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He is a member of the Los Angeles County and San Fernando Valley Bar Associations, Consumer Attorneys Association of California, Commercial Law League of America, and is a founding member of the National Association Of Retail Collection Attorneys, where he has served as a vice president and member of the board of directors. He is also the former president of the California Creditors Bar Association. He has worked with the California state legislature and has been appointed by the California Judicial Council to serve on committees implementing changes in the procedural requirements affecting the way collection cases are handled, implementing changes making the administration of these matters more efficient for not only the parties, but the courts and attorneys. In 1988, he was chosen by the United States Department of Justice and awarded the initial contract for the use of private law firms to collect debts of the United States of America, including those of the Department of Education, Veterans Administration, Department of Defense, Housing & Urban Development (HUD), Department of Transportation, and Small Business Administration. He has an "AV" Rating from Martindale-Hubbell.
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Mr. Milde is a frequent speaker at seminars and programs in the areas of enforcement of judgments, collections, commercial law, and bankruptcy.
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Ms. Vaage has lectured to many industry and Bar groups on topics related to her areas of expertise, and frequently speaks to in-house groups for representative clients, including the California Bankers Association and the National Business Institute. She is a member of the State Bar of California (former member, Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section), the Financial Lawyers Conference, the Los Angeles Bankruptcy Forum, the Los Angeles County Bar Association and its Commercial Law and Bankruptcy and Provisional Remedies

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Abbreviations

California Constitution and Statutory Sources

Cal Const California Constitution

B&P Code Business and Professions Code

CC Civil Code

CCP Code of Civil Procedure

Com Code Commercial Code

Corp Code Corporations Code

Ed Code Education Code

Elec Code Elections Code

Evid Code Evidence Code

Fam Code Family Code

Fin Code Financial Code

F&G Code Fish and Game Code

F&A Code Food and Agriculture Code

Gov Code Government Code

H&N Code Harbors and Navigation Code

H&S Code Health and Safety Code

Ins Code Insurance Code

Lab Code Labor Code

M&V Code Military and Veterans Code

Pen Code Penal Code

Prob Code Probate Code

PC Code Public Contract Code

PR Code Public Resources Code

PU Code Public Utilities Code

R&T Code Revenue and Taxation Code

S&H Code Streets and Highways Code

UI Code Unemployment Insurance Code

Veh Code Vehicle Code

Water Code Water Code

W&I Code Welfare and Institutions Code

Cal Stat California Statutes **United States Constitution and Statutory Sources**

US Const United States Constitution

USC United States Code

USC app United States Code Appendices

IRC United States Code, Title 26 **California and Federal Regulations**

CCR California Regulations

CFR Code of Federal Regulations

Fed Reg Federal Register **California Attorney General Opinions**

Ops Cal Atty Gen Opinions of California Attorney General **Case Law**

C California Reports

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C3d California Reports, Third Series

C4th California Reports, Fourth Series

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CA3d California Appellate Reports, Third Series

CA4th California Appellate Reports, Fourth Series

CA Supp California Appellate Reports, Supplement

CA2d Supp California Appellate Reports, Second Series, Supplement

CA3d Supp California Appellate Reports, Third Series, Supplement

CA4th Supp California Appellate Reports, Fourth Series, Supplement

CR California Reporter

CR2d California Reporter, Second Series

P Pacific Reporter

P2d Pacific Reporter, Second Series

P3d Pacific Reporter, Third Series

US United States Supreme Court Reports

S Ct Supreme Court Reporter

L Ed Lawyer's Edition

L Ed2d Lawyer's Edition, Second Series

F Federal Reporter

F2d Federal Reporter, Second Series

F3d Federal Reporter, Third Series

F Supp Federal Supplement

F Supp2d Federal Supplement, Second Series

FRD Federal Rules Decisions **California State Court Rules**

Cal Rules Ct California Rules of Court

Cal Rules Prof Conduct California Rules of Professional Conduct **California Jury Instructions**

CACI Judicial Council of California Civil Jury Instructions

(Matthew Bender) Cal. Forms Jury Inst. California Forms of Jury Instruction **Federal Rules**

Fed R Civ P Rules of Civil Procedure

Fed R Civ P Appendix of Forms Rules of Civil Procedure, Forms Appendix

Fed R App P Federal Rules of Appellate Procedure

9th Cir R Circuit Rules

9th Cir R Appendix of Forms Circuit Rules, Forms Appendix

Sup Ct R Supreme Court Rules

Multidistrict R Multidistrict Rules

Fed R Evid Rules of Evidence

Fed R Bankr P Rules of Bankruptcy Procedure

Fed R Crim P Rules of Criminal Procedure **Central District abbreviations**

CD Cal Civ LR Local Rules

CD Cal Local Civil Appendix Civil Appendices

CD Cal Mag LR Magistrate Judge Rules

CD Cal Gen Order General Orders **Eastern District abbreviations**

ED Cal Gen LR General Rules

ED Cal Civ LR Civil Rules

ED Cal Mag LR Magistrate Judge Rules

ED Cal Automated Case Assignment Plan Automated Case Assignment Plan

ED Cal Gen Order General Orders **Northern District abbreviations**

ND Cal Civ LR Local Rules

ND Cal ADR LR Local Rules for Alternative Dispute Resolution

ND Cal Appendix Appendixes of Sample Forms

NC Cal Gen Order General Orders **Southern District abbreviations**

SD Cal Civ LR Local Rules

SD Cal Gen Order General Orders **Miscellaneous**

Cal L Rev Comm'n Reports California Law Revision Commission Reports

US Code Cong & Admin News Congressional and Admin. News

UST United States Treaties

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What's New

1 MB Practice Guide: CA Debt Collection Scope

Scope

HIGHLIGHTS

Release 9 October 2010

2010 Midyear Update for Recent Judicial Decisions and Judicial Council Forms
The entire publication has been updated for recent California and federal decisions, and new Judicial Council forms effective July 1, 2010. For a more detailed summary of the most important changes incorporated into the publication in this release, see below.

This release contains the 2010 midyear update for Matthew Bender(R) Practice Guide: California Debt Collection And Enforcement Of Judgments. The publication has been updated for recent federal and state judicial decisions, and California Judicial Council Forms operative July 1, 2010 have also been substituted for the earlier versions. Significant additions or changes to the publication in this release include the following:

ORAP Liens. In *Credit Suisse First Boston v. Danning, Gill, Diamond & Kollitz (2009) 178 CA4th 1290* , the court held that an ORAP lien (as well as execution liens and other liens described in *CCP § 697.910*) continues its existence on money paid to third parties if those parties do not otherwise qualify for an exception; e.g., as a holder in due course. *See Ch. 1, Planning Collection of Debt, § 1.53[2]* ; *Ch. 10, Postjudgment Discovery, § 10.31* .

Default Judgments. *In Stein v. York (2010) 181 CA4th 320, 325* , the court held that a default judgment is void if the amount awarded in the judgment exceeds the amount in the complaint, notwithstanding participation in discovery and other pre-trial activities by the defendant. *See Ch. 1, Planning Collection of Debt, § 1.69* .

Dischargeability of Debt. *Boyajian v. New Falls Corp. (In re Boyajian) (2009) 564 F3d 1088* , held that an assignee may claim a debt is non-dischargeable (despite the assignee's lack of reliance) if the original creditor relied on false information. *See Ch. 3, Effect of Bankruptcy, § 3.24[2]* .

Recovery Under Resulting Trust Theory. In *Fidelity National Title v. Schroeder* (2009) 1979 CA4th 834, 847-848 , the court held that in an appropriate case a plaintiff may seek imposition of a resulting trust against a

defendant who conveys legal title to real property to another in order to avoid a judgment lien, when circumstances indicate that the transferor in fact retained the beneficial interest in use of the property. *See Ch. 4, Fraudulent Transfers, § 4.04* ; Ch. 6, *Litigation to Recover Debts--Selecting the Appropriate Causes of Action, § 6.10A* .

Uniform Fraudulent Transfer Act. *Donell v. Kowell (2008) 533 F3d 762* , held that the UFTA may be used to require innocent investors in a Ponzi scheme to disgorge profits received. *See Ch. 4, Fraudulent Transfers, § 4.11[4]* .

Meaning of "Debt" Under FDCPA. In *Fleming v. Pickard (9th Cir 2009) 581 F3d 922* , the FDCPA was held not to apply to a judgment arising out of a cause of action for conversion, becaue this does not fall within the definition of a "debt" under the FDCPA. See *Ch. 5, Debt Collection Prior to Litigation, § 5.12* .

Litigation Privilege / Validation Letter. *Welker v. Law Office of Horwitz* (SD CA 2009) 626 FSupp2d 1068, 1072, held that the litigation privilege under California law is not a defense to violations of the FDCPA. *See Ch. 5, Debt Collection Prior to Litigation, § 5.12* . The court also held that a validation letter may not simply state an amount due and say that the collector also has been retained to collect interest and court costs without stating the amounts of those other items, unless it is clearly stated that the creditor would accept the stated dollar amount as payment in full. *Hutton v. Law Offices of Collins & Lamore* (SD CA 2009) 668 FSupp2d 1251, held that a letter providing a specific dollar amount, but stating that it might not include accruing interest and stating the debtor could call an 800 number to obtain the full amount due did not violate the FDCPA. *See Ch. 5, Debt Collection Prior to Litigation, § 5.29[3]* .

Bona Fide Error Under FDCPA. In *Jerman v. Carlisle* (2010) 130 SCt 1605, 176 LEd 519 , the United States Supreme Court held that for purposes of the FDCPA, the bona fide error defense *15 USC § 1692k(c)* does not include a mistaken interpretation of the law. *See Ch. 5, Debt Collection Prior to Litigation, § 5.32[2][a].*

FDCPA Statute of Limitations. *Mangum v. Action Collection Service, Inc. (9th Cir 2009) 575 F3d 935* , held that the federal FDCPA statute of limitations does not accrue until the plaintiff knows, or has reason to know, of the violation. *See Ch. 5, Debt Collection Prior to Litigation, § 5.32[2][b].*

Award of Costs and Attorneys' Fees Under FDCPA. In *Rouse v. Law Offices of Rory Clark (9th Cir 2010) 603 F3d 699* , the court held that an award of costs to a prevailing defendant in an FDCPA action requires a finding of bad faith and harassment. *Hyde v. Midland Credit Mgmt. Inc. (9th Cir 2009) 567 F3d 1137* , held that attorneys' fees and costs to a prevailing defendant in an FDCPA action pursuant to *15 USC 1692K(a)(3)* may only be awarded against the plaintiff and not the plaintiff's attorney. *See Ch. 5, Debt Collection Prior to Litigation, § 5.32[2][e]* .

Default Judgment--Error In *Defendant's Name.* *Manson, Iver & York v. Black (2009) 176 CA4th 36* in which an error in the defendant's name (Paula Black served as Paula Black) resulted in a default judgment being set aside where the error precluded proper notice and an opportunity to defend. In contrast, *Sakaguchi v. Sakaguchi (2009) 173 CA4th 852* held that a minor misspelling did not require vacating a judgment (Takeshi Sakaguchi incorrectly named as Takechi Sakaguchi). *See Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of Action, § 6.05[1][f]* .

Recovery of Service Charges. *Imperial Merchant Service v. Hunt* (2009) 47 C4th 381 , held that a creditor who recovers a service charge pursuant to *CC§ 1719* may not also recover interest under *CC § 3287. See Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of Action, § 6.12* .

Venue Under FDCPA. *Fontaine v. Superior Court (2009) 175 CA4th 830, 838* , held that the venue provisions of the Fair Debt Collection Practices Act applied irrespective of whether the action was brought by a consumer plaintiff or against a consumer defendant. *See Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of Action, § 6.18[4][b]* .

Fictitiously Named Defendants. *Gilbert v. Haller (2009) 179 CA4th 852* , determined that persons who are subsequently served as fictitiously named Doe defendants must also be advised that they are being sued and served under a fictitious name. Failure to do so rendered the service defective and required the setting aside of a default

judgment. *See Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of Action, § 6.28* .

Attachment. *United Central Bank v. Superior Court (2009) 179 CA4th 212* , confirmed that even if the underlying debt is secured by real property, an attachment may be obtained against a guarantor when the guaranty is not secured by real property. *See Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, § 8.36* .

Turnover Orders. In *Palacio Del Mar Homeowners Association, Inc. v. McMahon (2009)174 CA4th 1386* , the court held a turnover order issued pursuant to *CCP 708.205* does not permit the turnover of property (other than cash) to the judgment creditor, but only to the levying officer. *See Ch. 9, Planning Enforcement of Judgment, § 9.23[4] ; see also Ch. 10, Postjudgment Discovery, § 10.38A* .

Liens. In *Pou Chen Corporation v. MTS Products (2010) 183 CA4th 188* , an attorney's contractual liens were held subordinate to adverse party's right to offset a judgment acquired in the same action and based upon the same transaction. *See Ch. 12, Determining Priority and Sources of Liens, § 12.13[1]* .

Homestead Exemption. *Tarlesson v. Broadway Foreclosure Investments, LLC (2010)184 CA4th 931* , held that in order to qualify for the California homestead exemption, a judgment debtor need not continuously own the property during the specified statutory period; the property need only be the principal dwelling in which the judgment debtor resides during the relevant period. *See Ch. 17, Executing and Levying Against Real Property, § 17.42* .

Jurisdictional Challenges. *Airlines Reporting Corporation v. Renda (2009) 177 CA4th 14* , held that a motion challenging entry of a sister state judgment on jurisdictional grounds is not subject to the 30 day limitation of *CCP § 1714.10. See Ch. 25, Enforcing Out of State Judgments in California, §§ 25.05[2][b], 25.06[11][b]* .

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The Matthew Bender[(R)] Practice Guide series is updated twice a year and cites the strongest, most recent cases available as of its last update. New cases are added to *lexis.com* daily, and can be combined with additional cases online to update, validate, and research fact patterns, issues, and points of law.

[2] California Case Databases.

Numerous sources may assist research needs. They include:

CA Federal & State Cases, Combined (CAL;CAMEGA)

CA Cases, Administrative Decisions & Attorney General Opinions, Combined (CAL;CACASE)

CA Published Cases, Combined (CAL;CACTSP)

CA State Cases, Combined (CAL;CACTS) (includes unpublished as well as published cases)

CA Supreme Court Cases from 1850 (CAL;CAL)

CA Courts of Appeal Cases from 1905 (CAL;APP)

Published CA Court of Appeal Cases from 1905 (CAL;APP-P)

Unpublished CA Court of Appeal Cases from 1966 (CAL;APP-U) n1

Although unpublished cases are not citable in California courts, users may wish to search the CA State Cases, Combined to get ideas about possible legal arguments. That source would also be preferable to CA Published Cases, Combined if a user is searching for any appellate cases in which a party, attorney, or judge has been involved.

Case law from all 50 states, the Virgin Islands, Guam, Northern Marianas Islands, Washington D.C. federal courts, state and federal agencies are also available on *lexis.com* through the Legal tab> Cases - U.S.

[3] Hypertext Links.

Click the hypertext link to jump to the corresponding cases, codes, rules, and other publications online.

[4] Finding Related Sources and Suggested Searches.

This publication highlights additional online sources to assist your research tasks, both legal and factual, related to pretrial civil procedure. Thousands of additional sources are also available on *lexis.com*.

[5] Search by Topic Links to Related Cases and Analytical Materials.

Search by Topic or Headnote is a finding tool for legal data based on areas of law and related legal topics. It can help target your legal issue, identify appropriate sources, and formulate your search request.

This publication is tied to **Search by Topic**. From the sections of this publication you can link to **Search by Topic** to search the topic related to the section you are looking at in this publication.

In **Search by Topic**, you can use the search box to search across the available cases, statutes, and analysis, on the topic, or to select specific primary or secondary sources that you wish to search. You can also use **Search by Topic** as a current awareness case law update device by restricting the date to limit your searches to a specific time period (e.g.,"Previous 6 Months").

FOOTNOTES:
(n1)Footnote 1. Unpublished CA Court of Appeal Cases from 1966 covers selected unpublished, depublished, and partially published opinions from August 1966 through current, and full coverage of Rule 977 unpublished opinions from October 2001. Although local rules generally preclude citation to unpublished opinions except in limited circumstances, this database may be useful to research similar fact patterns, case information, rulings, factual discovery, strategy, and disposition.

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How To Use lexis.com (R) With This Publication

1- MB Practice Guide: CA Debt Collection HowTo.03

HowTo.03 Formulating a Search Query on *lexis.com*.

[1] Frame Your Search.

After you have selected your source, you can use available tables of contents or enter search terms to retrieve relevant documents. This sample search form provides tips about structuring your search, search connectors, segment searching and date restrictions:

Click here to view image.

[2] Develop Your Search Strategy.

Identify relevant terms, their variations, synonyms, necessity, proximity, and relationship to your research issue. Your first search should be structured broadly, then results can be narrowed without additional search transactions through Focus[(R)] by adding terms to reduce your search results set.

[3] Narrow Your Search.

Additional parameters, like Restrict by Segment (field) and Restrict by Date are available. Available Segments are displayed in a drop down box. For example, the NAME segment of a case contains the names of the parties to the action. To research your adversary's litigation history, you can do a NAME segment search in cases and jury verdicts. You can Add the segment restriction, or type this restriction in your search query as: name (Party Name). Targeted results can also be obtained by restricting the search results to documents that have multiple references to a term or phrase by using ATLEAST#. For example, including *atleast5 (turnover order)* as a search term will restrict your search results to documents that reference the phrase "turnover order" a minimum of five times.

[4] Find More Authorities Like This.

When you find cases or other documents that are helpful (or hurtful) and you want (or need) to find whether there are other similar materials, you can click the More Like This link at the top of the page. More Like This extracts the relevant search terms for the document you are viewing and gives you the option to use these terms to locate additional materials in the same or a different database. Cases have an additional benefit using More Like This to extract citations from an on-point case and use similar citation patterns to locate other cases, treatises, or law reviews. Similarly, the More Like Selected Text link at the top of documents can be used to target specific paragraphs or language you

highlight in an on-point document to locate similar materials. In Case law, More Like This Headnote creates a virtual case law digest online based on the language, law, and topic discussed in headnotes.

[5] Keep Current With Alerts.

To keep your search results current, update your search results by saving an **Alert**. From your online search results screen, select **Save as Alert** link at the top of the screen. You will be given options for how often the search should be run (including daily or weekly) and for how to have the results delivered or a notification sent to you by email.

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HowTo.04 Shepardize[(R)] to Validate Your Results and As a Research Tool.

Shepardize[(R)] the cases that you intend to cite to be sure that they are still good law. Additionally, Shepard's can be used as a case-finding and research tool to lead you to other cases, statutes, treatises, and authority on a given issue. You can FOCUS within a Shepard's report on particular terms or phrases. Additionally, the Custom Restrictions link at the top of the Shepard's report allows you to narrow results by jurisdiction, date and/or headnote restriction. Use the Shepard's Signals to help you analyze validity and subsequent treatment of the case. Shepard's Brief Suite is a free software program to automate Shepardizing your brief or cases, and streamlines the cite checking process for briefs, motions, research, and prior to hearings.

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Chapter 1 Planning Collection of Debt

1-1 MB Practice Guide: CA Debt Collection 1.syn

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

§ 1.syn Synopsis to Chapter 1: Planning Collection of Debt

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1.02 Objective and Strategy.

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FOOTNOTES:
(n2)Footnote *. Jerome J. Blum and Allan Herzlich are partners in Herzlich & Blum, LLP, an Encino, California law firm representing commercial creditors, attorneys, trustees and receivers in the recovery of their accounts receivable. They received their law degrees in 1981 from the UCLA School of Law. Mr. Blum is a frequent lecturer at CEB courses dealing with enforcement of judgments.

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Chapter 1 Planning Collection of Debt
I. STRATEGY

1-1 MB Practice Guide: CA Debt Collection 1.01

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.01 Scope.

This chapter covers:

- Initial evaluation of collection matter [*see 1.03 -1.26*].
- Determining who may be liable for debt [*see 1.27 -1.39*].
- Determining what assets may be legally applied to debt [*see 1.40 -1.43*].
- Considering methods for preserving or recovering assets [*see 1.44 -1.53*].
- Developing a strategy for asset recovery [*see 1.54 -1.64*].
- Planning responses to debtor's defenses or tactics [*see 1.65 -1.74*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Chapter 1 Planning Collection of Debt
I. STRATEGY

1-1 MB Practice Guide: CA Debt Collection 1.02

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.02 Objective and Strategy.

The objective in planning the collection of a debt is to collect as much of the debt in the least time and at the lowest expense to the client. The strategy to accomplish that is to identify correctly the greatest number of potential individuals and entities that may be liable for the debt with the greatest amount of assets subject to attachment and/or enforcement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Chapter 1 Planning Collection of Debt
II. INITIAL EVALUATION OF COLLECTION MATTER

1-1 MB Practice Guide: CA Debt Collection 1.03

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.03 CHECKLIST: Initial Evaluation of Collection Matter.

☐ Determine complexity of action and counsel's ability to handle matter.

Discussion:
See *1.05*

☐ Determine if any conflicts of interest exist.

Authority:
Cal Rules Prof Conduct, Rules 3-300, 3-310

Discussion:
See *1.06*

☐ Gather adequate information to evaluate case.

○ Interview client to obtain following information:

☐ Details about transaction.

☐ Names used by debtor.

☐ Location of debtor's assets.

☐ Existence of guaranty.

☐ Relatives/friends of debtor.

☐ Debtor's previous actions and personality.

Discussion:
See *1.07[1]*

○ Review all relevant documents.

Discussion:
See *1.07[2]*

○ Consult other sources regarding debtor's names.

☐ Secretary of State.

☐ City clerk.

Discussion:
See *1.07[3]*

○ Conduct asset and location searches.

Discussion:
See *1.07[4]*

☐ Identify all potentially liable parties.

Discussion:
See *1.08*, *1.28 -1.39*

☐ Determine if debtor or spouse has filed bankruptcy.

○ If bankruptcy has been filed, attempts to collect generally are stayed.

Authority:
11 USC § 263(a)

Discussion:
See *1.09*

☐ Determine statute of limitations regarding each cause of action.

Authority:
CCP §§ 312-366.3

Discussion:
See *1.10*

☐ Find out if debtor has died.

Timing:
Claims must be filed against estate later of:

☐ Four months after date letters are first issued to general personal representative, or

☐ Sixty days after date notice of administration is given to creditor.

Timing:
Claims against assets in a revocable trust in which decedent debtor was settlor must be filed within later of:

☐ Four months after notice is published, or

☐ Sixty days after actual notice is given to creditor.

Timing:
Unless tolled, actions must be filed within one year of debtor's death.

Authority:
CCP §§ 366.2, 366.3; Prob Code §§ 9100, 9103, 9352, 9353; Stewart v. Seward (2007) 148 CA4th 1513, 1519, 56 CR3d 651 ; Farb v. Superior Court (2009) 174 CA4th 678, 684, 94 CR3d 586 .

Discussion:
See *1.11*

☐ Determine if creditor has any security interests in debtor's assets.

Discussion:
See *1.12*

☐ Find out if debtor or debtor's assets are out of state.

Discussion:
See *1.13*

☐ If debtor cannot be located, determine whether to proceed.

Discussion:
See *1.14*

☐ Evaluate adequacy of debtor's assets available to satisfy debt.

Discussion:
See *1.15*

☐ If debt is disputed, determine whether client has meritorious claim.

Authority:
B&P Code § 6068(c); *Cal Rules Prof Conduct, Rule 3-200(A), (B)*

Discussion:
See *1.16*

☐ Determine if debt is consumer debt subject to either or both of following:

- ○ Federal Fair Debt Collection Practices Act.
- ○ California Fair Debt Collection Practices Act.

Authority:
15 USC §§ 1692-1692o; *CC §§ 1788-1788.32*

Discussion:
See *1.17*

☐ Review significant contract provisions, especially:

- ○ Arbitration.
- ○ Mediation.
- ○ Attorney's fees.
- ○ Venue.

Discussion:
See *1.18*

☐ If debt has been reduced to judgment, review judgment itself, proofs of service, and all postjudgment documents.

Discussion:
See *1.19*

☐ Determine if judgment has expired or will expire soon.

- ○ Money judgment expires 10 years after date of entry.
- ○ Each installment of judgment expires 10 years after that installment is due.
- ○ Consider renewal.

Authority:
CCP §§ 683.020, 683.030, 683.110

Discussion:
See *1.20*

☐ After judgment, if judgment debtor has died, comply with special enforcement restrictions and deadlines.

Authority:
CCP § 686.020; *Prob Code §§ 9300 et seq., 9391*

Discussion:
See *1.21*

☐ Review documents relating to service to determine if service was proper.

Authority:
See *CCP §§ 415.10-417.40*; *Peralta v. Heights Med. Ctr. (1988) 485 US 80, 84, 108 S Ct 896, 99 L Ed2d 75*

Discussion:
See *1.22*

☐ Determine if enforcement of judgment has been stayed by reason of any of following:

- ○ Agreement.
- ○ Court order.
- ○ Appeal.
- ○ Bankruptcy.

Authority:
CCP §§ 917.1, 918; *11 USC § 362(a)*

Discussion:
See *1.23*

☐ If judgment has been assigned, confirm that acknowledgement of assignment documents comply with statute and are filed to permit enforcement by assignee.

Authority:
CCP §§ 673(a), 681.020

Discussion:
See *1.24*

☐ If judgment was rendered outside California, comply with requirements for registrations or enforcement.

○ No enforcement may be commenced until 30 days after notice of entry of judgment has been served on debtor.

Authority:
CCP §§ 1710.15, 1710.45

Discussion:
See *1.25*

☐ Determine if debtor is military servicemember or dependent.

Authority:
50 USC app § 501

Discussion:
See *1.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Chapter 1 Planning Collection of Debt
II. INITIAL EVALUATION OF COLLECTION MATTER

1-1 MB Practice Guide: CA Debt Collection 1.04

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.04 Options and Strategy.

Initial evaluation of a collection matter will vary depending upon whether the attorney is presented with a claim or a judgment. For a claim, the details of the transaction to establish the debt, as well as potential collectibility, must be considered and evaluated. For a judgment, usually only potential collectibility need be considered. However, in either situation, when determining collectibility, the strategy is to ascertain whether the debt was discharged in bankruptcy and, if not, whether the debtor has non-exempt assets subject to enforcement (or is likely to at some time in the future). The level of investigation into assets will vary with the size of the debt, from considering what information the client provides about the debtor's assets, to paying for searches, up to hiring a private investigator.

Cross References:

Evaluation of claims, see *1.07 -1.18*.

Evaluation of judgments, see *1.19 -1.25*.

Locating the debtor and the debtor's property, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Enforcement of judgments, see Ch. 4, Fraudulent Transfers.

Planning enforcement of judgment; bankruptcy, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers

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Chapter 1 Planning Collection of Debt
II. INITIAL EVALUATION OF COLLECTION MATTER

1-1 MB Practice Guide: CA Debt Collection 1.05

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.05 Attorney Must Have Basic Understanding of Law to Evaluate Matter and Advise Client Properly.

At the initial stage, a basic understanding of the law and process relating to debt collection and enforcement of judgments is required to evaluate the matter and to advise the client properly. For example, if the potential client has a judgment and information about a bank account in the name of the judgment debtor, the initial steps are simpler and more straightforward than if there are nonbank account assets of the judgment debtor in the name of his or her spouse or another third party. The attorney should consider that a bank levy is a simple proposition (although knowledge of claims of exemption or third party claims may become necessary), whereas determining when and how the courts will permit levy on assets in the spouse's name are more complex. Fraudulent transfers are even more complicated.

Cross Reference:

Competent representation, see *California Forms of Pleading and Practice, § 72.270* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers

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Chapter 1 Planning Collection of Debt
II. INITIAL EVALUATION OF COLLECTION MATTER

1-1 MB Practice Guide: CA Debt Collection 1.06

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.06 Avoid Potential Conflicts of Interest.

From time to time, an attorney may be approached by more than one creditor pursuing the same debtor. Similarly, claims may be presented against former or current clients. The attorney must ensure acceptance of any claim(s) does not give rise to a conflict of interest [*Cal Rules Prof Conduct, Rules 3-300*, *3-310*].

Cross Reference:

Conflict of interest, see *California Forms of Pleading and Practice, § 72.30 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers

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1-1 MB Practice Guide: CA Debt Collection 1.07

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.07 Attorney Must Gather Adequate Information to Evaluate Collection Matter.

1.07[1] Client Interview Is Initial Source of Information.

1.07[1][a] Attorney Should Inquire in Detail About Transaction Giving Rise to Debt. Counsel should first determine whether the debt is based upon any writings. Counsel should make certain that client has provided *all* writings related to the transaction. If there was no written agreement, counsel should inquire as to the terms of any oral agreement. Counsel should determine if there were any modifications to the written or oral agreement. If there was no written or oral agreement, counsel should ascertain facts that may support an open book account, quantum meruit, or other common count cause of action, including when the last contact and/or action relating to the debt occurred. Inquiry should be made about any promises or acts or omissions that may lead to a fraud cause of action.

Distinguish:

If debt already has been reduced to judgment, it often is unnecessary and an inefficient use of time to consider the details of the underlying transaction.

Strategic Point:

When collecting a debt for a financial institution or a collection agency, the collection agents usually will keep collector's notes regarding their contacts with the debtors and their attempts to collect the debt. These are frequently very informative regarding why the debt has not been repaid, and any potential defenses the debtor believes may be available. Sometimes they will also indicate violations of the FDCPA or other issues. It is imperative that counsel obtain and review these notes as soon as possible, preferably before litigation is commenced. Similarly, counsel should obtain copies of any e-mails sent to or from the debtor or the debtor's representatives.

Cross References:

Documents to review, see *1.07[2]*, *1.19*.

Potential causes of action, see Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of

Action.

1.07[1][b] Attorney Should Inquire Regarding All Names Used by Debtor. To locate assets effectively and to ensure an enforceable judgment, it is important to ascertain each name used by the debtor (including any alias or fictitious business names).

Trap:

Properly identifying (and naming) the potential defendants can be the difference in enforceability. A failure may result in a critical delay and/or result in a legal malpractice claim. Relying solely on information provided by the client is inadequate; the information should be confirmed, supplemented and, if necessary, corrected. However, this confirmation is more critical when drafting a lawsuit than when undertaking the initial evaluation.

Cross Reference:

Situations in which a judgment may be set aside due to improper naming of a defendant, see Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of action, 6.05[1][f].

Strategic Point:

Counsel should try to find the debtor's social security number and middle name or initial to avoid identity issues when the name is fairly common in your community.

1.07[1][c] Bankruptcy Filings, Location of Debtor, and Debtor's Assets Should Be Ascertained. Counsel should ask the client whether the debtor has filed or threatened to file bankruptcy. Counsel should also ask for the debtor's business and home addresses and phone numbers and any assets of which the client is aware.

Strategic Point:

When there is an indication that the debtor may have filed bankruptcy, either currently or in the past, the attorney should run a name search on the PACER service for the appropriate bankruptcy court. This is a service available for all federal bankruptcy courts and can be very informative. For example, if the debtor filed bankruptcy several years ago, identity issues can be clarified as well as assets potentially discovered by pulling up a copy of the debtor's bankruptcy schedules.

Cross References:

Methods for locating the debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Bankruptcy in relation to debt collection, see *1.09*; see also Ch. 3, Effect of Bankruptcy.

1.07[1][d] Attorney Should Inquire As to Existence of Guaranty. Inquiry should be made not only for the documents constituting the transaction, but also whether a separate guaranty or credit application containing a guaranty may exist.

Strategic Point:

Because guaranties can become ineffective based on issues other than those in the document, counsel

should review the guaranty language carefully and ask the client if the client has ever released the guarantor or received a notice from the guarantor regarding revoking the guaranty.

Cross Reference:

Guaranty, see *1.07[2]*, *1.35*; see also *Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action, 6.05[1][f]*.

1.07[1][e] Persons Related to Debtor May Be Holding Debtor's Assets or Have Information About Existence and Location of Debtor's Assets. Information about related persons may be critical in determining the existence or whereabouts of debtor's assets and whether such assets are held in names other than the debtor. The attorney should inquire whether the client knows the identity of the relatives, friends or business associates of the debtor (or principals of any corporate debtor).

Strategic Point.

Counsel should analyze this information to determine whether other persons may be liable for debt under available theories, such as fraudulent transfer.

Cross References:

Suggestions for locating debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Fraudulent transfers, see Ch. 4, Fraudulent Transfers.

Rules governing contacts with third parties to obtain information about debtor, see Ch. 5, Debt Collection Prior to Litigation.

1.07[1][f] Debtor's Actions and Personality May Be Important. The attorney should elicit from the client information regarding why the debtor will not pay the debt, the debtor's responses to the client's approaches or assertions of the claim or those of other creditors, and anything known about the debtor's personality.

1.07[2] All Documents Relating to Debt Should Be Obtained and Reviewed. All documents relating to debt should be obtained and reviewed. These will often include:

- Agreements of any type, including guaranties and credit applications, promissory notes, security agreements (evidence of perfection), and leases.

  Strategic Point:

  Sometimes guaranties are located in unusual or not very obvious locations, such as in the middle of a lease agreement or a few lines on a credit application. Counsel should always review the documents for such language.

- Correspondence.

- Invoices, statements, ledgers.

- Purchase orders, delivery receipts.

- Checks, wire transfer documents, receipts for money, other evidence of payment.

Strategic Point:

Again, counsel should review the collector's notes to ascertain exactly why the debtor is not paying. In addition, if the debtor has access to defense counsel, this may cause the cost of the action to go up substantially. Counsel also should keep that fact in mind if the debtor, spouse, or other family member is a lawyer.

1.07[3] Other Sources May Provide Additional Information Regarding Debtor's Names. The attorney may wish to:

- Check Secretary of State website for corporations, limited partnerships and LLCs: http://kepler.ss.ca.gov/list.html.

- Search fictitious business names through an online search company or obtained from the county clerk.

- Obtain business licenses by writing to the city clerk.

1.07[4] Asset and Location Searches Should Be Undertaken. Searches may be conducted via computer (of public records or commercial databases) and/or private investigator, if the size of the case merits. There are many useful sources of information and the choice of which to employ will vary in time, effort and cost with the size of the debt and transparency of the assets. Asset searches may also have to be made of related parties when the debtor recently had assets, but they do not show up in the investigation. These searches will also inform attorney if the debtor has died (which will affect collection process and time frames within which certain actions are required).

Strategic Point:

Review of copies of debtor checks obtained from the client can be informative not only as to potential sources of recovery, but may reveal other names or fictitious business identities.

Cross References:

Suggestions for finding debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Claims against decedent, see Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action.

Using Lexis resources to find debtor information, see How to Use Lexis.com at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewContracts LawDebtor & Creditor RelationsGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawBankruptcyGeneral Overview

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1.08 Attorney Must Consider All Potentially Liable Parties.

The attorney should determine who may be liable for the debt in addition to the debtor. The client interview, a thorough review of the documents relating to the transaction, and use of certain other sources of information will enable the attorney to determine all potential debtors.

Strategic Points:

- When the debtor is a failing or out-of-business limited liability entity, the existence of a guaranty may provide the only realistic source of recovery. This is a key source of leverage when negotiating by reminding the debtor that even if the business entity fails, the guarantor will still be personally liable for the debt.

- In appropriate cases, counsel should consider a cause of action for piercing the corporate veil. It is unusual for individual small business owners to keep up the corporate formalities, and failure to do so may create a potential for personal liability when they might not otherwise be exposed.

Cross References:

Parties responsible for debt, see *1.28 -1.39*.

Fraudulent transfers, see Ch. 4, Fraudulent Transfers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewContracts LawDebtor & Creditor RelationsGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawBankruptcyGeneral Overview

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1-1 MB Practice Guide: CA Debt Collection 1.09

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.09 Bankruptcy Status Must Be Determined.

1.09[1] Bankruptcy Filing Generally Stays Collection Efforts. If the debtor has filed a bankruptcy petition, attempts to collect the debt are stayed in most cases [*11 USC § 362(a)*]. Upon learning of the bankruptcy filing, the attorney must immediately review the status of the bankruptcy case to determine whether deadlines exist for opposing claims of exemption, filing adversary proceedings to avoid discharge of the client's debt or of the debtor, or opposing the debtor's proposed plan of reorganization (if applicable).

Strategic Point:

Counsel should always obtain and review the bankruptcy schedules and compare them with any financial statements or financial information previously obtained regarding the debtor. There are usually substantial differences that may give rise to an action for non-dischargeability based on fraud or other bankruptcy remedies that will "save" the debt from discharge.

Cross Reference:

Impact of bankruptcy on collection of debts, see Ch. 3, Effect of Bankruptcy.

1.09[2] Debtor Discharged in Bankruptcy Is No Longer Liable. If an individual debtor filed a bankruptcy petition after the debt arose, and was discharged, generally the debt is uncollectible [*11 USC §§ 524*, *727(b)*, *1141(d)*, *1328*].

Exceptions:

- If the debt was determined to be nondischargeable, the discharge will not cause the debt to be uncollectible [*11 USC § 523*].

- If the debtor was discharged, but the creditor has a pre-existing lien against the debtor's property (such as a lien resulting from the filing of an abstract of judgment), the debt may be collectible against

that property only [*In re Weathers (Bankr KS 1981) 15 BR 945, 949* ; *Songer v. Cooney (1989) 214 CA3d 387, 391, 264 CR 1]* .

Strategic Point:

Many debtors do not complete the requirements of their bankruptcy proceedings and do not receive their discharge. The attorney should not abandon the case when a bankruptcy is filed, but should monitor the bankruptcy case to its end and ensure the debt is discharged before advising the client to close the file.

Cross Reference:

Bankruptcy, see Ch. 3, Effect of Bankruptcy.

1.09[3] Discharge of Debtor's Spouse May Render Debt Uncollectible. If the debtor is an individual, and the debtor's spouse files a bankruptcy petition (individually, not jointly with the debtor) and was discharged, community property is no longer subject to enforcement of the judgment [*11 USC § 524(a)(3), (b)*]. The debt may effectively be uncollectible. Since all property acquired during marriage (including the debtor's earnings) is presumed to be community property (other than property owned before marriage, gifts, inheritance, and the proceeds), there may be no property against which to enforce any judgment [*Fam Code §§ 760, 770*].

Strategic Point:

There may still be reason to monitor the debtor. If the debtor subsequently gets divorced, any property awarded to the debtor will become the debtor's separate property and be subject to enforcement, as will the debtor's earnings and subsequently obtained assets.

Cross Reference:

Bankruptcy, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysAppealsBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageLiensCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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1.10 Statute of Limitations May Preclude Collection.

The attorney must determine if any applicable statutes of limitations have passed [*CCP §§ 312-366.3*]. If the statute of limitations has passed on all causes of action, the attorney must consider whether any tolling or equitable exceptions may apply.

Strategic Point:

If the statute of limitations has passed on an obvious cause of action, counsel should always consider whether there are alternative causes of action on which the statute may not have not passed.

Warning:

In consumer cases (as opposed to commercial cases), litigation when the statute of limitations has passed, or even threats of litigation, may be prohibited by the Fair Debt Collection Practices Act [*15 USC § 1692e*; *see Goins v. JBC & Assocs. P.C. (D Conn 2005) 352 F Supp2d 262, 272*]. A demand for collection, if litigation is not threatened (such as when the debt is time-barred), may be permitted [*Abels v. JBC Legal Group, P.C. (ND Cal 2005) 428 F Supp2d 1023, 1027]* .

Cross References:

Decedent debtors, see *1.11*.

Statutes of limitations and tolling, see *Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action, 6.20 et seq*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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1.11 Death of Debtor Limits Time Available for Collection of Debt.

Claims must be asserted in a decedent debtor's estate by the later of the following [*Prob Code § 9100*; *see also Prob Code § 9103* (late claim relief)]:

- Four months after the date letters are first issued to a general personal representative; or
- Sixty days after the date notice of administration is given to the creditor.

Claims against assets in a revocable trust in which decedent debtor was the settlor must be filed within the later of four months after notice is published or 60 days after actual notice is given to the creditor [*Prob Code § 19100 et seq.*]. Late claim relief may be allowed [*Prob Code § 9103(a)*].

If there is no probate, if the creditor's claim is disallowed, if the creditor wishes to file for late claim relief, or if the creditor wishes to file suit, the statute of limitations is one year from date of death (with very limited exceptions) [*CCP § 366.2*].

The filing of a creditor's claim will toll the statute of limitations [*Prob Code §§ 9352*, *9353*], but will not do so when the claim is based on a promise by the decedent regarding a distribution from the estate [*CCP § 366.3*; *Stewart v. Seward (2007) 148 CA4th 1513, 1519, 56 CR3d 651]* .

Despite a tolling provision for minors [*see CCP § 352*], the minority of a claimant will not toll the statute applicable to filing actions in an estate [*CCP § 366.2*], which has very limited tolling provisions. Nor will the location of the personal representative or the estate outside of California (in Texas) toll the statute of limitations [*Farb v. Superior Court (2009) 174 CA4th 678, 684, 94 CR3d 586]* .

Cross Reference:

Expired judgment, see *1.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet LawCivil ActionsStatutes of LimitationsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1.12 Existence of Security Generally Will Increase Collectibility.

If the debt is secured, and the security is still available and of adequate value, collectibility is much more likely. The existence of security may, however, affect the availability of attachment remedies.

Cross Reference:

Provisional remedies, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsStatutes of LimitationsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1.13 Out of State Debtor or Out of State Assets May Significantly Reduce Collectibility.

If the debt has not been reduced to judgment, the attorney must determine whether the debtor is subject to California jurisdiction. If the debtor is in the state, but has significant assets outside the state, one alternative is to obtain a California judgment and then domesticate the judgment in a jurisdiction where the debtor's assets are located.

Strategic Points:

- When there is jurisdiction in California over an out of state debtor, the creditor has leverage by suing in California because the debtor is unlikely to have easy or convenient access to California courts or attorneys. Suit, therefore, may lead to a quick settlement. This advantage must be balanced against the potential of the debtor failing to settle during litigation with the result that the creditor will obtain a judgment that will likely require enforcement in a foreign jurisdiction. Careful consideration of the ability to domesticate and the costs should be made by consultation with an attorney in the foreign jurisdiction *prior to engaging in suit* locally.

- Certain types of assets (including those held in "Debt Protection Entities" based outside California) may be reachable only by having California or federal courts issue orders to the judgment debtor to repatriate those assets or face contempt [*Federal Trade Comm'n v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1240]* . Since this process can prove expensive, the size of debt must be worth the investigative and court time, costs, and effort.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsStatutes of LimitationsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1.14 If Debtor Cannot Be Located, Creditor Must Determine Whether to Proceed.

When the debtor's location cannot be determined, the attorney and client must decide whether the case merits immediate suit and service by publication, as opposed to waiting to locate the debtor. If the amount in controversy merits the expenditure of time and money on the chance of future collection or if the statute of limitations is about to run, immediate suit may be appropriate.

Cross Reference:

Service by publication, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPublicationGovernmentsLegislationStatutes of LimitationsGeneral Overview

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1.15 Adequacy of Debtor's Assets Available to Satisfy Debt Must Be Determined.

After conducting an asset investigation(s) to identify the assets of each potential debtor, the attorney should analyze whether the debtor has sufficient assets available to satisfy the debt. In addition to locating the assets, the attorney should evaluate whether the debtor's non-exempt assets are subject to pre-existing liens and whether they are subject to enforcement.

Cross References:

Assets to satisfy debt, see *1.41 -1.43*.

Pre-existing liens, see Ch 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationGeneral OverviewAdmiralty LawBankruptcyGeneral OverviewTransportation LawWater TransportationLicensing & Registration

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1-1 MB Practice Guide: CA Debt Collection 1.16

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.16 If Debt Is Subject to Dispute, Attorney Must Determine Whether Client Has Meritorious Claim.

It is inappropriate to attempt to collect a debt when the attorney believes the client does not have a good faith position [*B&P Code § 6068(c)*; *Cal Rules Prof Conduct, Rule 3-200(A), (B)*]. The attorney and client also may be subject to suit for malicious prosecution, abuse of process, and unfair debt collection practices as a result of pursuing a nonmeritorious action [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 C3d 863, 868, 254 CR 336* ; *White Lighting Co. v Wolfson (1968) 68 C2d 336, 347, 66 CR 697]* . The attorney needs to analyze whether the client has, or is likely to be able to obtain, admissible evidence to prove the claim.

Strategic Point:

If there is a genuine dispute, the attorney must determine if the legal issue is complex. If it involves other practice areas (such as partnership disputes, for example), the attorney should assess whether he or she is qualified in that area.

Cross Reference:

Unfair debt collection practices, see Ch. 5, Debt Collection Prior to Litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1.17 Consumer Debt Classification Adds Complexity to Collection Efforts.

If the debt was incurred primarily for personal, family, or household use, collection efforts will be subject to both federal and state statutes regulating collection practices, principally the Federal Fair Debt Collection Practices Act [*15 USC §§ 1692-1692o*] and California Fair Debt Collection Practices Act (Rosenthal Fair Debt Collection Practices Act) [*CC §§ 1788-1788.32*]. These statutes may affect communications with the debtor, whether suit can be instituted or threatened, when statute of limitations issues are present, venue for litigation, and where remedies can be effectuated.

Other consumer debt protection statutes also affect claims against various defined consumers. These California statutes include the Unruh Act [*CC § 1801 et seq.*], the Rees-Levering Act [*CC § 2981 et seq.*] and Song-Beverly Act [*CC § 1747 et seq.*].

Cross Reference:

Debt collection, see Ch. 5, Debt Collection Prior to Litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionCommunicationsCivil ProcedureVenueGeneral OverviewGovernmentsFederal GovernmentClaims By & AgainstGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.18 Contract Provisions May Affect Evaluation of Claim.

Arbitration and/or mediation provisions can result in significant up-front expense to a creditor. Venue provisions can make asserting a claim inconvenient or impractical. Attorney's fees provisions can provide great leverage to the creditor, but can result in potentially significant costs if the creditor does not prevail in the lawsuit. Presence of a guaranty may be critical when the debtor is insolvent.

Strategic Point:

Since, in most collection cases, liability really is not in question, the inclusion of an attorney's fee provision in an agreement is often an important weapon in the creditor's arsenal. It provides leverage for a quick settlement. Most debtors who have not settled prior to litigation are either (1) hoping that their economic future will improve; or (2) seeking to delay payment and will only "cut a deal" as trial approaches. The creditor's aim, however, is to resolve the matter quickly, before assets are dissipated or other creditors get to them.

The debtor (or the debtor's counsel) should be reminded that the attorney's fee provision will result in increased potential liability the further the litigation proceeds (and thus increased exposure for the debtor). Since the debtor will have to pay not only his or her own attorney's fees, but also the creditor's attorney's fees, the debtor often can be convinced that it is in his or her best interests to settle without further delay and expense.

A very important added benefit (which also should be part of any settlement discussion) is that if the judgment ultimately obtained includes an award of contractual attorneys' fees, then postjudgment attorney's fees to collect on the judgment also are recoverable [*CCP §§ 685.040*, *685.070(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureVenueGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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1.19 When Debt Has Been Reduced to Judgment, Judgment Itself, Proofs of Service, and all Postjudgment Documents (Including Those Creating Liens) Should Be Obtained and Carefully Reviewed.

Review of the judgment and postjudgment documents is important to determine if the judgment has expired, whether judgment debtors are properly named, whether judgment debtors have any claims of a void judgment, and whether judgment liens must be created. The documents relating to the transaction should also be reviewed for clues regarding different names used by the debtor, assets, relatives, and/or business associates who may have information or assets of the debtor.

Strategic Points:

- The judgment must be scrutinized to determine whether the judgment debtor(s) are properly named in the judgment and, if not, whether any defect can be remedied. If the judgment debtor is named *only* with a fictitious business name; as a practical matter, there is no judgment debtor against whom to enforce the judgment, and the judgment is worthless [*see Earl W. Schott v. Kalar (1993) 20 CA4th 943, 946, 24 CR2d 580*]. If the statute of limitations has passed on the original cause of action (so that the creditor cannot sue and properly name the debtors), the claim is worthless.

- Even when the debtor or assets cannot presently be located, the attorney should make certain to obtain judgment liens when appropriate. It is not uncommon for the debtor to later acquire assets, which will be subject to the lien.

- If the judgment is a default judgment and six months has not passed since the debtor's default was entered, the creditor's attorney may wish to wait to enforce the judgment until after the six months passes, so that the judgment debtor may not seek to set aside the default under *CCP § 473(b)*.

Cross Reference:

Postjudgment liens, see *1.52[1]*.

Judgment lien, see Ch. 11, Obtaining and Removing Judgment Liens.

Timing, see Ch. 13, Expiration and Renewal of Judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureVenueGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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Chapter 1 Planning Collection of Debt
II. INITIAL EVALUATION OF COLLECTION MATTER

1-1 MB Practice Guide: CA Debt Collection 1.20

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.20 If Judgment Has Expired, Debt May Be Uncollectible.

A money judgment generally becomes unenforceable 10 years after the date of its entry [*CCP § 683.020*]. An installment judgment becomes unenforceable separately as to each installment 10 years after the installment is due [*CCP § 683.030*].

Strategic Point:

If the judgment is within six months of expiring, counsel should immediately begin renewal of the judgment because the process often takes some time, old files cannot be easily located by the court, and errors in the application for renewal may need correction. In order to retain the priority of the original judgement lien on real property, the application for renewal must be recorded prior to the expiration date of the judgment [*CCP § 683.110*].

Exceptions:

- Sometimes, even when a judgment has expired (and therefore, cannot be renewed or enforced), a new action on the judgment can be initiated because the statute of limitations is 10 years from the time the judgment became final (for example, after the time for appeal has run), and, unlike renewal, tolling considerations apply to any new action on the judgment [*CCP §§ 337.5, 683.050*].

- Family law judgments, including judgments for child, family, or spousal support, do not expire after 10 years [*CCP § 683.310*; *Fam Code § 291*; *In re Marriage of Wilcox (2004) 124 CA4th 492, 500-501, 21 CR3d 315*].

Cross Reference:

Time limits and renewal of judgment, see Ch. 13, Expiration and Renewal of Judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-1 MB Practice Guide: CA Debt Collection 1.21

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.21 Limitations on Enforcement Apply If Debtor Is Deceased.

Generally, enforcement of a judgment against a decedent is limited to filing a claim in the probate estate [*CCP § 686.020*; *Prob Code § 9300 et seq*.]. Levies begun prior to death may be completed [*Prob Code § 9303*]. Liens on the decedent debtor's property may be foreclosed by waiving recourse to other assets [*Prob Code § 9391*].

If no probate is filed, actions against specified people who have taken the deceased debtor's property pursuant to specific statutory authority without probate may be filed [*see Prob Code §§ 7664*, *13109*, *13112*, *13156*, *13204*, *13550*]. There is no explicit authority to sue others who have taken the decedent's property without statutory authority, and the creditor's attorney may have to open a probate to file a claim and get the property back into the estate.

Strategic Point:

Before waiving rights to other property in the estate, counsel should determine if the property securing the debt is adequate to satisfy the debt. If not, counsel should consider filing a claim and assert it as secured.

Cross Reference:

Spouse liability after death, see *1.42[5][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewCriminal Law & ProcedureCounselRight to CounselGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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1-1 MB Practice Guide: CA Debt Collection 1.22

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.22 Documents Relating to Service Should Be Reviewed to Determine If Service Was Proper.

If the judgment was obtained by default, the attorney must anticipate a debtor claim of bad service, effectively rendering the judgment void. The attorney should determine whether the service requirements were met [*see CCP §§ 415.10-417.40*; *Peralta v. Heights Med. Ctr. (1988) 485 US 80, 84, 108 S Ct 896, 99 L Ed2d 75]* .

Cross Reference:

Service, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.23 Attorney Must Determine If Enforcement of Judgment Has Been Stayed.

Enforcement, execution or particular orders may be stayed by agreement of the parties, court order, appeal or bankruptcy filings. Generally, an appeal of a judgment or order does not give the court authority to stay enforcement for more than 10 days after the last date for filing of notice of appeal unless an undertaking is filed or the creditor consents to waive the requirement of the undertaking [*CCP §§ 917.1, 918*]. A bankruptcy filing generally stays all enforcement efforts [*11 USC § 362(a)*].

Consider:

The often confused use of the terms "enforcement" and "execution" may have to be distinguished when analyzing the scope of the stay. For example, if execution (but not enforcement) is stayed by the court or by agreement, the creditor may still create liens on the debtor's property.

Cross Reference:

Execution and enforcement of judgment, see *1.42[1]*.

Ch. 15, Staying Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewContracts LawDebtor & Creditor Relations

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1-1 MB Practice Guide: CA Debt Collection 1.24

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.24 Assignment Documents Must Meet Specific Requirements.

If the judgment was assigned to the creditor, in order to enforce the judgment, the creditor must become an assignee of record [*CCP § 681.020*; *see CCP § 673(a)* (how to become an assignee)].

Warning:

Sometimes, when the required documents do not comply with the statutory requirements, there can be a problem in getting an assignor (who may no longer have any incentive to cooperate) to execute the documents properly and to enable the assignee to commence enforcement.

Cross Reference:

Ch. 14, Assigning a Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewContracts LawDebtor & Creditor Relations

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II. INITIAL EVALUATION OF COLLECTION MATTER

1-1 MB Practice Guide: CA Debt Collection 1.25

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.25 Attorney May Apply for Entry of Sister State Judgment and May Sue on Foreign Judgment.

Counsel must review any judgment by another state or territory of the United States to determine if application may be made for entry of a California judgment [*see CCP § 1710.15*].

CCP § 1710.15 specifies all the necessary information a judgment creditor must present to the court in its application in order to have the court enter the sister state judgment. Once filed in the proper county [*see CCP § 1710.20*], the court clerk is required to enter the judgment based upon the information contained in the application [*CCP § 1710.25(a)*]. The judgment, once entered, will have the same effect as an original money judgment of the court and may be enforced or satisfied in like manner [CCP § 710.35]. However, absent a specific statutory exception, after entry of a sister state judgment the judgment may not be enforced until 30 days after notice of entry of judgment is served on the judgment debtor [*CCP § 1710.45(d)*].

Strategic Point--Creditor:

Although *CCP § 1710.45* (concerning enforcement) provides that a writ of execution may not issue until 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor, nothing in that section prohibits issuing or recording an abstract of judgment during that time. Thus, although the judgment creditor cannot levy or hold a sale of the debtor's property until the 30-day requirements of *CCP § 1710.45* are met, there is nothing prohibiting the judgment creditor from merely placing a lien on real property in the interim. If court staff mistakenly refuses to issue an abstract due to a misunderstanding of the statutory enforcement provisions, the attorney may find it necessary to pursue the issue with more senior court personnel to obtain issuance.

Judgments entered by a governmental unit *other than* the United States or one of its states or territories meeting the specific requirements of the Uniform Foreign-Country Money Judgments Recognition Act [*CCP § 1713 et seq.*] may be enforced in California only after an action is instituted on the judgment [*Renoir v. Redstar Corp. (2004) 123 CA4th 1145, 1148, 20 CR3d 603*]. The statute of limitations is the earlier of the time during which the foreign-country judgement is effective in the foreign country or 10 years from the date that the foreign-country judgement became effective in the foreign country [CCP § 7721].

Cross Reference:

Foreign judgments, see Ch. 25, Enforcing Out of State Judgments in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-1 MB Practice Guide: CA Debt Collection 1.26

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.26 Member of Military and Dependents Accorded Special Treatment.

Special rules limit collection of debts from members of the military and their dependents [*see 50 USC app § 501 et seq.*].

Cross Reference:

Collecting from military members, see *Ch. 5, Debt Collection Prior to Litigation, 5.45 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.27 CHECKLIST: Determining Who May Be Liable for Debt.

☐ If debtor is corporation or limited liability company, determine if it is liable for debt.

○ Corporation generally is liable for its own debt.

Authority:
Corp Code § 17101(a)

Discussion:
See *1.30[1]*

○ Evaluate whether shareholders, officers, or directors are liable for entity's debts.

☐ Shareholders generally are not liable unless one or more of following conditions exist:

Authority:
Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 CA2d 825, 837, 26 CR 806

Discussion:
See *1.30[2]*

○ Shareholder is guarantor of debt.

Discussion:
See *1.30[1]*

○ Shareholder is alter ego of entity.

Authority:
First Western Bank & Trust Co. v. Bookasta (1968) 267 CA2d 910, 915-916, 73 CR 657 ; *Automotriz del Golfo de California v. Resnick (1957) 47 C2d 792, 796, 306 P2d 1*

Discussion:
See *1.30[2]*

○ Entity is not in good standing.

Authority:
R&T Code § 25962.1

Discussion:
See *1.30[3]*

○ Entity makes distributions when its assets are inadequate.

Authority:
Corp Code §§ 316(a), 501-506; *CC § 3439 et seq.*

Discussion:
See *1.30[4][a]*

○ Major shareholder/creditor takes disproportionate share of assets.

Authority:
Commons v. Schine (1973) 35 CA3d 141, 144-145, 110 CR 606

Discussion:
See *1.30[4][b]*

○ Shareholder is personally responsible for entity's tortious acts.

Authority:
Wyatt v. Union Mortgage Co. (1979) 24 C3d 773, 785, 157 CR 392 ; *Filet Menu, Inc. v. C.C.L & G., Inc. (2000) 79 CA4th 852, 865, 94 CR2d 438*

Discussion:
See *1.30[5]*

☐ Consider if any successor liability exists for corporate debt.

Authority:
McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 753-754, 107 CR2d 702

Discussion:
See *1.31*

☐ Determine if agent is liable for failing to disclose corporate principal.

Authority:
G.W. Anderson Constr. Co. v. Mars Sales (1985) 164 CA3d 326, 210 CR 409 ; *J&J Builders Supply v. Caffin (1967) 248 CA2d 292, 56 CR 365*

Discussion:
See *1.32*

☐ If debtor is partnership, determine if partnership and/or partners are liable for debt.

○ Determine liability of partnership and general partners.

Authority:
Corp Code §§ 16306(a), 16307(c); *B&P Code § 17900 et seq.*

Discussion:
See *1.33[1]*

○ If partnership is a limited partnership, evaluate liability of limited partnership and general partners.

Authority:
Corp. Code §§ 15632, 15643

Discussion:
See *1.33[2]*

○ If partnership is a limited liability partnership, evaluate liability of partnership and partners.

Authority:
Corp Code § 16306(c), (d), (e)

Discussion:
See *1.33[3]*

☐ If debtor is unincorporated association, determine if it is liable.

Authority:
Corp Code §§ 18250, 18605, 18610

Discussion:
See *1.34*

☐ Determine whether any guarantor is liable for debt.

○ Determine if guaranty meets following criteria for validity:

☐ Is it in writing?

☐ Is there separate consideration?

Authority:
CC §§ 1615, 2787, 2792-2794

Discussion:
See *1.35[1]*

○ Determine scope of guaranty.

Authority:
CC §§ 2800-2802, 2806, 2814-2815

Discussion:
See *1.35[2]*

○ Determine if guaranty is exonerated.

☐ Was original agreement modified?

☐ Have rights of guarantor been impaired?

Authority:
CCP §§ 2819, 2849

Discussion:
See *1.35[3]*

☐ Determine if any fraudulent transferees and co-conspirators are liable.

Authority:
CC § 3439.08(b), (c); Monastra v. Konica Bus. Machs., U.S.A., Inc. (1996) 43 CA4th 1628, 1644, 51 CR2d 528

Discussion:
See *1.36*

☐ Determine if heirs of debtor are liable.

Authority:
Prob Code §§ 13550-13551, 13553, 19100 et seq.

Discussion:
See *1.37*

☐ Determine if any third parties are liable under third party beneficiary theory.

Authority:
CC § 1519; *Gilbert Fin. Corp. v. Steelform Contracting Co. (1978) 82 CA3d 65, 69-70, 145 CR 448*

Discussion:
See *1.38*

☐ Determine if purchaser of business is liable for noncompliance with bulk sales statute.

○ Bulk sales notice must be published.

Authority:
Com Code § 6101 et seq.

Discussion:
See *1.39*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesBusiness & Corporate LawUnincorporated Associations

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.28 Options and Strategy.

The goal in evaluating who is liable for the debt is to identify as many as possible potential persons/entities against whom there is a legitimate cause of action and who may have assets available for collection of the debt.

In addition to the individual who actually incurred the debt, liability of all of the following should be evaluated:

- Spouse or domestic partner [*see 1.29*].
- Agent of undisclosed principal [*see 1.32*].
- Partners [*see 1.33*].
- Guarantors [*see 1.35*].
- Fraudulent transferees [*see 1.36*].
- Heirs [*see 1.37*].
- Third parties who contracted with debtor [*see 1.38*].
- Purchaser of business [*see 1.39*].
- Individual as alter ego of corporation [*see 1.30[2]*; *see also Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of Action, 6.03[11], 6.15*].
- Passers of bad checks [*see Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Causes of Action, 6.03[8], 6.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesBusiness & Corporate LawUnincorporated AssociationsFamily LawMarital Duties & RightsDebt Liability

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.29 Spouse/Domestic Partner May Be Personally Liable.

1.29[1] Spouse May Be Independently Liable on Same Causes of Action As Debtor. If the debtor's spouse was also a party to the agreement or if goods or services were provided to the spouse, the spouse may be independently liable and named in the complaint.

Cross Reference:

Availability of community property, see *1.42[3]*.

1.29[2] Spouse Is Liable for Necessaries of Life. If a debtor was provided with necessaries of life by a creditor, the spouse is personally liable [*Fam Code § 914(a)*].

1.29[3] Registered Domestic Partner Has Same Liability As Spouse. A registered domestic partner is treated as a spouse for purposes of determining liability [*Fam Code § 297.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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1-1 MB Practice Guide: CA Debt Collection 1.30

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.30 Corporations Generally Are Separate Legal Entities.

1.30[1] Corporations Are Liable for Their Own Debts. Generally, corporations and limited liability companies are separate entities solely liable for their own debts [*Corp Code § 17101(a)*]**.**

Strategic Points:

- There is no point trying to collect a debt from a corporate debtor which is not operating unless there are assets (e.g., bank accounts or receivables) remaining in the name of the corporation. However, simply because a corporation has been suspended does not necessarily mean it is no longer operating. While suspension usually occurs a significant time after a corporation ceases operations, sometime the opposite occurs and a corporation is operating, but has simply failed to file its annual information return with the Secretary of State or to pay its franchise tax. In such a case, suspension should not cause the attorney to consider the debt uncollectible.

- Counsel should look for a fraudulent transfer of assets (such as collections of accounts receivable or sales of inventory) by a sister corporation. This is not unusual when there are solely owned corporations who in theory "close" and then open for business the next day under a different corporate shell.

1.30[2] Shareholders Generally Are Not Liable for Corporate Debts. Generally, shareholders are not liable for debts of corporations [*Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 CA2d 825, 837, 26 CR 806]* .

Exceptions:

- Shareholders may be liable if they guaranteed the debt.

- Shareholders may be liable under alter ego theory. Under this theory, shareholders are liable if they

have treated the corporation as their alter ego and if failing to hold the shareholders liable would permit an injustice or fraud [*First Western Bank & Trust Co. v. Bookasta (1968) 267 CA2d 910, 915-916, 73 CR 657* ; *Automotriz del Golfo de California v. Resnick (1957) 47 C2d 792, 796, 306 P2d 1*]. There must be some combination of failing to capitalize the corporation adequately, commingling corporate and personal funds, using corporate assets for personal purposes and/or failing to observe corporate formalities [*Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 CA2d 825, 838, 26 CR 806*]. Even after judgment, a nonparty alter ego which had controlled the litigation and who had a commonality of interest with the named corporate defendant may be added to the judgment by motion [*Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 148-149, 198 CR 457]* .

Cross References:

Guarantor's liability, see *1.33*.

Alter ego liability, see Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action.

1.30[3] Officers and Directors Generally Are Not Liable for Corporate Debts. Generally, officers and directors are not liable for debts of corporations [*Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 CA2d 825, 837, 26 CR 806*].

Strategic Point:

The attorney should always investigate if the corporate debtor was in good standing at the time the debt arose. If not, counsel should consider naming as individuals in the complaint shareholders, directors and officers, and anyone who attempted to avail themselves of the limited liability available through a corporate structure, on the theory that there was no corporation recognized by the state at the time the debt was incurred. Additionally, if the individuals knew of the suspension, they were committing a criminal act in violation of Rev & Tax Code § 25962.1 and therefore might be liable for the debt.

1.30[4] Shareholders and Directors May Be Liable for Improperly Taking or Authorizing Improper Distribution of Corporate Assets.

1.30[4][a] Shareholders and Directors May Be Liable for Corporate Distributions When Assets Are Inadequate. Authorization and receipt of distributions when a corporation has inadequate assets creates individual liability for the authorizing directors and receiving shareholders [*Corp Code §§ 316(a), 501-506*]. A suit to recover these illegal dividends must be made in the name of the corporation for the benefit of all creditors.

Strategic Point:

Alternatively, when the requirements for a fraudulent transfer are met, a creditor is better off using the remedies afforded by the Uniform Fraudulent Transfer Act in order not to have to share the fruits of the collection efforts with other creditors [*CC § 3439 et seq.*].

Cross Reference:

Remedies under Uniform Fraudulent Transfer Act, see Ch. 4, Fraudulent Transfers.

1.30[4][b] Shareholder/Creditor May Be Liable for Taking Disproportionate Share of Assets. A controlling shareholder who is also a creditor of the corporation owes a fiduciary duty to other creditors and may be liable to them for taking more than a proportionate share of corporate assets in repayment of the debt owing to the shareholder by the corporation [*Commons v. Schine (1973) 35 CA3d 141, 144-145, 110 CR 606* ; *but cf. Nahman v. Jacks (In re Jacks)*

(Bankr D Cal. 1999) 243 BR 385, 393].

1.30[5] Corporate Officers, Directors, or Shareholders May Be Liable for Corporate Torts Resulting From Personal Misconduct. To the extent of an individual's personal misconduct while purportedly acting on behalf of the corporation, the individual may be held personally liable [*Wyatt v. Union Mortgage Co. (1979) 24 C3d 773, 785, 157 CR 392* ; *Filet Menu, Inc. v. C.C.L & G., Inc. (2000) 79 CA4th 852, 865, 94 CR2d 438]* . For example, if an individual fraudulently entices the provision of goods or services without any intention of paying, the individual may be liable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionFraudBusiness & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawCorporationsShareholdersTransfers of SharesBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent Transfers

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1.31 Successor Liability May Be Asserted for Continuing Business of Corporate Debtor.

A corporation that merely continues the business of another corporation may be liable for the original corporation's debts [*McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 753-754, 107 CR2d 702* ; *cf.* Katzir's Floor & Home Design, Inc. v. M-MLS.COM (9th Cir 2004) 1143, 1150-1152].

Cross Reference:

Successor liability, see *Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action, 6.14.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionFraudBusiness & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawCorporationsShareholdersTransfers of SharesBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewMergers & Acquisitions LawLiabilities & Rights of SuccessorsSuccessor Liability Doctrine

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1-1 MB Practice Guide: CA Debt Collection 1.32

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.32 Agent Liable for Failing to Disclose Corporate Principal.

An agent who fails to disclose the corporate principal when incurring a debt may be individually liable. The agent may be liable for failing to state the true corporate identity of the principal [*G.W. Anderson Constr. Co. v. Mars Sales (1985) 164 CA3d 326, 332, 210 CR 409* (failure to mention the corporate status); *J&J Builders Supply v. Caffin (1967) 248 CA2d 292, 295, 56 CR 365* (disclosing a fictitious business name only)].

Cross Reference:

Agent's liability for failure to disclose corporate principal, see *Matthew Bender[(R)] Practice Guide: California Contract Litigation, 20.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionFraudBusiness & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawCorporationsShareholdersTransfers of SharesMergers & Acquisitions LawLiabilities & Rights of SuccessorsSuccessor Liability Doctrine

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.33 Partnerships and Partner Liability.

1.33[1] In General Partnership, Partnership and Partners Are Liable. The partnership itself and each partner of a general partnership are liable for the debts of the partnership [*Corp Code §§ 16306(a), 16307*]. However, in order to enforce a judgment against a partner's assets, the partner must be named in the lawsuit and judgment must be obtained against the partner [*Corp Code § 16307(c)*]. A general partnership in which the names of the general partners do not appear is required to file a fictitious business name statement [*B&P Code § 17900 et seq.*]. In such cases, the attorney should obtain and review a copy of the fictitious business name statement in order to ascertain all the partners' names.

1.33[2] In Limited Partnership, Partnership and General Partner Are Liable. The partnership itself and each general partner are liable for the debts of a limited partnership [*Corp. Code § 15643*]. Limited partners are not liable unless they participate in the control of the limited partnership and that control is known to the creditor at the time the debt is incurred [*Corp Code § 15632*].

1.33[3] In Limited Liability Partnership, Only Partnership and Partner Committing Malpractice Are Liable. In a limited liability partnership, only the partnership is liable for non-malpractice debts unless the partnership agrees otherwise [*Corp Code § 16306(c), (d)*]. However, if the debt arises from malpractice, the partner or partners who committed the malpractice also are liable [*Corp Code § 16306(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesTortsMalpractice & Professional LiabilityGeneral OverviewTortsVicarious LiabilityPartnersLimited Partners

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Chapter 1 Planning Collection of Debt
III. DETERMINING WHO MAY BE LIABLE FOR DEBT

1-1 MB Practice Guide: CA Debt Collection 1.34

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.34 Unincorporated Association Is Liable for Its Debts.

An unincorporated association is liable for its acts or omissions as if it were a natural person [*Corp Code § 18250*]. Individual members, directors, officers or agents of unincorporated nonprofit associations are generally not liable for debts of the association (except in specific circumstances) [*Corp Code §§ 18605*, *18610*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsTortsMalpractice & Professional LiabilityGeneral OverviewTortsVicarious LiabilityPartnersLimited Partners

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Chapter 1 Planning Collection of Debt
III. DETERMINING WHO MAY BE LIABLE FOR DEBT

1-1 MB Practice Guide: CA Debt Collection 1.35

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.35 Guarantor Liability.

1.35[1] Guaranty May Create Liability for Debt of Another. A guarantor is one who promises to answer for the debt of another [*CC § 2787*]. A guaranty must be in writing, with limited exceptions [*CC §§ 2793*, *2794*]. A guaranty must have separate consideration unless (1) given or accepted at the time the debt was incurred and (2) the guaranty comprises a portion of the consideration given [*CC § 2792*]. The burden is on the guarantor to prove lack of consideration [*CC § 1615*].

Cross Reference:

Guaranty, see *Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action, 6.08*.

1.35[2] Guaranties May Be of Limited Scope and Must Be Carefully Reviewed. Guaranties can be conditional or unconditional [*CC § 2806*]. Guaranties of collectibility guaranty only that the debtor is solvent, and the debt is collectible by a lawsuit prosecuted with reasonable diligence [*CC § 2800*]. However, if a lawsuit against a principal whose obligation is guaranteed would be moot because the principal is insolvent or left the state and there are no assets in the state, the guaranty is enforceable without suit [*CC §§ 2801*, *2802*].

A continuing guaranty applies to future transactions if it is not revoked. If there is continuing consideration, revocation requires renunciation of the consideration by the guarantor [*CC §§ 2814*, *2815*].

1.35[3] Guaranties May Be Unenforceable If Underlying Agreement Was Modified or Rights of Guarantor Were Impaired. Guaranties may be exonerated if the creditor has modified the original agreement or if the rights of the guarantor are impaired [CCP §§ 2819, 2849]. Exoneration of the guaranty requires that the modification be material [*ITT Diversified Credit Corp. v. Highland Ins. Co. (1987) 191 CA3d 301, 308, 236 CR 433*], but it does not have to prejudice the guarantor [*see Texaco Ref. & Mktg., Inc. v. Aetna Cas. & Sur. Co. (9th Cir. 1990) 895 F2d 637]* . However, a waiver of subsequent modifications and of the guarantor's rights pursuant to *CC § 2819* is enforceable [*Central Building, LLC v. Cooper (2005) 127 CA4th 1053, 1060, 26 CR3d 212]* .

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporate NamesGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsTortsMalpractice & Professional LiabilityGeneral Overview

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1-1 MB Practice Guide: CA Debt Collection 1.36

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.36 Fraudulent Transferees of Debtor Are Liable for Property Received.

A transfer of property determined to be fraudulent results in liability to the transferee to the extent of the debtor's net interest in the property at time of transfer [*CC § 3439.08(b), (c)*]. Any co-conspirators who assist in the fraudulent transfer may also be liable [*Monastra v. Konica Bus. Machs., U.S.A., Inc. (1996) 43 CA4th 1628, 1644, 51 CR2d 528]* .

Cross Reference:

Ch. 4, Fraudulent Transfers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsReal Property LawPurchase & SaleFraudulent TransfersTortsMalpractice & Professional LiabilityGeneral Overview

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1.37 Heirs of Debtor May Be Liable.

The heirs of the debtor may be liable for a debt to the extent they receive property that has not been probated [*see Prob Code §§ 13550*, *13551*, *13553* (obligations of property passing to the surviving spouse without probate); *see also Prob Code § 19100 et seq*. (claims against property distributed from a living trust of the debtor when there is no probate)].

Cross Reference:

Time limits to pursue debt of decedent debtor, see *1.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsEstate, Gift & Trust LawProbateGeneral OverviewTortsMalpractice & Professional LiabilityGeneral Overview

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1-1 MB Practice Guide: CA Debt Collection 1.38

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.38 Creditor May Be Third Party Beneficiary of Agreement Between Third Party and Debtor.

If, by agreement with a debtor, a third party assumes the debt, the third party may have liability to a creditor under the third party beneficiary theory [CC § 1519; *Gilbert Fin. Corp. v. Steelform Contracting Co. (1978) 82 CA3d 65, 69-70, 145 CR 448]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.39 Purchaser of Business May Be Liable Under Bulk Sales Statute.

A purchaser of assets of a business whose principal business is the sale of inventory from stock or a restaurant may be liable to creditors of the seller if a bulk sales notice is not published [*Com Code § 6101 et seq.*].

Cross References:

Ch. 4, Fraudulent Transfers; Bulk sales, see *Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action, 6.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsContracts LawDebtor & Creditor RelationsContracts LawThird PartiesGeneral OverviewContracts LawThird PartiesBeneficiariesGeneral Overview

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Chapter 1 Planning Collection of Debt
IV. DETERMINING WHAT ASSETS MAY LEGALLY BE APPLIED TO DEBT

1-1 MB Practice Guide: CA Debt Collection 1.40

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.40 CHECKLIST: Determining What Assets May Legally Be Applied to Debt.

☐ Determine what property is subject to enforcement.

○ Distinguish between property subject to enforcement and property subject to execution.

Authority:
CCP §§ 695.010, 695.030, 695.035, 695.060, 699.720, 700.015-700.200

Discussion:
See *1.42*

○ Determine if community property is available to satisfy debt.

☐ Community property is liable for debt of spouse/domestic partner incurred before or during marriage.

Authority:
Fam Code §§ 297.5, 902, 910

Discussion:
See *1.42[5][a]*

☐ All property acquired during marriage is presumed to be community property.

Authority:
Fam Code § 760

Discussion:
See *1.42[5][b]*

☐ Determine when debtor was married to determine if spouse's wages may be garnished.

Authority:
Fam Code § 911; *CCP § 706.109*

Discussion:
See *1.42[5][a]*

☐ Determine if community property is available after death of debtor to satisfy debt if there is no probate.

Authority:
Prob Code §§ 13550, *13551*, *13553*

Discussion:
See *1.42[5][c]*

○ Determine if debtor has separate property subject to enforcement.

Authority:
Fam Code § 913(a)

Discussion:
See *1.42[6]*

○ If spouse has separate property, determine if spouse is personally liable.

Authority:
Fam Code § 913

Discussion:
See *1.42[7]*

☐ Determine what exemptions apply to debtor's property.

Authority:
CCP §§ 703.010-704.995

Discussion:
See *1.43*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty

RightsCharacterizationSeparate Property

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1-1 MB Practice Guide: CA Debt Collection 1.41

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.41 Options and Strategy.

Having identified the debtor's assets through client information and case appropriate investigations, the attorney should analyze which assets are legally available for collection. Community and separate property issues bear on collectibility, as does the availability of exemptions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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1-1 MB Practice Guide: CA Debt Collection 1.42

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.42 Most Types of Property Subject to Enforcement of Judgment.

1.42[1] Attorney Should Distinguish Between Property Subject to Enforcement and Property Subject to Execution. "Execution" and "enforcement" are terms of art often incorrectly used interchangeably. Enforcement is a term which is broader than execution. Execution refers to that subset of enforcement performed by a levy. Some property is not subject to execution, but the judgment nevertheless may be enforced via alternative methods.

1.42[2] Property Not Subject to Execution. The following types of property are not subject to execution [*CCP § 699.720*]:

- An alcoholic beverage license that is transferable under *B&P § 24070 et seq*.
- The interest of a partner in a partnership or member in a limited liability company if the partnership or the limited liability company is not a judgment debtor.
- A cause of action that is the subject of a pending action or special proceeding.
- A judgment in favor of the judgment debtor prior to the expiration of the time for appeal from the judgment or, if an appeal is filed, prior to the final determination of the appeal.
- A debt (other than earnings) owing and unpaid by a public entity.
- The loan value of an unmatured life insurance, endowment, or annuity policy.
- A franchise granted by a public entity and all the rights and privileges of the franchise.
- The interest of a trust beneficiary.
- A contingent remainder, executory interest, or other interest in property that is not vested.
- Property in a guardianship or conservatorship estate.

1.42[3] Property Subject to Execution. Types of property that are subject to execution and that the creditor's attorney is most likely to encounter are [*CCP §§ 700.015-700.200*]:

- Deposit accounts.
- Safe deposit boxes.
- Wages (garnished, using a writ of execution).
- Accounts receivable.
- Real property.
- Tangible personal property of business possessed or controlled by debtor.
- Tangible personal property in the debtor's possession.
- Tangible personal property in the possession of a third person.
- Vehicles and vessels.
- Securities.

Cross References:

Enforcement, see *1.53* and *1.55*.

See Ch. 16, Executing and Levying Against Personal Property.

See Ch. 17, Executing and Levying Against Real Property.

1.42[4] All Property Is Subject to Postjudgment Enforcement Unless Specifically Excepted. After judgment, all property of a judgment debtor is subject to enforcement other than property specifically excepted by law [*CCP § 695.010*]. The principal exception is property that is not assignable or transferable [*CCP § 695.030(a)*]. Regardless of transferability, the following property (restricted by specific statutory limitations) is subject to enforcement:

- An interest in a trust [*CCP § 695.030(b)*].
- A cause of action in a pending action or proceeding [*CCP § 695.030(b)*].
- Specified real property leases [*CCP § 695.035*].
- An alcoholic beverage license [*CCP § 695.060*].

1.42[5] Community Property Is Liable for Debt of Either Spouse.

1.42[5][a] Community Property Is Liable for Debt of Either Spouse Incurred Before or During Marriage. Community property is liable for a debt of either spouse incurred before or during marriage [*Fam Code §§ 902, 910*]. Similarly, the community property equivalent of property owned by a domestic partner is liable for the debts of either partner [*Fam Code § 297.5*]. Community property is not liable for debts incurred by a spouse after separation [*Fam Code § 910(b)*]. Community property received by the non-debtor spouse in a marital dissolution is not liable unless the

debt was assigned to the non-debtor spouse. However, property awarded to the non-debtor spouse remains subject to a lien obtained prior to separation [*Fam Code § 916(a)(2)*].

Distinguish:

It is a common misconception that a debt is a "community debt" or a "separate debt." Technically, there is no such thing as a "community debt." The question is whether community property is liable for enforcement of the debt. In general, community property is liable for enforcement of the debts of either spouse. When the debt arises from a tort committed by one of the spouses, however, there is a priority order of which property (the separate property of the tortfeasor or community property) may first be applied to the debt, depending upon whether the tort was based upon something done for the benefit of the community [*CCP § 1000*].

Strategic Point:

If an individual debtor is married, but the spouse is *not* personally liable, counsel should consider naming the spouse of debtor in the law suit "as to community property only." While naming the spouse is not necessary to have community property liable for enforcement in California [*Fam Code § 910*], it can facilitate execution and permit certain liens to be effective against property in the name of the spouse. It may also be critical if the debtor lives in or has property in another community property state, such as Arizona. If it is known that the debtor lives in or has property outside of California, the attorney should check with an attorney in that state as to the best method to obtain a judgment enforceable against community property. However, naming the spouse can be challenged by demurrer in California [*11601 Wilshire Assocs. v. Grebow (1998) 64 CA4th 453, 457, 74 CR2d 912* ; *Reynolds & Reynolds Co. v. Universal Forms, Labels & Sys., Inc. (CD CA 1997) 965 F Supp 1392, 1396]* .

Exception:

Wages of a non-debtor spouse are not liable if the debt was incurred prior to the marriage (and therefore cannot be garnished), nor are they liable after receipt if not commingled with other community funds and placed into an account over which the judgment debtor spouse has no control [*Fam Code § 911*]. Due to this consideration, a court order must be obtained to levy on the wages of a non-judgment debtor spouse when the debt was incurred during marriage [*CCP § 706.109*]. A noticed motion must be made describing the date the debt resulting in the judgment arose, the date of the marriage, and stating that a current writ of execution has been issued.

1.42[5][b] All Property Acquired During Marriage Is Presumed to Be Community Property. All property acquired by the debtor or the debtor's spouse during marriage is presumed to be community property [*Fam Code § 760*]. However, the name or title in which the property is held can affect presumptions regarding whether the property is community or separate property [*Evid Code § 662*].

1.42[5][c] Community Property Received by Non-Debtor Spouse After Death of Debtor Remains Available to Satisfy Debt If No Probate. If the non-debtor spouse received community property after the debtor dies, that property remains available to satisfy the debt if there is no probate [*Prob Code §§ 13550*, *13551*, *13553*]. However, if there is a probate, a claim must be made in the probate estate [*Prob Code § 13553*].

Cross Reference:

Time limitations for claims against decedent, see *1.11*, *1.21*.

1.42[6] Separate Property of Debtor Is Subject to Enforcement. The separate property of the debtor is subject to enforcement of any of his debts [*Fam Code § 913(a)*].

1.42[7] Separate Property of Spouse Generally Is Not Subject to Enforcement. Generally, the separate property of the debtor's spouse is not subject to enforcement [*Fam Code § 913(b)*]. Property acquired by the spouse before a marital dissolution, but after separation, is the spouse's separate property [*Fam Code § 771*].

Cross Reference:

Personal liability of spouse, see *1.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsGeneral Overview

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IV. DETERMINING WHAT ASSETS MAY LEGALLY BE APPLIED TO DEBT

1-1 MB Practice Guide: CA Debt Collection 1.43

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.43 Exemptions Sometimes Make Property Unavailable to Satisfy Debt.

Exemptions are available to natural persons only (not entities) [*CCP § 703.020*]. Some property can be exempted entirely and other property may be exempted up to specific dollar values.

Consider:

For settlement purposes, the debtor sometimes may be persuaded voluntarily to make available certain assets that might not otherwise be available to satisfy the debt (or that may be enforced only through very limited, expensive or cumbersome methods of enforcement). These assets might include exempt property, trust assets or income or other property (such as intellectual property which might not be subject to enforcement other than through the expensive process of appointing a receiver).

Cross Reference:

Exemptions for personal property, see Ch. 16, Executing and Levying Against Personal Property.

Exemptions for real property, see Ch. 17, Executing and Levying Against Real Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsGeneral Overview

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Chapter 1 Planning Collection of Debt
V. CONSIDERING THE AVAILABLE METHODS FOR PRESERVING OR RECOVERING ASSETS

1-1 MB Practice Guide: CA Debt Collection 1.44

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.44 CHECKLIST: Considering the Available Methods for Preserving or Recovering Assets.

☐ Determine if secured property may be preserved or recovered.

Authority:
Com Code § 9610; *CCP § 511 et seq*.

Discussion:
See *1.46*

☐ Determine if any fraudulent transfer of real property permits recording of lis pendens.

Authority:
Kirkeby v. Superior Court, (2004) 33 C4th 642, 650, 15 CR3d 805 ; *CCP §§ 405.20, 405.22, 405.24*

Discussion:
See *1.47*

☐ Determine if injunction may be used to preserve fraudulently transferred or secured property.

Authority:
CC § 3439.07(a)(3)(A); *Chrysler Credit Corp. v. Waegele (1972) 29 CA3d 681, 685, 105 CR 914*

Discussion:
See *1.48*

☐ Determine if right to attach order may be obtained and if it would be advantageous with respect to

those assets that are subject to attachment:

○ Commercial contract claims.

Authority:
CCP §§ 483.010, 485.010, 486.010 et seq.

Discussion:
See *1.49[1]*

○ Assets subject to attachment.

Authority:
CCP § 487.010

Discussion:
See *1.49[2]*

☐ In suit for possession of property, determine if claim and delivery may be obtained and if it would be advantageous.

Authority:
CCP § 512.010

Discussion:
See *1.50*

☐ Determine if a receivership is available and would be advantageous prior to judgment.

Authority:
CCP § 564(b); Hoover v. Galbraith (1972) 7 C3d 519, 528, 102 CR 733

Discussion:
See *1.51*

☐ Determine which postjudgment liens applicable.

○ Real property liens.

○ Personal property liens.

Authority:
CCP §§ 697.310 et seq., 697.510 et seq., 708.110(d), 708.120(c)

Discussion:
See *1.52[1]*

☐ Determine which postjudgment levies may be applicable.

Authority:
CCP §§ 700.010-700.200

Discussion:
See *1.52[2]*

☐ Determine what other postjudgment remedies might be available.

○ Determine if assignment orders to obtain monies due, or to become due, from third parties to judgment debtor may be helpful.

Authority:
CCP § 708.510; *Hustead v. Superior Court of Contra Costa County (1969) 2 CA3d 780, 83 CR 26*

Discussion:
See *1.53[1]*

○ Determine if debtor examination to discover assets or create liens is useful.

Authority:
CCP § 708.110(d), 708.120(c), 708.510; *So. Cal. Bank v. Zimmerman (In re Hilde) (9th Cir. 1997) 120 F3d 950, 956*

Discussion:
See *1.53[2]*

○ If debtor is prosecuting litigation, determine if lien in pending action may be applicable.

Authority:
CCP §§ 695.030(b)(2), 699.720(a)(3), 708.410(a)

Discussion:
See *1.53[3]*

○ Determine if appointment of receiver may be appropriate.

Authority:
CCP §§ 564(b)(3), (4), 699.070, 708.610 et seq.

Discussion:
See *1.53[4]*

○ Determine if charging order to reach debtor's interest in partnership or limited liability company may be applicable.

Authority:
CCP § 708.310 et seq.; *Corp Code § 17302*

Discussion:
See *1.53[5]*

○ Determine if creditor's suit to establish debt owed to judgment debtor may be applicable.

Authority:
CCP § 708.210 et seq.

Discussion:
See *1.55[6]*

○ Determine if any trust property is subject to enforcement.

Authority:
Prob Code §§ 15301, 15304, 15306.5, 18200; Cal Rules Ct, Rules 3.1201-3.1207

Discussion:
See *1.53[7]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesReceiverships ReceiversPowersReal Property LawNonmortgage LiensGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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V. CONSIDERING THE AVAILABLE METHODS FOR PRESERVING OR RECOVERING ASSETS

1-1 MB Practice Guide: CA Debt Collection 1.45

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.45 Options and Strategy.

A security interest may be obtained; a lis pendens may be filed, and provisional remedies (such as attachment and injunctions) may be obtained prior to judgment in a debt collection action to protect the assets while the litigation is in progress. After a judgment, some types of property (such as an interest in a pending action) are not available for execution and may be reached only by specific specialized remedies, such as filing a lien in a pending action. In other instances, alternative methods exist to reach the same property and an attorney should consider which method to utilize.

Example:

For example, a receivable may be attacked by levy or by an assignment order, each of which is appropriate under different circumstances.

Cross References:

Strategies for asset recovery, see *1.54* et seq.

Provisional remedies, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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1-1 MB Practice Guide: CA Debt Collection 1.46

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.46 Assets Securing Debt May Be Preserved or Recovered.

If and when the debtor is approached, the debtor may agree to make voluntary payments and to provide security. There may also be assets previously provided as security. Depending upon the type of property securing the debt, perfection may be required to achieve priority. The creditor may sell the secured property after default to satisfy the debt [*Com Code § 9610*].

If the debtor has possession of the security, a creditor may resort to self-help to obtain possession if doing so does not cause a breach of the peace [*Com Code § 9609*]. However, if the property may not be repossessed through self-help, a suit for recovery of possession of personal property may be required. The provisional remedy of claim and delivery may be used [*CCP § 511 et seq.*].

Cross References:

Self help repossession, see *Ch. 5, Debt Collection Prior to Litigation, 5.33* et seq.

Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralContracts LawSecured TransactionsPerfection & PriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.47 Real Property May Be Preserved in Some Circumstances by Recording Lis Pendens at Time Suit Is Filed.

If the debtor has fraudulently transferred real property, a creditor filing suit to recover his debt may add a cause of action for fraudulent transfer and record a notice of pendency of action (commonly known as a lis pendens) against the real property [*Kirkeby v. Superior Court (2004) 33 C4th 642, 650, 15 CR3d 805]* . The purpose of a lis pendens is to put everyone on notice that the property is the subject of a pending action which might cause a change in title [*CCP § 405.24*]. The lis pendens process requires that the notice of pendency of action be [*CCP §§ 405.20, 405.22*]:

- Served on persons specified in the statute.
- Recorded in the office of the county recorder in which the real property is located.
- Filed with the court, with the county recorder instrument number.

Cross Reference:

Lis pendens, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.03 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingLis PendensReal Property LawPurchase & SaleFraudulent Transfers

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.48 Injunction May Sometimes Be Utilized to Preserve Property Pre-Judgment.

An injunction may be obtained to restrain further transfer of fraudulently transferred property [*CC § 3439.07(a)(3)(A)*]. An injunction also may be obtained to prevent the disposition of collateral by an out-of-state debtor [*Chrysler Credit Corp. v. Waegele (1972) 29 CA3d 681, 685, 105 CR 914]* .

Cross Reference:

Injunction, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.24 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralReal Property LawPurchase & SaleFraudulent Transfers

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1-1 MB Practice Guide: CA Debt Collection 1.49

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.49 When Right to Attach Order Is Obtained, Property Can Be Preserved for Postjudgment Enforcement by Creating Attachment Liens.

1.49[1] Attachment Available for Commercial Contractual Claims. Attachment requires a contractual (or quasi-contractual) commercial claim of a readily ascertainable amount of $500 or more [*CCP § 483.010*]. Attachment is available on an ex parte basis when the debtor is about to make assets unavailable to satisfy the debt and on certain specific other bases [*CCP § 485.010*].

A temporary protective order also may be available [*CCP § 486.010 et seq*.].

Cross Reference:

Attachment, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.34 et seq*.

1.49[2] Assets Subject to Prejudgment Attachment Generally Are Same As Those Subject to Postjudgment Enforcement. All assets of an entity (non-natural person) for which a method of levy is described in the attachment law are subject to attachment [*CCP § 487.010(a), (b)*]. For a natural person, only the following assets are subject to attachment [*CCP § 487.010(c)*]:

- Interests in real property except leasehold estates with unexpired terms of less than one year.
- Accounts receivable, chattel paper, and general intangibles arising out of the conduct by the defendant of a trade, business, or profession, except any such individual claim with a principal balance of less than $150.
- Equipment.
- Farm products.
- Inventory.

- Final money judgments arising out of the conduct by the defendant of a trade, business, or profession.

- Money on the premises where a trade, business, or profession is conducted by the defendant and, except for the first $1,000, money located elsewhere than on the premises, and deposit accounts. If the defendant has more than one deposit account or has at least one deposit account and money located elsewhere than on the business premises, the court, on application of the plaintiff, may order that the writ of attachment be levied so that an aggregate amount of one $1,000 in the form of that money and in those accounts remains free of levy.

- Negotiable documents of title.

- Instruments.

- Securities.

- Minerals or the like (including oil and gas) to be extracted.

Example:

Assets available for enforcement, but not subject to attachment:

- Earnings of an employee [*CCP § 487.020(c)*].

- Intellectual property (other than rights to payment--for example, royalties--even for royalties, in the attachment context, one can only levy on obligations in existence at the time of the levy; assignment orders that can cover future obligations are not available) [*CCP §§ 481.115*, *488.470*; *Com Code § 9102*.

Cross Reference:

Attachment, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.34 et seq*.

1.49[3] Attachment Liens Generally Are Created by Levying Writs of Attachment. Writs of attachment are levied in the same manner as postjudgment writs of execution against the same type of property [*compare CCP §§ 488.300-488.485* (attachment) *with CCP §§ 700.010-700.200* (execution)]. However, when the levying officer obtains possession of property or money through the levy, the sheriff will hold the property or money (pending the outcome of the litigation) rather than selling it and delivering the proceeds to the levying party [*compare CCP §§ 488.710-488.740* (attachment) *with CCP §§ 701.510*, *701.520*, *701.810*, *701.820* (execution)].

A plaintiff who obtains a right to attach order may also employ various remedies other than levy [*see CCP § 491.110 et seq*.; *see 11.53*].

Strategic Point:

Even when assets are unknown (so they could not be attached), the attorney might apply for a right to attach order just to obtain the benefit of prejudgment discovery of assets (which would not otherwise be available until judgment is obtained) [*CCP §§ 485.230*, *491.110*, *491.120*]. The factors to be considered are the size of the case, the time until judgment might be obtained and the relative ease or difficulty in

meeting the procedural and substantive requirements for obtaining a right to attach order.

Cross Reference:

Attachment, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.34 et seq.*

1.49[4] Distinctions Between Attachment Remedies Compared With Post-Judgment Enforcement Remedies May Be Significant. The following remedies are unavailable under attachment or are different in comparison with postjudgment enforcement and should be considered when planning:

- Assignment order for receivables is unavailable [*see CCP § 491.110 et seq.*].

- Equipment can be attached only by recording a lien; the levying officer may not take equipment into his or her possession [*CCP § 488.375*].

- Inventory can be attached either by recording a lien or by the levying officer taking into his possession [*see CCP §§ 488.395, 488.405*].

- Examination of a debtor or others regarding the debtor's assets is through a deposition under attachment, not the court-ordered examination procedure as in postjudgment enforcement [*CCP § 485.230*]. However, the examination of a third party having possession or control of assets of the debtor (or examination of a witness regarding such a third party examination) is conducted in the same manner under attachment as it is postjudgment [*CCP § 491.110 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawThird PartiesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.50 Claim and Delivery to Preserve Personal Property in Lawsuit to Recover Personal Property.

Claim and delivery is a provisional remedy that may be used to preserve property prior to judgment. It generally is used when the property is security for the debt [*CCP § 512.010*].

Cross Reference:

Claim and delivery, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.15 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawThird PartiesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.51 Pre-Judgment Receiverships Are Used in Limited Contexts.

Due to the harshness of the remedy, pre-judgment receiverships are generally permitted only in limited contexts, when other remedies are inadequate [*CCP § 564 (b)*; *see Hoover v. Galbraith (1972) 7 C3d 519, 528, 102 CR 733]* . Receiverships also usually entail great expense.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawThird PartiesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.52 After Judgment Is Obtained, Various Methods of Enforcement Can Be Used.

1.52[1] Postjudgment Liens May Be Created on Real and Personal Property. Judgment liens on real property are created by recording an abstract of judgment in each county where the debtor's real property is located [*CCP § 697.310 et seq.*]. A judgment lien on business personal property is created by preparing a JL-1 form and recording it with the California Secretary of State [*CCP § 697.510 et seq.*]. Examination liens on personal property are created by obtaining court order for appearance and examination ("ORAP") and serving same on the debtor and/or third parties [*CCP §§ 708.110(d), 708.120(c)*]. Other postjudgment liens may be created.

Strategic Point:

The attorney should always obtain and record abstracts of judgment and the JL-1 form. These are simple and inexpensive means of acquiring significant liens which attach both to presently owned and after acquired property. The attorney should consider recording an abstract of judgment not only in all counties where the debtor currently owns real property, but also in counties where the debtor may later acquire real property, does business, or where family members or associates reside.

Warning:

If the debtor is a non-California corporation, a judicial lien on California personal property cannot be perfected by the filing of a notice of judgment lien with the California Secretary of State. Instead, perfection of a lien against such collateral can be accomplished only by an appropriate filing under the laws of the state where the corporation is incorporated [*Aura Sys. v. Barovich (In re Aura Sys.) (Bankr Cal 2006) 347 BR 720, 725*].

Cross Reference:

Postjudgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

1.52[2] Postjudgment Enforcement May Be Carried Out by Levying Writs of Execution. All property subject to enforcement, other than property specifically excepted by statute, may be levied [*CCP §§ 699.710, 699.720*]. A

method of levy exists for each category of property. The categories include [*see CCP §§ 700.010-700.200* (methods of levy)]:

- Real property.
- Tangible property in the hands of the debtor.
- Property in a going business of the debtor.
- Property in the hands of a third person.
- Vehicles.
- Personal property represented by documents in the hands of the debtor or a third party.
- Bank accounts.
- Receivables.

Wage garnishments also utilize writs of execution directed at employers [*CCP § 706.021*].

Generally, the sheriff or marshal levies a writ of execution. However, in specified situations not requiring seizure, a registered process server may levy a writ of execution [*CCP § 699.080*].

Strategic Point:

Levying by registered process server, although more expensive, must be considered when speed and/or timing is significant; for example, to levy on a bank account which is known to, or likely to, contain significant funds at a specific time, such as a payday. This strategy also should be considered when levying a writ of attachment.

Cross References:

Real property, see Ch. 16, Executing and Levying Against Personal Property.

Personal Property, see Ch. 17, Executing and Levying Against Real Property.

Garnishment of wages, see Ch. 21, Garnishment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.53 Numerous Other Postjudgment Remedies Are Available to Facilitate Enforcement.

1.53[1] Assignment Orders Are Available to Obtain Monies Due, or to Become Due, From Third Parties to Judgment Debtor. Assignment orders may be used to require third parties who owe the debtor money, or may owe the debtor money in the future, to pay that money to the judgment creditor as it becomes due [*CCP § 708.510*].

Strategic Points:

- This remedy is extremely useful to cover streams of payment which might otherwise require numerous levies and, in certain cases, difficult timing because the obligation to pay does not arise until a future event occurs, such as monthly rental payments from the judgment debtor's real property [*Hustead v. Superior Court of Contra Costa County (1969) 2 CA3d 780, 83 CR 26*].

- Often, it will be unclear whether a debtor is being compensated as an employee or as an independent contractor. Therefore, it is advisable to use both a wage garnishment and an assignment order if counsel is at all unsure.

Cross Reference:

Detailed discussion of assignment orders, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.22 et seq.*

1.53[2] Debtor's Examinations May Be Used to Discover Assets. The judgment debtor and third persons owing money to the debtor or holding the debtor's property may be examined by obtaining and serving an Application and Order For Appearance and Examination (commonly called an "ORAP" or "OEX") [*CCP §§ 708.110*, *708.120*]. Witnesses who have knowledge regarding the debtor's assets or liabilities also may be examined [*CCP § 708.130*]. These procedures are generally preferred to the less effective methods of interrogatories and demands for production and inspection [*CCP § 708.010 et seq.*].

Consider:

When doing such an examination, make certain to serve a subpoena duces tecum to compel the examinee to produce relevant documents.

Strategic Points:

- Service of the ORAP creates a "secret lien" on all personal property of the debtor (or on specific personal property in the case of service of a third party exam). This lien may prove very valuable if it is acquired more than 90 days before debtor files bankruptcy as it will give the creditor priority over any bankruptcy trustee [*CCP §§ 708.110(d)*, *708.120(c)*; *So. Cal. Bank v. Zimmerman (In re Hilde) (9th Cir 1997) 120 F3d 950, 956*].

- An Orap lien (as well as execution liens and other liens described in *CCP § 697.910*) continues its existence on money paid to third parties if those parties do not otherwise qualify for an exception; e.g., as a holder in due course [*Credit Suisse First Boston Mortgage Capital, LLC v. Danning, Gill, Diamond & Kollitz (2009) 178 CA4th 1290, 101 CR3d 192]* .

- Consider hiring a court reporter to transcribe judgment debtor examinations if the debt is significant. Not only will the testimony be preserved, but if there is the potential for a fraudulent transfer or other action, such testimony may be utilized to the creditor's advantage. Counsel also should consider subpoenaing third parties for examination when the debtor has borrowed or obtained other credit (such as buying or leasing a new car) and obtaining the financials statements submitted by the borrower in support of the credit.

Cross Reference:

Detailed discussion of conducting a debtor's examination, see Ch. 10, Postjudgment Discovery.

1.53[3] Lien May Be Filed in Pending Action in Which Judgment Debtor Has Interest. A judgment creditor is not entitled to *execute* on a pending action of the judgment debtor [*CCP § 699.720(a)(3)*]. However, the creditor may acquire a *lien* in a pending action [*CCP §§ 695.030(b)(2)*, *708.410(a)*]. This lien is a quick, simple, inexpensive and effective remedy when one of the debtor's principal assets is his cause of action against a third party.

1.53[4] Receiver May Aid in Enforcing Judgment. A receiver is a useful but costly remedy to enforce a judgment and may be appropriate when other remedies are inadequate [*CCP §§ 564(b)(3)*, *(4)*, *699.070*, *708.610 et seq*.]. For example, a receiver may be used sell or collect the royalties from property of the debtor [*see CCP § 708.510(a)*; *Corp Code § 17302(a)*]. A receiver is also used in connection with a postjudgment sale of a liquor license, which has significant value.

Cross Reference:

Procedure for appointment of receiver, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.34 et seq*.

1.53[5] Charging Orders Reach Interest in Partnership or Limited Liability Company. A charging order is used to reach monies distributable to a judgment debtor for his/her interest in a partnership or LLC [*CCP § 708.310 et seq*.]. If the order is ineffective, foreclosure is an option [*Corp Code § 17302*].

Cross Reference:

Charging orders, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.12*.

1.53[6] Creditor's Suit May Be Used to Establish Debt Owed Judgment Debtor. A creditor's suit may be filed to establish the existence and amount of a debt owed to the judgment debtor by a third party [*CCP § 708.210 et seq*.].

Strategic Point:

Counsel should consider this option when a third party owes the debtor money, but fails to respond to a levy or assignment order and the alternative third party examination procedure proves ineffective [*see CCP §§ 700.170*, *708.180*, *708.510*].

1.53[7] Beneficiary's Interests in Trust May Be Subject to Enforcement by Motion.

1.53[7][a] Property of Debtor in Revocable Trust Is Subject to Enforcement. The property of a debtor in a revocable trust is subject to enforcement of a judgment [*Prob Code § 18200*].

Prerequisite:

While not technically required by statute or case law, most levying officers will not levy on property in any name other than the name of the judgment debtor as it appears on the judgment. Therefore, a court order from the court that issued the judgment ordinarily will be necessary to levy on assets in the name of a revocable trust. The order must be applied for ex parte, without notice, in order to permit the levy to be made without the debtor first transferring the property [*Cal Rules Ct, Rules 3.1201-3.1207*].

Cross Reference:

Enforcement against trust, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.03 et seq*.

1.53[7][b] Property in Irrevocable Trust Subject May Be Subject to Enforcement. Property or the rights of a debtor in a trust (other than a revocable trust) are subject to enforcement only by petition to the probate court having jurisdiction over the trust [*CCP § 709.010*; *Prob Code § 17000*]. Even if the trust document contains restrictions on transfers and/or various requirements regarding payments for education and support, portions of the debtor's interests may be subject to enforcement [*see Prob Code § 15300 et seq*.].

Cross Reference:

Enforcement against trust, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.03 et seq*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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VI. DEVELOPING A STRATEGY FOR ASSET RECOVERY

1-1 MB Practice Guide: CA Debt Collection 1.54

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.54 CHECKLIST: Developing a Strategy for Asset Recovery.

☐ Evaluate time, costs and effectiveness of various available remedies.

Discussion:
See *1.56*

☐ Determine client's objective and parameters**.**

Discussion:
See *1.57*

☐ Determine actions to take before approaching debtor.

Discussion:
See *1.58*

☐ Consider negotiation issues.

- ○ Consider opportunities to negotiate throughout collection process.
- ○ Consider leverage points.
- ○ Consider ancillary goals.

Discussion:
See *1.59*

☐ Determine when to file suit.

Discussion:
See *1.60*

☐ Determine which assets and methods to use to preserve assets of debtor during litigation and when to file suit.

Discussion:
See *1.61*

☐ When judgment is obtained, determine timing, methods, and order for attacking assets.

Discussion:
See *1.62*

☐ If property is unavailable for enforcement, evaluate additional litigation possibilities.

Discussion:
See *1.63*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.55 Options and Strategy.

If, after the initial evaluation, the attorney accepts the case, the attorney should develop an asset recovery strategy. In order to develop that strategy, the attorney should review the asset investigation(s), and identify the assets of the debtor with adequate value to satisfy the debt (that is, assets that are legally available for collection, non-exempt, not subject to pre-existing liens, and which, generally, can be reached in California).

The strategy must also include a determination as to whether, when, and how to approach the debtor. Before negotiating with the debtor, the attorney must determine the client's objectives and settlement parameters, evaluate any available information regarding the debtor's likely responses to various approaches and methods, consider available leverage points, and, during the negotiation, keep in mind important ancillary objectives. Although determining which of the debtor's assets to attack and the methods to employ will generally relate to the costs, effectiveness, and time required to do so effectively, that determination sometimes will depend on which are most likely to cause the debtor to want to satisfy the debt (rather than simply which assets might be adequate to do so); for example, going after a particular asset the debtor values (such as a home or car) or involving particular third parties (the debtor's customers or relatives) in the enforcement process.

This part explains a general approach to the analysis to be undertaken. Collection, however, is partly an art, and the determination of exactly how to proceed will vary with each client and debtor.

Strategic Point:

It is essential that counsel fully and realistically assess the weaknesses of the client's own case before initiating settlement negotiations, so that counsel can take those factors into consideration when assessing settlement value.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral Overview

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1-1 MB Practice Guide: CA Debt Collection 1.56

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.56 Time, Costs, and Effectiveness of Potential Remedies Should Be Evaluated.

1.56[1] Pre-Judgment Perfection of Security Interests Are Quick and Simple. Pre-judgment perfection of any previously obtained voluntary security interests are generally quick and simple to perfect.

1.56[2] Lis Pendens Is Inexpensive, But Has Drawbacks. A lis pendens, when applicable, is a relatively inexpensive and very quickly applied tool. Its drawback is the risk of expungement and liability for attorney's fees.

Cross Reference:

Use of lis pendens in debt collection actions, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.03 et seq.*

1.56[3] Attachment Is Not Always Available As an Option, But Is Relatively Quick. Attachment remedies are similar in time and expense to the equivalent postjudgment remedies, with the proviso that some postjudgment remedies are not available in an attachment context. The real property attachment levy is relatively quick and not very expensive (because an actual sale does not take place).

Cross Reference:

Use of attachment, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.34 et seq.*

1.56[4] Liens Are Quick and Inexpensive. Judgment liens on real and personal property and liens in the debtor's pending actions may be created quickly and inexpensively.

Cross Reference:

Discussion of liens, see Ch. 11, Obtaining and Removing Judgment Liens.

1.56[5] Bank Account Levies Are Inexpensive, But May Require Timing. Bank accounts levies are inexpensive and may be quick, but if timing is required, a registered process server should be used, which is more expensive.

Cross Reference:

Levying on deposit accounts in financial institutions, see Ch. 16, Executing and Levying on Personal Property, 16.51.

1.56[6] Receivables May Be Levied Inexpensively, But Timing May Be Crucial. Receivables may be levied inexpensively, but if timing is critical, a registered process server must be used and is more expensive. If the third person denies the debt, this can turn into long, expensive process to establish the debt by means of a third party debtor examination or a creditor's suit. A levy on a receivable also may elicit a third party claim by a secured party.

If the debtor receives periodic payments for any reason, an assignment order is a more effective process than a levy, but cannot be accomplished sooner than a motion can be drafted, noticed, heard and the order served on third parties. If third parties are related to the debtor (for example, the debtor's corporation, partnership, or limited liability company) levies and orders are often ignored and ineffective.

Warning:

When attempting to collect on assigned accounts receivable, counsel should expect the account receivable debtors to assert multiple defenses, such as that the debt has already been paid, the debt was fully or partially forgiven, and the goods sold were non-conforming. Without the active cooperation of the debtor, these will be nearly impossible to refute. Counsel should point out to the debtor that the more that is collected, the less the debtor's personal exposure, and that it is in the debtor's best interests to cooperate to assure the maximum recovery.

Cross Reference:

Levying receivables, see *Ch. 16, Executing and Levying Against Personal Property, 16.51[6].*

1.56[7] Wage Garnishment Is Initially Very Quick and Inexpensive, But Claims of Exemption or Garnishment of Spouse's Wages Will Require Time Consuming Preparations and Court Appearances. Wage garnishments are very inexpensive at the initial stage, but often elicit a claim of exemption, which in turn requires an opposition, a court hearing, and frequently results in a reduction by the court of the amount to be garnished each pay period. Garnishment of a spouse's wages (only if debt incurred during marriage) requires time for the motion, but may cause debtor more personal concern.

Strategic Point:

While wage garnishment may not, in and of itself, result in a significant recovery, it is very inexpensive and it does impress upon the debtor that the creditor will not go away. This may lead to settlement negotiations and other methods of payment.

Cross Reference:

Wage garnishment, see *Ch. 21, Garnishment, 21.09 et seq.*

1.56[8] Real Property Levies Require a Minimum of Five Months. Real property levies are expensive and the process takes a minimum of five months, usually longer.

Strategic Point:

While initiating a levy on real property can be expensive, it is highly motivating to the debtor to find another source of payment, such as a refinance or sale. Real property levies very frequently are started

but settled before the actual execution sale. In appropriate situations, this method is very effective.

Cross Reference:

Real property levies, see *Ch. 17, Executing and Levying Against Real Property, 17.15 et seq.*

1.56[9] Property in Custody of Levying Officer Is Quick to Levy. Property in custody of a levying officer (that is, property obtained via attachment) is quick and inexpensive to levy.

Cross References:

Attachment, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.34.*

Levies, see Ch. 16, Executing and Levying Against Personal Property.

1.56[10] Levies on Tangible Property May Be Expensive. Tangible property held by the judgment debtor or a third party may be relatively expensive to levy (such as an automobile--depending upon size, weight, and relative value) and subject to concealment in the hands of the judgment debtor.

Cross Reference:

Levies on personal property, see Ch. 16, Executing and Levying Against Personal Property.

1.56[11] Levies on Non-Tangible Property May Vary Significantly Depending on Property and Who Has Control of It. Some types of non-tangible personal property in the hands of third parties such as receivables and bank accounts are quick, easy, and inexpensive to levy. However, some types of personal property that are represented by a document such as a stock certificate or negotiable promissory note instrument in the hand of the judgment debtor may be subject to concealment and as a practical matter require turnover orders. Intellectual property, other than royalties, may require a receiver, which generally is very expensive.

