as practicable to the time of trial, except as provided in subdivision (b). Section 2552(b) states that, on 30 days' notice by the moving party to the other party, a court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate of the parties in an equitable manner. See Judicial Council Form FL-315 (Application for Separate Trial). Applying these principles, California appellate courts have concluded the proper valuation date for a community property residence for purposes of a dissolution proceeding is the date of trial unless some reason exists that renders this result inequitable. A date of separation valuation is appropriate when the hard work and actions of one spouse alone, and after separation, greatly increases the "community" estate being divided. On the other hand, when an asset increases in value from nonpersonal factors such as inflation or market fluctuations, fairness dictates that both parties share in that increased value, which requires a valuation as close to trial as is practicable. *In re Marriage of Sherman* (2005) 133 CA4th 795, 800, 35 CR3d 137 (collecting cases).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.16 3. Community Investment in Separate Business

## §13.16 3. Community Investment in Separate Business

Because income arising from a spouse's skill and efforts during marriage is community property, the community should receive a share of the economic benefit that derives from a spouse's contribution of time and effort to the handling of his or her separate property, such as a business or real estate. In these situations, the court must apportion the total economic benefit (in the form of profit or increased value of the spouse's separate property) between community property and separate property. California courts have developed two alternative approaches to this type of allocation. They are as follows (*Beam v Bank of America* (1971) 6 C3d 12, 18, 98 CR 137):

- Allocate a fair return to the separate property investment and allocate the balance of the increased value to community property as arising from community efforts. This is known as the "*Pereira* approach." See *Pereira v Pereira* (1909) 156 C 1, 103 P 488.
- Allocate the reasonable value of the spouse's efforts to community property and allocate the balance of the profits or increased value to the separate property as attributable to the normal earnings of the separate property investment. This is known as the "*Van Camp* approach." See *Van Camp v Van Camp* (1921) 53 CA 17, 199 P 885.

The court is free to choose the approach that is most appropriate and equitable in a particular situation, depending on whether the separate property investment or the community property efforts of the spouse are the chief contributing factor in producing the profits or increased value. After the court determines the community income, however, whether through the *Pereira* or the *Van Camp* approach, it deducts the community's living expenses from that income to determine the balance of the community property interest. *Beam v Bank of America* (1971) 6 C3d 12, 21, 98 CR 137.

For a helpful discussion of the *Pereira/Van Camp* issue generally, see *Marriage of Dekker* (1993) 17 CA4th 842, 21 CR2d 642.

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## §13.17 F. Credit Acquisitions

In characterizing property acquired by loan or extension of credit during marriage, whether the lender intended to rely on the separate property of the purchaser or on community assets for satisfaction of the obligation is determinative. Even if the nonborrowing spouse joins in signing the note or trust deed, if the lender relied on the credit of the borrowing spouse, the property is his or hers and not community property. *Hicks v Hicks* (1962) 211 CA2d 144, 27 CR 307.

Proceeds of an unsecured loan obtained during marriage are usually community property because the lender usually is deemed to have been relying for payment on the spouses' earnings, which are community property. See *Bank of Cal. v Connolly* (1973) 36 CA3d 350, 111 CR 468. See, *e.g., Olson v Six Rivers Nat'l Bank* (2003) 111 CA4th 1, 3 CR3d 301 (under CC §1785.11, bank did not violate California Consumer Credit Reporting Agencies Act by requesting credit information about husband in connection with loan to wife because loan was partly based on husband's creditworthiness and community estate could be liable for loan). On the other hand, proceeds of a loan obtained during marriage and secured by a deed of trust usually are characterized in accordance with the character of the property securing the loan because the lender is deemed to have relied for payment on the security. Thus, loans secured by a spouse's separate property are usually that spouse's separate property (see *Marriage of Neal* (1984) 153 CA3d 117, 200 CR 341, disapproved on other grounds in *Marriage of Buol* (1985) 39 C3d 751, 763 n10, 218 CR 31), and loans secured by community property, *e.g.*, by the purchased property itself, are usually community property (see *Bank of Cal. v Connolly*, *supra*).

Absent evidence of the lender's intent to rely on separate property, loan proceeds acquired during marriage are presumptively community property. See Fam C §760, discussed in §13.6. The presumption may be overcome by showing the lender intended to rely solely on a spouse's separate property and did so. *Marriage of Grinius* (1985) 166 CA3d 1179, 212 CR 803.

Loan proceeds acquired during marriage but after separation are the separate property of the borrowing spouse if the transaction is unrelated to community property. *Marriage of Stephenson* (1984) 162 CA3d 1057, 1085, 209 CR 383.

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## III. LIABILITY OF COMMUNITY ESTATE FOR DEBT

### §13.18 A. Before or During Marriage

Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt. CCP §695.020; Fam C §910(a). On management and control of community property, see §13.5. Quasi-community property is also liable. Fam C §912. Except as otherwise provided by statute, the separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage, except for debts incurred for necessities of life. Fam C §§913(b)(1), 914(a).

There is one major exception to these rules: community property earnings are not liable for the premarital debts of a spouse if the earnings are held in a deposit account in which the debtor spouse has no right of withdrawal and are uncommingled with other property in the community estate (except property insignificant in amount). Fam C §911(a). See §§13.21, 13.23A.

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## §13.19 B. When Marriage Dissolved

On the dissolution of a marriage, when the spouses divide their community and quasi-community property, property received by one of the spouses is not liable for debts incurred by the other before or during marriage unless the debt was assigned to the spouse. Fam C §916(a)(2), (a)(3). On assignment of debts for payment, see §13.22.

Despite the provisions of Fam C §916, the Uniform Fraudulent Transfer Act (UFTA) (CC §§3439-3439.12) applies to marital settlement agreements such that a transfer between spouses pursuant to a dissolution may be invalidated due to fraud and property transferred to one spouse may be liable for debts of the other. *Mejia v Reed* (2003) 31 C4th 657, 3 CR3d 390. See §13.32.

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## §13.20 C. Naming Nondebtor Spouse in Enforcement Proceedings

A creditor suing a debtor to enforce a debt incurred for the benefit of the community in certain community property states, such as Arizona, must name the debtor's spouse in the lawsuit. See Ariz Rev Stat §25-215(D). In California, however, the nondebtor spouse's share of community property is liable even if he or she is not a party to the debt or the judgment. Fam C §910(a). Therefore, it is not necessary to name the nondebtor spouse in the lawsuit in order to bind the community estate. Although it is *permissible* to name the non-debtor spouse, he or she may opt out of the lawsuit. The nondebtor spouse may effectively opt out of a lawsuit in federal court by a motion to dismiss the complaint as to him or her (see *Reynolds & Reynolds v Universal Forms, Labels & Sys.* (CD Cal 1997) 965 F Supp 1392, 1396; see also Fed R Civ P 21); in state court, by motion for summary judgment as to the nondebtor spouse (see *11601 Wilshire Assocs. v Grebow* (1998) 64 CA4th 453, 74 CR2d 912). For this reason, it is difficult to place judgment liens and execute on community property in the name of a nondebtor spouse.

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## D. Exceptions to Liability of Community Property

### §13.21 1. Segregated Earnings of Nondebtor Spouse

Earnings of a nondebtor spouse, even if community property, are not liable for pre-marital debts and remain free from enforcement as long as the earnings are held in a deposit account in which the other spouse has no right of withdrawal and are not commingled with other property in the community estate, except property insignificant in amount. Fam C §911(a). On the rationale underlying this rule, see 17 Cal L Rev'n Comm'n Reports 9 (1983).

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## §13.22 2. Debts Assigned for Payment

Normally, after dissolution and after the parties divide their property, a person is not liable for the other spouse's debts incurred during marriage. Fam C §916(a)(2). See §13.19. However, if the other spouse's debts are assigned to a person in the division of property pursuant to a dissolution, that person is personally liable for the debt, and his or her separate property and any community property he or she receives in the division is liable for the other spouse's debt. Fam C §916(a)(3).

If a money judgment for the debt is entered after the division, the property is not subject to enforcement of the judgment, and the judgment may not be enforced against the formerly married person, unless the person is made a party to the judgment for that purpose. Fam C §916(a)(3).

On the other hand, if the property became subject to a lien during the marriage, it remains subject to the lien even if the nondebtor spouse is awarded the property subject to the lien and the other spouse is awarded the debt. In that situation, if a creditor satisfies a money judgment from the property awarded to the nondebtor spouse, the appropriate party has a right of reimbursement from the debtor spouse. *Lezine v Security Pac. Fin. Servs.* (1996) 14 C4th 56, 58 CR2d 76. See Fam C §916(b).

Because of these rules concerning assignment of debt, courts must take the rights of creditors into account when allocating community property and debt in a dissolution. *Lezine v Security Pac. Fin. Servs., supra*. On the conflict between Fam C §916 and the Uniform Fraudulent Transfer Act (UFTA) (CC §§3439-3439.12), see *Mejia v Reed* (2003) 31 C4th 657, 3 CR3d 390, discussed in §13.32.

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## IV. ENFORCEMENT CONSIDERATIONS

### §13.23 A. Enforcing Judgments Against Community Property

Community property is treated in three different ways, depending on the nature of the property, as follows:

(1) If the property is a deposit account or safe deposit box, an affidavit showing that the person in whose name the account stands is the judgment debtor's spouse must be delivered to the financial institution at the time of levy. See CCP §§700.149, 700.160(b)(2).

(2) If the property is tangible personal property, such as the inventory of a community property business run by the nondebtor spouse, it is simply levied on by informing the levying officer, in the levying officer's written instructions, that the property is community property. The regular methods of levy on tangible personal property are then used. See CCP §§700.030, 700.070; see also chap 9.

(3) When the community property sought to be reached is the earnings of the nondebtor spouse, not maintained in a segregated bank account (see §13.21), a court order on noticed motion is required. CCP §706.109.

**NOTE:** The remedy of garnishing a nondebtor spouse's earnings is not available when the debt was one incurred before marriage. And, if nondebtor earnings may be traced to a non-commingled deposit account, that account is exempt from levy, as well. See §13.18. Family Code §911(a) states:

> The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount.

**NOTE:** A child, spousal, or family support obligation owed by a debtor that arises from a previous marriage (or paternity relationship), is consider a premarital debt, regardless of whether the order is made or modified, or installments accrued, during marriage. As such, the nondebtor spouse's wages may not be garnished based on Fam C §911(a). See Fam C §915(a) and its related comment.

**WARNING:** Counsel must exercise caution when titling a motion seeking to reach earnings of the nondebtor spouse. The nondebtor spouse is not being added to the judgment. Rather, the practitioner is simply reaching community property earnings in the custody and control of the nondebtor spouse. See forms in §§13.23A-13.23D.

**PRACTICE TIP:** The Code of Civil Procedure is silent as to how a motion seeking to reach earnings of a nondebtor spouse is to be served. Prevailing practice is to serve it by mail on the nondebtor spouse and on the judgment debtor, as any other motion is served in the post-judgment world. Some bench officers believe that such a motion must be personally served on the nondebtor spouse, apparently on due process grounds. However, nothing in the Code or the legislative comments of the Law Revision Commission supports this interpretation. A better interpretation is to argue that the community property is already subject to the judgment (CCP §695.020) so the court has *in rem* jurisdiction over the community property. The community property was before the court because the debtor spouse was served with the original summons and complaint.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.23A 1. Form: Notice of Motion for Earnings Withholding Order

## §13.23A 1. Form: Notice of Motion for Earnings Withholding Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **NOTICE OF MOTION FOR** |
| **vs** | ) | **EARNINGS WITHHOLDING** |
| _ _[*Name(s)*]_ _, | ) | **ORDER ON SPOUSE'S** |
| **Defendant(s)** | ) | **COMMUNITY PROPERTY** |
| | ) | **WAGES (CCP §706.109)** |
| _____ | ) | **Hearing:** _ _[*date; time*]_ _ |
| | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**TO:** _ _[*name*]_ _ **and to** _ _[*his/her*]_ _ **spouse** _ _[*name of spouse*]_ _**.**

**PLEASE TAKE NOTICE that on** _ _[*date set for hearing*]_ _**, at** _ _[*time*]_ _**, or as soon thereafter as the matter can be heard, in Department** _ _[*number*]_ _ **of this court, at** _ _[*address*]_ _**, California, the plaintiff-judgment creditor,** _ _[*name*]_ _ **will move this court for an order under Code of Civil Procedure §706.109 and Family Code §§900-1000 charging** _ _[*name of spouse*]_ _ **with payment of the unsatisfied judgment against the defendant that was entered in this action. This motion is made on the grounds that the judgment entered in this action against defendant,** _ _[*name*]_ _**, has become final and remains unsatisfied and that the obligation is one that arose at a time when defendant** _ _[*name*]_ _ **was married to** _ _[*name of spouse*]_ _**.**

**This motion is based on this notice, all of the pleadings, recorded and papers previously filed in this action, the declaration and memorandum in support of the motion attached to this notice and any oral and/or documentary evidence as may be presented at the hearing on this motion.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* Original (filed with court clerk with proof of service); copies for service (one for judgment debtor and if desired, one for judgment debtor's attorney); office copies.

*Comment:* A memorandum in support of motion, commonly referred to as a memorandum of points and authorities, must accompany the motion. See Cal Rules of Ct 3.1113(a), 3.1114(a). When drafting the memorandum, the attorney should base it on the specific facts of the case and the relevant authorities. See Cal Rules of Ct 3.1113(b). See §13.23C. A supporting declaration should also accompany the motion; a form of declaration is set forth in §13.23B.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.23B 2. Form: Declaration in Support of Motion for Earnings Withholding Order

## §13.23B 2. Form: Declaration in Support of Motion for Earnings Withholding Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **DECLARATION OF** |
| **vs** | ) | **_ _[*NAME*]_ _ IN SUPPORT OF** |
| _ _[*Name(s)*]_ _, | ) | **MOTION FOR EARNINGS** |
| **Defendant(s)** | ) | **WITHHOLDING ORDER** |
| | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**I,** _ _[*name*]_ _, **the undersigned, declare:**

**1. I am the attorney for plaintiff.**

**2. I have personal knowledge of all facts stated in this declaration and, if called as a witness, could and would testify competently to them under oath.**

**3. On** _ _[*date*]_ _ **a judgment was duly entered in this action in favor of plaintiff,** _ _[*name*]_ _**, and against defendant,** _ _[*name*]_ _**, for the sum of $**_ _[*amount*]_ _**. The judgment has not been stayed by stipulation or any order of any court and is in full force and effect.**

**4. Since entry of judgment, interest has accrued in the sum of $**_ _[*amount*]_ _ _ _[*after adjustments for partial payments*]_ _ _ _[*and costs have accrued in the sum of $*_ _[*amount*]_ _]_ _**.**

**5. The judgment, with accrued interest and costs, remains unsatisfied in the sum of $**_ _[*amount*]_ _ _ _[*after credit for all payments made*]_ _**.**

**6.** _ _[*Name*]_ _ **and**_ _[*name*]_ _ **are husband and wife.**

**7. Plaintiff is informed and believes that the debt underlying the judgment was incurred after the marriage of** _ _[*name*]_ _ **and** _ _[*name*]_ _**.**

**I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct and that this Declaration is executed at** _ _[*City*]_ _**,** _ _[*State*]_ _ **on** _ _[*date*]_ _**.**

**Date:** _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

*Copies:* See §13.23A.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.23C 3. Form: Memorandum in Support of Motion for Earnings Withholding Order

## §13.23C 3. Form: Memorandum in Support of Motion for Earnings Withholding Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
**_ _[_ _ _ _ _ _ *Judicial District*]_ _**

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **MEMORANDUM IN SUPPORT** |
| **vs** | ) | **OF MOTION FOR EARNINGS** |
| _ _[*Name(s)*]_ _, | ) | **WITHHOLDING ORDER** |
| **Defendant(s)** | ) | **Hearing:** _ _[*date; time*]_ _ |
| _____ | ) | **Dep't:** _ _[*number*]_ _ |
| | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**Judgment creditor _ _[*name*]_ _ submits the following memorandum in support of the motion for an earnings withholding order of the spouse of the judgment debtor.**

**_ _[*Name*]_ _ and _ _[*name*]_ _ were married at the time of the judgment in the case captioned above. Therefore _ _[*name*]_ _ is also liable for this debt.**

**Although there is no decided case under California law, every treatise and commentary on the Enforcement of Judgments Law (EJL), including Witkin, Summary of California Law (10th ed 2005); Witkin, California Procedure (5th ed 2009); Debt Collection Practice in California (2d ed Cal CEB 1999); Enforcing Civil Money Judgments (Cal CEB Action Guide November 2008); and The Rutter Group, Enforcing Judgments and Debts, concur: community property is liable for the judgment, and the wages of the non-debtor spouse are reached by this same noticed motion procedure.**

**Both spouses' earnings during marriage are community property. *Marriage of Harrison* (1986) 179 CA3d 1216, 1226, 225 CR 234, 239.**

**It is important to keep in mind what is actually being sought by a motion for a court order for an earnings withholding order on the wages of a non-debtor spouse. The aim is not to make the spouse a judgment debtor; the aim is to apply a particular form of community property to the judgment.**

**Community property is liable for the enforcement of a money judgment under Code of Civil Procedure §695.020, which provides:**

> **(a) Community property is subject to enforcement of a money judgment as provided in the Family Code.**
>
> **(b) Unless the provision or context otherwise requires, if community property that is subject to enforcement of a money judgment is sought to be applied to the satisfaction of a money judgment:**
>
> **(1) Any provision of this division that applies to the property of the judgment debtor also applies to the community property interest of the spouse of the judgment debtor and to obligations owed to the other spouse that are community property.**

**Family Code §910(a) states that:**

> **Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse.... Regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.**

**Family Code §902 further states that:**

> **"Debt" means an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise.**

**Family Code §903 then states that:**

> **A debt is "incurred" at the following time:**
>
> **(a) In the case of a contract, at the time the contract is made.**
>
> **(b) In the case of a tort, at the time the tort occurs.**
>
> **(c) In other cases, at the time the obligation arises.**

**Code of Civil Procedure §487.010(d)(1) states that:**

> **Any provision of this title that applies to the property of the defendant or to obligations owed to the defendant also applies to the community property interest of the spouse of the defendant and to obligations owed to either spouse that are community property.**

**When the Enforcement of Judgments Law (EJL) was passed in 1982 it became effective July 1, 1983.**

**In the original Enforcement of Judgments Law, Code of Civil Procedure §706.109 did not exist. It was added later in 1984. The reason for the late addition of the section can be found in the report entitled "Liability of Marital Property for Debts" which may be found at 17 Cal L Rev'n Comm'n Reports (1984). The introduction to this report reads:**

**The Law Revision Commission was authorized by Resolution Chapter 65 of the Statutes of 1978 to study whether the law relating to community property should be revised. The Commission submits this recommendation relating to one aspect of the study—the liability of marital property for debts. The recommendation recodifies and clarifies the law governing the rights of spouses and creditors, including provisions governing reimbursement rights between the spouse.**

**Thus the provisions of Code of Civil Procedure §706.109 requiring a noticed motion before charging the community property wages of a nondebtor spouse were part of a review of community property rights, not of enforcement of judgment questions.**

**Under the EJL as originally passed, there is only one primary mention of community property in Code of Civil Procedure §695.020. One simply levied on the property. In fact, community property today is treated in three different ways, depending on the nature of the property. For real property or personal property capable of manual delivery, including inventory of a business, one simply levies and in the written instructions to the levying officer indicates that the property is community property. For a bank account, one provides a declaration under penalty of perjury that the person named on the account is the spouse of the judgment debtor. For wages of the debtor, a simple levy is made; only for wages of the nondebtor spouse is a court order required.**

**The Law Revision Commission Report makes two references to the issue. First, in the general discussions of the recommendations, the topic is mentioned as part of a discussion on the liability of community property for prenuptial debts, and then only in a footnote. Footnote 34 provides, in part: "Because it will not always be apparent whether earnings are liable for a particular debt, the commission also recommends that wage garnishment of the debtor's spouse not be permitted except upon court order." The second mention is in the proposed language of the section that became Code of Civil Procedure §706.109.**

**Thus, it is clear that what the legislature was concerned with was the community property itself, not specifically the rights of the nondebtor spouse.**

**The concept of *in rem* jurisdiction is an ancient one. No one can seriously argue that a court cannot have**

**jurisdiction over property as well as over people. When this law suit was served on the debtor, notice was given to the debtor not only that _ _[*his/her*]_ _ separate property was potentially liable for any judgment rendered, but also that _ _[*his/her*]_ _ community property was also liable. In addition, the Family Code establishes the presumption that all property acquired after marriage is community property. Family Code §760 provides that "Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." Thus, the "community property" is a "party" to the action every bit as much as the defendant.**

**Once a party has been served with a summons, service after that may be made by mail as provided in Code of Civil Procedure §§1012, 1013 and 684.120. Service here was done in exactly this manner.**

**Code of Civil Procedure §1012 states that service by mail may be made when the person on whom it is to be made resides or has an office at a place where there is a delivery service by mail, or when the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail.**

**Code of Civil Procedure §1013(a) provides that in case of service by mail, the notice or other paper must be deposited in a post office, mailbox, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by mail; otherwise at that party's place of residence.**

> **Code of Civil Procedure §684.120(a) states that, except as otherwise provided, if a writ, notice, order, or other paper is to be served by mail, it must be sent by first-class mail (unless some other type of mail is specifically required) and must be deposited in a post office, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person at the person's current mailing address, if known, or, if unknown, at the address last given by the person on any paper filed in the proceeding and served on the party making the service.**

**CONCLUSION**

**Judgment creditor respectfully requests, with this noticed motion, that the court sign the order to withhold the wages requested in the motion until such time as the judgment is fully satisfied.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
**Attorney for** _ _[*name*]_ _

*Copies:* See §13.23A.

*Comment:* This memorandum in support of motion (commonly referred to as a memorandum of points and authorities) must accompany a motion for an earnings withholding order. See Cal Rules of Ct 3.1113(a), 3.1114(a). When drafting the memorandum, the attorney should base it on the specific facts of the case and the relevant authorities. See Cal Rules of Ct 3.1113(b).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.23D 4. Form: Earnings Withholding Order

## §13.23D 4. Form: Earnings Withholding Order

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
**Attorney for** _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

**_ _ _ _ _ _ Court, County of _ _ _ _ _ _**
_ _[_ _ _ _ _ _ *Judicial District*]_ _

| | | |
|---|---|---|
| _ _[*Name(s)*]_ _, | ) | **No. _ _ _ _ _ _** |
| **Plaintiff(s)** | ) | **EARNINGS WITHHOLDING** |
| **vs** | ) | **ORDER (CCP §706.109)** |
| _ _[*Name(s)*]_ _, | ) | **Hearing:** _ _[*date; time*]_ _ |
| **Defendant(s)** | ) | **Dep't:** _ _[*number*]_ _ |
| _____ | ) | **Hearing judge:** _ _[*if known*]_ _ |
| | ) | **Action filed:** _ _[*date*]_ _ |
| | ) | **Trial date:** _ _[*if set*]_ _ |
| | ) | |
| | ) | |

**The judgment creditor's motion for an order to charge spouse's community property earnings came on regularly for hearing before this court at the date and time noted above, after notice was given according to law. The judgment creditor appeared by _ _[*name*]_ _; the judgment debtor appeared by _ _[*name*]_ _; and the spouse of the judgment debtor appeared by _ _[*name*]_ _. The court having considered the motion and good cause appearing:**

**IT IS ORDERED that the judgment creditor's motion for an earnings withholding order is GRANTED. An Earnings Withholding Order may issue against _ _[*name*]_ _, spouse of the judgment debtor.**

**Date:** _ _ _ _ _ _ __[*Signature*]__
**Judge of the** _ _[*title of court*]_ _

*Copies:* See §13.23A.

*Comment:* The fee for serving an earnings withholding order is prescribed by statute. See Govt C §26750. In addition, a processing fee is assessed for each disbursement of money collected under the order to be collected from the judgment debtor. See Govt C §26746.

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### §13.24 B. Problem of Nondebtor Spouse Assuming Debt

A problem arises when the nondebtor spouse voluntarily assumes liability for a judgment debt of the other spouse in a dissolution. How does a judgment creditor enforce such an assumption of liability when the nondebtor spouse is not named on the judgment and is not named on any abstract that has been recorded or filed? The answer remains unclear.

It appears, however, that a noticed motion to add the new debtor to the judgment on the basis of an express assumption of the debt may not be the answer. In an unpublished opinion, the court found that it was error for the trial court to grant a motion to add the nondebtor spouse to the judgment on the basis of her express assumption, in a marital settlement agreement, of community debts contracted before the date of separation. The court found that the nondebtor spouse "was made personally liable for a debt without being served with summons and complaint, without getting a trial … and without the benefits and protection of any of the procedures by which liability may be adjudicated" even if she had waived her rights to these things, because "there is simply no equitable, common law, or statutory procedure allowing the court to proceed in the manner it did." *Minkes v Rhodes* (Apr. 14, 2004, No. G032082, not certified for publication) 2004 Cal App Unpub Lexis 3624.

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## C. Enforcement Methods

### 1. Debtor's Examination

### §13.25 a. Examination of Judgment Debtor

Under CCP §708.110(a), a judgment creditor may apply to the court for an order requiring the judgment debtor to appear and supply information to aid in enforcement of the judgment. Service of the order for examination on the judgment debtor creates a lien on the personal property of the judgment debtor for a period of one year from the date of the order. CCP §708.110(d). This type of lien is referred to as an "ORAP (or order to appear) lien." See *Southern Cal. Bank v Zimmerman (In re Hilde)* (9th Cir 1997) 120 F3d 950, 953. A lien created by a judgment debtor examination is one of the lesser known liens. For a detailed discussion of how to apply for an order of examination, see §§8.15-8.19.

**NOTE:** It is possible that if a judgment debtor's spouse is served under CCP §708.110(d), a lien will be created on all community property. It is unclear what effect that will have on distribution by a family law court of property subject to the lien.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.26 b. Examination of Third Person

### §13.26 b. Examination of Third Person

A judgment creditor may apply to the proper court for an ex parte order requiring a third person to appear for examination when the third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount exceeding $250. CCP §708.120(a). If the property in the third person's possession or control is described in sufficient detail in the application for the order, a lien is created on the property when the order is served. CCP §708.120(c). This is another type of "ORAP (order to appear) lien," similar to the one discussed in §13.25.

If the third party ordered to appear is a spouse, the marital privilege does not apply in the examination proceeding. CCP §708.130(b).

**NOTE:** It is possible that if a spouse is ordered to appear for examination as a third party under CCP §708.120, a lien will be created on all community property. The effect on the distribution by the family law court of property subject to the lien is unclear.

**PRACTICE TIP:** When an order for examination is served on a judgment debtor or a third party, the judgment creditor may ask the court to issue an order at the conclusion of the examination. At that point, the court may order the judgment debtor's interest in the property in possession of either the judgment debtor or a third person to be applied toward satisfaction of a money judgment. CCP §708.205(a). The property must be exempt from enforcement, however. See CCP §708.205(b).

For a more detailed discussion of obtaining an order for examination of a third person, see §§8.20-8.24.