Cross Reference:

Levies, see Ch. 16, Executing and Levying Against Personal Property.

1.56[12] Levies on a Business Can Vary in Expense. A going business of the debtor may be levied at various levels of expense, from a "till tap"--in which the levying officer takes whatever money is on premises at moment of performance of the levy--to a "one day keeper"--in which the levy ing officer takes money from all sales during an entire day--to inventory seizure and sale, in which the levying officer takes into custody inventory and equipment as determined by the attorney, and removes it for sale. The advance for the latter is in excess of $2,700 in Los Angeles County, and substantially more money may be required before property is removed and sold, depending upon its size and weight.

1.56[13] Levies on Property in Revocable Trust Require Court Appearances. Levying on a debtor's assets in a revocable trust (as opposed to levying on assets in the debtor's name) often requires the time and effort of preparing an ex parte application and a court appearance to obtain a court order because the order is generally required by the sheriff, notwithstanding that the levies are permitted by statute without a court order. Enforcing a judgment against the debtor's assets in an irrevocable trust is not permitted by levy. This requires substantially more effort in investigating what restrictions the trust places on distributions, and whether the debtor is also a settlor. It may also require opposition to a debtor's claim that the debtor needs the entirety of distributions for support.

Strategic Point:

If counsel knows of a revocable trust before judgment, counsel should consider amending the pleadings

to include it as an alter ego of the borrowers. Counsel should also consider amending the judgment under the same circumstances if it is discovered after judgment is entered.

Cross Reference:

Levies on trusts, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.03 et seq.*

1.56[14] Debtor Examinations May Take a Long Time to Accomplish. Debtor examinations may take a long time to accomplish because the debtor must be personally served [*CCP § 708.110(d)*] (substituted service is not permitted because a failure to appear is punishable by contempt [*see CCP § 708.170(a)*], and debtors often will evade service. It may require obtaining multiple orders (simple to obtain from the court for price of the motion) and multiple service attempts. Actual service sometimes accomplishes the very valuable benefit of a "secret" one-year lien on all of the debtor's personal property (which may prove invaluable if the debtor files bankruptcy more than three months after service) [*CCP § 708.110(d)*].

Cross Reference:

Detailed discussion of debtor examinations, see Ch. 10, Postjudgment Discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral OverviewContracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawTrustsRevocable Living Trusts

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1-1 MB Practice Guide: CA Debt Collection 1.57

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.57 Counsel Must Be Aware of Client's Objectives and Parameters.

When approaching the debtor, the attorney must be aware of the client's goals regarding collection of the debt. The attorney should know whether the client is willing to accept less than 100 percent of the amount owed, and whether the client is willing to accept payments over time.

Consider:

It is critical throughout the collection process that counsel educate the client about the time, effort, and costs involved with collection of the debt, depending upon the nature of the assets available for collection and the actions required to obtain them. The client must be made aware of the tradeoffs, and made to understand that it often makes sense to forgo the last dollar due (or part of the interest, costs or attorneys' fees) in order to settle the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral OverviewContracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawTrustsRevocable Living Trusts

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1.58 Counsel Must Determine What Action to Take, If Any, Before Approaching Debtor.

Based on what the attorney has learned about the debtor from the client, whether the debt is secured, an asset investigation (including any fraudulent transfers the debtor may have made) and whether the debtor's personality led to a conclusion that the debtor is likely to make assets unavailable if approached by the attorney, it must be determined which, if any, of the following actions to take prior to approaching the debtor:

- Perfect interests in any security previously obtained and unperfected (which should be done in most cases).

- File suit alleging a cause of action that permits the recording of a lis pendens.

- File suit and apply for a right to attach order (on ex parte application or on noticed motion, with or without seeking a temporary restraining order).

- File suit and apply for an injunction.

- File suit if required by time constraint of a statute of limitations or if the debtor is unlikely to negotiate unless the creditor has a suit in hand.

Strategic Point:

If the debt is a loan, counsel should consider a limited extension or other repayment modification before filing suit to correct any deficiencies in the loan documentation and potentially obtain releases of defenses. A few months extra to repay may correct a multitude of potential problems in litigation. However, if the statute of limitations is about to run, a waiver of the statute must be obtained or the suit cannot be delayed

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent

TransfersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawPurchase & SaleFraudulent Transfers

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1-1 MB Practice Guide: CA Debt Collection 1.59

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.59 Approaching and Negotiating With Debtor.

1.59[1] Negotiation With Debtor Occurs at Various Times During Process. Negotiation with the debtor may occur during any part of the process. Negotiations typically occur at one or more of the following stages:

- During demand collection.
- After suit is filed and served.
- While provisional remedies are pursued.
- Just prior to judgment.
- At the time of judgment.
- When postjudgment remedies are being pursued.

It may be determined to proceed directly to suit to attempt to preserve property or because it is determined that the debtor will not react positively until suit is filed.

Cross Reference:

Contacting debtor prior to litigation, see *Ch. 5, Debt Collection Prior to Litigation, 5.07*.

1.59[2] Leverage Points Must Be Effectively Utilized When Negotiating. The presence of the following factors must be considered and utilized during any negotiations with debtor:

- Attorney's fees provision in the underlying agreement.
- Guaranties by individuals or solvent corporations.

- An out of state debtor may have a more difficult time defending suit.

1.59[3] Ancillary Goals Should Be Kept in Mind When Negotiating. Since the entire amount due (or even a settlement amount) often is not received in a lump sum, the attorney often must attempt to achieve important ancillary objectives when negotiating:

- Acknowledgment of the debt.
- Security for the debt or agreed payment plan.
- Avoiding the statute of limitations problems by creating a new debt or obtaining a waiver.
- Creating a simpler, more easily provable debt, such as by "changing" a potential breach of contract or open book account action to a new one on a promissory note.
- Creating individual liability instead of corporate liability, such as by obtaining a guaranty or promissory note signed by an individual in his or her individual capacity, rather than as a business entity.
- Making it quicker and simpler to proceed in case of default, such as by execution of a stipulation to judgment.

Strategic Point:

If, prior to filing suit, an agreement is reached providing for payments, counsel should try to obtain a stipulation to judgment which provides that judgment may be obtained in the event of default. Note, however, that a suit will need to be filed prior to execution of the stipulation to judgment since a pre-suit confession of judgment is disfavored.

Warning:

If a stipulation to judgment provides that the claim will be satisfied and the case dismissed for a lower amount than the creditor may obtain in a judgment in the event of a default in a payment plan, a court may refuse to enter judgment if the higher amount is considered to be a penalty [*Greentree Financial Group, Inc. v. Execute Sports, Inc. (2008) 163 CA4th 495, 499, 78 CR3d 24]* .

Cross Reference:

For more detail regarding this issue, see *Ch. 5, Debt Collection Prior to Litigation, 5.08[2].*

Strategic Point:

When negotiating with the debtor after litigation has been initiated, if the parties agree to a payment plan, the attorney should attempt to obtain an agreement for immediate judgment and then execute a stipulation to forbear from execution provided the debtor does not default. This will allow the attorney to obtain post-judgment liens which may be invaluable in the event of default or bankruptcy.

Cross Reference:

Discussion and forms for stipulation of judgments, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsContracts LawRemediesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.60 Counsel Must Determine When to Cease Demand Collection and File Suit.

If the debtor has not made a final offer for resolution which is commensurate with the attorney's knowledge of the available assets and within the client's settlement parameters, it is time to file suit.

Cross Reference:

Determining causes of action, see Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsContracts LawRemediesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.61 Upon Initiating Litigation, Attorney Should Consider Preservation of Assets Pending Trial.

If the debtor was contacted prior to initiating litigation, depending upon which actions were taken, issues may have to be reconsidered:

- Perfecting interests in any security previously obtained.
- Filing suit alleging a cause of action that permits the filing of a lis pendens.
- Filing suit to apply for right to attach order (on an ex parte application or on noticed motion, with or without a temporary restraining order).
- Filing suit and applying for an injunction.

Strategic Point:

Counsel should consider filing for a pre-judgment writ of possession when the secured assets have the potential for "disappearing."

Cross References:

Preserving assets, see *1.45* et seq.

Lis pendens, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.03 et seq.*

Right to attach orders, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.72.*

Injunctions in debt collection actions, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.24 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsContracts LawRemediesGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.62 When Judgment Is Obtained, Attorney Must Determine When, How, and Which Assets to Attack and Which Remedies to Employ.

1.62[1] Postjudgment Collection Strategy Is Based on Cost and Ease of Collection. The determination of which assets to attack (including remedies to employ), and in what general order, will often be based on which assets which can be reached inexpensively, quickly, and without court hearings; e.g., placing of certain liens or a bank levy.

1.62[2] Assets In Hands of Unrelated Third Parties Usually Are Easier to Collect. Attacking assets in the hands of third parties unrelated to the debtor is preferable to attacks on assets in the hands of the debtor or related third parties because the latter are less likely to be honored, and the assets may then be concealed. These general rules, however, are subject to modification; the effective use of the available remedies is partly an art and depends on a variety of factors, including what is known about the debtor, the size of the debt, and other factors.

Example:

Real property often has significant net equity in excess of permitted exemption amounts (no exemption for non-dwelling real property unless the debtor in bankruptcy uses his or her omnibus exemption) [*CCP § 703.140(b)(5)*]. This valuable asset can be secured quickly and inexpensively post-judgment via an abstract of judgment [*CCP § 697.310*]. However, actual levy requires the outlay of at least $1,000, and the process generally takes a minimum of six months to complete. Therefore, an abstract of judgment to create a lien generally is recorded immediately after judgment (or a lien is created immediately after obtaining a right to attach order by levying a writ of attachment).

1.62[3] Collection Strategy May Be Designed to Avoid Alerting Debtor to Collection Efforts. Sometimes the timing of the remedy and the required notice to the debtor require a modification of strategy in order to avoid making the debtor aware of the creditor's efforts, so that the debtor cannot conceal or move certain assets.

Examples:

- If the debtor has a bank account with substantial funds, the attorney may decide not to record an abstract of judgment to create a judgment lien on real property (because the county recorder will then

provide notice to the debtor) until the attorney knows the bank levy has been served.

- On the other hand, if the debt is large and the real property provides the most likely source of satisfaction of the debt, the abstract may be recorded and the attorney may refrain from any other enforcement methods (for 90 days) that may cause the debtor to file bankruptcy. This is done so the creditor will be a secured creditor if the debtor files bankruptcy and will not have to share the non-exempt equity with other creditors and the trustee. Notwithstanding that the debtor will get notice of the recording, often that notice alone will not trigger a bankruptcy whereas other, more aggressive measures which immediately deprive the debtor of possession of property or funds are more likely to trigger a bankruptcy.

1.62[4] Debtor's Examination May Stimulate Settlement. Debtor examinations are often considered time consuming and of little benefit in obtaining valuable information. However, if the debtor is averse to appearing in court and/or providing information about assets, business, relatives, and business associates, or if the debtor is averse to the creditor obtaining orders for those other persons to come to court, service of orders for examinations often can cause the debtor to initiate settlement discussions to avoid an examination.

Cross References:

Examination of debtor, see *Ch. 10, Postjudgment Discovery, 10.25* et seq.

Examination of third parties, see *Ch. 10, Postjudgment Discovery, 10.39* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationNoticeCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentReal Property LawBankruptcyGeneral OverviewReal Property LawBankruptcySecured Claims

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.63 When Property Is Not Available for Enforcement, Attorney Should Evaluate Necessity, Time, Cost, and Effectiveness of Potential Postjudgment Litigation.

After filing suit, the attorney will often discover facts that require reevaluation and/or availability of new litigation or enforcement options such as:

- Fraudulent transfer suit (and lis pendens if applicable).
- Creditor's suit.
- Motion to add alter egos to judgment, or separate suit against alter ego.
- Motion to modify name or add fictitious business name.
- Contempt proceedings for failure to honor court orders.

Cross References:

Fraudulent transfer actions, see Ch. 4, Fraudulent Transfers.

Adding additional parties to judgment, see *Ch. 9, Planning Enforcement of Judgment, 9.37* et seq.

Contempt for failure to appear at debtor's examination, see *Ch. 10, Postjudgment Discovery, 10.35*, *10.44*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendReal Property LawPriorities & RecordingLis PendensReal Property LawPurchase & SaleFraudulent Transfers

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.64 Plan May Require Constant Adjustments.

The collection plan developed by counsel will need to be adjusted constantly based upon results, obstacles, and newly obtained information.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendReal Property LawPriorities & RecordingLis PendensReal Property LawPurchase & SaleFraudulent Transfers

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.65 CHECKLIST: Planning Responses to Debtor's Defenses and Tactics.

☐ Respond to debtor's claims.

Discussion:
See *1.66*

☐ Respond to debtor's threat of bankruptcy.

Authority:
11 USC §§ 522(f), 523, 727

Discussion:
See *1.67*

☐ Respond to debtor's assertion that he or she is judgment proof.

○ Check for fraudulent transfer.

Authority:
CC § 3430 et seq.

Discussion:
See *1.68*

☐ Respond to debtor's threat or motion to vacate judgment or have judgment declared void.

Authority:
CCP §§ 473(b), 473.5

Discussion:
See *1.69*

☐ Avoid wrongful attachment.

Authority:
CCP §§ 490.010, *490.060*

Discussion:
See *1.70*

☐ Oppose debtor's claims of exemption.

Authority:
CCP §§ 703.020, *703.080*. 703.520, 703.530(a), 703.550, 703.570, 704.070, 704.080

Discussion:
See *1.71*

☐ Oppose third party claims.

Authority:
CCP §§ 720.110, *720.210*, *703.550*, *703.570*

Discussion:
See *1.72*

☐ Anticipate and oppose debtor's attempt to recall and quash writ of execution.

Authority:
Stegge v. Wilkerson (1961) 189 CA 2d 1, 5, 10 CR 867 ; *Marriage of Peet (1978) 84 CA3d 974, 977, 149 CR 108, 109*

Discussion:
See *1.73*

☐ Anticipate and respond to any third party failures to honor levies.

Authority:
CCP §§ 701.020, *701.050(a)*, *701.060*, *701.070*, *706.152- 706.154*; Law Revision Comment to *[CCP § 708.530]*.

Discussion:
See *1.74*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCivil

ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.66 Debtor May Claim Late or Inadequate Goods.

Debtors often assert the timeworn defenses that the goods or services were late, inadequate, different from what was ordered or other similar variations. The most likely response to such a claim is to inquire of the debtor whether any complaint was ever made to the creditor prior to the creditor's attempt to collect the money due.

Strategic Point:

If the debtor states that a complaint was made, counsel should confirm that response with the creditor.

If a complaint was in fact made, the next most appropriate response (after investigation to confirm the fact) is that the debtor nevertheless resold the goods or used the services and had no damages as a result of any alleged defense.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.67 Debtor May Threaten Bankruptcy.

Many debtors will threaten bankruptcy during negotiations. The attorney must consider the likelihood of a bankruptcy filing by comparing the debtor's equity in non-exempt property to the total amount of debt (including all creditors) that the debtor may be able to discharge. The attorney also should determine whether the client/creditor has a realistic ability to avoid a discharge of the debt if the debtor files bankruptcy [*see 11 USC §§ 523, 727*]. If the debtor will not be able to discharge much debt, or the creditor's debt likely will not be discharged, or there are reasons to believe the debtor may not be able to obtain a discharge, the attorney can discuss with the client his or her belief that bankruptcy is unmerited or will not be filed.

If the creditor has liens on the debtor's property, the attorney may point out to the debtor that the liens will survive a bankruptcy (although certain types of liens may be subject to avoidance to the extent they impair the debtor's exemptions) [*11 USC § 522(f)*].

Cross Reference:

Bankruptcy, see *1.09*.

See Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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1-1 MB Practice Guide: CA Debt Collection 1.68

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.68 Debtors Who Have Transferred Property May Advise They Are Judgment Proof.

Debtors will frequently contend they have no assets after having transferred property to relatives or friends to defeat creditors ability to collect. The attorney may point out that the debtor and the transferee may be subject to a fraudulent transfer action [CC § 3430.01 et seq.]. The idea of incurring the displeasure of friends, relatives, or associates who have been brought in as defendants to a legal proceeding due to the debtor's machinations may be sufficiently distasteful to the debtor to stimulate a desirable result.

Cross Reference:

Fraudulent transfers, see Ch. 4, Fraudulent Transfers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawDeedsDeliveryReal Property LawPurchase & SaleFraudulent Transfers

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.69 Debtor May Threaten or Move to Vacate Judgment or Have Judgment Declared Void.

In the case of default judgments, debtors will often attempt to vacate the judgment or threaten to do so by reason of mistake, inadvertence, or excusable neglect [*CCP § 473(b)*] or failure to receive actual notice in time to defend the action [*CCP § 473.5*]. Attorneys will have to investigate the facts regarding service and oppose such motions if service was proper and the debtor's bases have no merit.

Strategic Point:

If the six month time limit within which the debtor may make a motion under *[CCP § 473(b)]* is approaching, the attorney should consider waiting until after that before initiating enforcement efforts which may alert the debtor of active pursuit. The attorney must weigh a potential loss of priority or transfer of assets by the debtor against the value of having a default or default judgment not subject to a timely *[CCP § 473(b)]* motion.

Distinguish:

- Failure to serve the debtor properly may render the judgment void rather than simply subject to a motion to vacate [*Peralta v. Heights Med. Ctr. (1988) 485 US 80, 84, 108 S Ct 896, 99 L Ed2d 75]* .

- A default judgment is void when the amount awarded in the judgment exceeds the amount in the complaint, notwithstanding participation in discovery and other pre-trial activities by the defendant [*Stein v. York (2010) 181 CA4th 320, 325, 105 CR3d 1]* .

Cross Reference:

Detailed discussion regarding motions to vacate judgment, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 27, Motion to Vacate Judgment and Enter Different Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.70 Debtor May Assert Wrongful Attachment.

A debtor may recover for wrongful attachment when a levy occurred in an action in which attachment is not authorized, when the creditor fails to later recover judgment, or for wrongful levy on exempt property [*CCP § 490.010*].

The debtor may also assert common law theories of wrongful attachment [*CCP § 490.060*]. Such theories, however, like abuse of process, are now called into question by the litigation privilege [*CC § 47(b)*; *see also Rusheen v. Cohen (2006) 37 C4th 1048, 1065, 39 CR3 516, 128 P3d 713*].

Cross Reference:

Attachment, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.34 et seq.*

Compare:

The litigation privilege has been held *not* to provide a defense to a claim under the Rosenthal Act (California's Fair Debt Collection Practices Act) [*Sial v. Unifund CCR Partners (SD Cal 2008) 2008 US Dist LEXIS 66666, *15]* . The *Sial* Court did note a substantial split of authority on whether the Rosenthal Act and the litigation privilege are irreconcilable.

Cross-Reference:

For further discussion, see *Ch. 5, Debt Collection Prior to Litigation, 5.12.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.71 Debtor May Claim Exemption from Attachment or Enforcement.

A debtor or debtor's spouse (but only natural persons) may make claims of exemption to various levies or other enforcement actions [*see CCP §§ 703.020*, *703.520*].

Warning:

An attorney receiving such a claim should *immediately* review the claim and make note of the very strict time limits for setting hearings, and timely filing (with the court and the levying officer) and serving notice of opposition to the claim of exemption regardless of how inappropriate the claim may be [*CCP §§ 703.550*, *703.570*]. Otherwise, the funds or property levied or garnished will be released [*CCP § 703.550*].

Strategic Point:

Information and/or documents previously obtained from the client, debtor, third party or other investigation may contradict the statements being made by the debtor in support of the claim of exemption and often may be used to the creditor's advantage in opposing the claim.

Debtors often make claims of exemption (and submit financial statements) regarding bank levies based upon financial need. Submitting a financial statement is not appropriate for a bank levy and is only required when there is a statute permitting an exemption based upon need. The mere submission of a financial statement does not create such an exemption [*see CCP § 703.530(a)*]. Exemptions pertaining to funds in deposit accounts are available only for paid earnings, certain government benefits, and when other exemptions may be traced by the debtor into the debtor's bank account [*see CCP §§ 703.080*, *704.070*, *704.080*].

Cross Reference:

Exemptions, see *Ch. 16, Executing and Levying Against Personal Property, 16.17 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Chapter 1 Planning Collection of Debt
VII. PLANNING RESPONSES TO DEBTOR'S DEFENSES AND/TACTICS

1-1 MB Practice Guide: CA Debt Collection 1.72

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.72 Third Parties May Claim Ownership or Security Interest in Levied Property.

Third parties may make claims to ownership or possession of property or to a security interest in properties levied [*see CCP §§ 720.110*, *720.210*]. Sometimes a judgment debtor will have someone file a claim as a delaying, negotiating, or defrauding tactic.

Warning:

An attorney receiving such a claim should *immediately* review the claim and make note of the very strict time limits for filing undertakings or making deposits (or requesting a waiver of same), setting hearings on, and timely filing (with the court and the levying officer) and serving notice of opposition to the third party claim, regardless of how inappropriate the claim may be [*CCP §§ 720.160*, *720.260*, *720.310*, *720.380*]. Otherwise, the funds or property levied or garnished will be released [*CCP §§ 720.170*, *720.270*].

Cross Reference:

General discussion of claims by third parties, see Ch. 23, Third Party Claims.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Chapter 1 Planning Collection of Debt
VII. PLANNING RESPONSES TO DEBTOR'S DEFENSES AND/TACTICS

1-1 MB Practice Guide: CA Debt Collection 1.73

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.73 Debtor May Attempt to Recall and Quash Writ of Execution.

A debtor may attempt to defeat a levy by moving to recall and quash a writ of execution, contending that the writ was improperly issued because the judgment has been satisfied [*In re Marriage of Chapman (1988) 205 CA3d 253, 259, 252 CR 359]* or vacated [*Stegge v. Wilkerson (1961) 189 CA2d 1, 5, 10 CR 867]* or the writ failed to account for a legitimate offset [*Marriage of Peet (1978) 84 CA3d 974, 977, 149 CR 108]* .

Cross Reference:

Quashing writ of execution, see *Ch. 16, Executing and Levying Against Personal Property, 16.03 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 1 Planning Collection of Debt
VII. PLANNING RESPONSES TO DEBTOR'S DEFENSES AND/TACTICS

1-1 MB Practice Guide: CA Debt Collection 1.74

AUTHOR: Jerome J. Blum, Esq. and Allan Herzlich, Esq.

1.74 Debtor May Try to Influence Third Party Not to Honor Levies.

In response to an enforcement action, the debtor may attempt to convince third parties to fail to honor levies or garnishments. For example, a debtor who becomes aware of an assignment order or a third party levy directing a third party to pay the creditor or levying officer might have the third party not make payments at all, or make payments directly to other third parties for the debtor's benefit, or make payments directly to the debtor. In such instances, the third party can be held liable to the creditor for failing to make the payments as properly required [*see CCP §§ 701.020*, *701.050(a)*, *701.060*, *701.070*, *706.152-706.154*; *see also* Law Revision Comment to *CCP § 708.530*, *16* Cal L Revision Comm'n Reports 1527 (1982)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets

1-2 MB Practice Guide: CA Debt Collection 2.syn

§ 2.syn Synopsis to Chapter 2: Locating the Debtor and Identifying the Debtor's Assets

2.01 Scope.

2.02 Objective and Strategy.

2.03 CHECKLIST: Locating the Debtor.

2.04 Case File Should Be Reviewed First.

2.05 Online Phone Books Should Be Searched.

2.06 Forwarding Addresses of Post Office Boxholders May Be Obtained.

2.07 Credit Reports May Be Available.

2.08 Department of Motor Vehicle Records Are Available In Some Cases.
2.08[1] Availability of DMV Records Is Limited.
2.08[1][a] Privacy Considerations--Driver's Privacy Protection Act of 1994.
2.08[1][b] Privacy Considerations--Information Practices Act.
2.08[1][c] Privacy Considerations--Vehicle Code.
2.08[2] DMV Request Form Must Be Submitted to Obtain Releasable Records.
2.08[3] Mailing Address May Be Requested.
2.08[4] Commercial Requester Account May Be Established.

2.09 Voter Registration Records May Be Available.

2.10 Occupational Licensing Boards May Have Information on Licensees.

2.11 Search of UCC Filings May Reveal Address Information.

2.12 Military Records May Help Locate Servicemembers and Veterans.
2.12[1] Locating Active Duty Members.
2.12[2] Locating Retired and Separated Military Members.

2.13 Federal Aviation Administration Records May Be Searched.

2.14 Death Records May Provide Information on Deceased Debtors.

2.15 Basic Commercial People Locators Provide Convenience.

2.16 Commercial Research Systems Provide Most Comprehensive Sources of Records.

2.17 CHECKLIST: Locating the Debtor's Assets.

2.18 Client's Records Should Be Reviewed.

2.19 Litigation Search May Reveal Debtor's Assets.
2.19[1] Litigation Search May Reveal Assets.
2.19[2] County Clerk Has State Court Records--Some Are Available Online.
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2.20 Records of Real Property Assets Are Available.
2.20[1] County Assessor Has Real Property Tax Records.
2.20[2] Deeds and Security Interests Are Filed With County Recorder.
2.20[3] Title Companies Have Real Property Information.

2.21 Searches May Locate Personal Property Assets.
2.21[1] Motor Vehicle and Boat Registrations May Be Obtained From DMV.
2.21[2] Aircraft Registrations May Be Obtained From FAA.
2.21[3] Locating Bank Accounts Can Be Difficult.
2.21[4] Review of UCC Filings May Discover Secured Assets.
2.21[5] Records of Corporate Filings May Be Obtained From Secretary of State.
2.21[6] Check of Fictitious Business Name Statements May Reveal Hidden Assets.
2.21[7] Business Credit Report May Be Obtained.

2.22 Asset Search Companies Can Locate Hard-to-Find Assets.

2.23 Commercial Fee-Based Resources Are an Alternative to Private Asset Search Companies.

2.24 Postjudgment Discovery Is Important Tool for Discovering Judgment Debtor Assets.
2.24[1] Judgment Debtor May Be Required to Undergo Debtor's Examination.
2.24[2] Records of Third Party Creditors May Be Subpoenaed.

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
I. STRATEGY

1-2 MB Practice Guide: CA Debt Collection 2.01

2.01 Scope.

This chapter covers:

- Resources for locating the debtor [*see 2.04 -2.16*].
- Resources for locating the debtor's assets [*see 2.17 -2.21*].
- Using professional services to locate assets [*see 2.22 -2.23*].
- Using postjudgment discovery [*see 2.24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionCommunicationsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
I. STRATEGY

1-2 MB Practice Guide: CA Debt Collection 2.02

2.02 Objective and Strategy.

The first steps in collecting any debt are locating the debtor and determining if the debtor has assets from which the debt can be collected. The objective is to determine whether or not the creditor has a realistic expectation of collecting the debt from the debtor in a manner that will make economic sense. This chapter discusses methods of locating debtors as well as methods for locating assets from which a judgment may be satisfied.

Strategic Point:

More and more, information in public documents that formerly had to be obtained in person may now be found on the Internet. Some sites, including some government agencies, provide information without charge. URLs for useful websites are included in connection with specific types of searches discussed in this chapter.

Conversely, the legislative trend in favor of protecting individual privacy has made it harder to obtain personal and financial records than formerly was the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionCommunicationsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
II. LOCATING THE DEBTOR

1-2 MB Practice Guide: CA Debt Collection 2.03

2.03 CHECKLIST: Locating the Debtor.

☐ Review case file.

Discussion:
See *2.04*

☐ Search online phone books.

Discussion:
See *2.05*

☐ Check with post office.

Discussion:
See *2.06*

☐ Obtain credit reports.

Discussion:
See *2.07*

☐ Obtain Department of Motor Vehicle records.

Discussion:
See *2.08*

☐ Consider requesting voter registration information.

Discussion:

See *2.09*

☐ Check occupational licensing boards.

Discussion:
See *2.10*

☐ Search UCC filings with Secretary of State.

Discussion:
See *2.11*

☐ Locate active duty military members and veterans.

Discussion:
See *2.12*

☐ Search Federal Aviation Administration records.

Discussion:
See *2.13*

☐ Investigate death records.

Discussion:
See *2.14*

☐ Use commercial people locators.

Discussion:
See *2.15*

☐ Use databases available on commercial research systems.

Discussion:
See *2.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionCommunicationsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
II. LOCATING THE DEBTOR

1-2 MB Practice Guide: CA Debt Collection 2.04

2.04 Case File Should Be Reviewed First.

The case file should be one of the first places to turn to in seeking information that may aid in locating the debtor. Relevant information that may be found in the file includes:

- Debtor's complete name.

  Strategic Point:

  It is critically important to have the debtor's complete and correct name. Counsel should check with the client concerning possible alternative names used by the debtor, such as aliases. A writ of execution must be issued in the name of the judgment debtor as listed on the judgment, and may include additional names by which the judgment debtor is known. The additional names must be set out in an "Affidavit of Identity," as defined in *[CCP § 680.135]*. The affidavit of identity must be filed by the judgment creditor together with the application for issuance of the writ of execution.

  Cross References:

  Discussion of writs of execution, see Ch. 16, Executing and Levying Against Personal Property.

  Form for affidavit of identity, see *Ch. 17, Executing and Levying Against Real Property, 17.51*.

- Social security number.
- Driver's license number.
- Type of legal entity, if debtor is a business.
- Prior addresses.

Strategic Point:

A debtor may have assets in areas where he or she lived even if he or she no longer lives there.

- Employer. The debtor's employer may be contacted to verify employment information and, if the debtor is no longer employed there, may provide information on the debtor's current employment.

- Names and addresses of witnesses or other parties to the litigation who may know the debtor's whereabouts.

Warning:

The Fair Debt Collection Practices Act [*15 USC § 1601 et seq*.] and other privacy laws apply when communicating with third parties, such as employers, concerning a debtor.

Cross Reference:

Discussion of debt collection and privacy laws, see Ch. 5, Debt Collection Prior to Litigation.

- Copies of tax returns, when available.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionCommunicationsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
II. LOCATING THE DEBTOR

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2.05 Online Phone Books Should Be Searched.

A number of websites allow searches for telephone numbers and addresses free of charge. Many of those websites also allow searches using telephone numbers. Some provide only phone numbers, and charge for addresses.

Examples:

- www.anywho.com
- www.whitepages.com
- www.zabasearch.com
- www.zoominfo.com
- www.google.com (In addition to the usual search results, typing a name and city into the Google search box will sometimes return "phonebook results" at the top of the page.)

Strategic Point:

If the debtor's last name is sufficiently uncommon, searching by last name only may return the names and phone numbers of possible relatives who could provide information about the debtor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionCommunicationsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
II. LOCATING THE DEBTOR

1-2 MB Practice Guide: CA Debt Collection 2.06

2.06 Forwarding Addresses of Post Office Boxholders May Be Obtained.

The post office has a form to fill out to try to obtain a forwarding address or to "break" a P.O. box to get an address for the person leasing it. This form is available as Form 5.2b is the USPS website as part of the document "Requests for Special Categories of Records" at www.usps.com/cpim/ftp/hand/as353/as353/353c5.pdf, or alone at http://www.usps.com/foia/_rtf/39CFR265-266.rtf. It is also illustrated in this publication in 6.41. Its use is not mandatory, but is recommended. The Postal Service authorizes people such as lawyers and process servers to obtain the information when it is needed and will be used solely for service of legal process in connection with actual or prospective litigation [*39 CFR § 265.6(d)(5)(ii)*].

Cross Reference:

Form for change of address or boxholder information for service of legal process, see *Ch. 6, Litigation to Recover Debts--Selecting the Appropriate Cause of Action, 6.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsPublicationCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
II. LOCATING THE DEBTOR

1-2 MB Practice Guide: CA Debt Collection 2.07

2.07 Credit Reports May Be Available.

Credit reports may include such information as recent and prior addresses, telephone numbers, and the last place of employment. The three major credit reporting agencies are:

- Equifax (www.equifax.com).
- Experian (www.experian.com).
- TransUnion (www.transunion.com).

To obtain a credit report it may be necessary to demonstrate to the credit bureau that the person seeking information has a legitimate use for the information. Credit reports are available to persons who have a legitimate need for the information in connection with a business transaction, which should include enforcement of judgments [*see CC § 1785.11(a)(3)(F)*].

Strategic Point:

The federal Fair Credit Reporting Act [*15 USC § 1681 et seq.*] and Gramm-Leach-Bliley Act [*15 USC § 6801*] severely limit the personal information that may be disclosed by the credit bureaus. As a result, it might be preferable to use commercial services such as LexisNexis who have compiled this information using other sources such as public records. Privacy considerations do not apply to business credit reports [*see 2.21[7]*].

Warning:

Pre-judgment, it is not permissible under the Fair Credit Reporting Act to access a credit report in an attempt to collect a debt. The debt must have resulted from a transaction involving the deferral of payment in the purchase of property or services by the debtor. However, postjudgment, a judgment creditor is entitled to obtain a credit report regardless of whether there was a direct request for credit by the judgment debtor in the underlying transaction [Pintos v. Pac. Creditors Ass'n (9th Cir 2009) 565 F3d 1106, 1112-1114]. The Ninth Circuit withdrew its 2007 opinion in this case [*504 F3d 792]* and replaced it with a new opinion limited to, but upheld in, the postjudgment context, the right of a debt collector to obtain a credit report per *Hasbun v. County of Los Angeles (9th Cir. 2003) 323 F.3d 801]* .

Strategic Point:

Post-judgment, look to see if the debt was created voluntarily, at the request of the debtor, as opposed to those that arise from an obligation, fine, or sanction imposed by statute, such as a vehicle owner's debt arising out of towing and impound charges [*see, e.g.*, Pintos v. Pac. Creditors Ass'n (9th Cir 2009) 565 F3d 1106, 1111].

Consider:

If the creditor is an institution, it may have established relationships with credit reporting agencies, and may be able to readily access credit reports.

Cross Reference:

Discussion of Gramm-Leach-Bliley Act, see *Ch. 5, Debt Collection Prior to Litigation, 5.21[1], [2].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawFederal ActsGramm-Leach-Bliley ActCivil ProcedurePleading & PracticeService of ProcessMethodsPublicationCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
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1-2 MB Practice Guide: CA Debt Collection 2.08

2.08 Department of Motor Vehicle Records Are Available In Some Cases.

2.08[1] Availability of DMV Records Is Limited.

2.08[1][a] Privacy Considerations--Driver's Privacy Protection Act of 1994. Personal information from the California Department of Motor Vehicles records generally is not available without the individual's consent. Disclosure of personal information by motor vehicle departments is subject to the restrictions set forth in the federal Driver's Privacy Protection Act of 1994 ("DPPA") [*18 USC § 2721 et seq.*; *Veh Code § 1808(e)*]. The DPPA generally prohibits the disclosure of personal information (which is defined to include the individual's photograph, social security number, driver's license number, name, address except for a five-digit ZIP code, telephone number, and medical or disability information) [*see 18 USC § 2725(2)*] by state departments of motor vehicles without the express consent of the individual to whom the information applies [*18 USC § 2721(a)*]. However, the DPPA specifically excepts the enforcement of judgments from that prohibition [*18 USC § 2721(b)(4)*], which means that records not otherwise protected may be obtained for those purposes.

2.08[1][b] Privacy Considerations--Information Practices Act. In California, personal information held by state agencies is subject to the state Information Practices Act [*CC § 1798 et seq.*]. That Act generally prohibits the disclosure of any personal information in a manner that would link the information disclosed to the individual to whom it pertains, with specified exceptions [*CC § 1798.24*]. The Act allows disclosure of DMV records in compliance with *Veh Code § 1800 et seq.* [*CC § 1798.24(m)*].

2.08[1][c] Privacy Considerations--Vehicle Code. The California Vehicle Code protects the confidentiality of home addresses, with very few exceptions. Disclosure of residential addresses is prohibited unless the requester comes within specified limited exemptions [*Veh Code §§ 1808.21(a)*, *1808.22*, *1808.23*]. Those exemptions do *not* specifically include locating debtors or the enforcement of judgments. However, attorneys are exempted if the attorney states, under penalty of perjury, that the motor vehicle or vessel registered owner or driver residential address information is necessary in order to represent his or her client in a criminal or civil action that directly involves the use of the motor vehicle or vessel that is pending, is to be filed, or is being investigated [*see Veh Code § 1808.21(c)*].

2.08[2] DMV Request Form Must Be Submitted to Obtain Releasable Records. DMV Form INF70, Request for Record Information, is used to request driver's license/ID card information and vehicle or vessel registration information. This form is available at www.dmv.ca.gov/forms/inf/inf70.pdf ("Request for Record Information"). The form may be filled in online and printed out. It must be submitted by mail to the DMV with a fee of $5 per computer

printout or $20 per copy of the requested documents. Residential addresses will not be released unless a state or federal statute that authorizes or requires the release is cited by code name and section number in section D of the form, and the request is approved by the DMV.

Consider:

The DMV notifies the holder of the driver's license or state ID or when it receives a request for personal information. To avoid putting the debtor on notice, it is preferable to obtain a debtor's personal information from another source.

Warning:

The request for record information form includes a certification that the information received will not be used for any unlawful purpose. Making false representations to obtain information from a department record is a misdemeanor punishable by a fine of up to $5,000, by imprisonment in the county jail not exceeding one year, or both fine and imprisonment [*Veh Code § 1808.45*].

Strategic Point:

A national database of driver's licenses containing records from approximately 20 states is available from *lexis.com*. Motor vehicle registrations for approximately 30 states are available in a national database on *lexis.com*. Due to the California privacy restrictions discussed above, California DMV records are not available on *lexis.com*. However, the database may be useful for obtaining information on out of state debtors.

Locating Driver's License Information Using Online Resources:

Many resources are available online for determining if a debtor holds a driver's license outside of California. For example, helpful resources at *lexis.com* include:

- Public Records tab > Public Records > Licenses > Driver Licenses > All Driver License Records
  - Sample Search: To locate a driver's license held by a debtor, use a NAME segment search: *name (first name /3 last name)*.

2.08[3] Mailing Address May Be Requested. The Vehicle Code distinguishes mailing addresses from residential addresses. Release of all or part of any mailing address in any record of the department may be restricted to a release for purposes related to the reasons for which the information was collected, including, but not limited to, the assessment of driver risk, or ownership of vehicles or vessels [*Veh Code § 1808.21(b)*].

Drawback:

Drivers can opt to give the DMV a mailing address rather than an actual home address. Thus, any address obtained from the DMV may be a mailing address rather than a home address.

2.08[4] Commercial Requester Account May Be Established. The DMV establishes commercial requester accounts for individuals or organizations and issues requester codes for the purpose of obtaining information from the department's files, except as prohibited by *Veh Code § 1808.21* [*Veh Code § 1810.2(a)*]. DMV will establish a commercial requester account when it determines that the applicant has a legitimate business need for the information requested.

Drawback:

An applicant who is issued a requester code permitting the applicant access to residence address information must file a $50,000 bond and pay a $250 filing fee [*Veh Code § 1810.2(c)*]. Due to the bond and auditing requirements, commercial requester accounts are generally held by large commercial services.

A requester code may be canceled immediately if the requested information is used for a purpose other than the purpose for which it was issued [*Veh Code § 1810.2(e)*; *see also Veh Code § 1808.46* (penalties for misuse of requester code information include civil fine of up to $100,000)].

Cross Reference:

For DMV forms for commercial requester accounts, go to www.dmv.ca.gov/forms/forms_cra.htm.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawForfeitures & PenaltiesGeneral OverviewCivil Rights LawPrivacy RightsGeneral OverviewCivil Rights LawPrivacy RightsDriver PrivacyTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
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1-2 MB Practice Guide: CA Debt Collection 2.09

2.09 Voter Registration Records May Be Available.

Voter registration records, including addresses and phone numbers, formerly were available from county registrars of voters. However, most states now are implementing voter information security measures. It therefore is hard to find voter registration information that is more recent than the mid-1990s in California.

Strategic Points:

One alternative is to check Federal Election Commission and state election donor lists, which give the addresses of donors to political campaigns and PACs. The FEC disclosure database is online at www.fec.gov/finance/disclosure/disclosure_data_search.shtml. Information concerning donors in California is available at http://cal-access.ss.ca.gov/.

A national database of voter registration records that contains information from more than 30 states is available from *lexis.com*. This database does not include California, but may be useful for out of state debtors.

Locating Voter Registration Records Using Online Resources:

Many resources are available online for determining if a debtor has registered to vote outside of California. For example, helpful resources at *lexis.com* include:

- Public Records tab > People, Business & Asset Locator > Person Locator > Voter Registrations > US Voter Registrations, Combined

  - Sample Search: To locate a debtor's voter registration record outside California, use a NAME segment search: *name (first name /3 last name)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVoting Rights ActGeneral OverviewGovernmentsFederal GovernmentElectionsGovernmentsLocal GovernmentsElections

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2.10 Occupational Licensing Boards May Have Information on Licensees.

If the debtor holds an occupational license, the debtor's business address, phone number and other information such as licensing status may be available from the state licensing board.

Examples:

- Information concerning building contractors may be obtained from the California Contractor's State License Board using the contractor's license number, business name, or the name of personnel at www.cslb.ca.gov/consumers/default.asp.

- Real estate brokers' and salespersons' mailing addresses and employers' names, license numbers, and information concerning disciplinary actions are available from the Department of Real Estate at www.dre.ca.gov/licstats.htm.

- A list of occupations subject to licensing through the Department of Consumer Affairs with links to the appropriate licensing board is available at www.dca.ca.gov/aboutdca/licnhelp.htm.

Investigating Occupational Licenses Using Online Resources:

Many resources are available online for determining if a debtor holds an occupational license in California. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find Licenses > Professional Licenses

  - Sample Search: To locate a variety of professional licenses held by a debtor, use a NAME segment search: *name (first name /3 last name)*.

- Legal tab > States Legal--U.S. > California > Public Records > Find Licenses > Professional Licenses

- Sample Search: To research if a debtor may be a licensed contractor in California, use the following search: *name (first name /3 last name)*.

- Legal tab > States Legal--U.S. > California > Public Records > Find Licenses > Professional Licenses
  - Sample Search: To locate a real estate license held by a debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

A state agency index is available as a link from the State of California home page at www.ca.gov/.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVoting Rights ActGeneral OverviewGovernmentsFederal GovernmentElectionsGovernmentsLocal GovernmentsElectionsReal Property LawBrokersDiscipline, Licensing & Regulation

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2.11 Search of UCC Filings May Reveal Address Information.

UCC financing statements for security interests in personal property or fixtures that secure payment or performance of an obligation are filed with the California Secretary of State. This is the equivalent of recording security interests in real property with the county recorder. A search will reveal the names of lenders and lienholders who may be able to provide a current billing address for the debtor, as well as co-owners of property.

Investigating UCC Filings Using Online Resources:

Many resources are available online for determining if an individual is a lienholder or a debtor for a UCC lien. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Uniform Commercial Code Lien Filings
  - Sample Search: To locate UCC liens where an individual is a debtor or secured creditor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

For UCC records searches, go to www.ss.ca.gov/business/ucc/ucc.htm. Fees are charged for searches and documents copied [*see* www.ss.ca.gov/business/ucc/ra_9_ucc_formsfees.htm].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests

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2.12 Military Records May Help Locate Servicemembers and Veterans.

2.12[1] Locating Active Duty Members. The Armed Forces provide locator services for active duty members of the armed services, with the exception of the Army. However, the Privacy Act of 1974 prohibits federal agencies from providing the home addresses or telephone numbers of individuals without their written permission. Contact information for the Navy, Air Force, Marine Corps, and Coast Guard locator services is available at www.pueblo.gsa.gov/call/locating_individuals.htm#military.

2.12[2] Locating Retired and Separated Military Members. The National Personal Records Center in St. Louis, Missouri, has a repository of records for retired and separated military members. Requests for military records must be submitted on a standard form to Military Personnel Records, 9700 Page Ave., St. Louis, Missouri 63132. Information that may be released to persons other than the veteran or next of kin is limited.

Cross Reference:

To submit a request for military records (Standard Form 180), go to www.archives.gov/veterans/military-service-records/standard-form-180.html.

Warning:

A court on its own motion may, and on the motion of a service member or a person acting on the service member's behalf must, stay the execution of any judgment or order entered against a military service member in any action or proceeding against the service member, before or during the period of the service or within 60 days thereafter, unless in the court's opinion the service member's ability to comply with the judgment or order is not materially affected by reason of the military service [M&V Code § 403(c)(2)].

Cross Reference:

Discussion of stays during military service, see *Ch. 15, Staying Enforcement of Judgment, 15.29* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCommercial Law

(UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview

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2.13 Federal Aviation Administration Records May Be Searched.

Federal Aviation Administration records may be searched by name for licensed or certified pilots at www.faa.gov/licenses_certificates/airmen_certification/interactive_airmen_inquiry. In addition, airplane registration information may be searched by name at http://registry.faa.gov/aircraftinquiry/name_inquiry.asp. Clicking on the n-number (registration number) link provides information including the name of the registered owner and the address where the plane is registered.

Researching Federal Aviation Administration Records Using Online Resources:

Many resources are available online for locating aircraft owned by a debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
  - Sample Search: To locate aircraft owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.

Warning:

Pilots may opt out of the disclosure of their personal information.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview

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2.14 Death Records May Provide Information on Deceased Debtors.

One reason why the debtor may be difficult to locate is because he or she is deceased. Social security death records and California death records are available on *lexis.com* and other online locations such as www.rootsweb.com. Those records indicate the county in which the deceased last resided.

If assets passed through probate, the filings may be searched at the county superior court clerk's office [*see 2.19*]. Probate records also available from commercial sources, including *lexis.com*. Assets that did not pass through probate may have gone to persons such as the debtor's spouse, domestic partner or children, who may be located using the methods outlined in this chapter. Asset locators may also be hired to find missing heirs [*see 2.22*].

Investigating Death Records Using Online Resources:

Many resources are available online for determining if and when a debtor died. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Marriage, Divorce & Death Records > CA Death Records

- Legal tab > States Legal--U.S. > California > Public Records > Marriage, Divorce & Death Records > Social Security Death Records

  - Sample Search: To find the death record of a debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Discussion of claims against estates in probate, see California Forms of Pleading and Practice, Ch. 454, Probate: Claims Against the Estate (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust

LawProbateGeneral OverviewGovernmentsCourtsClerks of Court

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2.15 Basic Commercial People Locators Provide Convenience.

Some vendors offer a basic search for a relatively low fee, providing such information as addresses, ex-directory phone numbers, and names and addresses of neighbors and possible relatives.

Examples:

- www.accurint.com (a LexisNexis service)
- www.intelius.com
- www.irbsearch.com
- www.merlindata.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview

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2.16 Commercial Research Systems Provide Most Comprehensive Sources of Records.

Commercial research systems, such as *lexis.com*, include a choice of people locator services. In addition to a variety of nationwide people, business and asset locators, LexisNexis offers a California people locator service that is compiled primarily from telephone white pages and also includes information from property records and other available sources.

Locating Debtor Using Online Resources:

Many resources are available online for finding a debtor's address. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Person Locator > CA Person Locator
  - Sample Search: To find the address of a debtor, use a NAME segment search: *name (first name /3 last name)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview

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2.17 CHECKLIST: Locating the Debtor's Assets.

☐ Review client's records.

Discussion:
See *2.18*

☐ Perform a litigation search.

Discussion:
See *2.19*

☐ Search real property records.

Discussion:
See *2.20*

☐ Search for personal property assets.

Discussion:
See *2.21*

☐ Consider using professional asset locator.

Discussion:
See *2.22*

☐ Consider using commercial fee-based resources.

Discussion:

See *2.23*

☐ Use postjudgment discovery.

○ Conduct a debtor's examination.

Discussion:
See *2.24[1]*; see also *Ch. 10, Postjudgment Discovery, 10.25* et seq.

○ Subpoena documents from other third party creditors of debtor.

Discussion:
See *2.24[2]*; see also *Ch. 10, Postjudgment Discovery, 10.20* et seq.

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2.18 Client's Records Should Be Reviewed.

The client's records, particularly if the client is an institutional lender, may prove to be fertile ground for information regarding the debtor's assets. Loan and credit applications may include statements regarding real property ownership, bank accounts, business information, and other assets. These records should be a starting point for further investigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsCourtsCourt Records

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2.19 Litigation Search May Reveal Debtor's Assets.

2.19[1] Litigation Search May Reveal Assets. Litigation searches can reveal lawsuits in which there may be money judgments for the debtor on which a lien may be placed. In the event of a divorce or support hearing, family court records can be a rich source of financial information such as bank account numbers, retirement plans, stock portfolios, and ownership of real estate. In addition, the debtor's spouse or litigation adversaries may be a source of information about assets. Some records are available online, but in many cases documents must be searched for and copied at the court clerk's office.

Consider:

Document retrieval searches may be used to reduce staff search time. LexisNexis CourtLink Document Retrieval Service offers nationwide document retrieval from federal and state courts. Documents can be ordered online at https://courtlink.lexisnexis.com, or via telephone at 1-866-540-8818. Another source of local document retrievers is the Public Record Retriever Network, a trade organization with more than 700 members. Its membership list can be searched by county at www.brbpub.com/prrn/.

2.19[2] County Clerk Has State Court Records--Some Are Available Online. State court litigation records are found at the office of the county clerk. Although some counties have made records available online, searches often must be conducted in person or through an online vendor. Indexes to litigation records for the California courts are generally available by computer at the clerk's office, although some smaller counties require a manual search. Indexes can be searched using various fields including party name and case number.

Examples:

- Alameda County records may be searched online at its DOMAINWeb page. DOMAINWeb provides information about general civil, probate, and family law cases. Images of documents for general civil cases can be viewed and printed. Images are also available on probate cases for documents filed after January 31, 2006, except for conservatorships, guardianships and confidential documents. Family law cases have no images. DOMAINWeb does not include criminal, juvenile, or traffic cases. DOMAINWeb can only be searched by case number. A link to DOMAINWeb is on the Alameda County Superior Court website at www.alameda.courts.ca.gov/courts/.

- Documents for general civil cases from the Los Angeles County Superior Court Stanley Mosk Courthouse are available online at www.lasuperiorcourt.org/ OnlineServices/CivilImages/index.asp. The Los Angeles Superior Court began imaging these case documents in 1997. Most but not all documents filed with or generated by the court since that time are included in the database; additional documents, both newly filed and previously captured, are added daily. Case numbers are required to locate documents, and may be obtained by performing a search on the name of a party in the case. Fees are charged for all searches.

Cross Reference:

Links to California county websites are available at www.csac.counties.org/default.asp?id=7.

2.19[3] Federal Court Records Are Available Online. Records from federal district courts, bankruptcy courts, and appellate courts are available online through the Administrative Office of the U.S. Courts PACER Service Center at http://pacer.psc.uscourts.gov/ at a charge of $.08 per page. PACER provides access to the case summary, docket entries, and in many jurisdictions copies of filed documents. How far back records are available depends on the jurisdiction providing the records. Documents from some courts are not available on PACER. A list of participating courts is available at http://pacer.psc.uscourts.gov/cgi-bin/links.pl. The PACER website includes the U.S. Party Case Index, which serves as a locator and can be searched by party name. USPCI is available at http://pacer.psc.uscourts.gov/uspci.html. It searches nationwide and generates a listing of court location and case number when a party is involved in federal litigation.

Cross References:

Discussion of effect of bankruptcy, see Ch. 3, Effect of Bankruptcy.

Comprehensive coverage of court records is available from commercial database services such as LexisNexis CourtLink[(R)], at https://courtlink.lexisnexis.com.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsCourtsCourt Records

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2.20 Records of Real Property Assets Are Available.

2.20[1] County Assessor Has Real Property Tax Records. One method of satisfying a debt is to attach or execute on the real property of the debtor. Property owned by the debtor may be located through tax records at the county assessor's office and recorded documents at the county recorder's office. Although these types of searches may be performed to a certain extent on the county's own websites or in person at county offices, as a general matter it is more practical to go through a commercial online service. For example, LexisNexis provides a combined database of deed transfers, tax assessor records and mortgage records.

Researching Real Property Assets Using Online Resources:

Many resources are available online for locating the real property assets of a debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Real Property Locator > CA Deed Transfers, Tax Assessor Records and Mortgage Records--Selected Counties
  - Sample Search: To locate real property owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Discussion of executing and levying against real property, see Ch. 17, Executing and Levying Against Real Property.

Strategic Point--How to Search:

Whether the debtor owns real estate in a county can be determined by a search under the debtor's name at the county assessor's office. The spouse's name and relevant business names should also be checked. Name searches are not available in California on county websites, but are available through commercial services.

2.20[2] Deeds and Security Interests Are Filed With County Recorder. Deeds and other security interests in real property are recorded at the county recorder's office. Thus, a search at the county recorder's office can turn up such information as:

- Interests in real property held by the debtor;
- The name of the lender;
- Co-owners of the property, who might be contacted if the debtor has not been located;
- Transfers of property that may have been made by the debtor to avoid the judgment;
- Liens on the property that may have priority over the judgment;
- A declaration of homestead, if filed.

Although some records are available online at the county level, in general these searches must be conducted in person or through an online commercial service. Deeds at the recorder's office are usually indexed by owners' names, in indexes covering a specific period of years.

2.20[3] Title Companies Have Real Property Information. Title companies have access to alphabetical listings of property owners and property profiles that provide detailed information on individual pieces of property. Some title companies allow access to their records, while others do not. Counsel should call title companies in the county where the debtor may have property to see whether information is available.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawDeedsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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2.21 Searches May Locate Personal Property Assets.

2.21[1] Motor Vehicle and Boat Registrations May Be Obtained From DMV. Motor vehicle or vessel registration information may be obtained from the Department of Motor Vehicles using DMV Form INF 70, available at www.dmv.ca.gov/forms/inf/inf70.pdf. "Motor vehicle" includes cars, trucks, motorcycles, boats, and recreational vehicles.

Consider:

DMV notifies the record subject of any request [*Veh Code § 1810(b)*]. Thus, to avoid notice to the debtor, it may be preferable to obtain registration information from a commercial service.

Strategic Point:

DMV records may not show accurate lien information and the value of the asset might be eroded all or substantially by such a lien. DMV records will also not show the removal of a lien even if it is paid off unless the registered owner goes to the DMV and has the lien cleared off. The vehicle/vessel thus could be held free and clear but still reflect a lien on the DMV records.

Cross References:

Obtaining information from the DMV, see *2.08*.

Discussion of executing and levying against personal property, see Ch. 16, Executing and Levying Against Personal Property.

2.21[2] Aircraft Registrations May Be Obtained From FAA. To determine who owns an aircraft, Federal Aviation Administration records may be searched by name, which links to the registration number ("n-number") and registration information at www.faa.gov/licenses_certificates/airmen_certification/interactive_airmen_inquiry.

Cross Reference:

Motor vehicle registrations, FAA registrations, state boat registrations, and U.S. Coast Guard merchant and recreational vehicle registrations may be searched for a fee at *lexis.com*. Motor vehicle registrations for approximately 30 states are available in a national database on *lexis.com*. Due to the California

privacy restrictions discussed in *2.08*, California DMV records are not available on *lexis.com*.

Investigating Aircraft and Boat Registrations Using Online Resources:

Many resources are available online for locating aircraft and boat registrations for a debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Personal Property Locator > Federal Aviation Administration Aircraft Registrations
  - Sample Search: To locate aircraft owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > California > Public Records > Personal Property Locator > US Coast Guard Merchant and Recreational Vessel Registrations
- Public Records tab > People, Business & Asset Locators > Personal Property Locator > Boat Registrations > Combined State Boat Registrations and U.S. Coast Guard
  - Sample Search: To locate boats owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.

2.21[3] Locating Bank Accounts Can Be Difficult. Checking and savings accounts at banks and credit unions are difficult to find. The name of the bank and branch is required to levy on a bank account. Although helpful, bank account numbers are not required.

Counsel should first check any credit or other applications made by the debtor; these applications commonly require a listing of bank accounts. Bank account information also may be obtained if the creditor has a copy of checks written by the debtor or checks cashed by the debtor, or copies of financial records from litigation files such as divorce proceedings. Otherwise, it is best to hire an asset search company. Some will not charge unless bank accounts are located.

2.21[4] Review of UCC Filings May Discover Secured Assets. UCC financing statements for security interests in personal property that secure payment or performance of an obligation are filed with the California Secretary of State [*Com Code § 9501*]. This is the equivalent of recording security interests in real property with the county recorder. The records on file may be used to locate assets and to identify financial institutions and other lenders with whom the debtor has done business. Fees are imposed for searches, and users must register and provide a credit card number before proceeding.

Warning:

Effective July 1, 2001, UCC financing statements must generally be filed in the debtor's "location," not the state where the collateral is located [*see Com Code §§ 9301*, *9307*]. Thus, it is necessary to know where a company is organized to find new UCC filings. Filings against individuals are made in the state where the person resides [*see Com Code §§ 9301*, *9307*].

Consider:

In California, the proper filing location is determined by the type of collateral. Security statements for collateral related to real estate, including fixtures, minerals to be extracted, and timber to be cut, are filed in the county recorder's office [*Com Code § 9501*]. However, security interests in crops are filed with the

Secretary of State [*Com Code §§ 9310(a), 9501(a)*].

Cross References:

Financing statements filed with the Secretary of State may be searched through UCC Connect at www.ss.ca.gov/business/ucc/ucc.htm using the name of the debtor. Fees are charged for searches and documents copied [*see* www.ss.ca.gov/business/ucc/ra_9_ucc_formsfees.htm].

Discussion of the filing of financial statements secured by personal property and the classification of collateral, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender).

2.21[5] Records of Corporate Filings May Be Obtained From Secretary of State. To check whether the debtor is a principal in a business, records for corporations, limited liability companies and limited partnerships can be searched by name on the Secretary of State's website at http://kepler.ss.ca.gov/list.html. Information available online includes the complete name of the corporation, corporate number, date of incorporation or date of conversion, status, jurisdiction (place of domicile), mailing address, and name and address of the agent for service of process. However, additional information, including the names and addresses of the corporate directors, must be obtained by ordering a Status Report or a copy of the last complete Statement of Information on file, using the form available at www.ss.ca.gov/business/pdf/be_ircform.pdf. The form may be submitted by mail or in person at the Secretary of State's office in Sacramento or any regional office.

Consider:

The Secretary of State's office provides a list of private companies who provide a variety of services including UCC searches and reproduction requests at www.ss.ca.gov/business/bpd_service_companies.htm.

Investigating California Secretary of State Records Using Online Resources:

Many resources are available online for investigating a debtor's connection to California business entities. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Business & Corporation Information > CA Secretary of State Corporation, LP and LLC Information

  - Sample Search: To find California corporations, limited partnerships, and LLCs connected to a debtor, use a NAME segment search: *name (first name /3 last name)*.

2.21[6] Check of Fictitious Business Name Statements May Reveal Hidden Assets. Fictitious business name statements should be checked for the names of spouses or children who could be hiding assets. In general, a "fictitious business name" is [*B&P Code § 17900(a), (b)*]:

- Any name other than the surname of an individual owner, the surnames of all general partners, or the full name of a business entity; or

- A name that suggests the existence of additional owners.

Fictitious business name statements are filed with the county where the principal place of business is located or, if the registrant has no place of business in California, with the Clerk of Sacramento County [*B&P Code § 17915*]. In addition, they may also be filed in any other county. Fictitious business names expire five years from the date of filing,

or earlier if there has been a change in the facts set forth in the statement or the registrant has filed a statement of abandonment [*B&P Code § 17920*].

Researching Fictitious Business Names Using Online Resources:

Many resources are available online for locating fictitious business names used by a debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Business & Corporation Information > CA Business Leads and Fictitious Business Name Information
  - Sample Search: To find a fictitious business name used by a debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Discussion of use of fictitious business names, see *California Legal Forms, § 1A.51* (Matthew Bender).

2.21[7] Business Credit Report May Be Obtained. Business credit reports are available from sources including the three major credit reporting agencies [*see 2.07*] and Dunn and Bradstreet. Dunn and Bradstreet reports include payment information, banking, finance, public filings, special events, and company and management history, and can be purchased on the Dunn and Bradstreet website at www.dnb.com/us/ or through *lexis.com*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirementsEvidenceDocumentary EvidenceWritingsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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2.22 Asset Search Companies Can Locate Hard-to-Find Assets.

To locate hard-to-find assets such as bank accounts and personal property, it is often necessary to turn to a private asset search company.

Strategic Point:

Counsel should give the asset locator all the information that already has been gathered and state that the client will not pay unless they find other assets. For example, many asset locators will do a quick service for about $75.00, but most of the time it will be the same information that can be obtained from websites such as www.accurint.com [*see 2.15*]. Some asset locators will not charge unless they find a bank account, for example, but such searches are more expensive (usually about $250). They are worth it if counsel cannot get anything from the public databases.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirementsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
III. LOCATING THE DEBTOR'S ASSETS

1-2 MB Practice Guide: CA Debt Collection 2.23

2.23 Commercial Fee-Based Resources Are an Alternative to Private Asset Search Companies.

As an alternative to using a commercial asset firm or private investigator to obtain assets on a defendant, counsel may want to consider using various fee based companies which are quite good at finding assets. This becomes more important, and cost effective, if counsel is handling a large number of collection matters.

The companies listed below are by no means all of the available resources, but give a fairly good idea of the type of services available. Some of these have a set fee, some have monthly or even yearly fees, some have minimum charges, and some only charge for services used or time actually spent.

Examples:

Examples of Internet fee-based search sites:

- www.TALX.com (employment information)
- www.Equifax.com (credit reports)
- www.TRW.com (credit reports)
- www.experian.com (credit reports)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirementsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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Chapter 2 Locating the Debtor and Identifying the Debtor's Assets
III. LOCATING THE DEBTOR'S ASSETS

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2.24 Postjudgment Discovery Is Important Tool for Discovering Judgment Debtor Assets.

2.24[1] Judgment Debtor May Be Required to Undergo Debtor's Examination. Once a debt has been reduced to judgment, the judgment creditor may schedule an examination in which the judgment debtor is required to appear in court to answer questions to aid in the enforcement of a money judgment [*CCP § 708.110(a)*]. The records of the judgment debtor also may be subpoenaed to the examination by serving a subpoena duces tecum when serving the order to appear [*Lee v. Swansboro (2007) 151 CA4th 575, 582, 59 CR3d 924*]. Debtor's examinations can be a useful tool for uncovering assets. Their importance and use is discussed in greater detail in Ch. 10, Postjudgment Discovery.

Cross Reference:

Discussion of debtors' examinations, see *Ch. 10, Postjudgment Discovery, 10.25* et seq.

Sample questions for use in debtor's examination, see *Ch. 10, Postjudgment Discovery, 10.25* et seq., *10.47*.

2.24[2] Records of Third Party Creditors May Be Subpoenaed. If counsel has obtained a judgment, finds that the judgment debtor does not own any real property, cannot locate a current job, business, or any way the debtor is making money, and yet learns the debtor is current on other outstanding obligations, such as an automobile lease, credit cards, or student loans, counsel should not give up. Rather, these things can be turned to the client's advantage. Counsel should subpoena the debtor's records from the third party creditor's file (i.e., a loan or lease application, financial statements, bank account information) via a subpoena duces tecum, giving proper notice to both the third party creditor and the debtor [*see CCP §§ 708.130(4),1985.3*.

Cross References:

Discussion of postjudgment discovery, *see* Ch. 10, Postjudgment Discovery.

Use of deposition subpoena to obtain discovery from a nonparty, see *Matthew Bender[(R)] Practice Guide: California Civil Discovery, 6.12 et seq*.

Consumer notice requirements, see *Matthew Bender[(R)] Practice Guide: California Civil Discovery, 2.40*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsContracts LawTypes of ContractsLease AgreementsGeneral OverviewCriminal Law & ProcedureDiscovery & InspectionSubpoenasGeneral Overview

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Chapter 3 Effect of Bankruptcy

1-3 MB Practice Guide: CA Debt Collection 3.syn

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3.24[5] Debt for Fiduciary Fraud, Embezzlement, or Larceny Is Not Dischargeable.
3.24[6] Debt for Willful and Malicious Injury Is Not Dischargeable.
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3.27[2][d] Filing Period May Be Extended for Cause.

3.28 Prepare, File, and Serve Complaint in Compliance With Rules.
3.28[1] General Requirements As to Form and Service Apply.
3.28[1][a] Bankruptcy Rules for Adversary Proceedings Apply.

3.28[1][b] Federal Rules of Civil Procedure Govern Pleading and Service.
3.28[2] Bankruptcy Court Local Rules Apply.

3.29 Notice of Stay of Proceedings--Judicial Council Form CM-180.

3.30 Notice of Termination or Modification of Stay--Judicial Council Form CM-181.

3.31 Notice of Motion and Motion for Relief From Automatic Stay Under 11 USC § 362.

3.32 Application for Order Authorizing Examination of Debtor.

3.33 Order for Bankruptcy Rule 2004 Examination of Debtor.

3.34 Stipulation and Order to Extend Bar Date.

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Chapter 3 Effect of Bankruptcy
I. STRATEGY

1-3 MB Practice Guide: CA Debt Collection 3.01

3.01 Scope.

This chapter covers the effect of bankruptcy on the enforcement of a judgment or the collection of a debt, and particularly:

- Determining whether enforcement of a judgment or collection of a debt is stayed because of the filing of a bankruptcy petition [*see 3.03 -3.10*].
- Obtaining relief from the automatic stay [*see 3.11 -3.19*].
- Determining whether a particular debt will be discharged in bankruptcy [*see 3.20 -3.25*], including whether discharge can be barred [*see 3.22*].
- Filing a complaint to determine dischargeability of a debt [*see 3.26 -3.28*].

Core Statutes:
11 USC §§ 362, 523, 524

Cross References:

Effect of bankruptcy on pending state court action, see California Forms of Pleading and Practice, Ch. 94, Bankruptcy (Matthew Bender).

Effect of bankruptcy on judgments in family law proceedings generally, see California Forms of Pleading and Practice, Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies (Matthew Bender).

Extensive discussion of bankruptcy law and procedure, see Collier on Bankruptcy, 15th Edition (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of

JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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Chapter 3 Effect of Bankruptcy
I. STRATEGY

1-3 MB Practice Guide: CA Debt Collection 3.02

3.02 Objective and Strategy.

When a debtor files a bankruptcy petition, the creditor generally is subject to an automatic stay against all activities to enforce a judgment or collect a debt. The creditor can be sanctioned for violating that stay. However, the creditor often will be able to work around the bankruptcy obstacle. Generally the creditor's strategy should take into account the following points:

- As soon as creditor's counsel becomes aware (by whatever means) that the debtor has filed a bankruptcy petition, counsel should instruct the creditor to promptly suspend all ongoing efforts to enforce a judgment or collect a debt (by legal proceedings or by self-help methods), and should not take any further action without seeking legal advice [*see 3.06*].

- There are some steps that the creditor can take even in spite of the stay in very limited circumstances [*see 3.06*].

- The stay is not automatic in every case, and may be short-lived [*see 3.07* et seq.], although a creditor should proceed with caution before taking any action that could be deemed a violation of the automatic stay.

- The creditor may be able to obtain court-ordered relief from the stay sufficient to preserve the creditor's interest in property of the bankruptcy estate [*see 3.12* et seq.].

- Most debts are dischargeable in bankruptcy; although there are several categories of debts that may be excepted from discharge if the creditor takes action in the bankruptcy court to obtain a judicial determination that the debt is not dischargeable [*see 3.20* et seq.].

Warning:

The automatic stay is not to be trifled with. An attorney and/or creditor can face serious consequences for an intentional violation of the automatic stay, including contempt of court and liability for damages, costs, attorney's fees, and punitive damages under *11 USC § 363(h)*.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 94, Bankruptcy (Matthew Bender).

California Points and Authorities, Ch. 30, Bankruptcy (Matthew Bender).

Cross Reference:

Staying enforcement of judgments during periods of military service, see Ch. 15, Staying Enforcement of Judgment.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageEnforcement of JudgmentsBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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Chapter 3 Effect of Bankruptcy
II. DETERMINING WHETHER ENFORCEMENT OF JUDGMENT OR COLLECTION OF DEBT IS STAYED

1-3 MB Practice Guide: CA Debt Collection 3.03

3.03 CHECKLIST: Determining Whether Enforcement of Judgment or Collection of Debt Is Stayed.

☐ Ascertain date of filing of bankruptcy petition, which is date automatic stay went into effect (unless, in particular case, stay is not automatic).

○ If appropriate, give notice of stay of proceedings.

Authority:
11 USC § 362(a)

Discussion:
See *3.04*, 3.04A

Form:
See *3.29*

☐ Review with client:

○ Types of acts and proceedings that are stayed.

Authority:
11 USC § 362(a)

Discussion:
See *3.05*

○ Specific acts and proceedings that are permitted notwithstanding stay.

Authority:
11 USC § 362(b)

Discussion:
See *3.06*

☐ Determine whether limitations or exceptions to automatic stay are applicable to case:

○ In case of individual debtor:

☐ Automatic stay will terminate 30 days after filing of petition if one single or joint bankruptcy case of debtor was pending within previous year but was dismissed.

Authority:
11 USC § 362(c)(3)

Discussion:
See *3.07*

☐ Stay does not apply automatically if two or more single or joint bankruptcy cases of debtor were pending within previous year but were dismissed.

Authority:
11 USC § 362(c)(4)

Discussion:
See *3.08*

○ In case of small business debtor in Chapter 11 case, stay does not apply automatically if one of following conditions exists:

☐ Debtor is debtor in small business case pending at time petition is filed.

☐ Debtor was debtor in small business case that was dismissed for any reason by order that became final in two-year period ending on date of order for relief entered with respect to petition.

☐ Debtor was debtor in small business case in which plan was confirmed in two-year period ending on date of order for relief entered with respect to petition.

☐ Debtor acquired substantially all of assets or business of small business debtor described in one of foregoing items and has not established that acquisition was made in good faith and not for purpose of evading *11 USC § 362(n)(1)* (imposing this limitation on automatic application stay).

Authority:
11 USC § 362(n)(1)

Discussion:
See *3.09*

☐ Determine whether automatic stay of acts against estate property has been terminated as to specific property because it is no longer part of estate.

Authority:
11 USC § 362(c)(1)

Discussion:
See *3.10*

Form:
See *3.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationCommencementJoint CasesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Chapter 3 Effect of Bankruptcy
II. DETERMINING WHETHER ENFORCEMENT OF JUDGMENT OR COLLECTION OF DEBT IS STAYED

1-3 MB Practice Guide: CA Debt Collection 3.04

3.04 Initial Steps After Bankruptcy Is Filed.

3.04[1] Bankruptcy Stay Automatically Applies From Beginning of Case. The filing of a bankruptcy petition operates to stay automatically all acts and proceedings by creditors against the party filing the petition [*11 USC § 362(a)*].

Exception:
The stay is not automatic (but can be imposed, on the debtor's motion) in the case of:

- An individual debtor who is a serial filer [*11 USC § 362(c)(4)(A)(i)*; *see 3.08*]; or
- A small business debtor in certain Chapter 11 cases [*11 USC § 101(51C)*, *(51D)(A)*; *see 3.09*].

Strategic Points--Creditor:

- Numerous acts and proceedings by creditors are excepted from operation of the stay [*see 3.06*].
- In a Chapter 13 case, the bankruptcy stay applies also to consumer debt actions by a creditor against an individual who is a co-debtor of the Chapter 13 debtor [*11 USC § 1301*; *see 3.04A*].

The four Bankruptcy Code chapters provide for different types of relief:

- Chapter 7, providing for liquidation and distribution of assets.
- Chapter 11, providing for reorganization of a debtor.
- Chapter 12, providing debt adjustment for family farmers and fishermen.
- Chapter 13, providing debt adjustment for individuals with regular income.

Determining If Debtor Has Filed For Bankruptcy Using Online Resources:

Many resources are available online for determining if a debtor has filed for bankruptcy. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings
  - Sample Search: To find California bankruptcy filings of an individual, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Discussion of proceeding under these different remedies, see California Forms of Pleading and Practice, Ch. 94, Bankruptcy (Matthew Bender).

3.04[2] Investigating and Responding to Bankruptcy Filing. All bankruptcy courts have online access through Public Access to Court Electronic Records (PACER), a subscription pay-as-you-go service on each court's website. Counsel can use PACER to pull up the latest information for any bankruptcy filing, including dockets and most actual pleadings filed. If counsel receives information that a bankruptcy has been filed, PACER should be used to verify it. If an action is not listed, the chances are it has not been filed.

If counsel is engaged in state court litigation on behalf of or against one or more of the debtors in bankruptcy, counsel should immediately file a notice of stay of proceedings (Judicial Council Form CM-180), advising the state court of the automatic bankruptcy stay. Judicial Council Form CM-180 is approved for mandatory use [*Cal Rules Ct, Rule 3.650(a)*].

Cross Reference:

Form for notice of stay of proceedings (Judicial Council Form CM-180), see *3.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewBankruptcy LawCase AdministrationNotice

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II. DETERMINING WHETHER ENFORCEMENT OF JUDGMENT OR COLLECTION OF DEBT IS STAYED

1-3 MB Practice Guide: CA Debt Collection 3.04A

3.04A Bankruptcy Stay Applies to Co-Debtor in Chapter 13 Consumer Debt Case.

In a Chapter 13 case, the bankruptcy stay applies to consumer debt actions by a creditor against an individual who is a co-debtor of the Chapter 13 debtor [*see 11 USC § 1301*].

Counsel should note the following concerning the stay:

- The stay applies only to consumer debt.
- Counsel should monitor the bankruptcy for filing of a plan.
- Counsel should assess the plan terms to determine if the entire debt is being paid in full. If not, file for lifting the co-debtor stay to enforce the balance of the obligation in state court.

Exceptions:

- The stay does not apply to a commercial debt, as opposed to a debt undertaken for personal, family, household, or other consumer purposes [*see 11 USC § 1301(a)(1)* (stay does not apply to co-debtor who became liable on or secured debt in the ordinary course of such individual's business)].
- The stay does not apply to a co-debtor if the Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7 or 11 [*11 USC § 1301(a)(2)*].
- The stay terminates on confirmation of a Chapter 13 plan with regard to a co-debtor to the extent that the full debt is not being paid through the plan. For example, if the plan pays only 50 percent of the debt, the balance can be collected from the nonbankrupt co-debtor.

Strategic Point:

Practically speaking, many state courts as a matter of course let the state action proceed against the co-debtor regardless. If counsel represents the co-debtor, and if the debt is primarily for personal, family, or household or other consumer purposes, the appropriate motion will have to be brought allowing the stay to encompass the co-debtor.

Cross Reference:

Discussion of seeking relief from stay of proceedings against co-debtor in Chapter 13 cases, see *3.15A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCodebtor StaysBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral Overview

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Chapter 3 Effect of Bankruptcy
II. DETERMINING WHETHER ENFORCEMENT OF JUDGMENT OR COLLECTION OF DEBT IS STAYED

1-3 MB Practice Guide: CA Debt Collection 3.05

3.05 Bankruptcy Stay Is Comprehensive.

The bankruptcy stay applies to all entities and prevents [*11 USC § 362(a)*]:

- The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under the Bankruptcy Code, or to recover a claim against the debtor that arose before the commencement of the case under the Bankruptcy Code.

- The enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under the Bankruptcy Code.

- Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

- Any act to create, perfect, or enforce any lien against property of the estate.

- Any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under the Bankruptcy Code.

- Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under the Bankruptcy Code.

- The setoff of any debt owing to the debtor that arose before the commencement of the case under the Bankruptcy Code against any claim against the debtor.

A creditor who willfully violates a stay may be liable for any actual damages, including costs and attorney's fees, and, in appropriate circumstances, punitive damages [*11 USC § 362(k)(1)*].

Cross Reference:

Consequences for creditor if stay is violated, see *California Forms of Pleading and Practice, § 94.32* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageLiensBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesDamagesBankruptcy LawClaimsSetoffsContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsGeneral Overview

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Chapter 3 Effect of Bankruptcy
II. DETERMINING WHETHER ENFORCEMENT OF JUDGMENT OR COLLECTION OF DEBT IS STAYED

1-3 MB Practice Guide: CA Debt Collection 3.06

3.06 Specified Permitted Acts and Proceedings by Creditors.

3.06[1] Creditor May Commence Nondischargeability Proceeding. Filing a complaint to determine nondischargeability in the bankruptcy court when the bankruptcy case is pending is permissible, and does not violate the stay [*see, e.g., Rein v. Providian Fin. Corp. (9th Cir 2001) 270 F3d 895, 904-905*]. An assignee of the original creditor's claim may file such complaints since the assignee "steps into the shoes" of the assignor [*Boyajian v. New Falls Corp. (In re Boyajian) (9th Cir 2009) 564 F3d 1088, 1090]* .

Cross Reference:

Determining nondischargeability of debt, see *3.20* et seq.

Warning:

Most nondischargeability actions must be filed by a date certain (the "bar date"), generally listed on the notice of bankruptcy. Counsel *must* calendar this date immediately. Cases filed after the bar date has passed (if no extension has been issued by the court) are absolutely barred. The bankruptcy court cannot retroactively relieve counsel of the consequences of missing the bar date.

Cross Reference:

Form for stipulation to extend bar date, see *3.34*.

3.06[2] Creditor May Exercise Investment Contract Rights. Filing a bankruptcy petition does not operate as a stay of the following setoffs:

- Setoff by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency in connection with specified types of contracts or margin accounts [*11 USC § 362(b)(6)*].

- Setoff by a repurchase agreement participant based on a mutual claim for a margin payment or settlement payment [*11 USC § 362(b)(7)*].

- Setoff pursuant to a swap agreement [*11 USC § 362(b)(17)*; *see 11 USC § 101(53B)* (definition)].

- Setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements [*see 11 USC §§ 101(38A), (38B), 561* (definitions; contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts)] or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements, or any contract or agreement subject to such agreements against any payment due to the debtor from the master netting agreement participant under or in connection with such agreements, or any contract or agreement subject to such agreements, or against cash, securities, or other property held by, pledged to, under the control of, or due from the master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that the participant is eligible to exercise setoff rights under *11 USC § 362(b)(6), (7),* or *(17)* for each individual contract covered by the master netting agreement in issue [*11 USC § 362(b)(27)*].

Strategic Point:

The exercise of these setoff rights not subject to the automatic stay cannot be stayed by order of a court or administrative agency in a proceeding under the Bankruptcy Code [*11 USC § 362(o)*].

The Ninth Circuit has held that the offset of a previously posted letter of credit was not a violation of the automatic stay [*see Biggs v. Stovin (In re Luz Int'l) (9th Cir BAP 1998) 219 BR 837, 848]* .

3.06[3] Qualified Retirement Plan May Compel Repayment of Loan to Debtor. Filing a bankruptcy petition does not operate as a stay of the withholding of income from the debtor's wages and the collection of amounts withheld, under an agreement by the debtor authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other tax-qualified plan [*see IRC §§ 401, 403, 408, 408A, 414, 457, 501(c)*], that is sponsored by the debtor's employer, or an affiliate, successor, or predecessor of the debtor's employer, to the extent that the amounts withheld and collected are used solely for payments relating to either of the following [*11 USC § 362(b)(19)*]:

- A loan from a plan under *ERISA § 408(b)(1)* [*see 29 USC § 1108(b)(1)*] or subject to *IRC § 72(p)* (each of which permits loan, on specified terms, from retirement plan to participant or beneficiary); or

- A loan from a thrift savings plan that satisfies the requirements of *5 USC § 8433(g)* (loan from retirement plan for federal civil service employees).

Distinguish:

Nothing in *11 USC § 362(b)(19)* may be construed to provide that any loan made under a governmental plan under *IRC § 414(d)* or a contract or account under *IRC § 403(b)* constitutes a claim or a debt under the Bankruptcy Code [*11 USC § 362(b)(19)*].

3.06[4] Creditor May Enforce Real Property Lien or Security Interest If Debtor's Bankruptcy Case Is Disallowed. Filing a bankruptcy petition does not operate as a stay of an act to enforce a lien against or security interest in real property if either of the following exceptions applies [*11 USC § 362(b)(21)*]:

- The debtor is ineligible to be a debtor in a bankruptcy case because the debtor is an individual and was a debtor in a bankruptcy case within the preceding 180 days and either of the following occurred [*11 USC § 109(g)*]:

○ The court dismissed the prior case for the debtor's willful failure to abide by orders of the court or to appear before the court in proper prosecution of the case.

○ The debtor requested and obtained a voluntary dismissal of the prior case after a creditor requested relief from the bankruptcy stay of creditor action.

- The bankruptcy petition was filed in violation of a bankruptcy court order in a prior bankruptcy case prohibiting the debtor from being a debtor in another bankruptcy case.

Strategic Point:

Filing a bankruptcy petition does not operate as a stay of an act to enforce a lien against or security interest in real property following entry of a relief order under *11 USC § 362(d)(4)* [*see 3.11*] in favor of the creditor as to the real property in any prior bankruptcy case for a period of two years after the date of entry of that order. However, in a subsequent bankruptcy case, the debtor may move for relief from that order based on changed circumstances or for other good cause shown, after notice and a hearing [*11 USC § 362(b)(20)*].

3.06[5] Creditor May Perfect Certain Interests in Property. Filing a bankruptcy petition does not operate as a stay of an act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to perfection under *11 USC § 546(b)* or to the extent that the act is accomplished within the 30-day period provided under *11 USC § 547(e)(2)(A)* [*11 USC § 362(b)(3)*].

Strategic Pont:

Note that ministerial acts are not barred. For example, filing a UCC renewal or extension to preserve a prior existing lien is a ministerial act not barred by the automatic stay. However, recording a lien that was not perfected before (such as recording a new abstract) is not a ministerial act. The key is to see whether the act maintains the status quo ante or creates a new lien position. Similarly, if counsel started a process that was "in the works" before the filing, and there is nothing further to do to follow it through, there is no need to take affirmative acts to stop the process.

Consider:

Before taking any action based on this authority, a creditor can first obtain a "comfort order" from the bankruptcy court in which the case is pending, granting relief from the automatic stay. Comfort orders are expressly authorized in *11 USC § 362(j)* to confirm termination of the automatic stay under *11 USC § 362(c)* as to repeat filers. Some courts have expressed a reluctance to issue comfort orders in other contexts as being outside their statutory authority [*see e.g., In re Dienberg (ND Ind Aug. 30, 2006) 2006 Bankr. LEXIS 2034*].

3.06[6] Creditor May Present Debtor's Negotiable Instrument for Payment. Filing a bankruptcy petition does not stay the following acts [*11 USC § 362(b)(11)*]:

- Presenting a negotiable instrument for payment.
- Giving notice of dishonor of a negotiable instrument.
- Protesting notice of dishonor of a negotiable instrument.

3.06[7] Creditor May Complete Nonavoidable Transfer. Filing a bankruptcy petition does not operate as a stay of any transfer that is not avoidable by the trustee under *11 USC §§ 544* and *549* (avoidance of both pre-petition transfers and post-petition transfers) [*11 USC § 362(b)(24)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPostpetition TransactionsContracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawNegotiable InstrumentsDishonor & PresentmentGeneral OverviewContracts LawNegotiable InstrumentsDishonor & PresentmentNotices of Dishonor

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Chapter 3 Effect of Bankruptcy
II. DETERMINING WHETHER ENFORCEMENT OF JUDGMENT OR COLLECTION OF DEBT IS STAYED

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3.07 Automatic Stay for Individual Debtor Can Expire in 30 Days If Another Bankruptcy File by or Against Debtor Was Dismissed Within the Preceding Year.

3.07[1] Individual With One Dismissed Case in Preceding Year Is Not Entitled to Continuation of Automatic Stay. If a single or joint case is filed by or against a debtor who is an individual in a case under Chapter 7, Chapter 11, or Chapter 13, and if a single or joint bankruptcy case of the debtor was pending within the preceding one-year period but was dismissed, the stay in the current case with respect to any action taken with respect to a debt or property securing a debt or with respect to any lease will terminate with respect to the debtor on the 30th day after the filing of the current case [*11 USC § 362(c)(3)(A)*].

Exception:

A bankruptcy case that was pending in the preceding one-year period, was dismissed, and was refiled under *11 USC § 707(b)* is not presumed to be filed in bad faith [*11 USC § 362(c)(3)(A)*].

Strategic Point--Creditor:

On request of a party in interest, the court must issue an order confirming that the stay has been terminated [*11 USC § 362(j)*].

3.07[2] Debtor May Prove Facts to Support Continuation of Stay. On the motion of a party in interest for continuation of the stay and on notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period, if the party in interest demonstrates that the filing of the current case is in good faith as to the creditors to be stayed [*11 USC § 362(c)(3)(B)*].

Strategic Point--Debtor:

In ruling on a motion for the stay to take effect, the court generally must presume that the case was not filed in good faith (but presumption may be rebutted by clear and convincing evidence to contrary) as to creditors in the following circumstances [*11 USC § 362(c)(3)(C)(i)*]:

- More than one previous case (under Chapter 7, Chapter 11, or Chapter 13) in which the individual was a debtor was pending within the preceding one-year period.

- A previous case (under Chapter 7, Chapter 11, or Chapter 13) in which the individual was a debtor was dismissed within that one-year period, after the debtor either:

  - Failed to file or amend the petition or other documents as required by the Bankruptcy Code or the court without substantial excuse (mere inadvertence or negligence is not substantial excuse unless dismissal was caused by negligence of debtor's attorney);

  - Failed to provide adequate protection as ordered by the court; or

  - Failed to perform the terms of a plan confirmed by the court.

- There has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next-previous case (under Chapter 7, Chapter 11, or Chapter 13) or any other reason to conclude that the later case will be concluded with a discharge (Chapter 7 case) or with a confirmed plan that will be fully performed (Chapter 11 or Chapter 13 case).

Exception:

If a previous case (under Chapter 7, Chapter 11, or Chapter 13) was dismissed because of the creation of a debt repayment plan, for purposes of *11 USC § 362(c)(3)*, a subsequent case commenced by the debtor (under Chapter 7, Chapter 11, or Chapter 13) cannot be presumed to be filed not in good faith [*11 USC § 362(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationCommencementJoint CasesGeneral OverviewBankruptcy LawCase AdministrationNoticeBankruptcy LawDischarge & DischargeabilityReorganizationsCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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3.08 Stay Is Not Automatic in Case of Individual Serial Filer.

3.08[1] Individual With Two Dismissed Cases in Preceding Year Is Not Entitled to Automatic Stay. If a single or joint case is filed by or against a debtor who is an individual, and if two or more single or joint cases of the debtor were pending within the previous year but were dismissed, the stay will not go into effect automatically on the filing of the later case [*11 USC § 362(c)(4)(A)(i)*].

Exception:

A case that was pending in the previous year, was dismissed, and was refiled under *11 USC § 707(b)* is not counted as a disqualifying case [*11 USC § 362(c)(4)(A)(i)*].

Strategic Point--Creditor:

On request of a party in interest, the court must promptly enter an order confirming that no stay is in effect [*11 USC § 362(c)(4)(A)(ii), (j)*].

3.08[2] Debtor May Prove Facts to Support Imposition of Stay. On the motion of a party in interest, the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, if the party in interest demonstrates that the filing of the current case is in good faith as to the creditors to be stayed [*11 USC § 362(c)(4)(B)*].

Timing:

The motion must be filed within 30 days after the filing of the petition in the current case [*11 USC § 362(c)(4)(B)*].

Strategic Point--Debtor:

In ruling on a motion for the stay to take effect, the court must presume that the case was filed not in good faith (presumption may be rebutted by clear and convincing evidence to contrary) as to creditors in the following circumstances [*11 USC § 362(c)(4)(D)(i)*]:

- Two or more previous bankruptcy cases in which the individual was a debtor were pending within the one-year period preceding the filing of the petition in the current case.

- A previous bankruptcy case in which the individual was a debtor was dismissed within the one-year period after the debtor either:

  - Failed to file or amend the petition or other documents as required by the Bankruptcy Code or the court without substantial excuse (mere inadvertence or negligence is not substantial excuse unless dismissal was caused by negligence of debtor's attorney);

  - Failed to provide adequate protection as ordered by the court; or

  - Failed to perform the terms of a plan confirmed by the court.

- There has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next previous bankruptcy case, or any other reason to conclude that the current case will not be concluded with a discharge (under Chapter 7) or with a confirmed plan that will be fully performed (under Chapter 11 or Chapter 13).

Strategic Point--Creditor:

The stay is effective on the date of the entry of the order allowing the stay to go into effect [*11 USC § 362(c)(4)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersGeneral OverviewBankruptcy LawCase AdministrationCommencementJoint CasesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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3.09 Stay Is Not Automatic in Small Business Debtor Cases.

3.09[1] Small Business Case Is Chapter 11 Case With Debts Not Exceeding $2 Million. A "small business case" is a bankruptcy case filed under Chapter 11 in which the debtor is a "small business debtor"; that is, a person engaged in commercial or business activities (including any affiliate of the person that is also a debtor under the Bankruptcy Code) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the bankruptcy filing, or the date of entry of an order for relief, in an amount not more than $2,190,000 (excluding debts owed to one or more affiliates or insiders) for a case when an unsecured creditors committee has not been appointed or when the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor [*11 USC § 101(51C), (51D)(A)*].

Exceptions:
The definition of "small business debtor" excludes:

- A person whose primary activity is the business of owning or operating real property or activities incidental to it [*11 USC § 101(51D)(A)*].

- Any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $2,190,000 (excluding debt owed to one or more affiliates or insiders) [*11 USC § 101(51D)(B)*].

3.09[2] Specified Conditions Can Prevent Automatic Application of Stay.

3.09[2][a] Debtor in Pending Small Business Case Is Not Entitled to Automatic Stay. The stay does not apply automatically when the debtor is a debtor in a small business case pending at the time the petition is filed [*11 USC § 362(n)(1)(A)*].

3.09[2][b] Debtor in Recently Dismissed Small Business Case Is Not Entitled to Automatic Stay. The stay does not apply automatically when the debtor was a debtor in a small business case that was dismissed for any reason by an order that became final in the two-year period ending on the date of the order for relief entered with respect to the petition [*11 USC § 362(n)(1)(B)*].

Consider:

"Order for relief" is not defined in the statutes, and is a term of art that generally is unfamiliar to non-bankruptcy practitioners. Almost all bankruptcy cases are voluntary, and the filing of a voluntary bankruptcy petition "constitutes an order for relief" under the applicable bankruptcy chapter in which it was filed [*11 USC § 301(b)*]. Practically speaking, this means that "filing a bankruptcy case," "filing a voluntary petition," or "order for relief" are virtually the same thing, and trigger the application of the automatic stay under *11 USC § 362(a)*.

3.09[2][c] Debtor That Received Plan Confirmation in Recent Small Business Case Is Not Entitled to Automatic Stay. The stay does not apply automatically when the debtor was a debtor in a small business case in which a plan was confirmed in the two-year period ending on the date of the order for relief entered with respect to the petition [*11 USC § 362(n)(1)(C)*].

3.09[2][d] Debtor That Recently Acquired Small Business Might Not Be Entitled to Automatic Stay. The stay does not apply automatically when the debtor acquired substantially all of the assets or business of a small business debtor described in 3.09[2][a]-[c], unless the debtor establishes by a preponderance of the evidence that the debtor acquired substantially all of the assets or business of the small business debtor in good faith and not for the purpose of evading the exception *11 USC § 362(n)(1)* [*11 USC § 362(n)(1)(D)*].

3.09[3] Debtor May Prove Facts to Support Imposition of Stay. In a voluntary case in which one of the conditions described in 3.09[2] exists, the stay will be imposed as usual if the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed, and if it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time [*11 USC § 362(n)(2)(B)*].

Distinguish--Involuntary Case:

In an involuntary case in which one of the conditions exists as described in *3.09[2]*, the stay will be imposed as usual if the case involves no collusion by the debtor with creditors [*11 USC § 362(n)(2)(A)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewBankruptcy LawReorganizationsPlansConfirmationPrerequisitesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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3.10 Stay Terminates As to Property That Is No Longer Part of Estate.

3.10[1] Stay of Acts Against Estate Property Normally Continues. Ordinarily, as to acts against estate property, the stay continues until the property is no longer property of the estate [*11 USC § 362(c)(1)*].

Exception:
The stay will not continue as to any property concerning which the creditor has obtained relief from the stay [*see 11 USC § 362(c)-(f)*].

Cross Reference:
Obtaining relief from stay, see *3.11* et seq.

3.10[2] Personal Property May Cease to Be Part of Individual Debtor's Estate. If the debtor is an individual, the stay is terminated with respect to the personal property of the estate or the debtor that either secures in whole or in part a claim or is subject to an unexpired lease, and thereupon the personal property is no longer property of the estate, if the debtor, within a specified 30-day period [*see 11 USC § 521(a)(2)*], fails to take these steps [*11 USC § 362(h)(1)*]:

- File a statement of intention, required under *11 USC § 521(a)(2)*, with respect to that personal property, indicating in the statement that the debtor will either:
  - Surrender the personal property;
  - Redeem the personal property [*see 11 USC § 722*];
  - Enter into a reaffirmation agreement [*see 11 USC § 524(c)*] applicable to the debt secured by the personal property; or
  - Assume the unexpired lease [*see 11 USC § 365(p)*] if the trustee does not do so.
- Take the action specified in the statement, in a timely manner, as the statement may be amended before expiration of the period for taking action--except when the statement specifies the debtor's

intention to reaffirm the debt on the original contract terms, and the creditor refuses to agree to the reaffirmation on those terms.

Exception:

This rule does not apply if the court determines, on the motion of the trustee filed before the expiration of the specified 30-day period [*see 11 USC § 521(a)(2)*], after notice and a hearing, that the personal property is of consequential value or benefit to the estate, and the court orders appropriate adequate protection of the creditor's interest and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not make that determination, the stay will terminate on the conclusion of the hearing on the trustee's motion [*11 USC § 362(h)(2)*].

3.10[3] Giving Notice of Termination of Stay. When a stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so [*Cal Rules of Ct, Rule 3.650(d)*].

To give notice of termination of the stay, counsel must file a notice of termination of modification of stay (Judicial Council Form CM-181), which is approved for mandatory use [*Cal Rules Ct, Rule 3.650(d)*].

Cross Reference:

Form for termination of stay of proceedings (Judicial Council Form CM-181), see *3.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionContracts LawTypes of ContractsLease AgreementsGeneral OverviewEstate, Gift & Trust LawTrustsGeneral Overview

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III. OBTAINING RELIEF FROM STAY

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3.11 CHECKLIST: Obtaining Relief From Stay.

☐ Determine whether creditor has ground for relief from stay because of either:

○ Lack of adequate protection of creditor's interest in specified property; or

○ Other cause.

Authority:
11 USC § 362(d)(1)

Discussion:
See *3.12*

☐ Determine whether creditor has ground for relief from stay because debtor has no equity in specified property.

Authority:
11 USC § 362(d)(2)

Discussion:
See *3.13*

☐ If creditor has security interest in real property that is part of bankruptcy estate, determine whether creditor has ground for relief because either:

○ Bankruptcy case is single-asset real estate case.

Authority:
11 USC § 362(d)(3)

Discussion:
See *3.14*

○ Bankruptcy case was part of scheme to delay, hinder, and defraud creditors.

Authority:
11 USC § 362(d)(4)

Discussion:
See *3.15*

☐ Determine whether creditor has ground for relief from stay against co-debtor in Chapter 13 case because:

○ Co-debtor received consideration for claim held by creditor;

○ Plan filed by debtor proposes not to pay claim; or

○ Creditor's interest would be irreparably harmed by continuation of stay.

Authority:
11 USC § 1301(c)

Discussion:

See *3.15A*

☐ Determine whether creditor has ground for ex parte relief from stay to prevent irreparable damage to creditor's interest in specified property.

Authority:
11 USC § 362(f)

Discussion:
See *3.16*

☐ Prepare, file, and serve motion papers and supporting papers, in compliance with rules.

Authority:
Fed R Bankr P 4001, 9013

Discussion:
See *3.17*

Form:
See *3.31*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCodebtor StaysBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysProceduresReal Property LawBankruptcySecured Claims

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3.12 Court Will Provide Relief From Stay for Cause.

3.12[1] Creditor Must Request Relief. On the creditor's motion and after notice and a hearing, the court, for cause, must grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause [*11 USC § 362(d)(1)*].

Cross Reference:

Form for notice of motion and motion for relief from stay, see *3.31*.

Consider:

In the context of enforcing a judgment or collecting a debt, relief from the stay is a remedy for a creditor having a security interest or an ownership interest in property that is part of the bankruptcy estate. The creditor's purpose in seeking relief is to protect the interest so that it can be used for satisfying the creditor's claim. A creditor not having this kind of interest in property of the estate probably cannot show a ground for relief from the stay.

Strategic Point:

In general, the court will not grant relief from stay to allow counsel to continue to prosecute a claim in state court. Rather, most courts will pull the matter up into the bankruptcy proceeding. In some circumstances, counsel can make a case that the action involves too many interdependent parties and liability issues to be fully resolved in the bankruptcy, but those instances are very rare [*see In re Related Asbestos Cases (ND Cal 1982) 23 BR 523, 531*]. Relief from stay may also be granted when:

- The creditor's claim is covered by insurance (if the creditor is willing to limit recovery to the amount of the policy) [*In re Fernstrom Storage & Van Co. (7th Cir 1991) 938 F2d 731, 736*];

- The factual determinations by a non-bankruptcy court are entitled to collateral estoppel effect in adversary proceedings to determine the dischargeability of debt in bankruptcy court [*Cobe v. Smith (In re Cobe) (9th Cir 1998) 229 BR 15, 19*];

- The non-bankruptcy court action is ready for trial and the bankruptcy is filed shortly before the trial date [*Packerland Packing Co. (9th Cir 1985) 776 F2d 802, 806-807*];

- The bankruptcy presents a "two party dispute" between a debtor and a creditor [*In re Silberkraus (CD Cal 2000) 253 BR 890, 906*]; or

- The bankruptcy case has been filed in bad faith [*In re Silberkraus (CD Cal 2000) 253 BR 890, 906*].

Strategic Point:

The court will grant relief from stay when a Chapter 13 plan does not provide for full repayment over the plan period and there is a non-bankrupt co-signer or guarantor.

3.12[2] Cause Includes Lack of Protection for Interest in Property. Cause for granting relief from the stay includes the lack of adequate protection of an interest of the creditor in property [*11 USC § 362(d)(1)*].

Strategic Point:

Most common motions for relief from stay are for lack of adequate protection, brought under *11 USC § 362(d)(1)* and *11 USC § 362(d)(2)*, in the alternative. The "lack of adequate protection" ground often means that the debtor's equity in property securing creditor's loan is of a lesser value than the current loan balance. Thus the "lack of equity in the property" ground is based on the same facts. To establish the lack of adequate protection, or lack of equity in property, the creditor must support the motion for relief from stay with a declaration or affidavit attesting to the current value of the property securing the loan, the loan balance, and any other liens against the property. Typically this information is provided in an accompanying document required by local court rules, such as the "relief from stay" cover sheet required by the Northern District of California Bankruptcy Court [*see* http://www.canb.uscourts.gov/ (click on Forms)]. The accompanying declaration also should include the name and capacity of the declarant, and the basis for the declarant's personal knowledge of the facts set forth in the declaration. The declaration should also attach and authenticate the relevant loan and security documents, as well as the appraisal or other basis for evaluation, such as the Kelly Blue Book in the case of motor vehicles [*see* www.KBB.com].

3.12[3] Adequate Protection Can Be Provided Without Lifting Stay. Except in a Chapter 12 case [*see 3.12[4]*], when adequate protection is required under *11 USC § 362* for the creditor's interest in property, the protection may be provided by [*11 USC § 361*]:

- Requiring the trustee to make a cash payment or periodic cash payments to the creditor, to the extent that the stay results in a decrease in the value of the creditor's interest in the property;

- Providing to the creditor an additional or replacement lien to the extent that the stay results in a decrease in the value of the creditor's interest in the property; or

- Granting other relief that will result in the realization by the creditor of the indubitable equivalent of the creditor's interest in the property.

Exception:

In granting other relief, the court may not entitle the creditor to compensation allowable under *11 USC §*

503(b)(1) as an administrative expense [*11 USC § 361(3)*].

Strategic Point:

Lack of insurance maintained to protect collateral is grounds for relief from stay based on lack of adequate protection [*see 11 USC § 361(3)*]. The point of adequate protection is to keep the parties in the same position they were in at the time of the bankruptcy filing. If that means that the collateral is a rapidly depreciating asset (such as a vehicle), payments are usually called for in order to preserve a party's position.

11 USC § 1325(a) provides that if the debtor bought a vehicle for personal use within 910 days of filing bankruptcy, the Chapter 13 plan must provide for payment in full of the loan amount.

If a creditor files a motion for relief from stay contending that there is no equity in a vehicle over and above the amount of the secured lien in a case other than a Chapter 13, to be allowed to retain possession and use of the vehicle, the debtor may offer to make adequate protection payments.

In a case under Chapter 11, a debtor still may provide a plan that proposes only to pay the actual value of the vehicle as opposed to the amount owing under the "cram-down" provisions of *11 USC § 1129*.

3.12[4] Creditor in Chapter 12 Case Can Protect Security or Ownership Interest in Property. The rules of *11 USC § 361* [*see 3.12[3]*] do not apply in a Chapter 12 case, relating to family farmers and fishermen [*11 USC § 1205(a)*]. Instead, in that case, when adequate protection is required under *11 USC § 362* for the creditor's interest in property, the protection may be provided by [*11 USC § 1205(b)*]:

- Requiring the trustee to make a cash payment or periodic cash payments to the creditor, to the extent that the stay results in a decrease in the value of property securing a claim or of the creditor's ownership interest in property;

- Providing to the creditor an additional or replacement lien to the extent that the stay results in a decrease in the value of property securing a claim or of the creditor's ownership interest in property;

- Paying to the creditor for the use of farmland the reasonable rent customary in the community where the property is located, based on the rental value, net income, and earning capacity of the property; or

- Granting other relief that will adequately protect the value of property securing a claim or of the creditor's ownership interest in property.

Exception:

In granting other relief, the court may not entitle the creditor to compensation allowable under *11 USC § 503(b)(1)* as an administrative expense [*11 USC § 1205(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportBankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewInsurance LawMotor Vehicle InsuranceCancellation & RenewalNotice RequirementsTime LimitationsInsurance LawProperty InsuranceExclusionsGeneral Overview

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3.13 Court May Grant Relief From Stay When Debtor Has No Equity in Property.

On the creditor's motion and after notice and a hearing, the court must grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, with respect to an act against property, if both [*11 USC § 362(d)(2)*]:

- The debtor does not have an equity in the property; and
- The property is not necessary to an effective reorganization.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewInsurance LawProperty InsuranceExclusionsGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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3.14 Court May Grant Relief From Stay in Single-Asset Real Estate Case.

On the creditor's motion and after notice and a hearing, the court must grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, with respect to an act against single-asset real estate by a creditor whose claim is secured by an interest in the real estate, unless, not later than a specified date, if either [*11 USC § 362(d)(3)*]:

- The debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

- The debtor has commenced monthly payments that both:

  - May, in the debtor's sole discretion, notwithstanding *11 USC § 363(c)(2)* (restricting the use of cash collateral), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by the real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

  - Are in an amount equal to interest at the then-applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate.

Timing:

The cutoff date for obtaining relief from the stay is the later of (1) 90 days after the entry of the order for relief or later date as the court may determine for cause by order entered within that 90-day period, or (2) 30 days after the court determines that the debtor is subject to *11 USC § 362(d)(3)*.

Distinguish:

Single-asset real estate is real property constituting a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor who is not a family farmer, other than the business of operating the real property and activities incidental to it [*11 USC § 101(51B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewInsurance LawProperty InsuranceExclusionsGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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3.15 Court May Grant Relief From Stay As to Real Property in Case of Fraudulent Bankruptcy.

On the creditor's motion and after notice and a hearing, the court must grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, with respect to an act against real property by a creditor whose claim is secured by an interest in the real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either [*11 USC § 362(d)(4)*]:

- Transfer of all or part ownership of, or any other interest in, the real property without the consent of the secured creditor or court approval; or

- Multiple bankruptcy filings affecting that real property.

Consider:

If recorded in compliance with applicable state law governing notices of interests or liens in real property, an order entered under *11 USC § 362(d)(4)* is binding in any other bankruptcy case that purports to affect the same real property and is filed not later than two years after the date of entry of the order by the court. However, a debtor in that subsequent bankruptcy case may move for relief from the order based on changed circumstances or for good cause shown, after notice and a hearing. Any federal, state, or local governmental unit that accepts notices of interests or liens in real property must accept any certified copy of an order entered under *11 USC § 362(d)(4)* for indexing and recording.

Strategic Point:

Serial filings will often occur on the brink of a scheduled foreclosure sale. In that case, rather than unwinding the foreclosure sale, counsel should ask that the order annulling the stay be issued nunc pro tunc to relate back to before the sale. Most title insurers will accept this type of order and insure the title after sale.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysDurationBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewBankruptcy LawCase AdministrationNoticeReal Property LawBankruptcyGeneral OverviewReal Property LawBankruptcySecured Claims

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3.15A Court May Grant Relief From Stay Against Co-Debtor in Chapter 13 Consumer Debt Case.

On the request of a party in interest and after notice and a hearing, the court may grant relief to the creditor from a stay of actions against a co-debtor of a Chapter 13 debtor if any of the following circumstances exist:

- As between the debtor and the co-debtor, the co-debtor received the consideration for the claim held by the creditor [*11 USC § 1301(c)(1)*]. This covers a situation where the person filing bankruptcy is a guarantor or surety and did not directly receive loan proceeds.

- The plan filed by the debtor proposes not to pay the claim [*11 USC § 1301(c)(2)*; *In re Jacobsen (Bankr 9th Cir 1982) 20 BR 648, 650]* . If not provided in plan at all, this is mandatory. However, when the debt will not be paid in full, such relief is arguably within the bankruptcy court's discretion.

- The creditor's interest would be irreparably harmed by the continuation of the stay [*11 USC § 1301(c)(3)*].

When a creditor requests relief from the stay as to the co-debtor on the ground that the plan does not propose to pay the debt, the stay automatically terminates 20 days after the filing of the creditor's request unless the debtor or the co-debtor files and serves written objections to the termination of the stay [*11 USC § 1301(d)*].

Cross Reference:

Discussion of stay of proceedings against co-debtor in Chapter 13 cases, see *3.04A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCodebtor StaysBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysDurationBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral Overview

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3.16 Creditor Can Obtain Ex Parte Relief to Prevent Irreparable Damage.

On the creditor's request, the court, with or without a hearing, must grant relief from the stay necessary to prevent irreparable damage to the creditor's interest in property, if that interest will otherwise suffer irreparable damage before there is an opportunity for notice and a hearing on a motion for relief [*11 USC § 362(f)*]. Relief from the stay may be granted without prior notice only if both [*Fed R Bankr P 4001(a)(2)*]:

- It clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the moving party before the adverse party or the attorney for the adverse party can be heard in opposition; and

- The moving party's attorney certifies to the court in writing the efforts, if any, that have been made to give notice or the reasons why notice should not be required.

Strategic Points--Creditor:

The party obtaining ex parte relief must immediately give oral notice of that fact to the trustee or debtor in possession and to the debtor and forthwith must mail or otherwise transmit to the adverse party or parties a copy of the order granting relief [*Fed R Bankr P 4001(a)(2)*].

Strategic Point--Debtor:

On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that case, the court must expeditiously hear and determine the motion [*Fed R Bankr P 4001(a)(2)*].

Strategic Point:

In the Central District of California the bankruptcy courts require filing the ex parte application first, then advise whether they will allow it to proceed on shortened notice, before counsel is required to give notice of an application. Judges may handle these matters slightly differently, so counsel should call the calendar clerk first to see what procedure is followed by the judge hearing a particular matter [*see* CD

Cal Local Bankr R 9013-1(a)(5)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysCauseBankruptcy LawCase AdministrationNoticeCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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3.17 Prepare, File, and Serve Motion in Compliance With Rules.

3.17[1] General Requirements As to Form and Service Apply.

3.17[1][a] Rules for Contested Matters Apply. A motion for relief from an automatic stay must be made in accordance with the rules of bankruptcy procedure for contested matters [*Fed R Bankr P 4001(a)(1)*]. In general, this means relief is requested by motion, on reasonable notice with an opportunity for a hearing [*see Fed R Bankr P 9014(a)*]. The motion is served in the manner of a summons and complaint, procedural rules as to discovery and disclosure apply, and the hearing provides for witnesses and testimony [*see Fed R Bankr P 9014(b)-(e)*].

Cross Reference:

Discussion of modifying and stipulating regarding stay, see *3.17[3]*.

Form for motion for relief from stay, see *3.31*.

3.17[1][b] Request for Relief Must Be in Form of Written Motion. A request for an order for relief from the stay must be made by written motion, stating the grounds with particularity and setting forth the relief or order sought [*Fed R Bankr P 9013*]. The motion must set forth the legal grounds for granting relief from the automatic stay, and be supported by an affidavit or declaration (there is no reason to use an affidavit) that presents all necessary facts and authenticates the supporting documents [*Fed R Bankr P 9011*]. There is generally no reason to file a memorandum of points and authorities in support of the motion. The motion must [*Fed R Bankr P 9011(a)*]:

- Be signed by at least one attorney of record in the attorney's individual name (or by a party who is not represented by an attorney);

- State the signer's address and telephone number, if any.

Cross Reference:

Form for motion for relief from bankruptcy stay, see *California Forms of Pleading and Practice, § 94.100* (Matthew Bender).

Strategic Point:

If the grounds for counsel's motion is lack of adequate protection based on no equity in the property or diminishing value, the court will require proof of value. This can be done either by an appraisal signed by an appraiser, reference to a recognized reference source, such as the Kelly Blue Book for cars [*see* www.kbb.com], or based on the value submitted in the debtor's bankruptcy schedules. It is the moving party's burden to prove the value; the rules of evidence do apply.

Strategic Point:

Most bankruptcy courts have their own forms available online, and normally require their use. For example, the Bankruptcy Court for the Central District of California's website offers many forms, including a motion for relief from stay, and the court requires use of that form [*see* http://www.cacb.uscourts.gov/].

3.17[1][c] Serve Motion on Debtor, Trustee, and Others. Every written motion other than one that may be considered ex parte must be served by the moving party on the trustee or debtor in possession and on other persons as specified by rules of bankruptcy procedure or as the court directs [*Fed R Bankr P 9013*]. The motion is supported by an affidavit, which must be served with the motion [*Fed R Bankr P 9006(d)*]. Other persons on whom service is required include [*Fed R Bankr P 4001(a)(1)*]:

- Any committee elected pursuant to *11 USC § 705* or appointed pursuant to *11 USC § 1102* or its authorized agent; and

- If the case is a Chapter 9 municipality case or a Chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to *11 USC § 1102*: the creditors included on the list filed pursuant to the rules of bankruptcy procedure [*see Fed R Bankr P 1007(d)*].

Timing:

A written motion, other than one that may be heard ex parte, and notice of any hearing must be served not later than five days before the time specified for the hearing, unless a different period is fixed by the rules of bankruptcy procedure or by order of the court. The order may for cause shown be made on ex parte application [*Fed R Bankr P 9006(d)*].

3.17[2] Local Rules Will Apply. Each bankruptcy court in California has local rules supplementing the federal rules of bankruptcy procedure that will apply with respect to motions for relief from the stay. The notice period for hearings is typically longer than the five day period under *Fed R Bankr P 9006(d)* [*see* ND Cal Local Bankr R 4001-1(c) (14 days); CD Cal Local Bankr R 9013-1(d)(2) (21 days)]. These local rules must be followed in the preparation, filing, and service of the motion, notice of motion, and supporting papers.

Local rules govern many aspects of the motion for relief from stay. For example, in the Northern District of California, counsel must refer to the available calendar hearing dates for motions for relief from stay published on the court's website, and "self-set" their motion for hearing [*see* ND Cal Local Bankr R 4001-1]. Some judges require that all motions for relief from stay be first scheduled for telephonic hearing.

These rules are available on each court's website [*see, e.g.,* http://www.caeb.uscourts.gov/formpubs/local_rules.asp (Eastern District of California Bankruptcy Court Local Rules)]. In addition, most bankruptcy courts have mandatory versions of these forms, which are available on their websites.

3.17[3] Modification or Temination of Stay and Stipulation for Relief From Stay. Interested parties can make an agreement to provide adequate protection or otherwise to modify or terminate the automatic stay. In that case, rather than move for relief from the stay, the creditor should move for approval of the agreement [*see generally Fed R Bankr P 4001(d)*].

Strategic Point:

Note that an agreement to modify the stay requires the approval and signature of the trustee or a debtor in possession, and usually must go out on notice to all creditors. Thus, it takes the same time that a noticed motion requires before the court can or will approve it. Keep this in mind when deciding whether to enter into such an agreement, or just file the motion first.

Particularly in Chapter 7 cases, a debtor has little or no say as to whether relief from stay should be granted. A Chapter 7 trustee takes control over all of the property of the bankruptcy estate as of the date of the order for relief [*see 11 USC § 541*]. When the debtor has no equity in the property in question, the trustee will usually execute a stipulation granting relief from the automatic stay. The stipulation should be presented to the court with an order granting relief from stay pursuant to the stipulation. Such orders are routinely granted. Notice of entry of the order should then be served on all parties in interest.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewBankruptcy LawCase AdministrationNoticeCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysContracts LawDebtor & Creditor Relations

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3.18 Court Will Duly Hear Motion.

3.18[1] Creditor Has Burden of Proof on Issue of Debtor's Equity in Property. In any hearing under *11 USC § 362(d)* concerning relief from the stay, the party requesting relief has the burden of proof on the issue of the debtor's equity in property. The party opposing relief has the burden of proof on all other issues [*11 USC § 362(g)*].

3.18[2] Local Rules Govern Hearing Procedure. Each bankruptcy court in California has local rules (supplementing the federal rules of bankruptcy procedure) that will apply with respect to motions for relief from the stay, and those local rules must be followed in setting the motion for hearing, appearing to argue for and against the motion, and presenting evidence [*see, e.g.,* http://www.caeb.uscourts.gov/formpubs/local_rules.asp (Eastern District of California Bankruptcy Court Local Rules)].

Strategic Point:

Local courts sometimes require that counsel bring along a completed proposed order, accompanied by a notice of entry, with addressed stamped envelopes for the court to serve on all parties. Failure to bring these may hold up entry of the order (keeping in mind that it takes 10 days for the order to become final and effective) [*Fed R Bankr P 4001(a)(3)*; *see 3.19*]. Counsel should call the court clerk in advance and see what the court requires.

3.18[3] Stay in Individual Bankruptcy Case Terminates 60 Days After Motion Unless Court Rules on Motion. In a case under Chapter 7, Chapter 11, or Chapter 13 in which the debtor is an individual, the stay terminates 60 days after a request is made by a party in interest under *11 USC § 362(d)*, unless either [*11 USC § 362(e)(2)*]:

- A final decision is rendered by the court during the 60-day period beginning on the date of the request; or
- That 60-day period is extended either:
  - By agreement of all parties in interest; or
  - By the court for a specific period of time that the court finds is required for good

cause, as described in findings made by the court.

3.18[4] Court May Order Continuation of Stay.

3.18[4][a] Stay Terminates 30 Days After Motion Unless Continued. Except for an individual debtor under Chapter 7, Chapter 11, or Chapter 13 [*see 3.18[3]*], 30 days after a request under *11 USC § 362(d)* for relief from the stay of any act against property of the estate, the stay is terminated with respect to the party in interest making the request, unless the court, after notice and a hearing, orders the stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under *11 USC § 362(d)*. A hearing on the issue of continuation of the stay may be a preliminary hearing or may be consolidated with the final hearing under *11 USC § 362(d)* [*11 USC § 362(e)(1)*].

3.18[4][b] Court Must Order Stay to Continue When Opponent of Motion Is Likely to Prevail. The court must order the stay continued in effect pending the conclusion of the final hearing under *11 USC § 362(d)* if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the conclusion of the final hearing. If the hearing on the issue of continuation of the stay is a preliminary hearing, the final hearing must be concluded not later than 30 days after the conclusion of that preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time that the court finds is required by compelling circumstances [*11 USC § 362(e)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysDurationBankruptcy LawCase AdministrationNoticeCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysGovernmentsCourtsRule Application & Interpretation

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3.19 Order Granting Relief From Stay Takes Effect After 10 Days.

An order granting a motion for relief from the automatic stay after a noticed hearing is itself stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise [*Fed R Bankr P 4001(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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3.20 CHECKLIST: Determining Whether Debt Will Be Discharged.

☐ If appropriate, attend Section 341 hearing, and file application for Rule 2004 examination.

Authority:
11 USC §§ 341, *343*; *Fed R Bankr P 2004*

Discussion:
See *3.21*

Forms:
See *3.32*, *3.33*

☐ If appropriate, stipulate to extend bar date.

Authority:
11 USC §§ 523, *727*

Discussion:
See *3.21*

Forms:
See *3.34*

☐ Determine whether debt is potentially nondischargeable, based on whether debtor is individual and on type of bankruptcy case.

Authority:
11 USC §§ 727, *1141*, *1228*, *1328*

Discussion:
See *3.22*

☐ Determine whether debt is nondischargeable by law because:

○ Bankruptcy procedure was not followed or was misused.

Authority:
11 USC § 523(a)

Discussion:
See *3.23*

○ Debt is of type declared to be nondischargeable as matter of public policy.

Authority:
11 USC § 523(a)

Discussion:
See *3.24*

☐ Determine extent to which discharge will prevent creditor from enforcing debtor's obligation.

Authority:
11 USC § 524

Discussion:
See *3.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminations of DebtorsBankruptcy LawDischarge & DischargeabilityGeneral OverviewBankruptcy LawDischarge & DischargeabilityFamily Farmers With Regular IncomeBankruptcy LawDischarge & DischargeabilityIndividuals With Regular IncomeBankruptcy LawDischarge & DischargeabilityReorganizations

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3.21 Examining Debtor and Debts for Grounds for Nondischargeability.

Any interested party can attend the *11 USC § 341* hearing conducted at the beginning of the case by the trustee. This is done under oath and in a public place. If counsel has questions and lets the trustee know of them, counsel will usually be allowed to ask them. Keep in mind that the trustee usually has many such hearings will substantially limit the time for, and number of, inquiries [*see 11 USC § 343*].

Counsel who suspects there are grounds for nondischargeability should file an application for an order to conduct an examination of the debtor under *Bankruptcy Rule 2004*. This is an examination done under oath that allows very broad inquiry into anything that bears on either the assets or liabilities of the debtor. The examination can and should require documents to be produced [*see Fed R Bankr P 2004*].

Strategic Point:

The Rule 2004 examination is a much more thorough inquiry than is allowed at the *11 USC § 341* hearing and can be transcribed by a court reporter and used later. It is a good "free look" at a matter before counsel must make a decision to file a nondischargeability action. Counsel can also request a stipulation to extend the bar date from opposing counsel.

Cross References:

Discussion of examination, see *Collier Bankruptcy Practice Guide, § 14.30* (Matthew Bender).

Form for application to conduct examination, see *3.32*.

Form for order for examination, see *3.33*.

Form for stipulation to extend bar date, see *3.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationExaminations of DebtorsCivil ProcedureDiscoveryMethodsStipulationsGovernmentsCourtsCourt PersonnelLegal EthicsProfessional

ConductOpposing Counsel & Parties

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3.22 Not All Debts Are Dischargeable in Bankruptcy.

Depending on whether or not the debtor is an individual, and depending on which Bankruptcy Code chapter governs the bankruptcy proceeding, some debts potentially are not dischargeable:

- In a Chapter 7 case [*11 USC § 727(a)(1), (b)*]:
  - An individual debtor is discharged except as to any debt of a kind declared in *11 USC § 523(a)* to be nondischargeable.
  - A debtor other than an individual is not discharged as to any debt.
- In a Chapter 11 case, debts covered by the confirmed plan are supplanted by it [*11 USC § 1141(a)*]. As to those debts, unless otherwise provided in the plan or the order confirming it [*11 USC § 1141(d)*]:
  - An individual debtor is discharged (provided the court grants a discharge after completion of the plan as far as it could be completed) except as to any debt of a kind declared in *11 USC § 523(a)* to be nondischargeable.
  - A debtor that is a corporation is discharged except as to debts owed to certain government entities and arising from fraud such as those described in *11 USC § 523(a)(2)*.
- In a Chapter 12 case, whether or not the debtor is an individual, the debtor is discharged in accordance with the plan except as to any debt of a kind declared in *11 USC § 523(a)* to be nondischargeable [*11 USC § 1228*].
- In a Chapter 13 case, the debtor is an individual [*see 11 USC § 109(e)*] and is discharged except as to a debt [*11 USC § 1328(a)*]:
  - Arising from fraud as specified in *11 USC § 523(a)(2)(A)*.

○ Arising from a false statement of the debtor's financial condition as specified in *11 USC § 523(a)(2)(B)*.

○ Unscheduled as specified in *11 USC § 523(a)(3)*.

○ Arising from fiduciary fraud, embezzlement, or larceny as specified in *11 USC § 523(a)(4)*.

○ For restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

○ Arising from educational benefits and loans as specified in *11 USC § 523(a)(8)*.

○ Arising from drunk driving or piloting as specified in *11 USC § 523(a)(9)*.

Cross References:

Debts that may not be nondischargeable under *11 USC § 523(a)(3)* or *(10)* for procedural reasons, see *3.23*.

Debts that may not be nondischargeable under *11 USC § 523(a)* as matter of public policy, see *3.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsGeneral OverviewBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsEmbezzlement & FraudBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsMalicious & Reckless Behavior

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3.23 Debt May Be Nondischargeable for Procedural Reason.

3.23[1] Unscheduled Debt Generally Is Not Dischargeable.

3.23[1][a] All Debts Must Be Scheduled to Permit Timely Proof of Claim. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt that was neither listed nor scheduled [*see 11 USC § 521(a)(1)* (requirement for listing creditors and scheduling debts)], with the name, if known to the debtor, of the creditor to whom the debt is owed, in time to permit the timely filing of a proof of claim, unless the creditor had notice or actual knowledge of the case in time for timely filing [*11 USC § 523(a)(3)*].

Some courts have permitted debtors to reopen their cases to amend their schedules and obtain a discharge. However, under *11 USC § 523(a)(3)(A)*, it is not necessary to reopen a case to obtain a discharge of a debt that has not been scheduled in a no-asset case because there is no deadline to file claims in such cases [*Zirnhelt v. Madaj (In re Madaj) (1998) 149 F.3d 467*].

3.23[1][b] Certain Debts Must Be Scheduled to Permit Bankruptcy Court's Determination of Dischargeability. The bankruptcy court has exclusive jurisdiction to determine the dischargeability of a debt listed in *11 USC § 523(c)(1)*. Normally, the creditor must request a determination of dischargeability; otherwise the debt is discharged [*see 3.23[1]*]. However, if *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any such debt that was not listed or scheduled [*see 11 USC § 521(a)(1)* (requirement for listing creditors and scheduling debts)], with the name, if known to the debtor, of the creditor to whom the debt is owed, in time to permit the creditor to make a timely request for a determination of dischargeability [*11 USC § 523(a)(3)(B)*].

Debts covered by this section include debts arising from any of the following [*11 USC § 523(c)(1)*]:

- Common law fraud [*see 11 USC § 523(a)(2)(A)*; *see 3.24[2]*].
- False statements of the debtor's financial condition [*see 11 USC § 523(a)(2)(B)*; *see 3.24[4]*].
- Fiduciary fraud, embezzlement, or larceny [*see 11 USC § 523(a)(4)*; *see 3.24[5]*].

- Willful and malicious injury to another person [*see 11 USC § 523(a)(6)*; *see 3.24[6]*].

Cross Reference:

Time limitations on creditor's request for determination of dischargeability, see *3.27[1]*.

Warning:

Even if the debt of counsel's client is not scheduled, if counsel has actual knowledge of the bankruptcy in time to file a claim and/or nondischargeability action, counsel's client will be deemed discharged. Thus, it is imperative to file a claim or action and do not wait and pretend not to know of the bankruptcy.

3.23[1][c] Nondischargeability of Debt Need Be Established Only Once Per Debt. If a debt is deemed nondischargeable under *11 USC § 523* in one proceeding, the debt continues to be nondischargeable in a later case; a creditor does not have to go through a nondischargeability action twice for the same debt [*see 11 USC § 523(b)*].

Distinguish:

Under *11 USC § 727*, a debt that was completely barred under *11 USC § 523(a)(3)* in a prior bankruptcy case is dischargeable in the current case unless, by the terms of *11 USC § 523(a)*, the debt is not dischargeable in the current case [*11 USC § 523(b)*].

3.23[2] Debt Not Listed or Scheduled in Prior Bankruptcy Case May Be Nondischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under the Bankruptcy Code (or former Bankruptcy Act) in which the debtor waived discharge, or was denied a discharge under *11 USC § 727(a)(2)-(7)* (or section 14c(1)-(4), (6), or (7) of the former Bankruptcy Act) [*11 USC § 523(a)(10)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawClaimsProofEffects & ProceduresBankruptcy LawDischarge & DischargeabilityIndividuals With Regular IncomeBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction

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Chapter 3 Effect of Bankruptcy
IV. DETERMINING WHETHER DEBT WILL BE DISCHARGED

1-3 MB Practice Guide: CA Debt Collection 3.24

3.24 Debt May Be Nondischargeable As Matter of Public Policy.

3.24[1] Creditor Must Request Determination of Nondischargeability for Certain Debts. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], the debtor will be discharged from a debt of a kind referenced below unless, on request of the creditor to whom the debt is owed, and after notice and a hearing, the court determines the debt to be excepted from discharge under *11 USC § 523(a)(2)*, *(4)*, or *(6)*, as the case may be. A debt covered by this rule is one arising from any of the following [*11 USC § 523(c)(1)*]:

- Common law fraud [*see 11 USC § 523(a)(2)(A)*; *see 3.24[2]*].
- False statements of the debtor's financial condition [*see 11 USC § 523(a)(2)(B)*; *see 3.24[4]*].
- Fiduciary fraud, embezzlement, or larceny [*see 11 USC § 523(a)(4)*; *see 3.24[5]*].
- Willful and malicious injury to another person [*see 11 USC § 523(a)(6)*; *see 3.24[6]*].

Distinguish:

The bankruptcy court has exclusive jurisdiction to determine the dischargeability of these debts [*see 11 USC § 523(c)(1)*; *28 USC §§ 157(a)*, *(b)(2)(I)*, *1334*]. If a debt is not listed and scheduled by the debtor to allow the creditor to make a timely request for a determination of dischargeability, the debt becomes nondischargeable because of that procedural misstep [*11 USC § 523(a)(3)(B)*, *(c)(1)*; *see 3.23[1][b]*].

Exception:

The requirement of *11 USC § 523(c)(1)* for a creditor-initiated determination of nondischargeability does not apply in the case of a federal depository institution regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in *11 USC § 523(a)(2)*, *(4)*, or *(6)* owed to the institution by an institution-affiliated party [*see 11 USC § 101(33)* (definition)] unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a federal depository institutions regulatory agency acting in its corporate capacity as a successor to the receiver, conservator, or liquidating agent to reasonably comply, with *11 USC § 523(a)(3)(B)* as a creditor of the institution-affiliated party with respect to the debt [*11 USC § 523(c)(2)*].

Strategic Point:

If the creditor requests a determination of dischargeability of a consumer debt under *11 USC § 523(a)(2)*--concerning debts arising from fraud or the use of a false financial statement [*see 3.24[2]*, *[4]*]--and the debt is discharged, the court must grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified. However, the court must not award costs and fees if special circumstances would make the award unjust [*11 USC § 523(d)*].

Warning:

Counsel must make sure to file any action before the bar date [*see 3.06[1]*].

3.24[2] Debt Arising From False Representation or Actual Fraud Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], and then only if the bankruptcy court so determines at the request of the creditor [*see 11 USC § 523(c)(1)*; *see 3.24[1]*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition [*11 USC § 523(a)(2)(A)*]. A debtor's guilty plea to operation of a Ponzi scheme with the actual intent to defraud creditors established the fraudulent intent required to avoid discharge pursuant to *11 USC § 548(a)(1)(A)* [*In re Slatkin (9th Cir 2008) 525 F3d 805, 814]* . Moreover, an assignee may claim that a debt is non-dischargeable (despite the assignee's lack of reliance) when the original creditor relied on the false information [*Boyajian v. New Falls Corp. (In re Boyajian) (9th Cir. 2009) 564 F3d 1088]* .

Warning:

An action based on actual fraud or false statements in a financial application must show that the creditor reasonably relied on the representations. If the creditor was negligent in conducting its due diligence, or if the financial information was not actually relied on by the creditor in making the decision to extend the credit, the action will not succeed.

3.24[3] Debt for Luxury Goods or Services Presumptively Is Nondischargeable. For purposes of *11 USC § 523(a)(2)(A)* [*11 USC § 523(a)(2)(C)(i)*]:

- Consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under the Bankruptcy Code are presumed to be nondischargeable; and

- Cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under the Bankruptcy Code are presumed to be nondischargeable.

Exception:

Luxury goods and services do not include goods and services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor [*11 USC § 523(a)(2)(C)(ii)(II)*].

3.24[4] Debt for False Statement of Financial Condition Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], and then only if the bankruptcy court so determines at the request of the creditor [*see 11 USC § 523(c)(1)*; *see 3.24[1]*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by use of a statement in writing that [*11 USC § 523(a)(2)(B)*]:

- Was materially false respecting the debtor's or an insider's financial condition;

- Was reasonably relied on by the creditor to whom the debtor is liable for the money, property, services, or credit; and

- The debtor caused to be made or published with intent to deceive.

3.24[5] Debt for Fiduciary Fraud, Embezzlement, or Larceny Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], and then only if the bankruptcy court so determines at the request of the creditor [*see 11 USC § 523(c)(1)*; *see 3.24[1]*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny [*11 USC § 523(a)(4)*].

Distinguish:

Any institution-affiliated party of an insured depository institution [*see 11 USC § 101(33)*, *(35)* (definitions)] must be considered to be acting in a fiduciary capacity with respect to the purposes of *11 USC § 523(a)(4)* [*11 USC § 523(e)*].

Strategic Point:

Conversion does not require the actual intent to harm another person, merely the intent to interfere with or take an asset [*see Schroeder v. Auto Driveaway Co. (1974) 11 C3d 908, 918, 114 CR 622, 523 P2d 662*]. Some bankruptcy judges will require actual intent to harm before the action will rise to the level of nondischargeability. In discovery, counsel should direct inquiries designed to show that the debtor knew that he or she did not have the right to sell or transfer the collateral, and did so despite this knowledge.

3.24[6] Debt for Willful and Malicious Injury Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], and then only if the bankruptcy court so determines at the request of the creditor [*see 11 USC § 523(c)*; *see 3.24[1]*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for willful and malicious injury by the debtor to another person or to the property of another person [*11 USC § 523(a)(6)*]. Attorney's fees and costs incurred in connection with a willful and malicious injury are similarly nondischargeable, even if they are the only monetary liability imposed in connection with such injury [*Suarez v. Barrett (In re Suarez) (9th Cir [BAP] 2009) 400 BR 732, 740]* .

3.24[7] Debt for Educational Benefit or Loan Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for [*11 USC § 523(a)(8)*]:

- An educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution;

- An obligation to repay funds received as an educational benefit, scholarship, or stipend; or

- Any other educational loan that is a qualified education loan, as defined in *IRC § 221(d)(1)*, incurred by a debtor who is an individual.

Distinguish:

A debt that was excepted from discharge under *11 USC § 523(a)(8)* (or section 17a(5) of the former Bankruptcy Act, former section 439A of the Higher Education Act of 1965, or former section 733(g) of

the Public Health Service Act) in a prior bankruptcy case concerning the debtor is dischargeable in the current case unless, by the terms of *11 USC § 523(a)*, the debt is not dischargeable in the current case [*11 USC § 523(b)*].

3.24[8] Debt for Death or Personal Injury From Drunk Driving or Piloting Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if the operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or other substance [*11 USC § 523(a)(9)*].

3.24[9] Debt for Malfeasance As to Depository Institution or Credit Union Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt that is:

- Provided in any final judgment, unreviewable order, or consent order or decree entered in any state or federal court, issued by a federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union [*11 USC § 523(a)(11)*]; or

- For malicious or reckless failure to fulfill any commitment by the debtor to a federal depository institutions regulatory agency to maintain the capital of an insured depository institution [*11 USC § 523(a)(12)*].

Distinguish:

Any institution-affiliated party of an insured depository institution [*see 11 USC § 101(33)*, *(35)* (definitions)] must be considered to be acting in a fiduciary capacity with respect to the purposes of *11 USC § 523(a)(11)* [*11 USC § 523(e)*].

3.24[10] Debt for Money Borrowed From Qualified Retirement Plan Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt owed to a pension, profit-sharing, stock bonus, or other tax-qualified plan [*see IRC §§ 401*, *403*, *408*, *408A*, *414*, *457*, *501(c)*] under [*11 USC § 523(a)(18)*]:

- A loan permitted under *29 USC § 1108(b)(1)* or subject to *IRC § 72(p)* (permitting loans on specified terms from retirement plan to participant or beneficiary); or

- A loan from a thrift savings plan that satisfies the requirements of *5 USC § 8433(g)* (loans from retirement plan for federal civil service employees).

Distinguish:

This provision may not be construed to mean that any loan made under a governmental plan under *IRC § 414(d)* or a contract or account under *IRC § 403(b)* constitutes a claim or a debt under the Bankruptcy Code [*11 USC § 523(a)(18)*].

3.24[11] Debt for Securities Fraud Is Not Dischargeable. If *11 USC § 523(a)* can be applied to the debtor [*see 3.21*], a discharge under any chapter of the Bankruptcy Code [*see 11 USC §§ 727*, *1141*, *1228*, *1328*] does not discharge the debtor from any debt for [*11 USC § 523(a)(19)*]:

- Violating any of the federal securities laws (as defined in *15 USC § 78c(a)(47)*), any state securities laws, or any regulation or order issued under a federal or state securities law; or

- Common law fraud, deceit, or manipulation in connection with the purchase or sale of any security.

Prerequisite:

In either case, the debt must have resulted (before, on, or after the date the petition was filed) from a judgment, order, consent order, or decree entered in a federal or state judicial or administrative proceeding, or from a settlement agreement entered into by the debtor, or from a court or administrative order for damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney's fee, cost, or other payment owed by the debtor [*11 USC § 523(a)(19)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewBankruptcy LawCase AdministrationProfessional ServicesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsConsent DecreesCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewContracts LawDebtor & Creditor Relations

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Chapter 3 Effect of Bankruptcy
IV. DETERMINING WHETHER DEBT WILL BE DISCHARGED

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3.25 Discharge in Bankruptcy Limits Creditor's Ability to Enforce Judgment or Collect Debt.

3.25[1] Discharge Eliminates Debtor's Personal Liability for Discharged Debts.

3.25[1][a] Judgments Are Voided. The discharge in a bankruptcy case voids any judgment at any time obtained, to the extent that the judgment is a determination of the personal liability of the debtor with respect to any debt discharged [*see 11 USC §§ 727*, *944*, *1141*, *1228*, *1328* (debts discharged)], whether or not discharge of the debt is waived [*11 USC § 524(a)(1)*].

3.25[1][b] Collection Activities Are Enjoined. The discharge in a bankruptcy case operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover, or offset any such debt as a personal liability of the debtor, whether or not discharge of the debt is waived [*11 USC § 524(a)(2)*].

Strategic Point:

In a Chapter 11 case, in connection with the order confirming the reorganization plan, the court may issue a supplemental injunction against taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under the plan of reorganization, is to be paid in whole or in part by a trust [*see 11 USC § 524(g)*, *(h)*].

3.25[1][c] Residential Mortgagee May Pursue Collection of Payments. The injunction under *11 USC § 524(a)(2)* [*see 3.25[1][b]*] does not operate against an act by a creditor that is the holder of a secured claim, if [*11 USC § 524(j)*]:

- The creditor retains a security interest in real property that is the principal residence of the debtor;
- The act is in the ordinary course of business between the creditor and the debtor; and
- The act is limited to seeking or obtaining periodic payments associated with a valid security interest in lieu of pursuit of in rem relief to enforce the lien.

3.25[1][d] Debtor Can Pay Discharged Debt. A debtor can make an enforceable reaffirmation agreement

concerning a discharged debt [*see 11 USC § 524(c)*, *(d)*; *see 3.25[4]*] or can voluntarily pay a discharged debt [*11 USC § 524(f)*].

Warning:

Although the debtor can voluntarily pay a discharged debt, any request that the debtor do so could subject counsel to sanctions by the bankruptcy court for violation of the post-discharge stay against enforcement. If counsel does call the debtor to talk about voluntary payment (which is *not* recommended), counsel should make it clear that the debtor has no legal obligation to do so. A partial payment does not "resurrect" the entire obligation.

3.25[2] Liability of Co-Debtor or Guarantor Is Not Affected. Discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, the debt [*11 USC § 524(e)*].

Exception:

Community property acquired after the date the petition was filed cannot be reached by the creditor on a community claim [*see 11 USC § 524(a)(3)*; *see 3.25[3]*].

3.25[3] Community Property Acquired After Petition Date Can Be Unreachable. The discharge in a bankruptcy case operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in *11 USC § 541(a)(2)* (concerning to what extent community property is part of estate in bankruptcy) that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under *11 USC §§ 523*, *1228(a)(1)*, or *1328(a)(1)*, or that would be so excepted, determined in accordance with the provisions of *11 USC § 523(c)* and *(d)* [*see 3.23[1]*], in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the current case concerning the debtor, whether or not discharge of the debt based on the community claim is waived [*11 USC § 524(a)(3)*].

Exception:

This provision does not apply if [*11 USC § 524(b)(1)*, *(2)*]:

- The debtor's spouse is or was a debtor in a case under the Bankruptcy Code (or is or was bankrupt or debtor in case under former Bankruptcy Act) commenced within six years of the date of the filing of the petition in the current case concerning the debtor; and
- The court does not grant the debtor's spouse a discharge in the current case concerning the debtor's spouse.
- The court would not grant the debtor's spouse a discharge in a case under Chapter 7 concerning the spouse commenced on the date of the filing of the petition in the current case concerning the debtor; and
- A determination that the court would not so grant a discharge is made by the bankruptcy court within the time and in the manner provided for a determination under *11 USC § 727* of whether a debtor is granted a discharge.

Trap:

If only the non-debtor spouse files a bankruptcy petition, and grounds exist to deny the dischargeability of the debt if the debtor had filed a bankruptcy petition, the creditor must file an adversary complaint pursuant to *11 USC § 524(b)(2)*. If the creditor fails to do so, the existing and subsequently acquired community property will not be available for satisfaction of the debt.

3.25[4] Creditor May Rely on Reaffirmation Agreement Made Before Discharge and Approved by Bankruptcy Court.

3.25[4][a] Validity of Agreement Is Conditional. An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a bankruptcy case is enforceable to any extent that it is enforceable under applicable nonbankruptcy law, whether or not discharge of the debt is waived, provided the following conditions are satisfied [*11 USC § 524(c)*]:

- The agreement was made before the discharge was granted.
- The debtor received a prescribed disclosure [*see 11 USC § 524(k), (l)(3)*] at or before the time the debtor signed the agreement.
- The agreement was filed with the court and accompanied by a declaration or an affidavit of the attorney, if any, that represented the debtor during the course of negotiating an agreement.
- In a case concerning an individual who was not represented by an attorney during the course of negotiating the agreement, the court approves the agreement (except that court approval is not necessary to the extent the agreement concerns a consumer debt secured by real property).
- The debtor did not rescind the agreement at any time before discharge or within 60 days after the agreement was filed with the court, whichever occurred later, by giving notice of rescission to the holder of the claim.

Strategic Point:

If the debtor is an individual, the court may be obliged to hold a hearing in order to ensure that the debtor understands the nature, purpose, and effect of the reaffirmation agreement [*see 11 USC § 524(c)(5), (d)*]. The court must also look into whether, and must be satisfied that, the debtor's income appears to be sufficient to support the payment schedule in the agreement [*see 11 USC § 524(m)*].

3.25[4][b] Creditor Has Limited Safe Harbor Protection. With respect to the conditions for validity of a reaffirmation agreement [*see 3.25[4][a]*], the creditor has the benefit of the following rules [*11 USC § 524(l)*]:

- The creditor may accept payments from the debtor before and after the filing of the agreement with the court.
- The creditor may accept payments from the debtor under any reaffirmation agreement that the creditor believes in good faith to be effective.
- The requirements for providing a prescribed disclosure to the debtor [*see 11 USC § 524(c)(2), (k)*] will be satisfied if required disclosures are given in good faith.

3.25[4][c] Debtor May Pay Without Agreement. The debtor may voluntarily pay a discharged debt, without bothering to make a reaffirmation agreement [*11 USC § 524(f)*].

3.25[5] Creditor May Enforce Liens in Spite of Discharge. Liens generally remain enforceable after discharge, because:

- A lien is not lost by the secured creditor's failure to file proof of the claim [*11 USC § 506(d)(2)*].

- Specified debts are enforceable from exempt property after discharge [*see 11 USC § 522(c)*].

Exception:

Liens can be avoided by the debtor under any of several provisions in the Bankruptcy Code [*see, e.g., 11 USC § 522(f)* (debtor's power to avoid certain liens impairing exemptions)].

Cross Reference:

Forms for use by debtor seeking lien avoidance and by creditor in opposition, see *California Forms of Pleading and Practice, § 94.80 et seq*. (Matthew Bender).

Perfected abstract liens cannot be stripped down in bankruptcy if they do not impair the homestead exemption in Chapter 7 cases [*see Concannon v. Imperial Capital Bank (9th Cir BAP 2006) 338 BR 90, 95]* . However, contrary to California law pertaining to lien priorities, the bankruptcy court can, under *11 USC § 522(f)*, consider subsequent consensual liens in calculating whether an involuntary lien impairs the homestead exemption. The possibility of lien avoidance "risk is simply part of the calculus of whether to seek a judgment" [*Moldo v. Charnock (9th Cir. 2004) 318 BR 720, 726* ; *see 17.13*].

Warning:

The debtor has the burden to file a motion to avoid liens. If the debtor does not do so, the lien remains even thought the debt is discharged. This can come as quite a surprise to judgment debtors and their escrow and title companies, who find years after their discharge that the abstract has not been removed. This creates a potential malpractice claim against a debtor's bankruptcy counsel [*see § 17.13*].

Investigating California Bankruptcy Exemptions Using Online Resources:

Many resources are available online for investigating California bankruptcy exemptions. For example, helpful resources at *lexis.com* include:

- Legal tab > Area of Law--By Topic > Bankruptcy > Treatises & Analytical Materials > Matthew Bender[(R)] > Collier Bankruptcy Exemptions

  - To locate information about available bankruptcy exemptions in California, use a HEADING segment search: *heading(california)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportBankruptcy LawClaimsGeneral OverviewBankruptcy LawClaimsTypesUnsecured Priority ClaimsAlimony, Maintenance & SupportBankruptcy LawFarming & Fishing DebtorsProceduresBankruptcy LawReorganizationsPlansDisclosure Statements

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Chapter 3 Effect of Bankruptcy
V. FILING COMPLAINT TO DETERMINE DISCHARGEABILITY

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3.26 CHECKLIST: Filing Complaint to Determine Dischargeability.

☐ Ascertain last date complaint to determine dischargeability may be filed.

Authority:
Fed R Bankr P 4007(b)-(d)

Discussion:
See *3.27*

☐ Prepare, file, and serve complaint and supporting papers, in compliance with rules.

Authority:
Fed R Bankr P 4007(e), 7001 et seq.

Discussion:
See *3.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportBankruptcy LawClaimsGeneral OverviewBankruptcy LawClaimsTypesUnsecured Priority ClaimsAlimony, Maintenance & SupportBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAutomatic Discharge & DeterminationsBankruptcy LawReorganizationsPlansDisclosure Statements

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3.27 Time for Filing Complaint Depends on Nature of Debt and Type of Case.

3.27[1] In Most Cases, Complaint May Be Filed at Any Time. Generally, a complaint to determine the dischargeability of a debt may be filed at any time [*Fed R Bankr P 4007(b)*].

Strategic Point:

A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination [*Fed R Bankr P 4007(b)*].

Cross Reference:

Form for motion to reopen case to file complaint, see *California Forms of Pleading and Practice, § 94.120* (Matthew Bender).

3.27[2] Filing Period Is Limited in Some Cases.

3.27[2][a] Nature of Debt Is Determining Factor. The filing period for a complaint to determine the dischargeability of a debt is limited when the debt is one as to which the bankruptcy court has exclusive jurisdiction to determine dischargeability. Debts of this kind include debts arising from the following [*11 USC § 523(c)(1)*; *see 3.24*]:

- Common law fraud [*see 11 USC § 523(a)(2)(A)*].
- False statement of the debtor's financial condition [*see 11 USC § 523(a)(2)(B)*].
- Fiduciary fraud, embezzlement, or larceny [*see 11 USC § 523(a)(4)*].
- Willful and malicious injury to another person [*see 11 USC § 523(a)(6)*].

3.27[2][b] Court Sets Filing Period in Chapter 13 Case. In a Chapter 13 case, on motion by the debtor for a discharge under *11 USC § 1328(b)*, the court will enter an order fixing a time for the filing of a complaint to determine the dischargeability of any debt under *11 USC § 523(c)* and will give not less than 30 days notice of the time fixed to all creditors [*Fed R Bankr P 4007(d)*].

3.27[2][c] Date of Creditors' Meeting Starts Filing Period in Other Cases. In a Chapter 7, Chapter 11, or Chapter 12 case, the complaint must be filed not later than 60 days after the first date set for the meeting of creditors [*see 11 USC § 341(a)* (meeting of creditors)], and the court must give not less than 30 days' notice of the time so fixed to all creditors [*Fed R Bankr P 4007(c)*].

3.27[2][d] Filing Period May Be Extended for Cause. On the motion of a party in interest, after hearing on notice, the court may for cause extend the period fixed for filing the complaint. The motion must be made before the period has expired [*Fed R Bankr P 4007(c), (d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationClosings & ReopeningsGeneral OverviewBankruptcy LawCase AdministrationNoticeCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedurePleading & PracticePleadingsGeneral Overview

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Chapter 3 Effect of Bankruptcy
V. FILING COMPLAINT TO DETERMINE DISCHARGEABILITY

1-3 MB Practice Guide: CA Debt Collection 3.28

3.28 Prepare, File, and Serve Complaint in Compliance With Rules.

3.28[1] General Requirements As to Form and Service Apply.

3.28[1][a] Bankruptcy Rules for Adversary Proceedings Apply. The rules for adversary proceedings [*see generally Fed R Bankr P 7001 et seq.*] apply to the commencement and disposition of a proceeding for determination of the dischargeability of a debt [*Fed R Bankr P 4007(e)*].

3.28[1][b] Federal Rules of Civil Procedure Govern Pleading and Service. Generally, the preparation, filing, and service of the complaint, and service of a summons, are governed by appropriate rules of civil procedure. In some ways, these procedures will be modified by the rules of bankruptcy procedure [*Fed R Bankr P 7002*]. Applicable rules of civil procedure concern:

- What pleadings are allowed [*Fed R Bankr P 7007*; *see Fed R Civ P 7*].
- The form for pleadings [*Fed R Bankr P 7010*; *see Fed R Civ P 10*].
- General rules of pleading [*Fed R Bankr P 7008*; *see Fed R Civ P 8*].
- Pleading special matters [*Fed R Bankr P 7009*; *see Fed R Civ P 9*].
- Service and filing of pleadings and papers [*Fed R Bankr P 7005*; *see Fed R Civ P 5*].
- Service of the summons [*Fed R Bankr P 7004*; *see Fed R Civ P 4*].

Cross Reference:

Form for complaint to determine dischargeability of debt, see *California Forms of Pleading and Practice, § 94.121* (Matthew Bender).

3.28[2] Bankruptcy Court Local Rules Apply. Each bankruptcy court in California has local rules (supplementing the federal rules of bankruptcy procedure) that apply with respect to a proceeding for determination of the dischargeability of a debt. The parties must follow these local rules in the preparation, filing, and service of the complaint and supporting papers [*see, e.g.*, http://www.caeb.uscourts.gov/formpubs/local_rules.asp (Eastern District of

California Bankruptcy Court Local Rules)].

Finding Local Bankruptcy Rules Using Online Resources:

Many resources are available online for finding local bankruptcy rules. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Statutes & Regulations > CA--Local Rules of U.S. District & Bankruptcy Courts in California
  - Sample Search: To find local bankruptcy rules for your district, use a HEADING segment search: *heading(bankruptcy and district name)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAutomatic Discharge & DeterminationsCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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VI. FORMS

1-3 MB Practice Guide: CA Debt Collection 3.29

3.29 Notice of Stay of Proceedings--Judicial Council Form CM-180.

Notice of Stay of Proceedings--Judicial Council Form CM-180.

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Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
Cal Rules Ct, Rule 3.650; California Judicial Council Form CM-180, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *3.04*

Detailed Discussion of Judicial Council Form/Requirements:
See *California Forms of Pleading and Practice, § 137.63* (Matthew Bender)

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1-3 MB Practice Guide: CA Debt Collection 3.30

3.30 Notice of Termination or Modification of Stay--Judicial Council Form CM-181.

Notice of Termination or Modification of Stay--Judicial Council Form CM-181.

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Go to Interactive Fillable Form.
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NOTES.

Authority:
Cal Rules Ct, Rule 3.650; California Judicial Council Form CM-181, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *3.10[3]*

Detailed Discussion of Judicial Council Form/Requirements:
See *California Forms of Pleading and Practice, § 137.64* (Matthew Bender)

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1-3 MB Practice Guide: CA Debt Collection 3.31

3.31 Notice of Motion and Motion for Relief From Automatic Stay Under 11 USC § 362.

Notice of Motion and Motion for Relief From Automatic Stay Under 11 USC § 362.

Click here to view image.

NOTES.

Authority:

11 USC 362. The version of Form F 4001-1M.PP pictured above has been approved for mandatory use in the Bankruptcy Court for the Central District of California [CD Cal Local Bankr R 9013-1(a)(5)]. Other districts have their own versions of this form, and use of those versions in their respective districts may also be mandatory

Grounds:

See *3.12[1]*

Timing:

See *3.17*

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VI. FORMS

1-3 MB Practice Guide: CA Debt Collection 3.32

3.32 Application for Order Authorizing Examination of Debtor.

Application for Order Authorizing Examination of Debtor.

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF CALIFORNIA	
)	
)	Chapter _____
)	CASE NO. _____
)	APPLICATION OF _____ FOR
)	ORDER AUTHORIZING
In re: _____,)	EXAMINATION OF DEBTOR
Debtor.)	_____ PURSUANT TO
)	*BANKRUPTCY RULE 2004*;
)	REQUEST FOR PRODUCTION
)	OF DOCUMENTS; DECLARATION OF
)	_____ IN SUPPORT
)	THEREOF
)	

TO THE HONORABLE _____, UNITED STATES BANKRUPTCY JUDGE:

The application of _____ ("Applicant") requests the issuance of an Order for Applicant to conduct a *Bankruptcy Rule 2004* Examination of Debtor _____ [*name*], and for production of documents before such examination and is based on the following:

1. On _____ [*date*], _____, the Debtor herein, filed a Voluntary Petition for Relief under Chapter 7 of Title 11 of the United States Code. _____ [*Name*] is the duly appointed and acting Chapter 7 Trustee for the Estate of _____. At the time of filing the Debtor's Voluntary Petition, it was stated that _____ [*debtor*]'s principal place of residence was _____ [*address*]. The Debtor indicated on his/her schedules that he/she is

unemployed and has no unsecured creditors.

2. On or about _____ [*date*], the Debtor represented to _____ [*creditor*] that he/she _____ [*describe, e.g.,* was either President and 90-percent owner of a business known as ABC Landscaping, Inc., and that she was applying in that capacity for a Small Business Administration loan for the business. In the course of her application, Debtor submitted a personal financial statement. In that statement, the Debtor represented that she had no outstanding debt, that she owned vehicles worth $105,000, and jewelry worth $565,000. She represented that all liens on the vehicles and her residence were paid in full. She also affirmatively stated that she had never filed for bankruptcy before].

3. Pursuant to the application, _____ [*creditor*] _____ [*describe, e.g.,* and the SBA loaned the business the principal sum of $169,000, which Debtor personally guaranteed].

4. Subsequent to obtaining the loan, Debtor _____ [*e.g.,* acquired two parcels of real property, including her residence, which she has listed in her schedules with the second parcel listed as "income property." The loan went into default on February 10, 2006].

5. In her schedules, Debtor failed to list _____ [*creditor*] as a creditor and _____ [*describe, e.g.,* totally omits any reference to this debt, her ownership of the ABC Landscaping company, the jewelry and lists the cars as being leased and repossessed]. Although omitted from the bankruptcy, _____ [*creditor*] learned of it in sufficient time to attend the first Section 341a meeting. At that time, under oath, the Debtor acknowledged the debt to _____ [*creditor*] but requested a continuance so that he/she could seek legal assistance. The continuance was granted. Debtor further admitted that he/she had filed a prior Bankruptcy petition under a different social security number.

6. At the continued Section 341a hearing on _____ [*date*], the Debtor appeared, without counsel, and handed the trustee a copy of his/her application to convert to Chapter 13 filed with the court that morning. As a result, the Section 341a hearing was taken off calendar. To date, Debtor has not appeared through counsel, nor has he/she filed amended Schedules.

7. Applicant is a creditor of Debtor herein and desires to conduct the examination of _____ [*debtor*] pursuant to the provisions of Rule 2004 of the Rules of Bankruptcy Procedure. Such examination cannot proceed under Rule 7030 or 9014 since this is neither an adversary proceeding nor a contested matter.

8. The examination that Applicant requests through this application will relate to the acts and conduct of the Debtor with respect to _____ [*e.g.,* the execution of the SBA loan and guaranty, the use and distribution of the loan funds, the alleged ownership of the business by Debtor, the location and value of assets, and the possibility of a distribution in the Debtor's Chapter 7 case, and potentially her lack of qualifications for a Chapter 13 plan].

9. It is necessary and in the best interest of the creditors of the Debtor and for the orderly administration of this estate that Applicant be permitted to examine the Debtor, _____ [*name*], at _____ [*address*], on a date and time to be set at least 28 days after the entry of an order approving this Application but no alter than 45 days later.

10. Applicant further requests that 10 days before the date set for examination, _____ [*debtor*] be ordered to produce for inspection and photocopying, the documentation set forth on Exhibit "A", a copy of which is attached and incorporated herein by this reference.

WHEREFORE, Applicant requests that this Court enter its order directing the Debtor, _____ [*name*], to appear at _____ [*address*] on a date and time to be set at least 28 days after the

entry of an order, to produce the documents referred to in Exhibit "A," and that a subpoena duces tecum be issued by the Court with respect thereto.

Date: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*Attach declaration of counsel as to facts in application*]

DECLARATION OF _____

I, _____, declare:

1. I am an attorney at law duly licensed to practice before all the Courts in the State of California and the United States District Court for the _____ District of California. I am a member of _____, attorneys of record for Creditor, _____ ("Applicant").

2. _____ [*Continue as necessary to document facts and events described in application*].

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.

_____

[*name of attorney*]

EXHIBIT A

As used herein, the term "document" or "documents" means any kind of written or graphic matter, however produced or reproduced, of any kind or description of whether sent or received or neither, including originals, copies, drafts, and both sides thereof, and including, but not limited to: papers, loan applications, appraisals, books, accounts, ledgers, letters of credit, financial statements, letters, deeds, promissory notes, photographs, objects, correspondence, telegrams, telexes, interoffice communications, statements, summaries, opinions, reports, studies, analyses, evaluations, agreements, desk calendars, appointment books, diaries, telephone logs, sound recordings, computer printouts, microfilms, and all other records, whether by electronic, photographic, or mechanical means or things similar to any of the foregoing regardless of their author or origin, and all writings and recordings described in *Rule 101 of the Federal Rules of Evidence*.

"You" or "Your" refers to _____ [*debtor*], individually and/or as owner of _____ [*name of business*].

"Debtor" refers to _____ [*name*].

"Business" refers to _____ [*name of business*].

"Loan" refers to the _____ [*e.g.*, Small Business Administration loan entered into between ABC Landscaping, Inc., and Western Bank, which was personally guaranteed by Debtor].

The documents required to be produced are the following:

1. _____ [*list as appropriate*].

NOTES.

Authority:
Fed R Bankr P 2004

Grounds:
See *3.21*

Detailed Discussion of Form/Requirements:
See Collier Bankruptcy Practice Guide, § 14.30 (Matthew Bender)

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3.33 Order for Bankruptcy Rule 2004 Examination of Debtor.

Order for Bankruptcy Rule 2004 Examination of Debtor.

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Chapter _____
	)	CASE NO. _____
	)	ORDER RE BANKRUPTCY
In re: _____,	)	RULE 2004 AUTHORIZING
Debtor.	)	EXAMINATION OF DEBTOR
	)	EXAMINATION OF
	)	DEBTOR _____
	)	Date: _____
	)	Time: _____
	)	Place:_____
	)	

_____

ORDER

On the filing of the foregoing application by Creditor, _____ [*name*], for examination of the Debtor, _____ [*name*], pursuant to *Bankruptcy Rule 2004*, and on consideration of all of the papers and proceedings had herein, and it appearing to the court that the Order requested in the application should be granted, the court finding that the examination of Debtor is in the best interest of the creditors of the estate:

IT IS HEREBY ORDERED that the Debtor, _____ [*name*], appear for examination concerning those matters set forth in *Bankruptcy Rule 2004* at _____ [*address*] on a date and time to be set at least 28 days but no more than 45 after the entry of this order; and,

IT IS FURTHER ORDERED that in addition to appearing at the time of place above specified, the Debtor must, 10

days before the examination authorized hereby, produce the documents specified in Exhibit "A" of the application, and the court will issue a subpoena duces tecum.

Date: _____

_____

BANKRUPTCY JUDGE

NOTES.

Authority:
Fed R Bankr P 2004

Grounds:
See *3.21*

Detailed Discussion of Form/Requirements:
See Collier Bankruptcy Practice Guide, § 14.30 (Matthew Bender)

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1-3 MB Practice Guide: CA Debt Collection 3.34

3.34 Stipulation and Order to Extend Bar Date.

Stipulation and Order to Extend Bar Date.

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Chapter _____
	)	CASE NO. _____
In re: _____,	)	STIPULATION TO EXTEND LAST DAY TO FILE
Debtor.	)	COMPLAINTS TO DETERMINE
	)	NONDISCHARGEABILITY OF DEBT AND TO
	)	BAR DISCHARGE AND ORDER THEREON
	)	Date: _____
	)	Time: _____
		Place: _____

_____

TO THE HONORABLE _____, UNITED STATES BANKRUPTCY JUDGE:

Creditor, _____ [*name*] and Debtor _____ [*name*], by and through their respective counsel of record, hereby stipulate to an extension of the bar date to file Complaints to Determine Nondischargeability of Debt and to Bar the Debtor's Discharge, based on the following:

1. That on _____ [*date*], Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. _____ [*Name*] is the duly appointed and acting Chapter 7 Trustee for the estate of _____ [*debtor*].

2. The Court had set _____ [*date*] as the last day to file Complaints to Determine Nondischargeability of Debt pursuant to *11 U.S.C. Section 523*, and to bar discharge pursuant to *11 U.S.C. Section 727*.

3. On _____ [*date*], _____ [*creditor*] filed an Application for Authority to Conduct

a *Bankruptcy Rule 2004* Examination of the Debtor. The purpose of the examination is to determine what, if any, basis there might be to file an action against the Debtor and to determine if there might be a distribution from the debtor's estate.

4. Both the Debtor and _____ [*creditor*] would prefer that the examination of the Debtor be completed before the expiration of the Bar Date, however, this will not be completed until after the currently set Bar Date of _____ [*date*]. _____ [*Creditor*] does not want to lose any ability he/she/it has to pursue an action under *11 U.S.C. Sections 523(a)* or *727*. Therefore:

IT IS HEREBY STIPULATED that the date to file Complaints to Determine Nondischargeability of Debt pursuant to *11 U.S.C. Section 523(c)* and to bar discharge pursuant to *11 U.S.C. Section 727*, shall be extended from _____ [*date*] to _____ [*date*].

Date: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Creditor, _____

Date: _____

_____ [*firm name*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Debtor, _____

ORDER

On reading and filing of the foregoing Stipulation Extending Last Day to File Complaints to Determine Nondischargeability of Debt and to Bar Discharge, and Order Thereon, and good cause appearing therefore:

IT IS HEREBY ORDERED that the last day to file Complaints to Determine Nondischargeability of Debt pursuant to *11 U.S.C. Section 523(c)* and to bar the Debtor's discharge pursuant to *11 U.S.C. Section 727*, shall be extended from _____ [*date*] to _____ [*date*].

Date: _____

_____

BANKRUPTCY JUDGE

NOTES.

Authority:
11 USC §§ 523, 727

Grounds:
See *3.21*

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Chapter 4 Fraudulent Transfers

1-4 MB Practice Guide: CA Debt Collection 4.syn

§ 4.syn Synopsis to Chapter 4: Fraudulent Transfers

4.01 Scope.

4.02 Objective and Strategy.

4.03 CHECKLIST: Asserting Claim Under UFTA, Related Statutes, and Common Law.

4.04 Strategy.

4.05 Elements of Cause of Action for Fraudulent Transfer Under UFTA.

4.06 Creditor Must Have Right to Payment.

4.07 Transfer Must Be Covered by UFTA.
4.07[1] UFTA Applies to Transfers and Obligations.
4.07[2] "Transfer" Is Any Method of Parting With Asset.
4.07[3] Transfer or Obligation Is Not Subject to Attack If It Is Permissible "Preference."
4.07[4] Transfer Must Have Injured Creditor.

4.08 Creditor Must Establish Actual Intent to Defraud or Constructive Fraud.
4.08[1] Creditor Must Show Actual Intent or Constructive Fraud.
4.08[1][a] Creditor May Challenge Claims.
4.08[1][b] Creditor Must Show Actual Intent or Constructive Fraud.
4.08[2] Creditor May Void Transfer Made With Actual Intent to Hinder, Delay, or Defraud Creditor.
4.08[2][a] Creditor May Challenge Transfer by Debtor With Actual Intent Without Having to Show Debtor's Financial Status.
4.08[2][b] Circumstantial Evidence, Including "Badges of Fraud," Can Prove Intent.
4.08[2][c] Badges and Other Evidence of Actual Intent Are Addressed to Trial Court's Discretion.
4.08[2][d] Creditor Must Show Actual Intent.
4.08[3] Creditors at Time of Transfer May Sue for Constructive Fraud.
4.08[3][a] All Creditors Must Show Debtor Did Not Receive Reasonably Equivalent Value.
4.08[3][b] Subsequent Creditors Must Show Debts Exceeded Assets or Debtor Lacked Ability to Pay.
4.08[3][c] Existing Creditors Must Show Debts Exceeded Assets, Debtor Lacked Ability to Pay Debts, or Debtor Was Insolvent.

4.08[4] Creditor May Shift Burden of Proof Through Evidence of Existing or Future Debts Resulting in Insolvency.

4.09 Creditor Must Establish That Assets Are Reachable Under UFTA.
4.09[1] Transferred Item or Items Must Be "Asset."
4.09[2] Special Rules Apply to Transfers of Personal Property Without Delivery.
4.09[3] Special Rules Apply to Transfers of Real Property.

4.10 Limitations on Transfers to Good Faith Takers for Reasonably Equivalent Value or Subsequent Transferees.
4.10[1] Creditor May Not Obtain Relief Against Taker in Good Faith for Reasonably Equivalent Value.
4.10[2] Creditor's Recourse Against Good Faith Transferees in Constructive Fraud Cases Is Limited.
4.10[3] Some Transfers Are Exempt Regardless of Transferee's State of Mind.
4.10[4] Limitations on Remedies Depend on Whether Transfer Has Been Made or Obligation Has Been Incurred.

4.11 Choosing Available Remedies.
4.11[1] Creditor May Void Transfer or Obligation.
4.11[2] Creditor May Seek Remedies Under Attachment Statutes.
4.11[2][a] Creditor May Proceed Under Attachment Statutes in Independent Action or UFTA Action.
4.11[2][b] Creditor May Seek Provisional Remedies Under Attachment Statutes.
4.11[3] Creditor May Seek Other Provisional Remedies and Interim Relief.
4.11[4] Creditor May Seek Damages.
4.11[5] Creditor May Seek Additional, Cumulative Remedies Under Other Causes of Action.
4.11[6] Remedy Is Against Debtor, Transferee, or Person for Whose Benefit Transfer Was Made.
4.11[7] Court May Fashion Procedures for Recovery by Innocent Transferees.
4.11[8] Creditor May State Cause of Action for Common Law Fraudulent Conveyance.

4.12 Action Must Comply With Statute of Limitations and Other Bars to Relief.
4.12[1] Bring Intent to Defraud Action Within Four Years of Transfer or One Year After Creditor Should Have Known of Transfer.
4.12[2] Bring Constructive Fraud Action Within Four Years From Transfer.
4.12[2A] Statute Does Not Apply to Express Trust Theory.
4.12[3] Statute Begins to Run When Sale Is Consummated.
4.12[3][a] Transfer Must Be Made or Obligation Incurred As Provided in CC § 3439.06.
4.12[3][b] Statute Starts Over When Creditor Seeks Judgment.
4.12[4] Bring Personal Property Action Within One Year From Transfer.
4.12[5] Equitable Defenses Apply to UTFA Claims.
4.12[6] Statute of Limitations for Common Law Fraudulent Conveyance Cause of Action May Apply.
4.12[6][a] Three-Year Statute Applies to Common Law Fraudulent Transfer Claims.
4.12[6][b] Statute Accrues on Judgment or Knowledge.
4.12[6][c] Bring Any Fraudulent Transfer Claims Within Seven Years Regardless of Knowledge.
4.12[7] Special Considerations for Debtors in Bankruptcy.
4.12[8] If Transferee Gives Undertaking, Creditor's Remedy Is Against Transferee.

4.13 Procedures for Asserting UFTA or Common Law Claim.

4.14 CHECKLIST: Defending Against Claim Under UFTA and Related Statutes, or Common Law.

4.15 Strategy.

4.16 Debtor or Transferee Should Evaluate Creditor's Right to Payment.

4.17 Debtor Should Challenge Whether Action Was "Transfer."
4.17[1] Mere "Preference" Is Not Transfer.

4.17[2] Creditor Must Demonstrate Injury.

4.18 Debtor Can Argue for Exception to Definition of "Asset."

4.19 Debtor or Transferee Should Challenge Creditor's Showing on Fraud.
4.19[1] Debtor or Transferee May Argue That Creditor Did Not Meet Burden on Actual Intent to Defraud.
4.19[1][a] Debtor or Transferee Should Oppose Circumstantial Evidence of Intent.
4.19[1][b] Debtor or Transferee Can Argue That Burden Does Not Shift From Badges of Fraud.
4.19[2] Debtor or Transferee Can Challenge Showing on Constructive Fraud.
4.19[2][a] Debtor or Transferee Should Argue That Transfer Was Made for Reasonably Equivalent Value.
4.19[2][b] Debtor or Transferee Should Argue That Debtor Did Not Meet Standards for Debts in Excess of Assets, Inability to Pay, or Insolvency.

4.20 Transferee May Assert Defenses Against Judgment.
4.20[1] Transfer to Good Faith Transferee for Reasonably Equivalent Value Is Not Voidable.
4.20[1][a] Applies in Cases of Constructive Fraud or Actual Intent.
4.20[1][b] Transferee Must Establish Good Faith.
4.20[1][c] "Subsequent Transferee" Means Taker for Value in Good Faith.
4.20[2] Transfers in Constructive Fraud Cases May Be Categorically Exempt.
4.20[3] Creditor's Ability to Recover Judgments for Constructively Fraudulent Transfers for Less Than Reasonably Equivalent Value Has Limits.
4.20[3][a] Creditor Has Remedy Against First or Subsequent Transferee Only If There Was No Good Faith Transferee.
4.20[3][b] Creditor's Remedy in Constructive Fraud Cases Is Only Against Good Faith Transferees.
4.20[4] Debtor or Transferee May Assert Equitable Defenses.

4.21 Procedures for Defending Against UFTA or Common Law Claim.

4.22 CHECKLIST: Asserting Claim Under Bulk Sales Law.

4.23 Strategy.

4.24 Elements of Cause of Action for Claim Under Bulk Sales Law.

4.25 "Bulk Seller" Is Restaurant Owner or Seller of Inventory From Stock.

4.26 Particular Bulk Sale Must Be Covered by Statute.
4.26[1] "Bulk Sale" Is Sale of More Than Half of Seller's Inventory or Equipment.
4.26[2] Some Bulk Sales Are Categorically Excepted.
4.26[3] Some Bulk Sales to U.S. Buyers Are Excepted.

4.27 Notice of Bulk Sale Must Comply With Statute Unless Exception Applies.
4.27[1] Buyer Must Draft Notice of Bulk Sale With Required Information.
4.27[2] Buyer Must Record Notice of Bulk Sale With County Recorder and Send to County Tax Collector.
4.27[3] Buyer Must Publish Notice of Bulk Sale.
4.27[4] Creditor Must Prepare for Buyer's Good Faith Defense.

4.28 Buyer or Escrow Agent Must Pay Claimants in Cash Sales of $2 Million or Less.
4.28[1] Payment Obligation Applies to Cash Sales Other Than Auction or Liquidation.
4.28[2] Buyer or Escrow Agent Must Pay Claims From Proceeds of Sale.
4.28[2][a] Buyer or Escrow Agent Must Provide Notice of Ability to Present Claims.
4.28[2][b] Buyer or Escrow Agent Must Take Steps to Satisfy Claims.

4.28[2][c] Buyer or Escrow Agent Must Give Claimant Opportunity to Litigate Claim If Seller Disputes Claim.
4.28[2][d] Buyer or Escrow Agent Has Immunity for Good Faith Distributions of Consideration by Terms of Notice.

4.29 Creditor Has Burden to Establish Valid Claim; Buyer Has Burden to Establish Exception.

4.30 Party Responsible for Auction or Liquidation Sale Assumes Buyer's Duties.

4.31 Asserting Claim Under Bulk Sales Law.

4.32 CHECKLIST: Defending Against Claim Under Bulk Sales Law.

4.33 Strategy.

4.34 Assert Actual Compliance or Good Faith Effort to Comply With Notice Requirements.
4.34[1] Buyer or Escrow Agent Should Establish Actual Compliance.
4.34[1][a] Notice Must Have Been Required.
4.34[1][b] Actual Compliance With Notice Is Complete Defense.
4.34[2] Buyer or Escrow Agent Can Rely on Good Faith Notice Defense.
4.34[2][a] Buyer Can Argue Good Faith Commercially Reasonable Attempt to Comply With Notice Requirements.
4.34[2][b] Buyer Can Argue Good Faith Attempt to Distribute Proceeds in Bulk Sale of $2 Million or Less.

4.35 Assess Whether Creditor Has Met Burden to Establish Cause of Action.

4.36 Buyer May Assert Limitation of Liability.
4.36[1] Buyer Is Not Liable on Unliquidated or Contingent Claims.
4.36[2] Buyer Is Liable to Claimant Only to Extent of Claim, Reduced by Amount Claimant Would Not Have Realized If Buyer Complied.
4.36[3] Buyer's Liability Is Subject to Cumulative Limits.

4.37 Buyer May Assert Rights to Property and Against Seller.

4.38 Procedures to Defend Against Bulk Sales Law Action.

4.39 Complaint for Relief Under UFTA and for Common Law Fraudulent Transfer.

4.40 Answer Alleging Affirmative Defenses to Complaint for Relief Under UFTA and for Common Law Fraud.

4.41 Transferee's Opposition to Application for Interim Relief Prohibiting Fraudulent Transfer.

4.42 Complaint for Damages Against Buyer Under Bulk Sales Law.

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Chapter 4 Fraudulent Transfers
I. STRATEGY

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4.01 Scope.

This chapter covers basic approaches for challenging, or defending against challenges to, transfers of property based on the Uniform Fraudulent Transfer Act (UFTA), related statutes, and associated common law remedies, or based on the Bulk Sales Law. Although reference is made to them, this chapter does not address the following in detail:

- Particular statutes relating to transfers of real property.

- Claims of conversion or criminal remedies based on unauthorized transfers of property in which the creditor has a perfected security interest.

- Applicable authority in the family law context, other than authority elucidating the general principles embodied in UFTA.

This chapter addresses the most recent cases and relevant authority. In the case of UFTA there are predecessor statutes--two versions of the Uniform Fraudulent Conveyance Act--and cases interpreting them that are not discussed in detail. Those cases may be relevant in interpreting the present statute, and practitioners should research them on points not resolved under present law. Before any of the current fraudulent transfer statutes, there was a common law of fraudulent transfer, and it has been held to be complementary to, not preempted by, UFTA, except as to UFTA's maximum statute of limitations provisions.

The discussion of UFTA and the common law of fraudulent transfers refer to particular statutes that have a bearing in two particular contexts: real estate transactions and transfers of personal property. There are separate sections relating to rules applicable to transactions subject to the Bulk Sales Law, which has a limited scope, and applies only to significant sales outside the ordinary course of business of more than half of a seller's inventory and equipment.

Discussion of UFTA and related remedies and of the Bulk Sales Law is divided into parts on asserting claims or defending against claims. Practitioners should review the parts on both asserting and defending to be aware of all arguments and strategic considerations.

Although not technically a "fraudulent transfer," the creditor also may consider whether the facts support an "express trust" theory of recovery. This most typically occurs when the debtor has a strawman purchase an asset in the strawman's name, and the strawman holds mere legal title pursuant to an express agreement that the asset is held in trust for the debtor. This may also be the only available theory when the statute of limitations has already expired as to any

fraudulent transfer [*see 4.12[3A*].

Core Statutes:

CCP §§ 3439.01-3449 (Uniform Fraudulent Transfer Act (UFTA) and associated statutes governing transfers of personal property); *Com Code §§ 6101-6111* (Bulk Sales Law).

Cross References:

Detailed discussion of UFTA, see California Forms of Pleading and Practice, Ch. 270, Fraudulent Conveyances (Matthew Bender).

Discussion of federal Fair Debt Collection Practices Act, see *California Legal Forms, § 92.83* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices ActReal Property LawPurchase & SaleFraudulent Transfers

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Chapter 4 Fraudulent Transfers
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4.02 Objective and Strategy.

The Uniform Fraudulent Transfer Act (UFTA) is the first resort for creditors seeking relief when debtors dispose of their assets to remove them from the reach of creditors who have unsatisfied claims against the debtor, and it is the first law that debtors and transferees will have to defend against. A claimant must evaluate whether transfers may be voided or otherwise challenged under UFTA so that the claimant can reach assets to satisfy the claim, whether particular statutes relating to transfers of personal or real property apply, and whether relief may be sought against the buyer in a transfer covered by the Bulk Sales Law. A party defending against a claim should assess whether all the elements of a UFTA or Bulk Sales Law claim are present, and whether procedural defenses such as jurisdiction or burden-shifting against the creditor may apply.

Cross Reference:

Strategy for creditors under UFTA and common law, see *4.04*.

Strategy for debtors or transferees under UFTA and common law, see *4.15*.

Strategy for creditors under Bulk Sales Law, see *4.23*.

Strategy for buyers and defendants under Bulk Sales Law, see *4.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersGovernmentsCourtsCommon LawReal Property LawPurchase & SaleFraudulent Transfers

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II. ASSERTING CLAIM UNDER UFTA, RELATED STATUTES, AND COMMON LAW

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4.03 CHECKLIST: Asserting Claim Under UFTA, Related Statutes, and Common Law.

☐ Evaluate and establish creditor's right to payment.

○ Be prepared to meet burden to show debtor owed creditor amount of claim, whether fixed or contingent.

○ Show creditor was a present or future creditor under statutory definition.

○ Consider reducing claim to judgment in complex case.

○ Consider bringing expedited procedure under attachment statutes if right to payment and fraud is clear.

Authority:
CC §§ 3439.01, 3439.04, 3439.07; *CCP §§ 481.010-493.060*; *Cortez v. Vogt (1997) 52 CA4th 917, 928-932, 60 CR2d 841*

Discussion:
See *4.05 -4.09*

☐ Consider whether transaction may be voided as a covered transfer or obligation.

○ Establish that action meets statutory definition for pending or past transfer or obligation.

○ Establish that transfer or obligation "injured" creditor (that voiding challenged transfer or other relief will provide creditor with a remedy).

○ Demonstrate that transfer was not merely the grant of a permissible preference between creditors of the debtor.

Authority:
Wyzard v. Goller (1994) 23 CA4th 1183, 1188, 28 CR2d 608 ; *Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80, 112 CR2d 802*

Discussion:
See *4.07*

☐ Make specific allegations in complaint regarding:

○ Creditor's status as present or future creditor.

○ Reasons why claim is covered by UFTA or related statutes or common law.

○ Specific actual intent or constructive fraud theories relied on and bases on which they apply.

○ Grounds on which action is within statute of limitations and any grounds on which statute has been tolled.

○ Separate allegations regarding common law claims and associated causes of action.

○ Maximum possible value of asset and value of creditor's claim.

○ Possible jury demand in case for specific sum of money.

Authority:
CC §§ 3439.01-3439.12; *CC §§ 3445-3449*; *Wisden v. Superior Court (2004) 124 CA4th 750, 756-757, 21 CR3d 523* ; *Neilson v. Union Bank (CD Cal 2003) 290 F Supp2d 1101, 1148*

Discussion:
See *4.06 -4.13*

☐ Argue that transfer or obligation constituted actual fraud.

○ Actual fraud focuses on debtor's intent and does not require proof of debtor's financial status.

○ Prove debtor's intent to hinder, delay, or defraud any creditor by direct admissions when possible.

○ Prove debtor's intent based on circumstantial evidence, including statutory "badges of fraud."

○ Attempt to demonstrate as many "badges of fraud" as possible.

○ Argue that "badges of fraud" and other evidence shift burden of proof to debtor under summary judgment or UFTA itself.

○ Establish under prevailing law that creditor must show actual intent only by preponderance of evidence.

Authority:
CC § 3439.04(a)(1), (b), (c); *Filip v. Bucurenciu (2005) 129 CA4th 825, 834, 28 CR3d 884* ; *Liodas v. Sahadi (1977) 19 C3d 278, 289-290, 137 CR 635, 562 P2d 316*

Discussion:
See *4.08[2]*

☐ Argue transfer or obligation constituted constructive fraud.

○ Constructive fraud focuses on debtor's financial status at time of and as a result of transaction.

○ Meet burden to establish transfer was not for reasonably equivalent value based on recent valuations so showing, or other available evidence.

○ As existing creditor, show debtor's debts exceeded assets, debtor lacked ability to pay, or insolvency.

○ As future creditor, show debtor's debts exceeded assets or debtor lacked ability to pay.

Authority:
CC § 3439.04(a)(2); *Lewis v. Superior Court (1994) 30 CA4th 1850, 1858 & n3, 37 CR2d 63* ; *Barisich v. Lewis (1990) 226 CA3d 12, 20, 275 CR 331* ; *In re Prejean (9th Cir 1993) 994 F2d 706, 709* ; *Alliance Mortgage Co. v. Rothwell (1995) 10 C4th 1226, 1250-1251, 44 CR2d 352, 900 P2d 601*

Discussion:
See *4.08[3]*

☐ Seek to shift burden of proof related to insolvency to debtor.

○ Establish debtor is presumed insolvent if not paying debts as they become due.

○ Establish transaction is presumptively fraudulent based on proof debtor was insolvent.

Authority:
CC § 3439.02(c); *Kirkland v. Risso (1979) 98 CA3d 971, 977, 159 CR 798*

Discussion:
See *4.08[3][c], [4]*

☐ Seek to apply additional rules in appropriate cases.

○ Transfers of personal property are void as against existing creditors if not accompanied by an immediate and continuing change in possession, unless particular exceptions apply, but creditor must meet shorter one-year statute of limitations.

○ Transfers of real property are void against prior or subsequent purchasers if made with intent to defraud.

○ Transferred real property subject to a judgment lien remains subject as long as creditor has recorded an abstract of judgment or similar document.

Authority:
CC §§ 3440-3440.9, *1227-1231*; *CCP §§ 697.310-697.320*, *697.390*

Discussion:
See *4.09[2]*, *[3]*

☐ Be prepared to counter debtor or transferee's defense that transfer may not be attacked or recovery may be limited.

○ Transfer made in good faith and for reasonably equivalent value is not subject to attack.

☐ Argue that burden is on debtor or transferee to establish good faith transfer for reasonably equivalent value.

○ Transfer in constructive fraud case may be invalidated only against first transferee or person for whose benefit transfer was made, or against subsequent transferee other than a good faith transferee for value.

○ Recovery is limited to value of asset, or amount required to satisfy creditor's claim, and if for value of asset, may only be for value of asset at time of transfer.

○ Transfers resulting from enforcement of liens in noncollusive manner or termination of lease on debtor's default are not subject to attack.

Authority:
CC § 3439.08

Discussion:
See *4.10[1] -[3]*

☐ Choose among available remedies.

○ Seek to void transfer, if against party as to whom this is permitted relief.

○ Seek provisional remedies under attachment statutes first, limiting transferee's procedural opportunities, if very likely to prevail on fraud.

○ Seek other provisional remedies subject to rules of civil procedure and equity.

○ Consider seeking damages against debtor or knowing transferee, if able to prevail in likely argument about legal availability of such relief.

○ Consider other possibly preferable or complementary remedies under other laws such as:

☐ Recording of lis pendens.

☐ Common law action for fraudulent transfer.

☐ Bulk Sales Law.

Authority:
CC §§ 3439.07, 3439.08; *Cortez v. Vogt (1997) 52 CA4th 917, 931, 60 CR2d 841* ; *Taylor v. S & M Lamp Co. (1961) 190 CA2d 700, 706, 712-713, 12 CR 323* ; *Monastra v. Konica Bus. Mach., U.S.A., Inc. (1996) 43 CA4th 1628, 1635-1642, 51 CR2d 528* ; *Kirkeby v. Superior Court (2004) 33 C4th 642, 651-652, 15 CR3d 805, 93 P3d 395*

Discussion:
See *4.11*

☐ Assess compliance with and make arguments regarding statute of limitations and procedural defenses:

○ Argue that transaction has not yet been made or obligation has not been incurred, so that statute has not commenced.

○ Argue that date of judgment on underlying claim reinitiates running of statute.

○ Be prepared to show that less than seven years have elapsed under UFTA or common law, regardless of tolling for lack of knowledge.

○ Prepare for litigation over possible equitable defenses such as laches or unclean hands.

○ Avoid filing against debtor or debtor's estate during pendency of bankruptcy.

☐ Review viability of and possible benefits of action subsequent to bankruptcy once trustee has abandoned estate.

○ Be prepared to respond to transferee's filing of bond.

☐ Be prepared to argue about maximum value of asset or creditor's claim.

☐ Make sure transferee's bond is for double the value of the lesser of the maximum value of the claim or the asset.

Authority:
CC §§ 3439.06, 3439.09, 3446-3448; CCP § 338(d); Cortez v. Vogt (1997) 52 CA4th 917, 934-936, 60 CR2d 841

Discussion:
See *4.12*

☐ Consider moving for summary judgment on elements of prima facie case, because creditor will bear burden on these points:

○ Prove actual intent to defraud by circumstantial or other evidence.

○ Prove constructive fraud by showing creditor's inadequate financial condition and lack of exchange for reasonably equivalent value.

Authority:
Fisher v. Gibson (2001) 90 CA4th 275, 287, 109 CR2d 145 ; Barisich v. Lewis (1990) 226 CA3d 12, 21-22, 275 CR 331

Discussion:
See *4.08[1][b], [2][a], [c]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersEvidence & ProcedureCivil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCivil ProcedureRemediesProvisional RemediesGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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Chapter 4 Fraudulent Transfers
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4.04 Strategy.

A creditor under UFTA should evaluate:

- Whether the debtor transferred property of sufficient value that can be reached, and whether there is jurisdiction over the property or the transferee.

  Cross Reference:

  Assets reachable under UFTA, see *4.07*. Jurisdiction, see *4.06*.

- Whether the creditor can establish actual intent to defraud, and what contrary evidence a debtor or transferee may present.

  Cross Reference:

  Actual intent to defraud, see *4.08[2]*.

- Whether the creditor can establish constructive fraud against the opponent by showing that the creditor was an existing creditor at the time of a transaction and, if so, whether the creditor can show that (1) the debtor intended to incur, or reasonably would have believed it was incurring, debts in excess of its ability to pay them; or that (2) the debtor was engaged in or about to engage in a business for which its debts were unreasonably small in relation to its assets, and what evidence a debtor or transferee can present on these points.

  Cross Reference:

  Constructive fraud, see *4.08[3]*.

- Whether the creditor can establish constructive fraud against the debtor by showing that the creditor was a future creditor at the time of a transaction and, if so, whether the creditor can show that (1) the debtor intended to incur, or reasonably would have believed it was incurring, debts in excess of its ability to pay them; that (2) the debtor was engaged in or about to engage in a business for which its debts were unreasonably small in relation to its assets; or that (3) the debtor was insolvent or was about to become insolvent as a result of the transaction; and what evidence a creditor or transferee can present on any of these points.

Cross Reference:

Constructive fraud, see *4.08[3]*.

- If the creditor's fraud case is strong, whether the creditor should pursue expedited remedies under the attachment statutes against the debtor or transferee.

Cross Reference:

Expedited remedies, see *4.11[3]*.

- Whether the transferee can assert procedural or substantive defenses, including the defense that the transfer was in good faith and for reasonably equivalent value, which will be fatal to a UFTA claim.

Cross Reference:

Defending against UFTA and common law claims, see *4.14 -4.21*.

- Whether particular real estate statutes or statutes accompanying UFTA relating to real property transfers may provide the creditor with effective remedies.

Cross Reference:

Statutes applicable to real property, see *4.09[3]*.

- Whether the facts support an "express trust" theory of recovery.

Strategic Point:

This most typically occurs when the debtor has a strawman purchase an asset in the strawman's name, and the strawman holds mere legal title pursuant to an express agreement that the asset is held in trust for the debtor. This may also be the only available theory when the statute of limitations has already expired as to any fraudulent transfer [*see 4.12[3A*].

- Whether the facts support a "resulting trust" theory of recovery.

Consider:

A resulting trust arises by operation of law under circumstances showing that the legal titleholder was not entitled to take the beneficial interest (in other words, it is based on the inferred intent of the parties) [*see Fidelity National Title v. Schroeder (2009) 179 CA4th 834, 847-848, 101 CR3d 854* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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4.05 Elements of Cause of Action for Fraudulent Transfer Under UFTA.

The basic elements to be proved for a cause of action for a fraudulent transfer under UFTA are the following:

- The creditor has a claim (that is, a right to payment) [*CC § 3439.01(c)*; *see 4.06*].
- The transfer is a covered transfer or obligation under UFTA [*CC § 3439.04(a)*; *see 4.07*].
- The creditor was injured as a result of the transfer [*Mehrtash v. Mehrtash (2003) 93 CA4th 75, 80-82, 112 CR2d 802* ; *see 4.07[4]*].
- There was an intent to defraud, or constructive fraud, in the transfer, which was a substantial factor in causing the injury [*CC § 3439.04(a)*; *see 4.08*].
- The transfer involved assets that are reachable under UFTA [*CC § 3439.01(a)*; *see 4.09*].

Jury Instructions:

Actual Intent to Defraud a Creditor (*Civ. Code, § 3439.04(a)(1)*)--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 4200* (LexisNexis Matthew Bender).

Cross Reference:

Form for complaint for fraudulent transfer, see *4.39*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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4.06 Creditor Must Have Right to Payment.

UFTA generally applies to any "creditor," defined as a person who has a claim [*CC § 3439.01(c)*]. "Claim" is broadly defined as a right to payment, whether or not that right is reduced to judgment, liquidated, unliquidated, matured, unmatured, disputed, undisputed [*CC § 3439.01(b)*]. "Creditor" specifically includes assignees of a general assignment for the benefit of creditors [*CC § 3439.01(c)*].

Strategic Point--Creditor:

A fraudulent transfer claim may be asserted as an in rem proceeding. If personal jurisdiction cannot be obtained over the debtor, the action may still proceed if jurisdiction can be had over the relevant transferred property [*Nichols v. Superior Court (1934) 1 C2d 589, 598-599, 36 P2d 380*]. Proper in rem procedures must be followed [*People v. Green (2004) 125 CA4th 360, 370-371 & n7, 22 CR3d 736*].

Strategic Point:

A claim can also be the threat of litigation; if a party has made a demand or if the debtor is aware that of a demand, this qualifies as a claim for fraudulent transfer purposes. If counsel is a creditor, or represents a creditor of a business in financial difficulties, be aware that sales outside the ordinary course or transfers to other corporations or accounts can qualify as a fraudulent conveyance.

Cross Reference:

Defending against assertion of a claim, see *4.14 -4.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsReal Property LawPurchase & SaleFraudulent Transfers

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4.07 Transfer Must Be Covered by UFTA.

4.07[1] UFTA Applies to Transfers and Obligations. Under UFTA, a creditor may attack a transfer made or an obligation incurred [*CC § 3439.04(a)*]. UFTA does not define "obligation," but it is reasonable to infer that it involves a duty relating to an asset short of a transfer. Because "transfer" itself is defined to include liens and encumbrances, an obligation incurred broadens the reach of the statute to cover agreements for future transfers [*see CC § 3439.01(i)*].

Cross Reference:

"Transfer" includes creation of encumbrances or liens, see *4.07[2]*.

Strategic Point:

This argument can be used to attack supposed deeds of trust against real property made to family members and friends, or for security for money lent against a motor vehicle.

4.07[2] "Transfer" Is Any Method of Parting With Asset. "Transfer" is defined under UFTA as every mode of disposing of or parting with an asset or an interest in an asset, whether direct or indirect, voluntary or involuntary [*CC § 3439.01(i)*]. It specifically includes the creation of an encumbrance or lien [*CC § 3439.01(i)*]. Additionally, a transfer must involve an asset or interest in an asset [*CC § 3439.01(i)*].

Warning:

Although a transfer may be covered under UFTA, it may not be attacked by a creditor when it is made to a good faith transferee for value in some circumstances [*see CC § 3439.08*]. The reverse can also be true; showing that the transferee acted with the intent to assist the debtor in shielding the assets can justify proceeding with an action under UFTA.

Example:

Transfers can mean different things. In one case, the court held that the transfer from the names of the individual debtors into a family trust was not a "transfer" for the purposes of UFTA and *11 USC § 727* because transferring assets into a family revocable trust does not make them immune from levy [*In re Harris (ED Cal 1989) 101 BR 210, 214-215*]. *Harris* was distinguished in *Bernard v. Shaeffer*, in which

the transfer from a bank account into the debtor's safe at home, although technically a transfer from "one pocket to another," still satisfied the broad definition of "transfer" under the Bankruptcy Code because it made the asset unable to be attached and was done with the specific intent to hinder and delay creditors. The Ninth Circuit held that there is no need to prove harm to the creditor to qualify a conveyance as fraudulent [*Bernard v. Sheaffer (In re Bernard) (9th Cir 1996) 96 F3d 1279, 1282*]. This is a very fact-specific area.

Jury Instructions:

"Transfer" Explained, see *Judicial Council of California Civil Jury Instructions, CACI No. 4204* (LexisNexis Matthew Bender).

Cross Reference:

Transfers to good faith takers for value, see *4.10*.

Limitations on definition of asset, see *4.18*.

4.07[3] Transfer or Obligation Is Not Subject to Attack If It Is Permissible "Preference." A creditor must establish that an act or agreement by the debtor constitutes a transfer made or obligation incurred rather than simply a permissible "preference." The grant of a preference is permissible when a debt is owed and due or past due, and will not be construed as actual intent to defraud another creditor [*see Wyzard v. Goller (1994) 23 CA4th 1183, 1188, 28 CR2d 608* ; *see also CC § 3432*]. Because a demurrer is likely if the facts permit it, a creditor should allege facts in the complaint sufficient to rebut that argument.

Strategic Point:

The Bankruptcy Code has a specific definition of "preference"--that is, a transfer of an asset to an unsecured creditor outside the ordinary course of business on an antecedent debt within 90 days of the bankruptcy filing (one year to an insider) [*see 11 USC § 547*]. Under those specific circumstances, a trustee or other interested creditor can file an action to recover the preference and bring the asset back into the estate so that all unsecured creditors can share on a pro rata basis. The UFTA does not contain any prohibition against preferring one creditor over another--thus, it allows "repaying your mother-in-law over your trade creditors." However, such preferential action, especially if done in favor of a potential insider, can be severely scrutinized under UFTA.

Strategic Point:

Although the preferential payment to a creditor may not be avoided under UFTA, a preferential transfer may be avoided under *11 USC § 547* if the debtor becomes subject to a bankruptcy proceeding within 90 days of the transfer being made to an third party, or one year of the transfer being made to an insider. A creditor should consider filing an involuntary bankruptcy petition complying with applicable bankruptcy law, against the debtor to preserve the ability of a trustee to avoid a preferential transfer or to obtain monetary judgment against the transferee, especially if UFTA remedies are not available.

In addition, preferential transfers may avoided by a bankruptcy trustee to achieve one of the primary goals in bankruptcy: the equal distribution of assets among similarly situated creditors [*see 11 USC § 547(b)* ("avoidable preference" defined)]

Strategic Point:

Generally, the preference requirements in bankruptcy court are more difficult to establish than the requirements necessary under UFTA. Therefore, if counsel represents a creditor, proceed as expeditiously as possible in state court so as to establish a judgment based on fraud *before* the debtor files a petition in bankruptcy.

Cross Reference:

Preferences, see *4.17[1]*.

Actual intent to defraud, see *4.08[2]*.

Constructive fraud requiring lack of transfer for value, see *4.08[3][a]*.

4.07[4] Transfer Must Have Injured Creditor. A transfer in fraud of creditors may be attacked only by a person who is injured, even if the elements of constructive fraud are present [*Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80-82, 112 CR2d 802* (creditor was not entitled to relief because law does not give relief for idle acts)]. No such finding is required under the bankruptcy fraudulent conveyance law [*Bernard v. Sheaffer (In re Bernard) (9th Cir 1996) 96 F3d 1279, 1282*].

Strategic Point--Creditor:

It is rare that a creditor will seek to set aside a transfer if that will not help the creditor satisfy a debt [*cf. In re Valente (1st Cir 2004) 360 F3d 256, 264-265* (distinguishing *Mehrtash* on ground that setting aside transfer in *Valente* would not be idle act)].

Strategic Point:

This can be an expensive action to prosecute, so there is no real point for a creditor to pursue it unless the creditor has been injured, and seeks recoupment as a result.

Cross Reference:

Defending against UFTA claims based on lack of injury, see *4.17[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsTrust AccountsTypesBankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsAntecedent DebtContracts LawDebtor & Creditor RelationsContracts LawDefensesFraud & MisrepresentationGeneral Overview

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4.08 Creditor Must Establish Actual Intent to Defraud or Constructive Fraud.

4.08[1] Creditor Must Show Actual Intent or Constructive Fraud.

4.08[1][a] Creditor May Challenge Claims. A transfer is fraudulent as to a creditor, regardless of when the claim arose or the obligation was incurred, if the transfer was made with actual intent to defraud or constructive fraud [*CC § 3439.04(a)*].

4.08[1][b] Creditor Must Show Actual Intent or Constructive Fraud. A creditor must show actual intent or constructive fraud to challenge a transfer [*CC § 3439.04(a)(1), (2)*]. A creditor may set aside a transfer made or obligation incurred either (1) with actual intent to hinder or defraud any creditor; or (2) if the debtor made the transfer without receiving reasonably equivalent value in return, and was unlikely to be able to cover present or future debts at that time [*CC § 3439.04(a)(1), (2)*; *Reddy v. Gonzalez (1992) 8 CA4th 118, 122-123, 10 CR2d 55, 10 CR2d 58*].

A debtor's guilty plea to operation of a Ponzi scheme with actual intent to defraud creditors established the fraudulent intent required under *CC § 3439.04(a)* [*In re Slatkin (9th Cir 2008) 525 F3d 805, 814]* .

If a transfer was done with the actual intent to defraud or to make the asset unavailable, it does not matter if the third party transferee paid sufficient consideration [*Burrows v. Jorgensen (1958) 158 CA2d 644, 648, 323 P2d 150*].

The creditor must prove actual intent or constructive fraud (proof that the debtor was unable to meet debts, and proof that the transfer was made for less than reasonably equivalent value), by a preponderance of evidence at trial [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1293-1294, 123 CR2d 924*], or on a creditor's motion for summary judgment [*cf. Fisher v. Gibson (2001) 90 CA4th 275, 287, 109 CR2d 145* (once creditor showed that transfer was not made in exchange for reasonably equivalent value, it was debtor's burden to establish triable issue of fact)].

Consider:

There is no firm definition of "reasonably equivalent value"; it is a question of fact to be decided by the trier of fact. However, fair market value is generally a starting point to determine reasonably equivalent value [*BFP v. Resolution Trust Corp (1994) 511 US 531, 545, 114 S Ct 1757, 128 L E2d 556*].

Jury Instructions:

Constructive Fraudulent Transfer (*Civ. Code, § 3439.04(a)(2)*)--Essential Factual Elements, see *Judicial*

Council of California Civil Jury Instructions, CACI No. 4202 (LexisNexis Matthew Bender).

Cross Reference:

Burdens on transferees, see *4.19*.

Procedural considerations for creditors, see *4.13*.

Procedural considerations for debtors and transferees, see *4.21*.

4.08[2] Creditor May Void Transfer Made With Actual Intent to Hinder, Delay, or Defraud Creditor.

4.08[2][a] Creditor May Challenge Transfer by Debtor With Actual Intent Without Having to Show Debtor's Financial Status. A case based on actual intent to defraud focuses on the debtor's intent, not the debtor's financial status. A creditor can set aside a transfer made with actual intent to hinder, delay, or defraud any creditor, and need not show that the debtor faced insolvency or the inability to pay debts [*CC § 3439.04(a)(1)*; *Reddy v. Gonzalez (1992) 8 CA4th 118, 123, 10 CR2d 55, 10 CR2d 58*].

Strategic Point--Debtor:

Although the creditor need not show the specific evidence of indebtedness or insolvency required for constructive fraud, to obtain relief the creditor must show that the creditor was injured [*Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80, 112 CR2d 802*].

Cross Reference:

Injury requirement under UFTA, see *4.07[4]*.

Warning--Creditor:

On summary judgment, the party claiming fraud must do more than speculate on the credibility of the transferor's statements regarding the transferor's intent or provide opinion evidence in the form of a declaration. The party must introduce evidence regarding the transferor's intent such as by an admission to a declarant that is admissible despite the hearsay rule [*Barisich v. Lewis (1990) 226 CA3d 12, 21, 275 CR 331*].

A court may deny summary judgment when material facts (including state of mind) turn on the credibility of the only witness to those facts. Both the adequacy of consideration and the existence of a fraudulent intent are questions of fact for trial, inasmuch as they "frequently depend on inferences drawn from circumstances surrounding the transaction" [*CCP § 437c(e)*; *Copple v. Lazzarevich (1951) 108 CA2d 143, 146, 238 P2d 612* ; *see TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 CA2d 826, 844-845, 29 CR 887* (proof of actual fraud is "peculiarly dependent upon the circumstances which surround the questioned transaction and the inferences which the trier of fact may reasonably draw from them")].

In cases of interfamilial transfers, the parties are held to a "fuller and stricter proof" of the legitimacy of the transaction [*Kirkland v. Risso (1979) 98 CA3d 971, 978-979, 159 CR 798*]. Because of this stricter standard, the sufficiency of consideration and the existence of actual fraud must be determined by the court, and cannot be determined as a matter of law [*Hickson v. Thielman (1956) 147 CA2d 11, 15, 304 P2d 122*].

Consider:

Transfers done pursuant to a marital settlement agreement are subject to UFTA considerations [*Mejia*

v. Reed (2003) 31 C4th 657, 669, 3 CR3d 390, 74 P3d 166].

4.08[2][b] Circumstantial Evidence, Including "Badges of Fraud," Can Prove Intent. Actual intent can be proved by circumstantial evidence relating to the transfer or obligation [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1298, 123 CR2d 924* (listing prior cases)]. Eleven factors are codified as "badges of fraud" [*CC § 3439.04(b)*]:

- The transfer was made to an insider.
- The debtor maintained possession or control of the asset.
- The transaction was disclosed or concealed.
- The debtor was sued or threatened with suit before the transaction.
- The transfer was of all or substantially all of the debtor's assets.
- The debtor absconded.
- The debtor removed or concealed assets.
- There was an exchange of reasonably equivalent value.
- The debtor was insolvent at the time or soon became insolvent.
- The transfer occurred at the time a substantial debt was incurred.
- The debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Evidence other than the badges may also be relevant to actual intent [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1298, 123 CR2d 924*]. The existence of several badges does not necessarily create a triable issue of fact [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1299, 123 CR2d 924*].

Jury Instructions:

Factors to Consider in Determining Actual Intent to Defraud (*Civ. Code, § 3439.04(b)*), see *Judicial Council of California Civil Jury Instructions, CACI No. 4201* (LexisNexis Matthew Bender).

4.08[2][c] Badges and Other Evidence of Actual Intent Are Addressed to Trial Court's Discretion. The badges of fraud are intended to assist the court in determining whether the debtor had actual intent to defraud, and are applied in the court's discretion [*Filip v. Bucurenciu (2005) 129 CA4th 825, 834, 28 CR3d 884*]. The legislature intended to codify existing law when it added reference to the badges [*CC § 3439.04(c)*].

The presence of one or more badges does not necessarily create a presumption of fraud [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1298-1300, 123 CR2d 924*].

Cross Reference:

Badges of fraud, see *4.08[2][b]*.

Strategic Point--Creditor:

- A creditor should argue that showing several of the badges of fraud shifts the burden to the debtor or transferee in a summary judgment motion [*cf. United States v. 5208 Los Franciscos Way (9th Cir 2004) 385 F3d 1187, 1192 , citing Celotex Corp. v. Catrett (1986) 477 US 317, 324-325, 106 S Ct 2458, 91 L Ed2d 265*].

- A creditor should refer to the legislative history to suggest that the legislature intended to create such a presumption [*see* Assembly Committee Analysis to SB 1408 (June 1, 2004), Senate Judiciary Committee Analysis (April 11, 2004)].

Strategic Point--Debtor:

The debtor should counter this argument by asserting that despite the language in these reports, the bill the legislature enacted specifically states that the inclusion of the badges in *CC § 3439.04(b)* does not constitute a change in, but is declaratory of existing law, and is not intended to affect any existing judicial decisions [*CC § 3439.04(c)*].

4.08[2][d] Creditor Must Show Actual Intent. Within the trial court's discretion, proof of actual intent may shift the burden of proof to the debtor to prove the contrary [*Liodas v. Sahadi (1977) 19 C3d 278, 289-290, 137 CR 635, 562 P2d 316*]. The creditor must show actual intent by a preponderance of the evidence [*Liodas v. Sahadi (1977) 19 C3d 278, 292-293, 137 CR 635, 562 P2d 316*].

Cross Reference:

Defending against claim of actual fraud under UFTA, see *4.19[1]*.

Shift in burden on proof of insolvency, see *4.08[4]*.

4.08[3] Creditors at Time of Transfer May Sue for Constructive Fraud.

4.08[3][a] All Creditors Must Show Debtor Did Not Receive Reasonably Equivalent Value. To attack a transfer or obligation under a constructive fraud theory, the creditor must show that the transfer or obligation took place without the debtor receiving a reasonably equivalent value in exchange [*CC § 3439.04(a)(2)*]. "Value" means that either property is transferred or an antecedent debt is secured or satisfied, except that it does not mean an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person [*CC § 3439.03*]. "Reasonably equivalent value" requires proof that the value exchanged for the transfer or obligation approximated its worth. Proof of no transfer for reasonably equivalent value likely must be part of the creditor's case in chief [*see CC § 3439.04(a)(2)* (specifying lack of exchange for reasonably equivalent value)]. The United States Supreme Court has held that ordinarily the appropriate standard of valuation will generally be fair market value [*BFP v. Resolution Trust Corp. (1994) 511 US 531, 545, 114 S Ct 1757, 128 L Ed2d 556*].

Examples:

- Appraisal for bank for purposes of financing real property transaction, and appraisal for purpose of litigation both confirmed that value of property was approximately equivalent to purchase price [*Lewis v. Super. Ct. (1994) 30 CA4th 1850, 1855 & n3, 37 CR2d 63*].

- Purchase of identical property in same time period at approximately the same price and offers in same range or less is evidence of reasonably equivalent value [*Barisich v. Lewis (1990) 226 CA3d 12, 20, 275 CR 331* ; *but see Pajaro Dunes Rental Agency v. Spitters (ND Cal 1994) 174 BR 557, 590* ("reasonably equivalent value" does not mean identical value)].

- Evidence based on prior history that services were performed in exchange for assets at less than market value was sufficient to prove reasonably equivalent value [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1295, 123 CR2d 924*].

- Payment of a preexisting debt, even though it was not enforceable because it was time-barred, is a transfer for reasonably equivalent value [*In re Prejean (9th Cir 1993) 994 F2d 706, 709* ; *United States Fid. & Guar. Co. v. Postel (1944) 64 CA2d 567, 571-572, 149 P2d 183*].

Strategic Point--Reasonably Equivalent Value:

Two procedural points work in a creditor's favor in proving reasonably equivalent value:

- The finder of fact may reject even uncontradicted testimony about transfers of "reasonably equivalent value" it does not find credible [*Filip v. Bucurenciu (2005) 129 CA4th 825, 836, 28 CR3d 884*].

- A defendant may not delay summary judgment on reasonably equivalent value by asserting that providing evidence would violate the defendant's right against self-incrimination in a criminal proceeding [*Fisher v. Gibson (2001) 90 CA4th 275, 287, 109 CR2d 145*]. In this case, the defendant also must show that proof in support of reasonably equivalent value did not come from another nonprivileged source [*Fisher v. Gibson (2001) 90 CA4th 275, 287, 109 CR2d 145*].

4.08[3][b] Subsequent Creditors Must Show Debts Exceeded Assets or Debtor Lacked Ability to Pay. To prevail on a claim of constructive fraud, a party who became a creditor subsequent to the transfer also must show (in addition to no reasonably equivalent value) that the debtor [*CC § 3439.04(a)(2)*]:

- Was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

- Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond the ability to pay as they became due.

4.08[3][c] Existing Creditors Must Show Debts Exceeded Assets, Debtor Lacked Ability to Pay Debts, or Debtor Was Insolvent. Assuming no exchange for reasonably equivalent value, a creditor whose claim existed at the time of the transfer, like a subsequent creditor, may show that (1) the debtor's debts exceeded its assets, or (2) the debtor lacked the ability to pay its debts at the time. An existing creditor may also show that the debtor was insolvent at the time or became insolvent as a result of the transfer [*Monastra v. Konica Bus. Mach., U.S.A., Inc. (1996) 43 CA4th 1628, 1635, 51 CR2d 528* ; *CC §§ 3439.04(a)(2), 3439.05*].

Jury Instructions:

Constructive Fraudulent Transfer (Insolvency) (*Civ. Code, § 3439.05*)--Essential Factual Elements, see *Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender).

A debtor is insolvent if at fair valuations the sum of the debtor's debts is greater than all of the debtor's assets [*CC § 3439.02(a)*], with the following conditions:

- A partnership is insolvent if at fair valuations the sum of the partnership's debts is greater than the aggregate of all the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts [*CC § 3439.02(b)*].

- A debtor is presumed insolvent if the debtor is generally not paying its debts as they become due [*CC § 3439.02(c)*].

- "Assets" for the insolvency analysis do not include property that has been transferred or concealed with the intent to hinder creditors [*CC § 3439.02(d)*].

- "Debts" for the insolvency analysis do not include obligations secured by valid liens on property not included as assets [*CC § 3439.02(e)*].

Jury Instructions:

Insolvency Explained, see *Judicial Council of California Civil Jury Instructions, CACI No. 4205* (LexisNexis Matthew Bender).

"Debts" for assessing insolvency do not include future obligations not yet due, and "assets" do not include future income not subject to levy by a creditor. Thus, it is inappropriate to calculate insolvency balancing future obligations against present assets [*see Mejia v. Reed (2003) 31 C4th 657, 671-672, 3 CR3d 390, 74 P3d 166*].

Strategic Point:

Counsel should order a credit report to show that the debtor is not paying its debts as they become due, and should compare this report to earlier reports to see if the debt load has increased disproportionately to the ability to repay or the assets held.

4.08[4] Creditor May Shift Burden of Proof Through Evidence of Existing or Future Debts Resulting in Insolvency. A creditor may be able to shift the burden of proof on fraud as a whole by proving insolvency. A debtor is presumed insolvent it the debtor is not paying its debts as they become due [*CC § 3439.02(c)*]. However, on proof of the debtor's existing insolvency or insolvency as a result of the transfer, the burden of proof that the transfer was not fraudulent shifts to the debtor [*see Kirkland v. Risso (1979) 98 CA3d 971, 977, 159 CR 798*]. That is, the burden on reasonably equivalent value may shift as well.

Strategic Point--Creditors:

A creditor should argue that in actual fraud cases proof of insolvency also shifts the burden on fraud to the debtor or transferee [*Kirkland v. Risso (1979) 98 CA3d 971, 977, 159 CR 798*], although the opposing party may cite cases stating that the badges of fraud do not shift the burden of proof, and insolvency is simply one of the badges.

Jury Instructions:

Presumption of Insolvency, see *Judicial Council of California Civil Jury Instructions, CACI No. 4206* (LexisNexis Matthew Bender).

Cross Reference:

Badges of fraud, see *4.08[2][b]*.

Defending against UFTA claims, burden of proof, see *4.19[2]*.

Warning:

Some older cases suggest that the transferee must overcome a presumption of fraud with proof of solvency or reasonably equivalent value by clear and convincing evidence of solvency or reasonably equivalent value [*see Kirkland v. Risso (1979) 98 CA3d 971, 978, 159 CR 798*]. Although the California Supreme Court specifically addressed the standard of proof for creditors in *Liodas v. Sahadi (1977) 19 C3d 278, 287, 137 CR 635, 562 P2d 316* , apparently it intended to disapprove of the use of the clear and convincing requirement for transferees on shifting of burden [*see Liodas v. Sahadi (1977) 19 C3d 278, 287 n3, 137 CR 635, 562 P2d 316*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewContracts LawConsiderationGeneral OverviewContracts LawConsiderationSufficient ConsiderationReal Property LawPurchase & SaleContracts of SaleGeneral OverviewSecurities LawLiabilitySecurities Exchange Act of 1934 ActionsInsider TradingDuty to Abstain & DiscloseGeneral Overview

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Chapter 4 Fraudulent Transfers
II. ASSERTING CLAIM UNDER UFTA, RELATED STATUTES, AND COMMON LAW

1-4 MB Practice Guide: CA Debt Collection 4.09

4.09 Creditor Must Establish That Assets Are Reachable Under UFTA.

4.09[1] Transferred Item or Items Must Be "Asset." An asset under UFTA means property of the debtor, unless it is [*CC § 3439.01(a)*]:

- Property to the extent it is encumbered by a valid lien.
- Property to the extent it is generally exempt under nonbankruptcy law.
- An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against one tenant.

Strategic Point--Creditor:

The lien exception in *CC § 3439.01(a)(1)* covers *valid* liens, and one case declined to apply it on the ground that the transaction was arguably suspect [*Filip v. Bucurenciu (2005) 129 CA4th 825, 835, 28 CR3d 884* (citing evidence that the transfer was not for fair market value so that lien was not aboveboard)].

4.09[2] Special Rules Apply to Transfers of Personal Property Without Delivery. The Civil Code governs transfers or obligations relating to personal property [*see CC §§ 3440-3440.9*]. "Personal property" includes money, goods, chattels, things in action, and evidences of debt [*CC § 14(3)*]. "Real property" is defined as "coextensive with lands, tenements, and hereditaments" [*CC § 14(2)*]. Because UFTA governs transfers and obligations relating to both real and personal property [*see CC § 3439.01(a), (h)*], these provisions apply only to the conveyance of personal property without delivery [*see CC § 3440(a) et seq.*].

A transfer of personal property made by a person having possession of the property that is not (1) accompanied by an immediate delivery, and (2) followed by an actual and continued change of possession of the property, is void as against creditors of the transferor who [*CC § 3440(a)*]:

- Were creditors at the time of the transfer;

- Became creditors while the transfer remains in possession;
- Are successors in interest of those creditors; or
- Were buyers from the transferor for value in good faith subsequent to the transfer.

For this rule, the term "creditors" is more broadly defined than under UFTA [*see CC § 3440(b)*].

Exception:

The special rule regarding transfers of personal property without delivery does not apply to [*CC § 3440.1*]:

- Things in action.
- Ships or cargo at sea or in a foreign port.
- The sale of accounts, chattel paper, payment intangibles, or promissory notes governed by the UCC, security interests, and contracts of bottomry or respondentia.
- Certain transfers of wine or brandy.
- Transfers or assignments for the benefit of creditors.
- Property exempt from the enforcement of a money judgment.
- Standing timber.
- Personal property not located within California at the time of the transfer or the attachment of the lien, unless used for the purpose of evading *CC § 3440(a)*'s requirements.
- Transfers of property (1) subject to a statute or treaty of the United States or a California statute providing for the registration of transfers of title or the issuance of certificates of title which (2) is so far perfected under the statute or treaty that a bona fide purchaser cannot acquire an interest in the property transferred that is superior to the interest of the transferee.
- Transfers immediately followed by leases in good faith for value under *Com. Code § 10308*.
- Transition property under PU Code § 840 or recovery property under PU Code § 848.
- Transfers of property by any governmental entity.
- Secured transfers for which steps have not been completed under UCC Division 9 unless the creditor is a buyer in the ordinary course of business [*CC §§ 3440.1(h)*, *3440.2*, *3440.3*, *3440.5*; *see Com Code § 1201*].

Warning:

The statute of limitations for creditors relying on *CC § 3440(a)* is one year, and is calculated in different ways depending on the factual circumstances [*CC § 3440.6*].

Cross Reference:

Statutes of limitations in personal property actions under *CC § 3440*, see *4.12[4]*.

4.09[3] Special Rules Apply to Transfers of Real Property. The Civil Code provides special rules regarding transfers of real property:

- An instrument affecting an estate in real property, other than a will, made with the intent to defraud prior or subsequent purchasers, is void against every purchaser or encumbrancer of that property for value, or the rents or profits from it [*CC § 1227*]. This is in addition to the provisions of UFTA [*CC § 1231*].

Exception:

This does not apply to parties with notice unless the fraud in the transfer was mutual between the transferee and transferor [*CC § 1228*].

- Transfers of interests in real property subject to a judgment lien are subject to the lien as long as an abstract of judgment or similar document has been recorded to create the lien [*CCP §§ 697.390*, *697.310*, *697.320*].

Strategic Point--Creditor:

- Recording an abstract of judgment or other document to create a judgment lien under *CCP §§ 697.310*, *697.320* can provide value to creditors because the lien applies even if the creditor is unable to prove actual or constructive fraud under UFTA [*compare Mejia v. Reed (2003) 31 C4th 657, 671-672, 3 CR3d 390, 74 P3d 166* (child support payments not debt under UFTA for purposes of insolvency analysis) *with CCP § 697.320(a)(1)* (recorded judgments for child or spousal support may create lien on real property)].

- A creditor can argue against transfers or encumbrances based on a constructive notice theory that is more stringent than the test applied for good faith takers for reasonably equivalent value [*see Bank One Tex. v. Pollack (1994) 24 CA4th 973, 981-982, 29 CR2d 510*].

Investigating Transfers of Real Property Using Online Resources:

Many resources are available online for investigating transfers of real property. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Real Property Locator > CA Deed Transfers--All Counties

  - Sample Search: To find deed transfer records when you know the name of the buyer or seller, use a NAME segment search: *name (first name /3 last name)*.

  - Sample Search: To find deed transfer records when you know the address of the property, use an ADDRESS segment search: *address (property address)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsEnforceabilityCommercial Law (UCC)Secured Transactions (Article 9)PerfectionGeneral OverviewContracts LawTypes of ContractsBona Fide PurchasersGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawLandlord & TenantLease AgreementsStatutes of Limitations

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Chapter 4 Fraudulent Transfers
II. ASSERTING CLAIM UNDER UFTA, RELATED STATUTES, AND COMMON LAW

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4.10 Limitations on Transfers to Good Faith Takers for Reasonably Equivalent Value or Subsequent Transferees.

4.10[1] Creditor May Not Obtain Relief Against Taker in Good Faith for Reasonably Equivalent Value. Transfers to good faith transferees for reasonably equivalent value are not actionable under UFTA. This is because in actual intent cases there is a defense under *CC § 3439.08(a)*, and in constructive fraud cases an essential element of all constructive fraud cases is that the transfer was not for reasonably equivalent value [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1294-1295, 123 CR2d 924*]. In actual fraud cases, transfers subsequent to a good faith transfer for reasonably equivalent value are not actionable [*CC § 3439.08(a)*].

Jury Instructions:

Affirmative Defense of Good Faith (*Civ. Code, § 3439.08*), see *Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender).

Although it is likely the transferee has the burden to show good faith [*see Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 C4th 1059, 1071-1072, 124 CR2d 142, 52 P3d 79* (discussing *Evid Code § 500*)], a showing of good faith may not be difficult for the transferee to make [*see, e.g., Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1299, 123 CR2d 924*], and a creditor should anticipate this argument to the extent possible before filing a complaint.

Strategic Point--Creditor:

A creditor may be able to prevail in arguing that a less stringent standard applies to a transfer or encumbrance of real property under specific statutes applicable to real property.

Warning:

Although both *CC § 3439.08(a)* and *CC § 3439.08(b)* refer to whether a transaction is "voidable," the word does not mean the same thing in both contexts. *CC § 3439.08(a)* means that UFTA simply does not apply in actual fraud cases where a good faith transferee took for reasonably equivalent value [*see Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1294, 123 CR2d 924*]; *CC § 3439.08(b)* means that UFTA applies but that a remedy less than voiding the transaction is available in constructive fraud cases involving good faith but not reasonably equivalent value.

Cross References:

Definition of reasonably equivalent value, see *4.08[3][a]*.

Limits on creditor's recovery, see *4.10[4]*.

Transferee's defenses including good faith, see *4.20*.

Preferences, see *4.07[3]*.

Rules applicable to real property, see *4.09[3]*.

Burdens of proof, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 9, Burdens of Proof and Persuasion.

Case annotations and legislative comments to *Evid Code § 500*, see Cotchett, *California Courtroom Evidence, § 13.01 (Matthew Bender)*.

4.10[2] Creditor's Recourse Against Good Faith Transferees in Constructive Fraud Cases Is Limited. In a constructive fraud case, assuming that the first transfer was not for reasonably equivalent value, a good faith transferee still has some defenses. To the extent that the creditor may void the transfer pursuant to *CC § 3439.07(a)(1)*:

- The judgment will be limited to the lesser of the asset transferred or the amount required to satisfy the creditor's claim [*CC § 3439.08(b)*].

- If the judgment is for the value of the asset, it will be limited to the value of the asset at the time of the transfer [*CC § 3439.08(c)*].

- The judgment may be only against the first transferee, the person for whose benefit the transfer was made, or any subsequent transferee other than a good faith transferee for value [*CC § 3439.08(b)(1), (2)*].

Strategic Point--Creditor:

Because the limitations on relief in *CC § 3439.08(b)* go to the remedy of voiding the transfer, a creditor may want to seek other forms of relief [*see CC § 3439.08(b)* (referring to relief under *CC § 3439.07(a)(1)* only); *see also CC § 3439.07(a)(2), (3)*].

Cross Reference:

Choosing UFTA and common law remedies, see *4.11*.

Defending against UFTA and common law claims by transferees, see *4.20*.

4.10[3] Some Transfers Are Exempt Regardless of Transferee's State of Mind. Regardless of the state of mind of the debtor or the transferee, a transfer is exempt if it results from the termination of a lease on the debtor's default or the enforcement of most types of liens in a noncollusive manner [*CC § 3439.08(e)*].

Cross Reference:

Transferee's defenses, categorically exempt transfers, see *4.20[2]*.

4.10[4] Limitations on Remedies Depend on Whether Transfer Has Been Made or Obligation Has Been

Incurred. The limitations in *CC § 3439.08* on a creditor's relief against transferees apply only if a transfer has been made [*CC § 3439.08(b)*, *(c)*, *(e)*] or, with respect to the limitations relating to good faith transferees or obligees, if a transfer has been made or obligation incurred [*CC § 3439.08(a)*, *(d)*].

A transfer is "made":

- With respect to an asset that is real property other than a fixture but including a lien or similar interest, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee [*CC § 3439.06(a)(1)*].

- With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than that is superior to the interest of the transferee [*CC § 3439.06(a)(2)*].

Exceptions:

Notwithstanding these rules:

- A transfer is deemed made immediately before the filing of a UFTA action if it can be perfected, but has not been, before the filing of the action [*CC § 3439.06(b)*].

- A transfer is made when it becomes effective between the debtor and transferee if it cannot be perfected under applicable law [*CC § 3439.06(c)*]

Strategic Point--Creditor:

Under these rules, a creditor should argue that a transfer is not yet effective between the parties, and seek relief before the transfer, if it cannot be perfected under applicable law. This may help in avoiding limitations on remedies under *CC § 3439.08* and statute of limitations issues under *CC § 3439.09*.

Under UFTA, an obligation is deemed incurred:

- If oral, when it becomes effective between the parties [*CC § 3439.06(e)(1)*].