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## 2. Liens

### §13.27 a. Lien in Pending Action

A judgment creditor may place a lien on a judgment debtor's pending cause of action or other claim. CCP §708.410(a). See CCP §708.410-708.480. To do so, the judgment creditor must file and serve a copy of a notice of lien on all the parties to the pending action or proceeding. CCP §708.410(b). The required contents of the notice are set forth in CCP §708.420. Once the notice of lien is served, the judgment creditor may move for an order that applies money or property that the judgment debtor is entitled to in the action or proceeding to the satisfaction of the judgment creditor's judgment. CCP §708.470(a), (b). Thus, for example, the judgment creditor may obtain a lien in a dissolution action for property received by a judgment debtor in the dissolution. See, *e.g.*, *Marriage of Katz* (1991) 234 CA3d 1711, 286 CR 495 (wife who transferred community property to husband as his separate property in exchange for cash was liable to judgment creditor of husband).

If a judgment creditor has obtained a lien in the judgment debtor's pending action or proceeding, the judgment creditor may also seek to intervene in the action. CCP §708.430(a). See, *e.g.*, *Marriage of Kerr* (1986) 185 CA3d 130, 229 CR 610 (attorney permitted to intervene in dissolution action when he had previously obtained judgment lien on community assets for payment of fees and intervention would not impede dissolution action). Because of the sparse case law on this subject, however, it is unclear exactly what property the lien may cover and how likely it is that a court in a dissolution action will permit intervention.

For a discussion of the procedures for obtaining a lien in a pending action or proceeding, see §§11.12-11.15.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.28 b. Judgment Lien on Real Property

### §13.28 b. Judgment Lien on Real Property

A judgment creditor may obtain a judgment lien on real property of the judgment debtor. The manner of creating the lien depends on whether the judgment is for a lump sum or installments. For a lump sum judgment, a judgment lien is created by recording an abstract of money judgment in the county where the property is located. CCP §697.310(a). For an installment judgment, such as a judgment for spousal or child support payable at specified intervals, a judgment lien is created by recording an abstract of support judgment, a notice of support judgment, an interstate lien form promulgated by the Secretary of Health and Human Services (for sister-state judgments), or a certified copy of the money judgment (*i.e.,* the order setting forth the support obligation) in the county where the property is located. CCP §§697.320(a), 697.330(a)(2). For other money judgments, such as an order for payment of attorney fees, the lien is created by recording an abstract of judgment. See CCP §§674(a), 697.310(a). When there are conflicting interests in the real property, the interests rank according to the time of recording. See CCP §697.380(c), (d).

On the procedure for obtaining a judgment lien on real property and a form of abstract of judgment, see §§7.50-7.51. On release or subordination of judgment liens concerning real property, see §§7.54-7.57.

**PRACTICE TIP:** With respect to judgment liens on real property in the dissolution context, two issues arise. First, if the lien is acquired before there is any division of property in the dissolution, the lien follows the property into the hands of the nondebtor spouse. It is unclear how to get a family law court to issue orders showing that the property is subject to the lien. Second is the question of how to place such a lien on community property in the name of the spouse of the judgment debtor alone. A motion to permit such a lien may be required and it may be limited to a specific piece of property so as not to interfere with the nondebtor spouse's separate property.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.29 c. Judgment Lien on Personal Property

### §13.29 c. Judgment Lien on Personal Property

Analogous to a lien on real property (see §13.28), a judgment creditor may obtain a lien on specified personal property of the judgment debtor. See CCP §§697.510-697.670. For lump sum money judgment, a judgment lien on certain types of business property located within California (*e.g.*, accounts receivable and inventory) can be created by filing a notice with the Secretary of State. CCP §§697.510(a), 697.530(a).

**PRACTICE TIP:** This type of lien is useful to employ in conjunction with other enforcement procedures. A judgment lien on personal property may be created as an alternative or in addition to other procedures provided for personal property. CCP §697.520.

On procedures for obtaining a personal property lien, including the types of property subject to and exempt from such a lien, see §7.52.

Conflicting interests in personal property rank according to priority in time of filing or perfection. CCP §697.590(b). See CCP §697.600. For a judgment lien, the priority dates from the time filing is first made. CCP §697.590(b). For a security interest or agricultural lien, on the other hand, the priority dates from when a filing is first made or when the security interest or agricultural lien is first perfected, whichever is earlier. CCP §697.590(b).

**PRACTICE TIP:** In order to give notice and obtain priority, a judgment lien must be filed in the name of anyone who has property subject to the lien in their name. Therefore, a key issue is how to place a judgment lien on community property in the name of the spouse of the judgment debtor alone. A motion to permit such a lien may be required.

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## V. FRAUDULENT TRANSFERS

### §13.30 A. Prenuptial Agreements

Prenuptial or premarital agreements determining property arrangements between the spouses are permitted by California law. Fam C §1610(a). There are no reported cases on whether such agreements are subject to fraudulent transfer rules, but there is no theoretical reason why they should not be. The difficult issue is one of proof.

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## §13.31 B. Agreements Between Spouses

As discussed in §13.9, agreements changing ownership of property by married persons are permitted by California law by agreement or transfer, with or without consideration, to transmute separate property to community property or vice versa. Such agreements, however, are clearly subject to fraudulent transfer law. Fam C §851. See, *e.g.*, *Marriage of Haines* (1995) 33 CA4th 277, 39 CR2d 673 (because transactions between spouses subject to fraudulent transfer rules, undue influence presumption of Fam C §721 applied to determine propriety of wife quitclaiming her interest in residence to husband).

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## §13.32 C. Marital Settlement Agreements

Resolving a significant split of authority regarding whether agreements made in the context of a marital dissolution are subject to fraudulent transfer law, the California Supreme Court concluded in *Mejia v Reed* (2003) 31 C4th 657, 3 CR3d 390, that the Uniform Fraudulent Transfer Act (UFTA) (CC §§3439-3439.12) applies to property transfers made under a marital settlement agreement (MSA).

In *Mejia*, a mother had a pending paternity suit against a doctor, who was the father of her child, at the same time the father was involved in a dissolution proceeding with his wife. The father and the wife entered into an MSA under which the father conveyed his interest in the community real property to the wife, and she conveyed her interest in his medical practice to him. The mother claimed that the transfer was fraudulent, intended to prevent her from collecting child support, and asked the court to impose a lien on the real property. The supreme court held that the UFTA applies to property transfers under an MSA and that such transfers may be set aside for fraud. 31 C4th at 669. In that regard, it found that the UFTA prevails over Fam C §916, which protects property transferred to a spouse incident to divorce from the debts of the other spouse. On the effect of Fam C §916, see §13.22.

In an additional holding, the court found that under the UFTA, a transfer can be invalid because of either actual fraud or constructive fraud. One form of constructive fraud is a transfer by a debtor, without receiving any equivalent value in return, that leaves the debtor insolvent. CC §3439.05. The court held that the doctor was not insolvent after the transfer under the MSA, even given his future child support obligations to the mother, because the discounted value of future child support may not be considered in determining solvency. 31 C4th at 671. The court remanded the case on the issue of actual fraud, however.

In reaching its holding, the court discussed the legislative history and intent of both the UFTA and Fam C §916. In resolving the two legislative schemes, it noted (31 C4th at 668):

> The California Legislature has a general policy of protecting creditors from fraudulent transfers, including transfers between spouses. A transfer before dissolution can be set aside as a fraudulent conveyance. (See Fam. Code, §851 [transmutation of marital property subject to UFTA]; *Reddy v Gonzalez* (1992) 8 CA4th 118, 122-123, 10 CR2d 55.) A transfer after dissolution can be set aside under the clear terms of the UFTA. When the court divides the marital property in the absence of an agreement by the parties, it must divide the property equally (Fam. Code, §2550), which provides some protection for a creditor of one spouse only. In view of this overall policy of protecting creditors, it is unlikely that the Legislature intended to grant married couples a one-time-only opportunity to defraud creditors by including the fraudulent transfer in an MSA.… In our view, the parties' debts, and how to pay them, are matters that *should* be considered in marital settlement negotiations even if, like pension plans and income tax consequences, they make the process of reaching an agreement more complex.

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## §13.33 VI. ENFORCEMENT OF SUPPORT JUDGMENTS

Many collection attorneys do not handle support enforcement, but there is no particular reason why they should not. In fact, this may be an area in which the skills acquired in general judgment enforcement may be used to a greater advantage than usually seen in family law enforcement.

**CAUTION:** When enforcing support obligations, the attorney must remain abreast of changes to both the Enforcement of Judgments Law (EJL) as well as to the Family Code. For example, in 2006, the California Legislature enacted a new chapter in the Family Code to regulate the activities of private child support collectors (see §13.34A). Fam C §§5610-5616.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.34 A. Support Judgments Distinguished From Money Judgments

## §13.34 A. Support Judgments Distinguished From Money Judgments

There are no statutes of limitations on support judgments. Rather, support judgments are enforceable until paid in full or otherwise satisfied (Fam C §291(a); but see Fam C §291(e) (enforcement after death of judgment creditor or debtor)) and they may be enforced without regard to renewal (Fam C §291(b); but see Fam C §291(c) (optional renewal procedure)). There is no defense of laches in dealing with support judgments (outside of any portion of the judgment that is owed to the state). Fam C §291(d). See also *In re Marriage of Fellows* (2006) 39 C4th 179, 46 CR3d 49 (statutory amendments precluding assertion of laches to support obligations not owed to state were intended by legislature to apply retroactively, and therefore, regardless of when arrearages accrued, laches may not be asserted).

Perhaps the greatest difference between support judgments and other civil judgments, however, is that in addition to all of the normal enforcement procedures available, the family court has broad contempt powers, and is more likely to use them than the general civil courts. See §13.39.

**NOTE:** Family Code §291(a) makes clear that *any* money judgment or order made or entered pursuant to the Family Code remains "enforceable until paid in full." Therefore, in addition to support obligations, money judgments for obligations such as attorney fees and equalization payments are also free from any statute of limitations. However, it is important to note that the elimination of laches as a defense is *only* applicable to support obligations since Fam C §291(d) is silent concerning nonsupport debt.

With respect to accounting, a significant difference between support judgments and money judgments is that, in accounting for payments made for support judgments, the payments must be applied against the current installment due first, then against the principal balance, and finally, toward accrued interest. CCP §695.221(a)-(c). Payments made on general money judgments, on the other hand, are credited first against statutory fees and costs of the levying officer, then against court fees, then against accrued interest, and finally against the principal amount of the judgment remaining unsatisfied. CCP §695.220(a)-(d).

**PRACTICE TIP:** The payment allocation discussed above is effective as of January 1, 2009. However, for payments made before that date, the statutory scheme in effect at the time should apply. Therefore, payments made before October 1993 should be applied first to interest, then principal, while payments made between October 1993 and December 31, 2008, should be applied first to the current month's support obligation, then to interest, and then principal.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.34A B. Private Child Support Collectors

### §13.34A B. Private Child Support Collectors

The California Legislature has enacted a comprehensive statutory scheme to regulate the practice of child support collection by "private child support collectors." Fam C §§5610-5616. A "private child support collector" ("PCSC") is defined as "any individual, corporation, attorney, nonprofit organization, or other non-governmental entity who is engaged by an obligee to collect child support ordered by a court or other tribunal for a fee or other consideration." Fam C §5610. These statutes also specifically apply to any private, nongovernmental attorney "whose business is substantially compromised of the collection or enforcement of child support." "Substantially" means that at least 50 percent of the attorney's business, either in terms of time spent or remuneration earned, is from child support collections. However, the statutes do not apply to attorneys who are addressing "issues of ongoing child support or child support arrearages" in the course of various family law proceedings (*e.g.,* parentage, dissolution, legal separation, nullity, or postjudgment or modification proceedings). Fam C §5610.

Anyone who falls within the PCSC definition faces a myriad of regulations on how he or she conducts business in California, including such basic issues as advertising, retainers and fee agreements, costs, advertising, disclosures, rights of cancellation, and record keeping. The statutes provide for:

- Required contents in any private contract for child support collection, including a cancellation provision and a statement that the child support to be collected for that individual has not been assigned to the state or county (Fam C §5611);
- Mandatory disclosures in the collector's advertising (Fam C §5612);
- Contract cancellation rights (Fam C §5613);
- Disclosure of information by the collector on amounts collected (along with establishing a direct deposit account with the state disbursement unit) (Fam C §5614); and
- The right to bring a civil action against the collector for damages for violating these statutes (Fam C §5615).

The statutes also provide that every court order for child support (including court-approved agreements) issued on or after January 1, 2010, must include a separate money judgment owed by the support obligor to pay a fee (not exceeding a specified percentage of support arrearages and not exceeding a specified percentage of a private collector's fee) for collection efforts undertaken by a private collector. That judgment must be in favor of both the collector and the support obligee. Fam C §5616.

**CAUTION:** A complete discussion of these provisions are beyond the scope of this publication. However, anyone enforcing child support obligations is strongly advised to thoroughly review these statutes to ensure compliance when necessary.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.34B C. Department of Child Support Services

## §13.34B C. Department of Child Support Services

Once enforced by the District Attorney offices in most of the 58 different California counties, California child support is now largely enforced by the California Department of Child Support Services (DCSS). The statewide DCSS works with local and regional child support offices to provide their federally and state mandated services. These services include establishment of paternity, obtaining support orders, and enforcing those orders. Additionally, requests for various types of aid, including Temporary Assistance to Needy Family (TANF) (formerly Aid to Families with Dependent Children (AFDC)), are administered through DCSS.

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## §13.34C 1. Special DCSS Remedies

Although all enforcement remedies available to the private sector are, theoretically, available to DCSS, the reverse is not true. Remedies not available to the private sector for the enforcement of child support include revocation of driver's and professional licenses, non-renewal and suspension of passports, federal tax refund intercepts, and garnishment of unemployment benefits. For a support creditor to take advantage of these remedies, the creditor must initiate a case with the local DCSS office.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.34D 2. Independent Enforcement

### §13.34D 2. Independent Enforcement

When DCSS has an active child support enforcement case, an individual seeking to enforce an obligation, either pro per or by counsel, must complete Judicial Council Form FL-645, Notice to Local Child Support Agency of Intent to Take Independent Action to Enforce Support Order (Governmental). Completion of this form requires, in part, a statement as to what enforcement action is intended. If, after service of this form, no objection is received from DCSS within 30 days, consent is implied, and the identified enforcement must commence within 180 days. See Fam C §17404(f)(2).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.34E 3. State Disbursement Unit

### §13.34E 3. State Disbursement Unit

The California State Disbursement Unit (SDU) is responsible for receiving and processing child support payments for individuals with open cases through a local child support agency. The SDU also receives and processes all employer child support wage withholding payments-including child support withholdings from private support orders. See Fam C §5235(e). As such, an independently obtained Earnings Withholding Order or Order/Notice to Withhold, will, in all likelihood, result in the withholding being redirected to the SDU, regardless of what name and address is on the form or order. For this reason, it is critical that a Judicial Council Form FL-191, Child Support Case Registry Form, be completed, filed, and mailed to the SDU. It is through this form that the SDU matches payments received with the intended payee. Contact information for the SDU is included in the Directory.

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## D. Methods of Enforcement of Support Judgments

### §13.35 1. Wage Assignment

An earnings assignment order for support, also referred to in the statutes as an "assignment order" and commonly referred to as a "wage assignment," is available for enforcement of orders for child, spousal, and family support. See Fam C §§150, 5202, 5208. Earnings assignment orders for child or family support must be prepared and issued on federal forms titled Income Withholding Order for Support (FL-195/OMB 0970-0154) and Sample Order/Notice With Instructions (FL-196/OMB 0970-0154). See 42 USC §666. Earnings assignment orders for spousal support may be prepared using the federal form FL-195 or a California Judicial Council form FL-435.

The order may be served on the obligor's employer. Unless the order states a later date, withholding under the order, from all earnings payable to the employee, must begin as soon as possible, but not later than 10 days after service. Fam C §5233. The employer must forward the withheld amounts to the obligee and must report to the obligee the date when each amount was withheld from the obligor's wages. Fam C §§5235(c).

**PRACTICE TIP:** The definition of "earnings" under a wage assignment order differs from "earnings" as defined under an earnings withholding order based on a writ of execution, even when done for support. In contrast to the definition of earnings under CCP §704.070, Fam C §5206(b) defines earnings to also include "[p]ayments due for services of independent contractors, interest, dividends, rents, royalties, residuals, patent rights, or mineral or other natural resource rights."

For a detailed discussion of wage assignments, see chap 11; wage garnishment is discussed in chap 10.

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## §13.36 2. Electronic Funds Transfer

If a child support obligor is not subject to an earnings assignment order (see §13.33), a child support order may require the obligor to designate an account from which his or her support obligation may be paid electronically. The court may order that support amounts be transferred to the obligee's account or to the district attorney's account. Fam C §4508.

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### §13.37 3. Writ of Execution

A writ of execution, *i.e.*, an order to a county's levying officer (such as the sheriff or marshal) to obtain satisfaction of a judgment for a judgment creditor, may be used to enforce family law orders for the payment of money or the transfer of property. Writs of execution are commonly used to enforce orders for attorney fees and for support. Generally, all of a judgment debtor's property is subject to execution (see CCP §§695.010, 699.710), with some exceptions (see CCP §§699.720, 704.010-704.210, 704.730). For a complete discussion of enforcing money judgments under a writ of execution, see chap 9.

**PRACTICE TIP:** When obtaining a writ of execution for child, spousal, or family support, it always advisable to note the phrase "child support" or "spousal support" on the *face* of the writ. This will reduce the likelihood that a levying officer will mistake the writ for a nonsupport judgment that might cause reduced garnishment amounts, alter statutory claim of exemption procedures on wages, or lower wage garnishment priorities among competing garnishments.

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### §13.38 4. Judgment Lien

A judgment lien on real property is a simple and sometimes very effective enforcement method in support proceedings. A judgment lien to enforce a money judgment for child, spousal, or family support payable in installments is created by recordation. CCP §697.320(a). See §13.23. A lien created to enforce a support judgment remains enforceable as long as the judgment remains enforceable. CCP §697.320(b). By recording the abstract of judgment ordering a former spouse to pay child support, the county established a valid lien against the debtor's residential property to satisfy support arrearages, even though the debtor's former spouse was not on welfare and did not assign support collection rights to the county. *Cal-Western Reconveyance Corp. v Reed* (2007) 152 CA4th 1308, 62 CR3d 244.

On the use of judgment liens to enforce support orders and for reproductions of the appropriate forms, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§20.32-20.36 (Cal CEB Annual).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.38A 5. Seek Work Orders

### §13.38A 5. Seek Work Orders

Although a court cannot order a debtor to become employed, when a family support debtor defaults on a support obligation, the court does have the authority to order the debtor to search and apply for employment, commonly referred to as a "seek work" order. Pursuant to Fam C §4505, a debtor can be ordered to submit a list of at least five different places where he or she has applied for employment, every 2 weeks or at a frequency determined by the court, to the appropriate child support enforcement agency or any other entity designated by the court (including the court itself).

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## 6. Contempt Proceedings

### §13.39 a. Civil or Criminal Contempt

Contempt proceedings are available to enforce judgments and orders made under the Family Code. Fam C §290. If the contempt alleged is for failure to pay child, spousal, or family support, each month for which payment has not been made in full may be alleged and punished as a separate count. The limitations period for such a failure is 3 years from when the payment was due. CCP §1218.5(a). To initiate a contempt proceeding, the moving party must complete Judicial Council Form FL-410, Order to Show Cause and Affidavit for Contempt, and the appropriate Judicial Council attachment, depending on the type of underlying order involved.

Contempt may be either civil or criminal. Criminal contempt is a violation of the penal statutes. It is prosecuted as a crime. See Pen C §166. Civil contempt is governed by CCP §§1209-1222, which provide for a special proceeding to implement the inherent power of the court to conduct its business and enforce its orders.

A contempt proceeding is also considered civil in nature if the alleged contemner is subject to incarceration only until he or she performs an act ordered by the court ("ability to purge"). *Hicks v Feiock* (1988) 485 US 624, 632, 99 L Ed 2d 721, 1429, 108 S Ct 1423. The contemner in *Hicks* had been ordered to pay support arrearages and placed on probation. The order did not provide for terminating or modifying the probation should the arrearages be paid off, suggesting that the contemner would have no means to purge the contempt. The Supreme Court remanded *Hicks* to the court of appeal to determine whether the contempt proceeding was civil or criminal. 485 US at 640, 99 L Ed 2d at 1434.

On remand, using the Supreme Court's "ability to purge" standard, the court of appeal found the contempt proceedings "unmistakably criminal." *In re Feiock* (1989) 215 CA3d 141, 145, 263 CR 437, overruled on other grounds in *Moss v Superior Court* (1998) 17 C4th 396, 71 CR2d 215. However, the court of appeal noted problems with the "ability to purge" approach, and suggested that California courts, which "have traditionally assumed or held that all contempts are at least quasi-criminal in nature," consider a different approach to the civil-criminal issue that would provide contemners potentially facing any jail time with greater due process rights (*In re Feiock,* 215 CA3d at 145 n6):

> First, neither the parties nor the court knows what type of proceedings they are in until judgment is pronounced. This surely would produce innumerable logistical nightmares, not to mention due process notice problems.... More importantly, because the consequences of a "civil" contempt are potentially *greater* than those of a "criminal" one, the procedural protection in those cases should be the same or stronger. Child support cases provide a perfect example. In each type of proceeding, ability to pay can be an issue. But a criminal contempt conviction results in no more than a five-day jail term and a $1,000 fine for each contempt, while a civil contemner may be imprisoned *indefinitely* pending compliance.

Due process requires counsel be appointed for an indigent person faced with possible jail time for allegedly violating a family court order. *County of Santa Clara v Superior Court* (1992) 2 CA4th 1686, 1697, 5 CR2d 7.

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### §13.39A b. Limitations on Contempt Proceedings

A court's use of its contempt power is limited by federal and state constitutional provisions that prohibit imprisonment for debt. US Const amend XIII; Cal Const art I, §10. Thus, the issue of the availability of contempt may arise whenever a contempt proceeding is brought to enforce an order for payment of money. The specific question is whether the particular order to pay money is an order to pay a debt to a creditor. However, orders to pay spousal support, child support, and attorney fees and costs are not considered orders to pay a debt to a creditor and are clearly enforceable by contempt. *Miller v Superior Court* (1937) 9 C2d 733, 736, 72 P2d 868 (spousal support); *Bailey v Superior Court* (1932) 215 C 548, 555, 11 P2d 865 (child support); *In re Hendricks* (1970) 5 CA3d 793, 796, 85 CR 220 (attorney fees and costs).

Generally speaking, for contempt to lie, the following factors must be present (*Moss v Superior Court* (1998) 17 C4th 396, 71 CR2d 215):

- The underlying order must be valid (see *Oksner v Superior Court* (1964) 229 CA2d 672, 40 CR 621);
- The citee must have knowledge of the order, as, for example, if the citee is present in court when the order was made or was served with a copy of the order (see *Phillips v Superior Court* (1943) 22 C2d 256, 137 P2d 838); and
- There must be noncompliance with the underlying order. Proof of a parent's noncompliance with a valid order for child support is prima facie evidence of their contempt of court. CCP §1209.5. Thus the burden to produce evidence refuting the elements of contempt in a child support case is on the alleged contemner. *Moss v Superior Court, supra*; *In re Ivey* (2000) 85 CA4th 793, 102 CR2d 447; *Martin v Superior Court* (1971) 17 CA3d 412, 95 CR 110.

Punishment for contempt can only rest upon clear, intentional violation of a specific, narrowly drawn order. *In re Marcus* (2006) 138 CA4th 1009, 1016, 41 CR3d 861.

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### §13.39B c. Ability to Comply With Order

When the order is a family law order for payment of support or attorney fees, and the family law court has already determined the alleged contemner's ability to pay the underlying order, ability to comply with the order is not an element of the contempt. *Moss v Superior Court* (1998) 17 C4th 396, 71 CR2d 215 (ability to pay is not element of contempt of child support order). Rather, inability to pay is an affirmative defense, which must be proven by the alleged contemner. *In re Ivey* (2000) 85 CA4th 793, 798, 102 CR2d 447. Ability to pay becomes an element of the contempt only when the alleged contempt occurs many years after the underlying order. *In re Ivey, supra*.

Further, if a court makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his or her child, proof that the order was made, filed, and served on the parent (or proof that the parent was present in court at the time the order was pronounced) and proof that the parent did not comply with the order is prima facie evidence of a contempt of court. CCP §1209.5.

**NOTE:** In *Moss v Superior Court* (1998) 17 C4th 396, 71 CR2d 215, the court identified the opinion in *Ex parte Todd* (1897) 119 C 57, 50 P 1071 as the apparent source of the belief that imposition of a contempt sanction on a parent who willfully disables himself or herself from having the ability to comply with a child support order is constitutionally impermissible. The court overruled *Todd* to the extent that it held that it was unconstitutional to impose a contempt sanction on a parent who refused to work. The duty of a parent to support the parent's child or children is a fundamental parental obligation. The court found no constitutional impediment to using contempt power to punish a parent who, otherwise lacking monetary ability to pay child support, willfully fails and refuses to seek and accept available employment commensurate with his or her education, experience, skills, and abilities. *Moss*, 17 C4th at 405.

Attorney fees are recoverable in contempt proceedings brought in connection with child support enforcement. *Goold v Superior Court* (2006) 145 CA4th 1, 51 CR3d 455.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.39C d. Responses to Contempt Charge

### §13.39C d. Responses to Contempt Charge

Although not required by statute, the accused may serve and file an affidavit or declaration (see CCP §2015.5) in opposition to the contempt allegation. This is in the nature of an answer. *Lyon v Superior Court* (1968) 68 C2d 446, 452, 67 CR 265. However, the allegations in the original affidavit are deemed admitted if the accused files an opposing affidavit that fails to deny them. Only the allegations that are denied require a hearing. Generally, if no opposition is filed, all issues are deemed in controversy. See *Crittenden v Superior Court* (1964) 225 CA2d 101, 107, 36 CR 903.

An accused who wishes to defend on the ground that the disobedience was not willful must raise that issue as an affirmative defense. *Moss v Superior Court* (1998) 17 C4th 396, 428, 71 CR2d 215 (addressing inability to pay child support).

Another possible response to a charge of contempt is to file a motion to have the contempt citation discharged on one of these grounds (*In re Marcus* (2006) 138 CA4th 1009, 41 CR3d 861; *In re Marriage of Jensen* (2003) 114 CA4th 587, 114 CA4th 587):

- The court lacked jurisdiction;
- The underlying order is void for want of subject matter jurisdiction;
- The underlying order is legally ineffective because of a clerical error, such as not being reduced to a written order signed by the judge or not entered properly in the court minutes;
- The underlying order is too vague to be enforced;
- The charging affidavit does not make out a prima facie case of contempt; or
- The underlying order expired before the alleged violation occurred.

For a complete discussion of contempt proceedings to enforce family law support orders, including reproductions of pertinent forms, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§20.37-20.51 (Cal CEB Annual).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.40 7. Deposit of Assets to Secure Child Support

## §13.40 7. Deposit of Assets to Secure Child Support

In unusual situations, a support obligee may be able to obtain an order requiring a parent who is subject to a child support order to deposit assets to secure future support payments. See Fam C §§4600-4641. This type of enforcement device is available when the obligor parent is in arrears in the amount of 60 days or more of payments, and circumstances are such that an earnings assignment order for support (see §13.35) would be impracticable (because, *e.g.*, the obligor is self-employed or changes employers often). Fam C §§4610(a), 4613.