- If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee [*CC § 3439.06(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawPriorities & RecordingBona Fide PurchasersTortsBusiness TortsFraud & MisrepresentationConstructive FraudDefensesTortsBusiness TortsFraud & MisrepresentationConstructive FraudRemedies

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Chapter 4 Fraudulent Transfers
II. ASSERTING CLAIM UNDER UFTA, RELATED STATUTES, AND COMMON LAW

1-4 MB Practice Guide: CA Debt Collection 4.11

4.11 Choosing Available Remedies.

4.11[1] Creditor May Void Transfer or Obligation. A creditor's first remedy is avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claims [*CC § 3439.07(a)(1)*]. The remedy of avoidance is limited in that the creditor may seek judgment only against (1) the first transferee of the asset or the person for whose benefit the transfer was made, or (2) any subsequent transferee except a good faith transferee who took for value or any subsequent transferee of that person [*CC § 3439.08(b)*]. This is subject to other limitations generally applicable under UFTA.

Cross Reference:

Limitations on relief in UFTA actions generally, see *4.10*.

Persons against whom creditor may seek remedy, see *4.10[1], [2]*.

4.11[2] Creditor May Seek Remedies Under Attachment Statutes.

4.11[2][a] Creditor May Proceed Under Attachment Statutes in Independent Action or UFTA Action. Under UFTA, a creditor can follow the remedy of seeking a judgment for the amount of the creditor's claim followed by a judgment creditor's suit, or the creditor may seek that relief in the UFTA claim itself [*see Cortez v. Vogt (1997) 52 CA4th 917, 931, 60 CR2d 841* ; *see also CC § 3439.07(b), (c)* (recognizing validity of both approaches)].

4.11[2][b] Creditor May Seek Provisional Remedies Under Attachment Statutes. A creditor can seek an attachment or other provisional remedy against the asset transferred or its proceeds pursuant to *CCP §§ 481.010-493.060*, which cover attachment procedures [*CC § 3439.07(a)(2)*].

Strategic Point--Creditor:

- A creditor may bring attachment proceedings against property in the hands of a third party on the ground that it really belongs to the judgment debtor, requiring the transferee to make a third party claim to the asset under *CCP § 720.110*, and then respond that the transferee's claim is invalid on the ground

that the transfer was fraudulent. This can trigger a summary evidentiary hearing, with no right to a jury trial or discovery, under *CCP § 720.310 et seq*. [*see Whitehouse v. Six Corp. (1995) 40 CA4th 527, 533, 48 CR2d 600*].

- If real property is involved, the creditor should also evaluate filing a lis pendens.

Cross References:

Limitations on relief in UFTA actions generally, see *4.10*.

Third-party claims, see Ch. 23, Third Party Claims.

Executing against real property, see Ch. 17, Executing and Levying Against Real Property.

Lis pendens, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 21, Lis Pendens.

4.11[3] Creditor May Seek Other Provisional Remedies and Interim Relief. Other than Code of Civil Procedure attachment proceedings, a creditor can obtain interim relief subject to applicable principles of equity and rules of civil procedure:

- An injunction against further disposition by the debtor or transferee, or both, of the asset transferred or its proceeds.

- Appointment of a receiver to take charge of the asset transferred or any proceeds.

- Other relief as required [*CC § 3439.07(a)(3)(A)-(C)*], including imposition of a constructive trust and recording a lis pendens against the fraudulently transferred property [*Kirkeby v. Superior Court (2004) 33 C4th 642, 650, 15 CR3d 805, 93 P3d 395*].

Warning:

Obtaining an attachment, or levying on property in the possession of a third party, may expose the creditor to liability if the property in question was legitimately transferred [*see CCP § 490.010 et seq*.]. There can also be liability for malicious prosecution. This exposure can be minimized by undertaking appropriate investigation, through discovery, a debtor examination, or otherwise before proceeding with the levy.

Cross Reference:

Limitations on relief in UFTA actions generally, see *4.10*.

Procedures for asserting UFTA or common law claims, see *4.03*.

4.11[4] Creditor May Seek Damages. UFTA's recognition that a creditor may seek any other relief the circumstances may require may allow a creditor to seek consequential damages [*see CC § 3439.07(a)(3)(C)*]. It is likely this remedy is available against the debtor [*cf. Wisden v. Superior Court (2004) 124 CA4th 750, 757-758, 21 CR3d 523* (allowing UFTA claim based on right to damages, thus supporting right to jury trial)], and possibly against a transferee if the transferee had knowledge of the intended fraud [*Taylor v. S & M Lamp Co. (1961) 190 CA2d 700, 706, 712-713, 12 CR 323*], although the cases are in conflict [*see, e.g., Kuzmicki v. Nelson (1950) 101 CA2d 278, 280, 225 P2d 233* (citing cases)], and the issue has been left unresolved [*see Cheung v. Daley (1995) 35 CA4th 1673, 1675 n3, 42 CR2d 164* (noting unresolved issue); *Forum Ins. Co. v. Devere, Ltd. (CD Cal 2001) 151 F Supp2d 1145, 1150* (only

equitable remedies are available against transferees)].

The UFTA may even be used to require innocent investors in a Ponzi scheme to disgorge profits received [*Donell v. Kowell (9th Cir. 2008) 533 F3d 762]* .

4.11[5] Creditor May Seek Additional, Cumulative Remedies Under Other Causes of Action. A number of complementary causes of action and remedies exist that are not superseded by, and do not supersede, UFTA:

- UFTA does not preempt common law fraudulent transfer law [*Macedo v. Bosio (2001) 86 CA4th 1044, 1051, 104 CR2d 1*].

- UFTA is not preempted by the Bulk Sales Law [*Monastra v. Konica Bus. Mach., USA, Inc. (1996) 43 CA4th 1628, 1635-1642, 51 CR2d 528*].

- A creditor can bring a claim for civil conspiracy to violate UFTA as well as a UFTA claim [*Monastra v. Konica Bus. Mach., USA, Inc. (1996) 43 CA4th 1628, 1644-1645, 51 CR2d 528*].

- Although it does not specifically provide for such a remedy, UFTA permits the recording of a lis pendens because it does not preclude that remedy and because a UFTA claim may affect title to property [*Kirkeby v. Superior Court (2004) 33 C4th 642, 651-652, 15 CR3d 805, 93 P3d 395*].

Cross References:

Common law fraudulent conveyance action, see *4.12[6]*.

Lis pendens, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 21, Lis Pendens.

4.11[6] Remedy Is Against Debtor, Transferee, or Person for Whose Benefit Transfer Was Made. A creditor's UFTA remedy is against the debtor if the transfer has not yet been made [*see CC §§ 3439.07(a)(1), 3439.06(a)*], against the transferee if the transfer has been made and no defenses apply [*CC § 3439.08(b)*], or the person for whose benefit the transfer is made [*CC § 3439.08(b)*].

UFTA limits the parties against whom a judgment may be made in cases where a creditor seeks to avoid a judgment, but it allows judgment against [*CC § 3439.08(b)*]:

- The first transferee of the asset or the person for whose benefit the transfer was made; or

- Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

This limitation allows judgment against the principal of a debtor corporation when the principal is reasonably the person for whose benefit the transfer is made [*CC § 3439.08(b)(1)*; *Qwest Communs. Corp. v. Weisz (SD Cal 2003) 278 F Supp2d 1188, 1191-1192*].

Strategic Point--Creditor:

Although remedies under UFTA are limited to these parties, civil conspiracy claims for violations of UFTA have been upheld against other parties, and creditors should evaluate whether they may be available [*compare Qwest Communs. Corp. v. Weisz (SD Cal 2003) 278 F Supp2d 1188, 1192 with*

Forum Ins. Co. v. Devere Ltd. (CD Cal 2001) 151 F Supp2d 1145, 1150 (no claim available against non-transferees)].

Cross Reference:

Limitation on creditor's remedies in constructive fraud cases, see *4.10[2], [3]*.

4.11[7] Court May Fashion Procedures for Recovery by Innocent Transferees. Good faith transferees and subsequent transferees are protected under UFTA, in that:

- A creditor may not recover against a good faith transferee for reasonably equivalent value or subsequent transferee in an actual intent case [*CC § 3439.08(a)*].

- A creditor may not void a transfer under *CC § 3439.07(a)(1)* with a judgment against a good faith transferee for value, other than the first transferee [*CC § 3439.08(b)(1), (2)*].

- A good faith transferee may obtain, to the extent of the value given the for the transfer, (1) a lien on or right to retain an interest in the asset transferred, (2) enforcement of any obligation incurred, or (3) a reduction in the amount of liability on the judgment [*CC § 3439.08(d)*]. "Good faith" means that the transferee acted without actual fraudulent intent and did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor [*Chorost v. Grand Rapids Factory Showrooms, Inc. (DNJ 1948) 77 F Supp 276, 280*]. Under UFTA, a transferee lacks good faith if he or she has enough knowledge of the actual facts to induce a reasonable person to inquire further about the transaction [*Plotkin v. Pomona Valley Imports (9th Cir [BAP] 1996) 199 BR 709, 719-720*].

4.11[8] Creditor May State Cause of Action for Common Law Fraudulent Conveyance. UFTA does not preempt other causes of action, including one for fraudulent conveyance under the common law [*see Macedo v. Bosio (2001) 86 CA4th 1044, 1051, 104 CR2d 1* ; *see also Wisden v. Superior Court (2004) 124 CA4th 750, 758, 21 CR3d 523*]. Other than the statute of limitations, the differences between UFTA and the common law cause of action are not discussed in detail.

Cross Reference:

Statute of limitations in common law claim, see *4.12*.

UFTA compatibility with other remedies, see *4.11[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawPriorities & RecordingLis PendensTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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4.12 Action Must Comply With Statute of Limitations and Other Bars to Relief.

4.12[1] Bring Intent to Defraud Action Within Four Years of Transfer or One Year After Creditor Should Have Known of Transfer. An action based on intent to defraud under *CC § 3439.07(a)* (allowing for avoidance, attachment remedies, or other civil or equitable remedies) or for a levy under *CC § 3439.07(b)*, *(c)* must be brought within four years of when the transfer was made or obligation incurred or, if later, within one year after the transfer or obligation could reasonably have been discovered by the creditor [*CC § 3439.09(a)*].

Jury Instructions:

Statute of Limitations Defense--Actual or Constructive Fraud (*Civ. Code, § 3439.09*), see *Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender).

Exception:

An action must be brought or levy made no later than seven years after the transfer was made or obligation incurred [*CC § 3439.09(c)*].

4.12[2] Bring Constructive Fraud Action Within Four Years From Transfer. In cases based on constructive fraud, the action must be brought within four years after the transfer was made or obligation incurred. There is no extension for lack of knowledge by the creditor [*CC § 3439.09(b)*].

Jury Instructions:

Statute of Limitations Defense--Actual or Constructive Fraud (*Civ. Code, § 3439.09*), see *Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender).

Exception:

An action must be brought or levy made no greater than seven years after the transfer was made or obligation incurred [*CC § 3439.09(c)*].

4.12[2A] Statute Does Not Apply to Express Trust Theory. Because an express trust is grounded upon the theory that the legal titleholder currently hold the property for the equitable titleholder, a statute of limitations defense is really not applicable [*Alhambra Bldg. & Loan Asso. v. De Celle (1941) 47 CA2d 409, 118 P2d 19* ; *Knapp v. Elliott (1947) 81 CA2d 667*]. This holding arguably should also apply with respect to a resulting trust cause of action.

4.12[3] Statute Begins to Run When Sale Is Consummated.

4.12[3][a] Transfer Must Be Made or Obligation Incurred As Provided in CC § 3439.06. The UFTA statute of limitations runs from the time the transfer was made or the obligation was incurred, under these guidelines [*CC § 3439.09(a)-(c)*]:

- A transfer is "made" when it has been so far perfected that a creditor cannot acquire a judicial lien other than under UFTA (in the case of assets other than real property) or a good faith purchaser cannot acquire an interest in the asset superior to the interest of the transferee (in the case of real property) [*CC § 3439.06(a)*].

- An obligation is "incurred" when it is effective or, if written, when the writing executed by the obligor is delivered to or for the benefit of the obligee [*CC § 3439.06(e)*].

Strategic Point--Creditors:

In addition to arguing that the statute of limitations has been tolled or recommenced, creditor's counsel should evaluate whether the transfer has not yet been made or obligation has not yet been incurred.

Cross Reference:

Recommencement of statute of limitations, see *4.12[3][b]*.

4.12[3][b] Statute Starts Over When Creditor Seeks Judgment. When a creditor has sought judgment against a debtor on the creditor's underlying claim, the statute of limitations for a subsequent fraudulent transfer begins to run on the date the creditor obtains judgment in the underlying action, because the creditor should not be penalized for pursuing this remedy [*Cortez v. Vogt (1997) 52 CA4th 917, 934-936, 60 CR2d 841*].

4.12[4] Bring Personal Property Action Within One Year From Transfer. The statute of limitations on claims under *CC §§ 3440-3449* is shorter than for actions under UFTA, and is one year from the *earliest* of [*CC § 3440.6*]:

- The date the person bringing the action, in the exercise of reasonable diligence, should have known of the transfer.

- The date the person actually knew of the transfer.

- The date of the delivery of and change in possession of the property transferred occurred.

- The date the filing and publication requirements under *CC § 3440.1(h)* were complied with, unless the financing statement has lapsed.

Strategic Point--Creditor:

Because this statute of limitations is short, counsel for the creditor should file a complaint with this cause of action and any information relating to other causes of action within one year. The complaint may be amended as the case develops.

4.12[5] Equitable Defenses Apply to UTFA Claims. Equitable defenses apply to UFTA claims, and creditors should be prepared to respond to them and to plead around them [*see CC § 3439.10*].

Cross Reference:

Debtor's and transferee's equitable defenses, see *4.20[4]*.

4.12[6] Statute of Limitations for Common Law Fraudulent Conveyance Cause of Action May Apply.

4.12[6][a] Three-Year Statute Applies to Common Law Fraudulent Transfer Claims. With regard to common law fraudulent conveyance claims, the three-year statute of limitations for common law fraud claims may apply as well as the UFTA statute [*Macedo v. Bosio (2001) 86 CA4th 1044, 1051, 104 CR2d 1*]. The common law fraud statute does not accrue until the aggrieved party discovers the facts constituting the fraud or mistake [*CCP § 338(d)*].

Strategic Point--Creditor:

Although it is arguable that a complaint alleging claims under UFTA makes a common law cause of action for fraudulent conveyance, counsel should set out separate causes of action based on the same facts when the statute of limitations may be in issue to take advantage of the statute that works best.

4.12[6][b] Statute Accrues on Judgment or Knowledge. The three-year statute of limitations under *CCP § 338(d)* runs from [*Macedo v. Bosio (2001) 86 CA4th 1044, 1051, 104 CR2d 1*]:

- The judgment, when the creditor reduces the creditor's underlying claim to judgment [*Macedo v. Bosio (2001) 86 CA4th 1044, 1051, 104 CR2d 1*]; or
- The creditor's discovery of facts constituting the cause of action [*CCP § 338(d)*].

Consider:

This latter provision may lead to a similar result as under UFTA statute's tolling provision allowing actions based on actual intent within one year after the transfer or obligation was or reasonably could have been discovered [*CC § 3439.09(a)*].

Strategic Points--Creditor:

If the statute of limitations is likely to be an issue, a creditor should evaluate:

- In actual intent cases, whether the requirement of one year from the date on which the creditor reasonably should have known of the transfer is better, or with the tolling under *CCP § 338(d)* regarding knowledge of the facts forming the cause of action.
- In constructive fraud cases, whether the delayed accrual in *CCP § 338(d)* is helpful, which is not available under UFTA.

Warning:

Regardless, the action must be brought within seven years of the transfer under the common law or UFTA [*Macedo v. Bosio (2001) 86 CA4th 1044, 1051 n4, 104 CR2d 1*].

Cross Reference:

Seven-year maximum statute, regardless of lack of discovery, see *4.12[6][c]*.

4.12[6][c] Bring Any Fraudulent Transfer Claims Within Seven Years Regardless of Knowledge. Even if there is no discovery rule, bring a fraudulent transfer action under UFTA or the common law within seven years of the transfer or obligation. This is because the legislature intended the seven-year maximum statute in UFTA to apply to all fraudulent transfer actions [*Macedo v. Bosio (2001) 86 CA4th 1044, 1051 n4, 104 CR2d 1*].

4.12[7] Special Considerations for Debtors in Bankruptcy. If the transferor files for bankruptcy, the automatic bankruptcy stay [*see 11 USC § 362(a)*] prohibits action by creditors during the bankruptcy proceedings against assets that are a part of the bankruptcy estate. As to those assets, only the trustee may pursue an action under *11 USC § 548* relating to fraudulent transfers within the Bankruptcy Code [*Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc. (1994) 29 CA4th 1828, 1842, 35 CR2d 348*].

Creditors in bankruptcy situations may have two possible other remedies beyond the standard relief from the stay:

- The trustee can pursue claims against the debtor under *11 USC § 548* and UFTA [*Plotkin v. Pomona Valley Imps., Inc. (In re Cohen) (9th Cir BAP 1996) 199 BR 709, 713]* .

- The automatic stay does not apply to property of the debtor within the estate after the filing of a trustee's no-asset report [*Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc. (1994) 29 CA4th 1828, 1842-1843, 35 CR2d 348* ; *see 11 USC § 362(a)*].

Strategic Point:

Contact the trustee early to see if the trustee is interested in pursuing a particular asset. The trustee may offer to allow counsel to proceed in the bankruptcy action under some kind of contingent fee arrangement. Note, however, that a successful case in Bankruptcy Court will result in a recovery for all creditors (and a potential conflict if counsel represents only one creditor), whereas if the trustee declines to proceed and the asset (a claim under UFTA) is not administered in the bankruptcy, counsel can go after it later to benefit only counsel's creditor. The statute of limitations is stayed pending the outcome of the bankruptcy.

Cross Reference:

Discussion of bankruptcy stays, see Ch. 3, Effect of Bankruptcy.

4.12[8] If Transferee Gives Undertaking, Creditor's Remedy Is Against Transferee. A transferee can give an undertaking pursuant to UFTA and may then dispose or encumber that property [*CC § 3446*]. In this case, the creditor's remedy is against the transferee for the lesser of [*CC § 3447*]:

- The value of the property or obligation as estimated in the undertaking.

- The amount determined in the action to be due and owing to the creditor by the person who transferred the property or incurred the obligation.

The undertaking itself must be for the lesser of [*CC § 3448*]:

- Double the value of the property or obligation.

- Double the amount of the creditor's claim in the action.

Strategic Point--Creditor:

Considering that the creditor's remedy may be limited to the value of the property as estimated in the undertaking [*CC § 3447(a)*], counsel for the creditor should make sure that property is appropriately valued.

Cross Reference:

Procedural bars in UFTA and related actions, see *4.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersElementsBankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersIntent

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4.13 Procedures for Asserting UFTA or Common Law Claim.

In asserting a cause of action under UFTA, a creditor should bear in mind that other causes of action can also be brought with UFTA. If possible, a creditor should assert all possible causes of action in a complaint and file the complaint in time to prevent running of the statute of limitations on all claims. Additionally, a creditor should weigh the benefits of possible expedited procedures relating to attachment, including a temporary restraining order, preliminary injunction, or other interim relief [*CC § 3439.07(a)(3)(A)-(C)*].

For an injunction, a creditor must meet the requirements of *CCP § 526*, and for a temporary restraining order (TRO) must follow the usual ex parte procedures of Cal Rules Ct, Rules 3.1201-3.1207. To request a TRO or other ex parte relief, a creditor should realize that a transferee probably can overcome the request by offering to post an adequate bond.

Strategic Point:

Counsel seeking a TRO on an in rem basis must keep in mind that this will preclude transfers of the property and affect anyone potentially claiming an interest, as opposed to a TRO directed at individuals.

Cross Reference:

Additional causes of action, see *4.11[5]*.

Provisional remedies relating to attachment, see *4.11[2][b]*.

Undertakings, see *4.11[8]*.

Form for complaint for relief under UFTA, see *4.39*.

A creditor should consider whether to include a jury demand. A number of equitable procedures can address fraudulent transfers. However, creditor may also assert a right to a jury trial under the California Constitution in cases in which the creditor is asserting a right to a determinate sum of money [*Wisden v. Super. Ct. (2004) 124 CA4th 750, 756-757, 21 CR3d 523*].

When a creditor can assert a UFTA claim in federal court, creditor's counsel should be aware that asserting claims on

behalf of a class of unnamed creditors may not meet federal pleading standards when it fails to establish that their individual claims are not barred by the statute of limitations [*see Nielson v. Union Bank of Cal., N.A. (CD Cal 2003) 290 F Supp2d 1101, 1148*].

Cross References:

State pleading requirements, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Jury demands in state actions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 7, Complaints.

Choosing non-jury trials, see Matthew Bender Practice[(R)] Guide: California Trial and Post-Trial Civil Procedure, Ch. 5, Non-Jury Trials.

Federal pleading requirements, see Matthew Bender[(R)] Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 5, Formatting, Serving, and Filing Papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersConstitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Jury TrialGovernmentsLegislationStatutes of LimitationsGeneral Overview

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III. DEFENDING AGAINST CLAIM UNDER UFTA AND RELATED STATUTES, OR COMMON LAW

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4.14 CHECKLIST: Defending Against Claim Under UFTA and Related Statutes, or Common Law.

☐ Test validity of creditor's claim, if appropriate.

○ Assess validity of underlying claim.

☐ If claim has been reduced to judgment, validity may not be contestable.

☐ If creditor asserts claim that has not been reduced to judgment, assess, and litigate questionable aspects of claim including legal basis and amount.

○ If appropriate, argue whether property at issue was a reachable asset.

○ Assess and assert possible argument that transfer was a mere preference between creditors.

○ If debts to creditors far outweigh assets sought and creditor's claim does not have a high priority, assess and assert possible argument that there is no "injury" and that court should not grant relief because it would be futile.

Authority:

CC §§ 3439.01(b), (i), 3432; *Wyzard v. Goller (1994) 23 CA4th 1183, 1188, 28 CR2d 608* ; *Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80, 112 CR2d 802* ; *Filip v. Bucurenciu (2005) 129 CA4th 825, 835, 28 CR3d 884*

Discussion:

See *4.16 -4.21*

☐ Contest creditor's showing on fraud.

○ Argue that creditor has burden on prima facie elements.

☐ In either case, that creditor was a creditor.

☐ For actual fraud, intent.

☐ For constructive fraud, debtor's financial status and lack of reasonably equivalent value.

○ On claim of actual fraud, contest "badges of fraud" asserted by creditor:

☐ Assert that present badges may be rebutted by other evidence.

☐ Argue that burden shifting does not necessarily result from presence of one or more badges.

☐ Challenge any possible assertion by creditor that burden to disprove all elements of fraud shifts to the debtor or transferee on showing of debtor's insolvency.

○ On claim of constructive fraud, argue that exchange was for "reasonably equivalent value."

☐ Reasonably equivalent value is evaluated from perspective of debtor, not creditor.

☐ Evidence of other recent offers or exchanges for the same or similar property in same range of cost, in discovery or through work product protected investigations.

☐ Consider summary judgment motion on reasonably equivalent value:

○ If transferee is good faith transferee for reasonably equivalent value, move on both points as this is transferee's burden at trial.

○ If allegations relate to constructive fraud, consider motion to flush out creditor's arguments, and reduce expense of litigation, although reasonably equivalent value likely is creditor's burden at trial.

Authority:

CC § 3439.04(b), (c); *Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1298-1300, 123 CR2d 924* ; *Kirkland v. Risso (1979) 98 CA3d 971, 977, 159 CR 798*

Discussion:

See *4.18, 4.19[1][a], [b]*

○ On claim of constructive fraud, demur or seek summary judgment to extent creditor has not alleged or cannot

prove either that:

☐ Creditor was a future creditor at time of transfer; and

○ Debtor intended to incur, or reasonably would have expected to incur, debts beyond its ability to pay them; or

○ Debtor was engaged or was about to engage in business or transaction for which remaining assets of debtor were unreasonably small.

☐ Creditor was an existing creditor at time of transfer; and

○ Debtor intended to incur, or reasonably would have expected to incur, debts beyond its ability to pay them;

○ Debtor was engaged or was about to engage in business or transaction for which remaining assets of debtor were unreasonably small; or

○ Debtor was insolvent, or became insolvent as a result of transfer.

Authority:
CC §§ 3439.04(b), 3439.05

Discussion:
See *4.19[2]*

☐ On claim of constructive fraud based on insolvency:

○ Demur to extent it is apparent from complaint, or seek discovery and summary judgment, that creditor bases insolvency on a calculation of *future* debts against *present* net worth; and

○ Challenge presumption of insolvency to extent creditor may have used an inappropriate legal theory to establish it, or to extent that facts do not support assertion that debtor was not paying debts as they became due.

Authority:
CC §§ 3439.04(b), 3439.05; *Mejia v. Reed (2003) 31 C4th 657, 671-672, 3 CR3d 390, 74 P3d 166*

Discussion:
See *4.19[2][b]*

☐ Assert defenses based on limitations on judgments in statute:

○ Argue that transfer may not be attacked as fraudulent because good faith transferee took for reasonably equivalent value.

○ In constructive fraud case:

☐ Evaluate and defend as appropriate if transfer is categorically exempt as:

○ Resulting from termination of a lease on debtor's default.

○ Resulting from enforcement of a lien in noncollusive manner in compliance with applicable law.

☐ If appropriate, argue that transferee was:

○ Not the first transferee.

○ Not the person for whose benefit first transfer was made.

○ Subsequent good faith transferee who took for value, or who took from a subsequent good faith transferee who took for value.

☐ If necessary, argue for limitations on judgment against transferee to lesser of value of asset transferred (at time of transfer) or amount necessary to satisfy creditor's claim.

Authority:
CC §§ 3439.04(a)(2), 3439.08

Discussion:
See *4.20*

☐ If defendant is a good faith transferee for value, argue for relief for good faith transferees, including:

○ Lien on or right to retain interest in asset transferred.

○ Enforcement of obligation incurred against transferor.

○ Reduction in amount of liability of judgment.

Authority:
CC § 3439.08(d)

Discussion:
See *4.20*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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4.15 Strategy.

A defendant in a case alleging violations of UFTA, the common law of fraudulent transfers, and related real and personal property statutes, should assess:

- Whether jurisdiction can be obtained over the property or the transferee and whether assets worth reaching are reachable.

Cross Reference:

Jurisdiction, see *4.05*

Assets and transfers, see *4.18*.

- Whether the creditor can establish actual intent to defraud, and what evidence the debtor or transferee has to the contrary.

Cross Reference:

Actual intent, see *4.19[1]*.

- Whether the creditor can meet its burden on summary judgment or at trial to establish constructive fraud against the opponent by showing the creditor was an existing creditor at the time of a transaction, and that (1) the debtor intended to incur, or reasonably would have believed it was incurring, debts in excess of its ability to pay them; or (2) the debtor was engaged in or about to engage in a business for which its debts were unreasonably small in relation to its assets. The creditor should also assess what evidence a debtor or transferee can present on these points.

Cross Reference:

Constructive fraud, see *4.19[2]*.

- Whether the creditor can establish constructive fraud against the debtor by showing the creditor was a future creditor at the time of a transaction, and, if so, whether the creditor can show that (1) the debtor intended to incur, or reasonably would have believed it was incurring, debts in excess of its ability to pay them; (2) the debtor was engaged in or about to engage in a business for which its debts were

unreasonably small in relation to its assets; or (3) the debtor was insolvent or was about to become insolvent as a result of the transaction. The creditor should also assess what evidence a creditor or transferee can present on these points.

Cross Reference:

Constructive fraud, see *4.19[2]*.

- Whether the debtor or transferee will be subject to burden shifting on insolvency if the debtor was failing to pay debts as they became due, and whether the debtor or transferee may be subject to burden shifting as a whole in fraud based on a showing of insolvency.

Cross Reference:

Burden shifting, see *4.19[1][b]*, *[2][b]*.

- Whether the creditor may be planning to seek expedited remedies under the attachment statutes and whether those actions may be challenged for any bad faith on part of creditor in failing to show fraud (such that the creditor may be liable for damages).

Cross Reference:

Provisional remedy of attachment of property in hands of third party, see *4.11[2][b]*.

Discussion of concerns for wrongful attachment, see *4.11[3]*.

- Whether the transferee can assert procedural or substantive defenses, including the defense that the transfer was in good faith and for reasonably equivalent value, which will be fatal to any UFTA claim.

Cross Reference:

See *4.20*.

- Whether the creditor may assert other claims based on particular statutes in the real estate context, or statutes accompanying UFTA relating to real property transfers.

Cross Reference:

See *4.09[3]*.

- Whether the creditor has complied with all applicable statutes of limitation for UFTA and common law fraud claims.

Cross Reference:

Statutes of limitations, see *4.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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Chapter 4 Fraudulent Transfers
III. DEFENDING AGAINST CLAIM UNDER UFTA AND RELATED STATUTES, OR COMMON LAW

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4.16 Debtor or Transferee Should Evaluate Creditor's Right to Payment.

Although UFTA allows suit on a "claim" (the right to payment, whether or not reduced to judgment, liquidated, unliquidated, matured, unmatured, disputed, undisputed) [*CC § 3439.01(b)*], a creditor's opposing party should assess and be prepared to litigate the legitimacy of the creditor's claim, if appropriate.

Strategic Point--Debtor or Transferee:

Because UFTA allows a creditor to bring suit on a claim that has not been reduced to judgment, a creditor may assert a "claim" based on a legal theory that is untested or invalid, and if so, the debtor or transferee needs to contest such a claim within the UFTA action.

Cross Reference:

Asserting a claim under UFTA, see *4.04*, *4.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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4.17 Debtor Should Challenge Whether Action Was "Transfer."

4.17[1] Mere "Preference" Is Not Transfer. The debtor or transferee should argue that the "transfer made or obligation incurred" is merely a permissible preference when possible. The grant of a preference is permissible when a debt is owed and due or past due, and will not be construed as actual intent to defraud another creditor [*see Wyzard v. Goller (1994) 23 CA4th 1183, 1188, 28 CR2d 608* ; *see also CC § 3432* ("[a] debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another")]. The grant of a preference to some creditors over others, when made for value, is not fraudulent under UFTA even when it puts assets beyond the reach of some creditors [*Lyons v. Security Pac. Nat'l Bank (1995) 40 CA4th 1001, 1019-1020, 48 CR2d 174* (discussing actual fraud)]. A debtor may argue that transfers in payment of prior debts are actually authorized under the statute under *CC § 3439.03*, which provides that value is given when a transfer is made or obligation is incurred in the normal course of business, or when an antecedent debt is satisfied [*CC § 3439.03*; *Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1297, 123 CR2d 924*].

Warning:

Counsel should be careful in giving this advice to a debtor. If a preference is made with actual intent to hinder, delay or defraud, or intent to protect assets of debtor, then it can be the subject of UFTA, so the transfer has to appear as clean as possible. It can happen that debtors testify that they transferred or did not list assets on the advice of counsel, which testimony can support a finding of fraud.

Exception:

When not made in return for value, a transfer pursuant to a marital settlement agreement before dissolution may be challenged as a fraudulent conveyance [*Mejia v. Reed (2003) 31 C4th 657, 663-669, 3 CR3d 390, 74 P3d 166]* .

4.17[2] Creditor Must Demonstrate Injury. In addition to alleging the elements of constructive fraud or intent to defraud, a creditor must allege that a challenged transfer puts beyond his or her reach property otherwise subject to the payment of his or her debt [*Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80, 112 CR2d 802* (denying relief to plaintiff creditor on ground that other creditors had superior liens on asset so that voiding the transfer would do plaintiff no good)]. In an appropriate case, a debtor or transferee should demur, move to dismiss, or seek summary judgment on the ground that a creditor has not adequately alleged injury or that the creditor will achieve no effective relief by the complaint [*see Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80, 112 CR2d 802*].

Cross Reference:

Requirement that creditor allege injury, see *4.07[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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4.18 Debtor Can Argue for Exception to Definition of "Asset."

A transfer must involve an asset [*CC § 3439.01(i)*]. When appropriate, debtors and transferees can demur or seek summary judgment on the ground that an asset was not involved. "Asset" means the property of a debtor, except;

- Property to the extent it is encumbered by a valid lien [*CC § 3439.01(a)(1)*];
- Property to the extent it is generally exempt under nonbankruptcy law [*CC § 3439.01(a)(2)*]; or
- An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant [*CC § 3439.01(a)(3)*].

Transferees and debtors should argue that an exception to the definition of asset applies so that the challenged action is not a transfer.

Example:

A good faith transferee for value, in addition to asserting defenses under *CC § 3439.08(a)*, can argue that a challenged action was not a transfer because it did not involve an "asset" since the property was encumbered by a lien [*CC § 3439.01(a)(1)*].

Strategic Point--Debtor or Transferee:

Precedent on "reasonably equivalent value" is more lenient than precedent on whether property is not an "asset" because it is the subject of a lien [*see Filip v. Bucurenciu (2005) 129 CA4th 825, 835, 28 CR3d 884* (rejecting debtor's "asset" argument)]. The former argument may be more appealing to a court than the suggestion that a major item of property is not subject to UFTA.

Cross Reference:

Debtors' and transferees' arguments on reasonably equivalent value, see *4.20[1]*.

Creditor's proof on good faith takers for value, see *4.10[1]*.

Creditor's proof on assets, see *4.09[1]*.

Creditor's proof on transfers, see *4.07[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudReal Property LawEstatesConcurrent OwnershipTenancies by EntiretiesReal Property LawPurchase & SaleFraudulent TransfersTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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4.19 Debtor or Transferee Should Challenge Creditor's Showing on Fraud.

4.19[1] Debtor or Transferee May Argue That Creditor Did Not Meet Burden on Actual Intent to Defraud.

4.19[1][a] Debtor or Transferee Should Oppose Circumstantial Evidence of Intent. A case based on actual intent to defraud focuses on the debtor's intent, not the debtor's financial status. Although a creditor can prove actual intent with circumstantial evidence, debtor's counsel should present testimony that the debtor did not have such intent, when supported by the facts [*cf. Barisich v. Lewis (1990) 226 CA3d 12, 21, 275 CR 331* (discounting declaration by creditor questioning state of mind of debtor in absence of facts)].

Cross Reference:

Creditor's showing of actual intent to defraud, see *4.08[2][a] -[d]*.

4.19[1][b] Debtor or Transferee Can Argue That Burden Does Not Shift From Badges of Fraud. A debtor or transferee should to alert the court to cases holding that the presence of one or more "badges of fraud" does not automatically shift the burden to the debtor to disprove actual intent [*see, e.g., Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1298-1300, 123 CR2d 924*].

Strategic Point--Debtor or Transferee:

Counsel should be prepared for the argument from the creditor that the legislature's 2004 inclusion of the badges of fraud into the text of UFTA [*see* Stats 2004, ch. 50 § 1] indicates that the presence of one or more badges now has added significance. Possible responses include that:

- The legislature explicitly stated that it did *not* intend to alter existing precedent [*CC § 3439.04(c)*].
- The statute itself expressly provides that courts have the discretion to consider factors other than the badges [*CC § 3439.04(b)*]--and therefore, presumably, to consider evidence negating the badges.

Nevertheless, counsel for a debtor or transferee should be prepared for the fact that the burden will shift to some degree, because a plaintiff's summary judgment motion requires the transferee to present a material issue of fact on that point [

United States v. 5208 Los Franciscos Way (9th Cir 2004) 385 F3d 1187, 1192].

4.19[2] Debtor or Transferee Can Challenge Showing on Constructive Fraud.

4.19[2][a] Debtor or Transferee Should Argue That Transfer Was Made for Reasonably Equivalent Value. A debtor or transferee can argue that a transfer was for reasonably equivalent value. Note that "reasonably equivalent value" does not mean identical value [*Pajaro Dunes Rental Agency (ND Cal 1994) 174 BR 557, 590*].

Examples:

- Property was an "asset" as it was not transferred based on a valid lien on ground that property was transferred for $400,000 note when other evidence supported conclusion that property was valued at between $530,000 and $605,000 [*Filip v. Bucurenciu (2005) 129 CA4th 825, 835, 28 CR3d 884]* .

- Property was transferred for "reasonably equivalent value" in cases when (1) the transfer was to pay back time-barred debts [*In re Prejean (9th Cir 1993) 994 F2d 706, 709*]; (2) the transfer was of a one-quarter interest in real property and the transfer was for $21,000 in 1982, and a similar interest had been purchased in 1979 for $20,000 and the interest in question was sold in 1984 for $30,000; and (3) a partnership paid its partners rather than paying its lease, even though it was aware that the lease payments were overdue [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1295, 123 CR2d 924*].

Cross Reference:

Good faith transfer for reasonably equivalent value as absolute defense, see *4.20[1]*.

Creditor's strategy on reasonably equivalent value, see *4.08[3][a]*.

4.19[2][b] Debtor or Transferee Should Argue That Debtor Did Not Meet Standards for Debts in Excess of Assets, Inability to Pay, or Insolvency. A debtor or transferee should analyze whether the allegations of the complaint state that the creditor was a present or future creditor at the time of the transfer and should consider whether litigating any flaws in the pleadings is to their ultimate advantage.

Present creditors may allege [*CC §§ 3439.04(a)(2)*, *3439.05*]:

- Debts exceeding assets.
- Debtor's inability to pay debts as they became due.
- Present or resulting insolvency.

Future creditors may allege [*CC § 3439.04(a)(2)*]:

- Debts exceeding assets.
- Debtor's inability to pay debts as they became due.

If it is questionable whether the debtor's financial status was as described, debtors and transferees should evaluate whether a summary judgment motion on that issue may be helpful.

Strategic Points--Debtors and Transferees:

Insolvency may *not* be calculated by balancing future liabilities against present net worth [*Mejia v. Reed (2003) 31 C4th 657, 671-672, 3 CR3d 390, 74 P3d 166* (finding child support payments not debt under UFTA for purposes of insolvency analysis)]. Debtors and transferees should look closely at whether liabilities to the creditor and to others are "debts" under UFTA.

The burden does shift to the debtor or transferee to overcome the presumption of insolvency if the debtor was not paying debts as they became due [*CC § 3439.02(c)*], and proof of insolvency may shift the burden of proof to the debtor or transferee on the question of fraud as a whole [*Kirkland v. Risso (1979) 98 CA3d 971, 977, 159 CR 798]* .

Jury Instructions:

Presumption of Insolvency, see *Judicial Council of California Civil Jury Instructions, CACI No. 4206* (LexisNexis Matthew Bender).

Cross Reference:

Creditor's allegations and proof of insolvency, inability to pay, and debts exceeding assets, see *4.08[3][b], [c], [4].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsTransfersContracts LawTypes of ContractsLease AgreementsGeneral OverviewTax LawFederal Tax Administration & ProcedureFiduciaries & Transferees (IRC secs. 6901-6905)Provisions Relating to Transferees

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4.20 Transferee May Assert Defenses Against Judgment.

4.20[1] Transfer to Good Faith Transferee for Reasonably Equivalent Value Is Not Voidable.

4.20[1][a] Applies in Cases of Constructive Fraud or Actual Intent. Under UFTA, a creditor may not challenge a transfer under an actual fraud theory against any of the following [*CC § 3439.08(a)*]:

- A person who took in good faith and for reasonably equivalent value.
- Any subsequent transferee.

A creditor cannot invalidate a transfer to a good faith taker for reasonably equivalent value regardless of whether the transferor had an actual intent to defraud [*see Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1294, 123 CR2d 924*].

Strategic Points--Transferees:

- Transferees should carefully examine whether they can establish good faith and reasonably equivalent value, and should consider attacking the pleadings or seeking summary judgment on these points.
- In constructive fraud cases, proof of no transfer for reasonably equivalent value should be part of the creditor's case in chief [*see CC § 3439.04(a)(2)* (specifying lack of exchange for reasonably equivalent value)].

Cross Reference:

Creditor's case on transfers for reasonably equivalent value, see *4.08[3][a]*.

4.20[1][b] Transferee Must Establish Good Faith. The transferee must establish good faith, which requires at a minimum that the transferee did not [*Cybermedia, Inc. v. Symantec Corp. (ND Cal 1998) 19 F Supp2d 1070, 1075*]:

- Collude with the debtor or otherwise actively participate in the debtor's fraudulent scheme; or

- Know of facts that would suggest to a reasonable person that the transfer was fraudulent.

At trial, it is likely to be the transferee's burden to show good faith, but it is the creditor's burden to provide evidence to the contrary [*see Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 C4th 1059, 1071-1072, 124 CR2d 142, 52 P3d 79* , *discussing Evid Code § 500*]. Disproving good faith requires evidence of deliberate wrongful conduct [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1299, 123 CR2d 924*]. Evidence that a transferee accepted payments knowing that the debtor had other overdue debts that would not be paid as a result does not negate good faith even if the transferor and transferee are adverse to other creditors [*see, e.g., Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1299, 123 CR2d 924*].

Cross Reference:

Case annotations and legislative comments to *Evid Code § 500*, see Cotchett, *California Courtroom Evidence, § 13.01* (Matthew Bender).

4.20[1][c] "Subsequent Transferee" Means Taker for Value in Good Faith. That a transfer cannot be voided against a person who took in good faith and for reasonably equivalent value "or against any subsequent transferee" [*CC § 3439.08(a)*] means a transfer cannot be invalidated against a subsequent transferee *of* a good faith taker for reasonably equivalent value, not just any subsequent transferee [*cf. Filip v. Bucurenciu (2005) 129 CA4th 825, 836-837, 28 CR3d 884* (voiding transfer to subsequent transferee because neither original transferee nor subsequent transferee showed good faith)].

4.20[2] Transfers in Constructive Fraud Cases May Be Categorically Exempt. A creditor may not attack a transfer in a constructive fraud case if the transfer results from either [*CC § 3439.08(e)*]:

- The termination of a lease, pursuant to the lease and applicable law, on default by the debtor.

- Enforcement of a lien in a noncollusive manner and in compliance with applicable law, including Title 9 of the UCC [*see Com Code § 9101 et seq.*], other than a retention of collateral under *Com Code §§ 9620, 9621* and other than a voluntary transfer of collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation.

4.20[3] Creditor's Ability to Recover Judgments for Constructively Fraudulent Transfers for Less Than Reasonably Equivalent Value Has Limits.

4.20[3][a] Creditor Has Remedy Against First or Subsequent Transferee Only If There Was No Good Faith Transferee. In constructive fraud cases, the creditor may recover judgment against either [*CC § 3439.08(b)*]:

- The first transferee or the person for whose benefit the transfer was made (whether or not the transferee was acting in good faith).

- Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

"Subsequent transferee" must mean a transferee taking any time after a good faith transferee [*see CC § 3439.08(b)(2)*].

Cross Reference:

Parties against whom creditor may obtain remedy, see *4.11[6]*.

"Subsequent transferee" defined, see *4.20[1][c]*.

4.20[3][b] Creditor's Remedy in Constructive Fraud Cases Is Only Against Good Faith Transferees. If a creditor seeks to void a transfer in a constructive fraud action, the creditor may obtain only a judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever is less [*CC §§ 3439.08(b)*, *3439.07(a)(1)*]. Moreover, if the judgment is for the value of the asset, it must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment by the court based on equity [*CC § 3439.08(c)*].

A good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to [*CC § 3439.08(d)*]:

- A lien on or right to retain any interest in the asset transferred;
- Enforcement of any obligation incurred; or
- A reduction in the amount of the liability of the judgment.

4.20[4] Debtor or Transferee May Assert Equitable Defenses. Unless they are displaced by provisions of UFTA, the principles of law and equity including laches, estoppel, fraud, duress and mistake supplement UFTA [*CC § 3439.10*; *Kirkeby v. Super. Ct. (2004) 33 C4th 642, 652, 15 CR3d 805, 93 P3d 395*]. These legal principles supplement UFTA's provisions and preclude interpretations that would narrow or nullify UFTA [*Mejia v. Reed (2003) 31 C4th 657, 664-665, 3 CR3d 390, 74 P3d 166*]. However, debtors and transferees still should raise equitable defenses and point out their applicability when creditors' complaints do not deny the existence of those defenses [*cf. Mehrtash v. Mehrtash (2001) 93 CA4th 75, 80, 112 CR2d 802* (dismissing creditor's complaint based on equitable principle that creditor had to show she would benefit from setting aside transfer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCommercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudRemedies

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4.21 Procedures for Defending Against UFTA or Common Law Claim.

A creditor can seek interim or extraordinary relief [*CC § 3439.07(a)(3)(A)-(C)*]. A debtor or transferee can seek to oppose such relief by offering to post an adequate bond [*CC § 3447(a)*]. The creditor must comply with the general requirements of *CCP § 526* and *Cal Rules Ct, Rules 3.1201-3.1207* in seeking injunctions and ex parte relief.

The debtor or transferee should consider demurring, denying inaccurate allegations, and moving for summary judgment when the facts warrant it. The debtor or transferee can also raise equitable defenses as affirmative defenses in an answer. As to summary judgment, the burdens are reversed as to denied allegations, and the debtor must show that it is more likely than not that the creditor will *not* prevail [*Annod Corp. v. Hamilton & Samuels (2002) 100 CA4th 1286, 1293, 123 CR2d 924*].

Strategic Point:

It is not a good idea for a debtor to offer what is prayed for in the complaint as a maximum for a bond until *after* a hearing is held. Most judges will almost take that to mean "defeat" at the outset.

Cross References:

Third party claims, see Ch. 23, Third Party Claims.

Demurrers and motions for judgment on the pleadings, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 11, Demurrers and Motions for Judgment on the Pleadings.

Answers, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 14, Answers.

TROs and preliminary injunctions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Chapter 18, TROs and Preliminary Injunctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureRemediesInjunctionsPreliminary & Temporary

Injunctions

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Chapter 4 Fraudulent Transfers
IV. ASSERTING CLAIM UNDER BULK SALES LAW

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4.22 CHECKLIST: Asserting Claim Under Bulk Sales Law.

☐ Assess whether sale was covered by Bulk Sales Law.

○ Seller was located in California, or outside the United States with a principal U.S. executive office in California, which was covered either because:

☐ Person whose principal business was the sale of inventory from stock, including those who manufacture what they sell.

☐ Person was restaurant owner.

○ Sale was:

☐ Of more than half seller's inventory and equipment;

☐ In single sale or series of sales by auction or liquidation;

☐ Outside seller's ordinary course of business; and

☐ Not subject to a complete exemption (generally as sales to satisfy security interests or conducted by judicial authority); or

○ Sale was:

☐ Subject to exemptions allowing U.S. buyer to assume seller's debts with 30 days recorded and published notice; and

☐ Buyer complied with assumption, notice, publication and recordation requirements.

Authority:
Com Code §§ 6102, 6103(a), (c)(9)-(11)

Discussion:
See *4.25, 4.26*

☐ Bring sale within Bulk Sales Law's notice requirements by:

○ Presenting evidence that sale was not in ordinary course of business for:

☐ Seller; or

☐ Industry.

Authority:
Danning v. Daylin, Inc. (9th Cir 1973) 488 F2d 185, 189

Discussion:
See *4.27*

☐ If subject to Bulk Sales Law and not within any exceptions, did notice adequately state:

○ That a bulk sale was about to be made.

○ Seller's name and business address, as well as any business name and address listed by seller as having been used in preceding three years.

○ Location and general description of assets.

○ Place and anticipated date of bulk sale.

○ Whether or not bulk sale would be subject to requirements applicable to bulk sales for $2 million or less for substantially all cash or a note from the buyer for all cash (and notice complied with notice requirements applicable to such sales).

○ If sale is by auction or liquidation under *Com Code § 6102(a)(3)(i)*:

☐ Sale is to be by auction or liquidation.

☐ Name of the auctioneer or liquidator.

☐ Time and place of the auction or commencement of liquidation.

☐ In anticipation of buyer's defense that creditor would not have avoided damages, creditor should assess whether last day to file claims as set forth in notice was correct, and whether creditor might have been injured.

Authority:
Com Code §§ 6105(a), 6106.2(f), 6108; *Gifford v. J&A Holdings (1997) 54 CA4th 996, 1000-1001, 1006, 63 CR2d 253*

Discussion:
See *4.26 -4.28, 4.30*

☐ Demonstrate that buyer or escrow agent were subject to additional duty to distribute sales proceeds to creditors upon receipt of claims in $2 million cash sales:

○ Show that sale was:

☐ For $2 million or less, in cash or an obligation to pay cash or a combination.

☐ Not by auction or liquidation.

○ Demonstrate that buyer or escrow agent did not comply with additional requirements for recorded and published notice to advise claimants of right to file claims and be compensated from proceeds; or

○ Demonstrate that buyer or escrow agent failed to distribute proceeds according to priorities and procedures specified in statute.

Authority:
Com Code §§ 6106.2, 6106.4

Discussion:
See *4.28*

☐ Be prepared to respond to buyer's defense that buyer made a good faith and commercially reasonable effort to comply with notice requirements.

○ Seek summary judgment or oppose motion noting that buyer has burden to establish defense.

○ Highlight that minor errors in compliance overcome defense.

○ Develop facts to undercut buyer's defense, such as:

☐ Buyer's ability to provide actual notice to creditors, and failure to do so.

☐ Additional steps buyer could have taken to give creditors notice in time to file claims.

Authority:
Com Code § 6107(c); *Gifford v. J&A Holdings (1997) 54 CA4th 996, 1000-1001, 1006, 63 CR2d 253*

Discussion:
See *4.27[4]*, *4.34[1]*

☐ Be prepared to meet burdens of proof on claim:

○ Sale was subject to Bulk Sales Law.

○ Buyer or escrow agent did not comply with notice procedures (or distribution procedures in covered sales).

☐ If distribution is at issue in covered $2 million cash sale, establish that buyer or escrow agent failed to comply with notice.

○ Creditor's claim was liquidated and not contingent.

○ Burden on good faith defenses were not met.

Authority:
Com Code §§ 6104-6107

Discussion:
See *4.27 -4.29*

☐ Assess additional procedural considerations before framing complaint:

○ Is creditor within one-year statute of limitations, as tolled for reasonable lack of knowledge if buyer concealed sale?

○ Will creditor forego potential other remedies against seller to obtain Bulk Sales Law remedy against buyer?

○ Will claim be precluded by bankruptcy petition?

Authority:

Com Code §§ 6107, 6110; California v. PG&E Corp (In re PG&E) (Bankr ND Cal 2002) 281 BR 1, 14

Discussion:

See *4.31*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentNoticesCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionDamagesCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsTortsBusiness TortsGeneral Overview

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4.23 Strategy.

Under the Bulk Sales Law, the claimant should evaluate whether:

- The sale was exempt from notice requirements.
- The buyer tried to comply with notice requirements, whether the buyer actually complied, and if there may be an issue, whether the buyer did or might have provided actual notice to creditors.
- The buyer has a defense for a good faith and commercially reasonable effort to provide notice.
- The sale was subject to the escrow or set-aside and distribution requirements for $2 million bulk sales other than by auction or liquidation, and if so, whether the buyer or escrow agent complied.
- The claimant can meet the one-year statute of limitations, with tolling for lack of knowledge.
- Pursuing a Bulk Sales Law action gives preferable remedies or precludes other available remedies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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4.24 Elements of Cause of Action for Claim Under Bulk Sales Law.

The basic elements to be proved for a cause of action for an improper bulk sale are the following:

- The bulk seller is a restaurant owner or seller of inventory from stock, including manufacturers [*Com Code § 6103(a)(1)*; *see 4.25*].

- The bulk seller is located in California, or outside U.S. with principal office in California [*Com Code § 6103(a)(2)*; *see 4.26*].

- The sale involves more than half of the seller's inventory [*Com Code § 6102(a)(4)*; *see 4.26*].

- The buyer did not send and publish the required notice of bulk sale in accordance with *Com Code § 6105* [*Com Code § 6104(b)*; *see 4.27*].

- In a sale of $2 million or less, the buyer or escrow agent applied cash improperly to pay the seller's debts [*Com Code § 6106.2*; *see 4.28*].

- The creditor has a valid claim [*Com Code § 6107(b)*; *see 4.27*, *4.29*].

Cross Reference:

Form for complaint under Bulk Sales Law, see *4.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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4.25 "Bulk Seller" Is Restaurant Owner or Seller of Inventory From Stock.

The Bulk Sales Law applies to persons whose principal business is the sale of inventory from stock, including those who manufacture what they sell, or restaurant owners [*Com Code § 6103(a)(1)*], who are located in California, or outside the United States with a principal U.S. executive office in California [*Com Code § 6103(a)(2)*].

Strategic Point--Creditor:

Although the scope of the Bulk Sales Law is limited, and its one-year statute of limitations is shorter than the four-year statute under UFTA, creditors should assess whether they have a claim under its terms because the remedy is against the buyer regardless of reasonably equivalent value or the buyer's good faith. However, a buyer who can demonstrate that it made a good faith and commercially reasonable effort to comply with the Bulk Sales Law's terms has a defense.

Consider:

Relatively few bulk sales are done correctly, and there have been discussions for several years in California to eliminate this provision of the Commercial Code.

Cross Reference:

Buyer's argument of good faith substantial compliance, see *4.27[4]*.

Statute of limitations under UFTA, see *4.12[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGeneral OverviewCommercial Law (UCC)Bulk Sales (Article 6)General OverviewCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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4.26 Particular Bulk Sale Must Be Covered by Statute.

4.26[1] "Bulk Sale" Is Sale of More Than Half of Seller's Inventory or Equipment. A "bulk sale" is a sale not in the ordinary course of business of more than half the seller's inventory and equipment, measured by the value on the date of the bulk sale agreement. The sale must be [*Com Code § 6102(a)(3)*]:

- For a sale by auction or by a liquidator, a sale or series of sales amounting to more than half the inventory or equipment.

- For other cases, a single sale.

Sales are "in the ordinary course of the seller's business" if the sale comports with usual and customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices [*Com Code § 6102(b)(13)*]. Under California's former bulk transfer law [*see* former *Com Code § 6101 et seq.*], the Ninth Circuit ruled that a transfer of a "significant portion" of a seller's inventory is a bulk sale, no matter how usual a practice the transfer may have been [*Danning v. Daylin, Inc. (9th Cir 1973) 488 F2d 185, 189]* . Although the current Bulk Sales Law applies to transfers of one half or more of a seller's inventory and assets, this determination on what is the ordinary course of business probably still applies.

Strategic Point--Creditor:

Creditors should research customary practices in the relevant industry and, if possible, the seller's actual practices, and what happened in the particular situation, before alleging a cause of action against the buyer. Discovery is important, because if the sale is in the ordinary course of business, this gives the buyer a complete defense. The buyer may argue that a particular sale was in the ordinary course of business even if the seller's business dissolved afterward.

Cross Reference:

Argument that creditor has not met burden, see *4.29*.

4.26[2] Some Bulk Sales Are Categorically Excepted. Many categories of transfers are specifically excepted from application of the Bulk Sales Law [*Com Code § 6103(c)*]:

- Transfers made to secure a performance of an obligation.

- Transfers of collateral to a secured party under *Com Code § 9609*.

- Dispositions of collateral under *Com Code § 9610*.

- Retention of collateral under *Com Code § 9620*.

- Sales of assets encumbered by security interests or liens if (1) all the proceeds of the sale are applied in partial or total satisfaction of the debt that is the subject of the lien, or (2) if the security interest of lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero.

- General assignments for the benefit of creditors or subsequent transfers to assignees.

- Sales by executors, administrators, receivers, trustees in bankruptcy, debtors in possession, or public officers under judicial process.

- Sales in the course of judicial or administrative proceedings for the dissolution or reorganization of an organization.

- Sales to U.S. buyers who meet substantive and procedural requirements.

Cross Reference:

Particular sales to U.S. buyers subject to limited requirements, see *4.26[3]*.

- Sales with a value of less than $10,000 net of liens and security interests, multiplied by the percentage the sold property represents of all property securing the liens, or more than $5 million, on the date of the bulk sale.

- Sales required by and made under statute.

- Transfers of personal property with an immediate leaseback, if in compliance with, or exempt from, *CC § 3440.1*.

- Sales of licenses relating to alcoholic beverages made under *B&P Code § 24070 et seq*.

- Transfers of goods in a warehouse if the receipt is issued by a warehouseman and retained both at the warehouse and at the warehouseman's principal place of business.

Cross Reference:

Sales subject to limited requirements, see *4.26[3]*.

4.26[3] Some Bulk Sales to U.S. Buyers Are Excepted. Sales to buyers whose principal place of business is in the U.S. are excepted in the following circumstances:

- The buyer satisfies the following conditions [*Com Code § 6103(c)(9)*]:

- No earlier than 21 days before the sale, (1) obtains from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer, or (2) conducts a reasonable inquiry to discovery claimants;
- Assumes in full the debts owed to claimants of whom the buyer learns;
- Is not insolvent after the assuming those debts; and
- Records and publishes a notice of the buyer's assumption of the debts within 30 days of the bulk sale in compliance with the requirements of *Com Code § 6105*.

- Or, the buyer satisfies the following conditions [*Com Code § 6103(c)(10)*]:
  - Assumes in full all the debts that were incurred in the seller's business before the date of the bulk sale;
  - Is not insolvent after the assumption; and
  - Records and publishes a notice of the assumption within 30 days of the bulk sale as required under *Com Code § 6105*.
- Or, the buyer satisfies the following conditions [*Com Code § 6103(c)(11)*]:
  - Is a new organization formed to take over and continue the business of the seller;
  - Assumes in full all debts incurred in the seller's business before the date of the bulk sale;
  - The seller receives nothing from the sale except an interest in the new organization that is subordinate to the claim against the organization arising from the assumption; and
  - The buyer records and publishes notice of the assumption within 30 days of the bulk sale as required under *Com Code § 6105*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationGeneral OverviewCommercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of CollateralReal Property LawLandlord & TenantLease AgreementsCommercial LeasesSale-Leaseback Transactions

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4.27 Notice of Bulk Sale Must Comply With Statute Unless Exception Applies.

4.27[1] Buyer Must Draft Notice of Bulk Sale With Required Information. To comply with the Bulk Sales Law, the buyer must give notice of the bulk sale in accordance with *Com Code § 6105* [*Com Code § 6104(b)*]. The notice must contain all of the following information [*Com Code § 6105*]:

- A statement that a bulk sale is about to be made.
- The name and business address of the seller and any business name and address the seller used in the preceding three years.
- The location and general description of the assets.
- The place and the anticipated date of the bulk sale.
- Whether the bulk sale is subject to the requirements applicable to bulk sales for $2 million or less for substantially all cash or a note from the buyer for all cash (the notice must then comply with the notice requirements applicable to those sales).
- If the sale is by auction or liquidation under *Com Code § 6102(a)(3)(i), (1)* a statement that the sale is to be by auction or liquidation, (2) the name of the auctioneer or liquidator, and (3) the time and place of the auction or the commencement of the liquidation [*see Com Code § 6108(a)(3)*].

Cross Reference:

Additional notice requirements in cash sales for $2 million or less, see *4.28[2]*.

4.27[2] Buyer Must Record Notice of Bulk Sale With County Recorder and Send to County Tax Collector. When a buyer must give notice, the buyer must comply with the following at least 12 business days before the bulk sale [*see Com Code § 6104(b)*]:

- Record the notice with the county recorder in the counties in which the assets are located, as well as the county in which the seller is located or has a principal U.S. office, if not the same [*Com Code §*

6105(b)(1)].

- Deliver or send by registered or certified mail a copy of the notice (and a completed business property statement under R&T Code § 441 if the delivery occurs between January 1 and May 7) to the county tax collector in the counties in the state in which the assets are located [*Com Code § 6105(b)(3)*].

Cross Reference:

Buyer's argument of good faith substantial compliance, see *4.34[2]*.

4.27[3] Buyer Must Publish Notice of Bulk Sale. The buyer must publish the notice of bulk sale at least once in a newspaper of general circulation [*Com Code § 6105(b)(2)*]:

- In the judicial district in which the tangible assets are located; and

- In the judicial district in which the seller is located, if that is not where the assets are located.

Exceptions:

- If the tangible assets are located in more than one judicial district, the notice must be published in a newspaper of general circulation published in the district in which a greater part of the assets are located [*Com Code § 6105(b)(3)*].

- If there is no newspaper of general circulation in the judicial district of the seller or the assets, the notice must be published in a newspaper of general circulation in the county of the judicial district in which the seller or assets is located [*Com Code § 6105(b)(2)*].

Strategic Point:

It is advisable to check with a newspaper and see where it has filed its declaration of county of publication. For example, the *Los Angeles Times* may have a high circulation in Orange County, but its Secretary of State filing gives its county of publication as Los Angeles County. Accordingly, a need to publish in Orange County will not be satisfied by publishing in this newspaper.

Cross Reference:

Buyer's argument of good faith substantial compliance, see *4.34[2]*.

4.27[4] Creditor Must Prepare for Buyer's Good Faith Defense. A creditor must prepare for a buyer to assert the defense that failure to provide notice is excused because the buyer made a good faith and commercially reasonable effort to comply with the statute's notice requirements or provisions for exclusion [*see Com Code § 6107(c)*]. The buyer has the burden to establish the defense [*Com Code § 6107(c)*].

Failure to do anything to comply with the notice provisions will not qualify [*Danning v. Daylin (9th Cir 1973) 488 F2d 185, 187*]. In cases in which the buyer was in contact with the creditor but did not provide actual notice of the bulk sale to the creditor, the "good faith and commercially reasonable" standard will be stringent, and will require that notice be published at least 12 business days before the anticipated date of sale included in the notice, as the anticipated date determines the date on which a creditor knows it may file a claim [*see Gifford v. J & A Holdings (1997) 54 CA4th 996, 1000-1001, 1006, 63 CR2d 253*].

Cross Reference:

Response to buyer's immunity defense, see *4.28[2][d]*.

Buyer's good faith defenses, see *4.34[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsGovernmentsLocal GovernmentsGeneral Overview

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4.28 Buyer or Escrow Agent Must Pay Claimants in Cash Sales of $2 Million or Less.

4.28[1] Payment Obligation Applies to Cash Sales Other Than Auction or Liquidation. In a bulk sale subject to *Com Code § 6106.2* (other than a bulk sale made at auction or a series of sales by a liquidator on the seller's behalf), the buyer, or the escrow agent if the transaction is handled through an escrow, must apply the cash consideration to pay the debts of the seller for which claims are due and payable on or before the date of the bulk sale, received in writing on or before the date specified as the last date to file claims with the person designated in the notice to receive claims [*Com Code § 6106.2(b)*]. These requirements apply to bulk sales if all of the following apply:

- The consideration is $2 million or less [*Com Code § 6106.2(a)*];
- The consideration is substantially all cash or an obligation of the buyer to pay cash at a later date, or a combination of the two [*Com Code § 6106.2(a)*].

4.28[2] Buyer or Escrow Agent Must Pay Claims From Proceeds of Sale.

4.28[2][a] Buyer or Escrow Agent Must Provide Notice of Ability to Present Claims. The buyer or retained escrow agent must create, record, and publish a notice of the intended bulk sale [*Com Code §§ 6105(a), 6106.2(f)*]. The *Com Code § 6106.2* notice also must state the name and address of the person with whom claims against the seller and bulk sale may be filed, and the last date for filing the claims [*Com Code § 6106.2(f)*], which is the business day immediately preceding the date of the bulk sale [*Com Code §§ 6106.2(f), 6105(a)(4)*].

4.28[2][b] Buyer or Escrow Agent Must Take Steps to Satisfy Claims. If the proceeds of the bulk sale will cover all filed claims and the seller does not dispute any of the claims, the buyer or escrow agent must pay received claims from the proceeds of the sale [*Com Code §§ 6106.2(b), 6106.2(e)*].

If the proceeds will not cover all filed claims, the buyer or escrow agent must delay distribution of the proceeds and the passing of title, give further notice to each claimant [*Com Code §§ 6106.4(a)(1), (2), 6106.2(d)*], and must first satisfy claims by the United States, secured creditors, escrow and professional charges relating to the sale, prioritized wage claims, and tax claims [*Com Code § 6106.4(b)*].

4.28[2][c] Buyer or Escrow Agent Must Give Claimant Opportunity to Litigate Claim If Seller Disputes Claim. If the seller disputes the validity of a claim, the buyer or escrow agent must withhold a reserve calculated under

the statute from distribution which, on notice, the creditor may seek to attach within 25 days [*Com Code § 6106.2(c)*]. Alternatively, the buyer or escrow agent can institute an interpleader action under *CCP § 386* within 45 days [*Com Code § 6106.2(e)*].

Cross References:

Interpleader, see California Forms of Pleading and Practice, Ch. 314, Interpleader (Matthew Bender).

Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 5, Parties.

4.28[2][d] Buyer or Escrow Agent Has Immunity for Good Faith Distributions of Consideration by Terms of Notice. If the consideration from the bulk sale is not sufficient to meet all claims, the buyer or escrow agent has immunity for any good faith errors in the distribution if the buyer or escrow agent complied with the requirements of *Com Code § 6106.2* and if no objection was received before the new bulk sale date [*Com Code § 6106.4(a)(3)*]. This immunity is in addition to any defense the buyer or escrow agent may have for good faith and commercially reasonable attempts to provide notice [*Com Code § 6107(c)*].

Cross Reference:

Buyer or escrow agent's defenses, see *4.32*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCommercial Law (UCC)Bulk Sales (Article 6)Application of ProceedsContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesProceedsContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesBuyers & Lessees in Ordinary Course of Business

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4.29 Creditor Has Burden to Establish Valid Claim; Buyer Has Burden to Establish Exception.

The creditor ("claimant") has the burden to establish the validity and amount of a claim [*Com Code § 6107(b)*]. The Bulk Sales Law does not allow creditors to sue on unliquidated or contingent claims [*Com Code § 6107(g)*]. The creditor probably has the burden to establish that its claim is not unliquidated or contingent [*cf. Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 C4th 1059, 1071-1072, 124 CR2d 142, 52 P3d 79 , discussing Evid Code § 500*] and should be prepared to meet that burden.

Cross Reference:

Case annotations and legislative comments to *Evid Code § 500*, see Cotchett, *California Courtroom Evidence, § 13.01* (Matthew Bender).

The buyer has the burden to establish the amount of a claim that a claimant would not have realized if the buyer had complied with the Bulk Sales Law [*Com Code § 6107(b)*], and to establish any defense that the buyer made a good faith and commercially reasonable effort to comply with the Bulk Sales Law's requirements on notice or provisions for exclusion [*Com Code §§ 6107(c), 6104, 6103(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCommercial Law (UCC)Bulk Sales (Article 6)Application of ProceedsCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesProceedsContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesBuyers & Lessees in Ordinary Course of Business

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4.30 Party Responsible for Auction or Liquidation Sale Assumes Buyer's Duties.

Although the requirements of *Com Code §§ 6104*, *6105*, and *6107* appear to apply to only nonexempt bulk sales other than by auction or liquidation, they do apply to auction and liquidation sales, with certain terms redefined to fit that context [*Com Code § 6108(a)*]. The auctioneer or liquidator assumes the responsibilities of the buyer [*Com Code § 6108(a)(1)*, *(2)*], and the buyer is absolved [*Com Code § 6108(c)*]. However, the auctioneer or liquidator's liability is subject to the following limitations:

- Liability is limited to the amount of the net proceeds from the bulk sale less payments to creditors relative to the inquiry and equipment [*Com Code § 6108(a)(4)*].

- Liability is reduced by payments the auctioneer or liquidator makes to persons to whom the auctioneer or liquidator is, or believes it is, liable [*Com Code § 6108(b)*].

The bulk sale notice must state that the sale is to be by auction or liquidation and include the name of the auctioneer or liquidator and the time and place of the sale or commencement of sale [*Com Code § 6108(a)(3)*].

Cross Reference:

Discussion of *Com Code § 6106.2* bulk sales, see *4.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)Application of ProceedsCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsContracts LawSales of GoodsAuction Sales

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4.31 Asserting Claim Under Bulk Sales Law.

Complaints for violations of the Bulk Sales Law must be filed against the buyer (in cases alleging liability for lack of notice) [*Com Code § 6107*] or against the buyer or escrow agent (in cases alleging liability for lack of notice or failure to distribute proceeds in compliance with *Com Code § 6106.4*). This remedy may be preferable to a creditor than the remedies available to the creditor under UFTA, although creditors may want to assert both causes of action [*Monastra v. Konica Bus. Machs. U.S.A., Inc. (1996) 43 CA4th 1628, 1635-1636, 51 CR2d 528*]. Creditors should realize that to the extent a creditor receives payment from a buyer under the Bulk Sales Law, the seller's liability is extinguished [*Com Code § 6107(i)*]. Remedies under UFTA, which allows other remedies, may be preferable for the creditor [*see CC § 3439.07(a)(3)(C)*].

A creditor can use existing attachment procedures when the creditor is notified that a seller in a *Com Code § 6106.2* bulk sale disputes the creditor's claim [*see Com Code § 6106.2(c)*]. It is likely that a creditor can use attachment procedures in any case in which the Bulk Sales Law is implicated.

The statute of limitations under the Bulk Sales Law is shorter than that of the four-year statute under UFTA [*CC § 3439.09*], limited to one year after the date of the bulk sale. If the buyer concealed the fact of the sale, the statute period is two years from when the creditor should have discovered the sale [*Com Code § 6110*].

Cross Reference:

Limitations on actions under UFTA, see *4.12*.

As with UFTA claims, claims under the Bulk Sales Law are taken over by the estate when a debtor files for bankruptcy [*California v. PG&E Corp. (in re PG&E) (Bankr ND Cal 2002) 281 BR 1, 14*]. Attempting to prosecute such a claim may violate the automatic bankruptcy stay [*cf. Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc. (1994) 29 CA4th 1828, 1842, 35 CR2d 348* (addressing same issue with respect to UFTA)], although exceptions may apply as under UFTA.

Cross References:

Attachment procedures, see *4.11[2]*.

Automatic stay and limits in UFTA actions, see *4.12[7]*.

Effect of bankruptcy, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationNoticeCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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V. DEFENDING AGAINST CLAIM UNDER BULK SALES LAW

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4.32 CHECKLIST: Defending Against Claim Under Bulk Sales Law.

☐ Argue that sale was not covered by Bulk Sales Law, and that its notice requirements do not apply:

○ Seller is neither in California nor outside the United States with a principal U.S. executive office in California.

○ Seller is neither of following:

☐ Person whose principal business is sale of inventory from stock, including persons who manufacture what they sell.

☐ A restaurant owner.

○ Sale was not:

☐ More than half seller's inventory and equipment;

☐ In a single sale or a series of sales by auction or liquidation;

☐ Outside the seller's ordinary course of business; and

☐ Not subject to a complete exemption (as sale to satisfy security interests or conducted by judicial authority).

○ Sale was not:

☐ Subject to exemptions allowing U.S. buyer to assume seller's debts with 30 days' recorded and published notice; and

☐ Subject to buyer's compliance with assumption, notice, publication, and recordation requirements.

Authority:
Com Code §§ 6102, 6103(a), (c)(9)-(11)

Discussion:
See *4.26*

☐ Argue that sale was not within Bulk Sales Law's notice requirements by presenting evidence that sale was in ordinary course of business for one of both of following:

○ Seller.

○ Industry.

Authority:
Danning v. Daylin, Inc. (9th Cir 1973) 488 F2d 185, 189

Discussion:
See *4.26*

☐ If subject to Bulk Sales Law and not within its exceptions, assert debtor's actual compliance to extent that notice adequately stated:

○ Bulk sale was about to be made.

○ Seller's name and business address, as well as any business name and address listed by seller as having been used in preceding three years.

○ Location and general description of assets.

○ Place and anticipated date of bulk sale.

○ Whether or not bulk sale is subject to requirements applicable to bulk sales for $2 million or less for substantially all cash or a note from buyer for cash, and notice therefore must comply with notice requirements applicable to such sales.

○ If sale is by auction or liquidation under *Com Code § 6101(a)(3)(i)*:

☐ That sale was to be by auction or liquidation;

☐ Name of auctioneer or liquidator; and

☐ Time and place of auction or commencement of liquidation.

Authority:
Com Code §§ 6102(a), 6103

Discussion:
See *4.26*

☐ To support defense that creditor would not have avoided damages, assess whether last day to file claims as set forth in notice was correct, and whether creditor might have been injured.

Authority:
Com Code §§ 6105(a), 6106.2(f), 6108; *Gifford v. J & A Holdings (1997) 54 CA4th 996, 1000-1001, 1006, 63 CR2d 253*

Discussion:
See *4.26 -4.28, 4.30*

☐ Demonstrate that buyer or escrow agent was not subject to duty to distribute sales proceeds to creditors on receipt of claims in cash sales of under $2 million:

○ Show that sale was:

☐ Not for $ 2 million or less, in cash or an obligation to pay cash or a combination of the two; or

☐ By auction or liquidation.

○ Demonstrate that buyer or escrow agent actually complied with additional requirements for recorded and published notice to advise claimants of right to file claims and be compensated from proceeds; and

○ Demonstrate that buyer or escrow agent distributed proceeds according to priorities and procedures specified in statute or were entitled to immunity based on actual notice to all claimants who should have been notified.

Authority:
Com Code §§ 6105, 6106.2, 6106.4

Discussion:
See *4.30, 4.34[1][b], [2][b]*

☐ Assert defense that buyer made a good faith and commercially reasonable effort to comply with notice requirements:

- ○ Buyer made effort to provide creditor with actual notice.
- ○ Buyer provided creditors with more notice and ability to file claims than statute requires.
- ○ Creditor received actual notice and failed to act.
- ○ Any other steps buyer took to give creditors notice that gave them adequate time to file claims.

Authority:
Com Code § 6107(c); *Gifford v. J & A Holdings (1997) 54 CA4th 996, 1000-1001, 1006, 63 CR2d 253*

Discussion:
See *4.27[4]*, *4.34[1]*, *[2]*

☐ Argue that creditor did not meet burdens on claim because creditor did not conclusively show that:

- ○ Sale was subject to and not exempt from Bulk Sales Law.
- ○ Buyer or escrow agent did not comply with notice procedures (or distribution procedures in covered sales).
- ○ Creditor's claim was liquidated and not contingent.

☐ Argue that buyer or agent met burdens applicable to defendant:

- ○ If distribution is at issue in covered $2 million cash sale, argue that buyer or escrow complied with notice to possible claimants such that immunity applies.
- ○ Establish that good faith defenses should apply.

Authority:
Com Code §§ 6104, *6105*, *6106.2*, *6106.4*, *6107*

Discussion:
See *4.27 -4.29*, *4.34[2]*, *4.35*

☐ Assess procedural defenses:

- ○ Is creditor within one-year statute of limitations, tolled for reasonable lack of knowledge if buyer concealed sale?

- Has creditor foregone other potential remedies against seller to obtain Bulk Sales Law remedy against buyer?
- Is claim precluded by bankruptcy petition?
- Consider whether equitable defenses may apply.

Authority:

Com Code §§ 6107, 6110; California v. PG&E Corp. (In re PG&E) (Bankr ND Cal 2002) 281 BR 1, 14

Discussion:

See *4.31*, *4.38*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationNoticeCommercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsContracts LawSales of GoodsAuction SalesTortsBusiness TortsGeneral Overview

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4.33 Strategy.

A buyer or escrow agent in an action under the Bulk Sales Law should evaluate whether:

- The sale was exempt or partially exempt from notice requirements.
- The buyer tried to comply with notice requirements, whether the buyer actually complied, or made any attempts to provide or did provide actual notice to creditors.
- The buyer has a defense for a good faith and commercially reasonable effort to provide notice.
- The sale was subject to the escrow or set-aside and distribution requirements for $2 million bulk sales other than by auction or liquidation, and, if so, whether the buyer or escrow agent complied.
- The claimant can meet the one-year statute of limitations, with possible tolling for lack of knowledge.
- The buyer can limit the creditor's damages because the creditor would not have recovered more if the buyer had complied.
- The buyer can limit damages based on the cumulative limits in the statute.
- Pursuing a Bulk Sales Law action may preclude other remedies.
- The buyer can pursue actions against the seller or others to limit liability.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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4.34 Assert Actual Compliance or Good Faith Effort to Comply With Notice Requirements.

4.34[1] Buyer or Escrow Agent Should Establish Actual Compliance.

4.34[1][a] Notice Must Have Been Required. The defendant in a Bulk Sales Law action should determine if a defense of actual compliance is possible. For notice to have been required [*see Com Code § 6102(a)*]:

- The seller must have been covered by the Bulk Sales Law as located in the state or a foreign firm with a principal executive office in the state whose principal business is the sale of inventory from stock or as a restaurant owner;
- The sale must have been out of the ordinary course of business;
- The sale must have been of more than half the seller's inventory and equipment;
- The sale must have been in a single sale or series of sales by auction or liquidation; and
- The sale must not have been subject to a complete exemption, or a limited exemption with which the buyer complied.

If the above conditions are not met, the buyer may assert a complete defense to the Bulk Sales Law [*see Com Code §§ 6102-6105*].

Cross Reference:

Discussion of sales for which notice is required under the Bulk Sales Law, see *4.26*, *4.27[1]*.

4.34[1][b] Actual Compliance With Notice Is Complete Defense. If a sale was not exempt from the Bulk Sales Law, the defendant should assert the defense of actual compliance with the notice requirements, if justified. The notice must have been published *and* recorded in compliance with the timing requirements of *Com Code § 6105*, and the notice must have contained the actual last date for the filing of claims [*Gifford v. J & A Holdings (1997) 54 CA4th 996, 1000-1001, 1004-1006, 63 CR2d 253]* .

Strategic Point--Buyer or Escrow Agent:

Although no case has litigated whether timely notice to the county tax collector is required, under the standards in *Gifford v. J & A Holdings (1997) 54 CA4th 996, 999-1000, 1003-1007, 63 CR2d 253* , it likely is, if possible harm to creditors can be established.

Cross Reference:

Notice requirements for Bulk Sales Law, see *4.27[2], [3].*

4.34[2] Buyer or Escrow Agent Can Rely on Good Faith Notice Defense.

4.34[2][a] Buyer Can Argue Good Faith Commercially Reasonable Attempt to Comply With Notice Requirements. In an action by a creditor based on the buyer's failure to provide notice or to take steps to exempt a sale from the Bulk Sales Law, the buyer may argue it has no liability because of a good faith and commercially reasonable efforts to comply with the notice requirements of the Law [*Com Code § 6107(c)*]. The burden is on the buyer to make that showing [*Com Code § 6107(c)*]. If the buyer did not try to provide actual notice to a known creditor, any defect can be fatal [*see Gifford v. J & A Holdings (1997) 54 CA4th 996, 1006, 63 CR2d 253*].

Example:

A buyer who was in daily contact with the creditor intentionally did not tell the creditor of an impending sale. The buyer sought to publish and record notice of the bulk sale to be effected on October 15 with a last day for filing claims specified as October 14. The notice was timely published, but was not recorded until 10 calendar days before the date of the intended bulk sale. The escrow was delayed so that the actual sale did not occur until after 12 business days had elapsed, but no revised notices with the new date of sale were published or recorded. This buyer did not make a good faith and commercially reasonable effort to comply [*Gifford v. J & A Holdings (1997) 54 CA4th 996, 1006-1007, 63 CR2d 253*].

Strategic Point--Buyer:

Although the Bulk Sales Law does not require direct or actual notice to known creditors [*see Com Code § 6105(b)* (providing only for publication and recordation of notice)], the result in *Gifford* was probably influenced by the buyer's failure to notify the *known* creditor. *Gifford* also states a broader rule that buyers must publish and record a revised notice with a new sale date sufficiently in advance if they do not complete publication and recordation 12 business days in advance. Buyers should do all of the following [*see Gifford v. J & A Holdings (1997) 54 CA4th 996, 1006-1007, 63 CR2d 253*]:

- Provide actual notice to major creditors in light of *Gifford*.
- Revise the sale and notice dates if *both* publication and recordation do not occur at least 12 days before the planned bulk sale date.
- Argue that a creditor had actual sufficient notice in future good faith cases.

Cross Reference:

Good faith defense under Bulk Sales Law, see *4.27[4].*

4.34[2][b] Buyer Can Argue Good Faith Attempt to Distribute Proceeds in Bulk Sale of $2 Million or Less.

In bulk sales of $2 million or less for cash or an obligation for cash in which the buyer or escrow agent has a duty to satisfy claims against the sale [*see Com Code §§ 6106.2*, *6106.4*], if the proceeds are insufficient to satisfy the claims, the buyer or escrow agent may have a second "good faith" defense. In those cases, the buyer or escrow agent must send notice of a new sale date and the creation of an escrow account to creditors who filed claims [*Com Code § 6106.4(a)(2)*]. Assuming such a notice was sent, and no objection was received, the buyer or escrow agent will have immunity for any "good faith" error in the distribution of the proceeds [*Com Code §§ 6106.4(a)(3)*, *6106.2(d)*].

Cross Reference:

Duties in sales of $2 million or less, see *4.28*.

Strategic Points--Buyer or Escrow Agent:

Because the statute provides immunity for the buyer or escrow agent in this situation, proof of the lack of good faith is an element of the creditor's prima facie case, and that the burden is on the creditor to establish it. The creditor is likely to argue the reverse, based on good faith being the buyer or escrow agent's burden in the only other context in which it is present in the statute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewCommercial Law (UCC)Bulk Sales (Article 6)Application of ProceedsCommercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to Claimants

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4.35 Assess Whether Creditor Has Met Burden to Establish Cause of Action.

The creditor has the burden to establish the validity and amount of the claim [*Com Code § 6107(b)*]. Although the statute defines "claim" as an underlying right to payment from the seller, whether or not fixed or contingent [*Com Code § 6102(a)(4)*], it is likely that the creditor also has the burden of showing that the sale was covered by the Bulk Sales Law [*see Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 C4th 1059, 1071-1072, 124 CR2d 142, 52 P3d 79 , discussing Evid Code § 500*].

Cross Reference:

Case annotations and legislative comments to *Evid Code § 500*, see Cotchett, *California Courtroom Evidence, § 13.01 (Matthew Bender).*

The buyer has the burden to establish the amounts a claimant would not have realized even if the buyer had complied with the statute [*see Com Code § 6107(a), (b)*], on the buyer's good faith compliance with notice or exemption requirements as a defense [*Com Code § 6107(c)*], and likely on the buyer or agent's good faith efforts to prioritize the distribution of the proceeds when those proceeds are inadequate to meet all claims [*see Com Code §§ 6106.2(d), 6106.4(a)(3)*].

Strategic Point:

It is inadvisable to sign escrow instructions exonerating the agent from liability for failure to conduct the sale in compliance with the Bulk Sales laws. Most escrow instructions will contain such a waiver and provide for indemnification from the buyer if litigation results in the buyer being named as a defendant to such an action. Counsel should make sure that the agent carries adequate E&O insurance coverage.

Cross Reference:

Buyer or agent's arguments on good faith regarding distribution, see *4.34[2].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)NoncomplianceInsurance LawClaims & ContractsEstoppel & WaiverAgents & BrokersInsurance LawClaims & ContractsEstoppel & WaiverPolicy Coverage

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4.36 Buyer May Assert Limitation of Liability.

4.36[1] Buyer Is Not Liable on Unliquidated or Contingent Claims. Although a claim is a right to payment from the seller whether fixed or contingent [*Com Code § 6102(a)(4)*], suits are not allowed against buyers based on inadequate notice when the claim is unliquidated or contingent [*Com Code §§ 6104, 6107(g)*]. This distinguishes a Bulk Sales Law claim from a UFTA claim. Buyers should consider defending on this basis when a claim does not appear fixed and has not been reduced to judgment.

4.36[2] Buyer Is Liable to Claimant Only to Extent of Claim, Reduced by Amount Claimant Would Not Have Realized If Buyer Complied. Buyers may avoid liability to the extent that they can show that their compliance would not have left the creditor any better off [*Com Code § 6107(a), (b)*]. Thus, the buyer may be able to avoid liability if the buyer can show that:

- The seller was so far in debt that the creditor could not have recovered anything against the seller [*cf. Mehrtash v. Mehrtash (2001) 93 CA4th 75, 81, 112 CR2d 802]* .

- With respect to a particular creditor, other creditors had claims with higher priority so that the creditor would not have recovered.

Examples:

- A buyer can show that there would not have been any proceeds left for an unsecured creditor after payment of U.S. government claims, secured claims, escrow and professional charges, prioritized wage claims, and taxes [*see Com Code § 6106.4(b)*].

- When a buyer's lack of compliance with notice requirements was the failure to timely forward the notice to the county tax collector, the buyer can argue that compliance would not have led the creditor to act any differently, so that no damages should be allowed [*see Com Code § 6105(b)*].

4.36[3] Buyer's Liability Is Subject to Cumulative Limits. Buyers are protected in that their maximum cumulative liability for any one bulk sale cannot exceed:

- For sales of inventory and equipment only, twice the net contract price [*Com Code § 6107(d)(1)*].

- For sales of inventory and equipment with other property, twice the net value of the inventory and equipment less any amounts paid for the benefit of the seller or to a creditor for the inventory or equipment, except to the extent that a debt secured by an asset has been considered in calculating the net contract price [*Com Code § 6107(d)(2)*].

The "net contract price" is what is newly paid for the assets (inventory, equipment, and other property), excluding what is paid in satisfaction of a debt secured by the asset, and excluding any debt that is secured by a lien or security interest on an asset that remains enforceable against the buyer [*Com Code § 6102(a)(1), (11)*]. "Net value" is defined to exclude secured debts on an asset satisfied by payment and liens [*Com Code § 6107(e)*].

Strategic Points--Buyer:

- There is no requirement under the Bulk Sales Law that a buyer or escrow agent compensate a creditor, unless the buyer or escrow agent has failed to comply with a requirement regarding notice [*see Com Code §§ 6104, 6105, 6106.2(f)*], exemption [*see Com Code § 6103(c)*], or distribution [*see Com Code §§ 6106.2(d), 6106.4, 6106.4(a)(3)*]. Thus, even if a creditor did not receive actual notice of a sale and was injured, a buyer or escrow agent is not necessarily liable, although a court may try to so find [*see Gifford v. J & A Holdings (1997) 54 CA4th 996, 1003, 63 CR2d 253*].

- A buyer may assert the good faith and commercially reasonable compliance defense.

Cross Reference:

Buyer's good faith defenses, see *4.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesBuyers & Lessees in Ordinary Course of BusinessGovernmentsLocal GovernmentsClaims By & Against

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4.37 Buyer May Assert Rights to Property and Against Seller.

Unlike UFTA, a buyer's violation of the Bulk Sales Law's notice requirements does not impair the buyer's rights in the assets purchased or render the transaction voidable, or entitle the creditor to more than one satisfaction of the creditor's claim [*Com Code § 6107(h)*]. In addition, payments of the buyer's liability reduce the seller's liability to the creditor, and the buyer gets a remedy against the seller, unless the parties agree otherwise [*Com Code § 6107(i), (j)*]. Accordingly, the buyer can seek recourse against the seller and to use the assets purchased to satisfy any judgment against it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesBuyers & Lessees in Ordinary Course of Business

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4.38 Procedures to Defend Against Bulk Sales Law Action.

Buyers may seek to establish other defenses. The statute of limitations for claims under the Bulk Sales Law is one year from the date of the bulk sale, or if the buyer, auctioneer, or liquidator conceals the fact the sale has occurred, the shorter of:

- One year after the creditor discovers the sale has occurred [*Com Code § 6110(b)(1)*].

- One year after the person bringing the action should have discovered that the sale occurred, but not later than two years after the date of the bulk sale [*Com Code § 6110(b)(2)*].

"Concealment" means more than simply failing to comply with the notice requirements [*Com Code § 6110(b)(2)*], but might include failure to advise a creditor with whom the buyer is in regular contact [*cf. Gifford v. A & J Holdings (1997) 54 CA4th 996, 1006, 63 CR2d 253*].

Buyers should consider whether equitable defenses such as laches or unclean hands may apply, and buyers or escrow agents in bankruptcy are shielded by bankruptcy's automatic stay [*California v. PG&E Corp. (In re PG&E) (Bankr ND Cal 2002) 281 BR 1, 14*].

Cross References:

Effect of bankruptcy, see Ch. 3, Effect of Bankruptcy.

Laches, see California Forms of Pleading and Practice, Ch. 345, Limitation of Actions (Matthew Bender).

Unclean hands, see California Forms of Pleading and Practice, Ch. 561, Trusts: Constructive Trusts (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bulk Sales (Article 6)NoncomplianceCommercial Law (UCC)Bulk Sales (Article 6)Notice to ClaimantsCommercial Law (UCC)Bulk Sales (Article 6)Statutes of LimitationsEstate, Gift & Trust LawTrustsConstructive TrustsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 4 Fraudulent Transfers
VI. FORMS

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4.39 Complaint for Relief Under UFTA and for Common Law Fraudulent Transfer.

Complaint for Relief Under UFTA and for Common Law Fraudulent Transfer.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*], Plaintiff, vs. _____ [*include name(s) of transferee and debtor, as appropriate*], Defendant(s).	NO. _____ COMPLAINT TO _____ [SET ASIDE *or* ANNUL] FRAUDULENT _____ [TRANSFER *or* OBLIGATION] AND FOR DAMAGES [Amount demanded _____ (exceeds *or* does not exceed) $ 10,000] [*if appropriate:* LIMITED CIVIL CASE] [*if desired and when including claim for determinate sum of money:* JURY DEMANDED]

Plaintiff alleges:

FIRST CAUSE OF ACTION: Uniform Fraudulent Transfer Act and Common Law

(To _____ [Set Aside *or* Annul] Fraudulent _____ [Transfer *or* Obligation])

1. Defendants are, and at all times herein mentioned were, residents of _____ County, California [*or*

allege other capacity and residence].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the property hereinafter described and which is the subject of this action.)]

3. _____ [From and after _____ (*date*) *or* At all times mentioned herein], plaintiff _____ [was *or* has been] the holder of a certain claim against defendant _____ [*name of transferor*]. This claim consists of _____ [*specify claim, and if based on a document, attach a copy as an exhibit, e.g.,* a note payable to plaintiff *or* a judgment from the Superior Court of California, County of _____. A copy of the _____ (note/judgment) is attached as "Exhibit A" and incorporated by reference].

[*EITHER*]

4. No part of the aforementioned claim has yet matured, but the claim will mature when _____ [*specify how and when claim matures*].

[*OR*]

4. The claim for which defendant _____ [*name of transferor*] is indebted to plaintiff is in the sum of $_____ and is currently owing to the plaintiff. _____ [Plaintiff has performed all conditions, covenants, and promises under the contract *or* Judgment was entered on _____ (*date*) and became final on _____ (*date*)]. This sum has not been paid and there is now due and unpaid from this defendant the sum of $_____ together with interest thereon at the rate of _____ percent per annum from _____ [*date*].

[*CONTINUE*]

[5. On or about _____ (*date*), defendant _____ (*name of transferor*) was the owner and in possession and control of _____ (*describe property fraudulently transferred; include later in complaint particular allegations relating to real property, or personal property covered by CC § 3440 et seq.)*.]

[*EITHER*]

6. [Plaintiff is informed and believes and thereon alleges that] [o]n or about _____ [*date*], defendant _____ [*name of transferor*] transferred by _____ [*describe manner of transfer, e.g.*, deeded] the above-described property to defendant _____ [*name of transferee*]. [*If instrument was recorded, official registration was changed, or security interest was given by UCC filing, give the particulars of the recordation, transfer of registration, or filing*.]

[*OR*]

6. [Plaintiff is informed and believes and thereon alleges that] [o]n or about _____ [*date*], defendant _____ [*name of obligor*] and defendant _____ [*name of obligee*] entered into an agreement under which defendant _____ [*name of obligor*] became obligated to _____ [*specify, e.g.,* purchase from transferee and defendant

_____ (*name of obligee*) _____ (*describe nature of purchase*)]. Defendant _____ [*name of obligor*] has _____ [not yet made any payments *or* paid $_____] to _____ [*name of obligee*] in fulfillment of this contract.

[*CONTINUE*]

7. The _____ [transferred property *or* property that was the subject of the obligation] was an asset of the debtor because it was not subject to a valid lien, exempt under nonbankruptcy law, or an interest in property held in tenancy by the entireties.

8. Plaintiff is informed and believes and thereon alleges that the _____ [transfer was made *or* obligation was incurred] with an actual intent to hinder, delay, or defraud [all of defendant _____'s (*name of tranferor*) (then and future) creditors, including] plaintiff in the collection of his/her/its/their claim(s).

9. Plaintiff is further informed and believes and thereon alleges that the transfer was constructively fraudulent in that the defendant debtor transferred the assets at issue for less than their reasonably equivalent value, and the debtor _____ [*if creditor was present creditor at time of transfer, either:* was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small *or* intended to incur or reasonably should have believed that he/she would incur debts beyond his/her ability to pay them as they became due *or* was insolvent at the time of the transfer, or became insolvent as a result of the transfer *or, if creditor was future creditor at time of transfer select from:* was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small *or* intended to incur or reasonably should have believed that he/she would incur debts beyond his/her ability to pay them as they became due].

10. In exchange for the aforementioned _____ [transfer *or* obligation], defendant _____ [*name of transferor or obligor*] received _____ [$_____ *or* consideration worth $_____ in the form of _____ (*specify property or obligation exchanged and its value*)]. At the time the _____ [transfer was made *or* obligation was incurred], the value of defendant debtor's asset _____ [*specify property transferred or obligation incurred*] was not less than $ _____. Thus, the defendant _____ [*name of transferor or obligor*] did not receive reasonably equivalent value in exchange for the asset.

[11. (Plaintiff is informed and believes and thereon alleges that) (t)he above-described _____ [property *or* obligation] was received by defendant _____ [*name of transferee or obligee*] with knowledge that defendant _____ [*name of transferor or obligor*] intended to hinder, delay, or defraud the collection of plaintiff's aforementioned claim (and the claims of all the _____ [then *or* then and future] creditors of defendant _____ [*name of transferor or obligor*]). Defendant _____ [*name of transferee or obligee*] had such knowledge by virtue of _____ [*specify, e.g.,* an agreement made on _____ (*date*), between defendant _____ (*name of transferor or obligor*) and defendant _____ (*name of transferee or obligee*) to defraud the plaintiff in the collection of his/her claim *or allege other facts which show transferee's knowledge of transferor's intent or knowledge of facts which would put transferee on notice of transferor's intent*].

[*If necessary to overcome statute of limitations defense based on timing of complaint:*

12. Defendant _____ [*name of transferor*] [and defendant _____ (*name of transferee*)] willfully and surreptitiously concealed the aforementioned _____ [transfer *or* obligation] from _____ [plaintiff *and/or* all of defendant _____'s (*name of transferor*) creditors]. Plaintiff did not discover, and could not reasonably have discovered, the existence of the fraud and fraudulent _____ [transfer *or* obligation] until _____ [*date*], at which time

_____ [*specify how plaintiff learned of transfer or obligation, e.g.,* defendant _____'s (*name of transferor*) former spouse informed plaintiff of the transfer,

[*AND/OR*]

13. The fraudulent transfer was made during the pendency of a lawsuit that established the debtor-creditor relationship between plaintiff and defendant. The judgment in that lawsuit did not become final until _____ (*date*).]

SECOND CAUSE OF ACTION

(Conspiracy)

[*Include if transferee or obligee had knowledge of fraudulent intent of transferor based on agreement with transferor*.]

14. Plaintiff refers to and incorporates herein Paragraphs 1 through 14 of this Complaint.

15. As alleged above, on _____ [*date*], defendants _____ [*name*] and _____ [*name*] agreed and knowingly and willfully conspired between themselves to _____ [*specify, e.g.*, hinder, delay, and defraud] plaintiff in the collection of his/her claim against defendant _____ [*name of transferor*].

16. Under this conspiracy, the above-named defendants agreed _____ [*state facts showing the nature of agreement e.g.,* that _____ (*name of defendant transferee or obligee*) should take the payments received from _____ (*name of defendant transferor or obligor*) under the sham cattle investment contract and place them in an account in his/her own name until the statute of limitations had expired on plaintiff's claim, at which time he/she was to return the money to _____ (*name of defendant transferor or obligor*)].

17. Defendants _____ [*name*] and _____ [*name*] did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

18. As a proximate result of the wrongful acts herein alleged, plaintiff has been generally damaged in the sum of $_____.

[19. *Here and in subsequent paragraphs allege any items of special damages*.]

[20. At all times mentioned herein, defendant _____ (*name of transferee or obligee*) knew of plaintiff's claim against _____ (*name of transferor or obligor*) and knew that plaintiff's claim could be satisfied only out of the _____ (property transferred *or* sums expended by _____ (*name of obligor*) in fulfillment of the obligation). Notwithstanding this knowledge, defendant _____ (*name of transferee or obligee*) intentionally, willfully, fraudulently, and maliciously did the things herein alleged to defraud and oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages.]

WHEREFORE, plaintiff prays [*if desired in action based on claim for determinate sum of money:* for a jury trial and] judgment as follows:

On the First Cause of Action:

1. That the _____ [(transfer *or* conveyance) from defendant _____ (*name of*

transferor) to defendant _____ (*name of transferee*) be set aside *or* obligation incurred by defendant _____ (*name of obligor*) be annulled and declared void as to the plaintiff herein to the extent necessary to satisfy plaintiff's _____ (claim *or* judgment) in the sum of $_____ plus interest thereon at the rate of _____ percent per annum from _____ (*date*)].

[2. That the property in the hands of defendant _____ (*transferee*) be attached in accordance with the provisions of *Code of Civil Procedure Sections 481.010 through 493.060*.]

[3. That defendant _____ (*name of transferee*) be restrained from disposing of the property (transferred *or* conveyed) _____ (until _____ (*date*), which is the date on which the aforementioned claim held by plaintiff against defendant _____ (*name of transferor*) will have matured and the sum of $ _____ will be due and owing from this defendant).]

[4. That a temporary restraining order be granted plaintiff enjoining and restraining defendant _____ (*name of transferee*), and his/her representatives, attorneys, and agents from selling, transferring, conveying, or otherwise disposing of any of the property transferred.]

[5. That an order pendente lite be granted plaintiff enjoining and restraining defendant _____ (*name of transferee*) and his/her representatives, attorneys, servants, and agents from selling, transferring, conveying, assigning, or otherwise disposing of any of the property transferred.]

[6. That the judgment herein be declared a lien on the property transferred.]

[7. That an order be made declaring that defendant _____ (*name of transferee*) holds _____ (*specify all or undivided portion of property, e.g.,* an undivided one-quarter interest in) the property described above in trust for plaintiff).]

[8. That defendant _____ (*name of transferee*) be required to account to plaintiff for all profits and proceeds earned from or taken in exchange for the property described above.]

On the Second Cause of Action against defendants, and each of them, as follows:

9. For general damages in the sum of $_____;

[10. For special damages in the sum of $_____];

[11. For exemplary or punitive damages;]

On all causes of action:

12. For costs of suit herein incurred; and

13. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

NOTES.

Authority:
CC §§ 3439.01-3439.12, 3440-3440.9, 3445-3449; Wisden v. Superior Court (2004) 124 CA4th 750, 756-757, 21 CR3d 523

Grounds:
See *4.05*

Discussion:
See *4.03 -4.13*

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4.40 Answer Alleging Affirmative Defenses to Complaint for Relief Under UFTA and for Common Law Fraud.

Answer Alleging Affirmative Defenses to Complaint for Relief Under UFTA and for Common Law Fraud.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*], Plaintiff, vs. _____ [*include name(s) of transferee and, debtor as appropriate*], Defendant(s).	NO. _____ ANSWER TO COMPLAINT OF _____ TO [SET ASIDE *or* ANNUL] ALLEGEDLY FRAUDULENT _____ [TRANSFER *or* OBLIGATION] AND FOR DAMAGES [Amount demanded _____ (exceeds *or* does not exceed) $ 10,000] [*if appropriate:* LIMITED CIVIL CASE] [*if desired and when including claim for determinate sum of money:* JURY DEMANDED]

_____

Defendant _____ [*name*], hereby responds to Plaintiff's complaint in the above-captioned action as follows:

1. Responding to Paragraph _____ [*insert number*], Defendant generally denies each and every allegation therein, except that _____ [*insert admission of any appropriate facts alleged*].

DEFENDANT'S AFFIRMATIVE DEFENSES TO COMPLAINT

DEFENDANT ALLEGES:

_____ (*specify number, e.g.,* FIRST) AFFIRMATIVE DEFENSE:

Transfer Was Exempt as a Preference

1. The _____ [transfer made to *or* obligation incurred in favor of] this defendant by [defendant] _____ [*name of transferor or obligor*], which _____ [transfer *or* obligation] was alleged to be in fraud of plaintiff's rights as creditor of [defendant] _____ [*name of transferor*], was in fact merely a permissible preference among creditors by the debtor.

2. The _____ [transfer *or* obligation] sought to be set aside in fact operated to _____ [discharge the transferee's claim *or* reduce the transferee's claim to the sum of $_____]. It was made for reasonably equivalent value in that it was _____ [a fair equivalent *or* not in an amount disproportionately small as compared] to the value of the _____ [property transferred *or* obligation undertaken] and was made in good faith.

_____ (*specify number, e.g.,* SECOND) AFFIRMATIVE DEFENSE:

Plaintiff Was Not Injured

1. Plaintiff was not harmed or injured in any manner by the allegedly fraudulent transfer because the transfer did not put beyond the plaintiff's reach any property that he/she would have been able to subject to the payment of his/her claim against [defendant] _____ [*name of transferor*].

2. The property transferred in fact was not available or subject to the plaintiff's claim against [defendant] _____ [*name of transferor*] because _____ [*allege facts showing that transfer did not injure plaintiff, e.g.*, the property conveyed was exempt from attachment and execution under *Code of Civil Procedure Sections 704.710-704.850*, in that (defendant) _____ (*name of transferor*) actually resided in the dwelling on that property and the property constituted his/her principal residence and his/her equity in the property did not exceed $_____, the amount of the exemption to which he/she (as _____ (*specify category of exemption, e.g.,* head of a household)) was entitled pursuant to *Code of Civil Procedure Section 704.730(a)*].

_____ (*specify number, e.g.,* THIRD) AFFIRMATIVE DEFENSE:

Transfer Was Exempt from Fraudulent Transfer Rules

1. The alleged transfer is exempt under *Civil Code Section 3439.08(e)* because it resulted from _____ [termination of a lease on debtor's default *or* the enforcement of a lien in a noncollusive manner and is thus exempt under *Civil Code Section 3439.08(e)*].

_____ (*specify number, e.g.,* FOURTH) AFFIRMATIVE DEFENSE:

Laches

1. Plaintiffs' claim is barred by the equitable doctrine of laches.

_____ (*specify number, e.g.,* FIFTH) AFFIRMATIVE DEFENSE:

Estoppel [*and/or* Unclean Hands]

1. Plaintiffs' claim is barred by the equitable doctrine of estoppel [*and/or* unclean hands].

_____ (*specify number, e.g.,* SIXTH) AFFIRMATIVE DEFENSE:

Complaint Is Time-Barred

1. Plaintiff's _____ [complaint is barred by the statute of limitations applicable to all fraudulent conveyance actions because no complaint was filed or levy made until more than seven years after the transfer was made or obligation was incurred *or* _____ (complaint *or* cause of action) for constructive fraud is barred because no complaint was filed or levy made until more than four years after the transfer was made or obligation was incurred].

[*And/or, if allegations include common law fraudulent transfer*]

Plaintiff's _____ [complaint is barred by the statute of limitations because no action was filed until more than three years after plaintiff learned of its possible cause of action *and/or* _____ (complaint *or* cause of action for) actual intent to defraud is barred because no complaint was filed or levy made until more than four years after the transfer was made or obligation was incurred, nor less than one year after the transfer was discovered thereafter].

NOTES.

Authority:

CC §§ 3439.01-3439.12, *3440-3440.9*, *3445-3449*; *Wyzard v. Goller (1994) 23 CA4th 1183, 1188, 28 CR2d 608* ; *Mehrtash v. Mehrtash (2001) 93 CA4th 75, 112 CR2d 802*

Discussion:

See *4.14 -4.21*

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4.41 Transferee's Opposition to Application for Interim Relief Prohibiting Fraudulent Transfer.

Transferee's Opposition to Application for Interim Relief Prohibiting Fraudulent Transfer.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	DEFENDANT _____'s
_____ [*name*],	)	OPPOSITION TO INTERIM
Defendant.	)	RELIEF PROHIBITING
	)	FRAUDULENT TRANSFER
	)	

_____

Defendant _____ [*name of transferee*] hereby opposes plaintiff's application for interim relief pursuant to the Uniform Fraudulent Transfer Act ("UFTA") [*Civil Code Sections 3439.01-3439.12*]. *Civil Code Section 3439.07(a)(3)* does allow plaintiffs to seek an injunction or other relief subject to principles of equity and in compliance with the rules of civil procedure. However, those principles and rules do not allow an order barring _____'s disposition of the property at issue here because _____ is filing an undertaking herewith for at least the lesser of double the amount of the value of the property or obligation or double the amount of the creditor's claims in the action.

[*Specify why amount is adequate under maximum possible valuation of property or creditor's claim*].

Civil Code Section 3446(b) requires that if they are complied with, the transferee may encumber or dispose of the property at issue. The rules of civil procedure and equity do not allow interim and extraordinary relief when the party against whom relief has sought has posted such an undertaking. Accordingly, plaintiff's application for interim relief must be denied.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	DEFENDANT _____'s
_____ [*name*],	)	UNDERTAKING
Defendant.	)	
	)	
	)	

_____

WHEREAS defendant _____ [*identify party*] wants to give an undertaking as provided by *Civil Code §§ 3445-3449*;

NOW, THEREFORE, the undersigned _____ [surety *or* sureties], _____ [*name(s) of surety or sureties*] hereby obligate(s) myself/ourselves [, jointly and severally,] to pay to the creditor _____ [*name of plaintiff or beneficiary*] under the statutory obligations, the amount of $_____, estimated as _____ [*state the lesser of* the value of the asset transferred *or* the amount determined to be owing to the creditor by the person who transferred the property or incurred the obligation]. The sureties hereby recognize that if the plaintiff [creditor] prevails on the complaint, they shall be jointly and severally liable for the amount of the judgment or order, together with any prejudgment interest which may have accrued.

[*ADD, if amount of bond is based on value of property or interest in property*]

The [interest in] property on which the amount of this _____ [bond *or* undertaking] is based, and which is relied on by the _____ [surety *or* sureties] as qualifying them on the _____ [bond *or* undertaking] is as follows: _____ [*describe the property or properties or interest in property*].

The estimate of the _____ [principal *or* beneficiary *or* court] as to the fair market value of the above-described [interest in] property is as follows: _____ [*specify fair market value of each property or interest*]. The undertaking is thus worth at least twice the amount of _____ [*lesser of* the value of the asset transferred *or* the amount determined to be owing to the creditor by the person who transferred the property or incurred the obligation].

[*CONTINUE*]

The addresses at which the sureties may be served with notices, papers, and other documents are:

_____ [*name of surety*] _____ [*address*]

_____ [*name of surety*] _____ [*address*]

[*If using personal sureties:*] Affidavits of qualification of each surety are attached hereto.

An affidavit of service on the beneficiary is attached hereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: _____

_____ [*signature of surety*]

_____ [*signature of surety*]

_____ [*signature of surety*]

_____ [*signature of principal*]

NOTES.

Authority:

CC §§ 3439.01-3439.12, 3440-3440.9, 3445-3449; *Wyzard v. Goller (1994) 23 CA4th 1183, 1188, 28 CR2d 608* ; *Mehrtash v. Mehrtash (2001) 93 CA4th 75, 112 CR2d 802*

Discussion:

See *4.14 -4.21*

Cross Reference:

California Pleading and Practice, Ch. 538, Suretyship, Bonds and Undertakings (Matthew Bender)

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4.42 Complaint for Damages Against Buyer Under Bulk Sales Law.

Complaint for Damages Against Buyer Under Bulk Sales Law.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR RECOVERY
vs.	)	OF CLAIM
_____ [*name*],	)	(Bulk Sales Law)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	_____ (exceeds *or* does
	)	not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ is a buyer at a bulk sale as described herein.

2. Plaintiff _____ [became *or* was] the holder of a liquidated, certain claim against _____ [*name of seller*] incurred by _____ [*name of seller*] in the conduct of his/her/its business described herein. The claim arose before date of the bulk sale described herein. This claim consists/consisted of _____ [*describe transaction or events that gave rise to claim*].

3. This claim for which _____ [*name of seller*] is indebted to plaintiff is in the sum of $_____, and is now due and unpaid, and was due and unpaid as of the date of the bulk sale alleged herein. [*If claim was reduced to judgment, add:* Plaintiff's claim was the subject of a judgment based on the aforementioned claim in the _____ (*specify court*), No. _____, certified copy of which is attached as Exhibit A. Judgment in that action was duly rendered in favor of plaintiff for the sum of $_____, and for costs in the sum of $_____, for a total

of the sum of $_____. The judgment became final on _____ (*date*), before the filing of this action. The judgment has never been vacated or modified. Plaintiff is still the owner of the judgment of which no part has been satisfied.]

[*CONTINUE*]

4. Before _____ [*date*], _____ [*name of seller*] was engaged in the business of _____ [*describe business*] [under the business name of _____ (*state name*)] at _____ [*street address*], _____ [*city*], _____ County, California.

5. On or about that date, _____ [*name of seller*] sold to defendant _____ [*name of buyer*] _____ property _____ [consisting of *or* including more than half of the inventory and equipment of this business] having the value of $_____. [*Allege mechanism of sale*.]

6. This sale was not made in the ordinary course of _____'s [*name of seller*] business in that it did not comport with the usual and customary practices of the kind of business in which _____ [*name of seller*] was engaged or with _____ [*name of seller*]'s usual and customary practices. The sale was subject to the Bulk Sales Law because the seller was _____ [located in California *or* outside the United States with a principal executive office in California] and had a principal business _____ [as a restaurant owner *or* of the sale of inventory from stock], and the sale was not exempted from the Bulk Sales Law under *Commercial Code Section 6103(c)*.

[*EITHER, if there was failure to properly record with county recorder*]

7. Buyer did not comply with subsection *Commercial Code Section 6105(b)(1)*, in that this sale was not preceded by a notice of intended bulk sale recorded in the Office of the County Recorder of _____ County, California [*if assets were located in more than one county add:*, and in the Office of the County Recorder of _____ County, California,] in which county/counties the tangible assets to be sold were located by defendant _____ [*name of buyer*] at least 12 business days before the date of the sale. [*If seller was located in different county than assets, add*: Nor was any notice recorded in the Office of the County Recorder of _____ County, California, the county in which _____'s (*name of seller*) _____ (chief executive office *or* major executive office in the United States) was located.]

[*AND/OR, if there was failure to properly publish notice of intended sale*]

7. This sale did not comply with *Commercial Code Section 6105(b)(2)* because it was not preceded by a notice of intended bulk sale published at least once in a newspaper of general circulation published in [the Judicial District of] _____ County, California, in which _____ [District *or* County] the tangible assets to be sold [or the greater portion of them] were/was located by defendant _____ [*name of buyer*] at least 12 business days before the date of the sale. [*If seller was located in different judicial district than assets, add*: Nor was any notice published in a newspaper of general circulation published in (the _____ (*name of district*) Judicial District of) _____ County, California, in which _____ (District *or* County) _____'s (*name of seller*) _____ (chief executive office *or* major executive office in the United States) was located.]

[*AND/OR, if there was failure to comply with other requirements of Com. Code § 6105*]

7. This sale did not comply with *Commercial Code Section 6105* _____ [*specify subsection(s), e.g.*, (a)(2)] in that it _____ [*if notice was published and recorded in compliance with Com. Code § 6105,*

allege facts showing noncompliance with requirements of notice, e.g., did not contain all prior business names and addresses used by _____ (*name of seller*) within the three immediately preceding years, under one of which names he/she/it was engaged in business at the time plaintiff became the holder of his/her/its claim. Plaintiff is informed and believes and on such information and belief alleges that defendant never obtained, or attempted to obtain, from _____ (*name of seller*) the list of its former business names and addresses as required by *Commercial Code Section 6104(a)*].

[*CONTINUE, if there was failure to comply with requirements of Com. Code § 6106.2*]

8. The consideration for the sale was less than $2,000,000 and consisted substantially of _____ [cash *or* the seller's obligation to pay cash in the future *or* a combination of cash and the seller's obligation to pay cash in the future]. In failing to comply with *Commercial Code Section 6106.2(f)*, _____ [*specify nature of noncompliance, e.g.,* the notice of the sale did not specify the final date by which creditors of _____ (*name of seller*) were to file claims].

[*CONTINUE*]

9. As a proximate result of defendant's noncompliance with the applicable statute, as alleged above, plaintiff was prevented from duly filing a timely claim or pursuing attachment procedures against _____ [*name of seller*]'s assets, to plaintiff's damage.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ plus interest thereon at the rate of _____ percent per annum.

2. For the costs of suit incurred herein.

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

NOTES.

Authority:
Com Code §§ 6101-6111; *Gifford v. J & A Holdings (1997) 54 CA4th 996, 1000-1001, 1006, 63 CR2d*

253 ; *Danning v. Daylin, Inc. (9th Cir 1973) 488 F2d 185, 189*

Grounds:
See *4.24*

Discussion:
See *4.22 -4.31*

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Chapter 5 Debt Collection Prior to Litigation

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§ 5.syn Synopsis to Chapter 5: Debt Collection Prior to Litigation

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5.02 Objective and Strategy.

5.03 CHECKLIST: Exploring Pre-Litigation Debt Collection Options

5.04 Options and Strategies.

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5.06 Counsel Must Determine Whether Special Debtor Protections Affect Collection Activity.
5.06[1] Fair Debt Collection Practices Laws Protect Consumers.
5.06[2] Servicemembers Relief Acts Protect Consumers Who Are Members of Military.

5.07 Counsel Should Contact Debtor Directly.

5.08 Counsel Should Evaluate Pre-Litigation Collection Options.
5.08[1] Creditor May Assign Claim to Collection Agency.
5.08[2] If Debtor Disputes Claim or Is Unable to Pay, Settlement Should Be Considered.
5.08[3] Counsel Should Consider Obtaining Confession of Judgment.
5.08[3][a] Confession of Judgment Admits Liability for Debt.
5.08[3][b] Creditor Must Obtain Written Statement Authorizing Entry of Judgment.
5.08[3][c] Debtor Must Sign Certificate of Review by Independent Counsel.
5.08[3][d] Statement and Certificate Must Be Filed in Court Where Judgment Will Be Entered.
5.08[4] Counsel Should Consider Self-Help Repossession.

5.09 Handling Payments by Debtor.

5.10 CHECKLIST: Determining Whether Fair Debt Collection Practices Acts Apply to Particular Collection.

5.11 Options and Strategies.

5.12 Purpose of Debt Collection Practices Laws Is to Protect Consumers.

5.13 Collector Must Follow Both Federal and State Laws in Action Against Debtor.
5.13[1] Federal Statute Preempts State Statute When Inconsistent.
5.13[2] Federal Regulators May Exempt Any Class of Debt Collection in Any State.
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5.14 Federal and State Definitions of Debt Collector Differ.
5.14[1] Federal Statute Narrowly Defines Debt Collector.
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5.14[1][b] Federal Definition Excludes Creditors.
5.14[1][c] Federal Definition Excludes Credit Affiliates or Subsidiaries.
5.14[1][d] Federal Definition Excludes Certain Federal or State Employees.
5.14[1][e] Federal Definition Excludes Process Servers.
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5.14[2] State Definition of Debt Collector Includes Creditors but Excludes Attorneys.

5.15 Attorney May Qualify As Debt Collector.
5.15[1] Attorneys Subject to Federal FDCPA If "Regularly Engaged" in Debt Collection.
5.15[2] Attorneys Must Follow Business and Professions Code.

5.16 Federal and California FDCPAs Govern Debts Arising From Consumer Transactions.
5.16[1] Federal Definition Focuses on Consumer Debt Transactions for Personal Use.
5.16[2] "Transaction" Must Involve Business Dealing or Other Consensual Obligation.
5.16[3] California Definition Is Similar to That of Federal FDCPA.

5.17 CHECKLISTS: Communicating With Third Parties to Acquire Information About Debtor and Debt.
5.17[1] Communicating With Third Parties to Acquire Information About Debtor.
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5.18 Options and Strategies.

5.19 Collector May Acquire Location Information About Debtor.
5.19[1] Collector Must Identify Self to Third Party.
5.19[2] California Law Requires Initial Contact to Be in Writing.
5.19[3] Collector Is Prohibited From Certain Actions Concerning Location Information.

5.20 Acquiring Information About Debt From Third Party Is Limited.

5.21 Privacy Laws May Affect Information Gathering.
5.21[1] Gramm-Leach-Bliley Act Protects Certain Financial Information.
5.21[2] Debt Collectors Must Protect Information Under Gramm-Leach-Bliley.
5.21[3] Fair Credit Reporting Act Applies to Debt Collectors.
5.21[3][a] Furnishers of Information to Credit Reporting Agencies Have Duties.
5.21[3][b] Furnishers of Information Must Be Mindful of Identity Theft.

5.22 CHECKLIST: Communicating With Debtor Regarding Consumer Debt.

5.23 Options and Strategies.

5.24 Federal and State FDCPAs Restrict Time, Place, and Manner of Communication.
5.24[1] Statutes Prohibit Communications at Unusual Times and Places.
5.24[2] Representation by Counsel Limits Direct Communication With Debtor.

5.24[3] Debtor Actions Can Trigger Cessation of Debt Collector's Communication.

5.25 Collector May Not Engage in Harassment or Abuse.
5.25[1] Threats of Use of Violence Are Prohibited.
5.25[2] Use of Obscene or Profane Language Is Prohibited.
5.25[3] Publishing List of Debtors Refusing to Pay Is Prohibited.
5.25[4] Advertising for Sale of Debt to Coerce Payment Is Prohibited.
5.25[5] Telephone Harassment Is Prohibited.

5.26 Debt Collector May Not Make False or Misleading Misrepresentations.
5.26[1] Statutes Provide Non-Exclusive List of Prohibited Conduct.
5.26[2] Whether Statement Is False or Misleading Is Subject to "Least Sophisticated Consumer" Standard.

5.27 Debt Collector May Not Use Unfair or Unconscionable Practices.
5.27[1] Collection of Amount Not Authorized by Agreement or Law Is Prohibited.
5.27[2] Acceptance of Postdated Payment Instrument Is Restricted.
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5.27[5] Written Communication Must Be Contained in Envelope.

5.28 Debt Collector May Not Furnish Deceptive Forms.

5.29 Debt Collector Has Statutory Obligations In Communications With Debtor
5.29[1] Federal FDCPA Requires "Mini-Miranda" Disclosure to Debtor.
5.29[2] Initial Communication Requires Written Description of Debtor's Rights.
5.29[2][a] Must Include Standard Paragraph.
5.29[2][b] Must Meet Type Size Requirements.
5.29[3] Within Five Days of Initial Communication, Collector Must Provide Validation of Debt.

5.30 Debt Collector Must Verify Debt If Consumer Disputes Amount.

5.31 Debt Collector Must Stop Collection Activities on Notification of Identity Theft.
5.31[1] Debtor Must Provide Evidence of Identify Theft.
5.31[2] Debt Collector Must Cease Collection Activities and Review Debtor's Evidence.
5.31[3] Debt Collector May Recommence Collection Activity After Good Faith Determination Adverse to Debtor.
5.31[4] Debt Collector Must Notify Credit Reporting Agency If Collection Is Not Recommenced.

5.32 Violation of State and Federal Statutes Entitles Debtor to Remedies.
5.32[1] Debt Collector May Be Liable for Damages.
5.32[1][a] Collector May Be Liable for Actual Damages.
5.32[1][b] Collector May Be Liable for Civil Penalties.
5.32[1][c] Collector May Be Liable for Attorney's Fees.
5.32[1][d] Courts Consider a Number of Factors in Determining Amount of Liability.
5.32[2] Debt Collector Has Defenses to Claims of FDCPA Violations.
5.32[2][a] Debt Collector May Assert Bona Fide Error Affirmative Defense.
5.32[2][b] Debt Collector May Assert Statute of Limitations Defense.
5.32[2][c] California Law Allows Debt Collector to Cure.
5.32[2][d] Debtor's Conduct Under California Law May Provide Additional Defenses for Collector.
5.32[2][e] Debt Collector Entitled to Attorney's Fees on Debtor's Bad Faith Claim.

5.33 CHECKLIST: Using Self-Help Repossession to Collect Debt.

5.34 Options and Strategies.

5.35 Collateral Used to Secure Debt May Be Subject to Repossession.

5.36 Loans Secured by Collateral Governed by California Uniform Commercial Code.
5.36[1] Creditor Must Have a Security Interest in Collateral.
5.36[1][a] Security Agreement Creates the Security Interest in the Collateral.
5.36[1][b] Executed Security Agreement Must Attach.
5.36[2] Commercial Code Provides for Self-Help Repossession on Default.
5.36[3] Repossession Must Be Effected Without Breach of Peace.
5.36[4] Creditor May Sell Repossessed Collateral to Satisfy Debt.
5.36[5] Sale Must be Commercially Reasonable.
5.36[6] Creditor Must Provide Notice of Sale.
5.36[6][a] Must Send Notice to Specified Parties.
5.36[6][b] Commercial Code Provides Content Requirements.
5.36[6][c] Additional Commercial Code Requirements Apply in Consumer Goods Transaction.
5.36[7] Debtor Is Liable for Deficiency.

5.37 Unruh Act Applies to Retail Installment Sales.

5.38 Creditor May Retake Goods or Recover Judgment for Balance.

5.39 Unruh Outlines Procedures for Repossession.
5.39[1] Creditor Must Notify Debtor of Sale Within 10 Days.
5.39[2] Debtor May Redeem.
5.39[3] Application of Resale Proceeds Follows Order.

5.40 Creditor May Not Recover Deficiency Judgment From Debtor Under Unruh Act.

5.41 Rees-Levering Act Applies to Automobile Financing.
5.41[1] Act Applies Only to Certain Automobile Sales Contracts.
5.41[2] Act Allows for Repossession of Motor Vehicle.

5.42 Notice Requirements to Sell Repossessed Vehicle.
5.42[1] Rees-Levering Requires Notice 15 Days Prior to Sale and 60 Days After Repossession.
5.42[2] Notice Must Contain Specified Information.

5.43 Creditor Must Comply With Commercial Code in Order to Recover Deficiency Judgment From Debtor.

5.44 Creditor Has Limited Remedies If Transaction Is Covered by Credit Disability Insurance.

5.45 CHECKLIST: Collecting Consumer Debt From Members of the Military.

5.46 Federal and California Servicemembers Relief Acts Delay Debt Collection.

5.47 Acts Apply to Servicemembers During Periods of Military Service.
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5.53[5] Act Delays Enforcement of Security Interests.

5.54 Acts Also Provide Court With Discretion to Grant Relief From Other Obligations.

5.55 California Law Provides Additional Debt Relief for Servicemembers in Iraq or Afghanistan.

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5.57 Letter--Validation Notice With "Mini-Miranda" Statement.

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Chapter 5 Debt Collection Prior to Litigation
I. STRATEGY

1-5 MB Practice Guide: CA Debt Collection 5.01

5.01 Scope.

This chapter covers:

- Objectives and strategies regarding debt collection prior to litigation [*see 5.02*].
- Exploring options for collecting a debt prior to litigation [*see 5.03 -5.09*].
- Fair debt collection practices laws and their application to particular collections [*see 5.10 -5.16*].
- Communication with third parties to acquire information about the debtor and debt [*see 5.17 -5.21*].
- Communication with a consumer debtor to recover debt [*see 5.22 -5.32*; Form: *see 5.57*].
- Using self-help repossession statutes to collect debt [*see 5.33 -5.44*].
- Collecting consumer debts from members of the military [*see 5.45 -5.56*].

This chapter does not address debt collection matters in family law.

Core Statutes:

15 USC §§ 1692-1692o (Federal Fair Debt Collection Practices Act); *CC §§ 1788-1788.33* (Rosenthal Fair Debt Collection Practices Act); *Com Code § 9101 et seq.*; *Com Code § 9701 et seq*. (Division 9 of the Commercial Code); *CC §§ 1799.90-1812.20* (Unruh Retail Installment Sales Act); *CC §§ 2981-2984.4* (Rees-Levering Motor Vehicle Sales and Finance Act); *50 USC app §§ 501-596* (Servicemembers Civil Relief Act); M&V Code §§ 400-409.13; M&V Code §§ 800-811 (debt relief for active-duty servicemembers).

Cross References:

Evaluating debtor's assets, see Ch. 1, Planning Collection of Debt.

Planning collection of debt, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Effect of bankruptcy on a collection, see Ch. 3, Effect of Bankruptcy.

Family law issues, see California Family Law Practice and Procedure (Matthew Bender); California Forms of Pleading and Practice, Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

Secured transactions, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 42, Secured Transactions (Matthew Bender).

Consumer contracts, see California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans (Matthew Bender).

Standards of conduct for attorneys related to debt collection, see California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics (Matthew Bender).

Installment contracts, see California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender); California Legal Forms, Ch. 46, Credit Card and Other Open-End Transactions (Matthew Bender).

Automobile contracts, see California Forms of Pleading and Practice, Ch. 89, Sales and Financing Under the Rees-Levering Act (Matthew Bender); California Legal Forms, Ch. 47, Automotive Financing and Vehicle Leasing (Matthew Bender).

Consumer credit reporting, see California Forms of Pleading and Practice, Ch. 129, Consumer Credit Reporting (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBankruptcy LawDebtor Benefits & DutiesGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsInstallment ContractsReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.02 Objective and Strategy.

Recovering a debt prior to litigation has the advantage of saving the time and expense of litigation. Avoiding litigation not only saves the creditor the resources that would be expended in marshaling witnesses and evidence to support a claim in court, but it also minimizes the risk that discovery procedures and trial might result in the exposure of sensitive details regarding the creditor's business operations.

Strategic Point:

Planning for debt collection prior to litigation requires a thorough understanding and organization of the information particular to the collection action, as each action tends to be unique.

If fair debt collections practices laws govern the collection activity, counsel must pay close attention to the limits on communication with the debtor and third parties, and should have office procedures in place to handle incoming cases. Further, counsel must pay attention to the interplay between federal and state laws. A debt collector's act that might conform to one law may be prohibited by another law.

In evaluating whether to attempt debt collection prior to litigation, counsel should review all documentation relevant to the debt, including contracts and agreements, promissory notes, security agreements, purchase orders, invoices, proofs of delivery, billing statements, and pertinent correspondence between the creditor and debtor. If the debt is secured by collateral, counsel should determine whether there are repossession, foreclosure, and sale options, whether other secured creditors have prior claims. Counsel should also ascertain whether attorney's fees and collection expenses are contractually available, and whether there are any special conditions or circumstances that might affect the amount due.

Finally, counsel should evaluate whether bankruptcy laws may protect the debtor or stay any debt collection activities.

Cross Reference:

Planning for debtor's bankruptcy, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase

AdministrationProfessional ServicesGeneral OverviewBankruptcy LawCase AdministrationProfessional ServicesCompensationGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of Collateral

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II. EXPLORING PRE-LITIGATION DEBT COLLECTION OPTIONS

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5.03 CHECKLIST: Exploring Pre-Litigation Debt Collection Options

☐ Determine whether debtor's file is a complete record of transaction at issue.

Discussion:
See *5.04 -5.05*

- ○ Are all transaction documents present?
- ○ Is a record of payments present?
- ○ Are all financial records updated?
- ○ Is debtor's credit file present?
- ○ If any exist, are all creditor's notes and correspondence with debtor present?

☐ Determine whether fair debt collection practices laws apply.

Discussion:
See *5.06[1], 5.10 -5.16*

- ○ Does creditor or counsel qualify as debt collector for purposes of those laws?
- ○ Does debtor qualify as consumer?

☐ Determine whether debtor is protected by Servicemembers Relief Acts.

Discussion:
See *5.06[2], 5.45 -5.56*

☐ Contact debtor to obtain information about debtor and debt, including following:

Discussion:
See *5.07*

- ○ Debtor's reason for not paying debt.
- ○ Debtor's financial condition.
- ○ Whether other creditors are being paid by debtor.
- ○ Whether other creditors have engaged in collection efforts against debtor.

☐ Consider assigning debt to collection agency.

Discussion:
See *5.08[1]*

☐ Consider attempting to settle with debtor.

Discussion:
See *5.08[2]*

- ○ If claim is disputed, evaluate strengths and weaknesses of both sides to determine bargaining position.
- ○ If debtor is willing to pay but is financially unable to pay full amount, determine whether less than full amount is acceptable to creditor.

☐ Consider seeking debtor's confession of judgment.

Discussion:
See *5.08[3]*

☐ Determine availability of self-help options.

Discussion:
See *5.08[4], 5.33 -5.44*

- ○ Is loan collateralized by property capable of being repossessed?
- ○ Has security interest been perfected properly?

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment by ConfessionContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.04 Options and Strategies.

Each debt collection case should be assessed on its own merits, because the governing documents might have terms, obligations, and remedies unique to that particular transaction. In addition, not all debtors are alike, as some are able to pay but dispute some aspect of the action, while others are willing to pay but are financially unable.

Cross Reference:

Pre-litigation collection options, see *5.08*.

The nature of the debt itself will often dictate counsel's course of action in a debt collection. If the debt is governed by the Fair Debt Collection Practices Act ("FDCPA") [*15 USC § 1692-1692o*] or the Rosenthal Fair Debt Collection Practices Act ("Rosenthal") [*CC § 1788-1788.33*], then counsel, and his or her support staff, must proceed carefully to avoid liability for a violation of these statutes. Counsel must also determine the client's options if the debt is secured by collateral, including self-help options.

Cross References:

Fair debt collection practices laws, see *5.18 -5.32*. Self-help repossession, see *5.33 -5.44*.

Evaluating debtor's assets, see Ch. 1, Planning Collection of Debt.

Planning collection of debt, see Ch. 2, Locating the Debtor and Indentifying the Debtor's Assets.

Effect of bankruptcy on a collection, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.05 Counsel Should Review Creditor's Entire File on Debtor.

The first step counsel should take in attempting to collect debt without litigation is obtain the creditor's *entire* file pertaining to the debtor and the underlying transaction, including all notes and correspondence (including any e-mails or other electronic information) between the creditor and debtor. This is the only way to be sure counsel has an informed evaluation of the creditor's claim.

Strategic Point:Reasonable Diligence:

The best practice is to have an attorney review the file to determine:

- The viability of the debt.
- That it is within the applicable statute of limitations.
- That there is enough documentation to obtain a judgment on the debt.

Review solely by a non-attorney staff member might result in important legal issues being overlooked.

In reviewing the creditor's file, counsel should evaluate the potential for recovery in light of such factors as the following:

- The current amount of the debt.
- Whether the parties' contract provides for any consequential damages for failure to pay the debt.
- The terms of default.
- Whether the debt is secured by collateral, and if so, whether any security interest has attached and been perfected. A UCC search will help to identify other secured creditors and determine lien priority.
- The debtor's potential defenses, including those that may be based on prior communications or conduct by the creditor.

- Whether there are guaranties supporting the debt.

- The debtor's available financial resources. A credit report may help in assessing the debtor's financial status and the likelihood of a bankruptcy petition.

- Whether the parties' contract provides for recovery of attorney's fees and collection costs.

The creditor's file also may reveal whether the debtor has had similar previous dealings with the creditor, and what other debtors, guarantors, or obligors might be involved in the transaction or might be brought into settlement negotiations.

Cross References:

Planning of debt collection, see Ch. 1, Planning Collection of Debt.

Locating debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Perfection of security interests, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral Overview

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5.06 Counsel Must Determine Whether Special Debtor Protections Affect Collection Activity.

5.06[1] Fair Debt Collection Practices Laws Protect Consumers. Before contacting the debtor or any third party, counsel should determine whether collection of the debt will be subject to federal and state regulation under federal and California fair debt collection practices acts. This means determining whether the creditor and counsel meet the definition of debt collector, and whether the debt arises from a consumer transaction.

Cross References:

"Debt collectors" subject to fair debt collection laws, see *5.13 -5.15*.

Federal and state definitions of "consumer transaction," see *5.16*.

Regulation of communications with debtor and third parties, see *5.17 -5.21*.

Consider:

Even in a case in which the federal and state acts do not apply, it is good practice for counsel to follow federal and state debt collection practices laws, because it avoids potential violation of any ethical standards under the Business and Professions Code.

5.06[2] Servicemembers Relief Acts Protect Consumers Who Are Members of Military. If the debtor is or might be a member of the military services, counsel should determine whether collection of the debt will be subject to federal and state laws governing the collection of consumer debts from members of the military.

Cross Reference:

Federal and California Servicemembers Relief Acts, see *5.45 -5.56*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsGovernmentsFederal GovernmentClaims By & AgainstReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.07 Counsel Should Contact Debtor Directly.

As soon as possible after reviewing the file, counsel should contact the debtor to determine:

- Whether the debtor disputes the existence or amount of the debt, and
- Whether the debtor can pay the debt.

Counsel's initial contact with the debtor is usually accomplished by sending the debtor a demand letter. In some circumstances, such as when a debt is payable "on demand," a demand letter will be a prerequisite to any lawsuit. Depending on the circumstances of the case, however, it is often useful for counsel to follow up the letter with a telephone call, or to call the debtor before sending a letter.

Strategic Point: Reasonable Inquiry--Purpose of Contact:

Regardless of the type of claim counsel is handling (such as a loan transaction, a retailer-consumer dispute, or a commercial dispute between merchants), it is important to attempt to speak with the debtor, in person or by telephone, before bringing suit. In talking with the debtor, counsel should remain as calm, professional, and reasonable as possible. Aside from attempting to collect the debt, counsel's purpose is to discover what reason, if any, the debtor has for not paying. Often, this is the best form of "discovery." The debtor may have a valid defense (for example, the goods were ordered but never received, or the services provided were not satisfactory). By discovering this information, counsel and the creditor can prepare for the issues that might be faced if a suit is filed, and decide whether a suit should even be filed at all.

In talking with the debtor, counsel may also learn potentially useful information such as the debtor's assets and liabilities and overall financial status; whether other creditors of the debtor are being paid; and whether other creditors have security interests in the debtor's assets, have engaged in collection efforts, or are suing the debtor.

Counsel may learn that there are no defenses to the debt, but that the debtor is having financial difficulties. This would be a good time to discuss various options with the debtor, such as paying by credit card, accepting a reduced lump-sum payment, suggesting third parties the debtor might borrow from, entering into a payment arrangement, or having the debtor sign a promissory note or pledge

security for the debt.

Consider: Debtor's Financial Difficulties:

If counsel becomes aware that the debtor is having financial difficulties, counsel should consider what counsel and the creditor would do to collect the debt if it were reduced to judgment (e.g., garnish the debtor's wages, place a "keeper" in the debtor's business, obtain a writ of execution and levy against the debtor's bank account, file an abstract of judgment against the debtor's real property). Under the circumstances, it might be advisable to reconsider even bringing suit in the first place, if the debtor will lack the financial resources to satisfy the judgment.

Warning:

If the debt was created in a consumer transaction, counsel's contacts with the debtor must comply with the requirements of federal and state fair debt collection practices laws.

Researching Debtor's Assets Using Online Resources:

Many online resources are available for obtaining information about a debtor's assets. These resources can help you determine if a debtor has the resources to satisfy a judgment. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find Assets > Real Property
  - Sample Search: To find the debtor's real property assets, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
  - Sample Search: To determine if the debtor owns an airplane, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Watercraft
  - Sample Search: To determine if the debtor owns a boat, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Stock Information > Stock Ownership
  - Sample Search: To find stock owned by the debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Form for initial letter to debtor, see *5.57*.

Restrictions on communicating with debtor regarding consumer debt, see *5.22 -5.32*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices ActTransportation LawWater TransportationLicensing & Registration

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5.08 Counsel Should Evaluate Pre-Litigation Collection Options.

5.08[1] Creditor May Assign Claim to Collection Agency. If the debtor's liability is clear and the creditor wishes to minimize its involvement in the collection process, the creditor may simply assign the debt to an agency that is in the business of taking assignments of debts for collection. The collection agency ordinarily will pay the creditor whatever amount is collected from the debtor, less a fee [*see Hospital Med. Collections, Inc. v. City of Los Angeles (1976) 65 CA3d 46, 50, 135 CR 147]* .

Reasonable Diligence:

Before advising the creditor to assign the debt for collection, counsel should send the debtor a demand letter. If the debtor has no real defense to the debt, a firm but courteous letter from an attorney might be enough to motivate the debtor to pay the full amount of the debt voluntarily.

Strategic Points--Creditor:

Depending on the specific circumstances of the case, a collection agency's fee may be less than the fees and costs that counsel would incur in collecting or litigating the creditor's claim, depending on the fee agreement in place with the creditor's counsel. However, the creditor may consider attorneys who specialize in collections and do so on a contingency fee basis; their fees may be competitive with agencies and, in addition, they may be more knowledgeable and will generally be quicker in initiating litigation when demand collection is unsuccessful. Assigning the debt to a collection agency also will relieve the creditor and counsel of the need to monitor compliance with California and federal fair debt collection regulations.

Drawback:

If the creditor expects to have future business transactions with the debtor, assignment of the debt to a collection agency may be less desirable. Being contacted by a collection agency is often a traumatic event that can affect the debtor's willingness to enter into future business relations with the creditor.

Cross References:

Fair debt collection regulation, see *5.10 -5.32*.

Assignment to collection agency, see California Forms of Pleading and Practice, Ch. 60, Assignments (Matthew Bender).

5.08[2] If Debtor Disputes Claim or Is Unable to Pay, Settlement Should Be Considered. Counsel should consider whether negotiating a settlement of the debt claim would be more effective than pursuing litigation. Pre-suit settlement of the claim will take less time and be less expensive than a lawsuit. In addition, the outcome of litigation is never certain, particularly if the debtor has a credible defense to the debt claim or has limited financial resources to pay the debt. In such circumstances, settlement of the creditor's claim has the advantage of certainty: the creditor may prefer a present, firm settlement for something less than the full amount of the debt, rather than face the uncertainty of what amount may be awarded and eventually collected in litigation.

Counsel should obtain all of the debtor's updated financial information, and thoroughly understand the creditor's and debtor's claims and defenses, before deciding to pursue a settlement.

Counsel should confer with the creditor to determine what concessions, in terms of extensions of time to pay or reduced payments, may be granted to the debtor to obtain a settlement. A thorough review of the debtor's assets and other liabilities will be useful in evaluating the collectability of the debt and how far the debtor may be pushed in negotiations.

Cross References:

Assessment of debtor's financial situation, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Evaluating collectability of debt, see Ch. 1, Planning Collection of Debt.

Consider:

A settlement of a debt claim (sometimes called a "workout" in the context of a defaulted loan obligation) will probably result in some terms that are less favorable to the creditor than in the original transaction (e.g., more time for the debtor to pay, or a reduced debt amount). At the same time, however, settlement negotiations may also present an opportunity to strengthen the creditor's position. For example, in return for an extension of time to pay or a discounted payoff amount, the creditor may obtain a pledge of the debtor's real or personal property to secure a previously unsecured or undersecured debt [*see CCP §§ 703.010(b)*, *704.940* (homestead exemption inapplicable to voluntarily encumbered property)]. Another method for improving the creditor's position is to obtain personal guaranties of the obligation from principals of a corporate debtor [*see CC §§ 2792*, *2793*]. If the debt is already supported by guaranties, the creditor may wish to obtain security for the guaranties. Further, in the context of restructuring the debt, the creditor may find it advantageous to obtain a release of liability, including unknown claims, or to add an attorneys' fee provision covering disputes that may arise from the debtor's failure to comply with the terms of the settlement. Creditors' attorneys should note also that a waiver of a jury trial in a workout may not be effective under current California law, but a provision for a judicial reference under *CCP §§ 638* and *645.1* may, as a practical matter, achieve essentially the same result.

Strategic Point--Preliminary Understanding:

Before even discussing potential modifications to the terms and conditions of the debt, it is good practice to have a pre-settlement or pre-workout agreement or disclosure. At the very least, such an agreement or disclosure should advise the debtor that conversations and negotiations are not binding unless and until they are reduced to writing and signed by all parties, that such discussions are not a waiver of existing defaults or rights by the creditor to proceed with other remedies, that there has been no fraud or other

inducement to engage in such discussions, that the parties are not in any fiduciary or special relationship and there is no reliance by the debtor on the creditor other than the normal relationship existing by virtue of the transaction underlying the debt, and that all parties have had the opportunity to discuss the agreement with their counsel. Ideally, there should be an acknowledgement of the amount of the debt, the default, and a waiver of defenses or affirmative claims from the debtor to the creditor.

Strategic Point: Reasonable Diligence--Written Settlement:

Any settlement should be reflected in a written agreement and, if appropriate, in a promissory note. It is desirable that any settlement agreement recites that the debtor acknowledges the full amount due, but permits full compliance with the settlement agreement by the payment of a lesser amount (if the settlement calls for a lower amount), with the further provision that the full amount will be due in the case of any default of the settlement agreement [*but see Greentree Financial Group, Inc. v. Executive Sports, Inc. (2008) 163 CA4th 495, 78 CR3d 24*]. If the debtor will not agree to the recitation of the higher amount (and even if the debtor will agree, if there is an issue of fraud), it is important to state that in the event of default, the new arrangement is not a novation (i.e., the substitution of a new obligation for an old one [*see CC §§ 1530,1531(1)*]), but instead is an accord and satisfaction [*see CC §§ 1521, 1522*]. Such a clause will enable the creditor to sue for the higher uncompromised amount due, as well as for fraud (rather than simply breach of contract), which might be important should the debtor file for bankruptcy. It is also important to make clear that any releases of the debtor will not be effective until after 91 days after the final payment is received, to permit the filing of a bankruptcy claim in the event that a bankruptcy is filed in the preference period [*see 11 USC § 547*].

Cross References:

Discussion of and forms for settlements, see California Legal Forms, Ch. 77, Discharge of Obligations (Matthew Bender).

Discussion of and forms for promissory notes, see California Legal Forms, Ch. 55, Negotiable Instruments (Matthew Bender).

5.08[3] Counsel Should Consider Obtaining Confession of Judgment.

5.08[3][a] Confession of Judgment Admits Liability for Debt. If the debtor does not dispute the debt, but is simply unable to pay on time, it might be possible for counsel to obtain a confession of judgment. A confession of judgment may be entered for money due or to become due, or to secure any person against contingent liability on behalf of the defendant [*CCP § 1132(a)*]. However, a confession of judgment may be entered only if the debtor knowingly waives his or her rights and is represented by independent counsel who advises the debtor to confess to the judgment [*CCP § 1132(b)*].

Exception:

A confession of judgment normally may not be taken from an individual debtor for a consumer debt [*12 CFR §§ 227.13(a), 535.2(a)(1); 16 CFR § 444.2(a)(1)*].

Consider:

The confession of judgment procedure is rarely used, because few debtors will agree to it, since confessing judgment effectively waives the debtor's right to trial and a hearing prior to entry of judgment. Under some circumstances, however, it might be reasonable for the debtor to confess judgment. For example, if the debtor can assert no defense to the debt, is willing to pay the debt when financial circumstances allow, and wishes to maintain a good business relationship with the creditor, the creditor may offer to postpone collection efforts in return for the debtor's confession of judgment.

Cross Reference:

Forms and procedure for confession of judgment, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

5.08[3][b] Creditor Must Obtain Written Statement Authorizing Entry of Judgment. If the debtor agrees to confess judgment, the creditor must obtain a written statement, signed by the debtor and verified under oath, that [*CCP § 1133* (if statement covers contingent liability, it must state facts constituting the liability and show that the confessed sum does not exceed the liability)]:

- Authorizes the entry of judgment against the debtor for a specified sum;
- States concisely the facts out of which the debt arose; and
- Shows that the sum confessed is justly due (or to become due)

Cross Reference:

Forms for confession of judgment, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

5.08[3][c] Debtor Must Sign Certificate of Review by Independent Counsel. An attorney independently representing the debtor must sign a certificate stating that the attorney has examined the proposed judgment (i.e., the debtor's statement confessing judgment) and has advised the debtor with respect to the waiver of rights and defenses under the confession of judgment procedure, and has advised the debtor to utilize the confession of judgment procedure [*CCP § 1132(b)*].

Cross Reference:

Forms for confession of judgment, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

5.08[3][d] Statement and Certificate Must Be Filed in Court Where Judgment Will Be Entered. The debtor's statement and the attorney's certificate must be filed with the clerk of the court in which the judgment will be entered [*CCP §§ 1132(b), 1134(a)*]. The creditor must pay a fee covering court costs, which will become part of the judgment entered by the clerk [*CCP § 1134(a), (b)*].

Cross Reference:

Procedure for confession of judgment, see California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

5.08[4] Counsel Should Consider Self-Help Repossession. The information gathered from the creditor's file and from the debtor will help counsel determine whether the creditor may and should repossess any collateral securing the debt.

Cross Reference:

Repossession of collateral, see *5.33 -5.44*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral

OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawFormationExecutionContracts LawNegotiable InstrumentsGeneral Overview

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5.09 Handling Payments by Debtor.

If counsel's contact with the debtor results in full payment of the debt, counsel should promptly forward the payment to the creditor. If the debtor issues a check to the attorney, the check should be deposited in a regular client trust account for the benefit of the creditor [*see B&P Code § 6211(a)*]. Effective Jan. 1, 2008, the account must be an "IOLTA" account paying a rate of interest not less than to a non-attorney on similar accounts [*B&P Code §§ 6211(a), 6212(a), (b)*; *see B&P Code § 6213(j)* (definition of "IOLTA account")], unless the amount is large or will be held for a long period of time, in which case, a separate interest bearing account should be opened [*B&P Code § 6211(b)*].

Warning:

Debtors sometimes might attempt to pay less than the full amount of the debt with a check that includes a notation that it constitutes "payment in full," or a similar notation. The effect of such a notation is unclear under current statutes. Even if the creditor strikes out the notation, it is possible that negotiating the check might constitute an accord and satisfaction (i.e., an agreement to accept a reduced payment in satisfaction of a disputed debt). Under *[CC § 1526(a)]*, which became operative in 1988, when a claim is disputed or unliquidated and a check is tendered by the debtor in settlement of the claim, and the words "payment in full" or other words of similar meaning appear on the check, the acceptance of the check does not constitute an accord and satisfaction if the creditor strikes out or otherwise deletes that notation. In contrast, *Com Code § 3311*, which became operative in 1993, provides that the creditor's obtaining payment of such a check will discharge the disputed claim unless the creditor tenders repayment within 90 days after the instrument was paid [*see Woolridge v. J.F.L. Elec., Inc. (2002) 96 CA4th Supp 52, 58-60, 117 CR2d 771* (enactment of *Com Code § 3311* superseded *CC § 1526(a)*)]. Accordingly, the best course is to return the uncashed check to the debtor, unless the creditor is willing to accept the lesser amount in full satisfaction of the debt.

Trap:

If the debtor sends a notice between 15 and 90 days before sending a check with a restricted endorsement, and the creditor cashes the check without striking out the restriction, the creditor cannot claim that cashing the check was inadvertent, and may be forced to accept the lesser amount [*CC § 1526(b)(2)*].

Cross Reference:

Acceptance of check creates accord and satisfaction, see California Forms of Pleading and Practice, Ch.

6, Accord and Satisfaction (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Subject MatterDefinitionsGeneral OverviewContracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral Overview

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5.10 CHECKLIST: Determining Whether Fair Debt Collection Practices Acts Apply to Particular Collection.

☐ Determine whether collection involves "debt collector" under federal and California law.

○ Federal definition applies to persons attempting to collect the debt of another.

Authority:
15 USC § 1692a(6)

Discussion:
See *5.14 -5.15*

○ California definition includes creditors.

Authority:
CC § 1788.2(c)

Discussion:
See *5.14 -5.15*

☐ Determine whether debt arises from consumer transaction.

○ Transaction must be for goods or services used primarily for personal, family or household use.

Authority:
15 USC § 1692a(5); *CC § 1788.2(d)*

Discussion:
See *5.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewContracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.11 Options and Strategies.

Federal and state debt collection practice laws are interpreted liberally in favor of the consumer, so it is essential that counsel review whether his or her practices fall under either act. While California adopts a substantial portion of the federal law, it does deviate from federal law and in some cases creates different standards to follow.

Strategic Point:

When California and federal law supply different standards for a particular matter, the prudent practice is to comply with the higher standard, that is, the standard that provides greater protection for the debtor. Moreover, if counsel is uncertain whether the debt might be subject to California and federal fair debt collection practices laws, the best practice is to comply with those laws.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewGovernmentsFederal GovernmentClaims By & AgainstReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.12 Purpose of Debt Collection Practices Laws Is to Protect Consumers.

The Fair Debt Collection Practices Act ("FDCPA") [*15 USC § 1692 et seq.*] and California's Rosenthal Fair Debt Collections Practices Act ("Rosenthal") [*CC § 1788.1 et seq.*] regulate debt collections on certain kinds of debt. The purpose of the FDCPA is to prevent "the use of abusive, deceptive, and unfair debt collection practices" [*15 USC § 1692*]. Rosenthal is similar in its purpose [*CC § 1788.1*]. They are remedial statutes and are construed liberally in favor of the consumer [*McDaniel v. South & Assocs., P.C. (2004 D Kan) 325 F Supp2d 1210, 1215*].

The Noerr-Pennington doctrine, which protects petitioning activity under the U.S. Constitution, does not bar an action against someone who violates FDCPA provisions prohibiting harassment, false representations, or the use of unfair or unconscionable means to collect a debt when a default judgment was obtained with false representations to the court that service had been effectuated [*Sial v. Unifund CCR Partners (SD Cal 2008) 2008 US Dist LEXIS 66666, *9]* .

The litigation privilege does *not* provide a defense to a claim under Rosenthal asserting a violation of the provision that prohibits attempts to collect a debt through judicial proceedings when the debt collector knows that service of process, when essential to achieving jurisdiction, has not been effectuated [*Sial v. Unifund CCR Partners (SD Cal 2008) 2008 US Dist LEXIS 66666, *14]* . The *Sial* court did note a substantial split of authority on whether the Rosenthal Act and the litigation privilege are irreconcilable.

The litigation privilege does not provide defense to a claim under Rosenthal [*Komarova v. National Credit Accept., Inc. (2009) 175 CA4th 324, 337, 95 CR3d 880, 890* ; *Sial v. Unifund CCR Partners (SD Cal 2008) 2008 US Dist LEXIS 66666, *14* (claim under Rosenthal provision that prohibits attempts to collect a debt through judicial proceedings; noting substantial split of authority on whether Rosenthal and litigation privilege are irreconcilable]. Nor is the litigation privilege under California law a defense to violations of the FDCPA [Welker v. Law Office of Horwitz (SD CA 2009) 626 FSupp2d 1068, 1072].

The FDCPA does not apply to a judgment arising out of a cause of action for conversion, because this does not fall within the definition of "debt" under the FDCPA [*Fleming v. Pickard (9th Cir 2009) 581 F3d 922]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt

CollectionUnfair PracticesReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.13 Collector Must Follow Both Federal and State Laws in Action Against Debtor.

5.13[1] Federal Statute Preempts State Statute When Inconsistent. The federal law will preempt the state law to the extent the two are inconsistent [*15 USC § 1692n*]. State law is not considered inconsistent if it provides greater protection than the federal statute [*15 USC § 1692n*; *see Pirouzian v. SLM Corp. (2005 SD Cal) 396 F Supp2d 1124, 1131* (California's more inclusive definition of "debt collector" not inconsistent with FDCPA; California statute merely provides a separate state remedy beyond what federal statute provides)].

5.13[2] Federal Regulators May Exempt Any Class of Debt Collection in Any State. The Federal Trade Commission must exempt from the requirements of the FDCPA any class of debt collection if it determines that the state law governing that class is "substantially similar" to the FDCPA's requirements, and provides adequate provision for enforcement [*15 USC § 1692o*]. The FTC's staff commentary on the FDCPA is at http://www.ftc.gov/os/statutes/fdcpa/commentary.htm.

5.13[3] California Statute Adopts Substantial Portion of Federal Statute. In California every debt collector involved in collecting a consumer debt must comply with *15 USC §§ 1692e-1692j* of the FDCPA, as well as its remedies in *15 USC § 1692k* [*CC § 1788.17*].

Consider:

California law does not adopt the FDCPA's definitions, which include exemptions [*see CC § 1788.17*; *see also 15 USC § 1692a*]. Therefore, counsel and staff should afford the debtor the protections of the FDCPA without regard to whether an FDCPA exemption might by its terms apply.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionUnfair PracticesReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.14 Federal and State Definitions of Debt Collector Differ.

5.14[1] Federal Statute Narrowly Defines Debt Collector.

5.14[1][a] Federal Definition Applies Only to Persons Attempting to Collect the Debt of Another. A "debt collector" is a person using any instrumentality of interstate commerce or the mails [*15 USC § 1692a(6)*]:

- In any business whose principal purpose is the collection of any debts;
- Who regularly collects, or attempts to collect, consumer debts owed or due or asserted to be owed or due another;
- Any creditor who, in the process of collecting his or her own debts, uses any name other than his or her own that would indicate that a third person is attempting to collect such debts; or
- Employed in any business whose principal purpose is the enforcement of security interests.

5.14[1][b] Federal Definition Excludes Creditors. The FDCPA excludes creditors or any officer or employee of a creditor (such as house counsel by the creditor) collecting debts for the creditor [*15 USC § 1692a(6)(A)*]. The FDCPA also defines "creditor" as any person who offers or extends credit creating a debt to whom the debt is owed, but does not include a person who receives an assignment or transfer of a debt in default for personal, family, or household purposes [*15 USC § 1692a(2)*; *see Kimber v. Federal Fin. Corp. (MD Ala 1987) 668 F Supp 1480, 1484*].

5.14[1][c] Federal Definition Excludes Credit Affiliates or Subsidiaries. A creditor's affiliate or subsidiary is exempt if it collects debts only for its related creditor and the debt collection is not the related entity's principal business [*15 USC § 1692a(6)(B)*].

5.14[1][d] Federal Definition Excludes Certain Federal or State Employees. A federal or state employee is exempt if collecting or attempting to collect debt is part of his or her official duty [*15 USC § 1692a(6)(C)*].

5.14[1][e] Federal Definition Excludes Process Servers. A process server is exempt when serving or attempting to serve process in connection with judicial enforcement of any debt [*15 USC § 1692a(6)(D)*].

5.14[1][f] Federal Definition Excludes Certain Nonprofit Organizations. A nonprofit organization is exempt if, at the request of consumers, it offers consumer credit counseling services, assists in debt liquidation, receives payments from consumers and distributes the payments to creditors [*15 USC § 1692a(6)(E)*].

5.14[1][g] Federal Definition Excludes Others Involved in Certain Debt Collection Activities. The federal definition of "debt collector" does not include any person collecting debts to the extent that activity (1) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (2) originates by that person; (3) concerns a debt not in default at the time it was obtained by that person; or (4) is obtained by that person as a secured party in a commercial credit transaction involving the creditor [*15 USC § 1692a(6)(F)*].

5.14[2] State Definition of Debt Collector Includes Creditors but Excludes Attorneys. In California a "debt collector" is any person or employee of the person who, in the ordinary course of business, regularly engages in debt collection, on behalf of himself or herself, or another, but does not include attorneys [*CC § 1788.2(c)*]. However, an attorney may still be a debt collector under the FDCPA, and its debt collection practices will be regulated by FDCPA as well as the Business and Professions Code [*see 5.15*, *5.16*; *Heintz v. Jenkins (1995) 514 US 291, 292-299, 115 S Ct 1489, 131 L Ed2d 395* ; *B&P Code § 6077.5(b)*].

Warning:

The Rosenthal Act provides broader protection for consumers than the federal law because Rosenthal applies to any person or employee collecting consumer debt. Thus, a creditor might be exempt from federal law but might be subject to the regulations under California law [*see Pirouzian v. SLM Corp. (2005 SD Cal) 396 F Supp2d 1124, 1131* (California's more inclusive definition of "debt collector" not inconsistent with FDCPA; state statute merely provides a separate state remedy beyond what the federal provides)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewContracts LawSecured TransactionsDefaultGeneral OverviewGovernmentsFederal GovernmentEmployees & OfficialsLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.15 Attorney May Qualify As Debt Collector.

5.15[1] Attorneys Subject to Federal FDCPA If "Regularly Engaged" in Debt Collection. Attorneys who regularly engage in consumer debt collection activity for their clients are "debt collectors" under FDCPA, even when that activity consists of litigation [*Heintz v. Jenkins (1995) 514 US 291, 299, 115 S Ct 1489, 131 L Ed2d 395*]. An attorney who regularly undertakes debt collection services, even if those services are not the principal purpose of the business, is a debt collector under the FDCPA [*Garrett v. Derbes (5th Cir 1997) 110 F3d 317, 318*].

Some courts look at not only the percentage of the law firm's business in debt collection but also the volume of the activity. If the volume of the debt collection services is great enough, it is irrelevant that those services only amount to a small fraction of the total business activity [*Garrett v. Derbes (5th Cir 1997) 110 F3d 317, 318*].

Examples--Regularly Engaged in Debt Collection:

- 80 to 100 percent of practice in the area of debt collection [*Fox v. Citicorp (9th Cir 1994) 15 F3d 1507, 1513*].
- Attempts to collect debts from 639 individuals over a nine-month period but constituting only.5 percent of the practice [*Garrett v. Derbes (5th Cir 1997) 110 F3d 317, 318*].
- Sending 145 notices over the course of a year but amounting to only 5 percent of the firm's total business [*Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertollotti (2d Cir 2004) 374 F3d 56, 61-64*].
- Handling 356 delinquent mortgage loans a year even though the percentage of those loans in the aggregate is small [*Oppong v. First Union Mortgage Corp. (ED Pa 2005) 407 F Supp2d 658, 666-667*].

Examples--Not Regularly Engaged in Debt Collection:

- Having debt collection cases constituting only.61 percent of partner's practice, and 1.07 percent of firm's practice, over 18-month period [*Nance v. Petty, Livingston, Dawson & Devening (WD Va 1994) 881 F Supp 223, 225*].

- Debt collection activities incidental to, and not relied upon or anticipated in their practice of law [*Schroyer v. Frankel (6th Cir 1999) 197 F3d 1170, 1176-1177* (2 percent of one firm's aggregate business and 7.4 percent of the other firm's aggregate business does not equal regular debt collection)].

- Averaging less than two debt collection matters a year [*Mertes v. Devitt (WD Wis 1990) 734 F Supp 872, 873-875*].

Warning:

Claims of FDCPA violations against collection lawyers are on the rise, so special care should be taken to ensure that counsel's collection practice complies with the law.

5.15[2] Attorneys Must Follow Business and Professions Code. While attorneys are exempt from the provisions of Rosenthal, the Business and Professions Code sections regulating attorney conduct contain most of the provisions of the FDCPA [*see B&P Code § 6077.5*]. Willful violation can subject the attorney to disciplinary action by the state bar [*see B&P Code § 6077*]. Under the Business and Professions Code, attorneys and their employees must do the following:

- Identify themselves, their employer and their title or capacity [*B&P Code § 6077.5(b)*; *see 5.19*].

- Follow the time, place and manner restrictions of the FDCPA [*B&P Code § 6077.5(c)*; *see 5.24 -5.28*].

- If the debtor notifies the attorney in writing that it either refuses to pay the debt or asks the attorney to cease communications, that attorney must cease that communication except to notify the debtor that efforts are being terminated, that specific remedies may be invoked, or that the attorney intends to invoke those remedies [*B&P Code § 6077.5(d)*; *see 5.24[3]*].

- Not threaten to take nonjudicial action to dispose of or disable property if there is no present security interest in the property, no present intention to take possession of the property or the property is exempt by law from that disposition or disablement [*B&P Code § 6077.5(e)*; *see 5.27[4]*].

- Comply with FDCPA's five-day debt validation requirements [*B&P Code § 6077.5(g)*; *see 5.29[3]*].

Warning:

The FDCPA applies to an attorney's employees, so counsel must ensure that his or her staff is following the requirements. The best way to do so is to maintain and keep updated a manual for employees that lists do's and don'ts, and to have evidence that employees not only have access to the manual but that they have reviewed it on a regular basis. This also means that employees should not mislead debtors into believing that they are attorneys licensed to practice law, or let such misunderstandings go uncorrected.

Cross Reference:

Discussion, attorney practice and ethics, see California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsLegal EthicsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.16 Federal and California FDCPAs Govern Debts Arising From Consumer Transactions.

5.16[1] Federal Definition Focuses on Consumer Debt Transactions for Personal Use. "Debt" is "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" [15 USC § 1962a(5)]. Whether a debt is consumer or commercial requires examining the whole transaction and looking at the purpose for which the credit was extended [*Slenk v. Transworld Sys., Inc. (9th Cir 2000) 236 F3d 1072, 1075*].

Warning:

Counsel should not rely solely on the face of the loan document or other contract to determine if the debt was a "consumer debt" within the meaning of the Act. Instead, counsel should consider who the debtor is and the purpose of the debt transaction. For example, the fact that loan funds were deposited in a personal account may prevent the creditor from claiming the loan transaction had a business purpose. Conversely, a "personal loan" that is meant for investment by someone who regularly engages in such activities is more likely to be categorized as a non-consumer debt.

5.16[2] "Transaction" Must Involve Business Dealing or Other Consensual Obligation. Courts generally agree that at a minimum, a transaction "must involve some kind of business dealing or other consensual obligation" [*Hawthorne v. Mac Adjustment, Inc. (11th Cir 1998) 140 F3d 1367, 1371*]. A consumer transaction does not include a damages obligation arising from a tort action [*Hawthorne v. Mac Adjustment, Inc. (11th Cir 1998) 140 F3d 1367, 1371*]. In addition, a transaction need not require an offer or extension of credit [*Charles v. Lundgren and Assocs. (9th Cir 1997) 119 F3d 739, 741-742)*].

Examples--Debt Covered by FDCPA:

- Dishonored checks [*Bass v. Stolper, Koritzinsky, Brewster & Neider (7th Cir 1997) 111 F3d 1322, 1325-1329)*].
- Back rent [*Romea v. Heiberger & Assocs. (2d Cir 1998) 163 F3d 111, 114-116*].

- Student loans [*Skerry v. Massachusetts Higher Educ. Assistance Corp. (1999 D Mass) 73 F Supp2d 47, 52*].

- Municipal services [*Pollice v. National Tax Funding, L.P. (3d Cir 2000) 225 F3d 379, 400*].

- Condominium fees [*Ladick v. Van Gemert (10th Cir 1998) 146 F3d 1205, 1206-1207* ; *Thies v. Law Offices of William A. Wyman (1997 SD Cal) 969 F Supp 604, 605-608*].

Examples--Debt Not Covered by FDCPA:

- Child support [*Mabe v. G.C. Servs. Ltd. P'ship (4th Cir 1994) 32 F3d 86, 88*].

- Taxes [*Staub v. Harris (3d Cir 1980) 626 F2d 275, 278-279* ; *Pollice v. National Tax Funding, L.P. (3d Cir 2000) 225 F3d 379, 401-403*].

- Loan from friend to invest in company [*Bloom v. I.C. Sys., Inc. (D Or 1990) 753 F Supp 314, 317]* .

5.16[3] California Definition Is Similar to That of Federal FDCPA. Under California law, "debt" is "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 California law also only applies to consumer debts [*see CC § 1788.2(b)*, definition of "debt collection"].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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IV. COMMUNICATING WITH THIRD PARTIES TO ACQUIRE INFORMATION ABOUT DEBTOR AND DEBT

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5.17 CHECKLISTS: Communicating With Third Parties to Acquire Information About Debtor and Debt.

5.17[1] Communicating With Third Parties to Acquire Information About Debtor.

☐ Determine whether information sought is allowed under law.

Authority:
15 USC § 1692b; *CC § 1788.12*

Discussion:
See *5.19*

○ Debt collector may acquire location information about debtor.

☐ Collector must identify self to third party.

☐ California requires contact to be in writing.

☐ Collector is prohibited from taking certain actions.

5.17[2] Communicating With Third Parties to Acquire Information About Debt.

☐ Determine whether communication with third party is allowed under law.

○ Debt collector may communicate with consumer reporting agency, creditor (or its attorney), or debt collector's attorney.

Authority:
15 USC § 1692c(b); *CC § 1788.12(e)*

Discussion:
See *5.20*

○ Privacy laws may affect debt collection.

☐ Gramm-Leach-Bliley makes it a crime to obtain personal customer information from financial institutions using false pretenses.

Authority:
15 USC 6821 et seq.

Discussion:
See *5.21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsBanking LawCriminal OffensesGeneral OverviewBanking LawFederal ActsGramm-Leach-Bliley ActReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.18 Options and Strategies.

Counsel has only a few options if acquiring information about a consumer debtor from third parties. A debt collector must first attempt to acquire location information by written communication. The written communication must not state the consumer owes any debt, or indicate on the letterhead that indicates the communication is related to debt collection.

A debt collector is also very limited with respect to whom it may communicate about the debtor's debt. Communication allowed under law only extends to a consumer reporting agency, creditor or the creditor's or debt collector's attorney.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsBanking LawFederal ActsGramm-Leach-Bliley ActReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.19 Collector May Acquire Location Information About Debtor.

5.19[1] Collector Must Identify Self to Third Party. When acquiring location information from third parties about a debtor, the debt collector must state that he or she is confirming or correcting location information concerning the consumer, and, if expressly requested, identify his or her employer [*15 USC § 1692b(1)*]. "Location information" is a debtor's residence and home phone number or the debtor's place of employment [*15 USC § 1692a(7)*].

5.19[2] California Law Requires Initial Contact to Be in Writing. A debt collector may contact a debtor's employer to acquire location information, but that communication must be made in writing unless the written communication receives no response within 15 days, at which point the debt collector may orally contact "only as many times as is necessary to the collection of the debt" [*CC § 1788.12(a), (b)*].

Exception:
A collector may contact a debtor's employer strictly regarding employment verification orally without first written contact [*CC § 1788.12(a)*].

Trap:
The debt collector must not disclose to any third party the reason for trying to locate the debtor [*15 USC § 1692b(2), (5)*]. Therefore, the debt collector may state that he or she is trying to locate the debtor (identifying the debtor by name), but the debt collector may not say anything about the debt or indicate that the purpose of the inquiry is to collect a debt.

5.19[3] Collector Is Prohibited From Certain Actions Concerning Location Information. A debt collector may not do any of the following:

- State the consumer owes any debt [*15 USC § 1692b(2)*];
- Communicate with a third party more than once unless requested to do so or unless the debt collector reasonably believes that the earlier response of the person is incorrect or incomplete, and that person now has correct or complete information [*15 USC § 1692b(3)*];
- Communicate by postcard [*15 USC § 1692b(4)*];

- Use any language/symbol anywhere on a written communication that indicates it relates to collection of a debt [*15 USC § 1692b(5)*];

- Communicate with the third party if that person is represented by an attorney, unless the attorney fails to respond within a reasonable period [*15 USC § 1692b(6)*].

Strategic Point:

The debt collector may ascertain the debtor's location and employment status by obtaining a credit report on the debtor or using an online locate-and-research tool such as Accurint[(R)] [*see* www.accurint.com].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsBanking LawFederal ActsGramm-Leach-Bliley ActReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.20 Acquiring Information About Debt From Third Party Is Limited.

A debt collector may only communicate with a consumer reporting agency, the creditor, the attorney of the creditor or the attorney of the debt collector [*15 USC § 1692c(b)*].

Exceptions:

A debt collector may communicate with other third parties if the consumer gave prior consent directly to the debt collector, a court of competent jurisdiction gave express permission, or such communication is reasonably necessary to effectuate a postjudgment judicial remedy [*15 USC § 1692c(b)*]. Similarly, California limits pre-judgement communication with a debtor's family member (other than the spouse of the debtor, or the parent or guardian of a debtor who either is a minor or lives in the same household as the parent or guardian) only to locate the debtor or if the debtor or debtor's attorney gave prior written consent [*CC § 1788.12(b)*]. Communication with a consumer reporting agency, or "any other person reasonably believed to have a legitimate business need for such information" is also allowed [*CC § 1788.12(e)*].

Example:

A debtor who is refinancing his or her home mortgage, and wants to pay off the debt from the proceeds of the refinance, may give permission for the debt collector and mortgage lender to communicate.

Warning:

It is not permissible to access a credit report simply because one is attempting to collect a debt. The debt must have resulted from a transaction involving the deferral of payment in a purchase of property or services [*Pintos v. Pac. Creditors Ass'n. (9th Cir 2007) 504 F3d 792, 798-800* (noting that after a revision to the Fair Credit Reporting Act, *15 USC § 1681 et. seq.*, the holding in *Hasbun v. County of Los Angeles (9th Cir. 2003) 323 F3d 801* that debt collection itself was a permissible purpose for obtaining a credit report--was no longer persuasive)].

Warning:

To lessen the risk of inadvertently violating FDCPA and California restrictions, the debt collector should minimize contacts with the debtor's family and third parties, except as necessary to locate the debtor and verify employment. Instead of contacting such persons, the debt collector should consider using an online locate-and-research tool such as Accurint[(R)] [*see* www.accurint.com].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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Chapter 5 Debt Collection Prior to Litigation
IV. COMMUNICATING WITH THIRD PARTIES TO ACQUIRE INFORMATION ABOUT DEBTOR AND DEBT

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5.21 Privacy Laws May Affect Information Gathering.

5.21[1] Gramm-Leach-Bliley Act Protects Certain Financial Information. The Gramm-Leach-Bliley Act provides protection for customer information of financial institutions by making it a crime to use false pretenses to obtain customer information [*see 15 USC § 6821 et seq.*]. According to the Act, financial institutions have an "affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information" [*15 USC § 6801*].

5.21[2] Debt Collectors Must Protect Information Under Gramm-Leach-Bliley. Federal regulations require financial institutions to develop procedures to safeguard their personal customer information [*see 16 CFR § 314.1(a)*]. This includes overseeing the actions of its "service providers," defined by the regulations as "any person or entity that receives, maintains, processes, or otherwise is permitted access to customer information through its provision of services directly to a financial institution that is subject to" the regulations implementing the Gramm-Leach-Bliley Act [*16 CFR § 314.2(d)*].

Consider:

Debt collectors do provide the services listed under the regulations; thus, any debt collection practices must adequately provide protection against unlawful disclosure of the debtor's private financial information.

Examples:

The Gramm-Leach-Bliley Act has altered some aspects of creditors' attorneys' practice. For example, to protect a consumer's financial information, the creditor's attorney should redact information such as social security numbers from documents that do not require such information (such as an abstract of judgment). Counsel also should place the closed file on the case in a professional storage facility that ensures the safeguarding of the consumer's personal information. Moreover, when the file is purged it should not just be discarded; it should be shredded. Finally, counsel's staff should be made aware of the Act's requirements.

5.21[3] Fair Credit Reporting Act Applies to Debt Collectors.

5.21[3][a] Furnishers of Information to Credit Reporting Agencies Have Duties. Both federal and state laws apply to the furnishing of information to credit reporting agencies: the federal Fair Credit Reporting Act (FCRA) [*15*

USC § 1681a et seq.] and the California Consumer Credit Reporting Agencies Act (CCCRA) [CCC § 1785.1 et seq.]. The FCRA contains certain limited rights of individuals to sue for violations, and also contains provisions preempting state law. Federal case law has permitted private actions under the CCCRA [*Gorman v. Wolpoff & Abramson, LLP (9th Cir. 2009) 552 F3d 1008]* .

If a debt collector furnishes information to a credit reporting agency [*see 5.31[4]*], the debt collector has the following duties under the Fair Credit Reporting Act ("FCRA") [*15 USC § 1681a et seq.*]:

- To report information without actual knowledge of errors [*15 USC § 1681s-2(a)(1)*].
- To correct and update information [*15 USC § 1681s-2(a)(2)*].
- To provide notice of dispute [*15 USC § 1681s-2(a)(3)*].
- To provide notice of closed accounts [*15 USC § 1681s-2(a)(4)*].
- To provide notice of delinquency of accounts [*15 USC § 1681s-2(a)(5)*].
- To have reasonable procedures in place to handle notice of identity theft-related information [*15 USC § 1681s-2(a)(6)*].

If a financial institution that extends credit and regularly furnishes information to a consumer reporting agency regarding credit extended to a customer furnishes negative information to such an agency regarding credit extended to a customer, the financial institution must notify the customer of such negative information [*15 USC § 1681s-2(a)(7)*].

Cross Reference:

Discussion, consumer credit reporting, see California Forms of Pleading and Practice, Ch. 129, Consumer Credit Reporting (Matthew Bender).

5.21[3][b] Furnishers of Information Must Be Mindful of Identity Theft. If a credit reporting agency receives information from a consumer that the negative information in its file is the result of identity theft, the agency must notify any furnisher of information, such as a debt collector, that identity theft has been reported to it [*15 USC § 1681c-2(a), (b)*]. A debt collector may not sell, transfer, or place for collection a debt that has been reported as an identity theft under the FCRA [*15 USC § 1681m(f)(1)*].

The debt collector must notify the creditor that what it is trying to collect may be the result of identity theft and, if the consumer requests, provide all information the consumer would be entitled to if it were disputing the debt and not a victim of identity theft [*15 USC § 1681m(g)*].

Cross Reference:

Discussion of debt collector's responsibilities concerning identity theft under California law, see *5.31*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawCriminal OffensesGeneral OverviewBanking LawFederal ActsGramm-Leach-Bliley ActCriminal Law & ProcedureCriminal OffensesProperty CrimesGeneral Overview

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5.22 CHECKLIST: Communicating With Debtor Regarding Consumer Debt.

☐ Determine whether time, place and manner of communication is allowed under law.

○ Time generally should be between 8 a.m. and 9 p.m. local time.

○ Collector must communicate only with debtor's attorney if collector has knowledge of representation.

○ Collector must cease communications if debtor disputes or tells debt collector to stop communication.

☐ Debt collector still may advise consumer that communication will cease and that it intends to take further legal action.

Authority:
15 USC § 1692c; *CC § 1788.14*

Discussion:
See *5.24*

☐ Collector must not engage in harassment or abuse.

○ Threats of use of violence, or use of obscene language is prohibited.

○ Publishing a "deadbeat" list is prohibited.

○ Advertising for sale of debt to coerce payment is prohibited.

○ Telephone harassment is prohibited.

Authority:
15 USC § 1692d; *CC §§ 1788.10-1788.12*, *1788.17*

Discussion:
See *5.25*

☐ Collector must not make false or misleading representations.

○ Collector should familiarize self with list of prohibited conduct.

○ Ask whether conduct passes "least sophisticated consumer" test.

Authority:
15 USC § 1692e; *CC §§ 1788.10-1788.13*, *1788.17*

Discussion:
See *5.26*

☐ Collector must not use unfair or unconscionable practices.

○ Collector should familiarize self with list of prohibited conduct.

Authority:
15 USC § 1692f; *CC § 1788.17*

Discussion:
See *5.27*

☐ Make sure written communication contains proper notifications.

○ Include "mini-Miranda" statement informing debtor that communication is from a debt collector, and that any information obtained from debtor will be used in collection of debt.

○ California law requires, in initial communication, a standard paragraph explaining debtor's rights.

Authority:
15 USC § 1692e(11); *CC § 1812.700*

Discussion:
See *5.29*

○ Provide validation of debt.

Timing:
Must be done within five days of initial communication.

Authority:
15 USC § 1692g

Discussion:
See *5.29[3]*

○ Provide verification of debt and name/address of original creditor if debtor requests in writing

Authority:
15 USC § 1692g

Discussion:
See *5.30*

☐ Must cease communication on notification of identity theft.

○ Debtor must provide copy of police report and a written statement claiming it is a victim of identity theft.

○ Debt collector must review debtor's evidence.

○ Debt collector may recommence action if it determines debtor failed to prove identity theft.

Authority:
CC §§ 1788.18(a)-(d)

Discussion:
See *5.31[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawCriminal OffensesGeneral OverviewBanking LawFederal ActsGramm-Leach-Bliley ActCriminal Law & ProcedureCriminal OffensesProperty CrimesLarceny & TheftGeneral Overview

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5.23 Options and Strategies.

To collect a debt prior to litigation, it is essential that the creditor's counsel communicate directly with the debtor. If the debt is a consumer debt, however, counsel's contacts with the debtor must comply with the requirements of the federal and California debt collection practices acts.

Cross Reference:

Discussion of goals and tactics for communicating with debtor, see *5.07*. Discussion of possible pre-litigation outcomes based on information obtained from debtor, see *5.08*.

FDCPA restrictions on communication with consumer debtor, see *5.22 -5.32*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsGovernmentsFederal GovernmentClaims By & AgainstReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.24 Federal and State FDCPAs Restrict Time, Place, and Manner of Communication.

5.24[1] Statutes Prohibit Communications at Unusual Times and Places. Without the debtor's prior consent, counsel may not communicate with the consumer in connection with the debt at a time that counsel should know is inconvenient to the consumer. Unless counsel has knowledge of circumstances to the contrary, counsel must assume that the convenient time for the consumer is between 8 a.m. and 9 p.m. local time at the consumer's location [*15 USC § 1692c(a)(1)*].

The debt collector also may not contact the consumer at his or her place of employment if the collector knows or has reason to know the employer prohibits such communication [*15 USC § 1692c(a)(3)*; *Horkey v. J.V.D.B. & Assocs. (7th Cir 2003) 333 F3d 769, 772-773*].

Strategic Point:

Before contacting the consumer, counsel should ascertain whether the creditor has any information that would help determine the most convenient time for the consumer. For example, if the consumer works a night shift and sleeps during the day, telephoning the consumer at noon might violate the FDCPA. With the advent of the cell phone, a consumer's telephone area code will not necessarily indicate his or her current location and time zone. Counsel therefore should attempt to verify the consumer's location (and local time) before calling.

5.24[2] Representation by Counsel Limits Direct Communication With Debtor. A debt collector who knows that the consumer is represented by counsel may not contact the debtor directly, unless the debtor's attorney fails to respond within a reasonable amount of time to a debt collector's attempt at communication [*15 USC § 1692c(a)(2)*]. When the debt collector communicates with the consumer's attorney, compliance with the FDCPA is not required [*Guerrero v. RJM Acquisitions LLC (9th Cir. 2007) 499 F.3d 926*].

The debt collector does not incur liability for making direct contact with the debtor unless he or she possesses actual knowledge of the debtor's representation by counsel [*Burger v. Risk Mgmt. Alternatives, Inc. (2000 ND NY) 94 F Supp2d 291, 293*]. A creditor's actual knowledge is not imputed to the agent debt collector [*Schmitt v. FMA Alliance (8th Cir 2005) 398 F3d 995, 999*].

Distinguish--California Law Requires Writing:

Rosenthal requires that the attorney representing the consumer must notify the debt collector in writing of the consumer's representation by counsel before the debt collector is prevented from contacting the consumer directly [*CC § 1788.14(c)*].

Strategic Point:

The best practice is for the debt collector to review the information provided by the creditor to determine whether it includes information regarding the debtor's representation by counsel.

5.24[3] Debtor Actions Can Trigger Cessation of Debt Collector's Communication. If the debtor notifies the debt collector in writing that he or she refuses to pay a debt or requests that the collector cease communications, the debt collector must end communications except to:

- Advise the consumer that communication will cease [*15 USC § 1692c(c)(1)*];
- Notify the consumer that the debt collector or creditor may invoke specified remedies ordinarily invoked by the debt collector or creditor [*15 USC § 1692c(c)(2)*]; or
- Notify the consumer that the debt collector or creditor will invoke a specified remedy [*15 USC § 1692c(c)(3)*; *Hulse v. Ocwen Fed. Bank, FSB (D Or 2002) 195 F Supp2d 1188, 1204* (pursuing legal remedies, such as nonjudicial foreclosure statutes, does not violate cease-communications rule)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.25 Collector May Not Engage in Harassment or Abuse.

5.25[1] Threats of Use of Violence Are Prohibited. A debt collector may not use or threaten to use any violence or criminal means to harm the physical person, reputation, or property of any person [*15 USC § 1692d*; *CC § 1788.10*].

5.25[2] Use of Obscene or Profane Language Is Prohibited. A debt collector may not use obscene or profane language, the natural consequence of which is to abuse the recipient of the language [*15 USC § 1692d*; *CC § 1788.11(a)*].

5.25[3] Publishing List of Debtors Refusing to Pay Is Prohibited. A debt collector may not publish a "deadbeat list" of consumers who allegedly refuse to pay debts [*15 USC § 1692d*; *CC § 1788.12(c)*].

Exception:
A debt collector may publish such a list to a consumer reporting agency [*15 USC § 1692d(3)*].

Consider:
The most prudent practice for the debt collector is to allow the creditor, who has superior knowledge of the validity and documentation of the debt, to make any reports to consumer reporting agencies.

5.25[4] Advertising for Sale of Debt to Coerce Payment Is Prohibited. A debt collector may not advertise for sale any debt, by naming the debtor, to coerce payment of the debt [*15 USC § 1692d*; *CC § 1788.12(c)*].

5.25[5] Telephone Harassment Is Prohibited. A debt collector may not engage in any of the following practices:

- Cause the telephone to ring or engage a person in phone conversation repeatedly or continuously to annoy, abuse, or harass any person at that called number [*15 USC § 1692d(5)* **;** *CC § 1788.11(d)*].

- Place a phone call without a meaningful disclosure of the caller's identity [*15 USC § 1692d(6)*; *CC § 1788.11(b)*]. An employee of a licensed collection agency may identify himself or herself by using a registered alias as long as he or she correctly identifies the agency he or she represents [*CC § 1788.11(b)*].

- Causing any person expense for long distance phone calls, telegram fees, or other similar charges by misrepresenting to the person the purpose of the communication [*CC § 1788.11(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.26 Debt Collector May Not Make False or Misleading Misrepresentations.

5.26[1] Statutes Provide Non-Exclusive List of Prohibited Conduct. A debt collector may not make any false, deceptive or misleading representations in connection with collecting debt, including:

- Representing that the debt collector is affiliated with the federal or state government [15 USC § 1962e(1); *CC § 1788.13(d)*].

- Falsely representing the nature or status of the debt or services rendered or compensation that lawfully may be received for the collection of a debt [15 USC § 1962e(2); *CC § 1788.14(b)*].

- Representing that any individual is an attorney or that any communication is from an attorney [15 USC § 1962e(3); *CC § 1788.13(b)-(c)*].

- Representing that any nonpayment will result in criminal or legal action or loss of property unless the action is lawful and the debt collector/creditor intends to take such action [15 USC § 1962e(4)-(5); *CC § 1788.10(e)-(f)*].

Strategic Point:

At the outset, counsel should get the creditor's authorization to initiate litigation, so that any perceived threat to litigate will not constitute a violation of the statute.

- Representing that a sale or transfer of interest in a debt will cause the consumer to lose any claim or defense to payment of the debt or became subject to any practice prohibited by law [15 USC § 1962e(6); *CC § 1788.10(d)*].

- Representing or implying that the consumer committed a crime or other conduct in order to disgrace the consumer [15 USC § 1962e(7)].

- Communicating or threatening to communicate to any person false credit information, including

failing to communicate that a debt is disputed [15 USC § 1962e(8); *CC § 1788.13(f)*].

- Using or distributing any communication that purports to be from a federal or state government agency [15 USC § 1962e(9); *CC § 1788.13(c)-(d)*].

- Using a false representation or deceptive means to collect any debt or obtain information concerning a consumer [15 USC § 1962e(10)].

- Failing to disclose in the initial written communication that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and failing to disclose in subsequent communications that the communication is from a debt collector [15 USC § 1962e(12)].

- Representing that accounts have been turned over to innocent purchasers for sale [15 USC § 1962e(12); *CC § 1788.10(d)*].

- Representing that documents are legal process [15 USC § 1962e(13); *CC § 1788.16*].

- Using anything other than the true name of the debt collector's business, company, or organization [15 USC § 1962e(14); *CC § 1788.13(a)*].

- Representing that documents are not legal process forms or do not require action by the consumer [15 USC § 1962e(15)].

- Representing that a debt collector operates or is employed by a consumer reporting agency [15 USC § 1962e(16); *CC § 1788.13(g)*].

- Falsely representing the true nature of the business or services being rendered by the debt collector [*CC § 1788.13(i)*].

- Falsely representing that a legal proceeding has begun or will be instituted unless payment of a consumer debt is made [*CC § 1788.13(j)*].

- Falsely representing that a consumer debt has been, is about to be, or will be sold assigned or referred to a debt collector for collection [*CC § 1788.13(k)*].

- Any communication by a licensed collection agency to a debtor demanding money unless the claim is actually assigned to the collection agency [*CC § 1788.13(i)*].

5.26[2] Whether Statement Is False or Misleading Is Subject to "Least Sophisticated Consumer" Standard. In an action against a debt collector regarding a communication to a debtor under the FDCPA, a court will examine whether the communication would confuse the least sophisticated consumer [*Terran v. Kaplan (9th Cir 1997) 109 F3d 1428, 1431-1432]* . The standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor" [*Swanson v. Southern Or. Credit Serv. (9th Cir 1988) 869 F2d 1222, 1227*]. The standard applies even if the debtor has an attorney [*Irwin v. Mascott (1999 ND Cal) 96 F Supp2d 968*].

Examples--Methods That Would Deceive or Mislead Least Sophisticated Debtor:

- Language that would be construed as a threat to take legal action the debt collector cannot take [*Swanson v. Southern Or. Credit Servs. (9th Cir 1988) 869 F2d 1222, 1227*].

- Language that leads a consumer to believe he or she needs supporting documents in order to dispute the debt [*Sambor v. Omnia Credit Servs. (D Haw 2002) 183 F Supp2d 1234, 1238-1241*].

Consider:

To avoid confusion, counsel should keep the communication simple, avoiding the use of conflicting dates or demands, and being clear in the amounts owed. Counsel should keep in mind that in the event of a suit for violating the FDCPA, counsel's letter will be Exhibit 1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawClayton ActDefensesBanking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBusiness & Corporate LawCorporate NamesFictitious NamesGeneral OverviewGovernmentsState & Territorial GovernmentsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.27 Debt Collector May Not Use Unfair or Unconscionable Practices.

5.27[1] Collection of Amount Not Authorized by Agreement or Law Is Prohibited. The collection of any interest, fee, charge, or expense incidental to the principal obligation is prohibited, unless the amount is expressly authorized by the agreement creating the debt or permitted by law [*15 USC § 1692f(1)*; *CC § 1788.17*].

Warning:

Counsel should not rely on the creditor's calculation of the amount due; rather, counsel should personally review the underlying agreement to ascertain the amount that may be collected.

5.27[2] Acceptance of Postdated Payment Instrument Is Restricted. A debt collector may not accept a payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than 10 nor less than three business days prior to such deposit [*15 USC § 1692f(2)*].

A debt collector also may not solicit any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution [*15 USC § 1692f(3)*]. Further, depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on that check or instrument is prohibited [*15 USC § 1692f(4)*].

5.27[3] Causing Incurred Charges by Deception Is Prohibited. Causing charges to the debtor by concealment of the true purpose of the communication include, but are not limited to, collect telephone calls and telegram fees [*15 USC § 1692f(5)*].

5.27[4] Taking or Threatening to Take Any Nonjudicial Action to Cause Dispossession of Property Is Restricted. A debt collector may not take such action if [*15 USC § 1692f(6)*]:

- 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 dispossession or disablement.

5.27[5] Written Communication Must Be Contained in Envelope. Communication by postcard is prohibited [*15 USC § 1692f(7)*]. Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, also is prohibited, except that a debt collector may use its business name if the name does not indicate that it is in the debt collection business [*15 USC § 1692f(8)*].

Consider:

To minimize the risk that the envelope might be opened routinely, it should be marked "personal and confidential."

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawU.S. Department of Justice ActionsCriminal ActionsGeneral OverviewAntitrust & Trade LawU.S. Department of Justice ActionsCriminal ActionsIntentContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for Payment

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5.28 Debt Collector May Not Furnish Deceptive Forms.

A debt collector may not design, compile, and furnish any form knowing that the form would be used to create the false belief in a consumer that a person other than the creditor is participating in the collection [*15 USC § 1692j*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsGovernmentsFederal GovernmentClaims By & AgainstReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.29 Debt Collector Has Statutory Obligations In Communications With Debtor

5.29[1] Federal FDCPA Requires "Mini-Miranda" Disclosure to Debtor. In the initial written or oral communication with the consumer, the debt collector must disclose that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose [*15 USC § 1692e(11)*].

In subsequent communications the debt collector also must state that the communication is from a debt collector [*15 USC § 1692e(11)*].

Exceptions:

These communication requirements do not apply to formal pleadings [*15 USC § 1692e(11)*]. The federal FDCPA also does not apply to communications with a consumer's attorney [*Guerrero v. RJM Acquisitions, LLC (9th Cir. 2007) 499 F. 3d 926, 936]* .

5.29[2] Initial Communication Requires Written Description of Debtor's Rights.

5.29[2][a] Must Include Standard Paragraph. California debt collectors subject to FDCPA must provide the following notice to debtors that describes the debtor's 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 www.ftc.gov.

The notice may be changed only as necessary to reflect changes under FDCPA that would otherwise make the disclosure inaccurate [*CC § 1812.701(a)*].

Timing--Initial Communication:

The debt collector must include this notice in the initial written communication to the debtor [*CC §*

1812.700(b)]. If the language other than English is principally used by the debt collector in its initial oral communication with the debtor, a notice must be provided to the debtor in that language within five working days [*CC § 1812.700*].

Cross Reference:

Form for validation letter, see *5.57*.

5.29[2][b] Must Meet Type Size Requirements. The notice may be in the same type size that the debt collector uses to inform the debtor of the debt, but is not required to be larger than 12-point type [*CC § 1812.701(b)*]

5.29[3] Within Five Days of Initial Communication, Collector Must Provide Validation of Debt. The validation must state:

- The amount of the debt [*15 USC § 1692g(a)(1)*];

Warning:

A validation letter may not simply state the principal amount of the debt and indicate that the collector also has been retained to collect interest, court costs and attorney's fees without specifying the amount of these additional costs, without stating the amounts of those other items unless it also is clearly stated that the creditor will accept the stated dollar amount as payment in full [Welker v. Law Office of Horwitz (SC CA 2009) 626 FSupp2d 1068]. However, a letter providing a specific dollar amount, but stating that it might not include accruing interest and that the debtor could call an 800 number to obtain the full amount due, did not violate the FDCPA [Hutton v. Law Offices of Collins & Lamore (SD CA 2009) 668 FSupp2d 1251].

- The name of the creditor to whom the debt is owed [*15 USC § 1692g(a)(2)*];

- The debt is assumed valid unless the consumer, within 30 days after receipt of the notice, disputes the validity of any portion of the debt [*15 USC § 1692g(a)(3)*];

- The debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector if the consumer notifies the debt collector in writing within the 30-day period that any portion of the debt is disputed [*15 USC § 1692g(a)(4)*; *see 5.30*]; and

- That, upon written request within the 30-day period, the debt collector must provide the consumer with the name and address of the original creditor, if different from the current creditor [*15 USC § 1692g(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsGovernmentsFederal GovernmentClaims By & AgainstReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.30 Debt Collector Must Verify Debt If Consumer Disputes Amount.

If the consumer notifies the debt collector in writing within the 30-day period that any portion of the debt is disputed, or that the consumer requests the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector obtains the requested information and mails it to the consumer [*15 USC § 1692g(b)*].

Warning:

The right of the consumer to dispute the debt and obtain information should be explained in the debt collector's first letter to the consumer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionCommunicationsGovernmentsFederal GovernmentClaims By & AgainstReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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5.31 Debt Collector Must Stop Collection Activities on Notification of Identity Theft.

5.31[1] Debtor Must Provide Evidence of Identify Theft. A debt collector must cease collection activities when a debtor provides for the debt collector's review:

- A copy of the police report filed by the debtor alleging that the debtor is a victim of identity theft [*CC § 1788.18(a)*];

- A written statement that the debtor claims to be the victim of identity theft with respect to the debt collected by the debt collector [*CC § 1788.18(a)*]. The debtor must provide the documentation in the form of either an FTC form, a form provided by the State of California, or a written certified statement containing certain information [*see CC § 1788.18(b)*].

5.31[2] Debt Collector Must Cease Collection Activities and Review Debtor's Evidence. If the debtor notifies the debt collector orally that he or she is the victim of identity theft, the debt collector must notify the debtor that that claim must be in writing [*CC § 1788.18(c)*]. Further, if the debtor submits a claim in writing but omits the required documentation, the debt collector must notify the debtor of that omission [*CC § 1788.18(c)*].

Once the debt collector has received all of the required information, the debt collector must review and consider all of the 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)*].

Consider:

When reviewing a claim of identity theft, the debt collector may apply common sense. If the debtor has previously affirmed the debt or acknowledged it, that fact can be considered in determining whether the claim of identity theft is valid or made in good faith. The debt collector should document all communications and provide a clear explanation if it is decided that the claim is not valid.

5.31[3] Debt Collector May Recommence Collection Activity After Good Faith Determination Adverse to Debtor. The debt collector may recommence collection activities only after making a good-faith determination that the evidence presented does not establish the debtor is not responsible for that specific debt [*CC § 1788.18(d)*]. The debt collector must notify the debtor in writing that he or she is still responsible for the debt, as well as the basis for that determination [*CC § 1788.18(d)*].

5.31[4] Debt Collector Must Notify Credit Reporting Agency If Collection Is Not Recommenced. If the debt collector has given adverse information to a credit reporting agency, it must instruct the agency to delete that information [*CC § 1788.18(g)*]. It must also notify the creditor that it has ceased collection activities based on the debtor's claim of identity theft [*CC § 1788.18(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingIdentity TheftCriminal Law & ProcedureCriminal OffensesProperty CrimesLarceny & TheftGeneral Overview

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5.32 Violation of State and Federal Statutes Entitles Debtor to Remedies.

5.32[1] Debt Collector May Be Liable for Damages.

5.32[1][a] Collector May Be Liable for Actual Damages. Actual damages are available under both the FDCPA and Rosenthal [*see 15 USC § 1692k*; *CC § 1788.30(a)*].

5.32[1][b] Collector May Be Liable for Civil Penalties. A debt collector who knowingly or willingly violates state and federal FDCPAs may be liable for additional damages "as the court may allow" not to exceed $1,000 in an individual action or, in a class action, not to exceed the lesser of $500,000 or 1 percent of the net worth of the debt collector [*15 USC § 1692k*; *CC § 1788.30(b)*; *CC § 1788.17*].

5.32[1][c] Collector May Be Liable for Attorney's Fees. A prevailing debtor is entitled to costs of the action, together with "reasonable attorneys' fees" [*15 USC § 1692k(a)(3)*; *CC § 1788.30(c)*].

5.32[1][d] Courts Consider a Number of Factors in Determining Amount of Liability. "Among other relevant factors," courts must consider, in individual actions, the frequency and persistence of the debt collector's noncompliance, the nature of the compliance, and the extent to which the noncompliance was intentional [*15 USC § 1692k(b)(1)*].

In class actions, courts must consider the frequency, persistence and nature of the noncompliance, the resources of the debt collector, the number of people affected and the extent to which the conduct was intentional [*15 USC § 1692k(b)(2)*]**.**

5.32[2] Debt Collector Has Defenses to Claims of FDCPA Violations.

5.32[2][a] Debt Collector May Assert Bona Fide Error Affirmative Defense. The debt collector must show by a preponderance of evidence that its violation was not intentional and resulted from a bona fide error, and that it had procedures in place to avoid such error [*15 USC § 1692k(c)*; *CC § 1788.30(e)*].

Consider:

A good office manual with express policies and procedures that are in conformity with the FDCPA can help the debt collector establish that a violation resulted from a bona fide error.

Warning:

The U.S. Supreme Court has held that a bona fide error does not include a mistaken interpretation of the law [*Jerman v. Carlisle (2010) ___ U.S. ___, 130 SCt 1605, 176 LEd 519* (notice to debtor requiring any dispute to be in writing was deemed to have violated *15 USC § 1692g(a)(3)* and was not subject to the bona fide error defense of *15 USC § 1692k(c)*].

5.32[2][b] Debt Collector May Assert Statute of Limitations Defense. A debtor must bring a claim under both state and federal statutes within one year from the date on which the violation occurs [*15 USC § 1692k(d)*; *CC § 1788.30(f)*].

Warning:

The Ninth Circuit has held the federal FDCPA statute of limitations does not accrue until the plaintiff knows, or has reason to know, of the violation [*Mangum v. Action Collection Service, Inc. (9th Cir 2009) 575 F3d 935]* .

5.32[2][c] California Law Allows Debt Collector to Cure. If a debt collector discovers a violation, and that violation is able to be cured, the debt collector will incur no civil liability if, within 15 days of the discovery, he or she notifies the debtor of the violation and makes whatever corrections are necessary to cure the violation [*CC § 1788.30(d)*].

5.32[2][d] Debtor's Conduct Under California Law May Provide Additional Defenses for Collector. A debt collector may assert as a defense that the debtor violated the Debtor's Responsibilities section under Rosenthal [*see CC § 1788.30(g)*]. A debtor has the following responsibilities:

- A debtor may not apply for credit without an intention to pay or knowingly submit false or inaccurate information that would adversely affect his or her creditworthiness [*CC § 1788.20(a)-(b)*].

- A debtor must within a reasonable time notify a creditor of a change of name, address, or employment, if the creditor, in writing, had clearly informed the debtor of that responsibility [*CC § 1788.21(a)-(b)*].

- A debtor must not attempt to consummate a credit transaction knowing that credit privileges under the account have been terminated or suspended and shall notify the creditor, provided that the creditor, in writing, had clearly informed the debtor of that responsibility [*CC § 1788.22(a)-(b)*]

5.32[2][e] Debt Collector Entitled to Attorney's Fees on Debtor's Bad Faith Claim. If a debtor brings or defends an action under federal law in bad faith and for the purpose of harassment or under state law in bad faith, a court may award reasonable attorney's fees to the debt collector. A prevailing party under state law is also entitled to costs [*15 USC § 1692K(a)(3)*; *CC § 1788.30(c)*]. An award of costs to a prevailing defendant in an FDCPA action requires a finding of bad faith and harassment [*Rouse v. Law Offices of Rory Clark (9th Cir 2010) 603 F3d 699]* .

Attorney' fees and costs to a prevailing defendant in an FDCPA action may only be awarded under *15 USC § 1692k(a)(3)* against the plaintiff, not the plaintiff's attorney [*Hyde v. Midland Credit Mgmt. Inc. (9th Cir 2009) 567 F3d 1137]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawClayton ActDefensesAntitrust & Trade LawPrivate ActionsCosts & Attorney FeesClayton ActAntitrust & Trade LawRobinson-Patman ActDefensesBanking LawConsumer ProtectionFair Debt

CollectionGeneral OverviewBanking LawCriminal OffensesFalse Statements in Credit Applications

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5.33 CHECKLIST: Using Self-Help Repossession to Collect Debt.

☐ Determine whether there is a perfected security interest in collateral.

- ○ Security agreement creates security interest in collateral.
- ○ Security interest gains priority over subsequent security interests by perfection.

Authority:
Com Code §§ 9102, 9108, 9203, 9309, 9313-9316

Discussion:
See *5.36[1]*

☐ Determine whether repossession is possible.

- ○ Must be completed without breach of peace.

Authority:
Com Code § 9609; *Williams v. Ford Motor Co. (8th Cir 1982) 674 F2d 717, 718-720* ; *Hartford Fin. Corp. v. Burns (1979) 96 CA3d 591, 600, 158 CR 169*

Discussion:
See *5.36[3]*

☐ Determine method of sale of collateral.

- ○ Sale must be commercially reasonable.

- ○ Must provide notice of sale to proper parties.

- ○ Notice must contain specified information.

Authority:
Com Code §§ 9610-9613, 9627

Discussion:
See *5.36[5], [6]*

☐ Obtain deficiency judgment.

- ○ Provide explanation of how deficiency is calculated, if requested by debtor.

Authority:
Com Code § 9626

Discussion:
See *5.36[7]*

☐ Determine whether Unruh Act applies to repossession action.

- ○ Act applies to retail installment sales.

- ○ Procedures for repossession include notification of sale, notice of right to redeem.

- ○ Not entitled to deficiency judgment.

Authority:
CC § 1812.2

Discussion:
See *5.37 -5.40*

☐ Determine whether Rees-Levering Act applies.

- ○ Act applies to particular automobile sales contracts.

  - ☐ Applies to conditional sales contracts for sale of motor vehicle between a buyer and seller.

Authority:
CC § 2981 et seq.

Discussion:
See *5.42, 5.43*

○ Act allows for repossession of vehicle.

○ Must provide notice of sale.

☐ Requires notice 15 days prior to sale and 60 days after repossession.

☐ Must state right all of debtor's rights, including right to redeem.

Authority:
CC § 2983.2

Discussion:
See *5.42*, *5.43*

○ May recover deficiency judgment.

Authority:
CC § 2983.2

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of SaleContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsPerfection & PriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral Overview

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5.34 Options and Strategies.

If the debt is secured by personal property, counsel should ascertain the current location of the collateral. If it is in another state, counsel should then determine whether self-help repossession is available under the laws of that state and, if so, whether repossession in that state would be a cost-effective remedy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawBankruptcyGeneral OverviewComputer & Internet LawPrivacy & SecurityState RegulationContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementTransportation LawWater TransportationLicensing & Registration

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5.35 Collateral Used to Secure Debt May Be Subject to Repossession.

If a debt is secured by personal property, a debt collector may repossess that property in appropriate circumstances. Such a transaction takes one of two forms: either a direct loan in which a debtor acquires a loan in exchange for the lender taking a security interest in specific personal property, or an indirect loan, such as a retail installment contract or automobile contract, in which a purchaser-debtor acquires personal property and pays for that property in installments, with the seller-creditor taking a security interest in the property.

Direct loans are almost exclusively governed by Division 9 of the Commercial Code [*Com Code §§ 9101-9629*]. Retail installment sales are governed by the Unruh Retail Installment Sales Act [*CC §§ 1799.90-1812.20*] and automobile sales are governed by the Rees-Levering Motor Vehicle Sales and Finance Act [*CC §§ 2981-2984.4*].

Warning:

Division 9 of the Commercial Code underwent extensive revisions that took effect on July 1, 2001. Even if the transaction took place before the effective date of the revisions, in most cases, that transaction is governed by the revised provisions, even if that transaction would not have been covered under the former provisions [*see Com Code § 9702*].

Cross References:

Discussion, secured transactions, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 42, Secured Transactions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseInstallment ContractsCommercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsInstallment Contracts

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5.36 Loans Secured by Collateral Governed by California Uniform Commercial Code.

5.36[1] Creditor Must Have a Security Interest in Collateral.

5.36[1][a] Security Agreement Creates the Security Interest in the Collateral. The security interest [*Com Code § 9102(a)(73)*] is the interest in the property that secures payment of an obligation [*Com Code § 1201(b)(36)(A)*]. The security agreement must contain a description of the property that reasonably identifies the collateral [*Com Code § 9108*].

Examples--Reasonably Identifies:

A description of collateral reasonably identifies the collateral if it identifies the collateral by any of the following:

- Specific listing [*Com Code § 9108(b)(1)*].
- Category [*Com Code § 9108(b)(2)*].
- Quantity [*Com Code § 9108(b)(3)*].
- Computational or allocational formula or procedure [*Com Code § 9108(b)(4)*].
- Any other method, if the identity of the collateral is objectively determinable [*Com Code § 9108(b)(5)*].

Warning:

Description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral [*Com Code § 9108(c)*].

5.36[1][b] Executed Security Agreement Must Attach. A security interest in property attaches when it becomes enforceable against the debtor as it relates to the collateral [*Com Code § 9203(a)*]. The security interest becomes enforceable when:

- Value has been given [*see Com Code § 1204*, defining "value")].
- The debtor has rights in the collateral [*Com Code § 9203(b)*].
- The debtor has signed a security agreement that describes the property [*Com Code § 9108*; *see 5.36[1][a]*].

In addition to attachment, the security interest must be perfected to have priority over subsequent security interests. Perfection can occur in one of several ways [*see Com Code § 9309-9316*]:

- Automatically on attachment [*Com Code § 9309*].
- Taking possession of the collateral [*Com Code § 9313*].
- Control of the collateral [*Com Code § 9314(a)*].
- Possession of a vehicle registration or certificate of title [*Com Code § 9311(a)*].
- For mobile homes, registration under the Health and Safety Code [*Com Code § 9311(a)*].
- Filing a financing statement [*Com Code §§ 9312-9316*].

Consider:

Prior to repossession, verify that the security interest in the collateral is perfected properly to avoid a violation of any other lienholders' rights.

5.36[2] Commercial Code Provides for Self-Help Repossession on Default. Following the debtor's default, the party with the security interest can either take possession of the collateral or, if agreed, require the debtor to assemble the collateral on the debtor's premises for sale [*Com Code § 9607(a), (b)*].

Cross Reference:

Discussion, rights of secured parties generally, see California Forms of Pleading and Practice, Ch. 503 Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 42, Secured Transactions (Matthew Bender).

5.36[3] Repossession Must Be Effected Without Breach of Peace. If taking possession, the secured party may repossess the collateral without judicial process as long as it proceeds without a breach of the peace [*Com Code § 9609(b)*].

Examples--Breach of Peace:

Using a law enforcement officer to aid in the repossession constitutes a breach of peace [*see* Official Comments, *Com Code § 9609*]. An incident that tends to provoke violence constitutes a "breach of peace" [*see Williams v. Ford Motor Co. (8th Cir 1982) 674 F2d 717, 720*], as does repossession effected over a party's actual verbal objection [*Hartford Fin. Corp. v. Burns (1979) 96 CA3d 591, 600, 158 CR 169]* .

Consider:

Use of a repossession agency is permitted, and the agency would then be bound by the same laws as the creditor. Counsel should obtain an indemnification agreement from the repossession agency holding the creditor harmless against claims arising from wrongful acts of the agency.

5.36[4] Creditor May Sell Repossessed Collateral to Satisfy Debt. After default, the secured party may sell, lease, or dispose of any part of the collateral [*Com Code § 9610(a)*]**.** The proceeds from the sale are applied in the following order [*Com Code § 9615(a)-(b)*]:

- To the expenses of retaking, holding, or preparing for disposition the collateral in a commercially reasonable manner;
- To the satisfaction of the indebtedness secured by the collateral;
- To the satisfaction of the indebtedness secured by subordinate security interests;
- To secured party that is a co-signer; and
- The remaining proceeds to the debtor [*Com Code § 9616(b)*].

5.36[5] Sale Must be Commercially Reasonable. A secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms as long as it is commercially reasonable [*Com Code § 9610(b)*].

A disposition of collateral is made in a commercially reasonable manner if the disposition satisfies *any* of the following conditions:

- It is made in the usual manner on any recognized market [*Com Code § 9627(b)(1)*].
- It is made at the price current in any recognized market at the time of the disposition [*Com Code § 9627(b)(2)*].
- It is made otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition [*Com Code § 9627(b)(3)*].
- It is approved in a judicial proceeding [*Com Code § 9627(c)(1)*].
- It is approved by a bona fide creditors' committee [*Com Code § 9627(c)(2)*].
- It is approved by a representative of creditors [*Com Code § 9627(c)(3)*].
- It is approved by an assignee for the benefit of creditors [*Com Code § 9627(c)(4)*].

5.36[6] Creditor Must Provide Notice of Sale.

5.36[6][a] Must Send Notice to Specified Parties. The secured party that sells collateral must provide reasonable authenticated notification of sale to all of the following:

- The debtor [*Com Code § 9611(c)(1)*].
- Any secondary obligor [*Com Code § 9611(c)(2)*].
- If other than consumer goods, any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral [*Com Code § 9611(c)(3)(A)*].

- If other than consumer goods, any other secured party or lienholder that, 10 days before the notification date, held a security interest in, or other lien on, the collateral [*Com Code § 9611(c)(3)(B)*].

- Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a statute, regulation, or treaty [*Com Code § 9611(c)(3)(C)*].

Timing--Reasonable Time for Notification:

Whether a notification is sent within a reasonable time is a question of fact [*Com Code § 9612(a)*]. The Official Comment to *Com Code § 9612* indicates that the notification must give the party enough time to act on the notification.

In a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition [*Com Code § 9612(b)*].

Exception--Reasonable Time Requirement:

If the goods are perishable or rapidly declining in value, the reasonableness requirement does not apply [*Com Code § 9611(d)*].

5.36[6][b] Commercial Code Provides Content Requirements. The notice must include all of the following:

- A description of the debtor and the secured party [*Com Code § 9613(1)(A)*].

- A description of the collateral that is the subject of the intended disposition [*Com Code § 9613(1)(B)*].

- The method of intended disposition [*Com Code § 9613(1)(C)*].

- A statement that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting [*Com Code § 9613(1)(D)*].

- The time and place of a public disposition or the time after which any other disposition is to be made [*Com Code § 9613(1)(E)*].

The form of notice set forth in the statute, when completed, provides sufficient information [*Com Code § 9613(5)*].

5.36[6][c] Additional Commercial Code Requirements Apply in Consumer Goods Transaction. In addition to the contents in 5.36[6][b], the notice must contain the following if the transaction is a consumer goods transaction:

- A description of any liability for a deficiency of the person to which the notification is sent [*Com Code § 9614(1)(B)*].

- A telephone number from which the amount that must be paid to the secured party to redeem the collateral is available [*Com Code § 9614(1)(C)*].

- A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available [*Com Code § 9614(1)(D)*].

The form of notice set forth in the statute, when completed, provides sufficient information [*Com Code § 9614(3)*].

5.36[7] Debtor Is Liable for Deficiency. The debtor is liable for any deficiency, except for any sale of accounts, chattel paper, payment intangibles or promissory notes [*Com Code § 9615(d)-(e)*].

Timing--Calculation of Deficiency:

At the time the secured party makes demand on the debtor for payment of the deficiency, or within 14 days of a request for an explanation, the secured party must provide an explanation of how the deficiency was calculated.

Trap--Failure to Adhere to "Commercially Reasonable" Standard:

In a consumer transaction, if the amount of deficiency is disputed and the secured party fails to meet its burden of proving commercial reasonableness of the sale, the secured party is forever barred from obtaining a deficiency judgment against the debtor for that transaction [*Com Code § 9626(b)(3)*].

Cross Reference:

Discussion, rights of secured party on default, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 42, Secured Transactions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsRequirementsCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentConsentContracts LawSecured TransactionsPerfection & PriorityGeneral Overview

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5.37 Unruh Act Applies to Retail Installment Sales.

The Unruh Act [*CC §§ 1799.90 et seq.*] applies to any consumer credit contract to pay money on a deferred payment basis if the money, property, or services, which is the subject matter of the contract, is primarily for personal, family or household purposes [*CC § 1799.90(a)*]. This includes retail installment contracts [*CC § 1799.90(a)(1)*; *see CC § 1802.6* (definition)], retail installment accounts [*CC § 1799.90(a)(2)*; *see CC § 1802.7* (definition)], and conditional sales contracts [*CC § 1799.90(a)(3)*; *see CC § 2981* (definition)].

Cross References:

Discussion and forms, retail installment sales, see California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

Secured transactions, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 42, Secured Transactions, Ch. 46, Credit Card and Other Open-End Transactions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentConsentContracts LawSecured TransactionsPerfection & PriorityGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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5.38 Creditor May Retake Goods or Recover Judgment for Balance.

The creditor may retake the goods or proceed to recover judgment for the balance due without retaking the goods [*CC § 1812.2*].

Strategic Point--Creditor:

If the collateral has significant value in relation to the amount of the debt, or is increasing in value (e.g., jewelry), the creditor will probably prefer to repossess it and hold a sale. If the value of the collateral is relatively small or diminishing (e.g., an older automobile), the more prudent business decision may be to sue for the balance.

Cross Reference:

Proceeding to recover judgment for balance due, see Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcement

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5.39 Unruh Outlines Procedures for Repossession.

5.39[1] Creditor Must Notify Debtor of Sale Within 10 Days. If the creditor retakes the goods, he or she must notify the debtor within 10 days of his or her intention either to sell the goods at public sale or to retain the goods in satisfaction of the balance due [*CC § 1812.2*].

5.39[2] Debtor May Redeem. The notice must state the amount of the overdue payments that the debtor must pay within 10 days of the notice in order to redeem the goods. The debtor has an absolute right to redeem the goods within 10 days after the notice is given by paying the amount owing under the contract. If the creditor gives notice of election to sell the goods, the debtor also has the absolute right to redeem the goods at any time before the sale by paying the amount specified by the creditor, as well as any expense reasonably incurred in good faith by the seller or holder for repairing or reconditioning the goods or preparing them for sale. If the debtor gives notice of his or her intention to retain the goods in satisfaction of the indebtedness, he or she is deemed to have done so at the end of the 10-day period if the goods are not redeemed [*CC § 1812.2*].

At the time the notice is given, the creditor must furnish the debtor with a written statement of the sum due under the contract and of any expenses incurred by the debtor for repairing or reconditioning the goods or preparing them for sale. If the creditor fails to render such a statement, he or she must forfeit $10 to the debtor and is also liable to the debtor for all damages suffered because of that failure [*CC § 1812.2*].

5.39[3] Application of Resale Proceeds Follows Order. The proceeds of a resale must be applied to the following [*CC § 1812.4*]:

- Payment of the expenses of the resale;
- Payment of any expenses of retaking, including reasonable attorney's fees actually incurred, and of any expenses of keeping, storing, repairing, reconditioning, or preparing the goods for sale to which the holder may be entitled;
- Satisfaction of the balance due under the contract; and
- Payment to the buyer, if any sum remains after satisfaction of the foregoing claims.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSales of GoodsGeneral OverviewContracts LawSales of GoodsPerformanceGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemption

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5.40 Creditor May Not Recover Deficiency Judgment From Debtor Under Unruh Act.

If the proceeds of the resale are not sufficient to cover the items set forth in *CC § 1812.4*, the holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer [*CC § 1812.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSales of GoodsGeneral OverviewContracts LawSales of GoodsPerformanceGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemption

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5.41 Rees-Levering Act Applies to Automobile Financing.

5.41[1] Act Applies Only to Certain Automobile Sales Contracts. The Rees Levering Act [*CC § 2981 et seq.*] applies to conditional sales contracts for the sale of a motor vehicle between a buyer and a seller, but does not apply, among other things, to leases or direct loans secured by a security agreement.

Cross References:

Discussion and forms, automobile sales contracts, see California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act (Matthew Bender).

Secured transactions, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions; California Legal Forms, Ch. 47, Automotive Financing and Vehicle Leasing (Matthew Bender).

5.41[2] Act Allows for Repossession of Motor Vehicle. If the buyer defaults on obligations under the contract, the seller, if it has a perfected security interest, may repossess the vehicle [*CC § 2983.3(a)*]. The secured party may repossess if it can do so without breaching the peace [*see 5.36[3]*].

Warning:

Habitual acceptance of late payments may affect repossession rights. If a secured party consistently accepts late payments without repossession, then an argument can be made that no repossession can occur until after the normally late payment period. Review loan documents to see if there is any provision for accepting late payments without prior repossession.

Cross References:

Discussion and forms, automobile sales contracts, see California Forms of Pleading and Practice, Ch. 89, Automobiles Under Rees-Levering Automobile Sales Financing Act (Matthew Bender).

Secured transactions, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 47, Automotive Financing and Vehicle Leasing (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsGeneral OverviewContracts LawSecured TransactionsDefaultCreditor ObligationsContracts LawSecured TransactionsDefaultForeclosure & RepossessionGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcement

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5.42 Notice Requirements to Sell Repossessed Vehicle.

5.42[1] Rees-Levering Requires Notice 15 Days Prior to Sale and 60 Days After Repossession. The seller must either personally serve or send by first-class mail written notice of intent to sell at least 15 days prior to the sale [*CC § 2983.2(a)*]. The seller also must send the notice within 60 days of the repossession [*CC § 2983.2(a)*].

Warning:

Failure to give notice within 60 days of repossession bars the seller from attempting to recover a deficiency judgment [*CC § 2983.2(a)*].

5.42[2] Notice Must Contain Specified Information. The secured party must notify the buyer of [*CC § 2983.2*]:

- The right to redeem by paying in full the indebtedness until the expiration of 15 days from the date of giving or mailing the notice, providing an itemization of the contract balance and of any delinquency, collection, or repossession costs and fees and setting forth the computation or estimate of the amount of any credit for unearned finance charges or canceled insurance as of the date of the notice.

- The right to reinstate the contract until the expiration of 15 days from the date of giving or mailing the notice. The notice of intent must inform the consumer of the specific and exact dollar amount that he or she would have to pay to reinstate the contract [*Juarez v. Arcadia Financial, Ltd. (2007) 152 CA 4th 889, 61 CR3d 382]* .

- The right of the seller to extend for an additional 10 days the redemption period or, if entitled to the conditional right of reinstatement, both the redemption and reinstatement periods.

- The place at which the motor vehicle will be returned to those persons upon redemption or reinstatement.

- The name and address of the person or office to whom payment must be made.

- The seller's intent to dispose of the motor vehicle upon the expiration of 15 days from the date of giving or mailing the notice, or 20 days if out of state, and further, that upon written request to extend the

redemption period and any applicable reinstatement period for 10 days, the seller will extend the period accordingly without notice.

- Upon written request, the seller or holder will furnish a written accounting regarding the disposition of the motor vehicle.

- A notice, in at least 10-point bold type if the notice is printed, reading as follows: "NOTICE. YOU MAY BE SUBJECT TO SUIT AND LIABILITY IF THE AMOUNT OBTAINED UPON DISPOSITION OF THE VEHICLE IS INSUFFICIENT TO PAY THE CONTRACT BALANCE AND ANY OTHER AMOUNTS DUE."

- That upon the disposition of the motor vehicle, the debtor will be liable for the deficiency balance plus interest at the contract rate, or at the legal rate of interest pursuant to *[CC § 3289]* if there is no contract rate of interest, from the date of disposition of the motor vehicle to the date of entry of judgment.

Cross References:

Discussion and litigation forms, automobile contracts generally, seller's rights, debtor's rights to reinstatement, see California Forms of Pleading and Practice, Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act (Matthew Bender); California Legal Forms, Ch. 47, Automotive Financing and Vehicle Leasing (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultCreditor ObligationsContracts LawSecured TransactionsDefaultForeclosure & RepossessionNotice RequirementsContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionTortsTransportation TortsGeneral Overview

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5.43 Creditor Must Comply With Commercial Code in Order to Recover Deficiency Judgment From Debtor.

In addition to the requirements under Rees-Levering, the seller must comply with the commercial reasonableness requirements under *Com Code §§ 9610-9615* and *Com Code § 9626* in order to preserve its right to sue for anti-deficiency [*CC § 2983.8*; *see Bank of Am. v. Lallana (1998) 19 C4th 203, 208-210, 77 CR2d 910, 960 P2d 1133* (secured creditor precluded from obtaining deficiency judgment--it gave proper notice under Rees-Levering but did not give proper notice under Division 9 of Commercial Code); *see also 5.36[5]*, [7]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bank Deposits & Collections (Article 4)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultCreditor MisbehaviorCommercially Reasonable ConductCommercial Law (UCC)Secured Transactions (Article 9)DefaultCreditor MisbehaviorRemedies for NoncomplianceCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of Sale

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5.44 Creditor Has Limited Remedies If Transaction Is Covered by Credit Disability Insurance.

A creditor cannot invoke any creditor's remedy against a debtor for nonpayment of any sum that becomes due during any disability claim period, and for which credit disability insurance coverage is provided [*CC § 1812.402(a)*].

If the insurer pays the claim within the disability claim period, the creditor must treat each payment made by the insurer as though it were timely made by the debtor. If the insurer rejects the claim, or accepts the claim as a partial disability resulting in a payment of less than the full amount that would be paid for the total disability, within the disability claim period, the debtor must be given the opportunity to pay the amount that became due during the disability claim period, minus any partial payment made by the insurer, without being subject to any creditor's remedy except the imposition of late charges, for 35 days following the date that the insurer sends notice of the rejection of the claim or acceptance of the claim as a partial disability. If the payment is not made within 35 days, the creditor may then invoke any creditor's remedy [*CC § 1812.402(e)*].

Cross Reference:

Discussion, consumer contracts generally, see California Forms of Pleading and Practice, Ch. 127, Consumer Contracts and Loans (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsInsurance LawClaims & ContractsNotice to InsurersGeneral OverviewInsurance LawDisability InsuranceTime LimitationsInsurance LawLife InsuranceCredit LifeLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsDisabilities

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5.45 CHECKLIST: Collecting Consumer Debt From Members of the Military.

☐ Ascertain debtor's military status.

- ○ Federal act applies to all members of uniformed services.
- ○ California law fills in gaps in federal law.
- ○ Period of military service depends on type of service.
- ○ Additional relief if debtor is serving in Iraq or Afghanistan.

Authority:
50 USC App §§ 511, *514*; M&V Code § 400

Discussion:
See *5.47*, *5.55*

☐ Determine whether federal or California statutes provide special relief from particular collection action.

- ○ File declaration of non-military service before receiving entry of default.

Authority:
50 USC App § 521; *M&V Code § 402(a)*

Discussion:
See *5.48*

- ○ Act provides relief from stays or vacations of execution of judgments, attachments, or

garnishments.

Authority:
50 USC App § 522; *M&V Code § 403(a)*

Discussion:
See *5.49 -5.50*; see Ch. 15, Staying Enforcement of Judgment.

○ Act delays fine and penalties on contracts.

Authority:
50 USC App § 523; *M&V Code 403(b)*

Discussion:
See *5.51*

○ Act tolls statutes of limitations.

Authority:
50 USC App 526(a); *M&V Code 404(a)*

Discussion:
See *5.52*

○ Act provides relief from certain contractual obligations.

☐ Interest rate ceiling.

Authority:
50 USC App § 527; *M&V Code § 405*

Discussion:
See *5.53[1]*

☐ Delays actions for breach of installment purchase or lease contracts.

Authority:
50 USC App § 532(a); *M&V Code § 407(a)*

Discussion:
See *5.53[2]*

☐ Early termination of residential or motor vehicle leases.