**PRACTICE TIP:** Child support obligees seeking security for ordered payments may be better served by obtaining a child support security deposit, discussed in §13.41. See *Marriage of Ilas* (1993) 12 CA4th 1630, 1639 n6, 16 CR2d 345 (describing child support security deposit proceeding as "newer and more liberal" than proceeding for deposit of assets to secure child support under Fam C §§4600-4641).

For a complete discussion of orders requiring deposits of assets in child support proceedings, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§20.52-20.57 (Cal CEB Annual).

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### §13.41 8. Deposit of Money to Secure Child Support

In an order or judgment requiring payment of child support, the court may require that the obligor pay up to one year's child support, known as a "child support security deposit." Fam C §4560(a). See Fam C §§4550-4573.

**NOTE:** This proceeding is distinguished from a similar proceeding, discussed in §13.40, for a deposit of assets to secure child support under Fam C §§4600-4641.

Before entering an order for deposit of money to secure child support, the court must give the obligor reasonable notice and an opportunity to file an application to reduce or eliminate the deposit. Fam C §4565(a). The obligee may file responsive financial information in support of the order. Fam C §4566. The court must provide an opportunity for hearing before entering an order. In issuing its order, the court must exercise discretion under the facts and circumstances before it to maximize the payment and deposit of the money, or an adequate equivalent security, without causing the obligor undue financial hardship. Fam C §4567. Any money to be deposited must be into an interest-bearing account with a financial institution. Fam C §4561.

For a discussion of deposit of money to secure child support, including forms of order and application for disbursement, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§20.58-20.65 (Cal CEB Annual).

A similar, but much less comprehensive, statutory scheme exists providing that the court may order security for the payment of spousal support. See Fam C §4339.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.42 9. Collection From State or Local Public Entity Owing Money to Judgment Debtor

## §13.42 9. Collection From State or Local Public Entity Owing Money to Judgment Debtor

When the state or a city, county, or public agency owes money to a judgment debtor, a special procedure in CCP §§708.710-708.795 may enable the judgment creditor to have the money paid to him or her to satisfy the judgment. See CCP §§708.710-708.720. The procedure is best known for intercepting state income tax refunds and lottery winnings, but is not limited to those uses. For a discussion of the procedure for enabling a judgment debtor to collect money from a state or local public entity, see §§11.36-11.41.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.43 10. Examination of Support Obligor or Third Party

## §13.43 10. Examination of Support Obligor or Third Party

As discussed in §§13.25-13.26, a judgment creditor may apply for an order requiring the judgment debtor or a third party to appear before the court to furnish information to aid in enforcement of a money judgment. Service of the order for examination creates a lien on the judgment debtor's personal property. CCP §§708.110, 708.120.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.43A 11. Qualified Domestic Relations Orders

### §13.43A 11. Qualified Domestic Relations Orders

Unlike most judgments that may not be enforced against a qualified ERISA plan (see 29 USC §§1001-1461), such as a 401K or defined contribution account, awards such as child and spousal support *may be* enforced through the issuance of a qualified domestic relations order (QDRO). See IRC §414(p). See also 29 USC §§1056(d)(3), 1144(b)(7).

**CAUTION:** Although California has adopted Judicial Council Form FL-460, Qualified Domestic Relations Order for Support, as a QDRO form, this form is not widely accepted by plan administrators as a "qualified" order due to its brevity and lack of compliance with plan requirements.

After drafting and receiving pre-approval from the plan administrator, the attorney may join the plan and file a motion for issuance of the QDRO. Specialized judicial council forms have been adopted regarding joinder of employee benefit plans. See Judicial Council Forms FL-370, Pleading on Joinder—Employee Benefit Plan; FL-372, Request for Joinder of Employee Benefit Plan Order; and FL-374, Notice of Appearance and Response of Employee Benefit Plan.

**NOTE:** The ordinary use of a QDRO is for division of community property interest in a retirement plan. However, for support purposes, a specialized QDRO must be used for enforcement.

**PRACTICE TIP:** When drafting a QDRO, the debtor is referred to as the "Participant" and the support creditor is referred to as the "Alternate Payee." It is critical to define the Alternate Payee by using the creditor's name, followed by "on behalf of the child …" For example, "Jane Doe, on behalf of the child, Lilly Doe." This inclusion minimizes the likelihood of the pension remitting a Form 1099 and, at best, creating accounting concerns, and at worst, creating tax liability for receipt of what should be the recovery of non-taxable child support.

For further discussion of QDROs, consult Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §§17.68-17.79B (Cal CEB Annual).

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.44 12. Appointment of Receiver

## §13.44 12. Appointment of Receiver

The court may appoint a receiver to enforce any judgment or order. Fam C §290. To support appointment of a receiver, the judgment creditor must show that, considering the interests of both the judgment creditor and the judgment debtor, such an appointment is a reasonable method to obtain the fair and orderly satisfaction of the judgment. CCP §708.620. The receiver may be appointed on the court's own motion or, more typically, on the motion of the party seeking to enforce the judgment or order. See generally §11.33. See also Practice Under the California Family Code: Dissolution, Legal Separation, Nullity §20.91 (Cal CEB Annual).

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### §13.45 13. Charging Order Against Partnership

A judgment debtor's interest in a partnership or a limited liability company (LLC) may be applied toward the satisfaction of a judgment by an order charging the judgment debtor's interest under Corp C §§15673, 16504, or 17302. CCP §708.310.

Service on the judgment debtor, and on the other partners or the partnership, or on the judgment debtor and on all members of the LLC or the LLC itself, of a notice of motion for a charging order creates a lien on the judgment debtor's interest in the partnership or LLC. CCP §708.320(a). If a charging order is issued, the lien continues under the terms of the order. If issuance is denied, the lien is extinguished. CCP §708.320(b). For a complete discussion of charging orders and the procedure for obtaining them, see §§11.7-11.20.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.46 14. Assignment Order

### §13.46 14. Assignment Order

On noticed motion by a judgment creditor, the court may order a judgment debtor to assign to the judgment creditor or to a properly appointed receiver all or part of a right to payment due or to become due, including (CCP §708.510(a)):

- Federal government wages not subject to an earnings withholding order (see §13.35);
- Rents;
- Commissions;
- Royalties;
- Payments due from a patent or copyright; and
- The loan value on an insurance policy.

On the procedure for obtaining assignment orders, exemptions, and modifying or setting aside such orders, see §§11.21-11.32.

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**Source:** Business Law/Debt Collection Practice in California/13 Debt Collection and Family Law/§13.46A 15. Liability of Third Parties

### §13.46A 15. Liability of Third Parties

In addition to third party liability arising under other laws, CC §§1714.4 and 1714.41 provide harsh penalties for persons or business entities who knowingly assist a child support debtor who is attempting to evade or escape his or her pecuniary obligations. The culpable persons or entities may be held liable to the child support creditor for an amount equal to three times the value of the assistance provided (*i.e.*, the fair market value of the obligor's assets that are illegitimately sold, transferred, or hidden), up to a maximum of the entire child support obligation due. Any funds or assets so collected must be paid to the child support obligee, and this payment does not reduce the amount of the unpaid support obligation. CC §1714.4.

For purposes of CC §1714.4, actions taken to knowingly assist a child support obligor to escape, evade, or avoid paying court-ordered or court-approved child support include, with actual knowledge of the child support obligation, helping to hide or transfer assets of the child support obligor. For purposes of CC §1714.41, actions taken to knowingly assist a child support obligor to escape, evade, or avoid paying court-ordered or court-approved child support include, but are not limited to, any of the following actions taken when the individual or entity knew or should have known of the child support obligation (CC §1714.41(b)):

- Hiring or employing the child support obligor as an employee in a trade or business and failing to timely file a report of new employees with the California New Employee Registry maintained by the Employment Development Department (EDD);
- Engaging the child support obligor as a service provider and failing to timely file a report with the EDD (see Un Ins C §1088.8); and
- When engaged in a trade or business, paying wages or other forms of compensation for services rendered by a child support obligor that are not reported to the EDD as required, including, but not limited to, payment in cash or via barter or trade.

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## §13.47 VII. LIABILITY ISSUES CONCERNING MARRIED SAME-SEX COUPLES AND CALIFORNIA REGISTERED DOMESTIC PARTNERS

**Married same-sex couples.** Same-sex couples who were married in California between June 16, 2008, and November 5, 2008, have the same rights and responsibilities as opposite-sex married couples. See *Strauss v Horton* (2009) 46 C4th 464, 474, 93 CR3d 591. On June 16, 2008, the California Supreme Court found that same-sex couples have the right to marry in California. *In re Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683. However, on November 5, 2008, Proposition 8, a ballot initiative, took effect and amended the California Constitution to provide that "only marriage between a man and a woman is valid or recognized in California." Cal Const art I, §7.5. The California Supreme Court upheld the validity of Proposition 8, but found that same-sex marriages that had occurred before it became effective were valid. *Strauss v Horton, supra.*

**Domestic partners.** Unmarried and unrelated same-sex couples and opposite-sex couples in which one of the partners is over age 62 may register in California as domestic partners. Fam C §297. Under the California Domestic Partner Rights and Responsibilities Act of 2003 (Fam C §§297-299.6), registered domestic partners have the same rights and benefits, and are subject to the same obligations and duties under the law, as married spouses. See Fam C §297.5(a).

Among other provisions, the Act gives former domestic partners the same rights and duties as former spouses. Fam C §297.5(b). A surviving registered domestic partner is treated as a widow or a widower. Fam C §297.5(c). Registered domestic partners are treated as spouses with respect to each other's children. Fam C §297.5(d). Any provision of California law that adopts federal law must be interpreted in light of the Act, and such provisions must be interpreted to treat domestic partners as spouses. Fam C §297.5(e). Domestic partnerships created in other states must be recognized as California registered domestic partnerships if the other-state relationship is substantially equivalent to a domestic partnership within the meaning of the Act. Fam C §299.2.

The broad rights granted to registered domestic partners under the Act are certain to affect their property, legal duties, and debts and liabilities, but it remains unclear to what extent. An uncodified section of the Act provides that it must be construed liberally to secure to registered domestic partners the full range of legal rights and obligations as California law extends to married spouses. Taken at face value, then, it appears that the Act has the following consequences with respect to liability for debt as between two registered domestic partners:

- Domestic partners have community property under Fam C §§750, 760. See §§13.2-13.3.
- Domestic partners owe each other the same obligations and fiduciary duties one spouse owes the other under Fam C §§720, 721. See §13.5.
- Each domestic partner has the right to manage and control the partnership's community property under Fam C §1100. See §13.5.
- Domestic partners have the privilege not to testify against each other under Evid C §970.
- Confidential communication between domestic partners is protected from disclosure under Evid C §980.

Obviously, this is only a partial list of the rights legal spouses enjoy that are now available to registered domestic partners. However, the full effect of the Act, particularly with respect to liability for debt, will not be understood until its provisions have been tested by time and the courts.

Registered domestic partners are subject to the same rules concerning exemptions under CCP §703.110 as are married persons. Fam C §297.5(a); *In re Rabin* (Bankr ND Cal 2005) 336 BR 459.

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Internet Resources for California Businesses

A. Government Sites—Federal

| | |
|---|---|
| Americans with Disabilities Act | http://www.ada.gov<br><br>Information and technical assistance on the ADA by the U.S. Department of Justice. |
| Board of Governors of the Federal Reserve System | http://www.federalreserve.gov/<br><br>Home page with informational links about the "Fed," monetary policy, banking regulation, economic data, and other topics. |
| Bureau of Industry and Security (BIS), U.S. Department of Commerce | http://www.bis.doc.gov/about/index.htm<br><br>Federal agency that administers the U.S. export control and treaty compliance system, including the Export Administration Regulations (EAR). |
| BusinessLaw.gov | http://www.business.gov/<br><br>Home page, operated by the U.S. Small Business Administration, with links to legal and regulatory information, and plain English guides for starting a business, handling finances, managing employees, and other topics. |
| CIA, The World Factbook | https://www.cia.gov/library/publications/the-world-factbook/<br><br>U.S. government profiles of countries and territories around the world. |
| Equal Employment Opportunity Commission (EEOC) | http://www.eeoc.gov/<br><br>EEOC site with basic introduction to employers' rights and responsibilities under the federal equal employment opportunity laws. |
| Federal agencies (through Library of Congress site) | http://www.loc.gov/rr/news/fedgov.html<br><br>A Library of Congress resource page with links to most federal agencies. |
| Federal Citizen Information Center (FCIC) | http://www.pueblo.gsa.gov/<br><br>Part of the U.S. General Service Administration, the FCIC's Small Business Links offer information for persons planning or owning small businesses, including information on procurement, taxes, woman- and minority-owned businesses, human resources, and financial and legal issues. |
| Federal Deposit Insurance Corporation (FDIC) | http://www.fdic.gov/<br><br>Home page with links to statistical data, pertinent regulations, and FAQs. |
| Federal Register | http://www.gpoaccess.gov/fr/index.html<br><br>Main page, with search functions, for the Federal Register—the official daily publication for federal agency rules, proposed rules, and notices as well as executive orders. Specific Federal Register pages can be retrieved at http://www.gpoaccess.gov/fr/retrieve.html |
| Federal Reserve Bank of San Francisco | http://www.frbsf.org/<br><br>Home page. The current FRBSF discount rate, used to determine the usury ceiling in California, is posted at http://www.frbsf.org/banking/data/discount/index.html |
| Federal Trade Commission | http://www.ftc.gov/ftc/business.shtm<br><br>Home page for businesses, with links to business publications, advertising guidance, fair packaging and labeling, antitrust law guide, and other topics. Information concerning the Hart-Scott-Rodino pre-merger notification requirements is at http://www.ftc.gov/bc/hsr/introguides/introguides.htm. |
| USA.gov | http://www.usa.gov/Business/Business_Gateway.shtml |

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| | The official web portal of the U.S. government, with links to information on contracting with the U.S. government, export licenses, business financial assistance, and many other topics. |
| Internal Revenue Service | http://www.irs.gov/<br><br>Home page; access to downloadable IRS forms and publications. |
| Occupational Safety and Health Administration (OSHA) | http://www.osha.gov/<br><br>Home page. |
| Office of Federal Contract Compliance Programs (OFCCP) | http://www.dol.gov/ofccp/index.htm<br><br>Home page with statutory, regulatory, and compliance information regarding nondiscrimination requirements for federal contractors. |
| Office of the Comptroller of the Currency (OCC) | http://www.occ.treas.gov/<br><br>Home page with links to reports and other resources for banking industry professionals as well as public information about the national banking system. |
| Office of the U.S. Trade Representative | http://www.ustr.gov/index.html<br><br>Home page. |
| Securities and Exchange Commission (SEC) | http://www.sec.gov/<br><br>Home page with links to information for small businesses; online access to proposed and final rules, SEC releases, policy statements, and other commission notices and information; searchable database of all electronic company filings since 1994. |
| SEC Edgar | http://www.sec.gov/edgar.shtml<br><br>SEC Edgar main page, with access to electronic filings and forms. |
| Small Business Administration | http://www.sba.gov/<br><br>Home page with extensive links to federal and other resources for small businesses. |
| Social Security Administration | http://www.ssa.gov/<br><br>Home page. SSA forms are available online at http://www.ssa.gov/online/forms.html. |
| THOMAS | http://thomas.loc.gov/home/thomas.html<br><br>Website of the Library of Congress providing federal legislative information. |
| U.S. Citizenship and Immigration Services | http://www.uscis.gov/portal/site/uscis<br><br>Home page with links to immigration laws and forms. |
| U.S. Copyright Office | http://www.copyright.gov/<br><br>Home page with links to copyright registration and other information. The agency's new Electronic Copyright Office (eCO) is at http://www.copyright.gov/eco/index.html |
| U.S. Department of Commerce | http://www.commerce.gov/<br><br>Home page. |
| U.S. Department of Justice, Antitrust Division | http://www.usdoj.gov/atr/public/guidelines/guidelin.htm<br><br>Link to Antitrust Division Guidelines and Policy Statements. |
| U.S. Department of Labor | http://www.dol.gov/<br><br>Home page with links to statutory and regulatory information, labor statistics, small business regulatory compliance assistance, and other information. |
| U.S. Department of | http://www.oalj.dol.gov/libdot.htm |

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| Labor, Dictionary of Occupational Titles (DOT) | Dictionary of job titles and standardized job descriptions; useful for job placement, occupational research, career guidance, labor-market information, curriculum development, and long-range job planning. Last updated in 1991, the DOT has now been replaced by O*NET Online, http://online.onetcenter.org/. |
| U.S. Department of State | http://www.state.gov/<br><br>Home page with links to international commercial laws and guides. |
| U.S. Environmental Protection Agency | http://www.epa.gov/<br><br>Home page. |
| U.S. Government Printing Office | http://www.gpo.gov/<br><br>Home page with links to products and services, including online searchable copies of the United States Code and the Code of Federal Regulations. |
| U.S. International Trade Commission | http://www.usitc.gov/<br><br>Home page with rules, regulations, reports, and other information, including an extensive list of links to international trade resources. |
| U.S. Patent and Trademark Office | http://www.uspto.gov/<br><br>Home page with downloadable forms and information on patent applications and trademark registrations. |

B. International Sites

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| Private International Law Database: Trade/Business Transactions Law, U.S. Department of State | http://www.state.gov/www/global/legal_affairs/transaction_law.html<br><br>Access to treaties in force for the United States, other international instruments, and information on current negotiations and projects concerning private international law. Updated through January 1, 2001. For treaty actions since President Bush took office, see http://www.state.gov/s/l/treaty/c3428.htm. |
| CURIA | http://curia.europa.eu/en/transitpage.htm<br><br>Home page of the courts of the European Communities, with texts governing procedures and searchable case law. |
| Electronic Embassy Website | http://www.embassy.org/<br><br>Information on all foreign embassies in Washington, D.C. |
| EUR-Lex | http://eur-lex.europa.eu/en/index.htm<br><br>Website providing direct free access to European Union law. Among other things, it includes the Official Journal of the European Union, treaties, legislation, case law and legislative proposals. |
| European Franchise Federation (EFF) | http://www.eff-franchise.com/<br><br>Non-profit international organization that promotes the interests and development of franchising in Europe. |
| Hague Conference on Private International Law (HCCH) | http://hcch.e-vision.nl/index_en.php?act=text.display&tid=1<br><br>Home page. |
| International Trademark Association (INTA) | http://www.inta.org<br><br>INTA is an international nonprofit membership association dedicated to the support and advancement of trademarks and related intellectual property. |
| North American Free Trade Agreement (NAFTA) Secretariat | http://www.nafta-sec-alena.org/en/view.aspx<br><br>Home page with link to text of NAFTA. |

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| United Nations Commission on International Trade Law (UNCITRAL) | http://www.uncitral.org/<br><br>Home page with links to UNICITRAL texts, including conventions, model laws, guides to enactment, legislative guides, legislative recommendations, and model contract rules. In particular, this website includes the text of the United Nations Convention on Contracts for the International Sale of Goods (CISG). |
| CISG Database at Pace University School of Law, Pace Law Library, Institute of International Commercial Law | http://cisgw3.law.pace.edu/<br><br>Site dedicated to U.N. Convention on Contracts for the International Sale of Goods (CISG), with annotated text of CISG, CISG in different languages, cases organized by countries, and related CISG material. |
| International Institute for the Unification of Private Law (UNIDROIT) | http://www.unidroit.org<br><br>Home page. |
| Canadian System for Electronic Document Analysis and Retrieval (SEDAR) | http://www.sedar.com/<br><br>Home page of the Canadian equivalent to the SEC's EDGAR. Provides access to corporate filings of Canadian companies with Canada's securities regulatory authorities. |
| World Intellectual Property Organization (WIPO) | http://www.wipo.int/portal/index.html.en<br><br>A specialized agency of the United Nations, dedicated to developing a balanced and accessible international intellectual property system. |
| World Trade Organization (WTO) | http://www.wto.org/<br><br>Global international organization dealing with the rules of trade between nations. |

C. Government Sites—California

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| California Department of Corporations (DOC), Franchise Regulation | http://www.corp.ca.gov/SRD/franchise.asp<br><br>Access to information and forms concerning franchise registration. |
| California Department of Corporations (DOC), Securities Regulation Division | http://www.corp.ca.gov/SRD/default.asp<br><br>Access to forms, departmental publications, Commissioner's releases, opinions and notices concerning the California blue sky laws. |
| Cal-EASI | http://www.corp.ca.gov/CalEASI/caleasi.asp<br><br>California Department of Corporations website providing access to securities and franchise filings. |
| California Department of Fair Employment and Housing | http://www.dfeh.ca.gov/<br><br>Home page. |
| California Department of Insurance, Workers' Compensation Information | http://www.dir.ca.gov/workers'_comp.html<br><br>Access to information on workers' compensation insurance. |
| California Division of Occupational Safety and Health (DOSH) | http://www.dir.ca.gov/dosh<br><br>Access to information concerning the Cal-OSHA program. |

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| California Employment Development Department (EDD) | http://www.edd.ca.gov<br><br>Home page; information concerning job placement and referrals, unemployment insurance, disability insurance, employment and training, labor-market information, payroll taxes, and other topics. |
| California Franchise Tax Board (FTB) | http://www.ftb.ca.gov/<br><br>Home page with links to downloadable state tax forms and publications. |
| California Law Revision Commission | http://www.clrc.ca.gov/<br><br>Home page. |
| Official California Legislative Information | http://www.leginfo.ca.gov/index.html<br><br>Full text of bills, resolutions, and constitutional amendments, as well as their status, history, votes, analyses, and veto messages. |
| California Legislative Resource | http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10137&id=10452<br><br>Webpage maintained by the State Bar of California with many helpful links regarding California's legislative process, pending bills, legislative calendar, committees, and other topics. |
| State Bar of California Bill Tracking Service | http://www.calbar.ca.gov/calbar/legislation/State%20Bar%20Bill%20Tracking-Sections.html<br><br>Centralized legislative monitoring and tracking service listing bills of potential interest to members of the State Bar's sections and their committees. |
| CalGOLD | http://www.calgold.ca.gov/<br><br>The CalGOLD website provides links and contact information for California businesses concerning business permits, licenses, and registrations required by federal, regional, state, and local agencies. Information is searchable according to type of business. |
| California Office of Privacy Protection | http://www.oispp.ca.gov/consumer_privacy/default.asp<br><br>State agency dedicated to promoting and protecting the privacy rights of consumers. |
| California state agencies | http://www.ca.gov/<br><br>State of California site with links to California agencies, departments, and commissions. |
| California State Association of Counties | http://www.csac.counties.org/<br><br>Home page with links to all California counties. |
| California State Board of Equalization | http://www.boe.ca.gov/<br><br>Home page with access to information about sales and use taxes, sellers' permits, forms, and publications. |
| **California Secretary of State: California Business Portal:** | http://www.ss.ca.gov/business/business.htm<br><br>Home page. |
| **Forms:** | http://www.ss.ca.gov/business/bpd_forms.htm<br><br>Directory of forms and samples for different business filings, including UCC forms; some in fill-in format. |
| **Business Filings:** | |
| Corporations | http://www.ss.ca.gov/business/corp/corporate.htm<br><br>Corporations main page with links to filing tips to meet statutory minimum requirements, name availability, FAQs, and more. |
| Limited Liability Companies (LLCs) | http://www.ss.ca.gov/business/llc/llc.htm<br><br>LLC main page with links to forms and fees, name availability, FAQs, and |

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| | more. |
| Limited Partnerships | http://www.ss.ca.gov/business/lp/lp.htm<br><br>Limited partnerships main page with links to forms and fees, name availability, FAQs, and more. |
| General Partnerships | http://www.ss.ca.gov/business/gp/gp.htm<br><br>General partnerships main page with links to forms and fees, name availability, FAQs, and more. |
| Limited Liability Partnerships | http://www.ss.ca.gov/business/llp/llp.htm<br><br>Limited liability partnership main page with links to forms and fees, name availability, FAQs, and more. |
| Trademarks and Service Marks | http://www.ss.ca.gov/business/ts/ts.htm<br><br>Trademarks and service marks main page with links to forms and fees, name availability, FAQs, private service companies, and more. |
| Miscellaneous Filings | http://www.ss.ca.gov/business/other/bp_other.htm<br><br>Links to filing requirements for unincorporated common interest development associations, unincorporated associations, unincorporated nonprofit associations, foreign lending institutions, and foreign partnerships. |
| California Business Search | http://kepler.ss.ca.gov/list.html<br><br>Fill-in boxes to check records online for corporations, limited partnerships, and limited liability companies. |
| Starting a Business | http://www.ss.ca.gov/business/resources.htm<br><br>A step-by-step guide for starting a business in California; available in English or Spanish. |
| e-file Statement of Information | https://businessfilings.ss.ca.gov/<br><br>Fill-in boxes to file a Statement of Information for a corporation online. |
| Notary Public | http://www.ss.ca.gov/business/notary/notary.htm<br><br>Notary public main page, with links to topics such as obtaining a notary public commission, handbook, authentications, apostille or certification, forms, and fees. |
| Uniform Commercial Code | http://www.ss.ca.gov/business/ucc/ucc.htm<br><br>UCC main page with links to financing statement forms, amendment forms, requests for information, revised Article 9 (as of July 1, 2001), and FAQs. |
| International Business Relations Program | http://www.ss.ca.gov/business/ibrp/ibrp.htm<br><br>Main page in English or Spanish with international resources and business tips; intended to assist foreign corporations with various filing procedures. |
| Business Program Division, Legislation | http://www.ss.ca.gov/business/bpd_newleg.htm<br><br>Summaries and links to new state laws affecting businesses. |

D. Private Agency Sites

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| ABA Section of Business Law | http://www.abanet.org/buslaw/home.html<br><br>Home page with links to publications and other resources for business lawyers. |
| Active Capital | http://activecapital.org/<br><br>Site dedicated to helping individual accredited investors, SBICs, and institutional venture capitalists find small, growing companies through a secure Internet database, and providing ongoing training and research for entrepreneurs and small investors. |
| AllBusiness | http://www.allbusiness.com |