Authority:
50 USC App § 535(e); *M&V Code § 409(b)*

Discussion:
See *5.53[3]*

○ Act requires special step prior to repossession.

Authority:
50 USC App § 534; *M&V Code § 407(b)*

Discussion:
See *5.53[4]*

○ Act delays enforcement of security interests.

Authority:
50 USC App § 533(a); *M&V Code § 408(a)*

Discussion:
See *5.53[5]*

☐ Determine whether servicemember applied for relief from other obligations not specifically mentioned in acts.

○ Within 180 days of termination or release from military service, servicemember may apply for relief from obligation/liability incurred before servicemember's military service.

Authority:
50 USC App § 591(a); *M&V Code § 409.3*

Discussion:
See *5.54*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultContracts LawDebtor & Creditor RelationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential LeasesTortsTransportation TortsMotor VehiclesGeneral Overview

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5.46 Federal and California Servicemembers Relief Acts Delay Debt Collection.

The servicemembers civil relief acts temporarily suspend certain legal proceedings and consumer obligations during periods of military service and for up to 90 days after termination of service [*see 50 USC app § 501 et seq.*; *M&V Code § 400 et seq.*; *M&V Code § 800 et seq.*; *M&V Code § 820 et seq.*]. In many cases the debt collector is required to seek a court order before enforcing the debtor's obligation [*see, e.g., 50 USC app § 521* (requiring debt collector to file declaration regarding debtor's military service prior to collecting)].

Strategic Point--Scrutinize Any Transfer of Interest:

If the debt collector can show that the debtor transferred any interest or property in order to take advantage of the benefits provided under the acts, the court has the power to enter any judgment or make any order that might lawfully be entered or made, notwithstanding any contrary provision in the Servicemembers Civil Relief Act or the comparable California statutes [*50 USC app § 581*; *M&V Code § 409.7*].

Strategic Point--Acquisition of Waiver From Servicemember:

If the servicemember indicates he or she will waive the right to relief under federal law, counsel must acquire that waiver in writing, specifying the particular obligation [*50 USC § 517*].

Warning:

Any action taken in retaliation for applying for a stay, postponement, or suspension creates civil liability for damages and attorney's fees [*M&V Code 401(a)*] and potentially criminal liability [*M&V Code 401(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultContracts LawDebtor & Creditor RelationsCriminal Law & ProcedureCounselRight to CounselGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsTransportation TortsMotor VehiclesGeneral Overview

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5.47 Acts Apply to Servicemembers During Periods of Military Service.

5.47[1] Servicemembers Are All Members of Uniformed Services. The federal law, which applies to states as well, includes as servicemembers:

- Members of the armed forces (Army, Navy, Air Force, Marine Corps, and Coast Guard) [*50 USC app § 511*; *10 USC § 101(a)(4)*].

- The commissioned corps of the National Oceanic and Atmospheric Administration [*10 USC § 101(a)(5)(B)*].

- The commissioned corps of the Public Health Service [*10 USC § 101(a)(5)(C)*].

State law fills in gaps in the federal law, in the wake of September 11, 2001, and includes as servicemembers:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor or into active federal service by the President [*M&V Code § 400(a)(1)*].

- Reservists of the United States Military Reserve who have been called to full-time active duty [*M&V Code § 400(a)(2)*].

- A citizen of the United States serving as a member of allied forces if that service is similar to military service [*50 USC App § 514*].

5.47[2] Periods of Military Service Vary. Military service includes:

- In the case of an armed forces member, full-time duty in the military service of the United States, including full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the secretary of the military department concerned [*50 USC app § 511(2)(A)(i)*; *10 USC § 101(d)(1)*].

- A member of the National Guard called to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national

emergency declared by the President and supported by federal funds [*50 USC app § 511(2)(A)(ii)*].

- A commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration on full-time National Guard duty [*50 USC app § 511(2)(B)*].

- Any period during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause [*50 USC app § 511(2)(C)*].

- Full-time active state service or full-time active federal service, or full-time active duty of a reservist, for a period in excess of seven days in any 14-day period. For any servicemember who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service count toward that time period even if that service preceded enactment of the state law [*M&V Code 400(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersU.S. National GuardPublic Health & Welfare LawHealthcareGeneral Overview

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5.48 Acts Provide Temporary Relief and Protections From Certain Judicial Proceedings.

5.48[1] Debt Collector Must File Declaration Before Entry of Default Judgment. If any debtor defaults in a court appearance, the debt collector, before judgment is entered, must file a declaration stating that the defendant is not in the military service. If unable to file that declaration, the debt collector must set forth that it is unable to determine whether the debtor is in military service [*50 USC app § 521*; *M&V Code § 402(a)*].

The affidavit may be either a statement, declaration, verification or certificate, in writing, subscribed and certified or declared true under penalty of perjury [*50 USC app § 521(b)(4)*].

Strategic Point:

The Department of Defense maintains a website where military status can be verified [*see* https://www.dmdc.osd.mil/scra/owa/home].

5.48[2] If Status Is Unascertainable, Court May Require Debt Collector to File Bond. Unless it appears that the defendant is not in the military service, the court may require that the plaintiff file a bond approved by the court conditioned to indemnify the defendant against any loss or damage that he or she may suffer by reason of any judgment, should the judgment be later set aside in whole or in part. The court may make such other and further order or enter judgment as in its opinion may be necessary to protect these rights of the defendant [*50 USC app § 521(b)(3)*; *M&V Code § 402(a)*].

Cross References:

Discussion, enforcement of judgments generally, see Ch. 9, Planning Enforcement of Judgments; California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief

From JudgmentGeneral OverviewMilitary & Veterans LawVeteransBenefitsLoans

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5.49 Act Provides for Stays in Pending Judicial Proceedings.

Federal and state law provide the court wide discretion to stay proceeding if a present or former recent member of the armed forces may be affected in the defense or other litigation of an action [*50 USC app § 522* (generally); *50 USC app § 537* (enforcement of storage liens); *M&V Code § 403(a)*].

During the period of military service or within 90 days after that period, the court may, in its discretion, and must, on application to it by the servicemember or some person on his or her behalf, stay the action or proceeding [*50 USC app § 522(b)(1)*], or stay foreclosure or enforcement of any lien on property or effects of a servicemember [*50 USC app § 537*].

Since under California law, the period of time is within 60 days after the period of military service [*M&V Code § 403(a)*], the longer period under federal law is applicable.

Cross References:

Discussion and forms, stays of judgment based on military service, see *Ch. 15, Staying Enforcement of Judgment, 15.29 -15.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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5.50 Act Provides for Stays or Vacations of Execution of Judgments, Attachments, and Garnishments.

During the period of service or within 90 days after that period, a court may stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, and stay the execution of any judgment or order entered against a service member, if it determines a servicemember is "materially affected by military service in complying with a court judgment or order" [*50 USC app § 524*]. For servicemembers who qualify under California law, the period of time is within 60 days after the period of military service [*M&V Code § 403(c)*].

Cross References:

Discussion and forms, stays of judgment based on military service, see *Ch. 15, Staying Enforcement of Judgment, 15.29 -15.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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5.51 Act Delays Accrual of Fines and Penalties on Contracts.

When an action for compliance with the term of any contract is stayed, no fine or penalty can accrue by reason of failure to comply with the terms of the contract during the period of the stay [*50 USC app § 523*].

If a fine or penalty for the nonperformance is incurred, a court may provide relief against the enforcement of that fine or penalty if that person was in the military service when the penalty was incurred and by reason of military service the ability of the person to pay or perform was materially impaired [*50 USC app § 523*; *M&V Code § 403(b)*].

Cross References:

Discussion and forms, stays of judgment based on military service, see *Ch. 15, Staying Enforcement of Judgment, 15.29 -15.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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5.52 Act Tolls Statutes of Limitations.

The period of military service is not included in computing any statutes of limitations period for bringing any action or proceeding by or against any service member (or against his or her heirs, executors, administrators, or assigns) whether the cause of action or the right to institute the proceeding accrued before or during the period of service [*50 USC app § 526(a)*; *M&V Code § 404(a)*].

Cross Reference:

Discussion, statutes of limitations generally, see California Forms of Pleading and Practice, Ch. 345, Limitation of Actions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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5.53 Federal and California Laws Provide Temporary Relief From Specified Contractual Obligations.

5.53[1] Acts Contain Interest Rate Ceiling. A servicemember's obligation, before that person's entry into service, bearing an interest rate greater than 6 percent a year, will not bear interest in excess of 6 percent during the period of military service, unless, in the opinion of the court, or on application by the obligee, the ability of the service member to pay interest on that obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of that service, in which case the court may make whatever order is in its opinion just. "Interest" includes service charges, renewal charges, fees, or any other charges, except bona fide charges for insurance, in respect of any obligation or liability [*50 USC app § 527*; *M&V Code § 405*].

Strategic Point--Monitor Timing:

Counsel should pay attention to the debtor's responsibilities. In order to receive the interest rate limitation, the servicemember must provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service [*50 USC app § 527*].

Strategic Point--Creditor Protection:

A court may grant a creditor relief from the limitations of this section if the court determines that the ability of the servicemember to pay interest at a rate in excess of 6 percent is not affected by reason of the servicemember's military service [*50 USC app § 527(c)*].

5.53[2] Acts Delay Actions for Breach of Installment Purchase or Lease Contracts. After a servicemember enters military service, a contract for the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may the property be repossessed for such a breach without a court order [*50 USC app § 532(a)*; *M&V Code § 407(a)*]. The relief applies only to a contract in which installments have been paid by the servicemember before entering military service [*50 USC app § 532(b)*; *M&V Code § 407(a)*].

Cross Reference:

Retail installment contracts generally, see California Forms of Pleading and Practice, Ch. 501, Sales: Retail Installment Sales (Matthew Bender).

5.53[3] Acts Allow Early Termination of Residential or Motor Vehicle Leases. A servicemember may terminate a residential or motor vehicle lease before the expiration of the contract [*50 USC app § 535*; *M&V Code § 409*]. Any rents or lease amounts unpaid for the period preceding the effective date of the termination may be paid by the servicemember on a prorated basis, and the lessor may not impose any other charges in accordance with the terms of the lease [*50 USC app § 535(e)*; *M&V Code § 409(b)*].

Cross References:

Discussion, residential leases, see *Matthew Bender[(R)] Practice Guide: California Landlord-Tenant Litigation; 4.13*; California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender).

Motor vehicle leases, see California Forms of Pleading and Practice, Ch. 90, Automobiles: Vehicle Leasing Act (Matthew Bender).

5.53[4] Court May Require Steps Prior to Repossession. The court may order the repayment of all or part of any prior installments or deposits as a condition of terminating the contract and repossessing the property. The court has wide discretion to may make other disposition as is equitable to preserve the interests of all parties [*50 USC app § 532(c)*; *M&V Code § 407(b)*].

When a stay is granted in a proceeding to foreclose on real property, repossess personal property or rescind a contract, the court may order that any equity in the property be paid back to the servicemember as a condition of foreclosure, repossession, or rescission [*50 USC app § 534*; *M&V Code § 407(b)*].

Warning:

Repossessing or attempting to repossess property in violation of the servicemembers acts is a misdemeanor punishable with up to a year in jail and a fine of up to $1,000 [*50 USC app § 532(b)*; *M&V Code § 407(d)*].

Cross Reference:

Debt collection through repossession, see *5.33 -5.44*.

5.53[5] Act Delays Enforcement of Security Interests. The federal and state laws limit the enforcement of security interests in real or personal property. These protections are available for obligations that [*50 USC app § 533(a)*; *see M&V Code § 408(a)*]:

- Originated before the period of the servicemember's military service for which the servicemember is still obligated; and
- Is secured by a mortgage, trust deed, or other security in the nature of a mortgage.

A sale, foreclosure, or seizure of property is not valid if made during or within 90 days after the period of the servicemember's military service, except if made either on a court order granted before the transaction, with a return made and approved by the court, or pursuant to an enforceable waiver agreement [*50 USC app § 533(c)*; *M&V Code § 408(c)*].

In an action filed during, or within 90 days after, a servicemember's period of military service to enforce an obligation described above, the court may, after a hearing and on its own motion, or must, on application by a servicemember, when the servicemember's ability to comply with the obligation is materially affected by military service, either stay the proceedings for a period of time as justice and equity require, or adjust the obligation to preserve the interests of all parties [*50 USC app § 533(b)*; *M&V Code § 408(b)*].

Warning:

A sale or foreclosure of property in violation of the servicemembers acts is a misdemeanor punishable by up to a year in jail and a fine of up to $1,000 [*50 USC app § 533(d)*; *M&V Code § 408(d)*].

Cross References:

Discussion, security interests generally, see California Forms of Pleading and Practice, Ch. 503, Sales: Secured Transactions (Matthew Bender); California Legal Forms, Ch. 42, Secured Transactions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsInstallment ContractsContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential Leases

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Chapter 5 Debt Collection Prior to Litigation
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5.54 Acts Also Provide Court With Discretion to Grant Relief From Other Obligations.

Within 180 days of termination of or release from military service, a servicemember may apply to the court for relief from:

- Any obligation or liability incurred before the servicemember's military service [*50 USC app § 591(a)(1)*; *M&V Code § 409.3(a)*]; and

- From a tax assessment due before or during the servicemember's military service [*50 USC app § 591(a)(2)*; *M&V Code § 409.3(a)*].

Exception:
The law does not permit an application for stay on an obligation to pay child support [*M&V Code 409.3(c)*].

Other areas in which relief may be granted include:

- Eviction or distress [*50 USC app § 531*; *M&V Code § 406*].

- Insurance [*50 USC app § 540-547*; *M&V Code § 409.1*].

- Taxes [*50 USC app § 561*; *M&V Code § 409.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsInstallment ContractsContracts LawTypes of ContractsLease AgreementsGeneral Overview

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5.55 California Law Provides Additional Debt Relief for Servicemembers in Iraq or Afghanistan.

In addition to relief provided by statutes mentioned above, any member of the U.S. military reserve or the California national guard who is called to active duty after February 9, 2005, as a part of the Iraq and Afghanistan conflicts may defer payments on any of the following obligations while serving on active duty [*M&V Code § 800(a)*]:

- An obligation secured by a mortgage or deed of trust.
- Credit card debt.
- Retail installment contract debt.
- Retail installment account or revolving account debt.
- Up to two loans subject to the Rees-Levering Automobile Sales and Finance Act.
- Any payment of property tax or any special assessment of in-lieu property tax imposed on real property assessed on residential property owned by the reservist and used as the primary place of residence on the date ordered to active duty.

The deferment period is the lesser of 180 days or the period of active duty plus 60 calendar days and will apply only to those payments due subsequent to the notice provided to a lender by the reservist or reservist's designee [*M&V Code § 800(d)*].

During the deferment period, the reservist may defer the payment of principal and interest on the specified obligations without additional interest or penalties [*M&V Code § 804*].

Strategic Point:

The reservist must comply with the procedures for deferment under *M&V Code § 800(b)*, including submitting a letter requesting a deferment and, if required by the financial institution, proof that the reservist's employer does not provide continuing income to the reservist while on active military duty, including reservist's military pay, of more than 90 percent of the reservist's monthly salary and wage income earned before the call to active duty.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsMilitary & Veterans LawServicemembersGeneral OverviewMilitary & Veterans LawServicemembersU.S. National GuardReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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5.56 Additional Relief Is Available for Servicemembers and Families.

Additional relief is available for servicemembers and their families on full-time active state service or full-time active federal service, or full-time active duty of a reservist, for a period of 30 consecutive days [*see M&V Code § 820(a)*].

Any servicemember who is in military service or any spouse or legal dependent of that service member, may terminate, without penalty, a cell phone contract if the contract was entered into on or after January 1, 2006 [*M&V Code § 823(a)*].

Any servicemember who terminates a motor vehicle lease pursuant to the federal Servicemembers Civil Relief Act must be allowed to make payments that are due and unpaid at the time of termination of the lease in equal installments over a period equal to at least the period of military service [*M&V Code 826*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests

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Chapter 5 Debt Collection Prior to Litigation
VIII. FORM

1-5 MB Practice Guide: CA Debt Collection 5.57

5.57 Letter--Validation Notice With "Mini-Miranda" Statement.

Letter--Validation Notice With "Mini-Miranda" Statement.

Law Offices of Smith and Jones
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555

THIS COMMUNICATION IS AN ATTEMPT TO COLLECT A DEBT. THE FOLLOWING LETTER IS FROM A DEBT COLLECTOR, AND ANY INFORMATION OBTAINED FROM YOU WILL BE USED IN THE COLLECTION OF THAT DEBT.
_____ [*date*]
_____ [*name of debtor*]
_____ [*debtor's address*]

RE: Creditor: _____ [*creditor's name*]

Account Number: _____ [*account number and type of account*]

Amount Due: $_____ [*specify amount as of date of letter*]
Dear_____ [*name of debtor*]:

This office represents _____ [*name of creditor*] in an attempt to recover the amount you owe on account number _____ [*account number*]. The total amount due to _____ [*creditor*] as of this date is $ _____. [*Add, if appropriate:* This amount includes interest that has accrued, attorney's fees and other charges set forth in your contract.]

This office will assume that the amount owed to _____ [*creditor*] is valid unless, within 30 days of receiving this letter, you dispute any or part of this amount. You must notify me in writing of your dispute with _____ [*creditor*]. When I receive this notification I will obtain a verification of the debt from _____ [*creditor*]. I will also mail you the name and address of

_____ [*creditor*], if I receive a written request from you.

If you do not pay this debt under the terms of your contract, this office will take additional legal action to recover $_____ that you owe to _____ [*creditor*]. In addition, if a court judgment is obtained, you could be liable for court costs and attorney's fees. If you have any questions please call me.

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 8:00 a.m. or after 9:00 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 www.ftc.gov.

Sincerely,

Mary Smith
Attorney at Law

NOTES.

Authority:
15 USC § 1692g

Communicating With Debtor:
See *5.22 -5.32*

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action

1-6 MB Practice Guide: CA Debt Collection 6.syn

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

§ 6.syn Synopsis to Chapter 6: Litigation to Recover Debts--Selecting the Appropriate Causes of Action

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Allan Herzlich, Esq. and Jerome J. Blum, Esq. n*

FOOTNOTES:

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
I. STRATEGY

1-6 MB Practice Guide: CA Debt Collection 6.01

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.01 Scope.

This chapter includes:

- Determining which causes of action to assert to collect a debt [*see 6.03 -6.15*; *Forms: 6.36 -6.39*].
- Pleading the various potential causes of action [*see 6.16 -6.19*].
- Determining the particular statutes of limitation [*see 6.20 -6.23*].
- Determining available defenses to actions [*see 6.24 -6.35*; *Form: 6.41*].

The discussion in this chapter assumes that the debt is unsecured.

Cross Reference:

For a discussion of the considerations applicable to debt secured by real or personal property, refer to California Forms of Pleading and Practice, Ch. 62, Attachment (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
I. STRATEGY

1-6 MB Practice Guide: CA Debt Collection 6.02

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.02 Objective and Strategy.

The objective of most debt collection actions is to obtain the most money for the client in the shortest amount of time. Debt collection often involves a race among many creditors to obtain a debtor's limited funds. With this in mind, particular consideration should be given to alleging causes of action which allow for application of provisional remedies, such as injunctions or attachment. Cases often settle at an earlier stage when a provisional remedy has been obtained. Consideration should also be given to alleging causes of action that allow the judgment creditor to file a lis pendens, the practical effect of which is to tie up the debtor's property pending trial.

In most cases, the attorney will want to allege all available causes of action. Specific factual exceptions may exist in which an available cause of action may not be alleged. For example, when a corporate debtor is out of business, the attorney may elect not to pursue breach of contract against the corporation, and instead elect to pursue only those causes of action available against a guarantor and/or one who has fraudulently transferred the corporation's assets.

Cross References:

Fraudulent conveyances, see Ch. 4, Fraudulent Conveyances.

Provisional remedies, including lis pendens, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Discussion of pleadings, generally see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure.

For tips on updating case law and expanding your research with additional resources, see **How To Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewContracts LawDebtor & Creditor Relations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
II. DECIDING WHAT CAUSES OF ACTION TO ASSERT

1-6 MB Practice Guide: CA Debt Collection 6.03

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.03 CHECKLISTS: Deciding What Causes of Action to Assert.

6.03[1] CHECKLIST: Breach of Written Agreement.

☐ Obtain and review any formal written agreements.

☐ Identify names of potentially liable parties (and any alternative name spellings or fictitious business names) and respective legal status (corporation, LLC, partnership, other entity).

☐ Obtain any credit applications, if any, which may contain supplementing or superseding terms.

☐ Determine if there are additional persons who may be liable for debt.

☐ Obtain and review any purchase orders and invoices from supplier of goods or services and order confirmations from purchaser for terms that become part of agreement.

☐ Ask client to provide copies of all correspondence, including e-mail.

☐ Investigate whether any guaranty of obligation exists.

Discussion:
See *6.05[1]*

☐ Review all documents (including correspondence) to determine whether original agreement was modified and, if so, whether modified agreement has been breached.

☐ Review agreement for arbitration or mediation provisions.

☐ Review agreement for venue provisions.

☐ Review agreement for choice of law provisions.

☐ Review agreement for attorney's fee provisions.

☐ Review agreement for interest provisions.

☐ Review agreement to determine signatures are correct.

Discussion:
See *6.05[2], [3]*

☐ Draft complaint.

○ Elements which must be pled:

☐ Existence of a contract.

☐ Plaintiff's performance or excuse for nonperformance.

☐ Defendant's breach.

☐ Damages to plaintiff.

Authority:
Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377 ;
Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 916, 92 CR 723

Discussion:
See *6.05[4]*

Form:
See *6.36*

6.03[2] CHECKLIST: Breach of Oral Agreement.

☐ Obtain and review any prior communications between parties, including correspondence, e-mails, and other writings that may constitute or clarify the agreement.

Discussion:
See 6.05[1][a]

☐ Obtain credit applications, if any, which may contain supplementing or superseding terms.

Discussion:
See 6.05[1][b]

☐ Obtain and review any purchase orders and invoices from supplier of goods or services and order confirmations from purchaser for terms that become part of agreement.

Discussion:
See 6.05[1][c]

☐ Review all documents (including correspondence) to determine whether the original agreement was modified and, if so, whether, the modified agreement has been breached.

Discussion:
See 6.05[1][d], 6.05[2]

☐ Investigate whether any guaranty of obligation exists.

Discussion:
See 6.05[1][e]

☐ Determine if there are additional persons who may be liable for debt.

☐ Identify name of each potentially liable party (and any alternative name spellings or fictitious business names) and each party's respective legal status (i.e., corporation, LLC, partnership, etc.).

Discussion:
See 6.05[1][f]

☐ Draft complaint.

○ Elements which must be pled:

☐ Parties entered into oral agreement (The complaint should state that agreement was oral).

☐ The parties made mutual promises constituting consideration.

☐ Defendant's breach.

☐ Damages to plaintiff.

Authority:
Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377 ;

Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 916, 92 CR 723

Discussion:
See *6.06[4]*

Form:
See *6.36*

6.03[3] CHECKLIST: Common Counts in General.

☐ Submit demand for payment if:

○ Debtor does not know that he or she owes creditor money; or

○ Until demand is made, payee's retention of money is lawful.

Authority:
Quimby v. Lyon (1883) 63 C 394, 395 ; *Samuels v. Larrimore (1909) 11 CA 337, 339, 104 P 1001* ; *Twining v. Thompson (1945) 68 CA2d 104, 114, 156 P2d 29* ; *Thresher v. Lopez (1921) 52 CA 219, 221, 198 P 419* ; *Rose v. Foord (1892) 96 C 152, 154, 30 P 1114*

Discussion:
See *6.07[2]*

☐ Draft complaint.

○ Elements which must be pled:

☐ Indebtedness in a specific sum.

☐ Consideration given (that is, goods sold or services provided).

☐ Nonpayment.

☐ Determine whether to plead for statutory attorney's fee if making claim for open book account.

Authority:
First Interstate Bank v. State of California (1987) 197 CA3d 627, 635, 243 CR 8 ; *Allen v. Powell (1967) 248 CA2d 502, 510, 56 CR 715*

Discussion:
See *6.07[1]*

Form:
See *6.37*

6.03[4] CHECKLIST: Quantum Meruit or Quantum Valebant.

☐ Draft complaint.

○ Elements that must be pled:

☐ Fact that plaintiff performed services for or delivered good to defendant.

☐ Reasonable value of services or goods.

☐ Services were rendered or goods delivered at the defendant's request.

☐ Nonpayment.

Authority:
Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373 , citing Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86

Discussion:
See *6.07[3][b]*

Form:
See *6.37*

6.03[5] CHECKLIST: Breach of Guaranty.

☐ Investigate whether guaranty exists.

☐ Review validity of signatures.

☐ Determine whether there was separate consideration for guaranty.

☐ Determine whether guaranty is in writing or meets exceptions to writing requirement.

☐ If guaranty is conditional, confirm condition was met.

Authority:
CC § 2787 et seq.

Discussion:
See *6.08*

6.03[6] CHECKLIST: Fraud.

☐ Draft complaint for intentional misrepresentation.

○ Elements which must be pled:

☐ False representation or concealment of material fact (or opinion) susceptible of knowledge.

☐ Made with knowledge of its falsity or without sufficient knowledge to warrant representation.

☐ With intent to induce person to whom it is made to act on it.

☐ An act by that person in justifiable reliance on representation.

☐ That person's damage.

Authority:
South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 CA3d 750, 765, 102 CR 286 ; *Balfour, Guthrie & Co. v. Hansen (1964) 227 CA2d 173, 192-193, 38 CR 525*

Discussion:
See *6.09*

Form:
See *6.38*

☐ Draft complaint for negligent misrepresentation.

○ Elements which must be pled:

☐ False representation or concealment of a material fact (or opinion) susceptible of knowledge.

☐ Not made intentionally.

☐ Act by person in justifiable reliance on representation.

☐ That person's damage.

○ Determine whether information is conveyed in commercial setting for business purpose or provided false information which posed risk of and resulted in physical harm to person or property.

Authority:
Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells (2000) 86 CA4th 303, 309-310, 103 CR2d 159 ; *Friedman v. Merck & Co. (2003) 107 CA4th 454, 477, 131 CR2d 885*

Discussion:
See *6.09*

Form:
See *6.38*

6.03[7] CHECKLIST: Fraudulent Transfer.

☐ Determine whether grounds exist:

- ○ Is intent to defraud presumed in law; or
- ○ Was there actual intent to hinder, delay, or defraud creditors.

☐ Consider whether also to file common law claim.

Authority:
CC §§ 3439.04-3439.06, 3439.08; *Hansford v. Lassar (1975) 53 CA3d 364, 374, 125 CR 804*

Discussion:
See *6.10*

6.03[8] CHECKLIST: Conversion.

☐ Determine whether there was wrongful interference with right to possession.

- ○ Determine if there was substantial and actual interference with plaintiff's possession or rights.
- ○ Determine whether conduct was intended to affect property.

Authority:
Chatterton v. Boone (1947) 81 CA2d 943, 946, 185 P2d 610 ; *Jordan v. Talbot (1961) 55 C2d 597, 610, 12 CR 488, 361 P2d 20* ; *Home v. Kramer (1936) 7 C2d 361, 363-364, 60 P2d 854* ; *Schroeder v. Auto Driveaway Co. (1974) 11 C3d 908, 918, 114 CR 622, 523 P2d 662*

Discussion:
See *6.11*

Form:
See *6.39*

6.03[9] CHECKLIST: Bad Check Violation.

☐ Determine whether check was passed on insufficient funds, including stop payment instructions.

☐ Send notice meeting statutory requirements.

☐ If the check is not honored within 30 days:

○ Request statutory damages for:

☐ Amount of check (minus any partial payments made within 30 days),

☐ Damages equal to treble amount (but not less than $100 nor more than $1500),

☐ Service charge for bad check, and

☐ Costs of mailing notice.

Authority:
CC § 1719

Discussion:
See *6.12*

Form:
See *6.40*

6.03[10] CHECKLIST: Bulk Sales Law Violation.

☐ Determine whether:

○ Seller's principal business is sale of inventory from stock or seller is restaurant owner.

○ On date of bulk sale agreement seller is located in California or, if seller is located in jurisdiction that is not part of United States, seller's major executive office in United States is in California.

Authority:
Com Code § 6103

Discussion:
See *6.13*

6.03[11] CHECKLIST: Successor Liability.

☐ Determine whether corporation continues to retain same rights as original owner.

☐ Determine whether change is in form only, not in substance, such as when corporation changes name.

Authority:
California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 CA3d 260, 271-272, 261 CR 484

Discussion:
See *6.14*

6.03[12] CHECKLIST: Alter Ego Liability.

☐ Determine whether any of the following factors exist (all need not be present):

- ○ Intermingling of entity and personal assets;
- ○ Failure to issue stock;
- ○ Failure to hold required meetings for the entity;
- ○ Failure to keep required entity records;
- ○ Inadequate capitalization;
- ○ Entity and individual have common principals and employee; or
- ○ Entity and individual have common counsel.

Authority:
Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 CA2d 825, 838, 26 CR 806

Discussion:
See *6.15[1]*

☐ Draft complaint:

- ○ Necessary allegations:
  - ☐ Existence of obligation owed to plaintiff by corporation.
  - ☐ Unity and identity of interest between individual and corporation.
  - ☐ That adherence to fiction of separate existence of corporation would, under particular circumstances alleged, sanction fraud or promote injustice.

Authority:
Design Associates, Inc. v. Welch (1964) 224 CA2d 165, 171, 36 CR 341 ; *Shea v.*

Leonis (1939) 14 C2d 666, 670, 96 P2d 332 ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 CA2d 324, 333, 44 CR 377* ; *Minifie v. Rowley (1921) 187 C 481, 487, 202 P 673* ; *Pearl v. Shore (1971) 17 CA3d 608, 618, 95 CR 157*

Discussion:

See *6.15[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersContracts LawBreachCauses of ActionBreach of WarrantyContracts LawBreachCauses of ActionElements of ClaimsContracts LawDebtor & Creditor Relations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
II. DECIDING WHAT CAUSES OF ACTION TO ASSERT

1-6 MB Practice Guide: CA Debt Collection 6.04

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.04 Objective and Strategy for Creditor.

Since debts ordinarily arise out of contractual obligations, an action for breach of contract is the most obvious and common way of collecting a debt [*see 6.05*, *6.06*]. However, other possible causes of action may arise in connection with recovery of a debt. Among these are:

- Quantum meruit, account stated, and other common counts [*see 6.07*].
- Breach of a guaranty agreement [*see 6.08*].
- Fraud and negligent misrepresentation [*see 6.09*].
- Fraudulent conveyance [*see 6.10*].
- Conversion [*see 6.11*].
- Violation of the bad check statute [*see 6.12*].
- Failure to comply with the Bulk Sales Law [*see 6.13*].
- Actions for successor liability and alter ego [see *6.14*, *6.15*].

The causes of action listed above and discussed in this chapter are not necessarily exclusive. The attorney should consider alleging any other legally viable cause of action that the facts of the client's transaction with the debtor may support.

Strategic Point:

The attorney should first consider what causes of action might be asserted in the action, anticipating to the extent possible any potential defenses. Then, once all potential theories of recovery have been explored, a cost-benefit analysis should be applied to determine whether the likelihood of success, and the amount of the probable recovery, will justify any additional expense that may be required in

discovery, research, and time, to assert all of the possible theories. In some cases, problems such as the statute of limitations or evidentiary issues may dictate what causes of action will be alleged. Within the limits of cost effectiveness, counsel should consider seeking recovery on as many theories as possible, to provide the greatest likelihood of ultimate success in the action, as well as potentially increasing the creditor's leverage in settlement negotiations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionBreach of WarrantyContracts LawDebtor & Creditor RelationsContracts LawRemediesEquitable ReliefQuantum MeruitTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
II. DECIDING WHAT CAUSES OF ACTION TO ASSERT

1-6 MB Practice Guide: CA Debt Collection 6.05

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.05 Breach of Written Agreement Cause of Action May Exist.

6.05[1] Attorney Should Identify All Documents That May Constitute the Agreement.

6.05[1][a] Attorney Should Make Sure Client Provides All Relevant Documents. Documents initially forwarded by the client with the case assignment often are incomplete and frequently do not detail the entire course of dealing between the parties, including waivers or modification of the original agreement. The attorney should obtain all relevant documents from the client and then identify those that constitute the agreement as initially and/or ultimately entered into between the parties.

Strategic Points:

- Counsel should have the client send the complete and original file, if possible. The client should not be allowed to try to decide for counsel what is considered "relevant." Counsel also should ask for copies of all e-mail communications with the defendant or their agents or employees. Not only will it alert counsel to potential issues, it might strengthen a written agreement or explain otherwise indefinite terms.

- Counsel also should ask the client if there are other loan or debt transactions involving the defendant, and even if those are not in default, counsel should obtain copies of those files as well. There are other potential claims that may be available based on a review of those documents, and other potential obligors. It is not uncommon for one department to not be aware of the obligations that another department is handling.

6.05[1][b] Credit Application May Contain Supplemental or Superseding Terms. A credit application may contain supplementing or superseding terms, even if the credit application was initially obtained in connection with a transaction other than the one(s) now at issue. Credit applications may also contain information about additional persons who may be liable for the debt (*e.g.,* they may contain language where the signatory guarantees the transaction(s) to be undertaken in reliance on the credit application).

6.05[1][c] Purchase Orders and Confirmations/Invoices May Contain Terms. Purchase orders and invoices from the supplier of goods or services and order confirmations from the purchaser often contain terms that become part of the agreement. Counsel should review the documents as those provided by the supplier may contain terms additional to and/or inconsistent with those provided by the purchaser. This "battle of the forms" may require a review of applicable provisions of the Commercial Code [*see Com Code § 2202 et seq*. and, particularly, *Com Code § 2207*].

6.05[1][d] Correspondence Should Be Reviewed Thoroughly. The attorney should ask the client to provide copies of all correspondence, including email. The correspondence will often shed light on the parties' intentions and understandings. Correspondence also may reveal modifications to the agreement or provide information to negate professed defenses to the breach of the agreement.

Strategic Point:

Counsel should review all correspondence and other communications with an eye to potential defenses. If the amount being sued on is minor, and the potential for a defense or cross-complaint is high, it may be the better not to pursue the smaller obligation rather than incurring disproportionate fees defending a cross-action. If there are collector's notes or emails, counsel should obtain them in the beginning, before litigation is filed. Collectors sometimes write things in computerized records that they would not want to say out loud, and these can prove very embarrassing to the plaintiff if discovered. Defense counsel should similarly ask for these records if appropriate, for the same reason.

6.05[1][e] Attorney Should Investigate Thoroughly to Determine Whether There Is a Guaranty. The attorney should investigate whether any guaranty of the obligation exists. If so, a separate cause of action should be asserted.

Cross Reference:

Breach of guaranty, see *6.08*.

6.05[1][f] Attorney Should Identify Names and Legal Status of All Potentially Liable Parties. Counsel should identify the names of each of the potentially liable parties (and any alternative name spellings or fictitious business names) and their respective legal status (corporation, LLC, partnership, etc.).

Strategic Point:

The naming of all possible alternative names is essential because the sheriff will not levy if there is any variation in the names and counsel will be required to amend the judgment. For example, a business that is a "dba" may present a business license that lists a completely different name when served with levy papers, and that will stop the levying officer. Counsel should conduct discovery and amend before judgment if at all possible.

Counsel should bear in mind that when a long list of names is used in the pleading caption, each name must be repeated exactly as in the summons caption. In addition, some courts will require evidence that the defendant uses all name variations before they will enter judgment. Sometimes a credit report will list name variations, as well as business licenses and fictitious name statements.

Trap:

An error in the defendant's name may result in a default judgment being set aside if the error precludes proper notice and an opportunity to defend [*Manson, Iver & York v. Black (2009) 176 CA4th 36, 97 CR3d 522* (complaint served on Paula Black, which incorrectly stated her name as Pamela Black, was

held not to give proper notice)]. If the error is not discovered until after the applicable statute of limitations has passed, the error could prove fatal [*see Earl W. Schott v. Kalar (1993) 20 CA4th 943, 24 CR2d 580*]. However, a minor misspelling should not require vacating a judgment [*Sakaguchi v. Sakaguchi (2009) 173 CA4th 852, 92 CR3d 717* (Takeshi Sakaguchi was incorrectly named as Takechi Sakaguchi)].

Cross Reference:

Considerations while reviewing agreement, see *6.05[3]*.

6.05[2] Attorney Should Determine Whether Agreement Has Been Modified. The attorney should review all documents (including correspondence) to determine whether the original agreement has been modified and, if so, whether, the modified agreement has been breached. Counsel should determine whether the modification constituted a novation or simply an accord. An accord is an agreement to accept something different from or less than that to which the person agreeing to accept is entitled [*CC § 1521*]. Novation is the substitution of a new obligation for an existing one [*CC § 1530*].

Strategic Point:

If the modification was simply an accord, the attorney may wish to consider whether it might be more advantageous to assert a cause of action for breach of the accord agreement instead of, or in addition to, breach of the written agreement.

6.05[3] Attorney Should Review Significant Provisions of Agreement Before Drafting Complaint.

6.05[3][a] Agreement May Contain Arbitration or Mediation Clause. The agreement may include a provision requiring arbitration with the American Arbitration Association ("AAA") or other arbitration tribunal or requiring mediation instead of (or in addition to) arbitration.

Consider:

Various advantages and disadvantages accompany arbitration. Unless a provision is specifically included, arbitration usually precludes conducting discovery in debt collection actions [*CCP § 1283.1*]. This can be advantageous (less costly) if liability is clear-cut, but disadvantageous if the debtor potentially can assert legitimate defenses that creditor's counsel would like to investigate prior to the arbitration hearing. While the creditor may often get to a final arbitration hearing earlier than with court proceedings, unless the debtor voluntarily pays an arbitration award in favor of the creditor, a suit still will have to be filed eventually to confirm the arbitration award as a judgment.

Trap:

Counsel should be careful not to inadvertently waive the right to arbitration. Any request for a provisional remedy should be accompanied by a statement that the party's right to arbitration is reserved [*CCP § 1281.8(b)*].

Trap:

Some contracts (for example, the standard California residential property purchase agreement and most standard residential rental and lease agreements) require that mediation be attempted before commencing litigation or arbitration. A prevailing party who fails to do so may be precluded from obtaining an otherwise available award of attorney's fees [*Lange v. Schilling (2008) 163 CA4th 1412, 1417, 78 CR3d 356]* .

Strategic Points:

- Even if the written contract contains an arbitration provision, the attorney may still wish to file suit. A debtor who prefers to arbitrate may be able to stay the action (in which case, the creditor will want to keep the action "open" to later confirm the arbitration award), but often the debtor will waive arbitration, either voluntarily or involuntarily by appearing in the action and not raising the issue.

- Counsel should be sure to check if the arbitration requirement is raised as an affirmative defense. It would be extremely undesirable to have the case proceed to the eve of trial and then be presented with a motion to compel arbitration. If the arbitration issue is raised in the answer, counsel should discuss the matter with defense counsel and either stay the action and file an arbitration petition or obtain a waiver (if applicable, use the leverage of an attorney's fee provision to convince the debtor that he or she does not want to litigate the matter twice).

- Counsel should be aware that provisional remedies remain available even if arbitration is commenced [*CCP § 1281.8*; *Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 CA 3d 1110, 212 CR 830]* .

- In recent years, the AAA has been less favored by debt collection practitioners (due to high costs and management fees) as compared with other alternative dispute resolution choices. Thus, if the agreement contains a provision requiring arbitration before the AAA, counsel may consider filing suit notwithstanding the arbitration provision. If debtor's counsel later points out the provision, counsel may suggest a mutual agreement to arbitrate elsewhere. A similar analysis applies to agreements to arbitrate before an industry board, unless counsel believes that the arbitrator's knowledge of industry practices would prove helpful to the creditor's case. Most arbitrations today take place before commercial arbitration service providers such as JAMS or ADR Services, Inc. These providers offer a large selection of retired judges or experienced arbitrators/mediators. They are often less costly and more flexible than the AAA or an Industry Board.

6.05[3][b] Review Agreement for Forum or Venue Selection Provision. Forum selection clauses designate a particular jurisdiction (such as California or some other state) [*see Alexander v. Superior Court (2003) 114 CA4th 723, 726-727*]. If the written agreement contains a forum selection clause, counsel should determine whether the provision compels or simply permits a specific forum.

Strategic Points:

- If presented with a choice of forums, counsel should consider which forum would be most advantageous to the action. For example, if pursuit of a provisional remedy is anticipated, the attorney may want to choose a court where a single judge has been appointed to hear all attachment applications (*e.g.* Dept. 66 of the Los Angeles CountySuperior Court), in contrast to a court where the judge is less likely to have experience with attachment matters.

- When confronted with an unfavorable forum selection clause, counsel may nevertheless make a decision to file elsewhere. For example, a forum selection clause may call for controversies to be decided in another state. If the attorney chooses to file locally, it is likely that opposing counsel will not object as

the opposition also may prefer that the matter be heard locally.

Consider--Venue Selection Clauses Are Unenforceable:

Unlike forum selection clauses, which select a specific jurisdiction, venue selection clauses attempt to select the county or other territory in which the case will be heard. Venue selection clauses have been held unenforceable in California on the ground that the legislature establishes venue and neither the parties nor the courts are permitted to do so [*see Caminetti v. Superior Court (1941) 16 C2d 838, 843, 108 P2d 911* ; *Alexander v. Superior Court (2003) 114 CA4th 723, 8 CR3d 111*]. However, no case has yet dealt directly with a venue clause agreeing to one of a number of permissible venue choices [*see Arntz Builders v. Superior Court (2004) 122 CA4th 1195-1201, 19 CR3d 346*].

Warning:

Counsel should be aware, however, that if the other side objects to a wrongfully chosen venue, the attorney may be required to pay the moving party's reasonable expenses and attorney's fees [*CCP § 396b*].

Cross References:

Venue, see *6.18[4]*.

Contractual forum selection clauses, see *Matthew Bender[(R)] Practice Guide: California Contract Litigation, 3.06*.

Invalidity of venue selection clauses in California, see *Matthew Bender[(R)] Practice Guide: California Contract Litigation, 3.32[7]*.

6.05[3][c] Determine If Agreement Contains a Choice of Law Clause. In practice, a provision providing for the application of the law of a state other than California is often ignored. Either it is not noticed by debtor's counsel or it is intentionally ignored as debtor's counsel is more comfortable with California law. Creditor's counsel should research the other state's law to investigate more favorable provisions. It is not uncommon for other states to provide a longer statute of limitations for certain causes of action (*e.g.* New York statute of limitations is six years on a guaranty).

Cross Reference:

Effect and enforceability of choice of law clauses in contract actions, see Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 1, Determining the Applicable Law.

6.05[3][d] Review Agreement for Provisions for Attorney's Fees. The inclusion of an attorney's fee provision is often the best weapon in the creditor's arsenal. It provides leverage for a quick settlement, since the effect of an attorney's fee provision is to increase potential recovery the further the litigation proceeds (and thus increase exposure for the debtor). If the judgment ultimately obtained includes an award of contractual attorney's fees, then attorney's fees incurred postjudgment to collect on the judgment may also be recoverable [*CCP §§ 685.040, 685.070(a)(6)*]. These include attorney's fees incurred in bankruptcy proceedings to avoid discharge of the debt [*Jaffe v. Pacelli (2008) 165 CA4th 927, 936, 82 CR3d 423]* .

Trap:

Some contracts (for example, the standard California residential property purchase agreement, and most standard residential rental and lease agreements) require that mediation be attempted before commencing litigation or arbitration. A prevailing party who fails to do so may be precluded from obtaining an otherwise available award of attorneys' fees [*Lange v. Schilling (2008) 163 CA4th 1412, 78 Cal. Rptr. 3d 356]* .

Cross References:

Identifying assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Effect and enforceability of contractual provisions governing award of attorney's fees, see Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 12, Recovering Attorney's Fees and Costs in Contract Litigation.

6.05[3][e] Determine If Agreement Contains Provision for Interest. The written agreement should be reviewed to determine whether it contains an interest provision. A written agreement may provide for any legal (non-usurious) rate of interest [*CC § 3289(a)*]. If the agreement does not specify an interest rate, interest may be recovered at the legal rate of 10 percent simple interest per annum [*CC § 3289(b)*]. Different interest rules apply, however, if the transaction is a retail installment agreement subject to the Unruh Act [*CC § 3289.5*]. Prejudgment interest recoverable pursuant to a provision of a written agreement is not subject to the *CC § 3287(a)* requirement that damages be "certain, or capable of being made certain by calculation" [*Roodenburg v. Pavestone Co., L.P. (2009) 171 CA4th 185, 191, 89 CR3d 558]* .

Warning:

Usurious interest rates often appear in promissory notes or written agreements drafted by lay persons or small business persons. Since such an improper provision could preclude the recovery of any interest, it may prove advisable to plead interest at the maximum legal rate so as not to draw attention to the usurious rate.

6.05[3][f] Review Agreement for Correct Signatures. The attorney should inspect the signature(s) to ensure that they are made in the appropriate place in the agreement and in the anticipated capacity. It is not uncommon for a client to believe that a person signed an agreement or guaranty when, in fact, they either failed to sign the proper portion of the agreement or signed indicating a representative capacity.

6.05[4] Elements for Breach of Contract Actions Must Be Pled. The essential elements of a cause of action for damages for breach of contract are [*Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377* ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 916, 92 CR 723]* :

- A contract;
- Plaintiff's performance or excuse for nonperformance;
- Defendant's breach; and
- Damages to the plaintiff.

Judicial Council Form PLD-C-001(1) is a standard form for a complaint for breach of contract. Use of this form is optional.

Cross References:

Judicial Council Form PLD-C-001 for breach of contract actions, see *6.36*.

Statute of limitations, see *6.23[1]*.

Further discussion and forms for breach of contract actions, Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 22, Suing or Defending Action for Breach of Contract.

California Forms of Pleading and Practice, § 140.50 et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawContract Conditions & ProvisionsForum Selection ClausesContracts LawDebtor & Creditor Relations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
II. DECIDING WHAT CAUSES OF ACTION TO ASSERT

1-6 MB Practice Guide: CA Debt Collection 6.06

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.06 Breach of Oral Agreement Cause of Action May Exist.

6.06[1] Attorney Should Identify All Statements That May Constitute the Agreement. The information initially provided by the client with the case assignment often tells only part of the story. The attorney should attempt to identify all terms of the oral agreement initially and/or ultimately entered into between the parties.

6.06[2] Attorney Should Identify All Documents That May Clarify the Agreement. The attorney should ask the client to provide copies of all documents relating to the transaction, including correspondence and e-mail. These documents will often shed light on the parties' intentions and understandings with respect to the oral agreement. They may also reveal modifications to the agreement or provide information to negate professed defenses to the breach of the agreement.

Strategic Point:

Even if the client states that the agreement was oral, the attorney should ask whether there was a credit application. Clients often will not realize that a credit application can become part of the agreement, or may have forgotten that one existed.

6.06[3] Attorney Should Determine Whether Agreement Has Been Modified. The attorney should review all documents, and make inquiry of the client, to determine whether the original agreement has been modified and, if so, whether the modified agreement has been breached. Care should be taken to determine whether the modification constituted a novation or simply an accord. An accord is an agreement to accept something different from or less than that to which the person agreeing to accept is entitled [*CC § 1521*]. Novation is the substitution of a new obligation for an existing one [*CC § 1530*].

Strategic Points:

- If the modification was simply an accord, the attorney may wish to consider whether it might be

more advantageous to assert a cause of action for breach of the accord agreement instead of, or in addition to, the breach of the agreement.

- While a cause of action for breach of oral contract may exist, if a cause of action for open book account also exists, many practitioners will not assert the oral contract since the open book account allows for the recovery of statutory attorneys' fees, whereas no attorneys' fees are recoverable on the oral contract. It may be advisable to allege both causes of action in case the client's open book account proves defective. However, if the debtor defaults, then recovery may be sought on the open book account and not the oral contract cause of action.

Cross Reference:

Open book account, see *6.07[3][a]*.

6.06[4] Essential Elements for Valid Breach of Oral Agreement Action Must Be Pled. A complaint for breach of an oral agreement must state [*Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377* ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 916, 92 CR 723]* :

- The parties entered into an oral agreement. The complaint should state that the agreement was oral; otherwise, the defendant may demur on the ground that defendant cannot ascertain from the pleading whether the contract is written or oral or implied by conduct [*CCP § 430.10(g)*];

- The parties made mutual promises constituting consideration (there is no presumption of consideration for an oral agreement) [*Acheson v. Western Union Tel. Co. (1892) 96 C 641, 644, 31 P 583]* ;

- The plaintiff performed all conditions required of plaintiff or was excused from performance;

- The defendant breached the contract; and

- The plaintiff sustained damages.

All contracts may be oral, except those that are specially required by statute to be in writing [*CC §§ 1622, 1624*].

Judicial Council Form PLD-C-001(1) is a standard form for a complaint for breach of contract. Use of this form is optional.

Cross References:

Judicial Council Form PLD-C-001(1) for breach of contract, see *6.37*.

Statute of limitations, see *6.23[2]*.

Further discussion and forms for breach of contract actions, Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 22, Suing or Defending Action for Breach of Contract.

California Forms of Pleading and Practice, § 140.50 et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of

ClaimsContracts LawContract ModificationsGeneral OverviewContracts LawContract ModificationsOral ModificationsContracts LawTypes of ContractsOral Agreements

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
II. DECIDING WHAT CAUSES OF ACTION TO ASSERT

1-6 MB Practice Guide: CA Debt Collection 6.07

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.07 Common Counts Cause of Action May Exist.

6.07[1] Specific Pleading Requirements for a Common Count Action. A properly pled cause of action for a common count must include statement of [*First Interstate Bank v. State of California (1987) 197 CA3d 627, 635, 243 CR 8* ; *Allen v. Powell (1967) 248 CA2d 502, 510, 56 CR 715]* :

- Indebtedness in a specific sum;
- Consideration given (that is, goods sold or services provided); and
- Nonpayment.

A complaint that alleges that no part of the amount sued for has been paid by the defendant is also sufficient [*Arocena v. Sawyer (1923) 60 CA 581, 585, 213 P 523]* . Judicial Council Form PLD-C-001(2) may be used to plead a common count cause of action [*Cal Rules Ct, Rule 1.45(a), (b)*]. Use of this form is optional. The form is both easy to understand and comprehensive.

Strategic Point:

An attorney who intends to develop a collections practice should consider drafting standard pleading templates. While they may require more time initially, they are essential to processing a volume of cases efficiently.

Cross References:

Open book account, see *6.07[3][a]*.

Quantum meruit, see *6.07[3][b]*.

Account stated, see *6.07[3][c]*.

Statute of limitations, see *6.23[3]*.

Judicial Council Form PLD-C-001(2) for common count cause of action, see *6.37*.

6.07[2] Demand for Payment Generally Is Not Required. A demand for payment is not generally required; the complaint itself is the demand [*Quimby v. Lyon (1883) 63 C 394, 395* (money had and received); *Samuels v. Larrimore (1909) 11 CA 337, 339, 104 P 1001* (money lent)].

A demand is required, however, when the debtor does not know that he or she owes the creditor money [*see Twining v. Thompson (1945) 68 CA2d 104, 114, 156 P2d 29* ; *Thresher v. Lopez (1921) 52 CA 219, 221, 198 P 419*]. A demand also is required when, until the demand is made, the payee's retention of the money is lawful [*see Rose v. Foord (1892) 96 C 152, 154, 30 P 1114]* .

6.07[3] Specific Types of Common Count Allegations.

6.07[3][a] Creditor May Wish to Allege an Open Book Account. Goods and services are often provided on an open book account basis. A "book account" is "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor ... and shows the debits and credits in connection therewith ... is entered in the regular course of business ... and is kept in a reasonable permanent form and manner" [*CCP § 337a*]. Statutory attorney's fees are recoverable in an action on a book account [*CC § 1717.5*].

Strategic Points:

- Especially when the debtor defaults (a common event in collection cases), the attorney may wish to proceed on this cause of action if attorney's fees are not otherwise recoverable.

- An open book account also provides a statute of limitation advantage as the statute does not commence running when the debtor initially fails to make timely payment, but only begins to run from the date of the last item [*CCP § 337(2)*]. In fact, some cases have gone so far as to hold that the statute does not begin to run until the parties no longer contemplate possible future transactions [*Reigelsperger v. Siller (2005) 125 CA4th 1008, 1015, 23 CR3d 249* ; *Cochran v. Rubens (1996) 42 CA4th 481, 485, 49 CR2d 672]* .

Cross Reference:

Judicial Council Form PLD-C-001(2) for common count cause of action, see *6.37*.

6.07[3][b] Creditor May Allege a Common Count Claim for Quantum Meruit. Even in the absence of a specific agreement, there may be an action to recover the reasonable value of services or goods provided. Technically, the action is quantum meruit when seeking recovery of the reasonable value of services provided and quantum valebant when seeking recovery for the reasonable value of goods provided. However, the term "quantum meruit" is commonly used and understood to refer to both services and goods.

A count for quantum meruit is sufficiently pleaded if the complaint alleges [*Haggerty v. Warner (1953) 115 CA2d 468, 475, 252 P2d 373* , *citing Brown v. Crown Gold Milling Co. (1907) 150 C 376, 382, 89 P 86]* :

- Plaintiff performed services for or provided good to the defendant;

- The reasonable value of those services or goods;
- The services were rendered at the request of or goods were provided to the defendant; and
- The defendant was not paid for the services or goods.

A count in quantum meruit is sufficiently pleaded even though the plaintiff fails to state when the defendant became indebted to him or her, or the nature of the services rendered [*Evans v. Zeigler (1949) 91 CA2d 226, 230, 204 P2d 902*]. No demand for payment is required before instituting the action [*McDonald v. Filice (1967) 252 CA2d 613, 623, 60 CR 832]* .

Cross References:

Judicial Council Form PLD-C-001(2) for common count cause of action, see *6.37*.

Detailed discussion of quantum meruit claims, see Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 9, Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery In Contract Actions.

6.07[3][c] Plaintiff May Allege Claim for Account Stated. An account stated exists when there is a writing between the debtor and creditor agreeing that a specific amount is owing as of a specific date [*Maggio, Inc. v. Neal (1987) 196 CA3d 745, 752, 241 CR 883*]. If a statement is sent to the debtor and no reply is received within a reasonable time, the law implies an agreement that the account is correct as rendered [*Zinn v. Fred R. Bright Co., Inc. (1969) 271 CA2d 597, 600, 76 CR 663*].

Strategic Point:

While it is rare that the debtor will acknowledge owing the specific amount claimed by the creditor, those instances do sometimes occur. Such an acknowledgment may be uncovered in correspondence acknowledging the debt, but requesting additional time in which to pay the debt.

Cross Reference:

Judicial Council Form PLD-C-001(2) for common count cause of action, see *6.37*.

6.07[3][d] Plaintiff May Wish to Consider Other Common Counts. While less common, the attorney should consider the potential for alleging the following common counts:

- Money had and received (when money has been paid by mistake or due to fraud or if an underlying contract is void, voidable or unenforceable).
- Work, labor, services and materials rendered (at the debtor's request).
- Goods, wares, and merchandise sold and delivered (for which a debtor promised to pay).
- Money lent (to debtor by creditor).
- Money paid, laid out, and expended (typically when a creditor pays a third person on a debtor's behalf).

Cross References:

Judicial Council Form PLD-C-001(2) for common count cause of action, see *6.37*.

Detailed discussion of common counts, see California Forms of Pleading and Practice, Ch. 121, Common Counts (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawDebtor & Creditor Relations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
II. DECIDING WHAT CAUSES OF ACTION TO ASSERT

1-6 MB Practice Guide: CA Debt Collection 6.08

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.08 Breach of Guaranty Cause of Action May Exist.

6.08[1] Attorney Should Investigate Whether Any Guaranty of the Obligation Exists. A guaranty (promise to pay the debt of another) may exist in a separate guaranty document, a portion of a written agreement, a credit application, correspondence and, contrary to common understanding, may be oral. Guaranties are governed by *CC § 2787 et seq*. The guarantor (surety) will be held liable on the terms of the guarantor contract, and not the principal contract. The courts cannot impose on the guarantors another or different contract from that which the parties made [*De Luca v. Budke (1956) 138 CA2d 565, 568, 292 P2d 298*].

Judicial Council Form PLD-C-001(1) is a standard form for a complaint for breach of contract. It can be used for guaranty contracts if desired. Use of this form is optional.

Strategic Point:

When there is a guaranty and the attorney determines that it is not worthwhile to pursue the original obligor, read the guaranty to determine if there is language sufficient to support the "waiver" of pursuing the obligor.

Cross References:

Writing requirements, see *6.08[4]*.

Credit applications, see *6.05[1][c]*.

Statute of limitations, see *6.23[4]*.

Judicial Council Form PLD-C-001 for breach of contract, see *6.36*.

6.08[2] Attorney Should Review Signature to Ensure that Guaranty Is Enforceable. The attorney should ensure that the guaranty is clearly signed in the anticipated capacity. It is not uncommon to find that a purported individual guarantor has signed indicating a corporate or other representative capacity, thereby negating the

effectiveness of the guaranty.

6.08[3] Separate Consideration Required to Support Guaranty. A guaranty must be supported by separate consideration if not entered into at the same time as the original obligation [*CC § 2792*].

6.08[4] Guaranty Must Generally Be in Writing. A guaranty generally must be in writing [*CC §§ 1624(a)(2)*, *2793*]. Exceptions to the writing requirement include [*CC § 2794*]:

- When the guarantor receives property to apply to the guaranteed obligation or a discharge from the guarantor's own obligation (in whole or part).

- When the creditor parts with value in consideration of the promise under circumstances that render the party making the promise to the debtor the debtor's guarantor.

- A novation, when a new promise is created in cancellation of the prior obligation.

- When the promisor receives consideration beneficial to the promisor.

- When a factor undertakes, for a commission, to sell merchandise and act as a guarantor in connection with the sale.

- When the guarantor transfers an instrument for the payment of money (*e.g.*, a promissory note) in payment of the guarantor's own debt or for new consideration and promises the instrument will be honored.

6.08[5] Guaranty May Be Conditional or Unconditional. Guaranties may be conditional or unconditional [*CC § 2806 et seq.*]. If conditional, the attorney should ensure that the condition has occurred before pleading this cause of action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGuaranty Contracts

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1-6 MB Practice Guide: CA Debt Collection 6.09

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.09 Fraud Cause of Action May Exist.

6.09[1] Attorney Should Consider If Facts Evidence Intentional Fraud. When the debtor has intentionally made a materially false statement to induce the creditor to supply goods or services, a cause of action for intentional fraud may be pled. Evidence of fraud sometimes may be found in documents given to the creditor, such as financial statements or credit applications.

Strategic Point:

Proof of fraud must meet a higher evidentiary standard (clear and convincing, as opposed to preponderance). While proof may be more difficult, the potential for an award of punitive damages often offsets that difficulty and can also provide settlement leverage.

6.09[2] Elements Necessary for Pleading Cause of Action for Intentional Fraud. The elements of fraud are [*South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 CA3d 750, 765, 102 CR 286* ; *Balfour, Guthrie & Co. v. Hansen (1964) 227 CA2d 173, 192-193, 38 CR 525]* :

- False representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge;
- Made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation;
- With the intent to induce the person to whom it is made to act on it;
- An act by that person in justifiable reliance on the representation; and
- To that person's damage.

Judicial Council Form PLD-C-001(3) is a standard form for a complaint for fraud. Use of this form is optional.

Cross References:

Judicial Council form, 6.38.

Statute of limitations, see *6.23[5]*.

Fraud and misrepresentation in contract actions, see Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 17, Attacking or Defending Existence of Contract: Fraud, Duress, Menace, and Undue Influence.

6.09[3] Attorney Should Consider Whether Facts Support Negligent Misrepresentation. Even if the debtor's materially false statement was not made intentionally, the debtor may have made the statement either negligently or with insufficient information to justify making the statement.

To be actionable, the representation must be of a past or existing material fact. A representation is not normally actionable if it is merely an expression of opinion as to a future fact or occurrence [*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells (2000) 86 CA4th 303, 309-310, 103 CR2d 159*].

A cause of action for negligent misrepresentation has been recognized only if either [*Friedman v. Merck & Co. (2003) 107 CA4th 454, 477, 131 CR2d 885]* :

- The information is conveyed in a commercial setting for a business purpose; or
- Providing the false information poses a risk of and resulted in physical harm to a person or property.

Judicial Council Form Form PLD-C-001(3) is a standard form for a complaint for fraud. Use of this form is optional.

Cross References:

Judicial Council Form PLD-C-001(3) for cause of action for fraud, see *6.38*.

Statute of limitations, see *6.23[5]*.

6.09[4] Other Types of Fraud May Have Occurred. The attorney may wish to consider adding cause of action for:

- Concealment (of material facts the debtor was bound to disclose).
- Promise without intent to perform.

Cross Reference:

Discussion of concealment and promise without intent to perform, see California Forms of Pleading and Practice, Ch. 269, Fraud and Deceit (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent

MisrepresentationElements

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1-6 MB Practice Guide: CA Debt Collection 6.10

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.10 Fraudulent Transfer Cause of Action May Exist.

6.10[1] When Debtor Transferred Assets, Attorney Should Consider Applicability of Uniform Fraudulent Transfer Act. The Uniform Fraudulent Transfer Act enables a creditor to pursue persons to whom the debtor has transferred the assets. The Act provides four distinct grounds for finding a transfer to be fraudulent as to creditors [*see CC §§ 3439.04*, *3439.05*]. Three of these grounds involve transfers in which the intent to defraud is presumed in law [*see CC §§ 3439.04(a)(2)(A)*, *(B)*, *3439.05*; *Hansford v. Lassar (1975) 53 CA3d 364, 374, 125 CR 804*]. The other ground involves transfers or conveyances made with actual intent to hinder, delay, or defraud creditors [*see CC § 3439.04(a)(1)*; *Hansford v. Lassar (1975) 53 CA3d 364, 375, 125 CR 804*].

Cross References:

Statute of limitations, see *6.23[6]*.

Discussion and forms relating to claims for fraudulent conveyances, see Ch. 4, Fraudulent Conveyances.

6.10[2] Attorney Should Also Consider Liability Under Common Law For Fraudulent Transfer. The Uniform Fraudulent Transfer Act does not supersede the ability to allege fraudulent transfers under the common law [*see Macedo v. Bosio (2001) 86 CA4th 1044, 1051, 104 CR2d 1* ; *see also Wisden v. Superior Court (2004) 124 CA4th 750, 758, 21 CR3d 523*]. Although transfers under the Act may be easier to prove, the common law may enable the pursuit of actions no longer available under the Act due to statute of limitations considerations. For example, the limitations period with respect to a cause of action for fraud may first commence upon discovery of the transfer.

Cross References:

Statutes of limitations, see *6.23[6]*.

Discussion of fraudulent transfers, see Ch. 4, Fraudulent Transfers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent Transfers

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1-6 MB Practice Guide: CA Debt Collection 6.10A

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.10A Cause of Action for Imposition of Resulting Trust May Exist.

In appropriate cases, the attorney may consider asserting a cause of action for imposition of a resulting trust. Unlike an express trust, which arises when the legal titleholder holds property for the equitable title holder pursuant to an express agreement, a resulting trust arises by operation of law under circumstances showing that the legal titleholder was not entitled to take the beneficial interest. In other words, it is based on the inferred intent of the parties [*see Fidelity National Title Ins. Co. v. Schroeder (2009) 179 CA4th 834, 847-848, 101 CR3d 854]* .

Example:

On learning that plaintiff was about to file an abstract of judgment as a lien against his home, defendant deeded his one-half interest in the home to the person with whom he co-owned it. The trial court found that defendant intended to defraud plaintiff, but the transfer was not set aside under the UFTA because no recoverable value remained in the property after deducting existing encumbrances and the homestead exemption. The trial court also rejected plaintiff's resulting trust claim, which alleged that the conveyance was intended only as a transfer of legal title, which the transferee held as trustee for defendant, and that defendant retained his equitable one-half interest in the property. The court of appeal agreed that plaintiff was not entitled to relief under the UFTA, but disagreed with its conclusion that plaintiff could not maintain a resulting trust cause of action. It held that California law provides that a judgment lien attaches to *all* interests in real property, including equitable interests [*CCP § 697.340(a)*], and that under established California common law, a resulting trust may arise from a transfer of property under circumstances showing that the transferee was not intended to take the equitable or beneficial interest. Thus, allowing a judgment creditor to maintain a resulting trust cause of action would merely apply a recognized legal and factual basis for concluding that the debtor actually retained an equitable interest to which a judgment lien may attach. The case was remanded to the trial court for a factual determination of whether the co-owner held defendant's one-half interest in the property as a resulting trust for defendant's benefit. If so, plaintiff's judgment lien would attach to defendant's equitable interest. Conversely, if the trial court determined that defendant made an outright gift of the property to the co-owner, and no beneficial or reversionary interest was retained, the resulting trust cause of action would fail [*Fidelity National Title Ins. Co. v. Schroeder (2009) 179 CA4th 834, 847-848, 856, 864-866,*

101 CR3d 854] .

Cross Reference:

Discussion and forms relating to imposition of resulting trusts, see California Forms of Pleading and Practice, Ch. 562, Trusts: Resulting Trusts (Matthew Bender).

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1-6 MB Practice Guide: CA Debt Collection 6.11

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.11 Conversion Cause of Action May Exist.

Conversion may be pled against a person who treats the creditor's assets as their own. This situation often arises with consignment transactions or when a written agreement provides that title to the creditor's goods does not pass until the debtor pays for the goods. The potential for an award of punitive damages often provides settlement leverage if this cause of action can be alleged.

Conversion is the wrongful interference with the right of possession [*Chatterton v. Boone (1947) 81 CA2d 943, 946, 185 P2d 610*]. The defendant's conduct must create a substantial interference with plaintiff's possession or rights [*Jordan v. Talbot (1961) 55 C2d 597, 610, 12 CR 488, 361 P2d 20*]. The interference must be actual [*Home v. Kramer (1936) 7 C2d 361, 363-364, 60 P2d 854*]. Conduct must be intended to affect the property [*Schroeder v. Auto Driveaway Co. (1974) 11 C3d 908, 918, 114 CR 622, 523 P2d 662*]. Although the conduct must be intentional, it need not be affirmative. If defendant's conduct is undertaken with an intent to affect the property, liability may be based on a willful omission to act that deprives plaintiff of the property [*Schroeder v. Auto Driveaway Co. (1974) 11 C3d 908, 918, 114 CR 622, 523 P2d 662*].

Cross References:

Form for complaint for conversion, see *6.39*.

Statute of limitations, see *6.23[7]*.

Remedies for protecting assets from conversion while litigation is in progress, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemedies

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1-6 MB Practice Guide: CA Debt Collection 6.12

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.12 Bad Check Statute Violation Cause of Action May Exist.

When the creditor has received a "bounced check" or the debtor has stopped payment, statutory liability may exist [*CC § 1719*]. Liability is imposed on "any person who passes a check on insufficient funds." This is defined to include a person who issued an instruction to stop payment [*CC § 1719(a)(6)*] unless the stop payment instruction was made in order to resolve a good faith dispute with the payee [*CC § 1719(a)(3)*].

If a notice complying with the statutory requirement [*see 6.40*] is sent and the check is not honored within 30 days, statutory damages can be imposed for the amount of the check (minus any partial payments made within the 30 days), plus damages equal to treble that amount (but not less than $100 nor more than $1,500), plus a service charge for the bad check, plus the costs of mailing the notice [*CC § 1719(a)(2)*].

Decision Point:

However, the creditor who recovers a service charge pursuant to *CC § 1719* may not also recover interest under *CC § 3287* [*Imperial Merchant Services, Inc. v. Hunt (2009) 47 C4th 381, 97 CR3d 464, 212 P3d 736]* .

Strategic Points:

- If the creditor has not sent the notice before giving the attorney the claim, the attorney should send the notice immediately. Even if the creditor previously gave notice, however, the attorney may elect to send notice again, because typically the impact on the debtor is more meaningful.

- Because collections often involve a race among creditors, the attorney should consider whether to file a complaint including this cause of action even before the 30-day period elapses. If that choice is made, the attorney should allege on information and belief that the debtor will not make any payment in the 30-day period. In practice, it rarely makes sense to wait an additional 30 days before filing, because the debtor almost never pays in response to the notice.

- Note that the statute refers to "any person who passes the check" and not to the drawer of the check. Therefore, the attorney should consider naming the individual who signed the check in instances when a corporate (or other limited liability entity) check is involved. Imposition of liability on the individual has been upheld in an case when the individual was also the owner of the corporation [*Mughrabi v. Suzuki (1988) 197 CA3d 1212, 1214, 243 CR 438]* .

Exception:

An attorney was able to raise a Commercial Code defense and was held not personally liable for writing a check to a third party from the client trust account without knowledge that the clients had stopped payment on a check previously deposited into the client trust account [*Cohen v. Disner (1995) 36 CA4th 855, 862, 42 CR2d 782*].

- If the check was not honored because the debtor stopped payment, a notice substantially in the form of the statutory notice set forth in *CC § 1719(c)* must be used [*CC § 1719(c)*; *see 6.40*]. This notice contains information regarding the debtor's rights in the event that the stop payment was the result of a good faith dispute. In cases other than those involving stop payments (insufficient funds or no account), the statute does not expressly require that the notice be in any particular form, as long as the notice informs the debtor of the provisions of *CC § 1719* [*CC § 1719(a)(2)*].

Cross References:

Form for notice, see *6.40*.

Statute of limitations, see *6.23[8]*.

Discussion and forms related to bad checks, see California Forms of Pleading and Practice, Ch. 95, Banks, Deposits and Checks (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorContracts LawDebtor & Creditor Relations

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1-6 MB Practice Guide: CA Debt Collection 6.13

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.13 Failure to Comply With Bulk Sales Law Cause of Action May Exist.

The purchaser of the debtor's business may be liable for failure to comply with the bulk sales law if both of the following are satisfied [*Com Code § 6103*]:

- The seller's principal business is the sale of inventory from stock, including those who manufacture what they sell, or that of a restaurant owner.

- On the date of the bulk sale agreement the seller is located in California or, if the seller is located in a jurisdiction that is not a part of the United States, the seller's major executive office in the United States is in California.

Strategic Point:

Compliance with the Bulk Sales Act does not preclude recovery on a claim made under the Uniform Fraudulent Transfer Act [*see* Com Code § 3439 et seq.]. The two acts are not mutually exclusive [*see Monastra v. Konica Business Machines, U.S.A., Inc. (1996) 43 CA4th 1628, 1641-1643, 51 CR2d 528]* .

Cross References:

Statute of limitations, see *6.23[9]*.

Discussion of Bulk Sales Act, see *California Forms of Pleading and Practice, § 270.101* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCommercial Law (UCC)Bulk Sales (Article 6)General OverviewCommercial Law (UCC)Bulk Sales (Article 6)Noncompliance

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1-6 MB Practice Guide: CA Debt Collection 6.14

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.14 Claim for Successor Liability May Be Asserted in Appropriate Cases.

Entities that merely continue the debtor's business may be held liable for the debt. The debtor will often close one business and open another. The debtor will likely be found, however, to have the same location, phone number, fax number, employees, etc. The debtor may have carried over the inventory from the previous business and have collected its receivables.

To be a successor in interest, a party must continue to retain the same rights as the original owner; the change must be in form only, not in substance. For example, when a corporation simply changes its name, the renamed corporation is the earlier one's successor in interest. A transferee is not a successor in interest [*California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 CA3d 260, 271-272, 261 CR 484]* .

Strategic Point:

If the client already has a judgment against the debtor's former entity, a new suit against the new entity may not be required. A motion to add the new entity to the existing judgment may be made pursuant to *CCP § 187* [*McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 753-754, 107 CR2d 702*].

Cross References:

Statute of limitations, see *6.23[10]*.

Adding a new judgment debtor, see *Ch. 9, Planning Enforcement of Judgments, 9.37* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Mergers & Acquisitions LawLiabilities & Rights of SuccessorsGeneral OverviewMergers & Acquisitions LawLiabilities & Rights of SuccessorsMere ContinuationMergers & Acquisitions LawLiabilities & Rights of SuccessorsSuccessor Liability Doctrine

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1-6 MB Practice Guide: CA Debt Collection 6.15

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.15 Claim for Alter Ego Liability May Be Asserted in Appropriate Cases.

6.15[1] Alter Ego Liability May Be Asserted for Failure to Treat Corporation As a Separate Entity. Debtors often operate though an entity that provides limited liability (a corporation or limited liability company), but fail to honor the separateness of that entity. While most alter ego situations arise when a corporation is the alter ego of an individual, it is also possible for one corporation to be the alter ego of another corporation. A number of factors have been recognized as indicative of the alter ego status.

All of the factors do not have to be present for an alter ego relationship to exist. The presence of only one or two of the factors may be sufficient, and no single factor is controlling. The attorney may wish to review the full list of potential factors for potential applications. Those factors most often arising in collections cases include [*Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 CA2d 825, 838, 26 CR 806]* :

- Intermingling of entity and personal assets (debtors often will have the entity pay personal expenses).
- Failure to issue stock (debtors may attempt to "back date" stock issuance, but will be found not to have registered the stock with the Department of Corporations at that time as required).
- Failure to hold required meetings for the entity (typically regular annual meetings, or under circumstances in which the entity's bylaws require special meetings).
- Failure to keep required entity records.
- Inadequate capitalization.
- Entity and individual having common principals and employees.
- Entity and individual having common counsel.

6.15[2] Necessary Allegations for Cause of Action for Alter Ego. If a creditor seeks to impute liability to either individual or corporate shareholders of a corporation that is alleged to be their alter ego, the following allegations of fact

should appear in the complaint:

- The existence of the obligation owed to plaintiff by the corporation [*see Design Associates, Inc. v. Welch (1964) 224 CA2d 165, 171, 36 CR 341*];
- Unity and identity of interest between the individual and the corporation [*Shea v. Leonis (1939) 14 C2d 666, 670, 96 P2d 332* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 CA2d 324, 333*]; and
- That adherence to the fiction of the separate existence of the corporation would, under the particular circumstances alleged, sanction fraud or promote injustice [*Minifie v. Rowley (1921) 187 C 481, 487, 202 P 673* ; *Pearl v. Shore (1971) 17 CA3d 608, 618, 95 CR 157]* .

Strategic Point:

Counsel should also consider this cause of action when the assets are held in a trust that is not an obligor and the defendant either controls the trust or is the beneficiary.

Cross References:

Statute of limitations, see *6.23[11]*.

Discussion and forms for alter ego liability, see California Forms of Pleading and Practice, Ch. 161, Corporations: Alter Ego Liability (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate Formalities

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
III. PLEADING THE VARIOUS CAUSES OF ACTION

1-6 MB Practice Guide: CA Debt Collection 6.16

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.16 CHECKLIST: Pleading the Various Causes of Action.

☐ Confirm status of entity against whom suit will be filed.

☐ Confirm that any limited liability entity plaintiff who conducts intrastate commerce in California is in good standing with Secretary of State**.**

☐ If creditor must be licensed in order to recover, confirm that current license is held.

Authority:
Corp Code § 2105

Discussion:
See *6.18[1]*

☐ Ascertain all names (and spelling variations) used by debtor.

Discussion:
See *6.18[2]*

☐ Determine appropriate jurisdiction to file suit.

Discussion:
See *6.18[3]*

☐ Determine appropriate venue.

○ Venue for individuals generally, in county:

☐ Where any debtor resides at commencement of action;

☐ In which debtor has agreed to perform obligation; or

☐ In which agreement was entered into (which is also is deemed to be the place of performance unless there is a special agreement in writing).

○ Venue against individual debtor if the agreement involved provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, in county:

☐ Where debtor signed agreement.

☐ Where debtor resides at commencement of action.

○ In consumer cases, complaint must be verified by plaintiff or plaintiff's attorney and specifically plead that it is subject to applicable law and that venue has been appropriately selected.

○ For corporate debtors or associations, venue is proper in county where:

☐ Agreement was made;

☐ Agreement was to be performed;

☐ Obligation or liability arises;

☐ Breach occurs; or

☐ Principal place of business is situated.

Authority:
CCP § 392 et seq.

Discussion:
See *6.18[4].*

☐ If client's claim is less than maximum limit for small claims court jurisdiction, send letter to debtor before commencement of suit advising that legal action could result in a judgment which may include the costs and necessary disbursements.

Authority:
CCP § 1033(b)(1)

Discussion:
See *6.18[5]*

☐ Calendar to ensure that fast track rules are met.

Authority:
Gov Code § 68600 et seq.

Discussion:
See *6.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor RelationsGovernmentsCourtsSmall Claims Courts

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1-6 MB Practice Guide: CA Debt Collection 6.17

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.17 Objective and Strategy.

In most respects, the pleading issues in collection causes of action are similar to the pleading issues in other litigation. However, certain preliminary pleading issues may take on particular significance in the collection context.

Cross Reference:

Drafting a complaint, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 7.03 -7.15*.

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III. PLEADING THE VARIOUS CAUSES OF ACTION

1-6 MB Practice Guide: CA Debt Collection 6.18

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.18 Preliminary Pleading Allegations May Require Specific Care.

6.18[1] Confirm Plaintiff's Capacity to Sue. The plaintiff should state whether it is a corporation, limited liability company, partnership, individual, or other entity. The attorney should confirm that any limited liability entity plaintiff who conducts intrastate commerce in California is in good standing with the Secretary of State. If the entity is suspended, it may not maintain any action in a California court [*Corp Code § 2105*]. If suit is initiated by a suspended entity, the defendant will be able to have the case abated, but not dismissed, since a plaintiff may cure the suspension and revive its right to prosecute the claim. However, if a statute of limitations expires before the entity's suspension is lifted, the claim will be barred [*United Medical Management Limited v. Gatto (1996) 49 CA4th 1732, 1740, 57 CR2d 600]* . Therefore, it is best to explore the status issue before suit is filed.

Distinguish:

Note, however, that entities which transact only interstate (as opposed to intrastate) business in California are not required to qualify to conduct business in California [*see Corp Code § 191*].

If the creditor must be licensed in order to recover, the licensed status should be alleged.

Examples:

- A real estate broker must plead that he or she is licensed to earn a commission on a sale of real property [*Fellom v. Adams (1969) 274 CA2d 855, 863, 79 CR 633]* .

- A contractor must be licensed to maintain a claim for construction services [*Bowline v. Gries (1950) 97 CA2d 741, 747, 218 P2d 806]* .

If the plaintiff is an assignee of the claim, that status should be alleged. The pleading should also state that the plaintiff currently has the right to enforce the creditor's claim against the debtor. Creditors may often assign claims because they don't wish their name to appear of record. Out-of-state creditors may assign claims to avoid the potential necessity to file a bond [*see CCP § 1030*].

6.18[2] Ascertain Defendant's Exact Legal Names and Capacities. The attorney should take care to ascertain all names (and spelling variations) used by the debtor and include them in the complaint. These should include each alias and all fictitious business names (whether or not properly filed). The name(s) set forth in the judgment ultimately obtained will impact the ability to enforce the judgment.

Strategic Point:

Levying officers will often refuse to enforce writs of execution that do not correspond precisely to the name associated with the asset being levied on. Two methods exist to deal with this situation. The first is a motion to amend the name set forth in the judgment [*CCP § 187*]. The second is the affidavit of identity process [*CCP § 680.135*]. It is therefore most important to name any and all spellings the creditor may have of the defendants' name, without adding additional defendants (i.e., "Will Deelay, aka Will Delay, aka Will Delei, aka William Deelay").

Consider:

If an individual debtor is married, but the spouse is *not* personally liable, consider naming the spouse of debtor in the lawsuit "as to community property only." While this is not necessary to have community property liable for enforcement in California [*Reynolds & Reynolds Co. v. Universal Forms, Labels & Systems, Inc. (CD CA 1997) 965 FSupp 1392, 1396*], it can facilitate execution and permit certain liens to be effective against property in the name of the spouse. It also may be critical if the debtor lives in or has property in another community property state. If it is known that the debtor lives in or has property outside of California, counsel should check with an attorney in that state for the best method to obtain a judgment enforceable against community property in that state. However, naming the spouse can be challenged by demurrer in California [*11601 Wilshire Associates v. Grebow (1998) 64 CA4th 453, 456-457, 74 CR2d 912*].

Cross Reference:

Ch. 2, Locating the Debtor and Identifying the Debtor's Assets, 2.04.

6.18[3] Consider Amount in Controversy or Other Basis for Choosing Jurisdiction. The progress of a debt collection case from filing to trial can be significantly delayed if the case must be transferred from one jurisdiction to another. In order to avoid such delay, care should be taken to ensure that the complaint accurately sets forth the amount of damages that are intended to be sought on the date of trial. If the damages are ongoing (*e.g.*, monthly payments on a lease or note), the complaint should set forth both the damages incurred to date and an allegation (likely on information and belief) that the damages may reach some specified sum by the time of trial. The calculation of that later sum will assist the attorney in deciding whether to file in the limited or unlimited jurisdiction of the state court or whether the amount in controversy requirement for federal jurisdiction can be met.

Strategic Point:

If damages will exceed the minimal amount to enable filing in the unlimited jurisdiction division of a court by a relatively small amount, the attorney may wish to discuss with the client the potential for filing in the limited jurisdiction division (and waiving a portion of the client's damages). Limited jurisdiction courts often process cases to trial within a much shorter time.

6.18[4] Basis for Venue.

6.18[4][a] Choose Venue Carefully. The progress of a debt collection case from filing to trial can be significantly delayed if the case must be transferred from one venue to another. If the other side objects to a wrongfully chosen

venue, the attorney may be required to pay the moving party's reasonable expenses and attorney's fees [*CCP § 396b*]. Therefore, care must be taken to ensure that the venue chosen is one permitted by the venue statutes [*CCP § 392 et seq.*].

Strategic Point:

Another venue consideration exists when counsel is going to seek a provisional remedy and there are courts where a specific department hears all such matters. These courts generally are more "user-friendly" because they are up to speed on the law and process involved in provisional matters and it is easier to process paperwork there rather than trying to educate a more generalist department and clerk.

6.18[4][b] Proper Venue for Individual Defendants. Venue is proper in the county [*CCP § 395*]:

- Where any debtor resides at the commencement of the action;
- In which a debtor has agreed to perform an obligation; or
- In which the agreement was entered into (which is also is deemed to be the place of performance unless there is a special agreement in writing to the contrary).

Venue against an individual debtor is further restricted if the agreement involved the provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use. Unless the transaction is governed by *CC § 1812.10* (retail installment sale) or *CC § 2984.4* (motor vehicle sale) or involves an unsolicited telephone or electronic communications seller, venue is permissible where the debtor [*CCP § 395(b)*]:

- Signed the agreement.
- Resides at the commencement of the action.

These venue provisions apply in such actions whether brought by a consumer plaintiff or against a consumer defendant [*Fontaine v. Superior Court (2009) 175 CA4th 830, 838, 96 CR3d 607]* .

Warning:

Although *CCP § 395(b)* provides that suit can be filed where the debtor resided at the time the debtor signed the agreement, the Federal Fair Debt Collection Practices Act is more restrictive and does not permit such venue. It allows venue only where the agreement was signed or where the consumer resides at the time of the commencement of the action [*15 USC § 1692i(a)*].

In consumer cases, the complaint must be verified by the plaintiff or the plaintiff's attorney, and must specifically plead that it is subject to the applicable law and that venue has been appropriately selected [*CCP § 396a(a)*].

6.18[4][c] Venue for Corporate Debtors. For corporate debtors or associations, venue is proper in the county where [*CCP § 395.5*]:

- The agreement was made;
- The agreement was to be performed;
- The obligation or liability arises;

- The breach occurs; or
- The principal place of business is situated.

Strategic Point:

It is often the case that an attorney represents a local client who provided goods or services to a non-local corporate debtor. Even if the agreement was made non-locally, if payment was to be made at the local client's business location, local venue will lie. When the breach is a failure to pay, a corporation's place of performance is the place where payment was due and not where the goods were delivered [*Anaheim Extrusion Co. v. Sup. Ct. (Classic Molding Co.) (1985) 170 CA3d 1201, 1203, 216 CR 815]* .

6.18[5] Creditor Must Send Notice When Seeking Sum Recoverable in Lower Jurisdiction Court. If the client's claim is below the maximum limit for small claims court jurisdiction, the attorney should ensure that a letter has been sent to the debtor, before commencement of suit, advising that the legal action could result in a judgment against the debtor which may include the costs and necessary disbursements allowed under *CCP § 1033(b)*. Failure to do so will preclude the court from entering such an award, which is discretionary in any event [*CCP § 1033(b)(1)*].

Cross Reference:

Prelitigation debt collection activities in general, see Ch. 5, Debt Collection Prior to Litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssigneesContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor Relations

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1-6 MB Practice Guide: CA Debt Collection 6.19

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.19 Fast Track Rules May Impact Complaint Filing Decision.

Because fast track rules [*Gov Code § 68600 et seq.*] impose time deadlines for service once the complaint is filed, if the attorney is not sure where any defendant is presently located, the attorney may wish to delay filing the complaint until the defendant is located. This may avoid excessive court appearances (for example, orders to show cause for failure to serve, and so on). Counsel should ensure that any delay does not cause statute of limitations issues.

Cross Reference:

Discussion of Trial Court Delay Reduction Act (fast track) rules, see California Forms of Pleading and Practice, Ch. 552, Trial Court Delay Reduction (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-6 MB Practice Guide: CA Debt Collection 6.19A

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.19A Collections Cases Under $25,000 Are Exempt From Many Fast Track Rules.

6.19A[1] Special Rules Apply to "Collections Case" Under $25,000. Effective July 1, 2007, a collections case seeking $25,000 or less is exempt from many of the Trial Court Delay Reduction Act (fast track) rules [*see Cal Rules Ct, Rule 3.740(c)-(f)*]. A "collections case" is an action for recovery of money owed in a sum stated to be certain that is not more than $25,000, exclusive of interest and attorney's fees, that arises from a transaction in which property, services, or money was acquired on credit [*Cal Rules Ct, Rule 3.740(a)*].

A "collections case" does not include an action for [*Cal Rules Ct, Rule 3.740(a)*]:

- Tort damages.
- Punitive damages.
- Recovery of real or personal property.
- Prejudgment writ of attachment.

Counsel filing such a collections case should check box 6 on the Civil Case Cover Sheet [*Cal Rules Ct, Rule 3.740(b)*; *see* Judicial Council of California Form CM-010]. Counsel should also review the amended collections case rules [*see Cal Rules Ct, Rules 3.110*, *3.712*, *3.721*, *3.740*, *3.741*, *3.1385*].

Cross Reference:

Illustration of Judicial Council Form CM-010, see *Matthew Bender Practice Guide: Pretrial Civil Procedure, 7.43 (Matthew Bender)*.

Discussion of Trial Court Delay Reduction Act (fast track) rules, see *6.19*; see also California Forms of Pleading and Practice, Ch. 552, Trial Court Delay Reduction (Matthew Bender).

6.19A[2] Six-Month Service Period Applies. Under the collections case rules, counsel has up to six months to

serve the debtor [*Cal Rules Ct, Rule 3.740(d)*]. In the interim, there will be no status conferences, case management conferences, proof of service hearings, or the like [*see* Cal Rules Ct, Rule 3.70(c)]. The court will schedule an Order to Show Cause re: Proof of Service six months from the date of filing of the action. At that time, if the matter still is not served, sanctions may be awarded [*see Cal Rules Ct, Rule 3.740(d)*].

Warning:

Counsel should not wait until the last few days to either file the proof of service or attempt service, as courts definitely will not look kindly on this. Counsel should plan on having any service issues resolved by the fifth month from the date of filing. If there are a problems--for example, the debtor has left the area, is still evading service, or counsel finally determines that it is necessary to apply for a publication order--these issues should be addressed by filing appropriate documentation in court (Application for Publication Order, Declaration re: efforts to serve during the past five months).

6.19A[3] Creditor Has up to 360 Days After Filing to Obtain Default Judgment. Once a debtor is served, counsel has up to 360 days after the filing of the complaint to apply for and obtain a default judgment [*Cal Rules Ct, Rule 3.740(f)*].

Warning:

Again, counsel should not wait until the last minute--that is, the eleventh month--to do this. If the court initially rejects a default judgment, it is still up to counsel to make any corrections within this 360-day period, or risk having sanctions imposed [*see Cal Rules Ct, Rule 3.740(f)*].

6.19A[4] Normal Fast Track Rules Apply If Defendant Files Reply. If the defendant files any type of reply, then the normal fast track rules apply and the case remains in the traditional civil court system. The exemption discussed in this section applies only to matters proceeding by default [*see Cal Rules Ct, Rules 3.712(d), 3.740(c)(2)*].

6.19A[5] Proceedings Are Vacated If Case Settles. If at time a "collection case" under $25,000 settles (including conditional settlements), and a proper notice of settlement is filed under *Cal Rules Ct, Rule 3.1385*, then the court must vacate any and all hearings, case management conferences, and status conferences, up to and including trials [*see Cal Rules Ct, Rule 3.741*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor RelationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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IV. DETERMINING THE APPLICABLE STATUTES OF LIMITATIONS

1-6 MB Practice Guide: CA Debt Collection 6.20

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.20 CHECKLIST: Determining the Applicable Statutes of Limitations.

☐ Determine whether statute of limitations is timely and appropriately pled in responsive pleading.

○ Proper pleading requires citation of specific section relied on including specific subsection when applicable.

Authority:
Adams v. Paul (1995) 11 C4th 583, 597, 46 CR2d 594 ; *Davenport v. Stratton (1944) 24 C2d 232, 246-247, 149 P2d 4* ; *CCP § 458*

Discussion:
See *6.22*

☐ Determine when statute of limitation begins to run:

○ Normally on accrual of specific cause of action, generally when breach occurs.

○ Different rules may apply:

☐ When fact of breach is not known and could not reasonably have been discovered;

☐ For agreements involving installment payments; and

☐ For common counts.

○ Creditor's lack of knowledge of debtor's breach may delay date on which statute of limitations begins to run.

○ For obligation payable in installments, statute of limitations runs separately for each installment.

○ Investigate whether the statute may have been tolled.

Authority:
Romano v. Rockwell Internat., Inc. (1996) 14 C4th 479, 488, 59 CR2d 20, 926 P2d 1114 ; *Norgart v. Upjohn Co. (1999) 21 C4th 383, 397-398, 87 CR2d 453, 981 P2d 79* ; *Trigg v. Arnott (1937) 22 CA2d 455, 458, 71 P2d 330* ; *CCP §§ 351, 360*; *11 USC § 108(c)*

Discussion:
See *6.22*

○ Written agreements:

☐ Generally subject to four year statute.

☐ Negotiable promissory note payable at definite time is subject to six year statute.

☐ If note is payable on demand, the limitations period is six years after demand or, if no demand is made, 10 years.

Authority:
CCP § 337; *Com Code § 3118(a), (b)*

Discussion:
See *6.23[1]*

○ Oral agreements are generally subject to two year statute.

☐ Contracts for sale of goods are governed by four year statute (trumping *CCP § 339* as to oral contracts for the sale of goods).

Authority:
Com Code § 2725

Discussion:
See *6.23[2]*

○ Common count causes of action based on writing (e.g., open book account, account stated), are governed by four year statute.

☐ Causes of action not based on writing (e.g., quantum meruit) are governed by two year statute.

☐ Written guaranties are governed by four year statute.

○ When the guaranty need not be written, two year statute applies.

Authority:
CCP §§ 337(1), 339(1)

Discussion:
See *6.23[3]*

○ Fraud statute of limitations does not accrue until creditor discovers fraud.

☐ Three-year statute applies.

Authority:
CCP § 338(d)

Discussion:
See *6.23[5]*

○ Fraudulent conveyances:

☐ Intentionally fraudulent transfers and constructively fraudulent transfers must be brought within later of four years after transfer was made or obligation was incurred or one year after transfer or obligation was or could reasonably have been discovered by creditor.

☐ Constructively fraudulent transfer must be brought within four years after transfer was made or obligation was incurred.

Authority:
CC §§ 3439.09(a), (b)

Discussion:
See *6.23[6]*

○ Conversion is governed by three-year statute.

☐ For theft of historical, interpretive, scientific or artistically significant items, statute does not begin to run until creditor, agent, or law enforcement discovers location of item.

Authority:
CCP § 338(c)

Discussion:
See *6.23[7]*

○ Bad check actions are subject to three year statute.

Authority:
CCP § 338(a)

Discussion:
See *6.23[8]*

○ Bulk Sale Law provides for one year statute.

Authority:
Com Code § 6610(a)

Discussion:
See *6.23[9]*

○ Successor liability statute of limitations is governed by nature of causes of action that may be asserted against original obligor.

Discussion:
See *6.23[10]*

○ Alter ego liability statute of limitations is governed by nature of causes of action that may be asserted against original obligor.

Discussion:
See *6.23[11]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-6 MB Practice Guide: CA Debt Collection 6.21

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.21 Statute of Limitations Is Affirmative Defense Which May Be Waived If Not Timely and Properly Pled.

The statute of limitations is an affirmative defense and may be waived if not timely and appropriately pled in the responsive pleading [*Adams v. Paul (1995) 11 C4th 583, 597, 46 CR2d 594]* . Proper pleading requires citation of the specific section relied on, including the specific subsection when applicable [*CCP § 458*; *Davenport v. Stratton (1944) 24 C2d 232, 246-247, 149 P2d 4]* . However, a creditor's attorney should not rely entirely on the inadequacy of or an omission in a debtor's pleading, as motions to amend (to clarify, or add additional, affirmative defenses) are liberally permitted [*Nestle v. Santa Monica (1972) 6 C3d 920, 939, 101 CR 568]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationContracts LawDefensesStatutes of Limitations

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1-6 MB Practice Guide: CA Debt Collection 6.22

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.22 Statutes of Limitation Normally Begin to Run on Accrual of Specific Cause of Action.

6.22[1] Cause of Action Generally Accrues When Breach Occurs. Statutes of limitation normally begin to run on accrual of the specific cause of action, generally when the breach occurs [*Romano v. Rockwell Internat., Inc. (1996) 14 C4th 479, 488, 59 CR2d 20, 969 P2d 1114*]. However, different rules may apply in the following situations:

- When the fact of breach is not known and could not reasonably have been discovered [*see 6.22[2]*].
- For agreements involving installment payments [*see 6.22[3]*].
- For common counts [*see 6.23[3]*].

6.22[2] Lack of Knowledge, If Reasonable, May Delay Accrual. Under some circumstances (usually involving a fiduciary relationship), a creditor's lack of knowledge of the debtor's breach may delay the date on which the statute of limitations begins to run [*Norgart v. Upjohn Co. (1999) 21 C4th 383, 397-398, 87 CR2d 453, 981 P2d 79*]. The complaint should state that the creditor was ignorant of the date the breach occurred and also state the date the creditor first learned of the breach. [*G. D. Searle & Co. v. Superior Court (1975) 49 CA3d 22, 26, 122 CR 218*]. Lack of knowledge also is a factor with respect to a fraud cause of action [*Sun'N Sand, Inc. v. United Cal. Bank (1978) 21 C3d 671, 701, 148 CR 329, 582 P2d 920]* .

6.22[3] Installment Payments Give Rise to Separate Limitations Periods. When an obligation is payable in installments, the statute of limitations runs separately as to each installment; for example, a lease or promissory note calling for monthly payments [*Trigg v. Arnott (1937) 22 CA2d 455, 458, 71 P2d 330]* . However, if the creditor exercises an option to accelerate future payments, then a single statute of limitations will apply [*Trigg v. Arnott (1937) 22 CA2d 455, 458-459, 71 P2d 330]* .

6.22[4] Attorney Should Investigate Whether Statute Might Be Tolled. Although a potential cause of action may appear to be barred by the applicable statute, the attorney should investigate whether the statute may have been tolled. Tolling will often arise in the collections context when:

- The debtor is out of the state [*CCP § 351*].

- There is a payment on a promissory note [*CCP § 360*].
- There is a written acknowledgment of or promise to pay the debt [*CCP § 360*].
- The debtor files for bankruptcy protection [*11 USC § 108(c)*].

Strategic Point:

If the statute appears to have been exceeded by a short time, counsel should consider filing suit and then conducting discovery as to whether the debtor traveled out of state on vacations, business trips, to visit relatives, and for other reasons. If counsel is relying solely on this hypothesis, it is important to be sure to plead on information and belief to avoid issues later on, and make clear the clients' reasonable belief as to why the statute of limitations has not run.

Trap--Debtor's Death May Shorten Time for Bringing Suit:

Other statutes of limitation notwithstanding, if the debtor has died, all causes of action must be brought within one year of the date of death; however, the period could be even shorter if a probate proceeding has commenced [*CCP § 366.2*]. This limit applies even if the estate or decedent's representative is not located in California [*Farb v. Superior Court (2009) 174 CA4th 678, 684, 94 CR3d 586]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTolling

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.23 Attorney Should Determine the Statutes Applicable to Specific Causes of Action.

6.23[1] Written Agreements Generally Are Governed by Four-Year Statute. Written agreements generally are subject to a four-year statute [*CCP § 337*]. However, a negotiable promissory note payable at a definite time is subject to a six-year statute [*Com Code § 3118(a)*]. If the note is payable on demand, the limitations period is six years after demand or 10 years if no demand is made [*Com Code § 3118(b)*].

Trap--Agreement May Provide for Shorter Period:

The written agreement must be carefully reviewed to see whether it contains a provision limiting the time period in which an action must be commenced. It is not uncommon to find a provision limiting actions to one year (or even six months).

Cross Reference:

Breach of written contract, see *6.05*.

6.23[2] Oral Agreements Generally Are Governed by Two-Year Statute. Oral agreements are generally subject to a two-year statute [*CCP § 339*]. However, contracts for the sale of goods are governed by the four-year statute of *Com Code § 2725* (trumping *CCP § 339* as to oral contracts for the sale of goods).

Cross Reference:

Breach of oral contract, see *6.06*.

6.23[3] Common Counts May Be Governed by Two- or Four-Year Statute. Common count causes of action based on a writing (e.g., open book account, account stated), are governed by a four-year statute [*CCP § 337(1)*]. This is true even if the parties orally agreed to conduct business on an open account basis [*Warda v. Schmidt (1956) 146 CA2d 234, 237, 303 P2d 762]* .

The open book account cause of action normally begins to run from the date of the last item [*CCP § 337(2)*]. However, some cases have held that the statute does not begin to run until the parties no longer contemplate possible future transactions [*Cochran v. Rubens (1996) 42 CA4th 481, 485, 49 CR2d 672]* .

Warning:

Although the statute uses the phrase "from the date of the last item," if the debtor has terminated the extension of credit and is simply paying down the debt, payments on the account do not qualify as an item on the account and do not restart the running of the statute of limitations [*R.N.C. Inc. v. Tsegeletos (1991) 231 CA3d 967, 974-975, 283 CR 48]* .

Causes of action not based on a writing (e.g., quantum meruit) are governed by the two-year statute [*CCP § 339(1)*].

Cross Reference:

Common count, see *6.07*.

6.23[4] Breach of Guaranty Generally Is Governed by Four-Year Statute. Written guaranties are governed by the four-year statute [*CCP § 337*]. In those instances in which the guaranty need not be written, a two-year statute applies [*CCP § 339*].

Cross Reference:

Discussion on guaranty, see *6.08*.

6.23[5] Fraud Is Governed By Three-Year Statute. An action for fraud is not deemed to have accrued until the creditor discovers the fraud. Thereafter, the three-year statute applies [*CCP § 338(d)*]. Although the statute does not include the phrase "or should have discovered" as do other delayed accrual statutes, case law seems to impose a duty of inquiry once "one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud" [*Vega v. Jones, Day, Reavis & Pogue (2004) 121 CA4th 282, 298, 17 CR3d 26]* .

Cross Reference:

Fraud, see *6.09*.

6.23[6] Fraudulent Conveyances Are Governed by Four-Year/One-Year Discovery Statute. The Uniform Fraudulent Transfer Act provides different statutes of limitations with respect to intentionally fraudulent transfers and constructively fraudulent transfers. A cause of action with respect to an intentionally fraudulent transfer must be brought within the later of four years after the transfer was made or obligation was incurred or one year after the transfer or obligation was or could reasonably have been discovered by the creditor [*CC § 3439.09(a)*]. A cause of action for a constructively fraudulent transfer must be brought within four years after the transfer was made or obligation was incurred [*CC § 3439.09(b)*].

Strategic Point:

The Uniform Fraudulent Transfer Act remedies have been held to be "cumulative" to other remedies and not exclusive with respect to fraudulent transfers. Therefore, determination of the applicable statute of limitations should be evaluated both under *CC § 3439.09* and *CCP § 338(d)* (the fraud statute) [*Cortez v. Vogt (1997) 52 CA4th 917, 929-930, 60 CR2d 841* ; *Macedo v. Bosio (2001) 86 CA4th 1044, 1048, 104 CR2d 1*]. The cause of action accrues not when the fraudulent transfer occurs, but when the judgment against the debtor is obtained, or later, depending on the belated discovery issue [*Macedo v. Bosio (2001) 86 CA4th 1044, 1048, 104 CR2d 1*].

No action may be brought under the Uniform Fraudulent Transfer Act or *CCP § 338(d)* more than seven years after the transfer was made [*CC § 3439.09(c)*; *Macedo v. Bosio (2001) 86 CA4th 1044, 1048 fn 6, 104 CR2d 1*].

Cross Reference:

Fraudulent conveyance, see *6.10*; see also Ch. 4, Fraudulent Conveyances.

6.23[7] Conversion Is Governed by Three-Year Statute. An action for taking, detaining, or injuring any goods or chattel is governed by a three-year statute. For theft of historical, interpretive, scientific or artistically significant items, the statute does not begin to run until the creditor, creditor's agent, or law enforcement discovers the location of the item [*CCP § 338(c)*].

Cross Reference:

Conversion, see *6.11*.

6.23[8] Bad Check Statute Violation Is Governed by Three-Year Statute. Bad check actions are subject to a three-year statute [*CCP § 338(a)*].

Cross Reference:

Bad check violations, see *6.12*.

6.23[9] Failure to Comply With Bulk Sales Law Generally Is Governed by One-Year Statute. The Bulk Sales Law provides its own one-year statute [*Com Code § 6110(a)*].

Cross Reference:

Bulk Sales Law, see *6.13*.

6.23[10] Successor Liability Statute of Limitations Is Governed by Nature of Underlying Obligation. Because the successor liability theory provides a means of holding one entity liable for the debt of another, the statute of limitations as to this cause of action will be governed by the nature of the causes of action that may successfully be asserted against the original obligor.

Cross Reference:

Successor liability, see *6.14*.

6.23[11] Alter Ego Statute of Limitations Is Governed by Nature of Underlying Obligation. Because the alter ego theory provides a means of holding one person or entity liable for the debt of another, the statute of limitations as to this cause of action will be governed by the nature of the causes of action that may successfully be asserted against the original obligor.

Cross Reference:

Alter ego liability, see *6.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
V. DETERMINING POTENTIALLY AVAILABLE DEFENSES

1-6 MB Practice Guide: CA Debt Collection 6.24

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.24 CHECKLIST: Determining Potentially Available Defenses.

☐ Determine whether court has subject matter jurisdiction to provide relief requested.

☐ Confirm personal jurisdiction over debtor.

Authority:
CCP § 85 et seq.

Discussion:
See *6.25*

☐ Confirm selection of proper venue.

○ If impermissible venue was chosen, consider whether to challenge venue or to waive defect.

Authority:
CCP § 397(c)

Discussion:
See *6.26*

☐ Confirm that each party is properly named, listing all spelling variations, each alias and each fictitious business name.

☐ Confirm proper service.

○ Persons who may properly be served on behalf of a corporation include:

- ☐ Agent for service of process as registered with Secretary of State.
- ☐ The corporation's president.
- ☐ The corporation's chief executive officer.
- ☐ The corporation's vice president.
- ☐ The corporation's secretary or assistant secretary.
- ☐ The corporation's treasurer or assistant treasurer.
- ☐ The corporation's controller or chief financial officer.
- ☐ The corporation's general manager.
- ☐ Any person authorized by corporation to receive service of process.

○ For individual debtors, debtor may be validly be served by substituted service at an address (other than a U.S. Postal Service post office box) where debtor usually receives mail.

- ☐ Submit form to post office requesting confirmation that debtor continues to receive mail at a specified address.

Authority:
CCP § 416.10; *Taylor-Rush v. Multitech Corporation (1990) 217 CA3d 103, 111, 265 CR 672*

Discussion:
See *6.27*, *6.28*

Form:
See *6.41*

☐ Confirm there is sufficient evidence to prove each essential element of causes of action alleged.

Discussion:
See *6.29*

☐ Confirm statute of limitations as to each cause of action.

○ If statute of limitations has been exceeded, determine whether statute has been tolled.

Discussion:
See *6.30*

☐ Confirm whether any goods or services provided were non-conforming or substandard.

☐ Confirm whether goods or services were timely provided.

Discussion:
See *6.31*

☐ Confirm whether creditor mitigated damages.

Discussion:
See *6.32*

☐ Confirm whether statute of frauds requires that agreement be in writing and signed by party to be charged:

○ Agreement that by its terms is not to be performed within one year from its making.

○ Special promise to answer for debt, default or miscarriage of another, except in the cases provided for in *CC § 1624*.

○ Agreement for lease longer than one year or for the sale of real property or interest.

○ Agreement authorizing or employing agent, for compensation, to purchase or sell real estate or lease real estate for more than one year or to find purchaser or seller of real estate or lessee or lessor of real estate for period longer than one year.

○ Agreement which by its terms is not to be performed during lifetime of promisor.

○ Agreement by purchaser of real property to pay debt secured by property purchased, unless assumption of debt is specifically provided for in conveyance of property.

○ Contract or commitment to loan money or extend credit in sum greater than $100,000, not primarily for personal, family or household purposes, made by person engaged in business of lending or arranging for lending money or extending credit.

Authority:
CC § 1624

Discussion:
See *6.33*

☐ Investigate whether other affirmative defense may be available.

☐ Determine whether cross complaint should be filed.

Discussion:
See *6.34*, *6.35*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawDefensesGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawStatutes of FraudsRequirementsGeneral Overview

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.25 Attorney Should Consider Whether Subject Matter and Personal Jurisdiction Exist.

The creditor's attorney should make sure that the court has subject matter jurisdiction to provide the relief requested. A limited jurisdiction court may not be able to issue a judgment for all the relief sought [*see CCP § 85 et seq*.].

Examples:

- If the creditor's attorney is seeking to establish a claim for $20,000 and set aside a fraudulent conveyance so that property is available for execution, the attorney might (erroneously) file in the limited jurisdiction division of the court. However, the limited jurisdiction court does not have jurisdiction to determine title to real property, although it may determine title to personal property [*CCP § 86(a)(9)*].

- While a limited jurisdiction court can issue a temporary restraining order and a preliminary injunction, it cannot issue permanent injunctions [*CCP § 86(a)(8)*]. Child and spousal support orders may be enforced only in an unlimited jurisdiction court [*see Fam Code § 200*].

The creditor's attorney also must ensure that personal jurisdiction over the debtor may be obtained. The debtor's attorney should look for facts enabling a challenge to jurisdiction.

Cross References:

Venue, see *6.05[3][b]*, *6.26*.

Motions for venue change, see California Points and Authorities, Ch. 238, Venue (Matthew Bender).

Motions to quash service, see *California Points and Authorities, § 70.314 (Matthew Bender)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter

JurisdictionAmount in ControversyContracts LawBreachCauses of ActionGeneral Overview

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.26 Attorney Should Consider Whether Court Selected Is a Permissible Venue.

The creditor's attorney should ensure that proper venue was selected. If an impermissible venue was chosen, consider whether to challenge venue or waive the defect (which may be preferable if proper venue lies in a less convenient forum).

Strategic Point:

Even if the venue chosen was permissible, the debtor's attorney should consider whether to seek a more convenient forum, pursuant to *CCP § 397(c)*.

Cross References:

Venue, see *6.05[3][b]*, 6.18[4].

Motions for venue change, see California Points and Authorities, Ch. 238, Venue (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral Overview

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.27 Proper Naming of Each Party Is Essential to an Enforceable Judgment.

It is essential that each party be properly named, listing all spelling variations, each alias and each fictitious business name. A debtor's attorney whose client has not been properly named will have to determine whether to respond to the complaint (since minor name variations may be determined to be insignificant) [*Seaver v. Fitzgerald (1863) 23 C 85, 23 C 86*].

Strategic Point:

The debtor may consider waiting until a later time to challenge any judgment enforcement efforts. The later tactic may prove particularly advantageous if an applicable statute of limitations expires between the date the complaint was initially filed and the date the creditor is able to either amend the pleading or file a new action properly naming the debtor.

Cross Reference:

Effects of improperly naming party and/or of failure to properly include all possible alternative names of parties, see *6.05[1][f]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesStatutes of Limitations

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.28 Attorney Should Ensure That Each Defendant Is Properly Served.

A debtor is under no duty to respond to a defectively served summons. If service was improper, any subsequently obtained judgment is void, even if the debtor had actual knowledge of the proceedings [*Taylor-Rush v. Multitech Corporation (1990) 217 CA3d 103, 111, 265 CR 672]* .

Persons who are subsequently served as fictitiously named Doe defendants must also be advised that they are being sued and served under this fictitious name. Failure to do so has been held to result in a defective service, resulting in the setting aside of a default judgment [*Gilbert v. Haller (2009) 179 CA4th 852, 101 CR3d 843]* . The propriety of service often arises with respect to service on corporations.

Persons who may properly be served on behalf of a corporation include [*CCP § 416.10*]:

- Agent for service of process as registered with the Secretary of State.
- The corporation's president.
- The corporation's chief executive officer.
- The corporation's vice president.
- The corporation's secretary or assistant secretary.
- The corporation's treasurer or assistant treasurer.
- The corporation's controller or chief financial officer.
- The corporation's general manager.
- Any person authorized by the corporation to receive service of process.

Warning:

Many process servers will complete a proof of service on a corporation indicating the name of a person followed by the statement that the named person was "authorized to receive service on the corporation's behalf." Such service will not withstand a proper challenge since the process server's statement is hearsay with respect to the purported authorization. The attorney should inspect the proof of service and ensure that an appropriate corporate representative was served and designated.

For individual debtors, service issues commonly arise when the debtor has moved and the current address (home or business) is unknown. The debtor may validly be served by substituted service at an address (other than a U.S. Postal Service post office box) at which the debtor usually receives mail [*CCP § 415.20(b)*]. The U.S. Postal Service provides a form that can be obtained online to request confirmation that the debtor continues to receive mail at a specified address.

Warning:

The Post Office is not always accurate in completing these forms. If the debtor challenges service, the creditor should ask the court to have the debtor provide written evidence that the debtor was usually receiving mail elsewhere. It is unusual to find a debtor who will be able to produce bills, bank statement, credit card statements or other evidence showing that the mail was being received at a different address on the purported date of service.