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| | Small business portal, with links to forms, directories, and resources on many topics. |
| American Arbitration Association | http://www.adr.org/<br><br>Home page with links to rules and procedures. |
| Annual Reports.com | http://www.annualreports.com/<br><br>Free service offering links to annual reports of public companies. |
| BenefitsLink | http://www.benefitslink.com<br><br>Compliance information and tools for employee benefit plan sponsors, service-providers, and participants. |
| Better Business Bureau | http://www.bbb.org/<br><br>Home page. |
| The Biz-Tech Network by Brint Institute, LLC | http://www.brint.com/<br><br>Portal with a meta-index of business, management, and information technology topics; it also provides search capabilities and full text articles on related issues. |
| Business.com | http://www.business.com/<br><br>Business search engine and directory intended to help users find companies, products, services, and other business-related information; some features are fee-based. |
| Business Law Section of the State Bar of California | http://www.calbar.ca.gov/state/calbar/calbar_sections_generic.jsp?sCategoryPath=/Home/Attorney%20Resources/Sections/Business%20Law<br><br>Home page with links to standing committees, programs, and publications. |
| Business Week Online | http://www.businessweek.com/<br><br>Articles, links, and opportunity to subscribe to free newsletter. |
| CNN Money | http://money.cnn.com/<br><br>General business news website offered by CNN and Fortune, Money and Business 2.0 magazines. |
| Corporate Finance Sourcebook | http://www.financesourcebook.com/<br><br>Link for ordering popular guidebook published by National Register Publishing. The guidebook features over 1500 top investment sources and 1700 service firms for business entrepreneurs. |
| Corporate Information | http://www.corporateinformation.com/<br><br>Subscription-based website offering research reports on public, private, domestic, and foreign corporations. |
| The Corporate Library | http://www.thecorporatelibrary.com/<br><br>The Corporate Library is an independent research firm providing corporate governance data, analysis, and risk assessment tools. |
| Creative Commons | http://creativecommons.org<br><br>A nonprofit organization founded by Prof. Lawrence Lessig of Stanford University that provides special copyright license forms and other free tools to enable authors, scientists, artists, and educators to share intellectual property. |
| Dun & Bradstreet | http://www.dnb.com/us/<br><br>Home page of Dun & Bradstreet. Subscribers can request reports and run online queries in proprietary databases. |
| Edgar Online, Inc. | http://www.edgar-online.com/<br><br>Edgar Online, Inc. is a private company, not affiliated with the SEC, specializing in the extraction, packaging, and distribution of public company |

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| | information contained in SEC filings. |
| Enterpreneur.com | http://www.entrepreneur.com/mag<br><br>Free access to Entrepreneur magazine articles back to 1998. |
| Financial Accounting Standards Board (FASB) | http://www.fasb.org/<br><br>Access to FASB Statements of Financial Accounting Standards and other resources. |
| Findlaw Business Center | http://smallbusiness.findlaw.com/<br><br>Portal with links to articles and guides on starting a business, taxes and accounting, small business legal concerns, and more. Part of West Group. |
| Garage Technology Ventures | http://www.garage.com/<br><br>Venture capital fund for emerging technology companies. |
| GNU | http://www.gnu.org/<br><br>Organization promulgating the development and use of free software and the use of open-source software licenses. |
| Google Business News | http://news.google.com/nwshp?tab=wn&ned=us&topic=b<br><br>Business news headlines with links to full stories from news organizations around the world. |
| Google Small Business Directory | http://directory.google.com/Top/Business/Small_Business/<br><br>A directory of small business resources. |
| Hieros Gamos Small Business Center | http://www.hg.org/sbcenter.html<br><br>Portal with links to topics such as starting a business, choosing a legal structure, and financing. |
| Hoover's Online | http://www.hoovers.com/<br><br>Subscription-based site with industry snapshots, company profiles, earnings, and other information. |
| Intellectual Property Law Section of the State Bar of California | http://www.calbar.ca.gov/state/calbar/calbar_sections_generic.jsp?cid=10707<br><br>Home page with links to standing committees, programs, and publications. |
| International Franchise Association (IFA) | http://www.franchise.org/<br><br>Trade association promoting responsible franchise development worldwide. |
| Internet Corporation for Assigned Names and Numbers (ICANN) | http://www.icann.org/<br><br>Private agency responsible for global coordination of the Internet's system of unique identifiers, including domain names (such as .com, .org, and country codes such as .fr), as well as addresses used in a variety of Internet protocols. |
| IP Mall | http://ipmall.info/<br><br>Website sponsored by Franklin Pierce Law Center, with links to intellectual property resources around the world (including patents, copyrights, trademarks, trade secrets, licensing, and technology transfers). |
| JAMS | http://www.jamsadr.com<br><br>Home page with information about JAMS mediation and arbitration services and a search engine to assist in locating qualified mediators and arbitrators. The website also offers a downloadable guide to dispute resolution clauses in commercial contracts. |
| Jeffren Publishing Co. | http://www.jefren.com<br><br>Subscription service offering proxy statement forms and strategies. |
| MarketResearch.com | http://www.marketresearch.com/ |

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| | Free database of market research reports representing all market and industry sectors. |
| NASDAQ | http://www.nasdaq.com/<br><br>Comprehensive current information on market performance and investments. |
| National Association of Attorneys General | http://www.naag.org/<br><br>Association of the attorneys general of all 50 states, with contact information and links to enforcement initiatives. |
| National Association of Seed and Venture Funds | http://www.nasvf.org/<br><br>Network of private, public, and nonprofit organizations investing and facilitating investment in entrepreneurs. |
| National Business Association | http://www.nationalbusiness.org/<br><br>Nonprofit association's site for the self-employed and small business community. |
| National Venture Capital Association (NVCA) | http://www.nvca.org/<br><br>Home page with links to members and other resources. |
| New York Stock Exchange (now, NYSE Euronext) | http://www.nyse.com/<br><br>Comprehensive, current information on market performance and investments. |
| Public Register's Annual Report Service | http://www.annualreportservice.com/<br><br>Free access to annual reports of over 2200 companies. Site also has links to the SEC's Edgar database for filings. |
| Reuters | http://www.reuters.com/finance<br><br>Business and finance news database with reports on business transactions, markets, small business, industries, the economy, and other topics. |
| Safeselling.org | http://www.safeselling.org/<br><br>ABA-sponsored resource for business people launching e-commerce enterprises and for businesses venturing into online sales. |
| The Small Business Portal | http://www.thesmallbusinessportal.com/<br><br>Links to topics such as starting a business, franchise advice, financing, and home-based businesses. |
| Standard & Poor's | http://www.standardandpoors.com/<br><br>Home page with search engine for public company credit ratings and other features. |
| Tripod by Lycos | http://www.tripod.lycos.com/smallbiz/index.html<br><br>Portal with tips on starting an online business, yellow pages, and some free and some fee-based services. |
| U.S. GAAP Information | http://cpaclass.com/gaap/<br><br>Comprehensive source of information on generally accepted accounting principles in the U.S. |
| Wall Street Journal Online Edition | http://online.wsj.com<br><br>General business and financial news. |
| Washburn University School of Law Small Business Portal | http://www.washlaw.edu/subject/small.business.html<br><br>Portal with links to a forms library and business and economic data. |
| Yahoo! Finance | http://biz.yahoo.com/i/<br><br>Free company profiles and stock charts for over 9000 public companies. |

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| Yahoo! Small Business | http://smallbusiness.yahoo.com/<br><br>Portal with links to topics such as creating a website, promoting a business, and selling online. |

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**Source:** Business Law/Debt Collection Practice in California/Directory

Directory

§1.1B

The National Association of Retail Collection Attorneys (NARCA) is the primary bar association for retail claims. Its contact information is as follows:

601 Pennsylvania Avenue, NM

Suite 900 South

Washington, DC 20004

Phone: (202) 861-0706; (800) 633-6069

Fax: (240) 559-0959

E-mail: narca@narca.org

Website: http://www.narca.org

§1.3

The Commercial Law League of America (CLLA) is the primary bar association in the collection field. It may be reached at:

70 East Lake Street, Suite 630

Chicago, IL 60601

Phone: (312) 781-2000

Fax: (312) 781-2010

E-mail: info@clla.org

Website: http://www.clla.org

§1.6A

The California Creditors Bar Association may be contacted through their website at: http://www.calcba.org.

§1.7

The California Association of Judgment Professionals, Inc. may be reached at:

601 Van Ness Avenue, Suite E3

San Francisco, CA 94102

Phone: (888) 311-2257

E-mail: http://www.cajp.org/about-contact.php?c=information

Website: http://www.cajp.org

§2.1

The Federal Trade Commission (FTC) website is http://www.ftc.gov. The following useful reference materials are available at these locations on the website:

- Reprints of FTC Staff Opinion Letters from April 1988 to May 2002: http://www.ftc.gov/os/statutes/fdcpa/letters.htm.

- FTC Staff Commentary on the FDCPA: http://www.ftc.gov/os/statutes/fdcpa/commentary.htm.
- The FTC's annual report on the FDCPA: http://www.ftc.gov/os/statutes/fdcpajump.htm.

§2.22

A debtor who wishes to obtain about debt collection activities, including information the debt collector is required to disclose, and notices the debt collector must supply, may contact:

Federal Trade Commission (FTC)

Phone: 1-877-FTC-HELP

Website: http://www.ftc.gov

§2.24B

Information about identity theft is available from the California Office of Information Security and Privacy Protection at the following location. Consumers who are victims of identity theft may also obtain forms to send to creditors and debt collection agencies from this office.

Office of Information Security and Privacy Protection

1325 J Street, Suite 1650

Sacramento, CA 95814

Phone: (916) 323-7300

Toll-free phone: (866) 785-9663

Email contact form: privacy@oispp.ca.gov

Website:

http://www.oispp.ca.gov

§2A.25

The website of the Privacy Rights Clearinghouse is http://www.privacyrights.org.

§2A.26

Sample contract provisions regarding privacy protection are available at the Department of Health and Human Services website: http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/contractprov.html

§2A.27

Information on HIPAA implementation is available at the California Office of HIPAA Implementation (CalOHI) website: http://www.ohi.ca.gov/calohi.

§§3.2, 3.23

To confirm the correct name and legal capacity of a debtor corporation, partnership, or other business entity, the attorney may consult

California Secretary of State

1500 11th Street

Sacramento, CA 95814

Phone: (916) 657-5448

Website: http://www.ss.ca.gov

Information may also be obtained from commercial online databases such as

ChoicePoint

Phone: (877) 547-2518

Website: http://www.choicepoint.com

or

Merlin Information Services

215 South Complex Drive

Kalispell, MT 59901

(800) 367-6646

(406) 755-8550

Email: sales@merlindata.com

Website: http://www.merlindata.com

§4.2

The website of the San Francisco County Superior Court is at http://www.sfgov.org/courts.

The website of the Los Angeles County Superior Court is at http://www.lasuperiorcourt.org.

Website addresses for all California superior courts are available at the Judicial Council website: http://www.courtinfo.ca.gov/courts/find.htm.

§4.36

Practice guides covering federal fair debt collection, credit regulation, warranties, unfair and deceptive practices, and repossessions and foreclosures may be obtained from

National Consumer Law Center, Inc.

7 Winthrop Square

Boston, MA 02110-1245

Phone: (617) 542-8010

Fax: (617) 542-8028

Website: http://www.consumerlaw.org

§4.86

The current discount rate for the Federal Reserve Bank of San Francisco is available at http://www.frbsf.org/banking/data/discount.

§9.7

The Alameda County Sheriff's Office provides levy instructions at http://alamedacountysheriff.org/CWS/civil.htm.

The Los Angeles County Sheriff's Department provides forms, fee schedules, and levy instructions at http://civil.lasd.org/CivilProcess/civprocess.html?1.

The Orange County Sheriff's Department provides levy instructions on its website at http://www.ocsd.org. Select the "Divisions" tab, then select "Court Operations."

§§12.4, 12.8, 12.9

The website for the American Bankruptcy Institute is http://www.abiworld.org.

Websites for the federal bankruptcy courts in California are as follows:

CENTRAL DISTRICT OF CALIFORNIA

http://www.cacb.uscourts.gov

Area Covered: Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura counties. The website of the U.S. Bankruptcy Court, Central District of California, has a search engine that allows a debtor to find the correct division in which to file the bankruptcy petition.

EASTERN DISTRICT OF CALIFORNIA

http://www.caeb.uscourts.gov

Sacramento Division

Area covered: Alpine, Amador, Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, Shasta, Sierra, Siskiyou, Solano, Sutter, Tehama, Trinity, Yolo, Yuba counties, and the following zip codes in San Joaquin County: 95220, 95227, 95234, 95237, 95240, 95241, 95242, 95253, 95258, 95686.

Modesto Division

Area covered: Calaveras, Stanislaus, Tuolumne counties, and all zip codes in San Joaquin County not designated for filing in the Sacramento Division.

Fresno Division

Area covered: Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, and Tulare counties.

SOUTHERN DISTRICT OF CALIFORNIA

http://www.casb.uscourts.gov

Area covered: San Diego and Imperial counties.

NORTHERN DISTRICT OF CALIFORNIA

http://www.canb.uscourts.gov

Santa Rosa Division

Area covered: Del Norte, Mendocino, Humboldt, Napa, Sonoma, Marin, and Lake counties.

San Francisco Division

Area covered: San Francisco and San Mateo counties.

Oakland Division

Area covered: Alameda and Contra Costa counties.

San Jose Division

Area covered: Santa Clara, Santa Cruz, Monterey, and San Benito counties.

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Information on calculating income and expenses using the Internal Revenue Services National Standards and Local Standards may be found at

Financial Analysis Handbook, IRS Manual §§5.15.1.8-5.15.1.10

Website: http://www.irs.gov/irm/part5/irm_05-015-001.html

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Information about the California State Disbursement Unit (SDU) and how to contact local offices is available at

Phone: (866) 325-1010

Website: http://www.childsup.ca.gov/sdu

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Bank of America v Granger (1931) 115 CA 210, 1 P2d 479: §3.104

Bank of America v Oil Well Supply Co. (1936) 12 CA2d 265, 55 P2d 885: §7.23

Bank of America v Salinas Nissan, Inc. (1989) 207 CA3d 260, 254 CR 748: §§6.20, 6.25, 6.29

Bank of Boston Int'l v Arguello Tefel (ED NY 1986) 644 F Supp 1423: §2.10B

Bank of Cal. v Brainard (9th Cir 1925) 3 F2d 3: §12.54

Bank of Cal. v Connolly (1973) 36 CA3d 350, 111 CR 468: §13.17

Bank of China v Wells Fargo Bank (9th Cir 1953) 209 F2d 467: §3.107

Bank of Shasta v Boyd (1893) 99 C 604, 34 P 337: §4.83

Banta v Wink (1897) 119 C 78, 51 P 17: §3.48

Barber v National Bank (Alaska 1991) 815 P2d 857: §2.6

Barbera v WMC Mortgage Corp (ND Cal, Jan. 19, 2006, No. C 04-3738 SBA) 2006 WL 167632: §2.4

Barbosa v Soloman (1st Cir 2000) 235 F3d 31: §12.17

Barneson, Marriage of (1999) 69 CA4th 583, 81 CR2d 726: §13.12

Barnhart Aircraft, Inc. v Preston (1931) 212 C 19, 297 P 20: §3.97

Barnhill v Robert Saunders & Co. (1981) 125 CA3d 1, 177 CR 803: §10.19

Baroni v Musick (1934) 3 CA2d 419, 39 P2d 435: §4.58

Barquis v Merchants Collection Ass'n (1972) 7 C3d 94, 101 CR 745: §§2.21, 3.56, 3.59

Bartlett v Heibl (7th Cir 1997) 128 F3d 497: §§2.18, 2.25

Baruch Inv. Co. v Huntoon (1967) 257 CA2d 485, 65 CR 131: §4.86

Basin Elec. Power Coop. v Midwest Processing Co. (8th Cir 1985) 769 F2d 483, cert denied (1986) 474 US 1083: §12.52

Basinger-Lopez v Tracy Paul & Assocs., Inc. (ND Cal, July 6, 2009, No. C 08-5192-SBA) 2009 US Dist Lexis 62805: §§2.25, 2.27

Baske v Burke (1981) 125 CA3d 38, 177 CR 794: §4.149

Batlan v Bledsoe (In re Bledsoe) (9th Cir 2009) 569 F3d 1106: §12.66A

Baum v Baum (1959) 51 C2d 610, 335 P2d 481: §11.9A

Bautista, People v (2004) 115 CA4th 229, 8 CR3d 862: §9.17

Bayne v Jolley (1964) 227 CA2d 630, 38 CR 873: §4.90

Beam v Bank of America (1971) 6 C3d 12, 98 CR 137: §§13.14, 13.16

Bear Stearns & Co. v Kurdoghlian (In re Kurdoghlian) (BAP 9th Cir 1983) 30 BR 500: §12.16

Beard, Estate of (1999) 71 CA4th 753, 84 CR2d 276: §4.147

Beattie v D.M. Collections, Inc. (D Del 1991) 754 F Supp 383: §§2.18, 2.31

Beatty v Traub (In re Beatty) (BAP 9th Cir 1994) 162 BR 853: §§12.15B, 12.17

Bebensee-Wong v Federal Nat'l Mortgage Ass'n (In re Bebensee-Wong) (BAP 9th Cir 2000) 248 BR 820: §12.35

Beck v Alliance Funding Co. (D Conn 2000) 113 F Supp 2d 274: §2.6

Beck v Fort James Corp. (In re Crown Vantage, Inc.) (9th Cir 2005) 421 F3d 963: §12.56

Becker v S.P.V. Constr. Co. (1980) 27 C3d 489, 165 CR 825: §4.150

Beezley v California Land Title Co. (In re Beezley) (9th Cir 1993) 994 F2d 1433: §12.43

Beler v Blatt, Hasenmiller, Leibsker & Moore LLC (7th Cir 2007) 480 F3d 470: §2.21

Bell Atlantic Corp. v Twombly (2007) 550 US 544, 167 L Ed 2d 929, 127 S Ct 1955: §2.5

Ben Hur Mfg. Co. v Empire Factors (1960) 181 CA2d 123, 5 CR 181: §4.58

Benedict v Danner Press (2001) 87 CA4th 923, 104 CR2d 896: §4.139

Benjamin v Dalmo Mfg. Co. (1948) 31 C2d 523, 190 P2d 593: §4.144

Bennett v Hibernia Bank (1956) 47 C2d 540, 305 P2d 20: §4.153

Bennett, In re (Bankr CD Cal 2007) 371 BR 440: §12.14B

Benson v Andrews (1958) 166 CA2d 44, 332 P2d 698: §4.76

Benson, Marriage of (2005) 36 C4th 1096, 32 CR3d 471: §13.10

Berg v Good Samaritan Hosp. (In re Berg) (9th Cir 2000) 230 F3d 1165: §12.35C

Berg & Berg Enters. v Sherwood Partners, Inc. (2005) 131 CA4th 802, 32 CR3d 325, modified at 2005 Cal App Lexis 1348 (Aug. 25, 2005, H026821): §4.126

Bergeron, In re (Bankr ND Cal 1999) 235 BR 641: §12.31

Berhanu v Metzger (1992) 12 CA4th 445, 15 CR2d 191: §9.82

Bernards v Grey (1950) 97 CA2d 679, 218 P2d 597: §4.140

Bescos v Bank of America (2003) 105 CA4th 378, 129 CR2d 423: §2.11

Bessette v Avco Fin. Servs., Inc. (1st Cir 2000) 230 F3d 439: §2.1B

Beverly Hills Nat'l Bank v Glynn (1968) 267 CA2d 859, 73 CR 808: §3.104

Bezpalko v Gilfillan, Gilpin & Brehman (ED Pa, June 15, 1998, No. 97-4923) 1998 US Dist Lexis 8859: §2.35

Bibb, Estate of (2001) 87 CA4th 461, 104 CR2d 415: §§13.10, 13.12

Bieber v Associated Collection Servs. (D Kan 1986) 631 F Supp 1410: §2.18

Billingham v Wynn & Wynn (In re Rothwell) (Bankr D Mass 1993) 159 BR 374: §2.1B

Bimini Island Air, Inc., In re (Bankr SD Fla 2007) 370 BR 408: §12.52

Bingham v Collection Bureau, Inc. (D ND 1981) 505 F Supp 864: §§2.19, 2.25

Black v Asset Acceptance LLC (ND Ga, Dec. 9, 2005, No. 1:05-cv-1588-BBM) 2005 US Dist Lexis 43264: §2.20

Blair v Pitchess (1971) 5 C3d 258, 96 CR 42: §6.116

Blank v Olcovich Shoe Co. (1937) 20 CA2d 456, 67 P2d 376: §3.119A

Blausey v United States Trustee (In re Blausey) (9th Cir 2009) 552 F3d 1124: §12.14B

Bledstein v Superior Court (1984) 162 CA3d 152, 208 CR 428: §2.1C

Bloom v I.C. Sys. (9th Cir 1992) 972 F2d 1067: §2.10A

Blumer v Kirkman Corp. (1952) 38 C2d 480, 241 P2d 17: §3.55

Boerner v Colwell Co. (1978) 21 C3d 37, 145 CR 380: §4.89

Bondanza v Peninsula Hosp. & Med. Ctr. (1979) 23 C3d 260, 152 CR 446: §2.21

Bono v Clark (2002) 103 CA4th 1409, 128 CR2d 31: §13.15

Bostanian v Liberty Savings Bank (1997) 52 CA4th 1075, 61 CR2d 68: §2.1B

Bowie v Union Bank (1970) 11 CA3d 807, 90 CR 103: §8.28

Boyajian, In re (Oct. 2, 2007) State Bar No. 06-TE-15159-RAH: §2.21

Boyd v Wexler (7th Cir 2001) 275 F3d 642, cert denied (2002) 537 US 883, 154 L Ed 2d 141, 123 S Ct 106: §2.20

Boyer v Jensen (2005) 129 CA4th 62, 28 CR3d 124: §12.39

Branco, Marriage of, In re (1996) 47 CA4th 1621, 55 CR2d 493: §13.15

Braud, Marriage of, In re (1996) 45 CA4th 797, 53 CR2d 179: §13.14

Braud, Marriage of (1996) 45 CA4th 797, 53 CR2d 179: §13.8

Breceda v Gamsby (1968) 267 CA2d 167, 72 CR 832: §3.120

Breeden v Northeast Binding Sys. (In re Bennett Funding Group, Inc.) (Bankr ND NY 2000) 253 BR 316: §12.65C

Brennan v Kroger Co. (7th Cir 1975) 513 F2d 961: §4.21

Brewer v Simpson (1960) 53 C2d 567, 2 CR 609: §3.62

Bright v Washington Mutual Bank, F.A. (In re Bright) (BAP 1st Cir 2006) 338 BR 530: §12.59

Broad Creek Edgewater, LP, In re (Bankr D SC 2007) 371 BR 752: §12.14

Brock v Superior Court (1947) 29 C2d 629, 177 P2d 273: §3.59

Broderick, Marriage of (1989) 209 CA3d 489, 257 CR 397: §13.10

Brooks v Allard (1966) 244 CA2d 283, 53 CR 82: §3.96

Brooks & Robinson, Marriage of, In re (2008) 169 CA4th 176, 86 CR3d 624: §13.12

Brown v Brown (1931) 117 CA 205, 3 P2d 580: §7.78

Brown v Cardoza (1944) 67 CA2d 187, 153 P2d 767: §4.90

Brown v Child Support Advocates (D Utah 1994) 878 F Supp 1451: §2.10B

Brown v Felson (1979) 442 US 127, 60 L Ed 2d 767, 99 S Ct 2205: §12.42

Brown v Superior Court (1966) 242 CA2d 519, 51 CR 633: §4.150

Brown, In re (2d Cir 1984) 734 F2d 119: §9.80

Brown & Cole Stores, LLC, In re (BAP 9th Cir 2007) 375 BR 873: §12.54

Brown Materials Co. v Angus (1937) 20 CA2d 32, 66 P2d 470: §3.57

Bruno v Superior Court (1990) 219 CA3d 1359, 269 CR 142: §7.79

Bryant v Bryant (1958) 161 CA2d 579, 326 P2d 898: §9.46

Buckeye Retirement Co. v Swegan (In re Swegan) (6th Cir 2008) 383 BR 646: §12.33

Buckley, In re (1973) 10 C3d 237, 110 CR 121: §8.49

Bundren v Superior Court (1983) 145 CA3d 784, 193 CR 671: §2.18

Burger v Risk Mgmt. Alternatives, Inc. (ND NY 2000) 94 F Supp 2d 291: §2.16A

Burnete v La Casa Dana Apartments (2007) 148 CA4th 1262, 56 CR3d 437: §4.138

Burr v Capital Reserve Corp. (1969) 71 C2d 983, 80 CR 345: §4.90

Burton v Santa Barbara Nat'l Bank (1966) 247 CA2d 427, 55 CR 529: §§4.61-4.62

Bush v Loanstar Mortgagee Servs., LLC (ND Cal 2003) 286 F Supp 2d 1210: §§2.10A, 2.23A

Butler Bros. v Connolly (1962) 204 CA2d 22, 22 CR 175: §4.60

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C.I.T. Corp. v Anwright Corp. (1987) 191 CA3d 1420, 237 CR 108: §6.150

CIT Group/Equip. Fin., Inc. v Super DVD, Inc. (2004) 115 CA4th 537, 8 CR3d 927: §6.3

Caballero v Ocwen Loan Servicing, Inc. (ND Cal, May 29, 2009, No. C-09091921 RMW) 2009 US Dist Lexis 45213: §2.6

Cable v Ivy Tech State College (7th Cir 1999) 200 F3d 467: §2.1B

Cacace v Lucas (D Conn 1990) 775 F Supp 502: §§2.20, 2.31

Cadle Co. II, Inc. v Fiscus (2008) 163 CA4th 1232, 78 CR3d 238: §7.71

Caffrey v Tilton (1952) 38 C2d 371, 240 P2d 273: §3.39

Cain v Burn (1955) 131 CA2d 439, 280 P2d 439: §4.78

Cal-Western Reconveyance Corp. v Reed (2007) 152 CA4th 1308, 62 CR3d 244: §13.38

California v Harleston (In re Harleston) (9th Cir 2003) 331 F3d 699: §12.5C

California Academy of Sciences v County of Fresno (1987) 192 CA3d 1436, 238 CR 154: §4.76

California Canneries Co. v Great W. Lumber Co. (1919) 44 CA 69, 185 P 1008: §3.97

California Coastal Comm'n v Allen (2008) 167 CA4th 322, 83 CR3d 906: §§9.82-9.83

California Employment Dev. Dep't v Taxel (In re Del Mission Ltd.) (9th Cir 1996) 98 F3d 1147: §12.35C

California Fed. Sav. & Loan Ass'n v City of Los Angeles (1995) 11 C4th 342, 45 CR2d 279: §7.41

California Shellfish, Inc. v United Shellfish Co. (1997) 56 CA4th 16, 64 CR2d 797: §5.32

California Trust Co. v Gustason (1940) 15 C2d 268, 101 P2d 74: §4.75

Camacho v Bridgeport Fin., Inc. (9th Cir 2005) 430 F3d 1078: §§2.22A, 2.23

Camacho v Bridgeport Fin., Inc. (9th Cir 2008) 523 F3d 973: §2.28

Campbell, In re (BAP 10th Cir 2004) 313 BR 313: §12.27

Campbell, Marriage of (1999) 74 CA4th 1058, 88 CR2d 580: §13.10

Campos v Western Dental Servs., Inc. (ND Cal 2005) 404 F Supp 2d 1164: §2.29

Canales, In re (Bankr CD Cal 2007) 377 BR 658: §12.14B

Carey v Flintridge Lumber Sales, Inc. (In re RJW Lumber Co.) (Bankr ND Cal 2001) 262 BR 91: §12.19

Carey, In re (10th Cir 1991) 938 F2d 1073: §4.27

Carlin, In re (Bankr D Or 2006) 348 BR 795: §12.14B

Carlson v Coca-Cola Co. (9th Cir 1973) 483 F2d 279: §2A.2

Carney v Rotkin, Schmerin & McIntyre (1988) 206 CA3d 1513, 254 CR 478, overruled on other grounds in Silberg v Anderson (1990) 50 C3d 205, 266 CR 638: §2.8

Carolco Television, Inc. v National Broadcasting Co. (In re De Laurentiis Entertainment Group, Inc.) (9th Cir 1992) 963 F2d 1269, cert denied (1992) 506 US 918: §12.57

Carr v Barnabey's Hotel Corp. (1994) 23 CA4th 14, 28 CR2d 127: §7.28

Carrier v Bryant (1939) 306 US 545, 83 L Ed 976, 59 S Ct 707: §9.81

Carruth v Superior Court (1978) 80 CA3d 215, 145 CR 344: §§3.51-3.52

Carter v Canty (1919) 181 C 749, 186 P 346: §3.88

Caruso v Snap-Tite, Inc. (1969) 275 CA2d 211, 79 CR 642: §4.58

Carvalho v Equifax Info. Servs., LLC (ND Cal 2008) 588 F Supp 2d 1089: §2A.14

Casa Eva I Homeowners Ass'n v Ani Constr. & Tile, Inc. (2005) 134 CA4th 771, 36 CR3d 401: §11.19

Casella v Southwest Dealer Servs., Inc. (2007) 157 CA4th 1127, 69 CR3d 445: §§7.21, 7.38

Casey v Gray (1993) 13 CA4th 611, 16 CR2d 538: §7.50

Caspar Lumber Co. v Stowell (1940) 37 CA2d 58, 98 P2d 744: §3.97

Cassinos v Union Oil Co. (1993) 14 CA4th 1770, 18 CR2d 574: §4.49

Castagnino v Balletta (1889) 82 C 250, 23 P 127: §3.90

Catalfamo v Countrywide Home Loan (ED Cal, Sept. 4, 2008, No. CV F 08-1117 LJO TAG) 2008 US Dist Lexis 84058: §2.27

Causley v Superior Court (1968) 267 CA2d 757, 73 CR 585: §§3.39, 3.54

Cavallaro v Law Office of Shapiro & Kriesman (ED NY 1996) 933 F Supp 1148: §2.22A

Cedars-Sinai Imaging Med. Group v Superior Court (2000) 83 CA4th 1281, 100 CR2d 320: §8.51

Cembrook v Superior Court (1961) 56 C2d 423, 15 CR 127: §5.4

Central Va. Community College v Katz (In re Wallace's Book Store, Inc.) (2006) 546 US 356, 163 L Ed 2d 945, 126 S Ct 990: §12.5A

Centre Ins. Co. v SNTL Corp. (In re SNTL Corp.) (BAP 9th Cir 2007) 380 BR 204, aff'd (9th Cir 2009) 571 F3d 826: §12.42

Chan v North Am. Collectors, Inc. (ND Cal, Mar. 24, 2006, No. 06-0016 JL) 2006 US Dist Lexis 13353: §§2.27, 2.30

Chandler v Robinett (1913) 21 CA 333, 131 P 891: §3.85

Charbonneau v Superior Court (1974) 42 CA3d 505, 116 CR 153: §8.49

Charles v Lundgren & Assocs. (9th Cir 1997) 119 F3d 739: §2.10B

Chaudhry v Gallerizzo (4th Cir 1999) 174 F3d 394: §§2.24A, 2.35

Cheatham v Virginia Alcoholic Beverages Control Bd. (4th Cir 1974) 501 F2d 1346: §4.21

Chicago Title Ins. Co. v Seko Inv., Inc. (In re Seko Inv., Inc.) (9th Cir 1998) 156 F3d 1005, cert denied (1999) 526 US 1066: §12.52

Chinese Yellow Pages Co. v Chinese Overseas Mktg. Serv. Corp. (2008) 170 CA4th 868, 88 CR3d 250: §§7.38, 11.47, 12.42

Christian v Superior Court (1898) 122 C 117, 54 P 518: §3.27B

Chrysler Fin. Corp. v Nolan (In re Nolan) (6th Cir 2000) 232 F3d 528: §12.17

Chubb & Son, Inc. v Clark (In re Clark) (BAP 9th Cir 2001) 262 BR 508: §12.27

Citibank v Dougherty (In re Dougherty) (BAP 9th Cir 1988) 84 BR 653: §12.42

Citizens Bank of Md. v Strumpf (1995) 516 US 16, 133 L Ed 2d 258, 116 S Ct 286: §§12.35C, 12.57

City of Indianapolis v Chase Nat'l Bank (1941) 314 US 63, 86 L Ed 47, 62 S Ct 15: §3.114

City of Ontario v Superior Court (1970) 2 C3d 335, 85 CR 149: §4.138

City of Santa Barbara v Adamson (1980) 27 C3d 123, 164 CR 539: §2A.2

Clark v Capital Credit & Collection Servs., Inc. (9th Cir 2006) 460 F3d 1162: §§2.17, 2.29A, 2.31A

Clark v Johnston (1920) 49 CA 315, 193 P 864: §7.78

Clark v Transpack Corp. (ED Cal, Nov. 11, 2005, No. CIV-S-040332DFLPAN) 2005 US Dist Lexis 29958: §2.32

Clarke v Horany (1963) 212 CA2d 307, 27 CR 901: §4.91

Clomon v Jackson (2d Cir 1993) 988 F2d 1314: §§2.18, 2.20

Cloud v Northrop Grumman Corp. (1998) 67 CA4th 995, 79 CR2d 544: §2.1B

Cochran, Marriage of (2001) 87 CA4th 1050, 104 CR2d 920: §13.7

Cockerell v Title Ins. & Trust Co. (1954) 42 C2d 284, 267 P2d 16: §4.70

Cohen v De La Cruz (1998) 523 US 213, 140 L Ed 2d 341, 118 S Ct 1212: §12.42

Cohen v Metropolitan Life Ins. Co. (1939) 32 CA2d 337, 89 P2d 732: §3.99

Cohen v de la Cruz (1998) 523 US 213, 140 L Ed 2d 341, 118 S Ct 1212: §12.51A

Cohrs, In re (Bankr ED Cal 2007) 373 BR 107: §12.15A

Colberg, Inc. v State ex rel Dep't of Pub. Works (1967) 67 C2d 408, 62 CR 401: §7.22

Coleman v Galvin (1947) 78 CA2d 313, 177 P2d 606: §8.32

Colla v Carmichael U-Drive Autos, Inc. (1930) 111 CA Supp 784, 294 P 378: §3.27B

Colonial Sur. Co. v Weizman (1st Cir 2009) 564 F3d 526: §12.43

Color-Vue, Inc. v Abrams (1996) 44 CA4th 1599, 52 CR2d 443: §3.111

Committee to Defend Reproductive Rights v Myers (1981) 29 C3d 252, 172 CR 866: §2A.2

Communist Party v 522 Valencia (1995) 35 CA4th 980, 41 CR2d 618: §§3.117, 3.119A

Congregational Church Bldg. Soc'y v Osborn (1908) 153 C 197, 94 P 881: §3.63

Connolly v Bank of Sonoma County (1986) 184 CA3d 1119, 229 CR 396: §6.150

Conrad v Bank of America (1996) 45 CA4th 133, 53 CR2d 336, disapproved on other grounds in Lovejoy v AT&T Corp. (2001) 92 CA4th 85, 111 CR2d 711: §2.1B

Continental Airlines v McDonald Douglas Corp. (1989) 216 CA3d 388, 264 CR 779: §4.49

Contractors' License Bd. v Dunbar (In re Dunbar) (9th Cir 2001) 245 F3d 1058: §12.35C

Cook v Pendergast (1882) 61 C 72: §3.56

Cooper v Litton Loan Servicing (In re Cooper) (Bankr ND Fla. 2000) 253 BR 286: §2.24A

Corbett v Hayward Dodge, Inc. (2004) 119 CA4th 915, 14 CR3d 741: §2.35

Corona Fruits & Veggies, Inc. v Frozsun Foods, Inc. (2006) 143 CA4th 319, 48 CR3d 868: §6.112

Cortez v Cortez (In re Cortez) (5th Cir 2006) 457 F3d 448: §12.14D

Costa v National Action Fin. Servs., Inc. (ED Cal, Apr. 30, 2008, No. CIV. S-05-2084 FCD/KJM) 2008 US Dist Lexis 35339: §2.28

Costerisan v DeLong (1967) 251 CA2d 768, 59 CR 803: §§3.85, 7.24

County of Napa v Franciscan Vineyards, Inc. (In re Franciscan Vineyards, Inc.) (9th Cir 1979) 597 F2d 181, cert denied (1980) 445 US 915: §12.55

County of Santa Clara v Superior Court (1992) 2 CA4th 1686, 5 CR2d 7: §13.39

County of Stanislaus v Johnson (1996) 43 CA4th 832, 51 CR2d 73: §7.10

Cowan v Their Creditors (1888) 77 C 403, 19 P 755: §9.72

Credit Bureau v Horeth (1943) 60 CA2d 47, 139 P2d 962: §3.121

Crib Retaining Walls, Inc. v NBS/Lowry, Inc. (1996) 47 CA4th 886, 54 CR2d 850: §7.12

Crittenden v Superior Court (1964) 225 CA2d 101, 36 CR 903: §13.39C

Crocker Nat'l Bank v American Mariner Indus. (In re American Mariner Indus.) (9th Cir 1984) 734 F2d 426: §12.36

Crocker Nat'l Bank v Perroton (1989) 208 CA3d 1, 255 CR 794: §11.11

Crocker-Anglo Nat'l Bank v Kuchman (1964) 224 CA2d 490, 36 CR 806: §3.90

Cromer v Strieby (1942) 54 CA2d 405, 128 P2d 916: §4.62

Cross, Marriage of (2001) 94 CA4th 1143, 114 CR2d 839: §§13.9, 13.13

Crossley v Lieberman (3d Cir 1989) 868 F2d 566: §§2.3, 2.20

Crow Winthrop Dev. Ltd. Partnership v Jamboree LLC (In re Crow Winthrop Operating Partnership) (9th Cir 2001) 241 F3d 1121: §12.62

Cruz v Fagor Am., Inc. (2007) 146 CA4th 488, 52 CR3d 862: §4.149

Cruz v MRC Receivables Corp. (ND Cal 2008) 563 F Supp 2d 1092: §§2.18, 2.20

Cukierman v Uecker (In re Cukierman) (9th Cir 2001) 265 F3d 846: §12.62

Culp v Webster (1937) 25 CA2d Supp 759, 70 P2d 273: §9.81

Cunningham v Hamilton Co. (1999) 527 US 198, 144 L Ed 2d 184, 119 S Ct 1915: §12.7

Currie Med. Specialties, Inc. v Bowen (1982) 136 CA3d 774, 186 CR 543: §4.94

Curtin v Salomon (1926) 80 CA 470, 251 P 237: §4.70

Cusano v Klein (9th Cir 2001) 264 F3d 936: §12.19

Cushman v Transunion Corp. (3d Cir 1997) 115 F3d 220: §2A.14

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D-Beam Ltd. Partnership v Roller Derby Skates, Inc. (9th Cir 2004) 366 F3d 972: §4.89

DCM Partners v Smith (1991) 228 CA3d 729, 278 CR 778: §4.90

Dahler v American Pipe & Constr. Co. (1968) 257 CA2d 816, 65 CR 259: §4.148

Damato v Slevin (1989) 214 CA3d 668, 262 CR 879: §§3.2, 3.23, 3.111

D'Anza Santa Cruz Mobile Estates Homeowners Ass'n v D'Anza Santa Cruz Mobile Estates (2001) 94 CA4th 890, 114 CR2d 708: §2.27

Daum v Superior Court (1964) 228 CA2d 283, 39 CR 443: §3.98

Davidson v Tilden (1978) 86 CA3d 283, 150 CR 194: §§3.65, 4.74

Davis v Par Wholesale Auto, Inc. (In re Tucker) (Bankr D Ariz. 2005) 329 BR 291: §§12.51, 12.54

Davis v Thayer (1980) 113 CA3d 892, 170 CR 328: §§4.136, 4.143

Dawson v Goff (1954) 43 C2d 310, 273 P2d 1: §§3.39, 3.54

Dawson v Washington Mut. Bank (In re Dawson) (9th Cir 2004) 390 F3d 1139, cert denied (2005) 546 US 927: §12.38

Day v Western Loan & Bldg. Co. (1940) 42 CA2d 226, 108 P2d 702: §3.3

Day, State v (1946) 76 CA2d 536, 173 P2d 399: §7.41

Deas v Lido Lumber Co. (1955) 132 CA2d 402, 282 P2d 90: §3.39

Degonzague v Weiss, Neuren & Neuren (ND NY 2000) 89 F Supp 2d 282: §2.16A

Degrosiellier v Solomon & Solomon (ND NY, Sept. 27, 2001, No. 00-CV-1065) 2001 US Dist Lexis 15254, 2001 WL 1217181: §2.35

Dekker, Marriage of (1993) 17 CA4th 842, 21 CR2d 642: §13.16

Del Campo v American Corrective Counseling Servs. (ND Cal, Feb. 8, 2007, No. C 01-21151 JW) 2007 US Dist Lexis 12387): §2.7

Demyer v Costa Mesa Mobile Home Estates (1995) 36 CA4th 393, 42 CR2d 260, disapproved on other grounds in Wilcox v Birtwhistle (1999) 21 C4th 973, 90 CR2d 260: §5.4

Denkers v United Compucred Collections, Inc. (ND Cal, Nov. 27, 1996, No. C-96-2946 MHP) 1996 US Dist Lexis 22332: §2.4

Deodati v M.M. Winkler & Assocs. (In re M.M. Winkler & Assocs.) (5th Cir 2001) 239 F3d 746: §12.42

Desper v King (1967) 251 CA2d 659, 59 CR 657: §4.147

Diamond Z Trailer, Inc. v JZ LLC (In re JZ LLC) (BAP 9th Cir 2007) 371 BR 412: §§12.20, 12.62

Dicker v Dye (In re Edelman) (BAP 9th Cir 1999) 237 BR 146: §12.55

Dieden v Schmidt (2002) 104 CA4th 645, 128 CR2d 365: §§9.37, 11.46

Diepenbrock v Auslen (1960) 185 CA2d 747, 8 CR 659: §3.54

Dinubilo, In re (ED Cal 1993) 177 BR 932: §12.3

Disney, In re (Bankr D Colo 2008) 386 BR 292: §12.17

Distefano v Hall (1963) 218 CA2d 657, 32 CR 770: §4.58

District of Columbia Court of Ap-peals v Feldman (1983) 460 US 462, 75 L Ed 2d 206, 103 S Ct 1303: §2.30B

Dix v Johnson (In re Dix) (BAP 9th Cir 1988) 95 BR 134: §12.55

Doak v Superior Court (1968) 257 CA2d 825, 65 CR 193: §§4.101, 5.2

Dobbins v Hardister (1966) 242 CA2d 787, 51 CR 866: §§4.57, 4.59, 4.70, 7.22

Dominguez v Miller (In re Dominguez) (9th Cir 1995) 51 F3d 1502: §12.51B

Don v Cruz (1982) 131 CA3d 695, 182 CR 581: §4.133

Dorner v Commercial Trade Bureau of Cal. (ED Cal, Apr. 10, 2008, No. CIV-F-08-0083 AWI SMS 2008) 2008 US Dist Lexis 70425: §2.20

Dorsey v Morgan (D Md 1991) 760 F Supp 509: §2.3

Dowling, In re (Bankr ND Cal, Jan. 5, 2009, No. 04-57297-MM) 2009 Bankr Lexis 688: §9.82

Doyka v Superior Court (1991) 233 CA3d 1134, 285 CR 14: §6.93

Dracos v Hellenic Lines, Ltd. (4th Cir 1983) 705 F2d 1392: §3.114

Drye v U.S. (1999) 528 US 49, 145 L Ed 2d 466, 120 S Ct 474: §12.12

Dudley, In re (Bankr WD Va 2009) 405 BR 790: §12.14A

Dudley, In re (SD Cal 1947) 72 F Supp 943: §§9.78-9.79

Dugar v Happy Tiger Records, Inc. (1974) 41 CA3d 811, 116 CR 412: §§3.59, 7.24

Dunlap v Credit Protection Ass'n (9th Cir 2005) 419 F3d 1011: §§2.18, 2.20

E

Earl W. Schott, Inc. v Kalar (1993) 20 CA4th 943, 24 CR2d 580: §§3.1, 7.9

Eaton v Borck (1954) 124 CA2d 10, 268 P2d 58: §4.78

Edelman v McDonnell (1899) 126 C 210, 58 P 528: §4.60

Educational Credit Mgmt. Corp. v Bernal (In re Bernal) (BAP 9th Cir 1998) 223 BR 542, aff'd (9th Cir 2000) 207 F3d 595: §12.3

Edwards v Superior Court (1991) 230 CA3d 173, 281 CR 30: §6.138

Egan v Bishop (1935) 8 CA2d 119, 47 P2d 500: §3.85

Egebjerg v Anderson (In re Egebjerg) (9th Cir 2009) 574 F3d 1045: §12.14C

Einstein/Noah Bagel Corp. v Smith (In re BCE West, LP) (9th Cir 2003) 319 F3d 1166: §12.62

Eisen v Curry (In re Eisen) (9th Cir 1994) 14 F3d 469: §12.15C

Ellett v Stanislaus (9th Cir 2007) 506 F3d 774: §12.20

Ellrott v Bliss (1983) 147 CA3d 901, 195 CR 446: §7.51

Elms v Elms (1946) 72 CA2d 508, 164 P2d 936: §§4.139, 4.157

Elston v City of Turlock (1985) 38 C3d 227, 211 CR 416: §§4.134, 4.136

Emery v Pacific Employers Ins. Co. (1937) 8 C2d 663, 67, P2d 1046: §3.27B

Engebretson & Co. v Harrison (1981) 125 CA3d 436, 178 CR 77: §§3.27B, 4.135, 7.4

Engineering Service Corp. v Longridge Inv. Co.(1957) 153 CA2d 404, 314 P2d 563: §3.119A

Erickson v Municipal Court (1934) 219 C 737, 29 P2d 192: §9.46

Escobar v Rogers (1920) 182 C 603, 189 P 268: §9.12

Estate of _____ (*see* name of decedent)

Ettefagh, Marriage of (2007) 150 CA4th 1578, 59 CR3d 419: §13.6

Eucalyptus Growers Ass'n v Orange County Nursery & Land Co. (1917) 174 C 330, 163 P 45: §4.80

Evans v American Credit Sys., Inc. (D Neb 2004) 222 FRD 388: §2.30A

Evans v Zeigler (1949) 91 CA2d 226, 204 P2d 902: §§3.80, 3.91

Ex parte Todd (1897) 119 C 57, 50 P 1071: §13.39B

Ex parte Young (1908) 209 US 123, 52 L Ed 714, 28 S Ct 441: §12.5B

F

Falahati v Kondo (2005) 127 CA4th 823, 26 CR3d 104: §4.151

Farley v Williams (WD NY, Dec. 30, 2005, No. 02-CV-0667C(SR)) 2005 US Dist Lexis 38924: §2A.8

Faust v Texaco Ref. & Mktg., Inc. (In re Faust) (MD Ga 1998) 270 BR 310: §2.1B

Fausto v Credigy Servs. Corp. (ND Cal 2009) 598 F Supp 2d 1049: §2.25

Fayusi v Permatex, Inc. (2008) 167 CA4th 681, 84 CR3d 351: §4.140

Feiock, In re (1989) 215 CA3d 141, 263 CR 437, overruled on other grounds in Moss v Superior Court (1998) 17 C4th 396, 71 CR2d 215: §13.39

Feldmeier, In re (Bankr D Ore. 2005) 335 BR 807: §§12.39, 12.51

Fellows, Marriage of, In re (2006) 39 C4th 179, 46 CR3d 49: §13.34

Ferrara v Jordan (1955) 134 CA2d Supp 917, 286 P2d 589: §7.28

Ferretti, In re (Bankr SD Fla 1999) 230 BR 883, aff'd (11th Cir 2001) 268 F3d 1065: §12.27

Fibreboard Paper Prods. Corp. v East Bay Union of Machinists (1964) 227 CA2d 675, 39 CR 64: §4.76

Fidelity Creditor Serv., Inc. v Browne (2001) 89 CA4th 195, 106 CR2d 854: §7.71

Fields v Wilber Law Firm, P.C. (7th Cir 2004) 383 F3d 562: §2.23A

Figuero v Citibank (SD Cal, Apr. 15, 2009, No. 08cv2214 L(AJB)) 2009 US Dist Lexis 32287: §2.10C

Finn v Butler (1925) 195 C 759, 235 P 992: §8.50

Firemen's Ins. Co. v Keating (SD NY 1990) 753 F Supp 1137: §2.33

Firpo v Pacific Mut. Life Ins. Co. (1926) 80 CA 122, 251 P 657: §§3.90, 4.57-4.58

First Fed. Bank of Calif. v Fegen (2005) 131 CA4th 798, 31 CR3d 853: §9.43

First Small Bus. Inv. Co. v Sistim, Inc. (1970) 12 CA3d 645, 90 CR 798: §§4.142, 4.157

Fisch, Spiegler, Ginsburg & Ladner v Appel (1992) 10 CA4th 1810, 13 CR2d 471: §§6.24, 9.57, 9.82

Fischer v First Int'l Bank (2003) 109 CA4th 4433, 1 CR3d 162: §4.32

Fischer v Machado (1996) 50 CA4th 1069, 58 CR2d 213: §3.8

Fjeldsted v Lien (In re Fjeldsted) (BAP 9th Cir 2003) 293 BR 12: §12.59

Fleet Mortg. Group, Inc. v Kaneb (1st Cir 1999) 196 F3d 265: §12.38

Fleming v Pickard (9th Cir, Sept. 9, 2009, No. 07-35979) 2009 US App Lexis 20129: §2.10B

Fletcher v Security Pac. Nat'l Bank (1979) 23 C3d 442, 153 CR 28: §4.37

Fobian, In re (9th Cir 1991) 951 F2d 1149): §12.42

Focus Media, Inc. v NBC (In re Focus Media, Inc.) (9th Cir 2004) 378 F3d 916: §12.52

Fokkena v Hartwick (D Minn 2007) 373 BR 645: §12.14C

Folsom v Butte County Ass'n of Gov'ts (1982) 32 C3d 668, 186 CR 589: §7.12

Fontaine v Superior Court (2009) 175 CA4th 830, 96 CR3d 607: §3.40

Foothill Ditch Co. v Wallace Ranch Water Co. (1938) 25 CA2d 555, 78 P2d 215: §§3.60, 3.65

Ford v Baroff (In re Baroff) (9th Cir 1997) 105 F3d 439: §12.51A

Ford v Herndon (1976) 62 CA3d 492, 133 CR 111: §4.136

Ford & Vlahos v ITT Commercial Fin. Corp. (1994) 8 C4th 1220, 36 CR2d 464: §6.150

Ford Motor Credit Co. v Waters (2008) 166 CA4th Supp 1, 83 CR3d 826: §§4.21, 9.73

Ford v Herndon (1976) 62 CA3d 492, 133 CR 111, disapproved on other grounds in Salas v Cortez (1979) 24 C3d 22, 154 CR 529: §4.148

Forsyth v Jones (1997) 57 CA4th 776, 67 CR2d 357: §12.39

Foti v NCO Fin. Sys., Inc. (SD NY 2006) 424 F Supp 2d 643: §2.22A

Fowler, In re (Bankr D Del 2006) 349 BR 414: §12.14B

Fox v Citicorp Credit Servs. (9th Cir 1994) 15 F3d 1507: §§2.3-2.4, 2.29A, 2.31, 2.33

Fox, In re (Bankr D NJ 2007) 370 BR 639: §12.14A

Franceschi v State Bar of Cal. (In re Franceschi) (BAP 9th Cir 2001) 268 BR 219, aff'd (9th Cir 2002) 43 Fed Appx 87: §12.5B

Franke v BAM Bldg. Co. (2009) 172 CA4th 224, 91 CR3d 212: §9.49C

Frey v Gangwish (6th Cir 1992) 970 F2d 1516: §2.22A

Frick, Marriage of, In re (1986) 181 CA3d 997, 226 CR 766: §§13.14-13.15

Fried v Municipal Court (1949) 94 CA2d 376, 210 P2d 883: §§7.58, 7.60

Friedman v HHL Fin. Servs., Inc. (ND Ill, Jan. 25, 1994, No. C-93-1545) 1994 US Dist Lexis 557: §§2.32, 2.35

Frost v Mighetto (1937) 22 CA2d 612, 71 P2d 932: §3.27B

Fugate v Phoenix Civil Serv. Bd. (9th Cir 1986) 791 F2d 736: §2A.2

Furlow Pressed Brick Co. v Balboa Land & Water Co. (1921) 186 C 754, 200 P 625: §3.65

G

G.D. Searle & Co. v Superior Court (1975) 49 CA3d 22, 122 CR 218: §3.64

G.W. Anderson Constr. Co. v Mars Sales (1985) 164 CA3d 326, 210 CR 409: §3.7

GE Capital Corp. v Future Media Prods., Inc. (9th Cir 2008) 530 F3d 1178, amended (9th Cir 2008) 547 F3d 956: §12.36

Gagan v Gouyd (1999) 73 CA4th 835, 86 CR2d 733: §13.6

Galam v Carmel (In re Larry's Apartment, LLC) (9th Cir 2001) 249 F3d 832: §12.42

Galdjie v Darwish (2003) 113 CA4th 1331, 7 CR3d 178: §9.4A

Gallin v Superior Court (1991) 230 CA3d 541, 281 CR 304: §3.41

Gammon v GC Servs. Ltd. Partnership (7th Cir 1994) 27 F3d 1254: §2.20

Gar-Lo, Inc. v Prudential Sav. & Loan Ass'n (1974) 41 CA3d 242, 116 CR 389: §3.111

Gardner v Rutherford (1943) 57 CA2d 874, 136 P2d 48: §§3.60, 3.65

Garrett v Crown Coach Corp. (1968) 259 CA2d 647, 66 CR 590: §3.3

Garrett v Derbes (5th Cir 1997) 110 F3d 317: §2.3

Gaskins v Security-First Nat'l Bank (1939) 30 CA2d 409, 86 P2d 681: §9.81

Gaughan v Edward Dittlof Revocable Trust (In re Costas) (9th Cir 2009) 555 F3d 790: §12.12

Gause v PG&E (1923) 60 CA 360, 212 P 922: §7.49

General Acceptance Corp. v Robinson (1929) 207 C 285, 277 P 1039: §3.53

General Elec. Capital Auto. Fin. Servs., Inc. v Appellate Div. (2001) 88 CA4th 136, 105 CR2d 552: §§7.92, 9.67

George Love Farming, LC, In re (Bankr D Utah 2007) 366 BR 170: §12.14

Gerber v CitiCorp, Inc. (ED Cal, Jan. 29, 2009, No. CIV S-07-0785 WBS JFM PS) 2009 US Dist Lexis 248094: §2.25

Gerber v CitiCorp, Inc. (ED Cal, Jan. 29, 2009, No. CIV S-07-0785 WBS JFM PS) 2009 WL 248094: §2.33