Strategic Point:

If at all possible, counsel should list the names of each officer, owner or agent for service of process and instruct the process server that these are the only people on whom they can affect service. It should not be left up to the process server to guess. However, if counsel knows some, but not all, of the names of the persons upon whom service may be lawfully effected, it may not be desirable to restrict the initial service attempt, since the server might be able to serve a valid person even though counsel is unaware of that person's name.

Cross Reference:

Form, see *6.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProcedurePleading & PracticeService of ProcessProofGeneral Overview

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.29 Attorney Should Determine Whether Evidence Exists to Prove Each Element of Each Cause of Action Alleged.

It is one thing to allege causes of action in good faith and another to prove them. Often information initially provided by the client may turn out to be erroneous. The creditor's attorney should always consider whether he or she has, or will have, sufficient evidence to prove each of the essential elements of the causes of action alleged (and should be alert to the discovery of new facts that may permit him to allege any causes of action not previously alleged). The debtor's attorney should remain vigilant in exploring whether any facts exist that will negate any of the essential elements of plaintiff's causes of action.

Cross Reference:

Trying and proving debt collection actions, see Ch. 7, Litigation to Recover Debts--Trying and Proving the Case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral Overview

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.30 Attorney Should Consider Whether Any Cause(s) of Action Are Subject to a Statute of Limitations Defense.

6.30[1] Counsel Should Consider Demurrer or Pleading Affirmative Defense. Debtor's counsel should consider whether a statute of limitations defense is applicable as to each of the creditor's causes of action. If so, debtor's counsel needs to consider whether to file a demurrer or simply allege the applicable statute as an affirmative defense.

Trap:

Many debtor's counsel simply state that "Plaintiff's causes of action, and each of them, are barred by the applicable statute of limitations." Such a pleading is legally insufficient [*CCP § 458*; *see 6.21*].

Strategic Point:

Since the creditor's attorney wishes to avoid any delays in the case, if any statute of limitations issue appear, the attorney should endeavor to plead around them if possible. For example, the attorney will want to affirmatively state why a cause of action did not accrue on the date when it might otherwise seem to have accrued (such as delayed discovery) or that a fraudulent transfer that occurred years ago may still be pursued because the creditor only recently obtained the judgment. Doing so will avoid having to respond to demurrers filed by debtor's counsel, thus enabling the case to proceed more expeditiously to trial.

Cross Reference:

Pleading affirmative defense of statute of limitations, see *6.21*.

6.30[2] Attorney Should Consider Potential Tolling of Statute of Limitations. When the statute of limitations has, or may have been, tolled, the attorney should include such a statement in the pleadings, for the reasons discussed in *6.30[1]*.

Cross Reference:

Tolling, see *6.22[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawBreachCauses of ActionGeneral OverviewContracts LawDefensesStatutes of Limitations

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1-6 MB Practice Guide: CA Debt Collection 6.31

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.31 Attorney Should Determine Whether Creditor Has Properly Performed.

6.31[1] Debtor May Claim Goods or Services Were Non-Conforming. In the vast majority of collections cases, liability is not really an issue. The debtor is simply trying to delay the inevitable, avoid the obligation entirely, or obtain settlement negotiation leverage. One of the most common claims raised by debtors is that the goods or services provided were non-conforming or substandard. Such a claim can be overcome by gathering evidence to show that the debtor accepted the goods and exercised ownership over them [*Com Code § 2602*]. It is common to find that the debtor resold the goods (at the debtor's normal selling price) notwithstanding the purported defects. If the defect claim is legitimate, the debtor's attorney should gather any evidence to show the goods were rejected by the debtor's buyer and/or were sold at a price lower that the debtor's normal selling price.

6.31[2] Debtor May Claim Late Delivery. Another debtor's tactic is to claim that the goods or services were not timely provided. Such a claim can similarly be overcome by gathering evidence to show that the debtor nevertheless accepted the goods or services.

If the late delivery claim is legitimate, the debtor's attorney should gather any evidence to show why the debtor accepted the goods and what damages the debtor suffered as a result of the delay.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsEffectsCommercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Sales (Article 2)PerformanceBuyer's Rights

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.32 Attorney Should Determine Whether Creditor Has Mitigated Damages.

The creditor's attorney should anticipate that the debtor will claim that the creditor failed to mitigate the damages. Evidence should be sought to show that the creditor acted reasonably in attempting to obtain the debtor's performance, to sell the goods or services elsewhere, or other facts as may apply under the circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawRemediesGeneral OverviewContracts LawRemediesAvoidable Consequences

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.33 Attorney Should Consider Whether Statute of Frauds Required Agreement to Be in Writing.

The statute of frauds requires that the following agreements be in writing and signed by the party to be charged [*CC § 1624*]:

- An agreement that by its terms is not to be performed within a year from its making.
- A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in *CC § 1624*.
- An agreement for a lease longer than one year or for the sale of real property or an interest.
- An agreement authorizing or employing an agent, for compensation, to purchase or sell real estate or lease real estate for more than one year or to find a purchaser or seller of real estate or lessee or lessor of real estate for a period longer than one year.
- An agreement that by its terms is not to be performed during the lifetime of the promisor.
- An agreement by a purchaser of real property to pay a debt secured by the property purchased, unless assumption of the debt is specifically provided for in the conveyance of the property.
- A contract or commitment to loan money or extend credit in a sum greater than $100,000, not primarily for personal, family or household purposes, made by a person engaged in the business of lending or arranging for lending money or extending credit (a contract to loan money secured solely by residential property of four or less units is deemed to be for personal, family or household purposes).

Written evidence of the agreement signed by the party to be charged is also required as a prerequisite to enforceability for:

- An agreement for the sale of personal property (other than goods) for $5,000 or more [*CC § 1624.5*].
- An agreement for the sale of goods for $500 or more [*Com Code § 2201(1)*].

Exceptions:

- Between merchants, a contracts for the sale of goods for more than $500 need not be signed by the party to be charged if, within a reasonable time after the agreement is entered, a written confirmation of the agreement sufficient to bind the sender is received, the party receiving it has reason to know its contents, and the party receiving it fails to make a written objection to its contents within 10 days after it is received [*Com Code § 2201(2)*].

- The statute of frauds does not apply to leases of personal property [*CC § 1624(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsMerchant RuleContracts LawStatutes of FraudsRequirementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsStatutes of FraudsReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.34 Attorney Should Investigate Applicability of Other Affirmative Defenses Common to Litigation.

All affirmative defenses common to litigation may be raised in the collection context. The creditor's attorney should anticipate them and conduct discovery to ascertain the validity of any affirmative defenses raised. A debtor's attorney should consider raising all potential defenses, not just those discussed in this chapter.

Cross Reference:

Pleading affirmative defenses, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 14.18, 14.19.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawDebtor & Creditor Relations

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AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.35 Cross-Complaint Potential Should Be Evaluated by Attorney.

The attorney should evaluate the potential filing of a cross-complaint by the debtor. The majority of cross-complaints are filed in an attempt to gain some negotiating leverage. There are instances, however, when real substantive issues may exist. In such cases, the attorney should discuss the issues with the client and determine whether and how best to proceed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor Relations

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
VI. FORMS

1-6 MB Practice Guide: CA Debt Collection 6.36

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.36 Cause of Action--Breach of Contract--Judicial Council Form PLD-C-001(1).

Cause of Action--Breach of Contract--Judicial Council Form PLD-C-001.

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NOTES.

Authority:

Reichert v. General Ins. Co. (1968) 68 C2d 822, 830, 69 CR 321, 442 P2d 377 ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 CA3d 887, 916, 92 CR 723* ; California Judicial Council Form PLD-C-001(1), pictured above, is approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion of Breach of Contract Claims in Connection With Collection of Debts:

See *6.05* (written contract), see *6.06* (oral contract)

Limitation of Action:

See *6.23[1], [2]*

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VI. FORMS

1-6 MB Practice Guide: CA Debt Collection 6.37

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.37 Cause of Action--Common Count--Judicial Council Form PLD-C-001(2).

Cause of Action--Common Count--Judicial Council Form PLD-C-001(2).

Click here to view image.

NOTES.

Authority:
Cal Rules Ct, Rule 1.45(a); California Judicial Council Form PLD-C-001(2), pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion of Common Count Claims in Connection With Collection of Debts:
See *6.07*

Limitation of Action:
6.23[3]

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VI. FORMS

1-6 MB Practice Guide: CA Debt Collection 6.38

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.38 Cause of Action--Fraud--Judicial Council Form PLD-C-001(3).

Cause of Action--Fraud--Judicial Council Form PLD-C-001(3).

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Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 CA3d 750, 765, 102 CR 286 ; *Balfour, Guthrie & Co. v. Hansen (1964) 227 CA2d 173, 192-193, 38 CR 525* ; California Judicial Council Form PLD-C-001(3), pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion of Fraud and Negligent Misrepresentation Claims in Connection With Collection of Debts:

See *6.09*

Limitation of Action:

6.23[5]

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
VI. FORMS

1-6 MB Practice Guide: CA Debt Collection 6.39

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.39 Complaint for Conversion.

Complaint for Conversion.
_____ [*Attorney's name*]
_____ [*Street address*]
_____ [*City, State, and Zip*]
_____ [*Area code and phone number*]
_____ [*Attorney's state bar number*]
Attorney for [*party's name*] _____
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ *[name]*,	)	
Plaintiff,	)	Case No. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ *[name]*,	)	(Conversion)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. _____ [*Allege defendant's capacity and residence, e.g.,* Defendant Mary Jones is, and at all times herein mentioned was, a resident of Farallon County, California].

2. At all times herein mentioned, and in particular on or about _____ [*date*], plaintiff was, and still is, the _____ [*describe plaintiff's interest in the property, e.g.,* owner] and was, and still is, entitled to the possession of the following personal property, namely: _____ [*describe property*].

4. On or about _____ [*date*], and at _____ [*city*], Farallon County, California, the property described above had a value of $_____.

5. On or about _____ [*date*], defendant _____ [*describe defendant's conversion of the property, e.g.,* took the property described above from plaintiff's possession and converted the same to his/her own use].
[*If the property was initially acquired lawfully from plaintiff*:]

6. On or about _____ [*date*], plaintiff [orally] demanded the immediate return of the above-mentioned property but defendant failed and refused, and continues to fail and refuse, to return the property to plaintiff. A copy of plaintiff's written demand for return of the property is attached as Exhibit A and incorporated by this reference. A copy of defendant's written refusal to return the property is attached as Exhibit B and incorporated by this reference.
[*If seeking damages under the alternative damage provision of CC § 3336* :]
[*CONTINUE*]

7. As a proximate result of defendant's conversion, plaintiff _____ [*allege injuries suffered which are the natural, reasonable, and proximate results of the conversion*], all to plaintiff's damage in the sum of $_____.

8. Between the time of defendant's conversion of the above-mentioned property to his/her own use and the filing of this action, plaintiff _____ [*describe time and money properly expended in pursuit of the converted property*], all to plaintiff's further damage in the sum of $_____.

9. The defendant's acts alleged above were willful, wanton, malicious, and oppressive, [were undertaken with the intent to defraud,] and justify the awarding of exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

[1. For the value of the property converted;]

[2. For interest at the legal rate on the foregoing sum pursuant to *Civil Code Section 3336*, from and after _____ [*date*];]

[3. For damages for the proximate and foreseeable loss resulting from defendant's conversion in the sum of $_____;]

[4. For interest at the legal rate on the foregoing sum pursuant to *Civil Code Section 3287(a)*, from and after _____ [*date*];]

[5. For damages for time and money properly expended in pursuit of the converted property in the sum of $_____;]

[6. For punitive and exemplary damages;]

[7. For costs of suit herein incurred;] and

[8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]]

Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

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*]

NOTES.

Authority:
Chatterton v. Boone (1947) 81 CA2d 943, 946, 185 P2d 610 ; *Jordan v. Talbot (1961) 55 C2d 597, 610, 12 CR 488, 361 P2d 20* ; *Home v. Kramer (1936) 7 C2d 361, 363-364, 60 P2d 854*

Discussion of Conversion Claims in Connection With Collection of Debts:
See *6.11*

Limitation of Action:
See *6.23[7]*

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
VI. FORMS

1-6 MB Practice Guide: CA Debt Collection 6.40

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.40 Notice for Bad Checks.

Notice for Bad Checks.

Notice From Payee to Drawer Regarding Potential Liability of Maker for Treble Damages [*Civ. Code § 1719(a), (c)*]
TO: _____ [*name of drawer*]

_____ [*Name of payee*] is the payee of a check you wrote for $_____. The check was not paid because _____ [there were insufficient funds or credit in the account on which the check was written *or* you do not have an account with the bank on which the check was drawn *or* you stopped payment], and the payee demands payment. [*If debtor stopped payment, add:* You may have a good faith dispute as to whether you owe the full amount]. If you [*If debtor stopped payment, add:* do not have a good faith dispute with the payee and] fail to pay the payee the full amount of the check in cash, a service charge of an amount not to exceed $25 for the first check passed on insufficient funds and an amount not to exceed $35 for each subsequent check passed on insufficient funds, and the costs to mail this notice within 30 days after this notice was mailed, you could be sued and held responsible to pay at least both of the following:

(1) The amount of the check.

(2) Damages of at least $100 or, if higher, three times the amount of the check up to $1,500.

[*If debtor stopped payment, add:* If the court determines that you do have a good faith dispute with the payee, you will not have to pay the service charge, treble damages, or mailing cost mentioned above. If you stopped payment because you think you have a good faith dispute with the payee, you should try to work out your dispute with the payee.] You can contact the payee at:
_____ [*name of payee*]
_____ [*street address*]
_____ [*telephone number*].

You may wish to contact a lawyer to discuss your legal rights and responsibilities.
_____ [*name of sender of notice*]

NOTES.

Authority:
CC § 1719(a) (insufficient funds/no such account), *CC § 1719(c)* (stop payments)

Discussion of Cause of Action for Violation of Bad Check Statute:
See *6.12*

Limitation of Action:
See *6.23[8]*

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Chapter 6 Litigation to Recover Debts--Selecting the Appropriate Causes of Action
VI. FORMS

1-6 MB Practice Guide: CA Debt Collection 6.41

AUTHOR: Allan Herzlich, Esq. and Jerome J. Blum, Esq.

6.41 Change of Address or Boxholder Request Format--Process Servers--U.S. Postal Service Form.

Change of Address or Boxholder Request Format--Process Servers--U.S. Postal Service Form.

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NOTES.

Authority:
CCP § 415.20(b)

Discussion of Form:
See *6.28*

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case

1-7 MB Practice Guide: CA Debt Collection 7.syn

AUTHOR: Arnold Levin

§ 7.syn Synopsis to Chapter 7: Litigation to Recover Debts--Trying and Proving the Case

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7.02 Objective and Strategy.
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Arnold Levin n*

FOOTNOTES:

(n6)Footnote *. Arnold Levin is a 1959 graduate of Harvard Law School. He practiced law for 17 years, primarily in civil litigation, and was a Commissioner of the Los Angeles County Superior Court for 26 years, most of it in civil departments. He has served as consultant to the BAJI and CALJIC committees. Mr. Levin retired from the court in November 2002 and since then has worked part time as a mediator, court appointed referee, and consultant.

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
I. STRATEGY

1-7 MB Practice Guide: CA Debt Collection 7.01

AUTHOR: Arnold Levin

7.01 Scope.

This chapter covers:

- Objectives and strategies for trying and proving a debt collection action [*see 7.02*].
- Collecting evidence of debt and ownership of debt [*see 7.03 -7.09*].
- Obtaining a default judgment [*see 7.10 -7.14*].
- Obtaining summary judgment [*see 7.15 -7.21*].
- Preparing for trial in debt collection litigation [*see 7.22 -7.37*].
- Preparing the statement of decision and judgment [*see 7.38 -7.40*].

Core Statutes:

Evid Code §§ 450-460 (judicial notice); *Evid Code §§ 1270-1272* (business records); *Evid Code §§ 1400-1454* (authentication); *[CCP §§ 585-587.5]* (default judgment); *[CCP §§ 437c-438]* (summary judgment).

Cross References:

See Ch. 1, Planning Collection of Debt.

See Ch. 6, Litigation to Recover Debts--Selecting Appropriate Cause of Action.

See Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Chs. 7- 12, 14, 16, 18- 20, 23.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedureSummary JudgmentGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor Relations

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
I. STRATEGY

1-7 MB Practice Guide: CA Debt Collection 7.02

AUTHOR: Arnold Levin

7.02 Objective and Strategy.

7.02[1] Collecting Evidence Requires Early Action. Trying and proving a debt collection action, like all litigation, requires the gathering and organizing of all the relevant evidence that proves the claim asserted and defeats any defenses raised. The basic guides for determining what evidence is needed are the pleadings and the pertinent jury instructions (even if the case will be tried without a jury). The allegations in the complaint are what must be proved, and the instructions are what the judge would tell a jury must be proved.

Strategic Point:

This process should begin as soon as possible in the trial preparation, so that there is as much time as possible to overcome any difficulties in finding and developing evidence. Lawyers frequently leave these tasks until the trial date is upon them and rush to catch up. Starting early with the analysis of what is needed provides a guide that can be used through all phases of trial preparation--with updates of the guide throughout the process of preparation [*see 7.03 -7.09*].

Consider:

Although the rulings and legal findings of a court made at a hearing prior to trial (such as a hearing on an application for right to attach order or a writ of possession) are not admissible at trial, such a hearing does serve to flesh out some of the issues that may be presented by the opposition at trial and will provide a template of the evidentiary and factual issues that will need to be presented at trial to overcome the anticipated opposition (and will do so without any res judicata effect).

The sources for this evidence initially are the clients, their witnesses, records and physical evidence obtained by interview, examination, and investigation. Then, to the extent necessary, discovery can provide evidence from the opposing party. As each piece of evidence is obtained, it must be tested under the rules of evidence in order to present it with other evidence that will make it admissible at trial [*see 7.06 -7.09*].

Some cases require the opinion testimony of one or more expert witnesses, which requires the careful crafting of foundational and hypothetical questions [*see 7.34*]. It is common today in trials to require the use of an interpreter, and

in such a case special attention is needed in framing questions [*see 7.35*].

If there has been a pretrial hearing for a writ of attachment or possession, the rulings of the court, including those pertaining to evidence, are not binding and cannot be considered in the trial of the action. If there was no opposition in the pretrial proceeding, nevertheless all rights and defenses remain available to the debtor at the time of trial [*see CCP §§ 484.100*, *484.110*, *512.100*, *512.110*]. The fact that no objection was made to the admissibility of evidence at the pretrial proceeding is not a bar to making the objections at trial.

Warning:

Debt collection cases are frequently underestimated as easy cases to win. Nothing should be taken for granted in the presentation of evidence. Overconfidence can bring unpleasant surprises and cause the loss of a winnable case.

7.02[2] Preliminary Assumptions. The discussion in this chapter is based on the following preliminary assumptions:

- The court in which the action is filed has subject matter jurisdiction and personal jurisdiction over the parties.
- The court in which the action is filed is the proper intra-state and intra-county venue for the case.
- The complaint asserts a proper cause of action of money owing on a debt, and there is a denial of the claim.
- All other defenses have been resolved in motion proceedings or have not been raised.
- All prejudgment remedies have been applied for and are in effect or have been denied.
- The case is at issue.
- The "fast track" deadlines and filings set forth in the California Rules of Court have been complied with.

Cross Reference:

Discussion, pretrial matters, see Matthew Bender[(R)] Practice Guide, California Pretrial Civil Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor Relations

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
II. COLLECTING EVIDENCE OF DEBT AND OWNERSHIP OF DEBT

1-7 MB Practice Guide: CA Debt Collection 7.03

AUTHOR: Arnold Levin

7.03 CHECKLIST: Collecting Evidence of Debt and Ownership of Debt.

☐ Analyze pleadings.

○ Prove that debt exists.

Discussion:
See *7.04[2]*

○ Prove that plaintiff is owner of debt.

Discussion:
See *7.04[3]*

○ Prove that debt is unpaid.

Discussion:
See *7.04[4]*

○ Prove that specific amount is due.

Discussion:
See *7.04[5]*

☐ Analyze relevant jury instructions.

Discussion:
See *7.05*

☐ Authenticate writings for admission into evidence.

Authority:
Evid Code §§ 1400-1402

Discussion:
See *7.06*

☐ Collect evidence to provide foundation for admission of business records as exception to hearsay rule.

Authority:
Evid Code §§ 1270-1272

Discussion:
See *7.07*

☐ Conduct discovery to obtain admissible evidence.

Discussion:
See *7.08*

☐ Determine facts that can be proved by judicial notice.

Authority:
Evid Code §§ 450-460

Discussion:
See *7.09*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor RelationsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceRelevanceGeneral Overview

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
II. COLLECTING EVIDENCE OF DEBT AND OWNERSHIP OF DEBT

1-7 MB Practice Guide: CA Debt Collection 7.04

AUTHOR: Arnold Levin

7.04 Counsel Must Thoroughly Analyze Pleadings.

7.04[1] Plaintiff Must Prove All Contested Allegations in Complaint. Assuming that the complaint states a cause of action upon which a debt collection action can be based, the allegations in the complaint and the responses in the answer act as a checklist of what must be proved. Allegations admitted or not denied will not require proof. However, even routine allegations such as corporate status of good standing must be proved if denied by the answer. The substantive claims of money owing on a valid debt usually require proof of some or all of the basic contentions listed in *7.04[2]- 7.04[5]*.

Cross Reference:

Discussion, elements of contract, see *Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 13, Attacking or Defending Existence of Contract--Absence of Essential Element, 13.04*.

7.04[2] Plaintiff Must Prove That a Debt Exists. The evidence needed to prove the existence of a debt includes a promissory note, other written evidence of money due but unpaid, a written contract, an oral contract, documents and witnesses proving full performance or excuse therefrom by the creditor, default or partial performance by the debtor, and that an amount of money is due and owing. This evidence may include documents that require authentication or foundation to establish them as business records admissible in evidence as exceptions to the hearsay rule.

Cross Reference:

Discussion, authentication, or foundation for business records admission, see *7.07*.

7.04[3] Plaintiff Must Show That Plaintiff Is Owner of Debt. The evidence of this fact is the same as proving that a debt exists. However, in business transactions, it is common for debts to be assigned to financial institutions, factors or other lenders for cash or, in the case of promissory notes, to be sold at discount for cash in financial markets. Documents of assignment must be authenticated and proof of the amount of money still owing must be supported by business records admissible in evidence.

In the case of an assignment or multiple assignments, finding a witness who can authenticate a document or prove a foundation for business records can be difficult and should be addressed as early in the case as possible. Witnesses with

the necessary knowledge, particularly as the debt ages, may have changed employment, moved or died, or the original assignor may no longer be in business and its agents may also be difficult to locate. Without obtaining this testimony, the success of collecting the debt is limited to hoping the debtor will default, since opposition could exclude evidence essential to proving the creditor's case by appropriate objections.

Warning:

There are frequently problems when a debt has been assigned, transferred, or sold. Counsel must make certain to establish witnesses and evidence well in advance of trial in order to prove the ownership of the debt and its particulars. This may not only mean finding appropriate witnesses, but also other documentation pertaining to the transfer of the debt that counsel otherwise might not have available. For example, when one bank acquires another, there are various certificates filed with state and federal agencies that reflect transfer of assets (which hopefully includes the loan in question), and these must be obtained and brought to trial in appropriate authenticated form.

Strategic Point:

If the witnesses or documents cannot be located, consider serving Requests for Admissions of Facts and/or Genuineness of Documents on the debtor. Debtors will often admit critical evidence (e.g., authenticating their signature to an agreement when the creditor cannot locate a former salesperson) or simply will not respond, thereby allowing the creditor to move to deem the matter admitted.

Cross Reference:

Discussion, authentication, or foundation for business records admission, see *7.06*, *7.07*.

7.04[4] Plaintiff Must Show That All or Part of Debt Is Unpaid. The evidentiary considerations described in proving the existence and ownership of debt [*see 7.04[2]*] also apply here [*see Generale Bank Nederland, N.V. v. Eyes of the Beholder (1998) 61 CA4th 1384, 72 CR2d 188* (discussion of the consequences of failure to present evidence in admissible form)].

7.04[5] Plaintiff Must Show That a Sum of Money Is Due and Owing. The specific amount set forth in the note or contract is not necessarily the amount owing. Partial payments and any credit given must be deducted and interest provided for in the note or contract must be calculated and added to the debt. While interest may be set in a fixed amount, it also may be variable based on an amount in excess of a published interest rate (such as the Federal Reserve prime rate). This rate probably will have changed several times since the note or contract was made, and therefore evidence of the rate amount at particular times must be presented in admissible form. If the debt is secured and the amount that is unsecured must be proved, the value of the security must be established by evidence of a proper lien sale or by expert testimony as to the value of the security in order to compute the amount that is unsecured.

Strategic Point:

Because the amounts of interest, fees and costs will vary and are not always calculated correctly, such figures (for example, in preliminary pleadings) should not be used until necessary at trial or other final hearings. Counsel should be certain that he or she can explain how the figures were calculated and arrived at, and do not rely wholly on the witness to do so.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawDebtor & Creditor RelationsContracts LawPerformancePartial PerformanceGeneral OverviewEvidenceAuthenticationGeneral OverviewEvidenceHearsayExceptionsBusiness RecordsGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceTestimonyGeneral Overview

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
II. COLLECTING EVIDENCE OF DEBT AND OWNERSHIP OF DEBT

1-7 MB Practice Guide: CA Debt Collection 7.05

AUTHOR: Arnold Levin

7.05 Counsel Should Thoroughly Analyze Relevant Jury Instructions.

The standard jury instructions published by the California Judicial Council (CACI instructions) are used by courts throughout the state and are useful as a checklist--even if the case will not be tried before a jury--because what must be proved is listed in a concise form.

Example:

CACI No. 370 for money had and received provides that to establish a claim that the defendant owes the plaintiff money, the creditor must prove:

- Money was received by the defendant to be used for plaintiff's benefit.
- The money was not used for plaintiff's benefit.
- Defendant has not given the money back to plaintiff.

This is a guide as to whose testimony is needed and which documents such as checks, receipts, bank records, correspondence, contracts, or financial records are required. The discussion in *7.04* is also applicable to using jury instructions as a guide.

Jury Instructions:

Instruction and discussion relating to debt, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 302 -304, 312, 352 -353, 355, 370 -374 (LexisNexis Matthew Bender).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor Relations

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1-7 MB Practice Guide: CA Debt Collection 7.06

AUTHOR: Arnold Levin

7.06 Counsel Must Authenticate Writings for Admission Into Evidence.

7.06[1] Documents Require Authentication Prior to Admission. Writings such as contracts, promissory notes, and correspondence must be authenticated in order to be admitted into evidence [*Evid Code § 1401*]. The party offering the writing must present evidence that the writing is what that party claims it to be. The means of proving authentication are not limited to those enumerated in the Evidence Code [*Evid Code § 1410*].

Example--Authentication of Promissory Note:

To admit a promissory note into evidence as proof of an obligation, other evidence must establish that it was prepared with the knowledge and agreement of parties to it, that consideration was given, and that the signature is that of the debtor [*Evid Code § 1400(a)*].

Warning:

Authentication is sometimes confused with the foundation evidence necessary for the admission of business records. They are separate concepts and principles and pertain to different aspects of a writing, although the two may overlap in some situations (for example, entries on the back of a promissory note as evidence of payments made).

Consider:

Many courts will require submission of original documents to support default prove-ups or otherwise. Many financial institutions do not like to produce such originals or have difficulty locating them. Counsel should obtain the originals as soon as possible and find out early whether or not they are not going to be available so that appropriate alternatives can be fashioned.

Cross Reference:

Discussion, establishing foundation for admission of business records, see *7.07*.

7.06[2] Alterations Must Be Explained. If the writing offered as evidence has been altered, the party offering it must present evidence accounting for the alteration, that it was made by another with consent, that it was made by agreement or innocently and that the alteration does not change the meaning of the writing [*Evid Code § 1402*].

Consider:

In discovery, the defendant should produce as many other writings as possible that contain his signature. Frequently counsel can point to the similarities in other authenticated documents to refute a claim of the loan not being signed. One of the best documents to use to do this is a canceled check for payment on the actual loan made from the defendant's account.

7.06[3] Subscribing Witness Testimony Is Not Required. The testimony of a subscribing witness, while very useful, is not necessary to prove authenticity of a signature, even if the subscribing witness denies or cannot recall the execution of the writing [*Evid Code § 1411*]. The writing can still be authenticated by other evidence [*Evid Code § 1412*].

Examples--Testimony to Authenticate Writing:

- An admission of the person executing the writing can authenticate the signature [*Evid Code § 1414(a)*].
- If the person alleged to have signed the writing acted as if the signature was authentic, evidence of his or her acts can authenticate the signature [*Evid Code § 1414(b)*].
- A witness who saw the writing executed can authentic the signature [*Evid Code § 1413*].
- The testimony of a handwriting expert can authenticate a signature [*Evid Code § 1418*; *see also Evid Code §§ 800-805*].
- A lay witness also may authenticate a signature if the witness meets the requirements of *Evid Code §§ 1416-1417* relating to handwriting opinion evidence.

Cross References:

Use of request for admissions for authentication, see *7.08*.

Case annotations and legislative comments to *Evid Code §§ 800 et seq.*, *1400 et seq.*, see Cotchett, *California Courtroom Evidence, 17.01 et seq.*, *22.00* et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementProof of SignatureContracts LawDebtor & Creditor RelationsContracts LawNegotiable InstrumentsEnforcementProof of SignatureContracts LawNegotiable InstrumentsTypesPromissory NotesEvidenceAuthenticationGeneral OverviewEvidenceScientific EvidenceHandwriting

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1-7 MB Practice Guide: CA Debt Collection 7.07

AUTHOR: Arnold Levin

7.07 Counsel Must Determine Foundation Needed for Admission of Business Records.

7.07[1] Business Records May Be Admitted As Exception to Hearsay Rule. Business records are out of court statements that fall within the definition of hearsay [*see Evid Code § 1200*]. However, they may be admitted in evidence if certain other evidence is presented to show their reliability. Business records include business, government, professional, occupational, or institutional-profit or non-profit writings [*Evid Code § 1271*].

To provide a basis for their admission, the party offering the records must establish by evidence all of the following [*Evid Code § 1271*]:

- The writing was made in the ordinary course of business;
- The writing was made at or near the time the act or event occurred;
- The custodian or other qualified person testifies as to its identity and method of preparation; and
- The sources of information and method and time of preparation indicate the writing's trustworthiness.

Cross Reference:

Case annotations and legislative comments to *Evid Code § 1271*, see Cotchett, *California Courtroom Evidence, 21.38* (Matthew Bender).

The witness must have personal knowledge which must be demonstrated in the testimony [*see MacLean v. City & County of San Francisco (1957) 151 CA2d 133, 143, 311 P.2d 158,* (police accident report inadmissible), quoting McCormick on Evidence § 286, at 602 (1954)]. Statements made in the conclusionary language of the statute are subject to objection, which, if sustained, could exclude the writing from evidence [*see Generale Bank Nederland N.V. v. Eyes of the Beholder (1998) 61 CA4th 1384, 1402, 72 CR2d 188] .*

Warning:

An astute defense attorney can refute computerized payment records unless there is sufficient evidence of the methodology used in the computer system (something most loan officers cannot testify to with any personal knowledge). Counsel should prepare for this and try to establish payment history by asking the defendant to produce proof of payment, such as canceled checks or receipts, in discovery.

7.07[2] Absence of Record Is Admissible to Prove Action Was Not Taken. Evidence of absence of a record to prove that something was not done or did not happen can be admitted as exceptions to the hearsay rule if [*Evid Code § 1272(a), (b)*]:

- It was the regular course to make such records; and
- The absence of a record is a trustworthy indication that the act or event did not occur.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceHearsayExceptionsBusiness RecordsGeneral OverviewEvidenceHearsayExceptionsBusiness RecordsNormal Course of Business

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1-7 MB Practice Guide: CA Debt Collection 7.08

AUTHOR: Arnold Levin

7.08 Counsel Should Use Discovery to Obtain Admissible Evidence.

The request for admission can be an efficient way to authenticate a writing. An admission establishes the fact as to party making it [*CCP § 2033.410*]. An admission also can authenticate writing [*Evid Code § 1414(a)*]. If a request for admission is denied and the fact denied is later proven at trial, the party making the denial is subject to monetary sanctions [*CCP § 2033.420*].

Strategic Point:

If there might be an issue with proof of parts of the case, often a request for admissions can be used effectively not only to establish necessary elements of proof, but also to get into evidence documents counsel might otherwise have difficulty getting admitted.

Business records of the opposing party can be obtained by a request for inspection and production of documents. It is necessary to follow up the production with evidence of authentication or foundation through requests for admission, interrogatories, or depositions, to obtain the names of witnesses who can provide the information and deposing them to establish their testimony. The discovery must be part of the overall plan to obtain the evidence needed to prove the claim.

Cross References:

Discussion, requests for admission, inspection, or production of documents, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 10, Inspection of Documents, Tangible Things and Land; see Ch. 12, Requests for Admissions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsEffectEvidenceAuthenticationGeneral Overview

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1-7 MB Practice Guide: CA Debt Collection 7.09

AUTHOR: Arnold Levin

7.09 Counsel Must Determine Facts to Be Proven by Judicial Notice.

For purposes of debt collection litigation, certain records can be received in evidence by judicial notice [*see Evid Code §§ 450-460*]. Taking judicial notice establishes the contents as fact for purposes of the trial, and can either be mandatory or permissive [*see Evid Code §§ 451, 452*]. To request judicial notice, the party seeking it must give notice to the adverse party and must give the court sufficient information to take judicial notice [*Evid Code § 453*].

Examples--Judicial Notice in Debt Litigation:

Examples include proceedings in other litigation--civil or criminal--that may be pertinent, records of liens or security interests, licenses, corporate filings with the state, fictitious name filings, geographical locations and laws of other jurisdictions that may govern the contract before the court.

Warning:

Judicial notice may not necessarily prove the facts counsel needs to establish. For example, judicial notice of a recorded deed of trust will only establish the fact of the recordation, and not the validity of the information contained in the document. This is a very limited doctrine and counsel should not rely upon it as a means to an end in proving a case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsEvidenceJudicial NoticeGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsFacts Generally KnownEvidenceJudicial NoticeAdjudicative FactsProceedings in Other Courts

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1-7 MB Practice Guide: CA Debt Collection 7.10

AUTHOR: Arnold Levin

7.10 CHECKLIST: Obtaining a Default Judgment.

☐ Verify that plaintiff may seek default.

- ○ Was defendant properly served?
- ○ Has defendant failed to file a response to complaint within time specified in summons, or such further time as may be allowed?

Authority:
CCP § 585(a)-(c)

Discussion:
See *7.11*

☐ Decide whether to seek entry of default judgment by clerk or by court.

- ○ Clerk may enter default judgment if:
  - ☐ Action arises on contract or judgment for payment of money damages only; and
  - ☐ Defendant has been served other than by publication (in other words, personally or by mail).
- ○ Court must enter default judgment in other cases.

Authority:

CCP § 585(a)-(c)

Discussion:
See *7.11*, *7.13[1]*

○ Each procedure has its respective advantages and disadvantages:

☐ Clerk-entered judgment does not require judicial involvement or formal prove-up hearing, but clerks can be very fussy about paperwork and delays can occur while paperwork is awaiting signature.

☐ Court-entered defaults can require formal "prove-up" hearing with examination of witnesses, but are sometimes faster.

☐ Some evidence of validity of allegations in complaint usually is required in either case.

Authority:
CCP § 585(a)-(d)

Discussion:
See *7.11*

☐ Calendar applicable time periods.

Timing:
Request for entry of default must be filed within 10 days after response is due from plaintiff, or sanctions may be imposed.

Authority:
Cal Rules Ct, Rule 3.110(g)

Discussion:
See *7.12[1]*

Timing:
Default judgment must be obtained within 45 days after entry of default unless court has granted extension, or sanctions may be imposed.

Authority:
Cal Rules Ct, Rule 3.110(h)

Discussion:
See *7.12[2]*

☐ If entry of default judgment by clerk is being sought:

○ File written application for default on official form.

○ Indicate on form that entry of judgment by clerk is being sought, and complete declaration with respect to application of consumer statutes on reverse side of form.

○ Itemize costs being sought in form.

Authority:
CCP §§ 585(a), 585.5(a)(1)

Discussion:
See *7.13[2]*

Form:
See *7.42*

○ Include proof of service of summons.

Authority:
CCP § 585(a)

Discussion:
See *7.13[3]*

○ If attorney's fees are being sought:

☐ Include request to have attorney's fees fixed by court; or

☐ If court has established standard schedule of attorney's fees in default actions, include scheduled amount in standard form as long as contract provides for recovery of attorney's fees or recovery of attorney's fees is authorized by statute.

Authority:
CCP § 585(a)

Discussion:
See *7.13[4]*

○ Provide additional documentation as required by court.

☐ Contact court to find out what documentation ordinarily is required.

☐ Find out if court requires original documents or will accept copies.

☐ Assemble and prepare any necessary documentation to prove allegations in complaint.

Discussion:

See *7.13[5]*

○ Mail copy of application to defendant and include with application an affidavit that copy was mailed to defendant's attorney or that address is unknown.

Authority:
CCP § 587

Discussion:
See *7.13[6]*

○ If clerk rejects or returns filing, determine source of problem, correct if possible, and resubmit.

Discussion:
See *7.13[5]*

○ On acceptance of filing, clerk will enter default and "immediately thereafter" enter default judgment for plaintiff.

Authority:
CCP § 585(a)

Discussion:
See *7.13[7]*

☐ If default judgment by court is being sought:

○ File written application for default on official form.

○ Indicate on form that entry of judgment by court is being sought.

○ Itemize costs being sought in form.

Authority:
CCP § 585(b), (c)

Discussion:
See *7.14[2]*

Form:
See *7.42*

○ Court clerk will enter default once application is filed.

Authority:
CCP § 585(b), (c)

Discussion:

See *7.14[3]*

○ Apply to court for default judgment.

○ Determine whether court prefers or will accept affidavits in lieu of full prove-up hearing.

Authority:
CCP § 585(b)-(d)

Discussion:
See *7.14[4], [6]*

☐ If so, prepare necessary affidavits, making sure that facts stated therein:

○ Are within affiant's personal knowledge.

○ Are set forth with particularity.

○ Show affirmatively that affiant, if sworn as witness, can testify competently to contents of affidavit.

Authority:
CCP § 585(d)

Discussion:
See *7.14[6]*

○ Schedule prove-up hearing if desired or if required by court.

Authority:
CCP § 585(b)-(d)

Discussion:
See *7.14[4]*

○ Prepare for and conduct prove-up hearing as if it were a trial, examining witnesses to elicit testimony proving allegations in complaint.

☐ No cross examination of witnesses occurs since defendant has not appeared.

☐ If defendant resides outside California, court must examine plaintiff or plaintiff's agent regarding any payments made to plaintiff.

☐ Defendant has no right to appear at hearing.

Authority:
CCP § 585(b), (c)

Discussion:
See *7.14[5]*

○ Court will render default judgment after hearing evidence.

Authority:
CCP § 585(b), (c)

Discussion:
See *7.14[7]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawDebtor & Creditor Relations

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AUTHOR: Arnold Levin

7.11 Options and Strategies.

A default may be obtained if the defendant, after being served, fails to file a response to the complaint [*see CCP § 585(a)-(c)* for a list of what constitutes a response] within the time specified in the summons, or such further time as may be allowed. Upon application by the plaintiff, the court clerk enters the default in the record, and the plaintiff then may seek a default judgment, using one of the procedures discussed below [*see CCP § 585(a)-(c)*].

Since many debtors simply do not appear, default judgments are commonplace in debt collection actions. The fact that the debtor has not shown up may relieve counsel of some of the pressure of an adversarial proceeding and the time and effort required to rebut arguments and affirmative defenses raised by the debtor. However, counsel is far from being completely "off the hook," because it is usually still necessary to prove to the court's satisfaction the validity of the claim and the amount that should be awarded to the debtor. Thus, preparation is necessary even when it is obvious in advance that the debtor intends to default. The process of substantiating the allegations in the complaint to a sufficient degree to obtain a default judgment is commonly referred to as "prove-up."

Two statutory default methods are available in debt collection actions:

- Entry of default by the court clerk on written application by plaintiff, followed by immediate entry of default judgment by the court clerk [*CCP § 585(a)*]. This method is available only if the defendant has been served other than by publication (in other words, personally or by mail) and if the action arises on a contract or judgment for payment of money damages only [*CCP § 585(a)*]. Although the procedure for immediate entry of judgment by the court clerk does not expressly require any kind of prove-up or substantiation of the underlying allegations of the complaint [*see CCP § 585(a)*], in practice court clerks in California generally do require the submission of materials in support of the application.

- Entry of default by the court clerk followed by a hearing (or submission of evidence by affidavit if permitted by the court), after which the court will render a default judgment [*CCP § 585(b)-(d)*].

Strategic Point:

Although it involves two submissions to the court instead of one, most debt collection attorneys prefer to initially submit only a Request for Entry of Default, and later submit the Request for Entry of Default

Judgment. The Request for Entry of Default is much less likely to be rejected by the court clerk and the entry of default cuts off the debtor's ability to participate in the proceedings and will start the clock running on the debtor's ability to obtain relief from default pursuant to *CCP § 473*.

Strategic Point:

Most debt collection attorneys prefer to seek entry of a default judgment by the court clerk under *[CCP § 585(a)]* rather than the court under *[CCP § 585(b)]*, *(c)*, although this is not universally true. Although it is common for default requests to be rejected by the clerk and have to be resubmitted, and may end up taking longer than if a "prove-up hearing" is scheduled [*see 7.14*], most debt collection attorneys still regard this procedure as less labor intensive than seeking a default from the court, especially if a full-blown "prove up" hearing will be required. However, a "prove-up" hearing actually may speed up the process in some cases [*see 7.14[6]*] and may merit consideration if time is a significant factor. Those attorneys who prefer to obtain a default from the court rather than the clerk cite the perceived reluctance of court clerks to enter default judgments and the time and effort involved in curing minor defects and resubmitting paperwork as a reason for seeking a default judgment from the court.

Warning:

Counsel should not take a default if a hearing on a writ of attachment or possession is pending. The court will take the hearing off calendar, so it is preferable to wait and until the day after the hearing and take the default at that time.

Cross Reference:

Detailed discussion of default procedures, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawDebtor & Creditor Relations

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1-7 MB Practice Guide: CA Debt Collection 7.12

AUTHOR: Arnold Levin

7.12 Counsel Must Observe Time Limits Relating to Defaults.

7.12[1] Request for Entry of Default Must Be Filed Within 10 Days After Defaulting Party's Response Is Due. Within 10 days after a response is due, the party seeking a default judgment must file a request for entry of default. Sanctions may be imposed for failure to file the request within that time [*Cal Rules Ct, Rule 3.110(g)*].

7.12[2] Default Judgment Must Be Obtained Within 45 Days After Entry of Default Unless Court Extends Time. When a default is entered, the party who requested entry of the default must obtain a default judgment against the defaulting party within 45 days after the default was entered, unless the court has granted an extension of time. Sanctions may be imposed for failure to obtain a default judgment within that time [*Cal Rules Ct, Rule 3.110(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawDebtor & Creditor Relations

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AUTHOR: Arnold Levin

7.13 Clerk May Enter Default Judgment Following Default in Contract Case.

7.13[1] Summary Procedure Is Available in Many Debt Collection Actions. *[CCP § 585(a)]* sets out a summary procedure that applies in actions on a contract or judgment for money damages only. Under this procedure, the court clerk enters the default judgment on application by the plaintiff without court hearing [*see CCP § 585(a)*]. Most defaults in debt collection actions will qualify for this summary procedure.

Prerequisites:

The action must have arisen on a contract or judgment for money damages only. In addition, the defendant must have been served by a method other than publication (in other words, personal or mail service) [*see CCP § 585(a)*].

Strategic Point:

If the creditor is seeking tort remedies as well as contract remedies, the clerk cannot enter a default judgment [*see CCP § 585(a)*] and a default must be obtained from the court, which may require a full prove-up hearing [*CCP § 585(b), (c)*], or at least submission of testimony by affidavit [*CCP § 585(d)*]. For this reason, the attorney may want to consider waiving the tort claims and seeking a default judgment only on the contract claims as a means of expediting the process.

Cross Reference:

Detailed discussion of default procedures, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief.

7.13[2] Plaintiff Must File Written Application on Official Form. In order to obtain a default, plaintiff must file a written application for a default with the clerk of the court. Application for default must be made on Judicial Council Form CIV-100, use of which is mandatory. Counsel must complete Item 1(e) of the form, and also the declaration on Item 5 of the form, which declares whether or not the action is any of the following [*see CCP § 585.5(a)*(statutory requirement for declaration)]:

- On a contract or installment sale for goods or services subject to the Unruh Act [*CC § 1801 et seq.*].

- On a conditional sales contract subject to the Rees-Levering Motor Vehicles Sales and Finance Act [*CC § 2981 et seq.*].

- An obligation for goods, services, loans, or extensions of credit subject to *[CCP § 395(b)]* (providing for venue in aforementioned classes of actions).

The form includes space for a request for costs, which must be included in the default judgment [*Cal Rules Ct., Rule 3.1700(a)(2)*].

Cross Reference:

Judicial Council Form CIV-100 for requesting default, see *7.42*.

7.13[3] Proof of Service of Summons Must Be Included. The request for a default must be accompanied by a proof of service of summons [*CCP § 585(a)*].

Warning:

Care must be taken to ensure that the names on the summons and request for entry of default are identical, and that proof of service of process, and the return of the summons, have been filed with the court prior to or concurrently with filing the request for entry of default.

7.13[4] Counsel Seeking Attorney's Fees Must File Written Request With Application Unless Fees Are Fixed by Court Rule. If the attorney is seeking attorney's fees as part of the default judgment, the request for default must be accompanied by a request to have attorney's fees fixed by the court. After entry of default, the court will hear and rule on the application [*CCP § 585(a)*].

Exception:

If a rule of court has established a schedule of attorney's fees to be allowed in the type of case in question, the clerk may include in the judgment attorney's fees in accordance with that schedule, provided (1) the contract permits recovery of attorney's fees, or (2) plaintiff is authorized by statute to recover attorney's fees in the action [*CCP § 585(a)*]. In this case, no hearing is required and the requested attorneys fees can simply be entered on the form.

7.13[5] Clerk Probably Will Require Additional Documentation Before Entering Judgment. The statutory procedure for entry of a default judgment by a clerk does not expressly require additional documentation, and a reading of *[CCP § 585(a)]* gives the impression that entry of judgment will be automatic if the requirements discussed in *7.13[1] -[4]* have been met. In practice, however, courts typically require additional documentation in support of the allegations in the complaint before the clerk will issue a default judgment. This documentation usually will consist of some combination of the following:

- A summary of the facts and issues in the case, if required by the court.

- The contract and other relevant documents on which the action is based.

- Declarations of parties who would have been witnesses had the case proceeded to trial.

Warning:

Clerks frequently are very picky about the documentation accompanying requests for a default, and

applications for default are commonly rejected based on perceived defects in the accompanying documentation. For this reason, it is recommended that attorneys unfamiliar with the practices of the court in a particular jurisdiction contact the court clerk before filing a request for a default to find out what local procedures apply, and whether there are particular documents that are required as a matter of routine in debt collection default cases.

Consider:

If a request is rejected the first time around, the clerk will give the reasons for the rejection (for example, the Los Angeles County Superior Court uses a standard rejection sheet that lists common problems, and the clerk merely checks the appropriate box when rejecting a claim). These objections then can be addressed and usually cured prior to resubmission. This is still easier in most cases than trying to cure similar defects at a prove-up hearing. The worst case would be that a full prove-up hearing would be necessary if defects in the request cannot be cured, but this would be unusual.

Strategic Points:

- If the request for entry of default or default judgment is rejected on improper grounds, it is often worth taking the time and effort to make a personal visit to the court clerk to see if the issue can be resolved, or to determine exactly what must be changed to comply with the clerk's requirements. A cordial relationship with the local default clerk is most helpful in this situation.

- Counsel must be very specific about amounts. If there is a discrepancy in the pleadings, the clerk will reject the entire request. For this reason, some attorneys prefer not to put any amount other than the principal in the complaint, and leave the interest and other costs to the declaration.

- It is necessary to comply with the rules of evidence as far as documentation and foundation are concerned. If counsel cannot establish the basic foundation or evidentiary base for the documents, the request is likely to be rejected.

- Some courts require original documents, and some do not. The best way to find out is to call the clerk. If the court requires originals and counsel does not have them, counsel may be required to submit a declaration about why the originals are unavailable.

7.13[6] Affidavit That Application Was Mailed to Defendant Must Be Filed With Application. The application must be accompanied by an affidavit that a copy of the application was mailed to the defendant's attorney or, if none, to the last known address of the defendant or a statement that the address is unknown to plaintiff or plaintiff's attorney [*CCP § 587*].

7.13[7] Court Clerk Will Enter Default and Default Judgment on Plaintiff's Written Application. Once the plaintiff files an application in accordance with the procedures specified in 7.13[1]-[6], the clerk will enter the default, and "immediately thereafter" enter judgment for the principal amount demanded in the complaint, or a lesser amount if credit is acknowledged. The judgment will also include interest and costs [*CCP § 585(a)*].

Consider:

In practice, most courts take three to six weeks to get default judgments entered by the clerk and returned.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawBreachCauses of ActionGeneral OverviewContracts LawDebtor & Creditor Relations

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III. OBTAINING A DEFAULT JUDGMENT

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AUTHOR: Arnold Levin

7.14 Court May Enter Default Judgment Following Prove-Up Hearing or on Affidavit.

7.14[1] Court Approval Process Is More Formal. If the procedure for having a court clerk enter a default judgment cannot be used in a particular case [*see 7.13[1]*] or the plaintiff's attorney does not wish to use it, a more formal alternative procedure, requiring a full prove-up (unless the court will permit submission of testimony by affidavit, as discussed in *7.14[6]*), is available [*CCP § 585(b), (c)*].

Cross Reference:

Detailed discussion of default procedures, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief.

7.14[2] Plaintiff Must File Written Request for Entry of Default on Official Form. In order to obtain a default from the court, plaintiff must file a written application for a default with the clerk of the court. Application for default must be made on Judicial Council Form CIV-100, use of which is mandatory. Counsel must complete Item 1(d) of the form to indicate that a court judgment rather than a clerk judgment is being requested. Item 5, regarding the application of various consumer statutes [*see 17.13[2]*] need not be completed when seeking entry of judgment by the court rather than by court's clerk [*see CCP § 585.5(a)*].

Cross Reference:

Judicial Council CIV-100 for requesting default, see *7.42*.

7.14[3] Court Clerk Will Enter Default. Once the plaintiff files an application, the clerk will enter the default [*CCP §§ 585(b), (c)*].

7.14[4] After Default Is Entered, Plaintiff Must Apply For Default Judgment. Once the default has been entered, plaintiff may apply to the court for the relief specified in the complaint [*CCP § 585(b), (c)*]. The court may either:

- Hold a formal prove-up hearing [*CCP § 585(b), (c)*; *see 7.14[5]*];

- Permit use of affidavits in lieu of personal testimony [*CCP § 585 (d)]*; or
- Any combination of the above [*CCP § 585(d)]*.

Strategic Point:

Most judges prefer to receive testimony by affidavit. Attorneys generally favor the same approach because it usually is more cost effective.

7.14[5] Formal Prove-Up Hearing May Be Held. If a prove-up hearing is held, the court will hear the evidence offered by plaintiff [*CCP § 585(b), (c)*]. The hearing is a formal proceeding similar to a trial, and the plaintiff may call witnesses to prove the allegations in the complaint.

If the defendant resides outside California, the court is required to examine plaintiff or plaintiff's agent regarding any payments made to plaintiff [*CCP § 585(b), (c)*].

Strategic Point:

When possible, the practice of the particular court in which the default "prove-up" will be heard should be learned. If the assigned court is not known at the time of preparation for the default proceeding, it is necessary to have the witnesses available and the affidavits prepared. In some courts local rules set forth what is required. It is also prudent to present the oral or written testimony in admissible form, even though objections cannot be made, because the judge has discretion, if he or she finds the evidence not to be convincing, to deny the entry of judgment.

Strategic Point:

Preparing a creditor for testimony at the prove up hearing is similar to preparing the client to testify at trial. While there will be no cross-examination, the court must be satisfied that the testimony is credible and supported by admissible evidence. The witness should be prepared to authenticate documents, and if an entity's business records will be required to support the judgment, the witness will need to qualified to establish the business records exception to the hearsay rule.

Strategic Point--Defaulting Judgment Debtor Has No Standing to Appear at Default Hearing:

A party whose default has been taken has no standing, and cannot appear or offer any opposition or testimony at the default hearing [*Forbes v. Cameron Petroleums, Inc. (1978) 83 CA3d 257, 262-263, 147 CR 766* ; *Brooks v. Nelson (1928) 95 CA 144, 147-148, 272 P 610]* . The only available remedy is to file a timely appeal of the judgment after it has been entered [*see Forbes v. Cameron Petroleums, Inc. (1978) 83 CA3d 257, 262-263, 147 CR 766* ; *Brooks v. Nelson (1928) 95 CA 144, 147-148, 272 P 610]* . If defendant or defendant's counsel appears at the prove-up hearing and attempts to object to testimony, or offer testimony in opposition, counsel for the plaintiff should object.

Strategic Point:

It is prudent to include proof that the case is filed in the proper court (venue) or the default can be set aside later by a motion [*CCP § 585.5(d)*].

7.14[6] Court May Permit Testimony by Affidavits. The court may accept all or part of the testimony in the form of affidavits in lieu of personal appearance [*CCP § 585(d)*].

The facts stated in an affidavit must be [*CCP § 585(d)*]:

- Within the personal knowledge of the affiant.
- Set forth with particularity.
- Show affirmatively that the affiant, if sworn as a witness, can testify competently to the contents of the affidavit.

Strategic Point--"Prove-Up" Hearing May Be Faster:

Counsel may find that in some cases, making an appearance on the court's "prove-up" calendar, rather than attempting to obtain entry of a court default judgment based on affidavits or declarations, will take less time and expense, and will lead to a satisfactory result. Courts may not have an assigned judge to review requests for court default judgments, and the requests may languish on a clerk's or judge's desk for weeks; default judgments may be deemed lower in priority to the court's other work. A judge, or the judge's law clerk, may apply a higher level of scrutiny to the declarations and other proof submitted in support of a request for a court judgment than otherwise would apply if counsel is "proving up" a default based on the testimony of a live witness, who can authenticate the necessary documents in open court. If the court expresses concerns regarding any aspect of the proof offered at the prove up, this can be addressed immediately, or in a supplemental briefing on legal issues, or additional proof may be submitted at a later date. In the rare case that counsel is unable to persuade the court at the prove up, immediate feed back from the court is available, and any problematic issues may be efficiently addressed.

Strategic Point--Defunct Entities:

Problems can arise if the company counsel needs an affidavit or declaration from a company that is no longer operating. In that case, counsel must acquire statements and records from the now defunct company, a declaration from the plaintiff saying it is now the holder in due course, and a copy of the purchase contract. This should be enough evidence to acquire a default judgment.

Cross Reference:

Discussion, accompanying papers, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 36, Defaults and Motions for Relief, 36.36*.

7.14[7] Court Will Render Default Judgment. After hearing the evidence, the court will render judgment in favor of the defendant in an amount that the court determines to be just [*CCP § 585(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault

JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawDebtor & Creditor Relations

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
IV. OBTAINING SUMMARY JUDGMENT IN DEBT COLLECTION LITIGATION

1-7 MB Practice Guide: CA Debt Collection 7.15

AUTHOR: Arnold Levin

7.15 CHECKLIST: Obtaining Summary Judgment in Debt Collection Litigation.

☐ State grounds for motion.

○ No triable issue of fact, no merit or defense to the action exists, and party is entitled to judgment as a matter of law.

Authority:
CCP § 437c(a), (c)

Discussion:
See *7.17*

☐ Follow procedural requirements for moving party.

○ Assess time for service.

Authority:
CCP § 437c(a)

Discussion:
See *7.18[1]*

○ Determine timing for hearing.

Authority:
CCP § 437c(b)

Discussion:

See *7.18[2]*

○ Prepare pleadings and documents.

Authority:
CCP § 437(b)(1)

Discussion:
See *7.18[3]*

○ Prepare statement of undisputed facts.

Authority:
CCP § 437c(b)

Discussion:
See *7.18[4]*

○ Determine procedural requirements for opposing party.

Authority:
CCP § 437c(b)(2)

Discussion:
See *7.19*

○ Follow general procedural requirements.

☐ If necessary, make evidentiary objections.

Authority:
CCP § 437c(b)(5)

Discussion:
See *7.20[2]*

☐ File necessary affidavits and declarations.

Authority:
CCP § 437c(d), (j)

Discussion:
See *7.20[3]*

☐ Consider motion for reconsideration.

○ Must prove "newly discovered" facts.

Authority:
CCP § 437c(f)(2)

Discussion:
See *7.20[6]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsAppropriatenessCivil ProcedureSummary JudgmentStandardsGenuine DisputesCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsContracts LawDebtor & Creditor Relations

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IV. OBTAINING SUMMARY JUDGMENT IN DEBT COLLECTION LITIGATION

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AUTHOR: Arnold Levin

7.16 Options and Strategies.

The procedural requirements for summary judgment motions have become more and more complex and detailed. Some of this development is the result of the incorporation of case law and local rules into the statutes and state rules. In addition, the notice requirements and time for opposition and reply are different from other motion practice. The main purpose of these changes is to make preparing and hearing summary judgment motions easier for the judges, but they have the effect of making life more difficult for lawyers.

Strategic Point--Effective Preparation of Summary Judgment Motions:

Because summary judgment motions are the most complex of motions and may have large evidentiary records, the statutes and state rules force lawyers to present the motion and opposition in accordance with a precise set of procedures and formats [*see 7.18 -7.21*]. Failure to comply can have serious consequences. However, this "burden" can be made a benefit because the parties know what is expected and can act accordingly. A summary judgment motion is a trial of the case on paper, with the limitation that mistakes and omissions cannot be corrected as they can be in a trial because of the notice requirements. Each step of the procedure should be followed precisely and thoughtfully to create the most effective presentation as briefly as possible. The motion and opposition should be prepared with an awareness that the judge who will make the decision may know nothing about the case except what is in the record before the court, and has limited time to consider the matter. Achieving clarity and brevity in the presentation to the court is the challenge of summary judgment motions.

Warning:

Errors and omissions in summary judgment or adjudication proceedings in the presentation of evidence, unlike trial, are difficult to remedy because of the notice requirements for such motions. All evidence in support and opposition must be served by the dates fixed by statute, and nothing can be added. Since having evidence excluded or omitting evidence necessary to support a claim or opposition can result in an adverse disposition, the preparation for these motions must be even more carefully done than that for trial.

Strategic Point--Use of Summary Judgment Motions in Debt Collection Actions:

A summary judgment motion can be a good tool for the creditor in collection actions because most answers filed in collections actions are attempts to delay the inevitable. A summary judgment motion will flush out any viable defenses.

Cross References:

Discussion of procedural requirements for summary judgment motions, see *7.18 -7.21*.

Discussion, presentation of evidence in summary judgment motions, see *7.21*.

Detailed discussion of summary judgment procedures, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsContracts LawDebtor & Creditor Relations

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7.17 Counsel Must State Grounds For Motion.

To prevail on a motion for summary judgment, counsel must establish that [*CCP § 437c(a), (c)*]:

- There is no triable issue of fact;
- There is no merit or no defense to the action; and
- The party is entitled to judgment as a matter of law.

Summary judgment must be denied when one or more elements of a cause of action has not been established or when a defense has been established [*CCP § 437c(o)*].

Cross References:

Discussion, collection and presentation of evidence in debt collection litigation see *7.04 -7.09*.

Forms for summary judgment motions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentStandardsAppropriatenessCivil ProcedureSummary JudgmentStandardsGenuine DisputesCivil ProcedureSummary JudgmentStandardsLegal Entitlement

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7.18 Counsel Must Follow Procedural Requirements for Moving Party.

7.18[1] Counsel Must Assess Time for Service. The moving party must give notice under the following time lines [*CCP § 437c(a)*]:

Timing:

- 75 days notice if notice is personally served.
- If notice is served by mail to a California address, five more days are added.
- If notice is served by mail to an address outside of California but in the United States, 10 more days are added.
- If it is served to an address outside the United States, 20 more days are added [*CCP § 437c(a)*].
- If it is served by FAX, express mail, or other method of overnight delivery, two more days are added.

7.18[2] Counsel Must Determine Timing for Hearing. The motion must be heard at least 30 days before the trial date, unless the court orders otherwise. Since the implementation of case management or "fast track," many courts require that dates for all motions and in particular summary judgment motions be reserved in advance on the calendar [*see CCP § 437c(a)*].

7.18[3] Counsel Must Prepare Pleadings and Documents. The motion can be supported by any of the following [*CCP § 437c(b)(1)*]:

- Affidavits.

- Declarations.
- Admissions.
- Answers to interrogatories.
- Deposition transcripts.
- Requests for judicial notice.

Cross Reference:

Discussion and forms regarding required documentation for submitting summary judgment motion, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

7.18[4] Counsel Must Prepare Separate Statement of Undisputed Facts. A separate statement of material facts that are not disputed is required and failure to comply may, in the court's discretion, constitute grounds for denying the motion [*CCP § 437c(b)*]. The Judicial Council format for the statement [*see Cal Rules Ct, Rule 3.1350(h)*] requires the presentation to be organized for the court by having the claimed undisputed fact and the references as to where the evidence in support may be found in the record. The court must search the record to find these references. A brief filed with the moving or opposition papers can provide a narrative statement of facts with references that can assist the court in seeing the case in a more unified way and give a context to the claimed undisputed facts.

Strategic Point:

The preparation of a separate statement will establish an outline of evidence needed at trial if the summary judgment motion is unsuccessful. It is a good time for counsel to organize his or her case elements. It can also highlight any lack of evidentiary foundation for defense purposes.

Cross Reference:

Discussion and forms, required documentation for submitting summary judgment motion, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

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7.19 Opposing Party May File Opposition to Summary Judgment.

The opposing party may file an opposition to the summary judgment motion. The opposition may be supported by the same items as the moving papers [*CCP § 437c(b)(2)*; *see 7.18[3]*].

The opposition also carry a separate statement that responds to each material fact the moving party contends is undisputed. Failure to comply may, in the court's discretion, constitute grounds for granting the motion [*CCP § 437c(b)(3)*].

Timing:

The opposition must be filed and served at least 14 days before the hearing date unless otherwise ordered by the court [*CCP § 437c(b)(2)*].

Strategic Point:

A frequent area of dispute involves the methodology used by the creditor in calculating interest and applying payments. If a good argument can be made for whether or not there has been a misapplication or lack of accounting for funds, a sufficient factual question has been raised to defeat summary judgment. Proving the appropriate application at trial may require testimony of an expert or at least an extremely knowledgeable witness.

Examples--Facts Commonly Disputed to Defeat Summary Judgment:

- That the amount sued on was in fact previously paid. This is common when there has been a long, ongoing relationship between creditor and debtor with debits and credits having been posted over a long period of time. If nothing else, it will prepare creditor for trial as well as making them aware of the appropriate witnesses to bring.

- That the creditor has no standing to bring suit. This typically occurs in large balances when the

plaintiff is not the original creditor (i.e., either the plaintiff is the assignee or the plaintiff has purchased the debt (or is the third, fourth or other subsequent purchaser of the debt). Be sure to have all necessary documentation so as to show a paper trail from the original creditor to this particular plaintiff.

- That the statute of limitations has run. Make sure to correctly calculate the statute of limitations (four years on a written contract, account stated, or open book account; two years on oral contract) [*see* x]. The statute begins from when payment is due, not from when interest, service, or other creditor charges are made. Moreover, "charge-off" dates have no relevance in debt collection actions as to the statute of limitation. This is pertinent only to accounting considerations, not legal ones. Confusion in this area can get counsel into trouble: not just in not being able to prove up the matter, but in possible FDCPA violations as well.

Timing--Replying to Opposition::

The moving party can file reply papers to the opposition not less than five days preceding the noticed or continued date of hearing [*CCP § 437c(b)(4)*].

Cross Reference:

Preparing and submitting opposition to summary judgment motion, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment, 38.19 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentTime LimitationsContracts LawDebtor & Creditor Relations

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7.20 General Procedural Requirements for Summary Judgment Must Be Observed.

7.20[1] Plaintiff Bears Burden of Proof. Plaintiff must prove each element of the cause of action that entitles plaintiff to damages. If plaintiff meets that burden, the burden of proof shifts to the defendant to establish that there is a triable issue of fact by an evidentiary showing, and defendant cannot rely on allegations in the pleadings [*CCP § 437c(p)(1)*].

Defendant must prove all elements of any defense raised or a lack of merit in the plaintiff's claims. If defendant meets that burden, the burden of proof shifts to plaintiff to establish a triable issue of fact by evidence without use of allegations in the pleadings [*CCP § 437c(p)(1)*].

Strategic Point:

A major problem can exist when a debt has been sold or transferred in that no one at the current bank/creditor may be qualified to testify as to foundation, such as method and manner of creation of the obligation, its terms and implementation, or whether historically payments have been appropriately credited. Similarly, provisions for interest rates that are based on the internal prime rate of a bank that no longer exists creates a true evidentiary problem when another rate not agreed on by the debtor has been substituted.

Typically, substantive defenses raised by debtors are difficult to defeat, such as that the goods were defective, services were not completed, and the like. Judges tend to allow these matters to have their "day in court."

Identity theft is difficult to overcome on summary judgment, although it may be easier to prove at trial. Issues include whether the plaintiff files a police report initially, and whether the goods and services were actually acknowledged.

Cross References:

Discussion of essential elements of a debt collection case, see *7.04*.

Discussion and forms, required documentation for submitting summary judgment motion, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment.

7.20[2] Evidentiary Objections Not Made Are Deemed Waived. Evidentiary objections may be submitted in writing. Any objection not made is deemed waived [*CCP § 437c(b)(5)*].

Consider:

It will aid the court if the evidentiary objections are filed before the hearing date as a separate pleading that specifies each portion of the adversary's evidence objected to by page and line or by attaching a copy of the document objected to with the parts objected to highlighted.

7.20[3] Affidavits and Declarations Must Meet Applicable Requirements. Affidavits and declarations must be made by a person based on personal knowledge, must state admissible evidence, and must include evidence of the affiant's competence [*CCP § 437c(d)*]. If the court finds any affidavit was presented in bad faith or for purposes of delay, the court may award reasonable expenses to the aggrieved party if that relief is requested by notice in that party's papers or by noticed motion [*CCP § 437c(j)*].

Strategic Point:

Make certain that the supporting declarations satisfy the requirements under California law not only of a custodian of records, but also that the methodology used to input loan data and account for payments is accurate and reliable. This includes when the declarant is from outside California. In addition, the declaration must be of the declarant's own personal knowledge, and signed under penalty of perjury.

7.20[4] Summary Adjudication Process Is Similar to Summary Judgment. Summary adjudication is similar to summary judgment, except that it disposes of specific causes of action, affirmative defenses, claims for damages, or issues of duty, rather than the whole case [*CCP § 437c(f)(1)*].

A motion for summary adjudication of specific claims or defenses may be made in the same manner as a summary judgment motion or a motion for summary judgment, and summary adjudication may be made in the alternative [*CCP § 437c(f)(2)*]. At trial, no party may make any comment to the jury regarding the granting or denial of summary adjudication [*CCP § 437c(n)(3)*].

Counsel should keep in mind the following issues regarding summary adjudication in debt collection actions:

- Foundational elements, i.e., execution terms and application of payments.
- Payments not paid and outstanding amounts owing.
- Dismissal and resolution of most affirmative defenses.

Counsel should be sure to review the debtor's answers to the complaint. Quite often debtors admit the debt, but merely want time to pay in installments, or plead poverty in the response. These matters are ripe for motions for summary adjudication, or stipulations for entry of judgment. Often these matters can be resolved informally over the phone. Additionally, when answers are filed with no affirmative defenses pled whatsoever, or merely "canned" boilerplate defenses, these matters can be disposed of as well.

Cross Reference:

Discussion of summary adjudication, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment, 38.09*.

7.20[5] Continuances May Be Granted. The court will grant a continuance on a showing of good cause that the opposition needs more time to obtain affidavits or needs additional discovery [*CCP § 437c(h)* and *(i)*]. If discovery is unreasonably not permitted by the moving party, a further continuance may be granted to complete discovery or the motion may be denied [*CCP § 437c(h)*].

7.20[6] Losing Party May File Motion for Reconsideration Based on Newly Discovered Facts or Change in Law. After a ruling has been made on a summary judgment or summary adjudication motion, the motion cannot be renewed without first making a motion for reconsideration and having the motion granted. To prevail on a motion for reconsideration, the moving party must show to the court's satisfaction that there are "newly discovered" facts or that there has been a change in the law that supports the moving party's position [*CCP 437c(f)(2)*].

Consider:

A question exists as to whether "new facts" include facts that could reasonably uncovered by investigation prior to the previous motion. However, facts that were known but not presented or were not presented in admissible form and therefore excluded by the sustaining of an objection are not "newly discovered." *[CCP § 1008(a)]* requires a showing of what was presented in the previous motion, what the decision was and what new facts or circumstances exist. *[CCP § 1008(b)]* allows the reconsideration upon a showing of a change in the law. However, a new law that is not retroactive is not considered a change in the law [*CCP § 1008(f)*].

Cross Reference:

Motion for reconsideration following summary judgment motion, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 38, Summary Judgment, 38.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentEvidenceContracts LawDebtor & Creditor Relations

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AUTHOR: Arnold Levin

7.21 Evidentiary Issues In Summary Judgment Motions.

7.21[1] Defects In Evidentiary Presentation May Not Be Curable. If meritorious objections are filed to the moving party's evidence, the defects in the presentation cannot be cured in the reply papers. The opposing party is entitled by law to 75 days notice of the evidence in support of the case in chief [*CCP § 437c(a)*]. If evidence appears for the first time in the reply, the opposing party has not been given proper notice. This is also true of the opposition, since the opposition has no statutory right to a reply, and having evidence excluded or not presented can result in a final unfavorable disposition of the case.

Warning--Anticipate Evidentiary Issues In Own Presentation:

Because of the limitation noted above, careful preparation of the evidence is even more important on summary judgment than at trial, because there may be no opportunity to cure any problems. The filing of evidentiary objections is a tactic widely used by lawyers. However, it is not uncommon for lawyers to thoroughly go through the opposition's evidence to look for admissibility problems, but fail to use the same scrutiny in their own presentation--which is of course even more important. In carefully going through an offer of evidence, it is necessary to evaluate the evidence not only on the merits, but to examine the evidence that makes that evidence admissible.

Strategic Point:

Most problematic is the foundation of documents to be introduced unless a stipulation has been negotiated in advance. Also, a good defense attorney can attack the witness's lack of knowledge of the computer program used for application of payments and interest calculation

To practice in this area successfully, counsel must be familiar with Evid Code § 1244, the business records exception to the hearsay rule. Counsel will rarely get the actual individual who produced the actual bill, invoice, ledger, or entry, if one even exists, as many of these are done routinely by computers. Moreover, with the advent of purchased debt, this particular exception is even more important. The custodian of records of the plaintiff, once qualified under Evid Code § 1244, is in fact qualified to testify

about the records kept in the ordinary course of business by plaintiff, including those which were purchased from the original creditor. The key is not the actual preparation of the original creditor's records; rather, it is whether the custodian is personally familiar with the process of how those records are kept. Therefore, make sure when representing a debt buyer that the original contract between the original creditor and purchaser (the plaintiff) lays out the elements necessary to qualify the plaintiff's custodian of records to so testify. Some judges have taken the position that to qualify under Evid Code § 1244, the plaintiff must produce the original creditor's custodian of records. Not only is this illogical and impractical, but there is no authority for this position. (For example, this would mean that the trustee for any creditor who files bankruptcy and has accounts receivable would for the most part never be able to either sue to collect these matters or sell these assets as they would never be able to be pursued.)

Keep in mind that paperwork is important. The more counsel can show, the better. Ideally, an application, invoices, bills, statements of accounts, ledgers, and journals are helpful. Although all are not always available, the more paperwork submitted the better. In California, absent specific statutory authority, attorney's fees are not recoverable unless so provided in the contract (typically contained in the original applications).

Strategic Point:

Keep in mind that it never hurts to ask for information. There may often be a key piece of information missing (such as a purchase order or signed contract). It may prove fruitful to merely call the debtor under *[CCP § 776]* and take him or her through the transaction item by item. The debtor will often readily admit the missing key facts, and merely focus on what he or she believes are defenses, which can later be addressed during argument.

7.21[2] Expert Witnesses Must Be Properly Qualified. Expert witness opinion in debt collection cases usually involves either the market value of property [*see Evid Code §§ 813-814*] or whether goods not paid for were defective by the standards of the industry. Before an expert's opinion can be admitted into evidence, the court must find that the person is qualified as an expert in the particular area [*Evid Code § 720*].

The evidence of qualifications must be presented by affidavit or resume attached with sufficient foundation testimony to make it admissible. The affidavit must also contain the hypothetical question or questions the expert would be asked on the witness stand--a question based on evidence in the record, which must be crafted by counsel [*see CCP § 2034.260(c)*]. The need for opposing counsel to cross examine the expert can be resolved by a deposition [*see CCP § 2034.410 et seq*. (rules governing depositions of expert witnesses)].

Consider:

Since the moving party must give 75 days' notice, it can save a continuance if the moving party notifies the opposition of the intention to use expert testimony and offers to make the expert available for deposition before the opposition is due. The offer should be conditional upon making any opposition expert available for deposition before the reply is due.

Cross References:

Discussion of expert witness qualification, see *7.34*; see also Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Procedure, Ch. 11, Experts May Testify, 11.13[2].

Deposing expert witnesses, see *Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 13, Exchanging Expert Witness Information, 13.22 et seq*.

7.21[3] Interpreters May Be Used. In litigation--particularly business and commercial litigation--witnesses who

do not speak or feel secure in English are common. The affidavits or declarations of such witnesses must be prepared in the language that the witness speaks, signed by the witness in that language and then be translated into English by a certified interpreter [*Evid Code §§ 751*, *752*; *Cal Rules Ct, Rule 3.1110(g)*]. This is the best assurance the court can have that the affiant understood what he or she signed.

The opposition has the ability to verify the accuracy of the translation by having its own interpreter. This is also true of documents in foreign languages that are presented as evidence. They must be attached as originally written and then be translated into English by a certified interpreter [*see Cal Rules Ct, Rule 3.1110(g)*]. This affords the opposition the same chance to verify the accuracy of the translation.

There can be disagreement about the translation, in which case the court will have to rule on the dispute or appoint its own interpreter. It is common for disputes to arise over the meaning of documents in English; the same is true for documents in other languages. This is particularly true when transactions are conducted by e-mail. These exchanges are frequently written in the slang or jargon of a particular business and can be difficult to understand even in English translation [*see generally Evid Code § 700 et seq*.].

Cross Reference:

Discussion of use of interpreters, see Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 8, Interpreters.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewContracts LawDebtor & Creditor Relations

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1-7 MB Practice Guide: CA Debt Collection 7.22

AUTHOR: Arnold Levin

7.22 CHECKLIST: Formulating Trial Strategy for Debt Collection Litigation.

☐ If case is limited civil case:

○ Consider making request for evidentiary statement.

Authority:
CCP § 97

Discussion:
See *7.24*

○ Consider requesting prepared testimony of witnesses.

Authority:
CCP § 98

Discussion:
See *7.25*

☐ Determine need for motion in limine.

Discussion:
See *7.26*

☐ Consider stipulations to be made before trial.

Discussion:
See *7.27*

☐ Consider whether to conduct a bench or jury trial.

Discussion:
See *7.28*

☐ Determine selection of jury instructions.

Discussion:
See *7.29*

☐ Determine strategy for opening statement.

Discussion:
See *7.30*

☐ Decide on presentation of direct testimony.

Discussion:
See *7.31*

☐ Formulate cross examination strategy.

Discussion:
See *7.32*

☐ Determine whether to use visual aids.

Discussion:
See *7.33*

☐ Determine whether to use expert witnesses.

○ If needed, follow procedure to establish proper foundation.

Authority:
Evid Code §§ 720-723, 730-733, 801-805

Discussion:
See *7.34*

☐ Determine whether and how to use an interpreter.

Discussion:
See *7.35*

☐ Prepare for closing argument.

Discussion:
See *7.36*

☐ Determine which verdict forms to use.

Discussion:
See *7.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewContracts LawDebtor & Creditor RelationsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceTestimonyExaminationGeneral Overview

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AUTHOR: Arnold Levin

7.23 Options and Strategies.

The trial of a claim for monetary indebtedness generally involves evidence that many people would consider "boring," such as contracts, promissory notes, business records, shipping records, and correspondence. It is a challenge for lawyers to hold the interest of the trier of fact--whether judge or jury--in a trial that has little, if any, dramatic appeal. There are a number of ways to meet this challenge:

- Presenting the case with controlled high energy and intensity so that the lawyer presenting the evidence and argument is the focus of the courtroom when it is his or her turn.

- Drafting questions that are brief and to the point.

- Not talking or interrogating around the case but going right to the heart of it.

- Being prepared with the next question immediately after the answer is given, or, if the answer is not responsive, moving immediately to strike and ask the question again. Long pauses between questions while a search is made through papers will almost certainly lose the attention of the trier of fact.

- Making the presentation as lucid and organized as possible from the opening statement through evidence to the closing argument.

- Using visual aids that are in fact aids and that quickly inform those who have no knowledge of the case but must decide it.

- Knowing and organizing the case so well that little time is spent looking through papers.

- Being aware of the time allotted for presentation of each phase of the trial. Most judges set time limits for each party at each step of the trial and enforce those limits strictly. This may require making instant adjustments as the time limit approaches.

- If something comes up that is a surprise, acting as if it was expected and can be easily handled.

Cross Reference:

Discussion, elements of debt collection action, see Matthew Bender[(R)] Practice Guide: California Contract Litigation, Ch. 22, Suing or Defending Action for Breach of Contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewContracts LawDebtor & Creditor RelationsEvidenceTestimonyPresentation of Evidence

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AUTHOR: Arnold Levin

7.24 Counsel Should Consider Requesting Evidentiary Statement In Limited Civil Case.

If the debt collection action is a limited civil case [*see Gov Code § 70613*], then a request for evidentiary statement is a useful tool. A request for an evidentiary statement requests information on [*CCP § 96*]:

- The names and addresses of witnesses of parties opposing counsel to be called at trial;
- A description of physical evidence to be offered at trial; and
- A description and copies of documentary evidence to be offered at trial.

Strategic Point:

With specified exceptions [*see CCP § 97(b)*], the opposing party will not be permitted to call any witness or introduce any evidence not included in the response to the request [*CCP § 97(a)*].

Timing:

The request must be served no more than 45 days nor less than 30 days prior to the date first set for trial [*CCP § 96(b)*]. A statement responding to the request must be served within 20 days from the service of the request [*CCP § 96(c)*].

Cross Reference:

Requesting an evidentiary statement in a limited civil case, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Procedure, Ch. 1, Reviewing Evidentiary Issues and Marshalling Evidence and Witnesses for Trial, 1.21 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureTrialsGeneral OverviewContracts LawDebtor &

Creditor RelationsEvidenceProcedural ConsiderationsGeneral Overview

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AUTHOR: Arnold Levin

7.25 Counsel Should Consider Offering Prepared Testimony of Witnesses In Limited Civil Case.

In a limited civil case, instead of presenting direct testimony, counsel may offer prepared testimony of relevant witnesses in the form of affidavits or declarations [*CCP § 98*]. The prepared testimony may include the opinions of expert witnesses, and testimony that authenticates documentary evidence [*CCP § 98*]. Prepared testimony must be received as evidence in the case to that the extent the contents of the prepared testimony would have been admissible if the witness had testified in person, provided that:

- A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial [*CCP § 98(a)*]; or

- The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition [*CCP § 98(b)*].

Strategic Point:

Prepared testimony of witnesses can be extremely helpful in debt collection cases. In cases for smaller amounts of money it makes more economic sense to offer prepared testimony when producing the witness in person would cost more. In essence, it is a "balancing act" between the cost savings of introducing a declaration versus the cost of bringing a witness in (sometimes from out of state) to testify in person. The amount of the debt at issue obviously plays a major role in this decision.

Strategic Point--Using Declaration Instead of Live Testimony:

The only disadvantages of using a declaration instead of having a "live" witness are that the other side will have the opportunity to know exactly what the "witness" will be testifying to, thereby enabling the other side to prepare, and that there will be no opportunity to present rebuttal evidence after the other side introduces its own testimony.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceTestimonyGeneral Overview

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1-7 MB Practice Guide: CA Debt Collection 7.26

AUTHOR: Arnold Levin

7.26 Counsel Must Determine Whether to File In Limine Motions.

Motions in limine (literally "on the threshold") are made just before the trial begins. A motion in limine may be used to exclude evidence either because it is irrelevant or because it is unduly prejudicial [*Lucas v. County of Los Angeles (1996) 47 CA4th 277, 284-285, 54 CR2d 655* ; *Clemens v. American Warranty Corp. (1987) 193 CA3d 444, 451, 238 CR 339]* . A typical order granting a motion in limine excludes the evidence and forbids counsel, the parties and witnesses from mentioning it in the presence of the jury [*People v. Morris (1991) 53 C3d 152, 188, 279 CR 720, 807 P2d 949]* .

The subject of such motions can include:

- Restrictions on the opposition introducing evidence for failure to provide discovery ordered by the court.
- Approval of specially drafted jury instructions in addition to the standard instructions.
- A finding that certain facts are deemed admitted based on allegations not denied and requests for admission.
- A finding that an interpreter is qualified and that the translations of documents to offered in evidence are accurate.
- The grant of a request for judicial notice that matters are established as facts [*see 7.09*].

Strategic Point--Written Motions Are Preferable:

While some courts may allow such motions orally on the record, it is better practice to submit them in writing as early as the court will accept them.

The most common motions in limine are motions involving parole evidence as to verbal representations when the contract or note contains an integration clause.

Cross References:

Discussion of motions in limine, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 23, Case Management, 23.51 et seq.*;

California Forms of Pleading and Practice, Ch. 373, Motions In Limine (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersMotions in LimineGeneral OverviewCivil ProcedurePretrial MattersMotions in LimineExclusion of EvidenceContracts LawDebtor & Creditor Relations

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AUTHOR: Arnold Levin

7.27 Counsel Must Consider What Stipulations Can Be Made Prior to Trial.

Trial courts favor stipulations because they shorten the trial by not requiring proof of undisputed matters. Stipulations should be arranged with opposing counsel prior to trial, and in debt collection actions typically can include such matters as:

- The corporate standing of a party, and other capacity issues.
- Whether an oral or written contract was entered into.
- Whether goods or services were provided to the debtor, and whether they were received.
- Whether the debtor was invoiced.
- Foundation for documents as exceptions to the hearsay rule.
- The authenticity of documents.
- The amount of any payments made and credit given.
- Authentication of documents.
- The residence or primary place of business of a party.
- The qualifications of interpreter and expert witnesses.
- The calling of witnesses out of order.
- The admission of all or part of deposition transcripts.

Most courts will order counsel to meet and stipulate to the numbering of exhibits, except those that may be offered in rebuttal or for impeachment of a witness.

Cross Reference:

Discussion of stipulations, see Matthew Bender[(R)] Practice Guide: California Pretrial Procedure, Ch. 28 Stipulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsEvidenceJudicial AdmissionsAdmissions During Trials

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AUTHOR: Arnold Levin

7.28 Counsel Must Determine Whether to Proceed by Bench or Jury Trial.

The choice of a court or jury trial is only partially in the control of each party [*see CCP § 601 et seq*.]. A jury request often is made as a strategy to intimidate or delay, and the request can be withdrawn before trial or as a matter of law by failure to post jury fees within the statutory time. Since mediation is mandatory, facts learned during mediation can assist in making the decision. Unless all sides agree early in the case to waive jury, the case must be prepared as if it will tried to a jury.

Strategic Point:

If there is no compelling reason for a jury trial, debt collection cases are usually tried by a judge to save time and money and because the evidence consists of a large volume of documents, which make the presentation to a group of people more time consuming than to one person [*see CCP § 631*]. However, another consideration is the judge who will try the case. In some courthouses each judge has an independent calendar, which means that judge will hear all proceedings in the case from the filing of the complaint to the entry of judgment. A decision regarding whether to go forward with a jury trial can be made after an assessment of the judge based on experience in pretrial proceedings and well before trial. In courts that have a master calendar system, the assigned judge may not be known until the day of trial, and the decision must be made with less information and time. In many counties the local legal newspapers publish profiles of the judges, which can be obtained to assist in deciding whether to waive a jury.

Cross References:

Discussion of procedures for bench and jury trials and factors in deciding which to select, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 23, Case Management 23.37*; Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Procedure, Ch. 5, Non-Jury Trials.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsContracts LawDebtor & Creditor Relations

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AUTHOR: Arnold Levin

7.29 Counsel Must Select Proposed Jury Instructions.

The standard jury instructions issued by the California Judicial Council (CACI Instructions) are probably sufficient in most debt collection litigation. However, there are circumstances that require one or more special instructions that must be drafted by counsel. Special instructions are case specific and a legal and strategic judgment must be made according to the circumstances. All jury instructions must be presented to the court before the trial for approval or rejection [*see CCP § 607a*].

Example:

If a defect in goods is claimed as a defense to payment on a contract, an instruction of what the jury must determine to reach a decision on the defense is necessary.

Cross Reference:

Discussion, selection of jury instructions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure Ch. 23, Case Management.

Jury Instructions:

Various issues relating to debt, see *Judicial Council of California Civil Jury Instructions (CACI) Nos. 302 -304*, *312*, *352 -353*, *355*, *370 -374* (LexisNexis Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsContracts LawDebtor & Creditor Relations

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1-7 MB Practice Guide: CA Debt Collection 7.30

AUTHOR: Arnold Levin

7.30 Counsel Must Determine Strategy for Presentation of Opening Statement.

An opening statement that informs the trier of fact what the evidence will show, and in court trials informs the court how the evidence supports a legal position, is crucial to effective litigation. It is the first opportunity to present an organized, cohesive, and lucid description of the entire case. It can also be referred to in closing argument to show the trier of fact that what was represented has been proved, or if proof failed on a particular point why that circumstance should not change the conclusion advocated.

Strategic Point:

Make the opening statement something that the trier of fact can relate to: almost everyone has borrowed money and paid it back. If counsel represents the creditor, point out that while everyone is obligated to pay their debts, the debtor in this case did not. Many people have encountered problems with banks or other large entities. If counsel represents a debtor, stress the lack of cooperation and humanity of dealing with a bank or other institution.

Strategic Points:

- There are no formulas for the opening statement. Fundamentally, it should tell a story and explain what occurred.

- In debt collection litigation, the statement can provide a framework for the many financial details that will be placed before the trier of fact.

- The opening statement should be practiced before a colleague or even a non-lawyer to learn what points need clarification.

- One problem that comes with being intimately familiar with a case is making assumptions that a third person will make the same assumption as the attorney.

- It is wise to avoid "legalese" and jargon, especially when addressing a jury [*see CCP § 607*].

Cross Reference:

Discussion of procedures for opening statement, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Procedure, Ch. 10, Opening Statements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsOpening StatementsGeneral Overview

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V. FORMULATING TRIAL STRATEGY FOR DEBT COLLECTION LITIGATION

1-7 MB Practice Guide: CA Debt Collection 7.31

AUTHOR: Arnold Levin

7.31 Counsel Must Orchestrate Presentation of Direct Testimony.

Direct testimony lacks the drama of cross examination but is the most important part of the presentation of evidence. If the evidence has been tested against admissibility rules, there is as complete control of the evidence as there will be in the trial.

Strategic Points:

- The witness must be prepared to make concise and responsive answers.

- Both counsel and witnesses should avoid the use of jargon or the shorthand terms used in a particular business that lay people would not understand. Technical terms should be explained in everyday English.

- Long pauses between questions or between the question and the answer should be eliminated to the attention and focus of the trier of fact.

- All exhibits should be organized and at hand with copies for opposing counsel and the court, if they have not already been marked before trial and exchanged. In complex cases, a binder with tabs for each exhibit assists in moving quickly from one document to another.

- Visual aids should be set up and organized before court is in session [*see 7.33*].

- To the extent possible, phrase the questions so the answer will be a simple "yes" or "no." *Always* go over testimony with the witness in advance. Nothing hurts more than having a witness not know how to answer on the stand.

In simple debt collection matters, it may prove most practical to proceed by way of plaintiff's declaration in limited jurisdiction courts, especially if counsel's witness is from out of state and it is not financially feasible to come out for the matter [*see CCP § 98*]. Be sure to give proper notice to opposing parties. The declaration should be simple and lay the same foundation as if the witness were testifying in court [*see* Evid Code § 1244 (exceptions to hearsay re custodian of

records)]. Make sure to cover the amount that is due, for what purpose, the amounts if any paid, the current balance, reference to any documents, and that there had never been a dispute or objection noted by the debtor prior to suit, if applicable. The "witness-less" trial is a good practical solution to smaller debt collection actions. However, if the debtor will be asserting various defenses that must be contradicted, advise your client that live witnesses will be necessary to defeat those defenses.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationDirect Examination

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1-7 MB Practice Guide: CA Debt Collection 7.32

AUTHOR: Arnold Levin

7.32 Counsel Must Determine Whether or When to Cross Examine.

Cross examination is not mandatory and may be conducted or not, at counsel's discretion.

Warnings:

- Cross examination has a drama that tempts lawyers to demonstrate their skills. This temptation should be resisted unless there is a specific purpose for it. If the opposing witness does no harm to the case or if the cross examination will only repeat and emphasize evidence that has a negative effect or allow explanation of things better left unexplained, telling the court "no questions" is the best strategy.

- The age-old legal axiom not to ask a question on cross examination unless the answer is known to the interrogator is as sound as ever.

Strategic Points:

- Good preparation should make whatever cross examination is made brief and focused.

- The questions should follow in rapid order and long pauses by the witness in answering should be noted by counsel for the record.

- Cross examination can be a part of the case of the party that is adverse to the witness. *Evid Code § 776* permits putting on an adverse party or witness as part of the case in chief. The adverse party or witness can be cross examined before that party's side has had a chance to present direct testimony.

- Have documents ready to use for impeachment.

- Consider videotaping the deposition of opposing witnesses. It is extremely effective to have the

witness testify one way in court and then play a videotape of contradictory testimony excerpted from the deposition.

- See what the witness will admit. Show the witness any documents he or she signed and ask to identify the signature. If the witness claims defective goods or services, ask to identify any writing evidencing that claim.

- Try to get the witness to acknowledge at least some of the debt, or some of the elements of your case, such as goods or services ordered, invoices received, payments made, and the like.

Consider:

The opposing party is not required to bring witnesses that the other party needs to testify or the document that the other party wants to introduce, so counsel should remember to prepare a subpoena (or notice in lieu of subpoena) to assure all witnesses' attendance, as well as ensuring that the opposing party produces all relevant documents. The notice should be served 10 days before the time required for attendance, or 20 days if it involves the production of books, documents, and other things [*see CCP § 1987(b), (c)*].

Cross References:

Discussion of rules governing cross examination, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Procedure, Ch. 11, Questioning Witnesses and Objections, 11.27 et seq.

Discussion and forms for subpoena of witnesses, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Procedure, Ch. 7, Compelling Witness Attendance and Witness Preparation, 7.03 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenasEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationScope

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AUTHOR: Arnold Levin

7.33 Counsel Must Determine Whether and How Visual Aids Will Be Used.

Counsel must determine what visual aids to use and how they will be prepared and presented. Visual aids have two principal functions:

- Providing a summary of portions of the evidence presented; and
- Showing exhibits to be offered or already in evidence so they can be seen by everyone in the courtroom.

Visual aids can include such things as poster cards containing charts, diagrams, graphs, photographic enlargements, and computer or video presentations.

Examples of visual aids include:

- Large images of documents with pertinent phrases or terms highlighted.
- Payment histories or timelines regarding alleged factual disputes.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceAdmissibilityEvidenceDemonstrative EvidenceComputer-Generated EvidenceEvidenceDemonstrative EvidencePhotographsEvidenceDemonstrative EvidenceVisual Formats

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AUTHOR: Arnold Levin

7.34 Counsel Must Determine Use of Expert Witnesses.

7.34[1] Alternatives to Expert Testimony May Exist. Because of the expense of hiring an expert witness, the first consideration should be whether one is needed. In some cases, alternatives may exist.

Examples:

- If a signature must be authenticated [*see 7.06*], it may be possible to do this with lay witnesses without a handwriting expert.
- The value of property can be testified to by the owner [*see Evid Code § 813(a)(2)*].
- Some technical processes can be testified to by a party or lay witness who has years of experience with the process.

7.34[2] Counsel Must Prepare for the Bias Issue. The use of lay witnesses who have an interest in the outcome of the litigation raises the issue of bias and prejudice. Similarly, bias can also be raised as to an expert by the fact that the "independent" expert is being paid by one side. This problem can be overcome by the testimony and demeanor of the witness.

7.34[3] Court May Appoint Expert. If the expert testimony appears to be in such conflict that the court cannot resolve it, the court may appoint its own expert (paid for by the litigants) [*see Evid Code § 730*]. In those circumstances, the court usually will receive a report from the expert and allow counsel to review it and examine the court's expert.

Warning:

If the court appoints its own expert, preparation time will be short. Counsel can only make the best of it and make the examination as favorable as possible. The court's expert will be considered unbiased in most cases, and the testimony will carry more weight than that of other experts.

7.34[4] Examination Must Cover Expert's Qualifications, Factual Knowledge of Case, and Opinion. There

are three phases to the examination of an expert witness [*Evid Code §§ 720-723, 730-733, 801-805*]:

- Evidence of qualifications as an expert [*see 12.21[2]*].
- Showing that the expert has knowledge of the facts upon which the opinion is based.
- Proposal of hypothetical question the answer to which is the expert's opinion.

Consider:

The framing of the question requires the skill of the lawyer and needs careful thought and preparation.

Types of experts to use in debt collection actions include:

- Banking experts as to the standard of care.
- Financial experts as to the application of funds and credit of interest.
- Questioned documents examiner when allegations of forgery are at issue.

Cross Reference:

Discussion of use of expert witness, see *Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, Questioning Witnesses and Objections, 11.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsGeneral
OverviewEvidenceTestimonyExpertsAdmissibilityEvidenceTestimonyExpertsCourt-Appointed ExpertsGeneral
OverviewEvidenceTestimonyExpertsQualificationsEvidenceTestimonyLay WitnessesGeneral Overview

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1-7 MB Practice Guide: CA Debt Collection 7.35

AUTHOR: Arnold Levin

7.35 Counsel Must Determine Whether and How to Use Interpreter.

7.35[1] Counsel Must Assess Whether to Use an Interpreter. If a witness speaks and understands English but does not feel "comfortable" with the language in the setting of a legal proceeding, use of an interpreter may be necessary or desirable.

Strategic Points:

Counsel must make a judgment as to whether the English language skill of the witness is good enough not to use an interpreter.

- It can be better to have the witness testify in English to avoid the problems of misunderstanding that can and do occur with interpreters. Interpreters may not understand the question correctly, or may translate in such a way that the import of counsel's question or the witness' answer is lost in translation.

- If the witness' insecurity is psychological rather than a lack of ability to speak and understand English, it is better to use an interpreter so that the witness can stay focused on the substance of the testimony.

Cross Reference:

Discussion, use of interpreters in trial, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 8, Interpreters.

7.35[2] Counsel Should Use Short Questions. The most important principle when an interpreter is used is to make the questions short break down a complex question that could be asked in English into several short questions. Convoluted long questions can take so long to translate that the witness and the trier of fact can lose the train of thought. The question, if repeated, continues the confusion and tries the patience of the court or jury.

Strategic Point:

If an opposing party is going to examine a witness though an interpreter, counsel may want his or her own interpreter to verify that the translation is accurate. Just as English has slang and jargon that are not in dictionaries, the same is true in other languages, and there can be disputes as to the meaning of particular words or expressions.

Cross Reference:

Discussion, use of interpreters in trial, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 8, Interpreters.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceCompetencyInterpreters

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
V. FORMULATING TRIAL STRATEGY FOR DEBT COLLECTION LITIGATION

1-7 MB Practice Guide: CA Debt Collection 7.36

AUTHOR: Arnold Levin

7.36 Counsel Should Determine Strategy for Presentation of Closing Argument.

Closing argument is the opportunity to remind the trier of fact what was said in the opening statement, review admitted (no longer promised) evidence, and demonstrate that what was contended at the beginning of the case has now been proven. Because trials, like all conflicts, do not always proceed as planned, closing argument may have to be used to modify an earlier position and try to demonstrate that the unexpected change does preclude the client from prevailing. It is also the time to argue about the credibility of the witnesses, which could not be addressed in the opening statement.

Strategic Point:

In debt collection litigation, impassioned pleas are not in order. Closing argument must be governed by a clear analysis of the evidence and its application to the law to be convincing.

Cross Reference:

Discussion of essential elements of a debt collection case, see *7.04*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral Overview

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1-7 MB Practice Guide: CA Debt Collection 7.37

AUTHOR: Arnold Levin

7.37 Determine Form of Verdict to be Submitted to Jury.

The California Judicial Council verdict forms are generic and general to all cases. Special verdict forms tailored to the case must be drafted by counsel in the form of a series of questions on liability that must be answered "yes" or "no." A "no" answer to any question will result in a defense verdict. If all the liability questions are answered "yes," the form should have a series of questions on damages--also to be answered "yes" or "no"--as to whether certain damages were sustained. If any or all are answered "yes" the jury must be instructed to award damages in accordance with the judge's instructions.

Cross References:

Verdict Forms, see Judicial Council of California Civil Jury Instructions, CACI No. VF 5000-5001 (LexisNexis Matthew Bender).

Detailed discussion of verdicts, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 13, Motion for Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
VI. PREPARING THE STATEMENT OF DECISION AND JUDGMENT

1-7 MB Practice Guide: CA Debt Collection 7.38

AUTHOR: Arnold Levin

7.38 CHECKLIST: Preparing the Statement of Decision and Judgment.

☐ Prepare proposed statement of decision.

Timing:

Court must issue statement of decision if requested by any party within 10 days after court announced its tentative decision, unless trial was completed in less than one day, in which case the request must be made before case is submitted for decision.

Authority:

CCP § 632

Discussion:

See *7.39*

☐ Prepare proposed judgment.

Timing:

When statement of decision is not requested or is waived and written judgment is required, court must do one of following within 10 days after expiration of time to request statement or 10 days after time of waiver:

○ Prepare proposed judgment and mail it to all parties who appeared at trial; or

○ Notify any party to prepare, serve, and submit proposed judgment to court.

Authority:

Cal Rules Ct, Rule 3.1590(g)

Discussion:
See *7.40*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
VI. PREPARING THE STATEMENT OF DECISION AND JUDGMENT

1-7 MB Practice Guide: CA Debt Collection 7.39

AUTHOR: Arnold Levin

7.39 Statement of Decision May Be Requested After Trial.

7.39[1] Court Must Issue Statement on Request by Any Party. California courts are not required to make written findings of fact and conclusions of law [*CCP § 632*]. However, the court must issue a statement of decision explaining the legal and factual basis for the decision, if requested by any party within 10 days after the court announced its tentative decision unless the trial was completed in less than one day, in which case the request must be made before the case is submitted for decision [*CCP § 632*].

Cross References:

Discussion of procedures for statement of decision, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 26, Court Must Issue Statement of Decision if Requested by Party, 26.18.

Extensive discussion of statement of decision, see California Forms of Pleading and Practice, Ch. 529, Statement of Decision (Matthew Bender).

7.39[2] All Parties May Submit Proposals for Content of Statement. Once a timely request is made, any party may submit proposals as to the content of the statement of decision [*CCP § 632*].

It is common for each side to submit its own completely drafted proposed statement of decision to the court, which the court may adopt in whole or in part and include in the statement issued and signed by the court [*CCP § 632*]. In the discretion of the court, objections may be made to the adverse party's proposed statement, either orally at a hearing or in writing for the court to consider. The court may consider the objections with or without a hearing before rendering a final decision.

Strategic Point:

A well-prepared statement of decision can persuade the judge by its soundness but also relieve the court of the job of extensive editing or preparing its own statement. The court may allow each party to submit its proposal on the same date and serve it on opposing counsel and then permit each side to object in

writing and file and serve the objections on the same date. If objections are allowed, counsel has a second chance not only to object but to refine and add any points that may have been overlooked in the proposed statement. After the statement of decision is issued by the court, judgment must be entered in conformity with it [*see CCP § 664*].

Strategic Point:

An appropriately drafted statement can be of enormous assistance in the event that the debtor filed a bankruptcy. Counsel should keep in mind the potential methods for determining the non-dischargeability of the debt in such cases (such as fraud or conversion).

Cross Reference:

Effect of bankruptcy on collection of debt, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
VI. PREPARING THE STATEMENT OF DECISION AND JUDGMENT

1-7 MB Practice Guide: CA Debt Collection 7.40

AUTHOR: Arnold Levin

7.40 Counsel Must Prepare Proposed Judgment.

When a statement of decision is not requested or is waived and a written judgment is required, the court, within 10 days after expiration of time to request a statement or within 10 days after time of waiver, must prepare a proposed judgment and mail it to all parties who appeared at trial.

Alternatively, the court may notify any party to prepare, serve, and submit to the court the proposed judgment within the same time period [*Cal Rules Ct, Rule 3.1590(g)*].

The same procedure for objections may be allowed by the court for the judgment as for the statement [*see 7.39*]. Once the judgment is signed, it must be entered by the clerk. While the wording of the statement and judgment is ultimately decided by the court, counsel can persuade and assist the court by doing the drafting [*see CCP §§ 664-674*].

Cross References:

Discussion of procedures for entry of judgment, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 26, Entry of Judgment.

Discussion, proposed judgments, see California Forms of Pleading and Practice Ch. 529, Statement of Decision (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsClerks of Court

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VI. PREPARING THE STATEMENT OF DECISION AND JUDGMENT

1-7 MB Practice Guide: CA Debt Collection 7.41

AUTHOR: Arnold Levin

7.41 Clerk Must Enter Judgment.

A judgment is required after a court trial and must be entered by the clerk immediately upon filing of the court's decision [*CCP § 664*].

If there is a jury verdict, the judgment is prepared by counsel and submitted to the court and must be entered by the clerk in accordance with the verdict [*CCP § 664*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsClerks of Court

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Chapter 7 Litigation to Recover Debts--Trying and Proving the Case
VII. FORM

1-7 MB Practice Guide: CA Debt Collection 7.42

AUTHOR: Arnold Levin

7.42 Request for Entry of Default--Judicial Council Form CIV-100.

Request for Entry of Default--Judicial Council Form CIV-100.

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP § 585(a)-(c); California Judicial Council Form CIV-100, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*].

Use of Form to Request Entry of Default Judgment by Clerk:
See *7.13[2]*

Use of Form to Request Entry of Default Judgment by Court:
See *7.14[2]*

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment

1-8 MB Practice Guide: CA Debt Collection 8.syn

§ 8.syn Synopsis to Chapter 8: Preserving Assets During Litigation or Pending Enforcement of Judgment

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8.02 Objective and Strategy.

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8.09 Lis Pendens Becomes Operative When Indexed.

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8.11 Lis Pendens Remains Effective While Action Is Pending.

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8.13 Court May Expunge Lis Pendens.
8.13[1] Court Must Expunge Lis Pendens If Service Was Invalid.
8.13[2] Court Must Expunge Lis Pendens If Pleading Does Not Contain Real Property Claim.
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8.14 Expungement or Withdrawal of Lis Pendens Notice Terminates Notice of Lis Pendens.

8.15 CHECKLIST: Obtaining Claim and Delivery to Preserve Personal Property During Litigation.

8.16 Claim and Delivery Gives Party Possession of Personal Property During Litigation.

8.17 Claim and Delivery Provides Only Temporary Possession to Plaintiff.

8.18 Plaintiff Must Assert Proper Grounds for Writ of Possession.

8.19 Plaintiff Applies Ex Parte or by Noticed Motion.

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8.25 Temporary Restraining Order and Preliminary Injunction Maintain Status Quo During Litigation.

8.26 Apply for Temporary Restraining Order and Preliminary Injunction When Applying for Writ of Possession.

8.27 Injunction May Be Mandatory or Prohibitory.

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8.29 Preliminary Injunction Available When Applicant Is Likely to Prevail on Merits and Harm to Applicant Outweighs Harm to Opposing Party.

8.30 TRO Is Available Ex Parte.

8.31 If Preliminary Injunction Is Granted, Obtain Undertaking As Ordered by Court.

8.32 If Preliminary Injunction Is Denied, Appeal Decision or Proceed to Trial.
8.32[1] Decision to Deny Preliminary Injunction Is Immediately Appealable.
8.32[2] Parties May Proceed to Trial on the Merits.

8.33 Person Is Subject to Contempt for Refusing to Comply With Injunction.

8.34 CHECKLIST: Obtaining Attachment to Place a Lien on Property Pending Judgment.

8.35 Attachment to Place a Lien on Property Aids Collection of Money Demand Pending Judgment.

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8.38 Determine Whether Property Is Subject to Attachment.
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8.38[4] Homestead Property Is Subject to Attachment.
8.38[5] Certain Property Subject to Pending Action or Special Proceeding Is Subject to Attachment.

8.38[6] Nonresident's Property Is Subject to Attachment.
8.38[7] Specified Property Is Exempt From Attachment.

8.39 Defendant May Claim Property Exemption.

8.40 Plaintiff May Oppose Claim of Exemption.

8.41 Court's Determinations Have No Effect on Trial.

8.42 Court May Issue Writ of Attachment Ex Parte If Great or Irreparable Injury Would Otherwise Occur.

8.43 Plaintiff May Conduct Discovery Concerning Defendant's Property.

8.44 Temporary Protective Order Binds Defendant Only.

8.45 Service of Temporary Protective Order Creates Lien.

8.46 Lien Terminates When Temporary Protective Order Expires.

8.47 Plaintiff May Attach Nonresident Property.

8.48 Undertaking Required Before Writ, Temporary Protective Order, or Lien Order Issued.
8.48[1] Plaintiff Must File Undertaking.
8.48[2] Statute Requires $10,000 Undertaking.
8.48[3] Defendant May Furnish Undertaking on Appeal of RTAO.

8.49 Levying Officer Levies on Writ of Attachment.
8.49[1] Writ Must Be Directed to Levying Officer.
8.49[2] Levying Officer Is Sheriff or Marshal in County Where Property Is Located.
8.49[3] Levy Must Be Made Without Delay in Manner Specified in Attachment Law and Written Instructions.

8.50 Levy Creates Attachment Lien.
8.50[1] Lien Exists Until Attachment Expires.
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8.50[3] Statute Controls Duration of Attachment Lien.
8.50[3][a] Attachment Lien May Last for Basic Three-Year Period.
8.50[3][b] Court May Grant One-Year Extensions.
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8.50[3][d] Defendant's Death Does Not Terminate Attachment Lien.

8.51 Court May Make Orders to Preserve Value of Attached Property.

8.52 Plaintiff May Obtain Lien on Defendant's Pending Causes of Action or Rights Under Judgment.

8.53 Plaintiff Is Liable For Wrongful Attachment.

8.54 CHECKLIST: Obtaining Appointment of Receiver.

8.55 Request Appointment of Receiver When Other Remedies Are Inadequate.

8.56 Court May Appoint Receiver Pendente Lite During Course of Litigation.

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8.59 Court May Not Appoint Receiver When Less Drastic Remedy Is Available.

8.60 Court May Appoint Receiver Only on Statutory Grounds.
8.60[1] Statutory Grounds Are Jurisdictional.
8.60[2] Court May Appoint Receiver When Property Is in Danger of Being Lost, Removed, or Materially Injured.
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8.60[9] Court May Appoint Receiver When Potential Default Under Health Facilities Loan Program.
8.60[10] Court May Appoint Receiver in Action for Specified Performance of Assignment of Rents Provision.
8.60[11] Court May Appoint Receiver in Action by Assignee Under Assignment of Leases, Rents, Issues, or Profits.
8.60[12] Court May Appoint Receiver for Equitable Reasons.
8.60[13] Court May Appoint Receiver After Judgment.
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8.61 Plaintiff May Obtain Appointment of Receiver by Noticed Motion.

8.62 Plaintiff May Obtain Appointment of Receiver Ex Parte.
8.62[1] Ex Parte Application Is Drastic Measure.
8.62[2] Procedure for Ex Parte Application.
8.62[2][a] Contents of Application.
8.62[2][b] Adverse Party Must Be Notified Unless Excused.
8.62[2][c] Applicant Undertaking Is Required Before Receiver Is Appointed Ex Parte.
8.62[2][d] Receiver Undertaking and Oath Is Required When Appointed.
8.62[3] Order to Show Cause Is Required When Receiver Is Appointed Ex Parte.
8.62[3][a] Order to Show Cause Confirming Appointment.
8.62[3][b] Order to Show Cause Preceding Appointment.

8.63 Appointment of Receiver Is Appealable.
8.63[1] Appellate Review of Order or Judgment Appointing Receiver Is Available.
8.63[2] Order Denying Appointment of Receiver Is Reviewable on Writ of Mandate.
8.63[3] Order Granting Motion to Vacate Appointment of Receiver Is Appealable.
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8.64 Notice of Lis Pendens.

8.65 Application for Writ of Possession--Judicial Council Form CD-100

8.66 Notice of Application for Writ of Possession and Hearing--Judicial Council Form CD-110

8.67 Declaration for Ex Parte Writ of Possession--Judicial Council Form CD-180

8.68 Order for Writ of Possession--Judicial Council Form CD-120

8.69 Writ of Possession--Judicial Council Form CD-130

8.70 Motion and Notice of Motion for Preliminary Injunction, Supporting Declaration, and Memorandum

8.71 Order Granting Preliminary Injunction and Requiring Undertaking

8.72 Application for Right to Attach Order, Temporary Protective Order, etc.--Judicial Council Form AT-105

8.73 Notice of Application and Hearing for Right to Attach Order and Writ of Attachment--Judicial Council Form AT-115

8.74 Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment After Hearing--Judicial Council Form AT-120

8.75 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment--Judicial Council Form AT-125

8.76 Temporary Protective Order--Judicial Council Form AT-140

8.77 Undertaking by Personal Sureties--Judicial Council Form AT-160/CD-140

8.78 Application to Post Cash in Lieu of Bond

8.79 Writ of Attachment--Judicial Council Form AT-135

8.80 Declaration in Support of Motion for Order Appointing Receiver

8.81 Order to Show Cause and Temporary Restraining Order--Judicial Council Form RC-300

8.82 Order Appointing Receiver After Hearing and Preliminary Injunction--Judicial Council Form RC-310

8.83 Ex Parte Order Appointing Receiver and Order to Show Cause--Judicial Council Form RC-200

8.84 Order Confirming Appointment of Receiver and Preliminary Injunction--Judicial Council Form RC-210

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
I. STRATEGY

1-8 MB Practice Guide: CA Debt Collection 8.01

8.01 Scope.

This chapter covers:

- Obtaining lis pendens to preserve real property during litigation [*see 8.03 -8.14*].