Ghirado v Antonioli (1994) 8 C4th 791, 35 CR2d 418: §4.86

Ghirado v Antonioli (1996) 14 C4th 39, 57 CR2d 687: §4.87

Gill v De Sanz (1975) 52 CA3d 457, 125 CR 384: §6.7

Gilmore v Hill (1957) 152 CA2d 881, 313 P2d 898: §4.60

Gilmore v Lycoming Fire Ins. Co. (1880) 55 C 123: §3.95

Giorgi v Conradi (1962) 199 CA2d 82, 18 CR 588: §4.90

Glaire v La Lanne-Paris Health Spa, Inc. (1974) 12 C3d 915, 117 CR 541: §4.90

Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co. (1977) 66 CA3d 101, 135 CR 802: §7.36

Globalist Internet Technols. v Reda (2008) 167 CA4th 1267, 84 CR3d 725: §11.47

Godon, Inc., In re (Bankr ED CA 2002) 275 BR 555: §12.66A

Goeb v Heid (In re Goeb) (9th Cir 1982) 675 F2d 1386: §12.15C

Goldberg v Ellet (In re Ellet) (9th Cir 2001) 254 F3d 1135, cert denied (2002) 534 US 1127: §12.5C

Goldberg v Engelberg (1939) 34 CA2d 10, 92 P2d 935: §3.119A

Goldman v Cohen (2d Cir 2006) 445 F3d 152: §2.22C

Goldman v Simpson (2008) 160 CA4th 255, 72 CR3d 729: §7.71

Gomez, People v (2005) 130 CA4th 1008, 30 CR3d 662: §9.17

Gonzales v Arrow Fin. Servs. LLC (SD Cal 2007) 489 F Supp 2d 1140: §§2.18, 2.20

Gonzales v Kay (5th Cir 2009) 577 F3d 600: §2.20

Goodarzirad, Marriage of (1986) 185 CA3d 1020, 230 CR 203: §4.150

Goodhue v Tureaud (1979) 100 CA3d 205, 160 CR 677: §4.136

Goold v Superior Court (2006) 145 CA4th 1, 51 CR3d 455: §13.39B

Gorman v Wolpoff & Abramson, LLP (9th Cir 2009) 552 F3d 1008: §2.20

Goswami v American Collections Enters., Inc. (5th Cir 2004) 377 F3d 488: §2.20

Goswami v MTC Distrib. (In re Goswami) (BAP 9th Cir 2003) 304 BR 386: §12.27

Gough v Security Trust & Sav. Bank (1958) 162 CA2d 90, 327 P2d 555: §4.57

Gould v Wood (1928) 205 C 141, 270 P 183: §§3.87-3.88

Gouskos v Aptos Village Garage, Inc. (2001) 94 CA4th 754, 114 CR2d 558: §§2.8, 2.11, 2.11A

Graham v Scissor-Tail, Inc. (1981) 28 C3d 807, 171 CR 604: §4.32

Grant v de Otte (1954) 122 CA2d 724, 265 P2d 952: §9.37

Graupner, In re (11th Cir 2008) 537 F3d 1295: §12.15A

Gray-Mapp v Sherman (ND Ill 1999) 100 F Supp 2d 810: §2.1B

Graziano v Harrison (3d Cir 1991) 950 F2d 107: §2.24A

Green v Ford Motor Credit Co. (Md App 2003) 828 A2d 821: §2.30A

Green v Hocking (ED Mich 1992) 792 F Supp 1064, aff'd (6th Cir 1993) 9 F3d 18: §2.33

Grinius, Marriage of (1985) 166 CA3d 1179, 212 CR 803: §13.17

Grogan v Garner (1991) 498 US 279, 112 L Ed 2d 755, 111 S Ct 654: §12.42

Groner v Miller (In re Miller) (BAP 9th Cir 2001) 262 BR 499: §12.37

Grothe v Cortlandt Corp. (1992) 11 CA4th 1313, 15 CR2d 38: §9.44

Gruen v EdFund (ND Cal, July 15, 2009, No. C 09000644 JSW) 2009 US Dist Lexis 60396: §2.7

Gruenberg v Aetna Ins. Co. (1973) 9 C3d 566, 108 CR 480: §3.98

Gruendi v Oewel Partnership, Inc. (1997) 55 CA4th 654, 64 CR2d 217: §3.13

Gudelj v Gudelj (1953) 41 C2d 202, 259 P2d 656: §13.14

Guerrero v RJM Acquistitions (9th Cir 2007) 499 F3d 926: §2.12

Guevarra v Progressive Fin. Servs., Inc. (ND Cal, Nov. 30, 2006, No. C-05-3466-VRW) 2006 US Dist Lexis 89193: §2.29

H

H&H Inv. Co. v T-J Constr. Co. (1969) 275 CA2d 58, 79 CR 890: §4.147

Haberbush v Charles and Dorothy Cummins Family Ltd. Partnership (2006) 139 CA4th 1630, 43 CR3d 814: §4.127

Haggerty v Warner (1953) 115 CA2d 468, 252 P2d 373: §3.91

Hahn v Triumph Partnerships LLC (7th Cir 2009) 557 F3d 755: §2.20

Haines, Marriage of (1995) 33 CA4th 277, 39 CR2d 673: §§13.6-13.7, 13.31

Haley v Dow Lewis Motors, Inc. (1999) 72 CA4th 497, 85 CR2d 352: §2.1B

Hall, Goodhue, Haisley & Barker, Inc. v Marconi Conf. Ctr. Bd. (1996) 41 CA4th 1551, 49 CR2d 286: §7.28

Hallett v Slaughter (1943) 22 C2d 552, 140 P2d 3: §4.148

Hallford v Baird (1938) 27 CA2d 384, 80 P2d 1040: §§3.65, 3.89

Hambrick v Wells Fargo Bank, N.A. (ND Miss, June 2, 2009, No. 1:07CV258-P-D) 2009 US Dist Lexis 46359: §2.5

Hambrose Reserve, Ltd. v Faitz (1992) 9 CA4th 129, 11 CR2d 638, overruled in part on other grounds in Trope v Katz (1995) 11 C4th 274, 45 CR2d 241: §7.45

Hamilton v State Farm Fire & Cas. Co. (9th Cir 2001) 270 F3d 778: §2.1B

Hamm v Elkin (1987) 196 CA3d 1343, 242 CR 545: §4.136

Hammell v Superior Court (1932) 217 C 5, 17 P2d 101: §3.27B

Hancock v Receivables Mgmt. Solutions, Inc. (ND Cal, May 30, 2006, No. C 06-1365 CW) 2006 US Dist Lexis 38639: §§2.1C, 2.20

Hansen v d'Artenay (1936) 13 CA2d 293, 57 P2d 202: §9.12

Hapin v Arrow Fin. Servs., Inc. (ND Cal 2006) 428 F Supp 2d 1057: §§2.1C, 2.18

Harchar, U.S. v (Bankr ND Ohio 2005) 331 BR 720; Aiello v Providian Fin. Corp. (7th Cir 2001) 239 F3d 876: §12.38

Hardacre, In re (Bankr ND Tex 2006) 338 BR 718: §§12.14B-12.14C

Harleston, California v (In re Harleston) (9th Cir 2003) 331 F3d 699: §12.5C

Harper v Better Bus. Servs. (ND Ga 1991) 768 F Supp 817, aff'd (11th Cir 1992) 961 F2d 1561: §2.27

Harris v St. Louis Univ. (ED Mo 1990) 114 BR 647: §2.1B

Harrison, Marriage of (1986) 179 CA3d 1216, 225 CR 234: §13.23C

Hartman v Meridian Fin. Servs., Inc. (WD Wis 2002) 191 F Supp 2d 1031: §2.7

Hartung v J.D. Byrider, Inc. (ED Cal, June 26, 2009, No. 1:08-cv-00960 AWI GSA) 2009 US Dist Lexis 54415: §2.25

Harvey v National Action Fin. Servs. (ND Ill 1999) 79 F Supp 2d 896: §2.23A

Harvey v United Adjusters (D Or 1981) 509 F Supp 1218: §§2.16, 2.19

Hassen Imports Partnership v KWP Fin. VI (In re Hassen Imports Partnership) (BAP 9th Cir 2000) 256 BR 916: §12.42

Hayes, In re (Bankr D Mass 2007) 376 BR 55: §12.14D

Hayhoe v Cole (In re Cole) (BAP 9th Cir 1998) 226 BR 647: §12.42

Hays v Temple (1937) 23 CA2d 690, 73 P2d 1248: §3.82

Hayward v Pimental (1895) 107 C 386, 40 P 545: §9.46

Heaton-Hobson Assoc. Law Offices v Arper (1904) 145 C 282, 78 P 721: §4.85

Heavilin v Westchester Fire Ins. Co. (1936) 12 CA2d 695, 56 P2d 252: §3.27B

Hebbring v U.S. Trustee (9th Cir 2006) 463 F3d 902: §12.14D

Heidary v Yadollahi (2002) 99 CA4th 857, 121 CR2d 695: §4.150

Heinemann v Jim Walter Homes, Inc. (ND W Va 1998) 47 F Supp 2d 716: §2.10C

Heintz v Jenkins (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489: §§2.3, 2.33

Heintz v Jenkins (7th Cir 1994) 25 F3d 536, aff'd (1995) 514 US 291, 131 L Ed 2d 395, 115 S Ct 1489: §2.21

Hellman v Anderson (1991) 233 CA3d 840, 284 CR 830: §11.11

Hendricks, In re (1970) 5 CA3d 793, 85 CR 220: §13.39A

Henigan v Ervin (1895) 110 C 37, 42 P 457: §3.27B

Hensley v Eckerhart (1983) 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933: §2.28

Hepler v Washington Mut. Bank (SD Cal, Apr. 17, 2009, No. CV 07-4804 CAS (Ex)) 2009 WL 1045470: §2.10C

Herbert v Monterey Fin. Servs. (D Conn 1994) 863 F Supp 76: §2.10B

Heredia v Green (ED Pa 1980) 504 F Supp 896, aff'd (3d Cir 1981) 667 F2d 392: §2.7

Heritage Hotel Ltd. Partnership I v Valley Bank of Nevada (In re Heritage Hotel Partnership I) (BAP 9th Cir 1993) 160 BR 374: §2.1B

Hester v U.S. (1924) 265 US 57, 68 L Ed 898, 44 S Ct 445: §9.17

Hi-Tech Communications Corp. v Poughkeepsie Bus. Park, LLC (In re Wheatfield Bus. Park, LLC) (BAP 9th Cir 2004) 308 BR 463: §12.55

Hicks v Feiock (1988) 485 US 624, 99 L Ed 2d 721, 108 S Ct 1423: §13.39

Hicks v Hicks (1962) 211 CA2d 144, 27 CR 307: §§13.14, 13.17

Higley v Bank of Downey (1968) 260 CA2d 640, 67 CR 365: §4.147

Hing v Lee (1918) 37 CA 313, 174 P 356: §8.28

Hipolito v Alliance Receivables Mgmt., Inc. (ND Cal, July 15, 2005, No. C-05-0842 JCS) 2005 WL 1662137: §2.22A

Hobbs v Buck (1981) 115 CA3d 176, 171 CR 258: §4.90

Hobbs v Weiss (1999) 73 CA4th 76, 86 CR2d 146: §6.29A

Hobgood v Class (1958) 161 CA2d 208, 326 P2d 546: §7.58

Hoffman v Partners in Collections, Inc. (ND Ill, Sept. 12, 1994, No. 93 C 4182) 1994 US Dist Lexis 12884: §2.20

Holm, In re (9th Cir 1991) 931 F2d 620: §12.55

Holt v Parmer (1951) 106 CA2d 329, 235 P2d 43: §4.135

Holtemann, Marriage of, In re (2008) 166 CA4th 1166, 83 CR3d 385: §13.10

Home Fed. Sav. & Loan Ass'n v Ramos (1991) 229 CA3d 1609, 284 CR 1: §3.7

Horkey v J.V.D.B. & Assocs., Inc. (7th Cir 2003) 333 F3d 769: §2.35

Hosseinzadeh v M.R.S Assocs. (CD Cal 2005) 387 F Supp 2d 1104: §§2.19, 2.22A

Hotchkiss v Smith (1895) 108 C 285, 41 P 304: §7.35

Household Credit Servs., Inc. v Ettell (In re Ettell) (9th Cir 1999) 188 F3d 1141: §12.42

Hoxie v Bryant (1900) 131 C 85, 63 P 153: §9.12

Hu v Fang (2002) 104 CA4th 61, 127 CR2d 756: §4.138

Hubbard v National Bond & Collec-tion Assocs. (D Del 1991) 126 BR 422, aff'd (3d Cir 1991) 947 F2d 935: §§2.1B, 2.16A, 2.31A

Huff v Pharr (11th Cir 1984) 748 F2d 1553: §7.71

Hulse v Davis (1927) 200 C 316, 253 P 136: §9.46

Hulse v Ocwen Fed. Bank (D Ore 2002) 195 F Supp 2d 1188: §2.10C

Humes v MarGil Ventures, Inc. (1985) 174 CA3d 486, 220 CR 186: §4.149

Hunt v Check Recovery Sys., Inc. (ND Cal 2007) 478 F Supp 2d 1157: §§2.20-2.21, 2.31A

Hyde v Midland Credit Mgmt., Inc. (9th Cir 2009) 567 F3d 1137: §2.35

Hyman v Plotkin (In re Hyman) (9th Cir 1992) 967 F2d 1316: §12.27

Hyman v Tate (7th Cir 2004) 362 F3d 965: §2.1B

I

Ilas, Marriage of (1993) 12 CA4th 1630, 16 CR2d 345: §13.40

Imperial Bank v Pim Elec. (1995) 33 CA4th 540, 39 CR2d 432: §8.43

Imperial Merchant Servs. v Hunt (2009) 47 C4th 381, 97 CR3d 464: §§2.20-2.21

Impulsora del Territorio Sur, S.A v Cecchini (In re Cecchini) (9th Cir 1986) 780 F2d 1440, over-ruled by Kawaauhau v Geiger (1998) 523 US 57, 140 L Ed 2d 90, 118 S Ct 974: §12.46

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Independence Bank v Heller (1969) 275 CA2d 84, 79 CR 868: §9.52

International Aerial Tramway Corp. v Konrad Doppelmayr & Sohn (1969) 70 C2d 400, 74 CR 908: §3.95

International Typographical Union Negotiated Pension Plan v Ad Compositors, Inc. (1983) 142 CA3d 733, 191 CR 227: §6.94

Irving v Carpentier (1886) 70 C 23, 11 P 391: §3.120

Irwin v Mascott (ND Cal 2000) 112 F Supp 2d 937: §§2.4, 2.20, 2.24B, 2.29A, 2.31A

Irwin v Mascott (ND Cal 1999) 96 F Supp 2d 968: §§2.10B, 2.20, 2.33

Itule v Metalease, Inc. (In re Itule) (BAP 9th Cir 1990) 114 BR 206: §3.8

Ivey, In re (2000) 85 CA4th 793, 102 CR2d 447: §§13.39A-13.39B

Iwanaga v Hagopian (1919) 39 CA 584, 179 P 523: §7.58

Izenberg v ETS Servs., LLC (CD Cal 2008) 589 F Supp 2d 1193: §2.10C

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J & J Builders Supply v Caffin (1967) 248 CA2d 292, 56 CR 365: §3.7

J. T. Jenkins Co. v Kennedy (1975) 45 CA3d 474, 119 CR 578: §4.90

J.J. MacIntyre Co. v Duren (1981) 118 CA3d Supp 16, 173 CR 715: §§4.8, 4.21, 10.26

Jackson v Homeowners Assoc. of Monte Vista (2001) 93 CA4th 773, 113 CR2d 363: §§7.12, 7.21

Jacobsen, In re (Bankr ED Tex 2007) 378 BR 805: §§12.15B, 12.17

Jaffe v Pacelli (2008) 165 CA4th 927, 82 CR3d 423: §§7.38, 11.47

Jancik v Cavalry Portfolio Servs., LLC (D Minn 2007) 2007 US Dist Lexis 49500: §2.31B

Jenkins, J. T., Co. v Kennedy (1975) 45 CA3d 474, 119 CR 578: §4.90

Jensen v Dorr (1911) 159 C 742, 116 P 553: §§4.57-4.58

Jensen, Marriage of, In re (2003) 114 CA4th 587, 114 CA4th 587: §13.39C

Jerman v Carlisle, McNeille, Rini, Kramer, & Ullrich LPA (6th Cir 2008) 538 F3d 469 (cert granted 2009) __ US __, 174 L Ed 2d 575, 129 S Ct 2863: §2.31A

Jerry's Shell v Equilon Enters., LLC (2005) 134 CA4th 1058, 36 CR3d 637: §4.141

Jeter v Credit Bureau, Inc. (11th Cir 1985) 760 F2d 1168: §2.18

Jett v Sicroff (In re Sicroff) (9th Cir 2005) 401 F3d 1101, as amended, 2005 US App Lexis 5919 (9th Cir, Apr. 11, 2005, No. 03-15610), cert denied (2005) 545 US 1139, 162 L Ed 2d 888, 125 S Ct 2964: §12.46

Jimenez v City of Oxnard (1982) 134 CA3d 856, 184 CR 864: §7.37

Jimenez v Protective Life Ins. Co. (1992) 8 CA4th 528, 10 CR2d 326: §11.46

Jogani v Jogani (2006) 141 CA4th 158, 45 CR3d 792: §8.32

Johnson v Dixon Farms Co. (1915) 29 CA 52, 155 P 134: §3.92

Johnson v E-Z Ins. Brokerage, Inc. (2009) 175 CA4th 86, 95 CR3d 782: §9.79

Johnson v Eaton (5th Cir 1996) 80 F3d 148: §§2.28, 2.35

Johnson v Phillips & Cohen Assocs., Ltd. (ND Cal, Aug. 15, 2006, No. C 05-05176 JW) 2006 US Dist Lexis 60697: §2.1C

Johnson v Riddle (10th Cir 2002) 305 F3d 1107: §2.31A

Johnson v Righetti (In re Johnson) (9th Cir 1985) 756 F2d 738, cert denied (1985) 474 US 828: §12.59

Jones v CBE Group, Inc. (D Minn 2003) 215 FRD 558: §2.31B

Jones v Daly (1981) 122 CA3d 500, 176 CR 130: §3.82

Jones v Re-Mine Oil Co. (1941) 47 CA2d 832, 119 P2d 219: §3.90

Jones v Weiss, Neuren & Neuren (ND NY 2000) 95 F Supp 2d 105: §2.16A

Jones v Wells Fargo Bank (2003) 112 CA4th 1527, 5 CR3d 835: §§4.33, 4.89

Jones v Wilton (1938) 10 C2d 493, 75 P2d 593: §3.63

Jordan v Kent (D Del 1990) 731 F Supp 652: §2.10C

Jordan-Lyon Prods., Ltd. v Cineplex Odeon Corp. (1994) 29 CA4th 1459, 35 CR2d 200: §§6.1, 6.12, 6.78

Joseph v J.J. Mac Intyre Cos., LLC (ND Cal 2002) 238 F Supp 2d 1158: §§2.1A, 2.19

Juras v Aman Collection Servs. (9th Cir 1987) 829 F2d 739: §2.20

K

Kadison, Pfaelzer, Woodard, Quinn & Rossi v Wilson (1987) 197 CA3d 1, 242 CR 595: §6.4

Kahen-Kashani v National Action Fin. Servs., Inc. (WD NY, Sept. 21, 2004, No. 03-CV-828A) 2004 US Dist Lexis 27836: §2.20

Kahn v Berman (1988) 198 CA3d 1499, 244 CR 575: §7.45

Kane, In re (Bankr D Nev 2006) 336 BR 477: §12.28

Kantor v Wellesley Galleries, Ltd. (9th Cir 1983) 704 F2d 1088: §3.114

Kapelus v Family Health Found. (1969) 276 CA2d 181, 80 CR 763: §8.44

Kaplan v Assetcare, Inc. (SD Fla 2000) 88 F Supp 2d 1355: §2.32

Karson Indus. v Superior Court (1969) 273 CA2d 7, 77 CR 714: §3.56

Karton v Dougherty (2009) 171 CA4th 133, 89 CR3d 506: §11.49

Katz, Marriage of (1991) 234 CA3d 1711, 286 CR 495: §§11.19, 13.27

Kawaauhau v Geiger (1998) 523 US 57, 140 L Ed 2d 90, 118 S Ct 974: §12.46

Kawasho Int'l U.S.A. v Lakewood Pipe Serv. (1983) 152 CA3d 785, 201 CR 640: §3.90

Keele v Wexter (7th Cir 1998) 149 F3d 589: §2.34

Kellett, In re (Bankr D Or 2007) 379 BR 332: §12.14A

Kelly v Gordon (In re Gordon) (BAP 9th Cir 1993) 988 F2d 1000: §12.51A

Kelsey v Waste Mgmt. of Alameda County (1999) 76 CA4th 590, 90 CR2d 510: §2.1B

Kelvie, In re (Bankr D Idaho 2007) 372 BR 56: §12.14D

Kendall v Allied Investigations, Inc. (1988) 197 CA3d 619, 243 CR 42: §§4.144, 4.163

Kendall v Pladson (In re Pladson) (9th Cir 1994) 35 F3d 462: §9.76

Kerr, In re (Bankr WD Wash, July 18, 2007, No. 06-12302) 2007 Bankr Lexis 2474: §12.14A

Kerr, Marriage of (1986) 185 CA3d 130, 229 CR 610: §13.27

Kertesz v Ostrovsky (2004) 115 CA4th 369, 8 CR3d 907: §§4.74, 7.48

Khoury v Maly's, Inc. (1993) 14 CA4th 612, 17 CR2d 708: §3.96

Kidwell, In re (Bankr ED Cal 1993) 158 BR 203: §12.52

Kimber v Federal Fin. Corp. (MD Ala 1987) 668 F Supp 1480: §2.5

Kimber v Jones (1954) 122 CA2d 914, 265 P2d 922: §§7.23, 7.25

Kinkade v Champion Horse Shoe Co. (1916) 32 CA 435, 163 P 228: §7.35

Kinney v United Health Care Servs., Inc. (1999) 70 CA4th 1322, 83 CR2d 348: §4.33

Kinnison v Guaranty Liquidating Corp. (1941) 18 C2d 256, 115 P2d 450: §7.78

Kipperman v Proulx (In re Burns) (BAP 9th Cir 2003) 291 BR 846: §§8.17, 8.22

Kirk v Culley (1927) 202 C 501, 261 P 994: §3.98

Kleczy v First Fed. Credit Control (Ohio App 1984) 486 NE2d 204: §2.20

Kline v Beauchamp (1938) 29 CA2d 340, 84 P2d 194: §3.120

Knauer v Enlow (In re Enlow) (Bankr SD Ind 1982) 20 BR 480: §12.65

Knupfer v Wolfberg (In re Wolfberg) (BAP 9th Cir 2000) 255 BR 879: §12.19

Kobs v Arrow Serv. Bureau (7th Cir 1998) 134 F3d 893: §2.25

Komarova v National Credit Acceptance, Inc. (2009) 175 CA4th 324, 95 CR3d 880: §§2.32-2.33

Kontrick v Ryan (2004) 540 US 443, 157 L Ed 2d 867, 124 S Ct 906: §12.51B

Koski v U-Haul Co. (1963) 212 CA2d 640, 28 CR 398: §4.142

Kougasian v TMSL, Inc. (9th Cir 2004) 359 F3d 1136: §2.30B

Krueger, In re (BAP 9th Cir 1988) 88 BR 238: §12.35B

Kruger v Wells Fargo Bank (1974) 11 CA3d 352, 113 CR 449: §4.20

Kuhn v Account Control Technol. (D Nev 1994) 865 F Supp 1443: §2.19

Kyne v Eustice (1963) 215 CA2d 627, 30 CR 391: §8.32

L

LPM Corp., In re (Bankr SD Cal 2000) 253 BR 914, aff'd (9th Cir 2002) 300 F3d 1134: §12.62

LaMar v Superior Court (1948) 87 CA2d 126, 196 P2d 98: §7.28

Ladick v Van Gemert (10th Cir 1998) 146 F3d 1205: §2.10B

Lambert v Haskell (1889) 80 C 611, 22 P 327: §3.95

Landis v Morrissey (1886) 69 C 83, 10 P 258: §4.84

Lane v Wilkens (1964) 229 CA2d 315, 40 CR 309: §3.107

Lane, In re (Bankr D Kan 2007) 374 BR 830: §12.17

Lanyi v Goldblum (1986) 177 CA3d 181, 223 CR 32: §7.12

Lapides v Bd. of Regents of Univ. Sys. of Ga. (2002) 535 US 613, 152 L Ed 2d 806, 122 S Ct 1640: §12.6

Larson v Barnett (1950) 101 CA2d 282, 225 P2d 297: §3.3

Las Palmas Assocs. v Las Palmas Ctr. Assocs. (1991) 235 CA3d 1220, 1 CR2d 301: §§3.117, 3.119A

Lasky, In re (Bankr CD Cal 2007) 364 BR 385: §2.1B

Latman v Burdette (9th Cir 2004) 366 F3d 774: §12.27

Lawrence v Shaw (1937) 300 US 245, 81 L Ed 623, 57 S Ct 443: §9.81

Lawrence Tractor Co. v Gregory (In re Gregory) (9th Cir 1983) 705 F2d 1118: §12.15A

Laws v Cheslock (ND Ill, Mar. 8, 1999, No. 98 C 6403) 1999 US Dist Lexis 3416: §2.3

Laycock v Hammer (2006) 141 CA4th 25, 44 CR3d 921: §9.30

Leach, In re (BAP 9th Cir 1991) 130 BR 855: §12.41

Lee v An (2008) 168 CA4th 558, 85 CR3d 620: §§4.143, 4.150

Lee v Baca (1999) 73 CA4th 1116, 86 CR2d 913, cert denied (2000) 529 US 1020: §12.35

Lee-Benner v Gergely (In re Gergely) (9th Cir 1997) 110 F3d 1448: §12.46

Leung v Verdugo Hills Hosp. (2008) 168 CA4th 205, 85 CR3d 203: §9.43

Levine v Smith (2006) 145 CA4th 1131, 52 CR2d 197: §4.151

Levine, In re (11th Cir 1998) 134 F3d 1046: §4.27

Levy v Superior Court (1995) 10 C4th 578, 41 CR2d 878: §7.15

Lewis v ACB Bus. Servs. (6th Cir 1998) 135 F3d 389: §§2.17, 2.20

Lewis v Scott (In re Lewis) (9th Cir 1996) 97 F3d 1182: §12.44

Lewis & Queen v N.M. Ball Sons (1957) 48 C2d 141, 308 P2d 713: §4.78

Lezine v Security Pac. Fin. Servs. (1996) 14 C4th 56, 58 CR2d 76: §§3.5, 13.22

Liberty Bank v Superior Court (1925) 195 C 766, 235 P 995: §8.50

Liberty Mut. Ins. Co. v Superior Court (1992) 10 CA4th 1282, 13 CR2d 363: §5.33

Liceaga v Debt Recovery Solutions, LLC (ordered not published Apr. 29, 2009; former opinion at 169 CA4th 901, 86 CR3d 876): §2.20

Liebelt v Carney (1931) 213 C 250, 2 P2d 144: §4.91

Lieberman v Superior Court (1987) 194 CA3d 396, 239 CR 450: §3.58

Lipman v Rice (1963) 213 CA2d 474, 28 CR 800: §3.120

Lippel, Marriage of, In re (1990) 51 C3d 1160, 276 CR 290: §4.150

Little v Otto Stiegler (2003) 29 C4th 1064, 130 CR2d 892: §4.33

Lobherr, In re (2002) 282 BR 912: §7.65

Lockerby v Sierra (9th Cir 2008) 535 F3d 1038: §12.46

Lockyer v Brar (2005) 134 CA4th 659, 36 CR3d 272: §4.140

Loeb & Loeb v Beverly Glen Music, Inc. (1985) 166 CA3d 1110, 212 CR 830: §§6.19, 6.30, 6.121

Lomagno v Salomon Bros. Realty Corp. (In re Lomagno) (1st Cir 2005) 429 F3d 16: §12.35B

Long v Harrision (1931) 113 CA 321, 298 P 148: §3.90

Lopez v Behles (In re American Ready Mix Inc.) (10th Cir 1994) 14 F3d 1497, cert denied (1994) 513 US 818: §12.7

Lopez v Superior Court (1986) 178 CA3d 925, 223 CR 798: §4.148

Los Angeles Nat'l Bank v Bank of Canton (1995) 31 CA4th 726, 37 CR2d 389: §4.49

Lovell v Stanifer (In re Stanifer) (BAP 9th Cir 1999) 236 BR 709: §12.44

Lucas, Marriage of (1980) 27 C3d 808, 166 CR 853: §13.7

Lucy v Lucy (1937) 22 CA2d 629, 71 P2d 949: §3.91

Luna v Alliance One Receivables Mgmt., Inc. (ND Cal, Feb. 16, 2006, No. C-05-04751 JF) 2006 US Dist Lexis 25187: §2.1C

Lundell v Anchor Constr. Specialists, Inc. (In re Lundell) (9th Cir 2000) 223 F3d 1035: §12.55

Luri v Greenwald (2003) 107 CA4th 1119, 132 CR2d 680: §4.137

Lutge v Eskanos Adler, P.C. (ND Cal May 24, 2007, No. C 06-07128 JSW) 2007 US Dist Lexis 40570: §2.8

Luz v Lopes (1960) 55 C2d 54, 10 CR 161: §4.144

Lyon v Superior Court (1968) 68 C2d 446, 67 CR 265: §13.39C

Lyons v Marcher (1897) 119 C 382, 51 P 559: §8.44

M

Mabe v G.C. Servs. Ltd. Partnership (4th Cir 1994) 32 F3d 86: §2.10B

Mabie v Hyatt (1998) 61 CA4th 581, 71 CR2d 657: §3.116

MacDonald, Estate of (1990) 51 C3d 262, 272 CR 153: §13.10

MacIntyre, J.J., Co. v Duren (1981) 118 CA3d Supp 16, 173 CR 715: §§4.8, 4.21, 10.26

Magee v AllianceOne, Ltd. (SD Ind 2007) 487 F Supp 2d 1024: §2.7

Maggio, Inc. v Neal (1987) 196 CA3d 745, 241 CR 883: §§3.83, 3.89

Magna Dev. Co. v Read (1964) 228 CA2d 230, 39 CR 284: §3.96

Mahon v Credit Bureau (9th Cir 1999) 171 F3d 1197: §2.22A

Mallory v Phillips (MD Ga 1996) 197 BR 721: §§2.1B, 2.22A

Manalad, In re (Bankr CD Cal 2007) 360 BR 288: §12.14D

Maney v Kagenveama (In re Kagenveama) (9th Cir 2008) 541 F3d 868: §12.15A

Mangum v Action Collection Servs., Inc. (9th Cir 2009) 575 F3d 935: §2.32

Mann v Quality Old Time Serv., Inc. (2006) 139 CA4th 328, 42 CR3d 607: §2.28

Mannino v Superior Court (1983) 142 CA3d 776, 191 CR 163: §5.19

Marcus v WCAB (1973) 35 CA3d 598, 111 CR 101: §8.49

Marcus, In re (2006) 138 CA4th 1009, 41 CR3d 861: §§13.39A, 13.39C

Maritime Elec. Co., Inc. v United Jersey Bank (3d Cir 1991) 959 F2d 1194, reinstated at (3d Cir Mar. 24, 1992, No. 90-6057) 1992 US App Lexis 5144: §2.1B

Markowitz v Campbell (In re Markowitz) (6th Cir 1999) 190 F3d 455: §12.46

Marlin v Chase Cardmember Servs., Inc. (ED Cal, May 19, 2009, No. 1:09cv0192 AWI DLB) 2009 US Dist Lexis 45189: §2.30A

Marrama v Citizens Bank of Mass. (In re Marrama) (2007) 549 US 365, 166 L Ed 2d 956, 127 S Ct 1105: §§12.14, 12.17

Marriage Cases, In re (2008) 43 C4th 757, 76 CR3d 683: §13.47

Marriage of _____ (*see* name of parties)

Marriage of Branco, In re (1996) 47 CA4th 1621, 55 CR2d 493: §13.15

Marriage of Braud, In re (1996) 45 CA4th 797, 53 CR2d 179: §13.14

Marriage of Brooks & Robinson, In re (2008) 169 CA4th 176, 86 CR3d 624: §13.12

Marriage of Fellows, In re (2006) 39 C4th 179, 46 CR3d 49: §13.34

Marriage of Frick, In re (1986) 181 CA3d 997, 226 CR 766: §§13.14-13.15

Marriage of Holtemann, In re (2008) 166 CA4th 1166, 83 CR3d 385: §13.10

Marriage of Jensen, In re (2003) 114 CA4th 587, 114 CA4th 587: §13.39C

Marriage of Lippel, In re (1990) 51 C3d 1160, 276 CR 290: §4.150

Marriage of Marsden, In re (1982) 130 CA3d 426, 181 CR 910: §13.15

Marriage of Mix, In re (1975) 14 C3d 604, 122 CR 79: §13.14

Marriage of Orchard, In re (1990) 224 CA3d 155, 273 CR 499: §13.7

Marriage of Sachs, In re (2002) 95 CA4th 1144, 116 CR2d 273: §8.32

Marriage of Sherman, In re (2005) 133 CA4th 795, 35 CR3d 137: §13.15

Marsden, Marriage of, In re (1982) 130 CA3d 426, 181 CR 910: §13.15

Martin v Superior Court (1971) 17 CA3d 412, 95 CR 110: §13.39A

Martin v Wells Fargo Bank (2001) 91 CA4th 489, 110 CR2d 653: §§2.10A, 4.5, 4.20

Masuda v Thomas Richards & Co. (CD Cal 1991) 759 F Supp 1456: §§2.20, 2.27

Mataya v Kissinger (In re Kissinger) (9th Cir 1995) 72 F3d 107: §12.59

Matthews v Government Employees Ins. Co. (SD Cal 1998) 23 F Supp 2d 1160: §2.31

Mattson v U.S.W. Communications, Inc. (8th Cir 1992) 967 F2d 259: §2.32

McCarthy v Mt. Tecarte Land & Water Co. (1896) 110 C 687, 43 P 391: §4.62

McCarthy, Johnson & Miller v North Bay Plumbing (In re Pettit) (9th Cir 2000) 217 F3d 1072: §§12.35-12.35A

McCartney v First City Bank (5th Cir 1992) 970 F2d 45: §2.25

McCombs v Rudman (1961) 197 CA2d 46, 17 CR 351: §3.119A

McCormick v Board of Supervisors (1988) 198 CA3d 352, 243 CR 617: §4.138

McCreadie v Arques (1967) 248 CA2d 39, 56 CR 188: §4.155

McCullough v Clark (1871) 41 C 298: §§8.20, 8.24

McFarland v Holcomb (1898) 123 C 84, 55 P 761: §§3.91, 4.57

McGuire, In re (Bankr WD Mo 2006) 342 BR 608: §12.14B

McKenzie v Kaiser-Aetna (1976) 55 CA3d 84, 127 CR 275: §3.83

McKinney v Cadleway Prop., Inc. (7th Cir 2008) 548 F3d 496: §§2.7, 2.23A

McNabb v Byrnes (1928) 92 CA 337, 268 P 428: §6.91

McNabb, In re (Bankr D Ariz 2005) 326 BR 785: §12.28

McRae v Bates (1961) 196 CA2d 510, 16 CR 565: §§7.58, 7.60

Meads v Citicorp Credit Servs. (SD Ga 1988) 686 F Supp 330: §2.6

Medford v Superior Court (1983) 140 CA3d 236, 189 CR 227: §6.93

Meek, In re (Bankr D Idaho 2007) 370 BR 294: §12.14C

Meister v Regents of Univ. of Cal. (1998) 67 CA4th 437, 78 CR2d 913: §2.31B

Mejia v Marauder Corp. (ND Cal, Mar. 15, 2007, No. C06-00520 HRL) 2007 US Dist Lexis 21313: §§2.1B, 2.27, 2.34

Mejia v Reed (2003) 31 C4th 657, 3 CR3d 390: §§11.19, 13.6, 13.19, 13.22, 13.32

Melander v Western Nat'l Bank (1913) 21 CA 462, 132 P 265: §7.58

Mendez v Kurten (1985) 170 CA3d 481, 215 CR 924: §4.50

Mendez, In re (BAP 9th Cir 2007) 367 BR 109: §12.14D

Menk v Lapaglia (In re Menk) (BAP 9th Cir 1999) 241 BR 896: §12.41

Mercantile Acceptance Corp. v Pioneer Credit Indem. Co. (1932) 124 CA 593, 12 P2d 988: §9.12

Mercantile Collection Bureau v Roach (1961) 195 CA2d 355, 15 CR 710: §7.50

Meredith v Marks (1963) 212 CA2d 265, 27 CR 737: §4.60

Meza, In re (ED Cal 2007) 2007 US Dist Lexis 48430: §12.14D

Micare v Foster & Garbus (ND NY 2001) 132 F Supp 2d 77: §2.16A

Michael N. Sofris, APC v Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.) (9th Cir 2009) 556 F3d 742: §12.52

Michelson v Hamada (1994) 29 CA4th 1566, 36 CR2d 343: §3.109

Mid-Century Ins. Co. v Gardner (1992) 9 CA4th 1205, 11 CR2d 918: §3.119A

Milam v Dickman Constr. Co. (1964) 229 CA2d 208, 40 CR 130: §3.3

Miles v Okun (In re Miles) (9th Cir 2005) 430 F3d 1083: §12.52

Miller v J.D. Abrams, Inc. (In re Miller) (5th Cir 1998) 156 F3d 598, cert denied (1999) 526 US 1016: §12.46

Miller v McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC (7th Cir 2000) 214 F3d 872: §§2.10A, 2.23A

Miller v Republic Grocery, Inc. (1952) 110 CA2d 187, 242 P2d 396: §3.121

Miller v Superior Court (1937) 9 C2d 733, 72 P2d 868: §13.39A

Milrot v Stamper Med. Corp. (1996) 44 CA4th 182, 51 CR2d 424: §7.28

Minifie v Rowley (1921) 187 C 481, 202 P 673: §§3.23, 3.117, 3.119A

Minkes v Rhodes (Apr. 14, 2004, No. G032082, not certified for publication) 2004 Cal App Unpub Lexis 3624: §13.24

Minor v Baldridge (1898) 123 C 187, 55 P 783: §3.90

Minton v Cavaney (1961) 56 C2d 576, 15 CR 641: §§3.117, 3.119A, 4.74

Mirabito v San Francisco Dairy Co. (1934) 1 C2d 400, 35 P2d 513: §3.119A

Mirolla v Mendez (1980) 111 CA3d 518, 168 CR 735: §9.69

Misic v Segars (1995) 37 CA4th 1149, 44 CR2d 100: §4.133

Mission Hills Dev. Corp. v Western Small Bus. Inv. Co. (1968) 260 CA2d 923, 67 CR 505: §4.90

Mission Ins. Group, Inc. v Merco Construction Eng'rs, Inc. (1983) 147 CA3d 1059, 195 CR 781: §4.50

Mitchell v County of Orange (1985) 165 CA3d 1185, 211 CR 563: §7.27

Mitchell v Surety Acceptance Corp. (D Colo 1993) 838 F Supp 497: §2.20

Mix, Marriage of (1975) 14 C3d 604, 122 CR 79: §13.6

Mix, Marriage of, In re (1975) 14 C3d 604, 122 CR 79: §13.14

Mobil Oil Corp. v City of Long Beach (9th Cir 1985) 772 F2d 534: §3.114

Moeller v Superior Court (Sanwa Bank) (1997) 16 C4th 1124, 69 CR2d 317: §9.4A

Moghaddam v Bone (2006) 142 CA4th 283, 47 CR3d 602: §4.145

Molloy v Primus Automotive Fin. Servs. (CD Cal 2000) 247 BR 804: §2.10C

Monogram Co. v Kingsley (1951) 38 C2d 28, 237 P2d 265: §3.50

Monogram Credit Card Bank of Ga. v Mata (NY Civ Ct 2002) 757 NYS2d 676: §2.30

Montana v Goldin (In re Pegasus Gold Corp.) (9th Cir 2005) 394 F3d 1189: §§12.5A, 12.5C

Montgomery v Meyerstein (1924) 195 C 37, 231 P 730: §9.46

Moore v Besse (1866) 30 C 570: §3.100

Moore, Marriage of (1980) 28 C3d 366, 168 CR 662: §13.15

Morelli, In re (1970) 11 CA3d 819, 91 CR 72: §8.51

Morgan v FDIC (In re Morgan) (BAP 9th Cir 1993) 149 BR 147: §12.69

Morgovsky v Creditors Collection Serv. (ND Cal 1995) 1995 US Dist Lexis 7055, aff'd without published opinion (9th Cir 1996) 92 F3d 1193: §2.32

Morse v Rudler (In re Rudler) (BAP 1st Cir 2008) 388 BR 433: §12.14B

Mosby v Superior Court (1974) 43 CA3d 219, 117 CR 588: §3.51

Moses v DeVersecy (1984) 157 CA3d 1071, 203 CR 906: §§4.21, 10.20

Moss v Superior Court (1998) 17 C4th 396, 71 CR2d 215: §§13.39A-13.39C

Motor City Sales v Superior Court (1973) 31 CA3d 342, 107 CR 280: §3.120

Motores de Mexicali v Superior Court (1958) 51 C2d 172, 331 P2d 1: §3.119

Moya v Chase Cardmember Servs. Inc. (ND Cal, Jan. 8, 2009, No. C 08-4097 BZ) 2009 US Dist Lexis 2109: §2.16

Moya v Northrup (1970) 10 CA3d 276, 88 CR 783: §§3.81, 3.93, 4.58

Mullally v Townsend (1897) 119 C 47, 50 P 1066: §3.97

Munoz v Lopez (1969) 275 CA2d 178, 79 CR 563: §§4.153, 4.155

Murphy v John Hofman Co. (1909) 211 US 562, 53 L Ed 327, 29 S Ct 154: §12.54

Murphy, Estate of (1976) 15 C3d 907 [126 CR 820, 544 P2d 956]: §13.14

Murphy, In re (4th Cir 2007) 474 F3d 143: §12.17

Myers v Bennett Law Offices (9th Cir 2001) 238 F3d 1068: §2.4

Myers v Sierra Valley Stock & Agricultural Ass'n (1898) 122 C 669, 55 P 689: §3.27B

Myers v Superior Court (1946) 75 CA2d 925, 172 P2d 84: §3.39

Myers v Superior Court (1920) 46 CA 206, 189 P 109: §8.50

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NEC Elec. v Hurt (1989) 208 CA3d 772, 256 CR 441: §3.119

Naas v Stolman (9th Cir 1997) 130 F3d 892: §2.32

Nahman v Jacks (In re Jacks) (BAP 9th Cir 2001) 266 BR 728: §12.46

Nakasone v Randall (1982) 129 CA3d 757, 181 CR 324: §6.5

Nance v Petty, Livingston, Dawson, & Devening (WD Va 1994) 881 F Supp 223: §2.10B

National Diversified Servs. v Bernstein (1985) 168 CA3d 410, 214 CR 113: §4.143

National Envt'l Waste Corp. v City of Riverside (In re National Envt'l Waste Corp.) (9th Cir 1997) 129 F3d 1052, cert denied (1998) 524 US 952: §12.59

National Fin. Servs., U.S. v (4th Cir 1996) 98 F3d 131: §§2.18, 2.27

National Reserve Co. v Metropolitan Trust Co. (1941) 17 C2d 827, 112 P2d 598: §3.121

National Union Fire Ins. Co. v Hartel (SD NY 1990) 741 F Supp 1139: §2.33

Neal v State Farm Ins. Cos. (1961) 188 CA2d 690, 10 CR 781: §4.32

Neal, Marriage of (1984) 153 CA3d 117, 200 CR 341, disapproved on other grounds in Marriage of Buol (1985) 39 C3d 751, 218 CR 31: §13.17

Neel v Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 C3d 176, 98 CR 837: §3.64

Nevada Nat'l Bank v Casgul of Nev., Inc. (In re Casgul of Nev., Inc.) (BAP 9th Cir 1982) 22 BR 65: §12.37

Newman v Boehm, Pearlstein & Bright, Ltd. (7th Cir 1997) 119 F3d 477: §2.10B

Newman v Checkrite Cal., Inc. (ED Cal 1995) 912 F Supp 1354: §§2.3, 2.29A, 2.31A, 2.33

Newport Nat'l Bank v Adair (1969) 2 CA3d 1043, 83 CR 1: §9.52

Nielsen v Dickerson (7th Cir 2002) 307 F3d 623: §2.20

Niles v Louis H. Rapoport & Sons (1942) 53 CA2d 644, 128 P2d 50: §3.61

Noble v Sears, Roebuck & Co. (1973) 33 CA3d 654, 109 CR 269: §8.12

North Hollywood Marble Co. v Superior Court (1984) 157 CA3d 683, 204 CR 55: §§6.46, 6.92

Northridge Fin. Corp. v Hamblin (1975) 48 CA3d 819, 122 CR 109: §4.160

Norton v Larco (1866) 30 C 126: §3.86

O

OCM Principal Opportunities Fund, LP v CIBC World Mkts. Corp. (2008) 168 CA4th 185, 85 CR3d 350: §§4.90, 9.3

O'Connell v Union Drilling & Petroleum Co. (1932) 121 CA 302, 8 P2d 867: §3.8

Oei v N Star Capital Acquisitions, LLC (CD Cal 2006) 486 F Supp 2d 1089: §§2.29A, 2.33

Offril v J.C. Penney Co., Inc. (ND Cal, Jan. 9, 2009, No. C 08-5050 PJH) 2009 WL 69344: §2.16A

Ogden v United Bank & Trust Co. (1929) 206 C 571, 275 P 430: §3.105

Oksner v Superior Court (1964) 229 CA2d 672, 40 CR 621: §13.39A

Olick v Parker & Parsley Petroleum Co. (2d Cir 1998) 145 F3d 513: §2.1B

Oliver v Campbell (1954) 43 C2d 298, 273 P2d 15: §3.90

Oliver v Swiss Club Tell (1963) 222 CA2d 528, 35 CR 324: §4.70

Olson v Anderson (In re Anderson) (BAP 6th Cir 2007) 377 BR 865: §12.27

Olson v Risk Mgmt. Servs., Inc. (7th Cir 2004) 366 F3d 509: §2.23A

Olson v Six Rivers Nat'l Bank (2003) 111 CA4th 1, 3 CR3d 301: §13.17

Olson-Ioane v Derham-Burk (In re Olson) (BAP 9th Cir 2000) 253 BR 73: §12.34

One Parcel of Land, People v (1991) 235 CA3d 579, 286 CR 739: §4.149

Onubah, In re (BAP 9th Cir 2007) 375 BR 549: §12.27

Oppenheim v Goodley (1957) 148 CA2d 325, 306 P2d 944: §9.86

Orange Empire Nat'l Bank v Kirk (1968) 259 CA2d 347, 66 CR 240: §4.148

Orchard, Marriage of, In re (1990) 224 CA3d 155, 273 CR 499: §13.7

Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 C3d 1157, 232 CR 567: §1.10

Ortiz v Lyon Mgmt. Group, Inc. (2007) 157 CA4th 604, 69 CR3d 66: §2A.19

Oswegatchie Chem. Prods. Co., In re (2d Cir 1922) 279 F 547, cert denied sub nom Abbott Factory v Bancroft (1922) 259 US

580: §12.54

Owens v Noble (1946) 77 CA2d 209, 175 P2d 241: §4.84

Ozkaya v Telecheck Servs. (ND Ill 1997) 982 F Supp 578: §2.21

P

Pacific Decision Sciences Corp. v Superior Court (2004) 121 CA4th 1100, 18 CR3d 104: §6.53

Pacific Valley Bank v Schwenke (1987) 189 CA3d 134, 234 CR 298: §6.112

Paeseno v Superior Court (1988) 204 CA3d 17, 250 CR 842: §3.58

Pak, In re (Bankr ND Cal 2006) 343 BR 239: §12.14D

Palacio Del Mar Homeowners Ass'n, Inc. v McMahon (2009) 174 CA4th 1386, 95 CR3d 445: §§8.43, 9.18

Pallesi, Marriage of (1977) 73 CA3d 424, 140 CR 842: §10.26

Palmer v I.C. Sys., Inc. (ND Cal, Nov. 8, 2005, No. C-04-03237 RMW) 2005 US Dist Lexis 27946: §2.21

Palmer v Stassinos (ND Cal 2006) 236 FRD 460: §2.26

Palmer v Stassinos (ND Cal 2004) 348 F Supp 2d 1070: §§2.23, 2.26

Panahiasl v Gurney (ND Cal, Mar. 8, 2007, No. 04-04479 JF) 2007 US Dist Lexis 17269: §2.25

Pantzalas v Superior Court (1969) 272 CA2d 499, 77 CR 354: §5.16

Paret, In re (Bankr D Del 2006) 347 BR 12: §12.14D

Parker v Shell Oil Co. (1946) 29 C2d 503, 175 P2d 838: §§3.86-3.87

Parker v Solomon (1959) 171 CA2d 125, 340 P2d 353: §3.91

Parrish v Greco (1953) 118 CA2d 556, 258 P2d 566: §3.105

Patterson v Shumate (1992) 504 US 753, 119 L Ed 2d 519, 112 S Ct 2242: §9.77

Paulemon v Tobin (2d Cir 1994) 30 F3d 307: §2.33

Pavone v Citicorp Credit Servs., Inc. (SD Cal 1997) 60 F Supp 2d 1040: §§2.6, 2.19

Pearce v Rapid Check Collection, Inc. (D SD 1990) 738 F Supp 334: §§2.13, 2.18

Peeples v Blatt (ND Ill, Aug. 14th, 2001, No. 00 C 7028) 2001 US Dist Lexis 11869: §2.1B

Peiser v Mettler (1958) 50 C2d 594, 328 P2d 953: §3.58

Peklar v Ikerd (In re Peklar) (9th Cir 2001) 260 F3d 1035: §12.46

Penrod, In re (9th Cir BAP 2008) 392 BR 835: §12.15A

People v Bautista (2004) 115 CA4th 229, 8 CR3d 862: §9.17

People v Gomez (2005) 130 CA4th 1008, 30 CR3d 662: §9.17

People v One Parcel of Land (1991) 235 CA3d 579, 286 CR 739: §4.149

People v Szabo (1980) 107 CA3d 419, 165 CR 719: §9.17

Pereira v Pereira (1909) 156 C 1, 103 P 488: §13.16

Peres v Sherman (In re Peres) (5th Cir 2008) 530 F3d 375: §12.27

Perez v Telecheck Servs., Inc. (D Nev 2002) 208 F Supp 2d 1153: §2.20

Perfetto, In re (Bankr D RI 2007) 361 BR 27: §12.14A

Perkins v Benguet Consol. Mining Co. (1942) 55 CA2d 720, 132 P2d 70: §3.107

Perlin v Hitachi Capital Am. Corp. (3rd Cir 2007) 497 F3d 364: §12.14D

Perpetual Am. Bank, F.S.B. v Terrestrial Sys. (9th Cir 1987) 811 F2d 504: §6.94

Perretta v Capital Acquisitions & Mgmt. Co. (ND Cal, May 5, 2003, No. C-02-05561 RMW) 2003 US Dist Lexis 10070: §2.21

Perry v Farley Bros. Moving & Storage (1970) 6 CA3d 884, 86 CR 397: §3.27B

Perry v Stewart Title Co. (5th Cir 1985) 756 F2d 1197: §§2.5-2.6

Peterson v United Accounts, Inc. (8th Cir 1981) 638 F2d 1134: §2.30A

Peterson v Wells Fargo Bank (ED Cal Aug. 17, 2000, No. CV-99-6389 REC/SMS) 2000 US Dist Lexis 18372: §2.4

Petralia v Jerchich (In re Jerchich) (9th Cir 2001) 238 F3d 1202: §12.46

Petty v Manpower, Inc. (1979) 94 CA3d 794, 156 CR 622: §4.161

Pflueger v Auto Fin. Group, Inc. (CD Cal, Apr. 23, 1999, No. CV-97-9499) 1999 US Dist Lexis 16701: §2.2

Phillips v Periodical Publishers Serv. Bureau (SC 1989) 388 SE2d 787: §2.6

Phillips v Superior Court (1943) 22 C2d 256, 137 P2d 838: §13.39A

Philpott v Superior Court (1934) 1 C2d 512, 36 P2d 635: §§3.80, 3.90

Pietrowksi v Merchants & Med. Credit Corp. (ED Mich 2008) 256 FRD 544: §2.28

Pike v Zadig (1915) 171 C 273, 152 P 923: §§3.81, 3.90

Pineda v Saxon Mortgage Servs., Inc. (CD Cal, Dec. 10, 2008, No. SACV 08-1187 JVS (ANx)) 2008 WL 5187813: §2.6

Pinkerton's, Inc. v Superior Court (1996) 49 CA4th 1342, 57 CR2d 356: §§3.1, 3.3

Pinkstaff v U.S. (In re Pinkstaff) (9th Cir 1992) 974 F2d 113: §12.5C

Pioneer Inv. Servs. Co. v Brunswick Assocs. Ltd. Partnership (1993) 507 US 380, 123 L Ed 2d 74, 113 S Ct 1489: §12.55

Pioneer Liquidating Corp. v U.S. Trustee (In re Consolidated Pioneer Mortgage Entities) (9th Cir 2001) 264 F3d 803: §12.19

Piontek v I.C. Sys., Inc. (MD Pa, Apr. 17, 2009, No. 1:08-1207) 2009 WL 1044596: §2.25

Piper v Portnoff Law Assocs. (ED Pa 2003) 262 F Supp 2d 520: §2.10C

Pipiles v Credit Bureau of Lockport, Inc. (2d Cir 1989) 886 F2d 22: §§2.20, 2.22A

Pirouzian v SLM Corp. (SD Cal 2005) 396 F Supp 2d 1124: §2.1A

Pleasant v Samuels (1896) 114 C 34, 45 P 998: §3.93

Poe v Francis (1933) 132 CA 330, 22 P2d 801: §4.70

Polk v Bradbury (1932) 127 CA 383, 15 P2d 865: §3.49

Pollock v Bay Area Credit Serv., LLC (SD Fla, Aug. 13, 2009, No. 08-61101-Civ) 2009 US Dist Lexis 71169: §2.1A

Postal Instant Press, Inc. v Kaswa Corp. (2008) 162 CA4th 1510, 77 CR3d 96: §3.116

Potter v Norwest Mortgage, Inc. (8th Cir 2003) 329 F3d 608: §2.31B

Powers v Professional Credit Servs., Inc. (ND NY 2000) 107 F Supp 2d 166: §2.16A

Powers v Savage (In re Powers) (BAP 9th Cir 1996) 202 BR 618: §12.17

Preblich v Battley (9th Cir 1999) 181 F3d 1048: §12.7

Prestige Ltd. Partnership v East Bay Car Wash Partners (In re Prestige Ltd. Partnership) (9th Cir 2000) 234 F3d 1108: §6.2

Preston v Central Cal. Water & Irrig. Co. (1909) 11 CA 190, 104 P 462: §3.92

Pro Value Props., Inc. v Quality Loan Serv. Corp. (2009) 170 CA4th 579, 88 CR3d 381: §4.49

Producers Cotton Oil Co. v Amstar Corp. (1988) 197 CA3d 638, 242 CR 914: §3.8

Progressive Collection Bureau v Whealton (1944) 62 CA2d 873, 145 P2d 912: §4.35

Puccetti v Girola (1942) 20 C2d 574, 128 P2d 13: §3.119A

Pueblo Radiology Med. Group, Inc. v Gerlach (2008) 163 CA4th 826, 77 CR3d 880: §3.116

Pulver v Avco Fin. Servs. (1986) 182 CA3d 622, 227 CR 491: §2A.21

Puryear v Golden Bear Ins. Co. (1998) 66 CA4th 1188, 78 CR2d 507: §3.116

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R.N.C., Inc. v Tsegeletos (1991) 231 CA3d 967, 283 CR 48: §§3.65, 4.74

RCA Serv. Co. v Superior Court (1982) 137 CA3d 1, 187 CR 602: §6.121

Rabin, In re (Bankr ND Cal 2005) 336 BR 459: §13.47

Ragsdale v Haller (9th Cir 1986) 780 F2d 794: §12.44

Raimondi v McAllister & Assocs., Inc. (ND Ill 1999) 50 F Supp 2d 825: §2.16A

Rains v Arnett (1961) 189 CA2d 337, 11 CR 299: §3.90

Rains v Flinn (In re Rains) (9th Cir 2005) 428 F3d 893: §9.77

Raiton v G & R Prop. (In re Raiton) (BAP 9th Cir 1992) 139 BR 931: §11.7

Randolph v IMBS, Inc. (7th Cir 2004) 368 F3d 726: §§2.1B, 2.4, 2.27

Ransom v MBNA Am. Bank (In re Ransom) (9th Cir, Aug. 14, 2009, No. 08-15066) 2009 US App Lexis 18179: §12.14B

Raphael Weill & Co. v Crittenden (1903) 139 C 488, 73 P 238: §4.70

Rappleyea v Campbell (1994) 8 C4th 975, 35 CR2d 669: §4.136

Rasmussen, In re (Bankr MD Fla 2006) 349 BR 747: §12.28

Ratzlaff v Portillo (1971) 14 CA3d 1013, 92 CR 722: §10.26

Rauer's Collection Co., In re (1948) 87 CA2d 248, 196 P2d 803: §9.51

Reddy v Gonzalez (1992) 8 CA4th 118, 10 CR2d 55: §§13.11, 13.32

Redwood Theaters, Inc. v Davison (In re Davison) (BAP 9th Cir 2003) 289 BR 716: §12.51A

Reed v Global Acceptance-Credit Corp. (ND Cal, Aug. 11, 2008, No. C-08-01826 RMW) 2008 US Dist Lexis 61738: §2.22A

Regevig, In re (Bankr D Ariz 2008) 394 BR 498: §9.76

Reichert v National Credit Sys., Inc. (9th Cir 2008) 531 F3d 1002: §2.31A

Reifler v Superior Court (1974) 39 CA3d 479, 114 CR 356: §4.158

Rembold v City & County of San Francisco (1952) 113 CA2d 795, 249 P2d 58: §4.66

Renfrow v Draper (9th Cir 2000) 232 F3d 688: §12.42

Republic Supply Co. v Richfield Oil Co. (9th Cir 1935) 79 F2d 375: §9.73

Resolution Trust Corp. v Rowe (ND CA, Nov. 20, 2007, No. C 90-20114 FMS (WDB)) 2007 US Dist Lexis 89263: §13.6

Rettner v Shepherd (1991) 231 CA3d 943, 282 CR 687: §7.75

Reusser v Wachovia Bank (9th Cir 2008) 525 F3d 855: §2.30B

Reyes v Kenosian & Miele, LLP (ND Cal, Jan. 17, 2008, No. CO7-00253 MJJ) 2008 US Dist Lexis 4120: §2.20

Reynolds & Reynolds v Universal Forms, Labels & Sys. (CD Cal 1997) 965 F Supp 1392: §13.20

Richmond v Higgins (8th Cir 2006) 435 F3d 825: §2.21

Riddle v Leuschner (1959) 51 C2d 574, 335 P2d: §3.119A

Rifino v U.S. (In re Rifino) (9th Cir 2001) 245 F3d 1083: §12.47

Rifkind v Superior Court (1994) 22 CA4th 1255, 27 CR2d 822: §5.16

Riley v Giguiere (ED Cal, June 19, 2009, No. CIV S-06-2126 LKK/KJM) 2009 US Dist Lexis 51887: §§2.3, 2.25

Rivercourt Co. v Dyna-Tel, Inc. (1996) 41 CA4th 1477, 49 CR2d 279: §7.20

Riveria v MAB Collections, Inc. (WD NY 1988) 682 F Supp 174: §2.22A

Robinson v Varela (1977) 67 CA3d 611, 136 CR 783: §4.140

Roe v Wade (1973) 410 US 113, 35 L Ed 2d 147, 93 S Ct 705, overruled in part on other grounds in Planned Parenthood v Casey (1992) 505 US 833, 120 L Ed 2d 674, 112 S Ct 2791: §2A.2

Romea v Heiherger & Assocs. (2d Cir 1998) 163 F3d 111: §2.10C

Romer, O'Connor & Co. v Huffman (1959) 171 CA2d 342, 341 P2d 62: §4.144

Romine v Diversified Collection Servs., Inc. (9th Cir 1998) 155 F3d 1142: §2.2

Rooker v Fidelity Trust Co. (1923) 263 US 413, 68 L Ed 362, 44 S Ct 149: §2.30B

Rooney v Vernont Inv. Corp. (1973) 10 C3d 351, 110 CR 353: §7.12

Root v Superior Court (1962) 209 CA2d 242, 25 CR 784: §6.6

Rosati v Heimann (1954) 126 CA2d 51, 271 P2d 953: §3.65

Rose v Rose (1987) 481 US 619, 95 L Ed 2d 599, 107 S Ct 2029: §9.81

Rosenthal v Garner (1983) 142 CA3d 891, 191 CR 300: §4.152

Ross-Tousey v Neary (In re Ross-Tousey) (7th Cir 2008) 549 F3d 1148: §12.14B

Rosson, In re (9th Cir 2008) 545 F3d 764: §§12.14, 12.17

Roth v Insley (1890) 86 C 134, 24 P 853: §9.46

Rourke v Troy (1993) 17 CA4th 880, 21 CR2d 660: §9.39

Rousey v Jacobway (2005) 544 US 320, 161 L Ed 2d 563, 125 S Ct 1561: §§9.76-9.77

Roussos v Michaelides (In re Roussos) (BAP 9th Cir 2000) 251 BR 86: §12.42

Rowe v Educational Credit Mgmt. Corp. (9th Cir 2009) 559 F3d 1028: §2.7

Royal Bank Export Fin. Co. v Bestways Distrib. Co. (1991) 229 CA3d 764, 280 CR 355: §11.27

Roybal v Equifax (ED Cal, May 18, 2006, No. 2:05-cv-1207-MCE-KLM) 2006 US Dist Lexis 31709: §2.2

Rubin, In re (9th Cir 1985) 769 F2d 611: §12.52

Rudek v Frederick J. Hanna & Assocs., P.C. (ED Tenn, Feb. 17, 2009, No. 1:08-CV-288) 2009 US Dist Lexis 11573: §2.24A

Russey v Rankin (D NM 1995) 911 F Supp 1449: §2.22A

Rutan v Summit Sports, Inc. (1985) 173 CA3d 965, 219 CR 381: §4.142

Ryder, In re (Bankr ND Cal, Aug. 18, 2008, No. 07-40192) 2008 Bankr Lexis 2220: §12.14A

S

S.C.V. Peat Fuel Co. v Tuck (1878) 53 C 304: §3.90

S.E.P. Assocs. v Peto (1975) 49 CA3d 305, 122 CR 514: §7.12

SBAM Partners, LLC v Wang (2008) 164 CA4th 903, 79 CR3d 752: §9.82

Sachs, Marriage of, In re (2002) 95 CA4th 1144, 116 CR2d 273: §8.32

Saddleback Valley Community Church v El Toro Materials Co. (In re El Toro Materials Co. Inc.) (9th Cir 2007) 504 F3d 978, cert denied (2008) ___ US ___, 170 L Ed 2d 746, 128 S Ct 1875: §12.62

Salveter v Salveter (1936) 11 CA2d 335, 53 P2d 381: §9.46

Salvucci, In re (Bankr ED Mass 2006) 339 BR 279: §12.27

Sambo's Restaurants, Inc. v Wheeler (In re Sambo's Restaurants, Inc.) (9th Cir 1985) 754 F2d 811: §12.55

San Francisco Found. v Superior Court (1984) 37 C3d 285, 208 CR 31: §3.51

San Francisco Unified Sch. Dist. v San Francisco Classroom Teachers Ass'n (1990) 222 CA3d 146, 272 CR 38: §7.41

San Jose Hosp. v Etherton (1927) 84 CA 516, 258 P 611: §3.58

Sanai v Saltz (2009) 170 CA4th 746, 88 CR3d 673, modified at 2009 Cal App Lexis 177: §2.20

Sanchez v Robert E. Weiss, Inc. (In re Sanchez) (ND Cal 2001) 173 F Supp 2d 1029: §2.23

Sanchez v Weiss (ND Cal 2001) 173 F Supp 2d 1029: §2.23

Sanders v Jackson (ND Ill 1998) 33 F Supp 2d 693, aff'd (7th Cir 2000) 209 F3d 998: §2.29

Sanders, Estate of (1985) 40 C3d 607, 221 CR 432: §4.146

Sands v EIC, Inc. (1981) 118 CA3d 231, 173 CR 342: §4.34

Santa Barbara Capital Mgmt. v Neilson (In re Slatkin) (9th Cir 2008) 525 F3d 805: §12.66A

Santisas v Goodin (1998) 17 C4th 599, 71 CR2d 830: §§7.21, 7.38

Sarder v Academy Collection Servs., Inc. (ED NY, Mar. 3, 2005, No. CV 02-2486 NG VVP) 2005 US Dist Lexis 11932: §2.20

Satey v JP Morgan Chase & Co. (9th Cir 2008) 521 F3d 1087: §2.24B

Savage v NIC, Inc. (D Ariz, July 28, 2009, No. CV 08-1780-PHX-JAT) 2009 US Dist Lexis 65071: §2.20

Savino v Computer Credit, Inc. (2d Cir 1998) 164 F3d 81: §2.10B

Schaff v Superior Court (1983) 146 CA3d 921, 194 CR 546: §5.19

Schmidt v Goscicki (In re Goscicki) (BAP 9th Cir 1997) 207 BR 893, aff'd (9th Cir 1998) 162 F3d 1168, cert denied (1998) 526 US 1099: §12.51A

Schmitt v FMA Alliance (8th Cir 2005) 398 F3d 995: §2.16A

Schoenfeld v Norberg (1970) 11 CA3d 755, 90 CR 47: §§9.93, 12.34

Schott, Earl W., Inc. v Kalar (1993) 20 CA4th 943, 24 CR2d 580: §§3.1, 7.9

Schueneman v 1st Credit of Am., LLC (ND Cal July 6, 2007, No. C 05-4505 MHP) 2007 US Dist Lexis 48981: §2.35

Schulman v California (In re Lazar) (9th Cir 2001) 237 F3d 967, cert denied (2001) 534 US 992: §§12.5A-12.5B

Schulman v California State Water Resources Control Bd. (In re Lazar) (Bankr CD Cal 1996) 200 BR 358: §12.5

Schwab v Reilly (3rd Cir 2008) 534 F3d 173, cert granted (2009) ___ US ___, 173 L Ed 2d 1131, 129 S Ct 2049: §12.27

Schwarm v Craighead (ED Cal 2008) 552 F Supp 2d 1056: §2.10B

Schwarz v Secretary of Health & Human Servs. (9th Cir 1995) 73 F3d 895: §2.35

Scognamillo v Herrick (2003) 106 CA4th 1139, 131 CR2d 393: §4.139

Scott v Jones (4th Cir 1992) 964 F2d 314: §§2.3, 2.33

Scott Co. v Blount, Inc. (1999) 20 C4th 1103, 86 CR2d 614: §§2.28, 2.31B

Scovis v Henrichsen (In re Scovis) (9th Cir 2001) 249 F3d 975: §12.15

Scrimpsher, In re (ND NY 1982) 17 BR 999: §2.21

Sea Rail Truckloads, Inc. v Pull-man, Inc. (1982) 131 CA3d 511, 182 CR 560: §§6.127, 6.130

Seacall Dev., Ltd. v Santa Monica Rent Control Bd. (1999) 73 CA4th 201, 86 CR2d 229: §4.140

Searle, G.D., & Co. v Superior Court (1975) 49 CA3d 22, 122 CR 218: §3.64

Sebastian Int'l v Peck (1987) 195 CA3d 803, 240 CR 911: §3.7

Security Pac. Nat'l Bank v Matek (1985) 175 CA3d 1071, 223 CR 288: §6.5

Security Pac. Nat'l Bank v Wozab (1990) 51 C3d 991, 275 CR 201: §6.112

See v See (1966) 64 C2d 778, 51 CR 888: §13.14

Seeger v AFNI, Inc (7th Cir 2008) 548 F3d 1107: §2.31A

Seelenfreund v Terminix, Inc. (1978) 84 CA3d 133, 148 CR 307: §3.64

Seibert v Sears, Roebuck & Co. (1975) 45 CA3d 1, 120 CR 233: §§4.47-4.48

Seidel v Larson (In re Seidel) (9th Cir 1985) 752 F2d 1382: §12.16

Sellery v Ward (1942) 21 C2d 300, 131 P2d 550: §3.27B

Seminole Tribe of Fla. v Florida (1996) 517 US 44, 134 L Ed 2d 252, 116 S Ct 1114: §12.5A

Sengchanthalangsy v Accelerated Recovery Servs., Inc. (SD Cal 2007) 473 F Supp 2d 1083: §2.33

Servanti v Lusk (1872) 43 C 238: §9.70

Sewell v MGF Funding, Inc. (In re Sewell) (BAP 9th Cir 2006) 345 BR 174: §12.35B

Shabrick v Moore (1961) 195 CA2d 56, 15 CR 310: §7.22

Shafford v Otto Sales Co., Inc. (1957) 149 CA2d 428, 308 P2d 428: §3.119A

Shamblin v Brattain (1988) 44 C3d 474, 243 CR 902: §4.137

Shapiro v Clark (2008) 164 CA4th 1128, 80 CR3d 398: §§4.140, 4.161

Shapiro v Greenberg (1928) 94 CA 241, 270 P 1008: §3.105

Sheble v Turner (1941) 46 CA2d 762, 117 P2d 23: §3.112

Sherman v SEC (In re Sherman) (9th Cir 2007) 491 F3d 948: §12.14D

Sherman, Marriage of, In re (2005) 133 CA4th 795, 35 CR3d 137: §13.15

Sherwood Partners, Inc. v Lycos, Inc. (9th Cir 2005) 394 F3d 1198: §4.127

Shields v Siegel (1966) 246 CA2d 334, 54 CR 577: §§4.135-4.136, 4.145

Shin v Superior Court (1994) 26 CA4th 542, 31 CR2d 587: §6.112

Showalter v Chase Manhattan/Providian (ND Cal, Aug. 19, 2005, No. C 05-00548 WHA) 2005 US Dist Lexis 45465: §2.4

Showalter v Chase Manhattan/Providian (ND Cal, Aug. 19, 2005, No. C 05-00548 WHA) 2005 WL 2000943: §2.4

Shriver v Superior Court (1920) 48 CA 576, 192 P 124: §7.28

Shulthis v McDougal (1912) 225 US 561, 56 L Ed 1205, 32 S Ct 704: §3.114

Sial v Unifund CCR Partners (SD Cal, Aug. 28, 2008, No. 08 CV 0905 JM (CAB)) 2008 US Dist Lexis 66666: §2.33

Sigala v Arrow Fin. Servs., LLC (SD Cal Feb. 22, 2007, No. 05 CV 0074 (WMc)) 2007 US Dist Lexis 12196: §2.31A

Silva v Linneman (1946) 73 CA2d 971, 167 P2d 794: §4.60

Silverman v FTC (9th Cir 1944) 145 F2d 751: §2A.2

Silverman v Superior Court (1988) 203 CA3d 145, 249 CR 724: §3.119

Simpson v Burkart (In re Simpson) (9th Cir 2009) 557 F3d 1010: §§8.35, 12.28

Simpson, In re (9th Cir 2009) 557 F3d 1010: §4.4

Sims v U.S. Dep't of Health & Hu-man Servs. (In re TLC Hospi-tals) (9th Cir 2000) 224 F3d 1008: §12.57

Sipe v McKenna (1948) 88 CA2d 1001, 200 P2d 61: §4.155

Skaff v Small Claims Court (1968) 68 C2d 76, 65 CR 65: §7.88

Skolsky v Electronovision Prods., Inc. (1967) 254 CA2d 246, 62 CR 91: §4.157

Slenk v Transworld Sys. Inc. (9th Cir 2001) 236 F3d 1072: §2.10A

Slusher v Durrer (1977) 69 CA3d 747, 138 CR 265: §4.136

Slusher, In re (Bankr D Nev 2007) 359 BR 290: §12.14B

Smith v Busniewski (1952) 115 CA2d 124, 251 P2d 697: §4.145

Smith v Kennedy (In re Smith) (9th Cir 2000) 235 F3d 472: §12.27

Smith v Law Offices of Mitchell N. Kay (1991) 124 BR 182: §2.25

Smith v Norman I. Fadel, Inc. (1963) 215 CA2d 13, 29 CR 839: §4.85

Smith v Randall (1942) 51 CA2d 195, 124 P2d 334: §3.90

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Smith, Valentino & Smith v Supe-rior Court (1976) 17 C3d 491, 131 CR 374: §3.53

Snyder v United Props. Co. (1921) 53 CA 428, 200 P 366: §3.95

Sofris, Michael N., APC v Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.) (9th Cir 2009) 556 F3d 742: §12.52

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Southern Cal. Bank v Zimmerman (In re Hilde) (9th Cir 1997) 120 F3d 950: §§8.17, 13.25

Southwest Concrete Prods. v Gosh Constr. Corp. (1990) 51 C3d 701, 274 CR 404: §4.87

Sower v Van Ru Fin. Serv. (D Minn, Jan. 25, 1995, No. Civ. 3-94-1591) 1995 US Dist Lexis 11746: §2.32

Sparrow v Mazda Am. Credit Co. (ED Cal 2005) 385 F Supp 2d 1063: §2.30A

Spears v Brennan (Ind App 2001) 745 NE 2d 862: §2.24A

Spellens v Spellens (1957) 49 C2d 210, 317 P2d 613: §1.10

Spirtos v Moreno (In re Spirtos) (9th Cir 2000) 221 F3d 1079: §7.65

Spirtos, Estate of v One San Bernardino County Superior Court (In re Estate of Spirtos) (9th Cir 2006) 443 F3d 1172: §§12.64, 12.66A

Sporn v Home Depot, Inc. (2005) 126 CA4th 1294, 24 CR3d 780: §§4.143, 4.146

Sprint Communications Co., L.P. v APCC Servs., Inc. (2008) ___ US ___, 171 L Ed 2d 424, 128 S Ct 2531: §3.114

St. John v Consolidated Constr. Co. (1920) 182 C 25, 189 P 276: §4.62

St. Paul Fire & Marine Ins. Co. v Superior Court (1984) 156 CA3d 82, 202 CR 571: §5.33

Stanley v Woodford (9th Cir 2006) 449 F3d 1060: §12.7

Stanton v French (1890) 83 C 194, 23 P 355: §9.70

Stanton v Santa Ana Sugar Co. (1927) 84 CA 206, 257 P 907: §4.84

Stark v Coker (1942) 20 C2d 839, 129 P2d 390: §3.119A

Stark, In re (7th Cir 1983) 717 F2d 322: §12.43

Starkweather v Minarets Mining Co. (1935) 5 CA2d 501, 43 P2d 321: §4.140

Stasz, In re (BAP 9th Cir 2008) 387 BR 271: §12.7

State v Day (1946) 76 CA2d 536, 173 P2d 399: §7.41

State Bd. of Equalization v Woo (2000) 82 CA4th 481, 98 CR2d 206: §13.11

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Stein v Cobb (1940) 38 CA2d 8, 100 P2d 358: §7.49

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Stephens v Baker & Baker (1957) 150 CA2d 558, 310 P2d 73: §3.112

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Stojanovski v Strobl & Monoogian (ED Mich 1992) 783 F Supp 319: §2.31

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Stonehart v Rosenthal (SD NY, Aug. 13, 2001, No. 01 Civ. 651 (SAS)) 2001 US Dist Lexis 11566: §2.24A

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Strang v Bradner (1885) 114 US 555, 29 L Ed 248, 5 S Ct 1038: §12.42

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Strauss v Horton (2009) 46 C4th 464, 93 CR3d 591: §13.47

Studwell, Inc. v Korean Exch. Bank (1997) 55 CA4th 1185, 64 CR2d 538: §§6.11-6.12

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Summers, In re (9th Cir 2003) 332 F3d 1240: §12.34

Supreme Beef Processors, Inc., In re (5th Cir 2006) 468 F3d 248: §12.5A

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Swanson v Southern Oregon Credit Serv. (9th Cir 1988) 869 F2d 1222: §§2.22A, 2.23A

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Sweet v Watson's Nursery (1939) 33 CA2d 699, 92 P2d 812: §3.119A

Symonds v Mercury Sav. & Loan Ass'n (1990) 225 CA3d 1458, 275 CR 871: §2.18

Szabo, People v (1980) 107 CA3d 419, 165 CR 719: §9.17

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Talbott v GC Servs., Ltd. (WD Va 1999) 53 F Supp 2d 846: §2.21

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Talmadge, In re (9th Cir 1987) 832 F2d 1120: §9.76

Tate, In re (5th Cir 2009) 571 F3d 423: §12.14B

Taylor v Cavalry Inv., LLC (7th Cir 2004) 365 F3d 572: §2.23A

Taylor v Fink (ND Ill, Nov. 23, 1994, No. 93 C 4941) 1994 US Dist Lexis 16821: §2.23A

Taylor v Freeland & Kronz (1992) 503 US 638, 118 L Ed 2d 280, 112 S Ct 1644: §§12.27, 12.69

Taylor v Quall (CD Cal 2007) 471 F Supp 2d 1053: §§2.21, 2.26

Taylor, In re (Bankr D Ariz 1981) 15 BR 596: §12.15

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Tennessee Student Assistance Corp. v Hood (In re Hood) (2004) 541 US 440, 158 L Ed 2d 764, 124 S Ct 1905: §12.5A

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Travelers Cas. & Sur. Co. of Am. v PG&E (2007) 549 US 443, 167 L Ed 2d 178, 127 S Ct 1199: §§12.42, 12.59

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Van v Grant & Weber (9th Cir 2008) 308 Fed Appx 46: §2.34

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Westinghouse Credit Corp. v Wolfer (1970) 10 CA3d 63, 88 CR 654: §4.148

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Wright v Financial Serv. of Norwalk (6th Cir 1994) 22 F3d 647: §2.27

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Yasin v Equifax Info. Servs., LLC (ND Cal, July 16, 2008, No. C-08-1234-MMC) 2008 WL 2782704: §2.26

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Ziemski v Ziemski (In re Ziemski) (BAP 8th Cir 2006) 338 BR 802: §§9.75, 12.35

Zumbrun v University of S. Cal. (1972) 25 CA3d 1, 101 CR 499: §3.82

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California Civil Discovery Practice (4th ed Cal CEB 2006): §§5.1-5.4, 5.7, 5.15, 5.19, 5.22, 5.30, 5.33-5.34, 7.3

California Civil Procedure Before Trial (4th ed Cal CEB 2004): §§1.11, 3.27A, 3.114, 3.142, 4.5, 4.55, 4.69, 4.96, 4.99, 5.7, 5.17, 5.24, 7.1, 7.6, 7.9, 7.12, 7.17-7.19, 7.21-7.23, 7.25-7.26, 7.32, 7.42, 11.4, 11.7

California Civil Writ Practice (4th ed Cal CEB 2008): §11.35

California Decedent Estate Practice (2d ed Cal CEB 2009): §11.46

California Landlord-Tenant Practice (2d ed Cal CEB 1997): §6.111

California Law of Contracts (Cal CEB 2007): §§4.29, 4.32, 4.34-4.35

California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009): §§4.6, 4.107

California Real Estate Finance Practice: Strategies and Forms (Cal CEB 2000): §4.88

California Real Property Sales Transactions (4th ed Cal CEB 2007): §4.40

California State Sheriffs' Association Civil Procedural Manual (4th ed rev 1994): §9.22

California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995): §§7.1, 7.3, 7.17, 7.22, 7.26-7.28, 7.31-7.32, 7.37-7.39, 7.41-7.42, 7.44, 8.49, 11.50

California UCC Sales and Leases (Cal CEB 2002): §4.2

Collier, William Miller. Collier on Bankruptcy. 15 vols. New York, Matthew Bender, 15th rev ed 1996: §12.9

Debt Collection Practice in California (2d ed Cal CEB 1999): §13.23C

Drafting California Revocable Trusts (4th ed Cal CEB 2003): §13.2

Organizing Corporations in California (3d ed Cal CEB 2001): §3.119A

Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual): §§10.13, 13.1, 13.38, 13.39C-13.41, 13.43A, 13.44

Privacy Compliance and Litigation in California (Cal CEB 2008): §§2A.2, 2A.5, 2A.15, 2A.17, 2A.20, 2A.23, 2A.30

Rutter Group, Enforcing Judgments and Debts (California Practice Guide), Eagan, Minn., West, 2008: §13.23C

Secured Transactions in California Commercial Law Practice (2d ed Cal CEB 2001): §§4.2, 6.112, 6.150, 12.58

West Group. Restatement (Second) of Agency. Eagan, Minn., 1958: §§2.29A, 3.7

———. Restatement (Second) of Contracts. Eagan, Minn., 1981: §3.96

———. Restatement (Second) of Trusts. Eagan, Minn., 1959: §9.4A

Witkin, B. E. California Procedure. Multivolume. San Francisco, Bancroft-Whitney, 5th ed 2009: §§3.80, 3.112, 4.57, 4.62, 4.140, 7.12, 7.21, 7.78, 9.46, 9.48-9.49, 13.23C

———. Summary of California Law. Multivolume. San Francisco, Witkin Legal Institute, 10th ed 2005: §13.23C


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