  Core Statutes:
  CCP §§ 405-405.61

- Obtaining claim and delivery to preserve personal property during litigation [*see 8.15 -8.23*].

  Core Statutes:
  CCP §§ 511.010-516.050

- Obtaining a temporary restraining order and preliminary injunction to preserve personal property during litigation [*see 8.24 -8.33*].

  Core Statutes:
  CCP §§ 525-534

- Obtaining attachment to place a lien on property pending judgment [*see 8.34 -8.53*].

  Core Statutes:
  CCP §§ 481.010-493.060

- Obtaining appointment of receiver [*see 8.54 -8.63*].

  Core Statutes:
  CCP §§ 564-570

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesLis PendensGeneral

OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesReceivershipsReceiversAppointments

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
I. STRATEGY

1-8 MB Practice Guide: CA Debt Collection 8.02

8.02 Objective and Strategy.

Preventing a defendant from getting rid of or hiding assets is crucial for recovering on a judgment. A judgment against a defendant without assets is virtually worthless. This chapter discusses various provisional remedies a plaintiff may use to maintain the status quo while an action is pending. These remedies include obtaining a lis pendens to preserve real property during litigation [*see 8.03 -8.14*], obtaining claim and delivery to preserve personal property during litigation [*see 8.15 -8.23*], obtaining a temporary restraining order and a preliminary injunction to preserve personal property during litigation [*see 8.24 -8.33*], obtaining an attachment to place a lien on property pending judgment [*see 8.34 -8.53*], and obtaining the appointment of a receiver [*see 8.54 -8.63*].

Strategic Point:

Counsel should try to identify the debtor's assets before filing. A review of prior credit files, tax returns if available, or other documents will provide this information. This information will also assist counsel in determining whether or not a provisional remedy will be needed, or if one is available.

Cross Reference:

Locating the debtor and identifying the debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Locating Debtor Assets Using Online Resources:

Many resources are available online for locating debtor assets in California. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
  - Sample Search: To find aircraft registrations, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Watercraft

- Sample Search: To find boat registrations, use a NAME segment search: *name (first name /3 last name)*.

- Legal tab > States Legal--U.S. > California > Public Records > Find Assets > Real Property
  - Sample Search: To find real property assets, use a NAME segment search: *name (first name /3 last name)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesReceivershipsReceiversAppointmentsReal Property LawPriorities & RecordingLis Pendens

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
II. OBTAINING LIS PENDENS TO PRESERVE REAL PROPERTY DURING LITIGATION

1-8 MB Practice Guide: CA Debt Collection 8.03

8.03 CHECKLIST: Obtaining Lis Pendens to Preserve Real Property During Litigation.

☐ Determine whether filing lis pendens would be advantageous.

○ Does plaintiff wish to protect his or her rights to title or possession of specific real property?

○ Does plaintiff wish to put third parties on notice of pending action, so that any third party acquiring an interest in the property after action is filed will be bound by judgment?

○ Does plaintiff wish effectively to preclude sale of or borrowing against real property in question during pendency of litigation?

○ Does plaintiff wish to stimulate settlement of action by "tying up" real property until claim is resolved?

Discussion:
See *8.04*

☐ Determine whether lis pendens may be filed.

○ Is action pending in a California or federal district court?

Authority:
CCP § 405.20; *see CCP § 405.5* (applicability to federal court action)

○ Does complaint in that action involve a real property claim?

Authority:

CCP §§ 405.4, 405.20

Discussion:
See *8.05*

☐ Prepare notice of lis pendens.

- ○ Include exact names of all parties to action.
- ○ Include legal description of property and address if applicable.
- ○ Include acknowledgment.

Authority:
CCP § 405.20

Form:
See *8.64*

☐ Have notice signed, and approved by court if necessary.

- ○ Notice ordinarily is signed by attorney of record.
- ○ On request of party, judge of court in which action is pending may approve notice.
- ○ If party is appearing in propria persona, party must sign notice and obtain court approval.

Authority:
CCP § 405.21

☐ Serve lis pendens on all required parties.

- ○ Mail copy of lis pendens notice by registered or certified mail, return receipt requested, to:
  - ☐ All known addresses of parties to whom the real property claim is adverse; and
  - ☐ All owners of record of real property affected by real property claim, as shown by latest county assessment roll.

Authority:
CCP § 405.22

○ If there is no known address for service on an adverse party or owner, prepare and execute declaration under penalty of perjury to that effect.

Authority:
CCP § 405.22

☐ Prepare and execute proof of service complying with *CCP § 1013a*.

Authority:
CCP § 405.23

☐ If any adverse parties are later joined in underlying action, serve lis pendens on those parties immediately and in same manner described above.

Authority:
CCP § 405.22

☐ Record lis pendens as soon as possible.

○ Record in office of county recorder where all or part of real property is situated.

Authority:
CCP § 405.22

Discussion:
See *8.09*

○ Record proof of service or declaration along with lis pendens notice.

Authority:
CCP § 405.23

☐ File copy of recorded lis pendens with court immediately after recording.

Authority:
CCP § 405.22

☐ Seek other additional remedies as appropriate, including:

○ Attachment [*see 8.34 -8.53*].

○ Injunction [*see 8.24 -8.33*].

○ Other relief.

Authority:
CCP § 405.8

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording Acts

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
II. OBTAINING LIS PENDENS TO PRESERVE REAL PROPERTY DURING LITIGATION

1-8 MB Practice Guide: CA Debt Collection 8.04

8.04 Lis Pendens Preserves Rights in Real Property During Litigation.

When an action involves a claim affecting real property, a party to that action may record a notice of lis pendens to preserve his or her rights or interests, if any, in the real property pending the final determination of the action [*CCP §§ 405.2*, *405.20*]. The notice of lis pendens provides constructive notice that the claim affecting that property is pending [*CCP § 405.24*]. Any taker of a subsequently created interest in that property thus takes that interest subject to any judgment rendered in the pending action [*see Kirkeby v. Superior Court (2004) 33 C4th 642, 647, 15 CR3d 805, 93 P3d 395* ; *CCP § 405.24*].

Strategic Point--Judgment Creditor:

Because a lis pendens can be an extremely powerful tool, some creditor's attorneys prefer to use it whenever possible.

Strategic Point:

Counsel should make certain the claim actually involves title, right to possess, or some other legal interest in the real property. Merely wanting to keep the property around as an asset is not a permissible basis for recording a lis pendens [*Campbell v. Superior Court (2005) 132 CA4th 904, 911, 34 CR3d 68*]. Filing a lis pendens in bad faith could subject counsel to sanctions, and the plaintiff to liability for damages caused by clouding title.

Cross References:

Form for notice of lis pendens, see *8.64*.

Detailed discussion and related forms for filing and serving, expunging, and opposing lis pendens, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 21, Lis Pendens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording Acts

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8.05 Determine Whether Lis Pendens Is Available.

A lis pendens may be filed only if the underlying action involves a real property claim [*CCP § 405.20*]. A claim that seeks an interest in real property in order to secure a judgment for money damages is not a real property claim [*Campbell v. Superior Court (2005) 132 CA4th 904, 916, 34 CR3d 68*].

However, a lis pendens may be recorded in conjunction with a fraudulent transfer claim that seeks to affect title to real property even if the underlying monetary claim previously has not been established (and may first be sought to be established in the same action) [*see Kirkeby v. Superior Court (2004) 15 CR3d 805, 93 P3d 395]* .

Warning:

Placing a lis pendens on wrongful grounds could subject counsel to substantial sanctions, particularly if the cloud on title created by the lis pendens harms a potential sale or development of the property. It is an inexpensive remedy compared with a writ of attachment, but only if the legal grounds exist for its placement.

Warning:

Availability of lis pendens in actions seeking imposition of a constructive trust or equitable lien on real property is unlikely [*see Campbell v. Superior Court (2005) 132 CA4th 904, 912-918, 34 CR3d 68*].

Cross Reference:

Detailed discussion on determining whether lis pendens is available, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.04*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral OverviewReal Property LawNonmortgage LiensEquitable LiensReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording ActsReal Property LawPurchase & SaleFraudulent TransfersReal Property LawTrustsConstructive Trusts

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8.06 Consider Using Lis Pendens With Other Provisional Remedies.

In addition to filing a lis pendens, other provisional remedies may be sought, such as attachment or injunctive relief, or any other relief available in connection with a real property claim [*CCP § 405.8*].

Cross References:

Claim and delivery protects creditor's collateral during litigation, see *8.16*.

Using temporary restraining order and preliminary injunction to maintain status quo during litigation, see *8.25*.

Obtaining attachment to place lien on property, see *8.35*.

Discussion of appointment of receiver, see *8.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesAttachmentsReal Property LawPriorities & RecordingLis Pendens

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8.07 Courts Construe Lis Pendens Statutes Restrictively.

Lis pendens statutes are designed to protect a plaintiff's interest by preserving the status quo, but they may as a practical matter pressure a defendant to settle [*see Kirkeby v. Superior Court (2004) 33 C4th 642, 651, 15 CR3d 805, 93 P3d 395*]. Courts construe lis pendens statutes restrictively rather than liberally because of the potential for abuse by plaintiffs seeking an unfair advantage in litigation [*see Kirkeby v. Superior Court (2004) 33 C4th 642, 651, 15 CR3d 805, 93 P3d 395*].

Strategic Point:

The practical effect of recording a lis pendens is to render a defendant's property both unmarketable and unsuitable as security for a loan. The financial pressure thus exerted on a defendant can be considerable, forcing settlement not on the merits of the case but simply to get rid of the cloud on defendant's title.

Warning:

Counsel should note the potential liability for attorney's fees if the debtor successfully moves to expunge the lis pendens [*see CCP § 405.38*].

Cross Reference:

Detailed discussion of service requirements and procedure for filing and recording lis pendens notice, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.07 -21.08*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewGovernmentsLegislationInterpretationReal Property LawPriorities & RecordingLis Pendens

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8.08 Lis Pendens Provides Constructive Notice of Pendency of Action.

A recorded notice of lis pendens provides constructive notice of the pendency of the noticed action as it relates to the real property described in the notice [*CCP § 405.24*]. The following persons are deemed to have constructive notice from the time that the notice is recorded [*CCP § 405.24*]:

- Any purchaser.
- Any encumbrancer.
- Any other transferee of the real property described in the notice.

Cross Reference:

Lis pendens becomes operative when indexed, see *8.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording Acts

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8.09 Lis Pendens Becomes Operative When Indexed.

Before constructive notice is conclusively presumed, the document must be "recorded as prescribed by law" [*CC § 1213*]. The operative event is the recording of the document [*see Lewis v. Superior Court (1994) 30 CA4th 1850, 1866-1867, 37 CR2d 63* ; *Gov Code §§ 27230-27265*].

Warning:

Certain county recorders, such as the Los Angeles County Recorder's office, will not do same day recording under most circumstances. Los Angeles will allow an exception if an urgency exists and if the lien document is actually walked in to be filed by the lienholder. In other words, counsel cannot, under any circumstances, get a same day recording if the attorney or an attorney service brings the document in for recording. It must be brought in by a party to the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis PendensReal Property LawPriorities & RecordingRecording Acts

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8.10 Lis Pendens Not Valid Against Doe Defendants.

Recording a lis pendens is effective to provide constructive notice of the pendency of the noticed action only against parties who are not fictitiously named [*see CCP § 405.24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.11 Lis Pendens Remains Effective While Action Is Pending.

Unless a notice of lis pendens is expunged or withdrawn, it remains effective as long as the action is pending; that is, until the action is finally determined on appeal or the time for appeal has passed, unless the judgment is sooner satisfied [*see CCP § 1049*; *Kartheiser v. Superior Court (1959) 174 CA2d 617, 619, 345 P2d 135*].

The lis pendens is terminated if an action is settled and then abandoned or dismissed, without any consent decree or judgment ordering an accounting or determining any rights in the real property. Thus, a person who has acquired an interest before settlement, abandonment, or dismissal is not affected by the prior lis pendens [*Harris v. Whittier Bldg. & Loan Asso. (1936) 18 CA2d 260, 266, 63 P2d 840*].

Cross References:

Discussion of procedure for expunging a lis pendens, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.10 -21.15*.

Preparing and filing notice of withdrawal, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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8.12 Plaintiff Must Record New Lis Pendens in New Action.

Plaintiff must record and file a new lis pendens if an action terminates without a judgment, and the plaintiff commences a new action asserting a real property claim [*see Garcia v. Pinhero (1937) 22 CA2d 194, 196, 70 P2d 675*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.13 Court May Expunge Lis Pendens.

8.13[1] Court Must Expunge Lis Pendens If Service Was Invalid. The court must order a lis pendens expunged if the service of the lis pendens was invalid [*CCP §§ 405.22*, *405.23*].

Cross Reference:

Discussion of service requirements, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.07*.

8.13[2] Court Must Expunge Lis Pendens If Pleading Does Not Contain Real Property Claim. The court must order a lis pendens expunged if the pleading on which the notice is based does not contain a real property claim [*Kirkeby v. Superior Court (2004) 33 C4th 642, 647, 15 CR3d 805, 93 P3d 395*]. In this event, the court may not require an undertaking as a condition of the expungement order [*CCP § 405.31*]. If an affected party or person seeks to expunge a notice of lis pendens on this ground, the claimant has the burden of proving that his or her pleading includes a real property claim [*see CCP § 405.30*].

8.13[3] Court Must Expunge Lis Pendens If Real Property Claim Lacks "Probable Validity." The court must order that a lis pendens notice be expunged if it finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim [*CCP § 405.32*; *see Behniwal v. Superior Court (2005) 133 CA4th 1048, 1050, 35 CR3d 162*]. In this event, the court may not require an undertaking as a condition of the expungement order [*CCP § 405.32*].

"Probable validity" of a claim means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim [*CCP § 405.3*].

8.13[4] Court May Expunge Lis Pendens If Undertaking Adequately Protects Claimant. A court must order a lis pendens expunged if it finds that an undertaking will adequately protect the claimant, even if the court also finds that the claimant alleges a real property claim and that it has probable validity [*see Kirkeby v. Superior Court (2004) 33 C4th 642, 651, 15 CR3d 805, 93 P3d 395*]. The expungement order must be conditioned on the giving of an undertaking sufficient to indemnify the claimant for all damages proximately resulting from the expungement that the claimant may incur if the claimant prevails on the real property claim [*CCP § 405.33*]. In determining whether an undertaking will secure adequate relief to the claimant, the presumption that real property is unique set out in *CC § 3387* does not apply, except for real property improved with a single family dwelling that the claimant intends to

occupy [*CCP § 405.33*].

Strategic Point:

In its order conditionally expunging the notice, the court is required to set a return date for the moving party to show fulfillment of the condition [*CCP § 405.33*]. The court must deny the motion to expunge without further notice or hearing if the moving party fails to fulfill the condition on the return day [*CCP § 405.33*].

Strategic Point:

The claimant may recover on the undertaking pursuant to the general bonds and undertakings provisions of *CCP § 996.440* [*CCP § 405.33*]. However, the undertaking serves to protect only against damages that proximately result from the expungement [*CCP § 405.33*]. Therefore, if a party is given a bond as a condition of expungement and prevails in the underlying action solely on a cause of action that did not support the lis pendens, he or she may not satisfy the judgment out of the bond [*Elder v. Carlisle Ins. Co. (1987) 193 CA3d 1313, 1319, 238 CR 897*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.14 Expungement or Withdrawal of Lis Pendens Notice Terminates Notice of Lis Pendens.

When either a certified copy of an expungement order or a notice of withdrawal is recorded, neither the notice of lis pendens nor any information derived from it constitutes actual or constructive notice of any matters contained in the notice or relating to the pending action [*CCP § 405.60*]. Nor does the notice or any information derived from it create a duty of inquiry in any person thereafter dealing with the affected property [*CCP § 405.60*].

In addition, after the withdrawal notice or expungement order is recorded, a person is not deemed to have actual knowledge of the action or any matters relating to the action if all of the following apply [*CCP § 405.61*]:

- The person is not a named party at the time the withdrawal notice or order is recorded.
- The person thereafter becomes a purchaser, transferee, mortgagee, or other encumbrancer of any interest in the real property subject to the action.
- The person takes that interest for a valuable consideration.
- The person takes that interest by a conveyance recorded prior to the recording of a certified copy of the judgment or decree issued in the action.

Warning:

Counsel should note the potential liability for attorney's fees if the debtor successfully moves to expunge the lis pendens [*see CCP § 405.38*].

Cross References:

Discussion of procedure for expunging a lis pendens, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.10 -21.15*.

Preparing and filing notice of withdrawal, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 21.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:

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1-8 MB Practice Guide: CA Debt Collection 8.15

8.15 CHECKLIST: Obtaining Claim and Delivery to Preserve Personal Property During Litigation.

☐ Determine whether right to prejudgment writ of possession exists.

Discussion:
See *8.18*

☐ Determine whether property in question has sufficient value to warrant expense of pursuing this prejudgment remedy.

Discussion:
See *8.16*

☐ Determine whether immediate possession of subject property would be advantageous to plaintiff.

- ○ May help protect property against loss, damage, or sale by defendant.
- ○ May help stimulate settlement of action.
- ○ May generate additional time and expense of legal fees, expenses of obtaining undertaking, and fees for execution of writ and storage of property.
- ○ Potential liability for plaintiff if plaintiff loses in underlying action [*see CCP § 512.120*].

☐ Consider likelihood of success in obtaining possession of subject property.

- ○ Is defendant in possession of property?

- Can plaintiff identify property with sufficient particularity?
- Can plaintiff make showing of probable validity of claim to possession of property?
- Does plaintiff have probable cause to believe property is located in a specific place?

Authority:
CCP §§ 512.010(b), 512.060, 512.080

☐ Determine best time to apply for writ of possession.

Timing:
Apply upon filing underlying complaint, or at some later time prior to entry of final judgment.

Authority:
CCP § 512.010(a)

Discussion:
See *8.19*

☐ Determine whether to apply for writ of possession ex parte or by noticed motion.

- Notice and hearing on motion normally is required.
- Ex parte application may be made under limited circumstances.

Authority:
CCP § 512.020

Discussion:
See *8.19*

☐ Determine whether to apply for temporary restraining order in addition to writ of possession.

Authority:
CCP §§ 513.010, 513.020, 516.050

Discussion:
See *8.24 -8.27*

☐ Draft application for writ of possession and supporting documents:

- Notice of application for writ of possession and hearing, executed under oath.

- Application for writ of possession and for temporary restraining order (if latter is applicable).
- Order for writ of possession.
- Writ of possession.
- Temporary restraining order, if applicable.
- Declaration for ex parte writ of possession, if applicable.
- Affidavits.

Authority:
CCP §§ 511.010, *512.020*

Forms:
See *8.65 -8.69*

☐ If basis of plaintiff's claim is written instrument, attach copy of instrument to application.

Authority:
CCP § 512.010(a)

☐ File application and supporting documents with court in which underlying action was brought.

☐ Serve the following on defendant prior to hearing, or, in case of ex parte application, serve on defendant if a writ of possession is issued following ex parte application:

- Copy of summons and complaint.
- Notice of application and hearing.
- Copy of application and any supporting affidavits.

Authority:
CCP §§ 512.020(b), *512.030*; *see CCP § 512.040* (notice of application and hearing)

☐ File with court and serve on defendant any affidavits and points and authorities intended to be relied on at hearing.

Authority:
CCP § 512.050

☐ Appear at hearing.

- Present further evidence or points and authorities as necessary and as permitted by court.
- Establish probable validity of claim of possession.
- If necessary, show probable cause to enter private place to obtain property sought to be recovered.

Authority:
CCP § 512.050

☐ Prior to issuance of writ, obtain and file undertaking with court, unless court waives undertaking requirement.

Authority:
CCP §§ 512.050, 515.010

Discussion:
See *8.20*

Forms:
See *8.77*

☐ If court issues writ of possession, give writ to levying officer (sheriff or marshal) for execution.

Authority:
CCP §§ 511.060, 512.080(a), 514.010(a)

Discussion:
See *8.22*

☐ If necessary, apply ex parte in writing to court for endorsement on writ directing levying officer to seize the property at a private place not specified in writ.

Authority:
CCP § 512.090

Discussion:
See *8.19*

Forms:
See *8.67*

☐ Once levying officer has seized property:

- Instruct plaintiff to take delivery of property from levying officer 10 days after levy of writ, if no notice of filing of an undertaking for redelivery or notice of objection to plaintiff's undertaking is received within that time.
- Pay levying officer's fees for taking property and any necessary expenses for keeping property.

Authority:
CCP § 514.030(a)

☐ Draft, file, and serve on the defendant a "turnover" order.

Authority:
CCP § 512.070

Discussion:
See *8.21*

☐ If plaintiff ultimately fails to recover judgment in action, return property to defendant.

Authority:
CCP § 512.120

Discussion:
See *8.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.16 Claim and Delivery Gives Party Possession of Personal Property During Litigation.

Claim and delivery, commonly referred to as writ of possession, secures possession of personal property pending the outcome of an action [*CCP § 512.010(a)*; *Simms v. NPCK Enterprises, Inc. (2003) 109 CA4th 233, 241-242, 134 CR2d 557*]. Claim and delivery should be used to preserve liened collateral when plaintiff cannot exercise self-help to take possession, and fears the debtor could dispose of the collateral.

To obtain provisional possession of personal property, the plaintiff generally must provide an undertaking and establish the probable validity of his or her claim to that property [*see CCP § 512.060*]. Possession of the property is obtained by levying execution of a writ of possession. California courts may issue writs only if they are to be executed by a levying officer within California [*see CCP §§ 17(b)(6)* (defining "process"), 71 (process of superior court extends through state)].

Strategic Point--Drastic Yet Influential Remedy:

Claim and delivery is a drastic remedy. Freezing debtor's collateral pending the outcome of the litigation gets the debtor's attention and may encourage cooperation, especially if the property taken is indispensable to the debtor's business. Pursuing a claim and delivery action also may prompt a bankruptcy filing by the debtor. Additionally, a plaintiff-creditor who ultimately is unsuccessful after levying a writ of possession must return the property to the debtor, and also may be liable for any damages caused by a temporary restraining order, levy of the writ of possession, or loss of possession of the property by the debtor [*CCP § 512.120*].

Strategic Point--Expense:

A writ of possession can be extremely expensive because the creditor must pay the sheriff to take and store the property. If the property is large equipment affixed to a building, for example, that cost can outweigh the value. Counsel should perform a liquidation analysis to determine whether it makes economic sense to proceed.

Strategic Point--Bond:

Plaintiff also must post a bond for, generally, double the value of the plaintiff's interest in the property [*CCP § 515.010(a)*]. This price may be difficult to ascertain. If there is no equity in the property, the court will waive the bond requirement for the issuance of writ [*CCP § 515.010(b)*].

Locating Personal Property Using Online Resources:

Many resources are available online for locating personal property assets in California. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
  - Sample Search: To find aircraft registrations, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Watercraft
  - Sample Search: To find boat registrations, use a NAME segment search: *name (first name /3 last name)*.

Cross References:

Discussion of undertaking, see *8.20*.

Detailed discussion of preparing, serving, and filing an application for claim and delivery, along with forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch, 20, Claim and Delivery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.17 Claim and Delivery Provides Only Temporary Possession to Plaintiff.

The title and right to possession are determined by the final judgment in the independent action from which the remedy of claim and delivery arose [*Simms v. NPCK Enterprises, Inc. (2003) 109 CA4th 233, 241-242, 134 CR2d 557*]. The determinations by the court regarding issuance of the writ of possession have no effect on the determination of any issues in the action, and are not admissible in evidence; nor may they be referred to at trial [*CCP § 512.110*].

Strategic Point--If Value of Collateral Declines or Storage Costs Are High:

If the collateral is likely to decline in value or if the costs of storing it are high, counsel should try to either (1) get the debtor to agree to allow a sale, or (2) seek the court's approval of sale by motion. In the sale application, counsel should include details to show that selling the property is the best and most cost-effective way to get the highest price. If the debtor agrees to sell, those details should be included in a stipulation in order to avoid a defense of failure to sell in a commercially reasonable manner [*see* UCC § 9-607]. A UCC Article 9 notice waiver should be included in the stipulation as well [*see* UCC § 9-611].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.18 Plaintiff Must Assert Proper Grounds for Writ of Possession.

A court may grant a writ of possession only if the following are found:

- The plaintiff has established the probable validity of his or her claim to possession of the property [*CCP § 512.060(a)(1)*]. 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 § 511.090*].

- The plaintiff has provided an undertaking [*CCP § 512.060(a)(2)*; *see CCP § 515.010*].

- In the case of a writ directing the levying officer to enter a private place to take possession of property, the plaintiff has established that there is probable cause to believe that the property is located there [*CCP § 512.060(b)*].

Strategic Point:

As a practical matter, establishing the probable validity means having a security, ownership or possessory interest evidenced by a written document. Counsel should consider submitting a separate declaration in support of a writ of possession because that way counsel can (and should) put in more detail than the Judicial Council Form allows.

Cross References:

Judicial Council Form CD-100 for application for writ of possession, 8.65.

Judicial Council Form CD-120 for order for writ of possession, see *8.68*.

Judicial Council Form CD-130 for writ of possession, see *8.69*.

Judicial Council Form AT-160/CD-140 for undertaking by personal sureties, see *8.77*.

Discussion of undertaking, see *8.20*.

Levying officer levies on property, see *8.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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1-8 MB Practice Guide: CA Debt Collection 8.19

8.19 Plaintiff Applies Ex Parte or by Noticed Motion.

Application generally must be made by noticed motion [*CCP § 512.020(a)*]. An ex parte application is proper, however, if the property was stolen or is a credit card [*CCP § 512.020(b)*]. An ex parte application also is available when the property was obtained in the course of trade for commercial purposes and all of the following apply [*CCP § 512.020(b)*]:

- The property is not necessary for the support of the defendant or defendant's family.
- There is some immediate danger that the property will become unavailable to levy because it will be transferred, concealed, removed or destroyed.
- The ex parte application is necessary to protect the property.

Judicial Council Form CD-100 must be used to apply for a writ of possession [*see 8.65*]. This form is mandatory for application for a writ of possession, whether after a hearing or ex parte. Counsel also should consider submitting a separate declaration in support of a writ of possession because that way counsel can (and should) put in more detail than the Judicial Council Form allows.

Judicial Council Form CD-110 must be used for notice of an application for writ of possession and hearing [*see 8.66*]. This form is mandatory.

Judicial Council Form CD-180 must be used for a declaration for ex parte writ of possession [*see 8.67*]. This form is mandatory.

Timing:

A plaintiff may apply for a writ of possession by filing a written application at the time the complaint is filed, or at any later time [*CCP § 512.010(a)*].

Strategic Point--Subpoena Debtor:

Counsel should subpoena the debtor for the hearing and have debtor state on the record where the collateral is located. This information is useful for levying purposes, and in the event of a possible later

conversion claim.

Consider serving the debtor with a subpoena to appear at the writ of possession hearing to verify the property location and value. If the debtor does not appear, ask the court to issue a bench warrant. Although some courts will not take actual testimony at a writ of possession hearing, argue that it is necessary to establish the location, one of the elements for the issuance of a writ of possession.

Strategic Point--Writ of Possession Hearing:

Counsel should appear at the hearing and establish probable validity of the claim of possession. Be prepared to present further evidence or points and authorities as necessary and as permitted by the court. If applicable, show probable cause to enter any private place to obtain property sought to be recovered.

Strategic Point--Local Rules:

Counsel should check local rules because most courts require points and authorities to be filed with the application.

Cross References:

Judicial Council Form CD-100 for application for writ of possession, see *8.65*.

Judicial Council Form CD-110 for notice of application for writ of possession and hearing, see *8.66*.

Judicial Council Form CD-180 for declaration for ex parte writ of possession, see *8.67*.

Detailed discussion of preparing and filing application for writ of possession, including hearing procedure, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 20.06 -20.14*.

Detailed discussion of preparing and filing ex parte application for writ of possession, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 20.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.20 Plaintiff Must File Undertaking.

A court may not issue a temporary restraining order or a writ of possession until the plaintiff has filed a written undertaking with the court [*CCP § 515.010*]. The purpose of the undertaking is to indemnify the defendant against the consequence of a taking that may later be adjudged to be wrongful [*see Symes Cadillac, Inc. v. Insurance Co. of North America (1977) 66 CA3d 905, 909, 136 CR 356* (decided under former *CCP § 512*)].

Judicial Council Form AT-160/CD-140 for undertaking by personal sureties must be used for giving a statutory undertaking by personal sureties in a claim and delivery action. Use of the Judicial Council form is mandatory.

Strategic Point--Bond:

The plaintiff must post a bond, generally for double the value of the collateral being sought [*CCP § 515.010*]. This value may be difficult to ascertain. However, if there is no equity in the property, the court will routinely waive the bond requirement for the issuance of writ under *CCP § 515.010(b)*.

Warning:

The debtor can post a re-delivery bond in the same amount to regain possession of the collateral. In this case, argue that the amount of the lien should be included in any re-delivery bond calculation.

Cross Reference:

Judicial Council Form AT-160/CD-140 for undertaking by personal sureties, see *8.77*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.21 Court May Issue Turnover Order.

Under the provisional remedy of claim and delivery, when a court issues a writ of possession, it may also issue an order directing the defendant to turn over possession of the property to the plaintiff [*CCP § 512.070*]. Under this process, a "turnover order" is an alternative means of enforcing a writ of possession [*Edwards v. Superior Court (1991) 230 CA3d 173, 178, 281 CR 30*]. The proposed order must include a notice to the defendant that failure to turn over possession of the property to plaintiff may subject the defendant to contempt [*CCP § 512.070*].

Cross References:

Discussion of claim and delivery, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 20, Claim and Delivery.

Form of application for turnover order, declaration in support of order, and turnover order, see *22.23 -22.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.22 Levying Officer Levies on Property.

On receipt of a writ of possession, the levying officer must search for and take custody of the specified property in the possession of the defendant or the defendant's agent by removing the property to a place of safekeeping or by installing a keeper [*CCP § 514.010(a)*; *see CCP § 511.060* (defining levying officer)].

The plaintiff also may apply ex parte to the court for an endorsement on the writ directing the levying officer to seize the property at a private place not specified in the writ [*CCP § 512.090*].

If the specified property or any part of it is in a private place, the levying officer must announce his or her identity, purpose, and authority at the time he or she demands possession of the property [*CCP § 514.010*]. If the property is not voluntarily delivered, the levying officer may cause any building or enclosure where the property may be located to be broken open in a manner he or she reasonably believes will cause the least damage [*CCP § 514.010(c)*]. The levying officer may call on the power of the county for aid and protection in entering and seizing the property [*CCP § 514.010(c)*]. However, if the levying officer reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he or she must refrain from seizing the property and promptly make a return to the court from which the writ issued. The return must set forth the reasons for his or her belief that the risk exists, and the court may make any appropriate orders [*CCP § 514.010(c)*].

Strategic Point:

Counsel should try to coordinate with the levying officer the times and costs of taking the property into custody. If it is something large that requires special storage, such as equipment or inventory, the sheriff will require some lead time to get things into place. Pending actually moving the property, the sheriff, with court permission, may place someone on the debtor's premises for several days until the property can be moved.

Strategic Point:

Counsel should be prepared to argue against a landlord's lien if the debtor is past due in rent or if the property has become a fixture. It sometimes pays to get the landlord's cooperation to keep the property on the premises pending the sale or other resolution of the action rather than incurring the costs of moving and short term storage. The landlord may prefer to leave things there with a guarantee of rent

from counsel rather than trying to immediately rent out the premises.

Cross Reference:

Execution of writ, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 20.18.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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8.23 Plaintiff Must Redeliver Property on Failure to Obtain Judgment.

A plaintiff who fails to recover judgment in an action must redeliver the property to the defendant [*CCP § 512.120*]. In addition, the plaintiff is liable for all damages sustained by the defendant which are proximately caused by any of the following [*CCP § 512.120*]:

- The operation of the temporary restraining order and preliminary injunction, if any.
- The levy of the writ of possession.
- The loss of possession of the property under the levy of the writ of possession or an order directing transfer of the property to the plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.24 CHECKLIST: Obtaining Temporary Restraining Order and Preliminary Injunction to Preserve Personal Property During Litigation.

☐ Determine nature of relief sought:

- ○ Mandatory injunction;
- ○ Prohibitory injunction; or
- ○ Mixture of both.

Discussion:
See *8.27*

☐ Decide whether to seek TRO.

Authority:
CCP § 527(c)

Discussion:
See *8.26*

☐ Determine whom to enjoin, what class of parties to enjoin, or both.

Discussion:
See *8.28*

☐ If seeking TRO, prepare and file:

○ Complaint, verified if it is to be used to prove facts.

○ Ex parte application, supporting declaration, and supporting memorandum for TRO and order to show cause, and supporting declaration regarding advance notification.

Authority:
CCP § 527(c); *Cal Rules Ct, Rules 3.1150(b)*, *3.1201*

Discussion:
See *8.30*

○ Proposed order to show cause and TRO.

Authority:
CCP § 527(d)(1); *Cal Rules Ct, Rules 3.1150(c)*

☐ Appear at TRO hearing.

Authority:
Cal Rules Ct, Rule 3.1150(d)

☐ If TRO is granted ex parte, serve on opposing party:

○ Order to show cause on opposing party as to why preliminary injunction should not be granted.

Authority:
CCP § 527(d)(1), *(2)*; *Cal Rules Ct, Rules 3.1150(a)*

○ All affidavits or declarations and memorandum in support of application.

Authority:
CCP § 527(d)(2)

○ Complaint, if not previously served.

Timing:
Opposing party must be served with order to show cause, verified complaint, declarations or affidavits, and memorandum within five days after date TRO was issued, or two days prior to hearing, whichever is earlier, or TRO will be dissolved.

Authority:
CCP § 527(d)(2)

○ If unable to serve opposing party within required time period, file affidavit stating that opposing party could not be served within time required and ask court to reissue order to show cause and TRO.

Authority:
CCP § 572(d)(5)

☐ If TRO is granted with notice to opposing party, serve motion and notice of motion for preliminary injunction, supporting declaration, and memorandum.

Authority:
Cal Rules Ct, Rule 3.1150(a)

☐ File undertaking if required by court.

Form:
See *8.77*

☐ If TRO is not granted:

- ○ Appeal decision; or
- ○ Follow procedure to obtain preliminary injunction.

Authority:
CCP § 904.1(a)(6) (unlimited civil cases); *CCP § 904.2(g)* (limited civil cases)

☐ If only preliminary injunction is sought, prepare and file:

- ○ If not previously filed, complaint for preliminary injunction, and damages (if damages are also sought).
- ○ Supporting affidavits or declarations and memorandum.

Discussion:
See *8.29*

- ○ Order to show cause why preliminary injunction should not be granted, unless opposing party has already appeared in action.

Timing:
If action is initiated on same day that order to show cause is filed, complaint must be filed first.

Authority:
Cal Rules Ct, Rule 3.1150(a), (b)

☐ Obtain judge's signature on order to show cause.

☐ Serve on opposing party:

○ If opposing party has not yet appeared in action:

☐ If not previously served, verified complaint.

☐ Affidavits or declarations in support of application.

☐ Memorandum in support of application.

☐ Order to show cause.

○ If opposing party has already appeared in action:

☐ Motion and notice of motion for preliminary injunction.

☐ Affidavits or declarations and memorandum.

Authority:
CCP § 527(a); *Cal Rules Ct, Rule 3.1150(a)*

☐ If preliminary injunction is granted:

○ Obtain undertaking in amount ordered by court, unless one of following exemptions from undertaking requirement applies:

☐ Either spouse is seeking injunction against other in proceeding for legal separation or dissolution of marriage.

☐ Applicant seeks an order under Domestic Violence Prevention Act [*see Fam Code §§ 6200-6219*].

☐ Applicant is federal or California state government, county, city, district, or other political subdivision, or officer of one of these public entities acting in official capacity [*see CCP § 995.220*].

☐ Applicant is poor or indigent.

○ Serve preliminary injunction order signed by judge on opposing party.

Discussion:

See *8.31*

Form:
See *8.71*

☐ If preliminary injunction is not granted:

○ Appeal decision; or

○ Proceed to trial on merits of underlying action.

Authority:
CCP § 904.1(a)(6) (unlimited civil cases), *CCP § 904.2(g)* (limited civil cases)

Discussion:
See *8.32*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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8.25 Temporary Restraining Order and Preliminary Injunction Maintain Status Quo During Litigation.

A temporary restraining order (TRO) and a preliminary injunction allow a plaintiff to maintain the status quo during litigation by preventing debtor from transferring the assets. A preliminary injunction requires notice to the opposing party [*CCP § 527(a)*]. A TRO may be granted on shortened or no notice [*CCP § 527(c)*].

Strategic Point:

A TRO and preliminary injunction are only as good as the debtor's fear of a contempt citation and the potential fine, which usually is not very significant. The debtor also must be available for service, because personal service must be used. If the debtor violates a TRO and preliminary injunction, it can set the case up for a conversion action with its threat of punitive damages. However, if the property is the only tangible asset available, once it is gone the creditor is left with an unenforceable judgment.

Cross Reference:

Detailed discussion of preparing, serving, and filing an application for a temporary restraining order and preliminary injunction, along with forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 18, TROs and Preliminary Injunctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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8.26 Apply for Temporary Restraining Order and Preliminary Injunction When Applying for Writ of Possession.

At or after the time a plaintiff files an application for a writ of possession, the plaintiff also may apply for a temporary restraining order and preliminary injunction to prevent the defendant from transferring any interest in the property or from otherwise disposing of or encumbering the property [*see CCP §§ 513.020* (TRO), *526(a)* (injunction)]. An injunction generally is not available after defendant answers, absent notice or upon an order to show cause [*CCP § 528*].

Strategic Point--Injunction and Monetary Damages Can Be Sought in Same Action:

Although an injunction is an equitable remedy, a plaintiff can seek both injunctive relief and money damages in the same action [*see West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 CA3d 693, 700, 95 CR 169*].

Strategic Point--Prepare "Pocket TPO":

Counsel should bring an application for a temporary protective order to an ex parte hearing for a writ of possession/writ of attachment. Then, if the court is not inclined to issue the latter, counsel can use the TPO as a fallback strategy.

Cross References:

Procedure to obtain a TRO, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.10.*

Procedure to obtain a preliminary injunction, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.11.*

Forms related to seeking injunctive relief and TRO, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.26 -18.30.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.27 Injunction May Be Mandatory or Prohibitory.

Whether the injunction sought is mandatory or prohibitory largely depends on what remedy is sought. If the plaintiff seeks to restrain a party from a course of conduct or to stop a particular condition, then the injunction is likely prohibitory. To compel a party to perform a certain act, then the injunction is likely mandatory [*Davenport v. Blue Cross of Cal. (1997) 52 CA4th 435, 446, 60 CR2d 641*]. An injunction can contain both mandatory and prohibitory features.

Strategic Point--Plaintiff:

Although only mandatory injunctions are automatically stayed on appeal [*see CCP § 916*; *Wolf v. Gall (1916) 174 C 140, 142, 162 P 115*], courts are reluctant to grant them absent a clear finding that irreparable injury would result if the injunction is not granted. Thus, the plaintiff should frame the injunctive relief as prohibitory rather than mandatory. For example, to retain the status quo in a dispute over the right to cut trees, counsel should seek an order that defendant refrain from cutting them (prohibitory) rather than an injunction ordering defendant to maintain the trees (mandatory).

Cross References:

Form for motion and notice of motion for preliminary injunction, supporting declaration, and memorandum of points and authorities, see *8.70*.

Form for order granting preliminary injunction and requiring undertaking, see *8.71*.

Additional forms and discussion for obtaining preliminary injunctions, see California Points and Authorities, Ch. 116, Injunctions (Matthew Bender).

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8.28 Injunction May Extend to Non-Parties.

Any person, even one who was not a party to the original action, may be enjoined and held guilty of contempt for noncompliance [*CCP § 525*]. An injunction can run to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders, and abettors [*Planned Parenthood Golden Gate v. Garibaldi (2003) 107 CA4th 345, 352-353, 132 CR2d 46*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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8.29 Preliminary Injunction Available When Applicant Is Likely to Prevail on Merits and Harm to Applicant Outweighs Harm to Opposing Party.

An injunction may be granted when it appears from the complaint that the applicant is entitled to the relief demanded and that the relief, or any part of it, consists of restraining the commission or continuance of the act complained of (or commanding certain conduct), either for a limited period or perpetually [*CCP § 526(a)(1)*].

In deciding whether an injunction should issue, the trial court evaluates: (1) the likelihood that the applicant will prevail on the merits at trial; and (2) the interim harm that the applicant is likely to sustain if the injunction were denied, as compared to the harm that the opposing party is likely to suffer if the preliminary injunction were issued [*White v. Davis (2003) 30 C4th 528, 554, 133 CR2d 648, 68 P3d 74*].

Cross References:

Form for motion and notice of motion for preliminary injunction, supporting declaration, and memorandum of points and authorities, see *8.70*.

Detailed discussion of availability of preliminary injunction, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsBalance of HardshipCivil ProcedureRemediesInjunctionsElementsIrreparable HarmCivil ProcedureRemediesInjunctionsElementsLikelihood of SuccessCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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8.30 TRO Is Available Ex Parte.

The plaintiff must set forth in the application a statement of the grounds justifying the ex parte order [*CCP § 513.010(a)*]. A court may issue a temporary restraining order ex parte if the plaintiff does all of the following [*CCP § 513.010(b)*]:

- Establishes the probable validity of his or her claim to possession of the property.
- Provides an undertaking [*CCP § 515.010* (requirements of undertaking)].
- Establishes the probability that there is an immediate danger that the property claimed may be transferred, concealed, removed, or substantially impaired in value, and thus, unavailable to levy.

Strategic Point--Prepare Pocket "TPO":

Counsel should bring an application for a temporary protective order to an ex parte hearing for a writ of possession/writ of attachment. Then, if the court is not inclined to issue the latter, counsel can use the TPO as a fallback strategy.

Cross Reference:

Form for ex parte application and supporting declaration for TRO and order to show cause, and supporting declaration regarding advance notification, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.31 If Preliminary Injunction Is Granted, Obtain Undertaking As Ordered by Court.

On granting a preliminary injunction, the court or judge must require a bond or undertaking from the applicant [*CCP § 529(a)*]. A preliminary injunction is not operative until an undertaking is furnished [*CCP § 515.010*]. The amount of the bond is based on the amount of damages the opposing party will probably sustain if the court subsequently determines that the applicant was not entitled to an injunction [*CCP § 529(a)*].

Timing:

The undertaking in the amount ordered by the court must be presented to the court with the proposed preliminary injunction order within one court day after the granting of the injunction, unless otherwise ordered by the court [*Cal Rules Ct, Rule 3.1150(f)*].

Strategic Point--Arrange for Undertaking in Advance:

Because of the importance of and timing for obtaining an undertaking, counsel should obtain financial information from the client and make arrangements from a bonding company for a bond in advance of seeking injunctive relief, subject only to the amount.

Cross Reference:

Form for order granting preliminary injunction, see *8.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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8.32 If Preliminary Injunction Is Denied, Appeal Decision or Proceed to Trial.

8.32[1] Decision to Deny Preliminary Injunction Is Immediately Appealable. The decision to deny a preliminary injunction is immediately appealable [*CCP § 904.1(a)(6)* (unlimited civil cases), *CCP § 904.2(g)* (limited civil cases)].

Cross Reference:

Discussion of appeal of denial of preliminary injunction, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.23*.

8.32[2] Parties May Proceed to Trial on the Merits. Instead of filing an appeal of the denial of a preliminary injunction, the applicant can proceed to a trial on the merits and seek a permanent injunction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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IV. OBTAINING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION TO PRESERVE PERSONAL PROPERTY DURING LITIGATION

1-8 MB Practice Guide: CA Debt Collection 8.33

8.33 Person Is Subject to Contempt for Refusing to Comply With Injunction.

A person may be charged with contempt for refusing to comply with a court's valid injunctive order [*see CCP § 1209(a)(5)*]. The four elements necessary to establish contempt are [*Conn v. Superior Court (1987) 196 CA3d 774, 784, 242 CR 148*]:

- The rendition of a valid order.
- Actual knowledge of the order.
- Ability to comply with the order.
- Willful disobedience of the order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsContemptCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureSanctionsContemptCivil Contempt

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
V. OBTAINING ATTACHMENT TO PLACE A LIEN ON PROPERTY PENDING JUDGMENT

1-8 MB Practice Guide: CA Debt Collection 8.34

8.34 CHECKLIST: Obtaining Attachment to Place a Lien on Property Pending Judgment.

☐ Determine whether claim meets statutory requirements for attachment:

- ○ Claim must be monetary and based on contract.
- ○ Claim must exceed $500 and be fixed or readily ascertainable.
- ○ Claim must be commercial.
- ○ Claim ordinarily cannot be secured by real property.

Authority:
CCP § 483.010

Discussion:
See *8.37*, *8.38*

☐ Determine amount to be secured by attachment.

Authority:
CCP §§ 483.015, *483.020*, *487.025*, *488.475(a)*

- ○ Determine what property may be attached.

Authority:
CCP § 487.010

- Determine what property is exempt.

Authority:
CCP § 487.020

☐ Determine whether to apply for turnover order along with writ.

Authority:
CCP § 482.080

Discussion:
See *8.36*

☐ Prepare application for a right to attach order (RTAO):

- Must be under oath.
- Include information required by statute to show that attachment is authorized.
- Include affidavits or declarations.

Authority:
CCP §§ 482.040, *484.020*, *484.030*

Form:
See *8.72*

☐ Prepare and file notice of application:

- Notice must inform defendant of all information required by statute.

Authority:
CCP §§ 484.050, *484.340*

Form:
See *8.73*

Timing:
Serve and file papers at least 16 court days before hearing; additional time if service is by mail or fax.

Authority:
CCP §§ 484.040, *1005(b)*

☐ Prepare for hearing on RTAO.

☐ Draft RTAO.

Authority:
CCP §§ 484.080, 484.090

Forms:
See *8.74*

Timing:
Serve defendant with notice of application and hearing, and a copy of the application at least 15 days before hearing.

Authority:
CCP § 484.330

☐ Consider seeking ex parte writ of attachment if delay would cause great and irreparable injury.

Authority:
CCP § 485.010(a)

Discussion:
See *8.42*

Form:
See *8.75*

☐ Obtain temporary protective order:

○ Prepare application.

Authority:
CCP § 486.010

Discussion:
See *8.44 -8.46*

Form:
See *8.72*

○ Prepare temporary protective order.

Authority:
CCP §§ 486.020, 486.040, 486.050

Form:
See *8.76*

☐ File undertaking, or apply to post cash in lieu of bond:

- Present to court for approval.
- Unless otherwise ordered, amount of undertaking must be $10,000.

Authority:
CCP §§ 486.020, *489.060*, *489.210*, *489.220*

Discussion:
See *8.49*

Form:
See *8.77*, *8.78*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachments

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
V. OBTAINING ATTACHMENT TO PLACE A LIEN ON PROPERTY PENDING JUDGMENT

1-8 MB Practice Guide: CA Debt Collection 8.35

8.35 Attachment to Place a Lien on Property Aids Collection of Money Demand Pending Judgment.

This remedy generally is available only in an action for money based on a contract [*CCP § 483.010*]. Attachment preserves assets pending a judgment by preventing defendant from dissipating, transferring, or absconding with assets that may be necessary to satisfy the judgment.

A lien on real property may be created by recording an appropriate writ of attachment and notice of levy in the office of the county recorder where the real property is located [*see CCP § 488.500*]. A lien on farm products or business inventory may be created by filing the writ of attachment with the secretary of state [*CCP § 488.405*]. An attachment may not be issued on a claim secured by an interest in real property unless the security has decreased in value to less than the amount owing on the claim [*see CCP § 483.010(b)*; *Doyka v. Superior Court (1991) 233 CA3d 1134, 1137, 285 CR 14*].

Consider:

Counsel may wish to engage a private process server to serve a levy on the sheriff's behalf. This enables counsel (albeit at a slightly higher cost) to control to date of the levy; for example, on the last day of the month when the debtor may have more funds in his bank account in order to make payroll or pay rent.

Strategic Point--A Powerful Tool:

Attachment is a powerful pre-judgment remedy. Nothing hurts more than an involuntary lien on one's home, and the non-debtor spouse may put pressure on the debtor spouse to try and get the lien removed by settling.

Strategic Point--Use Attachment Against Guarantors:

If the primary loan is secured but the personal guaranty is not, counsel can and should seek the issuance of a writ of attachment on the unsecured guaranty [*American Guaranty Corporation of California v. Stoody (1964) 230 CA2d 390, 392-393, 41 CR 69*]. Counsel should look for a waiver of *CC § 2845* because unless the guaranty contains a waiver of the obligation of the lender to pursue the collateral first, the guarantor can defend on this ground.

Strategic Point--Lien Converts Unsecured Claim to Secured Claim:

One advantage to obtaining a writ of attachment is that it will result in a lien against the defendant's assets, thereby converting an unsecured claim to a secured claim. This may prove beneficial if defendant files for bankruptcy, and if at least 90 days have passed from the date that the attachment lien is created [*see* Ch. 12, Determining Priority and Sources of Liens]. Creating an attachment lien on real property or personal property, rather than levying on accounts or taking other more disruptive actions, may minimize the possibility of a bankruptcy filing, allowing the attachment lien to "season."

Warning:

Attachment can be time-consuming and expensive, and may not be worthwhile if the lien is for something other than real property. Consider whether the amount of defendant's non-exempt assets in light of the amount in controversy and likelihood of success justifies proceeding with a writ of attachment.

Cross References:

Discussion of effect of bankruptcy, see Ch. 3, Effect of Bankruptcy.

Detailed discussion for priority of liens, see Ch. 12, Determining Priority and Source of Liens.

Detailed discussion of preparing, serving, and filing an application for attachment, along with forms, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 19, Attachment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawTypes of ContractsGuaranty Contracts

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8.36 Plaintiff Must Allege Required Elements of Attachment Claim.

With limited exceptions, a court may issue an attachment if the plaintiff's claim meets the following requirements [*see CCP § 483.010(a)-(c)*]:

- The claim is a claim for money that is based on an express or implied contract.
- The claim is of a fixed or readily ascertainable amount of not less than $500.
- The claim is a commercial claim.
- The claim is not secured by real property.

Exception:

Even if the underlying debt is secured by real property, an attachment may be obtained against a guarantor where the guaranty is not secured by real property [*United Central Bank v. Superior Court (2009) 179 CA4th 212, 101 CR3d 395]* .

Several Judicial Council forms are included in this chapter:

- Judicial Council Form AT-105 should be used to apply for right to attach order and order for writ of attachment [*see 8.72*].
- Judicial Council Form AT-115 should be used to give notice of application and hearing for right to attach order and writ of attachment [*see 8.73*].
- Judicial Council Form AT-120 should be used for a right to attach order after hearing, and order for writ of attachment [*see 8.74*].
- Judicial Council Form AT-135 should be used for a writ of attachment [*see 8.79*].

Use of the preceding forms is optional, but in practice their use is standard.

Strategic Point--Apply for TPO:

Plaintiff also may seek a temporary protective order at the time of applying for a right to attach order [*see 8.45*].

Strategic Point--Apply for "Turnover" Order:

When applying for a writ of attachment, plaintiff may apply for a turnover order directing defendant to transfer to they levying officer (1) property, and/or (2) proof of title to the property or debt [CCP § 483.080].

Strategic Point--Show That Debtor Engaged in Business:

One of the elements plaintiff can show to obtain a writ of attachment is that the guarantor is or was actively involved in the business [*see CCP § 483.010(a)-(c)*; *Advance Transformer v. Superior Court (1974) 44 CA3d 127, 144, 118 CR 350*]. Among other considerations that are weighed under the *Advance Transformer* analysis to determine whether the requirements of *[CCP § 483.010]* are met, counsel should plan to show the following:

- The income derives from the business;
- The guarantors are there regularly;
- The guarantors signed all of the loan documents as corporate officers or directors; and
- They own the majority of the stock.

Strategic Point--Include Fees and Costs in Application:

Counsel should add the estimated amount of fees and costs to the amount counsel seeks to attach, as these are included in a potential judgment and the point of attachment is to secure the amount necessary to satisfy a potential judgment [*CCP § 483.015* (amount of attachment); *see CCP § 482.110* (attorney's fees allowable in application for writ of attachment)]. The defendant has the burden of arguing whether the amount of fees is appropriate.

Strategic Point--Apply for Several Attachments When Levying on Real Property:

If levying on real property, counsel should seek as many attachments as possible and wait for the defendant to raise the issue of potential over-attachment. The burden is on the defense to show that plaintiff is adequately secured with fewer parcels; it is not the plaintiff's burden to show that it needs more than one parcel to cover the amount sought in the action.

Cross References:

Discussion of temporary protective order, see *8.45*.

Judicial Council Form AT-105 for application for right to attach order and order for writ of attachment, see *8.72*.

Judicial Council Form AT-115 for notice of application and hearing for right to attach order and writ of attachment, see *8.73*.

Judicial Council Form AT-120 for right to attach order after hearing, and order for writ of attachment, see *8.74*.

Judicial Council Form AT-135 for a writ of attachment, see *8.79*.

Detailed discussion of when attachment is available, see *California Forms of Pleading and Practice, § 62.11* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.37 Attachment Generally Not Available on Tort Claims.

Attachments generally are unavailable on tort claims due to their unascertainable amounts and because attachment is available only on claims based on an express or implied contract [*CCP § 483.010(a)*].

Unless a tort claim is characterized as a claim of implied contract or quasi-contract, attachment is not available due to the necessity of satisfying the contract element [*Arcturus Mfg. Corp. v. Rork (1961) 198 CA2d 208, 213, 17 CR 758*].

Strategic Point--Implied or Quasi Contracts:

An "implied contract" includes contracts implied by law, such as fraud, conversion, and secret profit of agent [*Klein v. Benaron (1967) 247 CA2d 607, 609, 56 CR 5*]. Thus, a writ of attachment is available on a claim for fraudulent conveyance [*Arcturus Mfg. Corp. v. Rork (1961) 198 CA2d 208, 213-214, 17 CR 758*]. A money judgment is "contractual" or "quasi-contractual" whether rendered on a tort or contract claim [*see Korea Water Resources Corp. v. Lee (2004) 115 CA4th 389, 401 n.11, 8 CR3d 853*]. A contract also includes leases of real or personal property [*CIT Group/Equipment Financing, Inc. v. Super DVD, Inc. (2004) 115 CA4th 537, 540, 8 CR3d 927*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.38 Determine Whether Property Is Subject to Attachment.

8.38[1] Corporate, Partnership, or Association Property Is Subject to Attachment. If the defendant is a corporation, partnership, or other unincorporated association, all corporate, partnership, or association property that may be levied upon [*see CCP § 488.300 et seq.*] is subject to attachment [*CCP § 487.010(a), (b)*].

8.38[2] Property of Natural Person Is Subject to Attachment. If the defendant is a natural person, all of the following property is subject to attachment [*CCP § 487.010(c)*]:

- Interests in real property, except leasehold estates with unexpired terms of less than one year.
- Accounts receivable, chattel papers, and general intangibles arising out of the conduct by the defendant of a trade, business, or profession, except any such individual claim with a principal balance of less than $150.
- Equipment.
- Farm products.
- Inventory.
- Final money judgments arising out of the conduct by the defendant of a trade, business, or profession.
- Money on the premises where a trade, business, or profession is conducted by the defendant.
- Except for the first $1,000, money located elsewhere than on the premises where the defendant conducts a trade, business, or profession, and deposit accounts, unless the defendant has more than one deposit account or has at least one deposit account and money located elsewhere. In the latter case, the court, on application of the plaintiff, may order that the writ of attachment be levied so that an aggregate amount of $1,000 in those accounts remains free of levy.
- Negotiable documents of title.

- Instruments.
- Securities.
- Minerals or the like, including oil and gas, to be extracted.

8.38[3] Community Property Is Subject to Attachment. Community property that otherwise qualifies under the criteria above is subject to attachment, if it would be subject to enforcement of a judgment obtained in the action in which the attachment is sought [*CCP § 487.010(d)*]. In general, when community property is sought to be attached, any provision of the Attachment Law that applies to property of the defendant also applies to the community property interest of the spouse of the defendant and to community obligations owed to either spouse [*CCP § 487.010(d)(1)*]. Similarly, any provision that applies to property in the possession or under the control of the defendant also applies to community property in the possession or under the control of the spouse of the defendant. These rules do not apply when a provision or the context requires otherwise [*CCP § 487.010(d)(1), (2)*].

Strategic Point--Naming the Non-Obligated Spouse:

Some practitioners name the non-obligated spouse as a defendant for the purpose of attaching community property, but some courts discourage this practice. The argument for naming the spouse is clear when the property is held in the name of the non-obligated spouse alone because an attachment lien might not show up or be levied on assets held in the name of a non-party. If, however, the attachment goes to the interest of one spouse when the property is held jointly, then the argument for naming the non-signing spouse is less viable.

8.38[4] Homestead Property Is Subject to Attachment. Recording a homestead declaration has no effect on the right to record an attachment lien, regardless of when the homestead was recorded [*CCP § 487.025(a)*]. An attachment lien attaches to a homestead in the amount of any surplus over the total of all liens and encumbrances on the homestead at the time the attachment lien is created, plus the statutory homestead exemption [*CCP § 487.025(b)*; *see CCP § 704.730*]. Nonetheless, a homestead is exempt from sale (except pursuant to a court order) [*see CCP § 704.740*] to the extent provided by the homestead exemption [*see CCP § 704.710 et seq.*; *see generally* Ch. 17, Executing and Levying on Real Property] when it is sought to be sold to enforce the judgment obtained in the action in which the attachment is obtained [*CCP § 487.025(d)*]. In addition, the defendant may protect a homestead by claiming an exemption for necessities [*CCP § 487.025(c)*; *see CCP § 487.020(b)*].

Cross Reference:

Detailed discussion of the homestead exemption and related forms, see *Ch. 17, Executing and Levying Against Real Property, 17.40 -17.49*.

8.38[5] Certain Property Subject to Pending Action or Special Proceeding Is Subject to Attachment. The following property may be attached even if it is subject to a pending action or special proceeding [*CCP § 488.475(a)*; *see CCP § 488.300 et seq.*]:

- Real property.
- Growing crops, timber to be cut, or minerals or the like, including oil and gas, to be extracted or accounts receivable resulting from sales at the wellhead or minehead.
- Tangible personal property in the possession or control of the defendant or in the custody of a levying officer.

- The interest of a defendant in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession.

Except as to those types of property set forth above, an attachment of property subject to a pending action or special proceeding is not effective [*CCP § 488.475(b)*].

Strategic Point:

An action or proceeding is "pending" from the time the action or proceeding is commenced until judgment has been entered and the time for appeal has expired or, if an appeal is filed, until the appeal has been finally determined [*CCP § 488.475(d)*].

If an attachment is attempted but is ineffective, a statement to that effect and the title of the court in which the action is pending and the number of the pending action or proceeding must be given in any garnishee's memorandum requested by the levying officer [*see CCP § 488.610*]. However, if the defendant is a party in the pending action or proceeding, the plaintiff nonetheless may obtain a lien to secure the amount to be secured by attachment [*CCP § 488.475(e)*; *see CCP § 491.410 et seq*.].

8.38[6] Nonresident's Property Is Subject to Attachment. A nonresident's property subject to attachment is defined as any property for which a method of levy is provided under the Attachment Law [*CCP § 492.040*; *see CCP § 488.300 et seq*.]. The definition expressly excludes reference to the provisions defining property subject to attachment and exempt property with respect to defendants generally [*CCP § 492.040*; *see CCP §§ 487.010*, *487.020*].

Once the nonresident defendant has filed a general appearance in the action, only the nonresident defendant's nonexempt property may be levied on [*CCP § 492.040*]. Any property previously levied on which is exempt under *CCP § 487.020* must be released on order of the court [*CCP § 492.040*].

Cross Reference:

Levying officer levies on writ of attachment, see *§ 8.49*.

8.38[7] Specified Property Is Exempt From Attachment. Except for certain fraudulent transfers [*see CC § 3439.07(a)(2)*], the following property is exempt from attachment [*CCP § 487.020*]:

- All property exempt from enforcement of a money judgment [*see CCP § 704.010 et seq*.].

- Property that is necessary for the support of a defendant who is a natural person or the defendant's family supported in whole or in part by the defendant [*CCP § 487.020(b)*].

- "Earnings" defined as compensation payable by an employer to an employee for personal services performed by the employee, whether denominated as wages, salary, commission, bonus, or otherwise [*see CCP § 706.011(a)*].

- All property not subject to attachment pursuant to *CCP § 487.010*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsProperty

RightsCharacterizationCommunity Property

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
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8.39 Defendant May Claim Property Exemption.

Any time prior to the entry of judgment, the defendant may claim a property exemption [*see CCP § 487.020(a)*] for real property by following the procedures for exemptions after levy [*CCP § 487.030(a)*; *see CCP § 703.510 et seq.*].

In addition, a homestead exemption for real property may be claimed after judgment [*see CCP § 704.710 et seq.*] unless, prior to entry of judgment, the defendant claimed that the property was exempt from enforcement of a money judgment and the claim was denied [*CCP § 487.030(d)*].

Strategic Point--Defendant Can Raise Issue of Over-Attachment:

It is not up to the plaintiff to show the value of the property attached, but the defendant can raise the issue of over-attachment as a defense to the attachment lien and argue that the value of the property attached exceeds the amount sought in the action.

Cross References:

Discussion of homestead exemption, see *Ch. 17, Executing and Levying Against Real Property, 17.40 -17.49*.

Discussion of methods by which defendant can oppose attachment, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.14 -19.22*.

Detailed discussion of claiming exemption after levy on real or personal is made, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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8.40 Plaintiff May Oppose Claim of Exemption.

If the plaintiff wishes to oppose the claim of exemption, he or she must file and serve on the defendant, not less than two calendar days before the date set for the hearing, a notice of opposition, accompanied by an affidavit (or declaration under *CCP § 2015.5*) supporting any factual issues and points and authorities supporting any legal issues raised [*CCP § 484.070(f)*].

If the plaintiff files and serves a proper notice of opposition to the claim, the defendant has the burden of proving that the property is exempt from attachment [*CCP § 484.070(g)*].

If the plaintiff does not file and serve a notice of opposition [*CCP § 484.070(f)*]:

- No writ of attachment may be issued as to the property claimed to be exempt.

- If all of the property described in the plaintiff's application is claimed to be exempt, no hearing may be held, no right to attach order ("RTAO") or writ of attachment may be issued, and any temporary protective orders immediately expire [*see CCP § 486.010 et seq.*].

Timing:

Plaintiff's opposition to defendant claim of exemption must be filed and served not less than two days before the hearing [*CCP § 484.070(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.41 Court's Determinations Have No Effect on Trial.

No determinations made by the court in a noticed hearing procedure [*see CCP § 484.010 et seq.*] may be considered in determining any issues in the principal action other than issues relevant to proceedings in the noticed hearing, nor may they be used to affect the rights of the plaintiff or defendant in any other action arising out of the same claim of the plaintiff or defendant [*CCP § 484.100*]. The court's determination in the noticed hearing must not be given in evidence or referred to at the trial of any such action [*CCP § 484.100*].

Neither the defendant's failure to oppose the issuance of an RTAO under the noticed hearing provisions nor the defendant's failure to rebut any evidence produced by the plaintiff in connection with proceedings under those sections may constitute a waiver of any defense to plaintiff's claim in the principal action or any other action, or have any effect on the defendant's right to produce or exclude evidence at the trial of any such action [*CCP § 484.110(a)*].

Similarly, neither the plaintiff's failure to oppose the issuance of an order reducing the amount to be secured by the attachment under the noticed hearing provisions nor the plaintiff's failure to rebut any evidence produced by the defendant in connection with proceedings under those sections constitute a waiver of any defense to the defendant's claim in the action or any other action, or have any effect on the plaintiff's right to produce or exclude evidence at the trial of any such action [*CCP § 484.110(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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8.42 Court May Issue Writ of Attachment Ex Parte If Great or Irreparable Injury Would Otherwise Occur.

Except as otherwise provided by statute, no right to attach order or writ of attachment may be issued ex parte unless the plaintiff shows facts by affidavit (or declaration under *CCP § 2015.5*) that he or she would suffer great or irreparable injury if the order were delayed until the matter could be heard on notice [*CCP § 485.010(a)*].

However, some statutes expressly permit an ex parte attachment without such a showing [*see, e.g.*, *CCP § 492.010 et seq.*; *H&N Code § 495.1*; *H&S Code § 11501*; R&T Code §§ 6713, 8972, 11473, 12680, 19373, 30302, 32352].

Judicial Council Form AT-125 should be used for an ex parte right to attach order and order for issuance of writ of attachment. This form is approved for optional use, but its use is standard.

Examples--Great or Irreparable Injury:

- Danger that property may become unavailable constitutes great or irreparable injury. The requirement of great or irreparable injury is satisfied if the plaintiff shows that under the circumstances of the case, it may be inferred that there is a danger that the property sought to be attached would be concealed, substantially impaired in value, or otherwise made unavailable to levy if the order were delayed until the matter could be heard on notice [*CCP § 485.010(b)(1)*].

- Defendant's failure to pay debts constitutes great or irreparable injury. The requirement of great or irreparable injury is satisfied if the plaintiff shows that, under the circumstances of the case, it may be inferred that the defendant has failed to pay the debt underlying the requested attachment, and the defendant is insolvent in the sense that the defendant generally is not paying his or her debts as those debts become due, unless the debts are subject to a bona fide dispute [*CCP § 485.010(b)(2)*].

  If the plaintiff bases the writ solely on this ground, the defendant may request a review and the court must conduct a hearing within five court days after the plaintiff is served with notice of the defendant's request [*CCP § 485.010(c)*].

- Recording of bulk sales notice constitutes great or irreparable injury. The requirement of great or irreparable injury is satisfied if the plaintiff shows that a bulk sales notice has been recorded and published with respect to a bulk transfer by the defendant [*CCP § 485.010(b)(3)*; *see Com Code § 6101*

et seq.]. Two limitations are provided for writs issued under this provision [*CCP § 485.010(c)*; *see CCP § 485.010(b)(3)*]:

- The only property affected is property covered by the bulk sales notice or the proceeds of the sale of the property.

- In addition to any other service required by the Attachment Law, the writ must be served by the levying officer or the transferee or auctioneer identified by the bulk sales notice, not more than five calendar days after the levy of the writ.

Strategic Point--Prepare TPO If Court Denies Ex Parte Application:

Courts generally are reluctant to grant attachments ex parte. Counsel should stress in the ex parte application the need for the ex parte nature, as opposed to having the court hear argument on a noticed motion.

Strategic Point:

The right to prejudgment discovery provides not only the means to discover assets upon which to levy the writ of attachment, but exerts tremendous settlement pressure on the debtor. In any reasonably sized case, application for an RTAO should be strongly considered. Although the RTAO process involves an investment of time and effort, not only are the rewards potentially considerable, but the time and effort of further litigation may be curtailed or eliminated.

Strategic Point:

Counsel should apply for a TPO as well as a RTAO because many courts are reluctant to issue a RTAO.

Cross References:

Judicial Council Form AT-125 for ex parte right to attach order and order for issuance of writ of attachment, see *8.75*.

Obtaining a temporary protective order, see *8.44*.

Detailed discussion of procedure for obtaining a temporary protective order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.43 Plaintiff May Conduct Discovery Concerning Defendant's Property.

If the court issues a right to attach order ("RTAO"), a plaintiff may discover, through any means provided for by and subject to the protections included in the Civil Discovery Act [*CCP § 2016.010 et seq.*], the identity, location, and value of property in which the defendant has an interest [*CCP § 485.230*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.44 Temporary Protective Order Binds Defendant Only.

Plaintiff may apply for a temporary protective order ("TPO") at the time of applying for a right to attach order [*CCP § 486.010(a)*]. In general, a temporary protective order binds only the defendant whether or not any other person knows of or is served with a copy of it [*CCP § 486.070*]. However, the lien created by a temporary protective order continues after transfer or encumbrance of the property, except for the transfer or encumbrance of personal property to certain persons [*see CCP § 486.110*].

Judicial Council Form AT-140 may be used for a temporary protective order. This form is approved for optional use, but its use is standard.

Strategic Point:

If the court is inclined to only issue a TPO/TRO, counsel should have language added that prevents not only potential transfers of title, but any hypothecation or financing that erodes the existing equity.

Strategic Point:

A TPO should be sought if the application for an ex parte right to attach order is denied [*see 8.42*].

Cross References:

Judicial Council Form AT-140 for temporary protective order, see *8.76*.

Procedure and drafting guidelines for temporary protective order, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining Orders

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8.45 Service of Temporary Protective Order Creates Lien.

Service of a temporary protective order on the defendant creates a lien on any property, or its proceeds, that is described in the order, owned by the defendant at the time of the service, and subject to attachment [*CCP § 486.110(a)*]. The lien continues in spite of the transfer or encumbrance of the property subject to the lien, except when the transfer or encumbrance is made to certain persons, such as a buyer in the ordinary course of business, or a holder in due course of a negotiable instrument [*CCP § 486.110(a)*; *see CCP § 697.740*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral OverviewContracts LawNegotiable InstrumentsTransfers

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8.46 Lien Terminates When Temporary Protective Order Expires.

The lien terminates when the temporary protective order expires, except with respect to property levied on under a writ of attachment while the temporary protective order is in effect [*CCP § 486.110(b)*]. Liens created by a temporary protective order or attachment within 90 days of filing of a bankruptcy petition or an assignment for the benefit of creditors are automatically terminated [*CCP § 493.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.47 Plaintiff May Attach Nonresident Property.

A court may issue an attachment in any action for the recovery of money brought against any of the following [*CCP § 492.010*]:

- A natural person who does not reside in California.
- A foreign corporation not qualified to do business in California [*see Corp Code § 2101 et seq*.].
- A foreign partnership that has not filed a designation of agent [*see Corp Code § 15700*].

Attachment against nonresidents is broader in scope than that permitted by the general attachment provisions, which limit attachment to actions "on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars..." [*see CCP § 483.010(a)*]. This means that a resident's property that would be exempt from attachment is attachable in the case of a nonresident until such time as the nonresident has filed a general appearance.

Cross Reference:

Detailed discussion of procedure for applying for attachment against nonresidents, see *California Forms of Pleading and Practice, § 62.36* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.48 Undertaking Required Before Writ, Temporary Protective Order, or Lien Order Issued.

8.48[1] Plaintiff Must File Undertaking. Before a writ of attachment, temporary protective order, or order permitting creation of a lien pursuant to *CCP § 491.415(b)* is issued, the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for wrongful attachment [*CCP § 489.210*].

Unless the surety on the undertaking is an admitted surety insurer [*see CCP § 995.120*], all undertakings must be presented to a proper court for approval. On approval by the court, the undertaking must be filed with the court in which the action is pending [*CCP § 489.060(a), (b)*].

Judicial Council Form AT-160/CD-140 must be used for undertaking by personal sureties. Use of this form is mandatory.

Strategic Point:

With prior court permission and an application, cash or a cashier's check may be posted in lieu of a bond.

Cross References:

Judicial Council Form AT-160/CD-140 for undertaking by personal sureties, see *8.77*

Application to post cash in lieu of bond, see *8.78*.

8.48[2] Statute Requires $10,000 Undertaking. Unless otherwise ordered, the amount of an undertaking is $10,000 [*CCP § 489.220(a)*]. If, on objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds that amount, it must order the amount of the undertaking increased to the amount it determines to be the probable recovery [*CCP § 489.220(b)*].

8.48[3] Defendant May Furnish Undertaking on Appeal of RTAO. A defendant may appeal from an order granting an RTAO [*CCP § 904.1(a)(5)* (appeal other than in limited civil case), *CCP § 904.2(f)* (appeal in limited civil case)]. A defendant is not required to post a bond or furnish an undertaking in this regard. However, to secure a release of the property attached, the appealing defendant must furnish an undertaking in accordance with *CCP § 489.310*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.49 Levying Officer Levies on Writ of Attachment.

8.49[1] Writ Must Be Directed to Levying Officer. A writ of attachment must be directed to a levying officer in the county in which property of the defendant described in the writ may be located, and to any registered process server [*CCP § 488.020(a)*].

8.49[2] Levying Officer Is Sheriff or Marshal in County Where Property Is Located. A "levying officer" is a sheriff, or marshal who is directed to execute a writ or order under the Attachment Law [*CCP § 481.140*]. The levying officer must be located in the county in which the defendant's property is located [*Pacific Decision Scis. Corp. v. Superior Court (2004) 121 CA4th 1100, 1108-1109, 18 CR3d 104*].

8.49[3] Levy Must Be Made Without Delay in Manner Specified in Attachment Law and Written Instructions. On receipt of the written instructions, the levying officer must levy the writ without delay. The levy must be carried out in the manner provided in the Attachment Law [*see CCP § 488.010 et seq.*] on the property described in the writ or as much of the property clearly needed to satisfy the amount to be secured by the attachment. The levying officer is not liable for this determination if made in good faith [*CCP § 488.020(b)*].

In general, the levying officer must act in accordance with the written instructions to the extent the actions are taken in conformance with the Attachment Law [*CCP § 488.030(b)*]. Thus, the levying officer may rely on any information contained in the written instructions, except to the extent that he or she has actual knowledge that the information is incorrect [*CCP § 488.030(c)*].

Cross Reference:

Detailed discussion of levy procedures, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.23 -19.31.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.50 Levy Creates Attachment Lien.

8.50[1] Lien Exists Until Attachment Expires. A levy on property under a writ of attachment creates an attachment lien on the property from the time of the levy until the attachment expires [*CCP § 488.500(a)*; *see CCP § 488.510*].

8.50[2] Lien Priority May Relate Back. The priority of an attachment lien may date back to the time an earlier lien was perfected [*CCP § 488.500(e)*]. This is true for property that is subject to the lien of a temporary protective order or a lien created under provisions setting forth a plaintiff's miscellaneous remedies, including the examination of third persons, a creditor suit, and a lien in a pending action or proceeding [*see CCP § 491.110 et seq.*]. However, the priorities or rights of third persons established while the earlier lien was in effect are determined by the law governing the effect of the earlier lien [*CCP § 488.500(e)*].

Cross Reference:

Detailed discussion and related forms for determining priority of liens, see Ch. 12, Determining Priority and Sources of Liens.

8.50[3] Statute Controls Duration of Attachment Lien.

8.50[3][a] Attachment Lien May Last for Basic Three-Year Period. Unless released or discharged sooner, an attachment ceases to be of any force or effect, and the property levied on must be released, no later than three years from the date the writ of attachment is issued [*CCP § 488.510(a)*].

8.50[3][b] Court May Grant One-Year Extensions. The court in which the action is pending may order a one-year extension of the time of an attachment [*CCP § 488.510(b)*].

The levying officer must serve notice of an extension order on any person holding property pursuant to an attachment and must record or file the notice in any office where the writ and notice of attachment are recorded or filed [*CCP § 488.510(c)*]. When real property is subject to an extension order, the plaintiff or his or her attorney, instead of the levying officer, may record or file the notice [*CCP § 488.510(c)*]. The notice must be recorded or filed prior to the expiration of the three-year period or any extension [*CCP § 488.510(c)*]. A copy of the original notice of attachment that has been served on a third party holding the property sought to be attached, if served on the defendant or any other party, suffices as the notice of attachment to that person [*CCP § 488.065*].

Timing:

Plaintiff must present a motion showing good cause for the extension not less than 10 nor more than 60 days before the three-year time limit expires [*see CCP § 488.510(b)*]. Plaintiff must give the defendant at least five days' notice of the motion [*CCP § 488.510(b)*].

8.50[3][c] Attachment Lien May Have Eight-Year Maximum Period. An attachment may be extended from time to time for one-year periods, but the maximum period, including extensions, may not exceed eight years from the date the writ of attachment was issued [*CCP § 488.510(d)*].

Strategic Point:

According to the California Law Revision Commission, the one-year extensions under *CCP § 488.510(b)* may not exceed a total of five years because the duration of the attachment lien is three years [*CCP § 488.510(a)*]. Subject to this limitation, the plaintiff may preserve the effect of the attachment after entry of judgment by levy of execution on the attached property. In this way, the plaintiff may obtain an execution lien that has the same priority as the attachment lien [15 Cal L Rev Comm'n Reports 1335-1336 (1979)].

If the attached property is real property, the plaintiff may preserve the priority of the attachment lien after entry of judgment by recording an abstract of judgment. The plaintiff will then have a judgment lien that has the same priority as the prior attachment lien [15 Cal L Rev Comm'n Reports 1335-1336 (1979)].

8.50[3][d] Defendant's Death Does Not Terminate Attachment Lien. The death of the defendant whose property is attached does not terminate the attachment [*CCP § 488.510(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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8.51 Court May Make Orders to Preserve Value of Attached Property.

If property has been, or is sought to be, attached, the court may appoint a receiver or order the levying officer to take any action necessary to preserve the value of the property [*CCP § 488.700(a)*]. For example, the court may order the sale of the property if it determines that the property is perishable or will greatly depreciate in value or that for some other reason the interests of the parties will be best served by the order [*CCP § 488.700(a)*].

The plaintiff, defendant, or a person who has filed a third-party claim [*see CCP § 720.010 et seq.*] may apply for such an order. The application may be made ex parte. However, the court, or a local court rule, may require the application to be made on noticed motion [*CCP § 488.700(a)*].

Cross Reference:

Discussion of appointment of receiver, see *8.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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1-8 MB Practice Guide: CA Debt Collection 8.52

8.52 Plaintiff May Obtain Lien on Defendant's Pending Causes of Action or Rights Under Judgment.

If the defendant is a party to a pending action or special proceeding, the plaintiff may obtain an attachment lien on both of the following [*CCP § 491.410(a)*]:

- Any cause of action of the defendant for money or property if the money or property would be subject to attachment should the defendant prevail.

- The rights of the defendant to money or property under any judgment subsequently obtained in the action or proceeding if the money or property would be subject to attachment.

An action or special proceeding is "pending" until the time for appeal from the judgment has expired, or, if an appeal is filed, until the appeal has finally been determined [*CCP § 491.410(d)*].

Cross Reference:

Detailed discussion of procedure for obtaining lien on pending actions or rights under judgment, and related form, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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1-8 MB Practice Guide: CA Debt Collection 8.53

8.53 Plaintiff Is Liable For Wrongful Attachment.

Causing a wrongful attachment subjects plaintiff to liability for damages as well as costs and expenses, including attorney's fees [*CCP § 490.020(a)*]. Liability is limited by the amount of the undertaking [*CCP § 490.020(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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VI. OBTAINING APPOINTMENT OF RECEIVER

1-8 MB Practice Guide: CA Debt Collection 8.54

8.54 CHECKLIST: Obtaining Appointment of Receiver.

☐ Determine if receivership is available.

○ Is nature of action or proceeding one in which a receiver might be appointed?

○ If so, do grounds for appointment exist?

Discussion:
See *8.60*

○ Do alternative remedies exist that would be less drastic than receivership?

Discussion:
See *8.59*

○ Is receiver being sought during litigation, or after judgment?

Discussion:
See *8.56*, *8.57*

☐ Consider cost of receivership, which at a minimum would include receiver's fee and cost of receiver's bond or undertaking.

Authority:
CCP § 567(b)

Discussion:
See *8.55*

☐ Determine whether to proceed by noticed motion or ex parte.

○ Do facts exist which establish emergency that would necessitate immediate appointment on ex parte application and order to show cause why appointment should not be confirmed?

○ Weigh additional costs involved against amount in controversy and what might be lost by delaying appointment until after hearing.

○ Additional costs would include, at a minimum, cost of undertaking that applicant would be required to post.

Authority:
CCP §§ 564-566

Discussion:
See *8.61*, *8.62*

☐ If seeking to obtain appointment of receiver by noticed motion:

○ Prepare and file:

☐ Moving papers.

☐ Supporting affidavit or declaration.

☐ Supporting memorandum.

Authority:
CCP § 2009; *Cal Rules Ct, Rule 3.1177*

Discussion:
See *8.61*

Form:
See *8.81*

○ Nominate a person to serve as receiver, if desired.

Authority:
Cal Rules Ct, Rule 3.1177

○ Attend hearing on the motion.

○ Draft order appointing receiver and fixing amount of receiver's undertaking.

○ Present original and copies of orders to judge who granted motion, or to judge's courtroom clerk to present to judge for signature.

Discussion:
See *8.61*

Form:
See *8.82*

○ Prepare and file receiver's oath and undertaking.

Authority:
CCP § 567; *Cal Rules Ct, Rule 3.1178*

Discussion:
See *8.61*

Forms:
See *8.80 -8.83*

☐ If seeking to obtain ex parte appointment of receiver, determine whether to begin by filing application for appointment of receiver, or by filing application for order to show cause and temporary restraining order.

Authority:
Cal Rules Ct, Rules 3.1200-3.1207, 3.1175

Discussion:
See *8.62*

Forms:
See *8.81*, *8.83*

☐ If proceeding by application, prepare and file:

- ○ Ex parte application for appointment of receiver.
- ○ Supporting declaration.
- ○ Memorandum showing that appointment of receiver is authorized and should be confirmed.
- ○ Affidavit or declaration of notification or excuse from notification.
- ○ Draft order fixing amount of applicant's undertaking.

Authority:
CCP §§ 564, *566*; *Cal Rules Ct, Rules 3.1201*, *3.1176(b)*

Discussion:
See *8.62*

Forms:
See *8.80*, *8.81*, *8.83*

○ Notify adverse party when and where application will be presented, unless excused from doing so.

Authority:
Cal Rules Ct, Rule 3.1204

Discussion:
See *8.62[2]*

○ If orders are signed, notify receiver that appointment has been made.

○ Draft receiver's undertaking.

○ Draft receiver's oath and have receiver take oath before a person authorized to administer oaths.

○ Present oath, applicant's undertaking or bond, and receiver's undertaking or bond, with proof of service attached, to court clerk for filing.

Authority:
CCP §§ 567, *2093* (authorized persons)

Discussion:
See *8.62[2]*

○ Serve copy of order appointing receiver and order to show cause regarding confirmation of ex parte appointment of receiver on adverse party.

○ Prepare and file proof of service.

○ Attend hearing on order to show cause.

○ Draft order confirming appointment of receiver or discharging receiver and prepare same number of copies and for same distribution as order appointing receiver.

Authority:
Cal Rules Ct, Rule 3.1176(a)

Discussion:
See *8.62[3][a]*

Form:
See *8.84*

☐ If proceeding by seeking ex parte order to show cause and temporary restraining order, prepare and file:

○ Ex parte application for order to show cause why a receiver should not be appointed and temporary restraining order.

○ Affidavits or declarations presenting facts showing grounds for appointment that are not contained in ex parte application or verified complaint.

○ Memorandum.

○ Draft orders.

Authority:
Cal Rules Ct, Rules 3.1201, *3.1175*; *CCP § 527(d)*

Discussion:
See *8.62[3][b]*

Forms:
See *8.83*

○ Obtain judge's signature on order to show cause.

○ Notify adverse party of date, time and place of hearing, unless excused from doing so.

Authority:
Cal Rules Ct, Rules 3.1150(a), *3.1204*

Discussion:
See *8.62[3][b]*

○ Attend hearing.

○ If court appoints receiver, notify receiver that appointment has been made.

○ Draft receiver's oath and have receiver take oath before a person authorized to administer oaths.

○ Draft receiver's undertaking.

○ Present oath, applicant's undertaking or bond, and receiver's undertaking or bond, with proof of service attached, to court clerk for filing.

Authority:
CCP §§ 567(a), *2093* (authorized persons)

Discussion:
See *8.62[2][d]*

○ Serve copy of order appointing receiver and order to show cause regarding confirmation of ex parte appointment of receiver on adverse party.

○ Prepare and file proof of service.

○ Attend hearing on order to show cause.

○ Draft order confirming appointment of receiver or discharging receiver and prepare same number of copies and for same distribution as order appointing receiver.

Authority:
Cal Rules Ct, Rule 3.1176(a)

Discussion:
See *8.62[3][a]*

Form:
See *8.84*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionPartiesCivil ProcedureRemediesReceivershipsJurisdictionPropertyCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

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8.55 Request Appointment of Receiver When Other Remedies Are Inadequate.

Receivership is a provisional remedy authorized by statute [*see CCP §§ 564-570*]. The appointment of a receiver is in aid of the action brought [*Marsch v. Williams (1994) 23 CA4th 238, 248, 28 CR2d 402*]. Because it is a remedy incidental to the main objects of the complaint, there is no such thing as an action brought for the mere appointment of a receiver [*Starbird v. Lane (1962) 203 CA2d 247, 261, 21 CR 280*]. Receivership is not a substitute for attachment and may not be resorted to for the reason that an attachment would be more expensive [*United States Overseas Airlines v. County of Alameda (1965) 235 CA2d 348, 353, 45 CR 337*].

Strategic Point:

Counsel should look through loan documents for a consent to the appointment of a receiver. This generally is standard in a deed of trust in California and is an additional ground for the appointment of receiver.

Strategic Point--When to Use Receivers:

Receivers are best employed in operating an ongoing business, or in completing an ongoing project, such as a construction job. A receiver also may be appropriate to enforce an assignment of rents provision on a deed of trust. Such a "rents and profits" receivership is typically more easily appointed, since there is little disruption of the debtor's business and there is no dispute that the rents are the creditor's collateral.

Warning:

Receiverships are very expensive and cost more than anticipated. Counsel should consider whether the value of the asset sought to be preserved is high enough to justify the expense.

Cross Reference:

Detailed discussion of preparing, serving, and filing an application for appointment of a receiver, along with forms, see California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

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8.56 Court May Appoint Receiver Pendente Lite During Course of Litigation.

A receiver pendente lite is a person appointed by the court to take the charge and management of property that is the subject of the litigation before the court to preserve and ultimately dispose of it according to the final judgment in the case [*Shannon v. Superior Court (1990) 217 CA3d 986, 992, 266 CR 242*]. Because the judgment is not final and the lawsuit is continuing, the receiver is a receiver pendente lite [*see CCP § 917.5*].

Cross References:

Appointment of receiver by noticed motion, see *8.61*

Appointment of receiver ex parte, see *8.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
VI. OBTAINING APPOINTMENT OF RECEIVER

1-8 MB Practice Guide: CA Debt Collection 8.57

8.57 Court May Appoint Receiver After Judgment.

A court may appoint a receiver after judgment to preserve the property during the pendency of an appeal [*CCP § 564(b)(4)*].

A receiver also may be appointed after judgment to take charge of property for specified purposes with respect to the enforcement of the judgment whether or not the case is a limited civil case [*see CCP §§ 86(a)(8)*, *564(b)(3)*, *(4)*, *699.070*, *708.610-708.630*, *712.060*]. When the receivership is supplementary to or in aid of execution, the receivership is a statutory creation and not an equitable remedy [*Morand v. Superior Court (1974) 38 CA3d 347, 349-350, 113 CR 281*]. In this situation, the receiver is not, except in a technical sense, an officer of the court, but nevertheless is subject to the continued direction and control of the court [*Morand v. Superior Court (1974) 38 CA3d 347, 350, 113 CR 281*].

The functions of a receiver appointed after judgment, either for the purpose of carrying the judgment into effect, or for its preservation until the judgment is executed, are limited to the property described in the judgment [*Kreling v. Kreling (1897) 118 C 421, 423, 50 P 549*].

Distinguish:

Unlike a receiver appointed pendente lite, the functions of a receiver appointed after judgment for the purpose of carrying the judgment into effect [*CCP § 564(b)(3)*] or of otherwise enforcing a judgment [*CCP § 564(b)(4)*] are suspended by an appeal on which an undertaking is given in a sum fixed by the trial court to stay proceedings on the judgment, and a receiver cannot be appointed to carry the judgment into effect after a stay bond has been given [*see CCP § 917.5*].

Cross References:

Appointment of receiver by noticed motion, see *8.61*.

Appointment of receiver ex parte, see *8.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDuties

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8.58 Receiver Is Court's Agent.

The receiver is the agent of the court and not of any party, and as such [*Cal Rules Ct, Rule 3.1179(a)*]:

- Is neutral;
- Acts for the benefit of all who may have an interest in the receivership property; and
- Holds assets for the court and not for the plaintiff or the defendant.

Cross Reference:

Discussion of who may be appointed receiver, see *California Forms of Pleading and Practice, § 486.14* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDuties

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8.59 Court May Not Appoint Receiver When Less Drastic Remedy Is Available.

A court should not appoint a receiver when a remedy less drastic in its nature and scope is available that will ensure to the litigants adequate protection [*Morand v. Superior Court (1974) 38 CA3d 347, 350, 113 CR 281*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointments

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8.60 Court May Appoint Receiver Only on Statutory Grounds.

8.60[1] Statutory Grounds Are Jurisdictional. A receiver may be appointed only in the classes of cases expressly set forth in the statute [*see CCP § 564*]. The statutory requirements are jurisdictional, and without a showing bringing the receiver within one of the subdivisions of that section the court's order appointing a receiver is void [*Marsch v. Williams (1994) 23 CA4th 238, 246-247, 28 CR2d 402*].

Cross Reference:

Detailed discussion of grounds for appointment of receiver, see *California Forms of Pleading and Practice, § 486.13* (Matthew Bender).

8.60[2] Court May Appoint Receiver When Property Is in Danger of Being Lost, Removed, or Materially Injured. The court may appoint a receiver in an action [*CCP § 564(b)(1)*]:

- By a vendor to vacate a fraudulent purchase of property;
- By a creditor to subject any property or fund to the creditor's claim;
- Between partners or others jointly owning or interested in any property or fund;
- On application of the plaintiff; or
- On application of any party whose right to or interest in the property or fund, or its proceeds, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured.

8.60[3] Court May Appoint Receiver to Enable Inspection of Property for Hazardous Substances. The superior court, other than in a limited civil case, may appoint a receiver in an action brought under *CC § 2929.5* by a secured lender, including a mortgagee or a beneficiary under a deed of trust, to enable the lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security [*CCP § 564(c)*; *see CCP § 564(e)(5)* ("secured lender" defined)].

Strategic Point:

Some plaintiffs have receivers appointed to sell property that may have environmental contamination in an attempt to shield themselves from exposure. Because the receiver is the court's agent, there cannot be a claim against the receiver for costs of cleanup.

8.60[4] Court May Appoint Receiver Upon Dissolution, Insolvency, or Mismanagement of Corporation. The court may appoint a receiver when a corporation has been dissolved [*CCP § 564(b)(5)*]. The court also may appoint a receiver when a corporation is insolvent, is in imminent danger of insolvency, or has forfeited its corporate rights [*CCP § 564(b)(6)*].

In addition, on the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on the application of any creditor or of any stockholder or member of the corporation, may appoint one or more persons to be receivers or trustees of the corporation to do the following [*CCP § 565*]:

- Take charge of the corporation's estate and effects.
- Collect the debts and property due and belonging to the corporation.
- Pay the corporation's outstanding debts.
- Divide the remaining money and other property among its stockholders or members.

8.60[5] Court May Appoint Receiver in Connection With Arbitrable Controversy. A court may appoint a receiver on the application of a party to an arbitration agreement on the ground that any arbitration award to which the applicant may be entitled may be rendered ineffectual without the appointment of a receiver [*CCP § 1281.8(b)*].

If submitting the application to appoint a receiver on this ground, counsel must include a complaint or copies of the demand for arbitration, and any response [*CCP § 1281.8(b)*]. If accompanied by a complaint, the application should also be accompanied by a statement stating whether the party is or is not reserving that party's right to arbitration [*CCP § 1281.8(b)*].

In the event any application is filed to appoint a receiver in connection with an arbitrable controversy, the applicant also must present to the court an application to stay all other proceedings pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action pursuant to which the provisional remedy is sought to avoid waiving the right to arbitration [*CCP § 1281.8(d)*].

8.60[6] Court May Appoint Receiver at Request of Water or Sewer System Corporation. The court may appoint a receiver at the request of the Public Utilities Commission (PUC) when a water or sewer system corporation is unable or unwilling to adequately serve its ratepayers, has been abandoned by its owners, or is unresponsive to rules or orders of the PUC [*CCP § 564(b)(8)*].

8.60[7] Court May Appoint Receiver to Oversee Household Goods Carrier. The court may appoint a receiver at the request of the PUC whenever the PUC determines that any household goods carrier or any officer, director, or agent of a household goods carrier has abandoned, or is abandoning stored household goods or property of any shippers under contract with the carrier or carriers) [*CCP § 564(b)(8)*; PU Code § 5259.5].

8.60[8] Court May Appoint Receiver in Unlawful Detainer Action. The court may appoint a receiver in an unlawful detainer proceeding [*CCP § 564(b)(7)*; *see CCP § 1159 et seq.*].

8.60[9] Court May Appoint Receiver When Potential Default Under Health Facilities Loan Program. The court may appoint a receiver at the request of the Office of Statewide Health Planning and Development (Office), or the Attorney General [*H&S Code § 129173*; *CCP § 564(b)(10)*]. The receiver, with the court's approval, may exercise all of the powers of the officers and directors of the borrower, including filing a petition for bankruptcy. No action at law or in equity may be maintained against the Office, the Attorney General, or the receiver because of the exercise by any of them of the powers of the borrower's officers and directors pursuant to the order of, or with the approval of, the superior court [*H&S Code § 129173(a)(4)*].

8.60[10] Court May Appoint Receiver in Action for Specified Performance of Assignment of Rents Provision. The court may appoint a receiver in an action by a secured lender for specified performance of an assignment of rents provision in a trust deed or mortgage, or in a separate assignment document [*CCP § 564(b)(11)*].

Strategic Point:

In California, where it takes up to 120 days to complete a nonjudicial foreclosure sale, a receiver can be appointed to maintain the property and collect rents during the interim period between the commencement and conclusion of the non-judicial sale [*CC § 2924*]. This is done in conjunction with the filing of a complaint for judicial foreclosure, which is dismissed if the option of pursuing non-judicial foreclosure is the one ultimately elected.

8.60[11] Court May Appoint Receiver in Action by Assignee Under Assignment of Leases, Rents, Issues, or Profits. The court may appoint a receiver in a case brought by an assignee under an assignment of leases, rents, issues, or profits [*CC § 2938(g)*; *CCP § 564(b)(12)*]. The appointment of a receiver is one of the steps which a real property secured creditor may take in order to enforce an assignment of rents clause which appears in a deed of trust [*CC § 2938(c)*].

8.60[12] Court May Appoint Receiver for Equitable Reasons. A court may appoint a receiver when necessary to preserve the property or rights of any party [*CCP § 564(b)(9)*].

8.60[13] Court May Appoint Receiver After Judgment. The court may appoint a receiver after judgment, to carry the judgment into effect [*CCP § 564(b)(3)*]. However, the functions of a receiver appointed after judgment for the purpose of carrying the judgment into effect are suspended by an appeal on which a sufficient undertaking is given to stay the proceedings on the judgment; moreover, a receiver cannot be appointed after a stay bond has been given [*CCP § 917.5*; *see Havemeyer v. Superior Court (1890) 84 C 327, 380-384, 24 P 121*].

Strategic Point:

In California, the only way to levy on a liquor license and sell it is through the appointment of a receiver [*CCP § 708.630*].

8.60[14] Court May Appoint Receiver in Cases Involving Attachment. Any court in which an action is pending in which property has been or is sought to be attached may appoint a receiver in specified circumstances to take any action the court orders that is necessary to preserve the value of the property, including its sale [*see CCP § 488.700*; *see 8.35 -8.53*].

Example:

A receiver can be appointed in this situation to sell the property, if the court determines that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason the interest of plaintiff will be best served by the appointment of a receiver. Thus, for example, the appointment of a receiver should be considered when the property attached is inventory consisting of food products that

will greatly depreciate in value unless sold immediately.

Cross Reference:

Obtaining attachment to place a lien on collateral pending judgment, see *8.35 -8.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipReceiverships Appointment of ReceiversCivil ProcedureRemediesReceiverships Jurisdiction General OverviewCivil ProcedureRemediesReceiverships Jurisdiction PropertyCivil ProcedureRemediesReceiverships ReceiversAppointments

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8.61 Plaintiff May Obtain Appointment of Receiver by Noticed Motion.

The usual procedure for obtaining appointment of a receiver is by noticed motion [*see Cal Rules Ct, Rule 3.1177*], supported by an affidavit [*see CCP § 2009*] (or declaration under *CCP § 2015.5*), and by a memorandum [*Cal Rules Ct, Rules 3.1100*, *3.1103(a)*, *3.1113(a)*], followed by a hearing on the motion [*see Cal Rules Ct, Rules 3.1304*, *3.1306*].

At the hearing for an application for appointment of a receiver, the applicant must state the reason for the amount of the receiver's undertaking [*CCP § 567*, *Cal Rules Ct, Rule 3.1178*]. After the judge grants the motion for appointment of receiver, the receiver must take an oath and give an undertaking [*CCP § 567*, *Cal Rules Ct, Rule 3.1178*].

Strategic Point--Creditor:

The noticed motion procedure eliminates the necessity for plaintiff to file an indemnity bond in favor of the defendant, as is required when a receiver is appointed on an ex parte application [*see CCP § 566(b)*], and must be used unless the delay occasioned by notice would result in irreparable injury [*see Cal Rules Ct, Rule 3.1175*].

Judicial Council Form RC-300 should be used for the order to show cause and temporary restraining order. Although approved for optional use, in practice its use is standard.

Judicial Council Form RC-310 should be used for the order appointing a receiver after hearing. Although this form is approved for optional use, in practice its use is standard.

Strategic Point:

If a receiver is appointed in a case that does not come within the class of cases in which appointment of a receiver is authorized, or if the trial court's order is for any other reason in excess of jurisdiction, the order is void and subject to collateral attack [*see, e.g., Barclays Bank of Cal. v. Superior Court (1977) 69 CA3d 593, 597-598, 137 CR 743*].

Cross References:

Form for declaration in support of motion for order appointing receiver, see *8.80*.

Judicial Council Form RC-300 for order to show cause and temporary restraining order, see *8.81*.

Judicial Council Form RC-310 for order appointing receiver after hearing, see *8.82*.

Discussion and form for memorandum supporting motion to appoint receiver, see *California Points and Authorities, § 200.10* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

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8.62 Plaintiff May Obtain Appointment of Receiver Ex Parte.

8.62[1] Ex Parte Application Is Drastic Measure. The appointment of a receiver on ex parte application and order to show cause confirming the appointment is a drastic remedy and seldom warranted [*see, e.g.*, *Golden State Glass Corp. v. Superior Court (1939) 13 C2d 384, 393, 90 P2d 75*]. Appointment of a receiver will be made on ex parte application and without notice, however, when imperative necessity or emergency is shown in the application or supporting declarations [*Misita v. Distillers Corp., Ltd. (1942) 54 CA2d 244, 250, 128 P2d 888*].

8.62[2] Procedure for Ex Parte Application.

8.62[2][a] Contents of Application. An ex parte application must include all of the following [*Cal Rules Ct, Rule 3.1201*]:

- An application containing the case caption and stating the relief requested.
- A declaration in support of the application making the necessary factual showing.
- A declaration of satisfaction of, or excuse from satisfying, the notice requirement.
- A supporting memorandum.
- A proposed order.

An ex parte application for appointment of receiver must include facts showing [*Cal Rules Ct, Rule 3.1175*]:

- The nature of the emergency and reasons why the applicant would suffer irreparable injury during the time necessary for a hearing or notice.
- The names, addresses and phone numbers of the persons in possession of the property, or of the president or manager of any corporation in possession.
- The use of the property by the persons in possession.

- If the property is part of the plant, equipment, or stock in trade of a business, the nature and approximate size of the business, and facts sufficient to show whether the taking of the property would stop or seriously interfere with the operation of the business.

If any of these facts are unknown to the applicant in spite of exercising due diligence, the applicant may be excused from providing them [*Cal Rules Ct, Rule 3.1175*].

Judicial Council Form RC-200 should be used for the ex parte order appointing receiver and order to show cause. Although approved for optional use, in practice its use is standard.

Cross References:

Judicial Council Form RC-200 for ex parte order appointing receiver and order to show cause, see *8.83*.

Discussion and form for memorandum supporting confirmation of ex parte appointment of receiver, see *California Points and Authorities, § 200.50* (Matthew Bender).

Discussion and form for declaration and ex parte application for order appointing receiver and order to show cause why appointment should not be confirmed, see *California Forms of Pleading and Practice, § 486.139* (Matthew Bender).

8.62[2][b] Adverse Party Must Be Notified Unless Excused. The adverse party must be notified when and where the application will be presented, unless excused from doing so [*Cal Rules Ct, Rule 3.1204*].

Timing:

The adverse party must be notified no later than 10:00 a.m. on the court day before the ex parte appearance, unless applicant can show circumstances that justify a shorter time for notice [*Cal Rules Ct, Rule 3.1203*].

8.62[2][c] Applicant Undertaking Is Required Before Receiver Is Appointed Ex Parte. Before a court appoints a receiver without notice, the court must require an undertaking from the applicant [*CCP § 566(b)*]. The amount must cover all damages defendant may sustain as a result of applicant obtaining the appointment wrongfully, maliciously, or without sufficient cause [*CCP § 566(b)*].

8.62[2][d] Receiver Undertaking and Oath Is Required When Appointed. The receiver must be sworn to perform the duties faithfully [*CCP § 567(a)*]. The receiver must also give an undertaking; the court will set the amount [*CCP § 567(b)*; *Cal Rules Ct, Rule 3.1178*].

8.62[3] Order to Show Cause Is Required When Receiver Is Appointed Ex Parte.

8.62[3][a] Order to Show Cause Confirming Appointment. Whenever a receiver is appointed without notice, the matter must be made returnable on an order to show cause why the appointment should not be confirmed [*Cal Rules Ct, Rule 3.1176(a)*].

The applicant must serve the following on the adverse party [*Cal Rules Ct, Rule 3.1176(b)*]:

- A copy of the complaint.
- The order to show cause stating the date, place and time of hearing.
- Any supporting affidavits.

- A memorandum supporting the application.

Judicial Council Form RC-200 should be used for an ex parte order appointing receiver and order to show cause. Although this form is approved for optional use, in practice its use is standard.

Judicial Council Form RC-210 should be used for an order confirming appointment of a receiver and preliminary injunction. Although this form is approved for optional use, in practice its use is standard.

Timing:

Service must be made no later than five days after the date on which the order to show cause is issued [*Cal Rules Ct, Rule 3.1176(b)*].

Strategic Point:

Many courts require the use of Judicial Council forms that have been approved for optional use. If counsel is considering the use of non-Judicial Council forms, this should be checked with the court to determine whether or not use of Judicial Counsel forms is required.

Cross References:

Judicial Council Form RC-200 for ex parte order appointing receiver and order to show cause, see *8.83*.

Judicial Council Form RC-210 for order confirming appointment of receiver and preliminary injunction, see *8.84*.

8.62[3][b] Order to Show Cause Preceding Appointment. An ex parte order to show cause can be used to set a hearing for an application for receiver [*Olsan v. Comora (1977) 73 CA3d 642, 648-649, 140 CR 835*]. An order to show cause allows issuance of a temporary restraining order, which remains in place until the hearing [*see 8.83*]. An ex parte application for an order to show cause must include all of the following [*Cal Rules Ct, Rule 3.1201*]:

- An application [*see 8.83*].
- A supporting affidavit or declaration.
- A supporting memorandum.
- An affidavit of notification or excuse from notification.
- A draft order.

The applicant must notify the adverse party of the time, date and place of the hearing, unless excused from doing so [*Cal Rules Ct, Rule 3.1204*].

Judicial Council Form RC-200 should be used for an ex parte order to show cause and temporary restraining order. Although this form is approved for optional use, in practice its use is standard.

Cross References:

Contents of application and notice requirements, see *8.62[2][a], [b]*.

Judicial Council Form RC-200 for ex parte order appointing receiver and order to show cause, see *8.83*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

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8.63 Appointment of Receiver Is Appealable.

8.63[1] Appellate Review of Order or Judgment Appointing Receiver Is Available. An order or judgment appointing a receiver is appealable [*CCP § 904.1(a)(7)* (appeal other than in limited civil case), *CCP § 904.2(h)* (appeal in limited civil case)].

Perfecting an appeal does not stay enforcement of the order or judgment unless an undertaking in a sum fixed by the trial court is given on condition that if the order or judgment is affirmed or the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay [*CCP § 917.5*].

8.63[2] Order Denying Appointment of Receiver Is Reviewable on Writ of Mandate. An order denying appointment of a receiver may be reviewed on a writ of mandate [*Conklin v. Superior Court (1934) 1 C2d 601, 603-604, 36 P2d 386*]. However, because the appointment of a receiver is a matter largely within the trial court's discretion, the appellate court will not compel the trial court to act in a particular manner unless the case is one in which the court can exercise its discretion in only one way [*Conklin v. Superior Court (1934) 1 C2d 601, 603-604, 36 P2d 386*].

Cross Reference:

Forms and procedures for writs of mandate, see California Forms of Pleading and Practice, Ch. 358, Mandate and Prohibition.

8.63[3] Order Granting Motion to Vacate Appointment of Receiver Is Appealable. An order setting aside and vacating an order appointing a receiver that in effect amounts to a discharge of the receiver is appealable as a final judgment [*Hibernia Sav. & Loan Soc. v. Ellis Estate Co. (1932) 216 C 280, 281-282, 13 P2d 929*].

An order *denying* a request to vacate appointment of a receiver ordinarily is not appealable [*Raff v. Raff (1964) 61 C 2d 514, 518, 39 CR 366, 393 P2d 678*].

8.63[4] Order Appointing Successor Receiver May Be Appealable. An order appointing a successor receiver has been held not to be appealable under *CCP § 904.1(a)(7)* [*City and County of San Francisco v. Shers (1995) 38 CA4th 1831, 1839, 46 CR2d 57*]. However, an order appointing a successor receiver is appealable under *CCP § 904.1(a)(2)* if the order was made after an appealable judgment and meets the following requirements [*City and County of San Francisco v. Shers (1995) 38 CA4th 1831, 1836, 1838-1839, 46 CR 2d 57*]:

- The issues raised by the appeal from the order must be different from those arising from an appeal from the judgment.

- The order must either affect the judgment or relate to it by enforcing it or staying its execution.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsTerminationsCivil ProcedureAppealsAppellate JurisdictionState Court Review

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VII. FORMS

1-8 MB Practice Guide: CA Debt Collection 8.64

8.64 Notice of Lis Pendens.

Notice of Lis Pendens.
Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER NOTICE OF PENDENCY OF ACTION
Defendant.	)	
	)	
	)	

_____

NOTICE IS GIVEN that the above-captioned action was commenced on _____ [*date*], in the above-captioned court by Plaintiff John Smith against Defendant Mary Jones; the action is now pending in the above court.

The above-captioned action alleges a real property claim affecting certain real property that is situated [in part] in _____ [*county in which notice is to be recorded*] County, California, and that is described as follows:
_____ [*set forth legal description of real property and, if appropriate, its street address*].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*claimant*]

ACKNOWLEDGMENT

_____

State of _____	)	ss.
County of _____	)	
	)	

_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity/capacities, and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

(Seal)

Signature: _____

Name of Office: _____

NOTES:

Authority:
CCP §§ 405-405.61

Grounds:
CCP §§ 405.4, 405.20; see *8.03 -8.14*

Related Forms and Points and Authorities:
See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Chapter 21, Lis Pendens.

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
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8.65 Application for Writ of Possession--Judicial Council Form CD-100

Application for Writ of Possession--Judicial Council Form CD-100

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Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP § 512.010; California Judicial Council Form CD-100, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
CCP §§ 511.090, *512.060*, *515.010*; see *8.18 -8.19*

Related Form for Notice:
See *8.66*

Related Form for Order:
See *8.68*

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VII. FORMS

1-8 MB Practice Guide: CA Debt Collection 8.66

8.66 Notice of Application for Writ of Possession and Hearing--Judicial Council Form CD-110

Notice of Application for Writ of Possession and Hearing--Judicial Council Form CD-110

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Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP § 512.020; California Judicial Council Form CD-110, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *8.19*

Related Form for Application:
See *8.65*

Related Form for Order:
See *8.68*

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1-8 MB Practice Guide: CA Debt Collection 8.67

8.67 Declaration for Ex Parte Writ of Possession--Judicial Council Form CD-180

Declaration for Ex Parte Writ of Possession--Judicial Council Form CD-180

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NOTES.

Authority:
CCP § 512.020; California Judicial Council Form CD-180, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *8.19*

Related Form for Order:
See *8.68*

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
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1-8 MB Practice Guide: CA Debt Collection 8.68

8.68 Order for Writ of Possession--Judicial Council Form CD-120

Order for Writ of Possession--Judicial Council Form CD-120

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NOTES.

Authority:
CCP § 512.060; California Judicial Council Form CD-120, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *8.18*

Related Form for Application:
See *8.65*

Related Form for Notice:
See *8.66*

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1-8 MB Practice Guide: CA Debt Collection 8.69

8.69 Writ of Possession--Judicial Council Form CD-130

Writ of Possession--Judicial Council Form CD-130

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NOTES.

Authority:
CCP § 512.080; California Judicial Council Form CD-130, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
CCP §§ 511.090, *512.060*, *515.010*; see *8.18*

Related Form for Undertaking:
See *8.77*

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1-8 MB Practice Guide: CA Debt Collection 8.70

8.70 Motion and Notice of Motion for Preliminary Injunction, Supporting Declaration, and Memorandum

Motion and Notice of Motion for Preliminary Injunction, Supporting Declaration, and Memorandum of Points and Authorities
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER NOTICE OF MOTION AND MOTION
_____ [*name*],	)	FOR
Defendant.	)	PRELIMINARY INJUNCTION;
	)	SUPPORTING DECLARATION;
	)	MEMORANDUM

_____

To Defendant Mary Jones and to her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____] of this Court, located at _____ [*address*], _____ [*city*], plaintiff will, and hereby does, move the court for a preliminary injunction enjoining and restraining the above-named defendants [and their officers, agents, employees, representatives, and all persons acting in concert or participating with them,] from engaging in or performing, directly or indirectly, any and all of the following acts:

a. _____ [*Specify the various acts and types of conduct or threatened acts and conduct sought to be prohibited*];

b. _____ [*Continue with specifications, if more than one*].

Plaintiff will also move the court that the above-named defendants, and each of them, be required and ordered to:

a. _____ [*Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain*];

b. _____ [*Continue with specifications if more than one*].

The motion will be made on the grounds that _____ [*specify grounds, such as those stated in CCP § 526*].

The motion will be based on this notice, on the declaration(s) of _____ [*name(s)*], on the memorandum served and filed with this motion, on the papers and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the plaintiff in this action.

2. _____ [*Set forth facts showing plaintiff has a property interest of the kind a preliminary injunction is available to protect, e.g., property ownership*].

3. _____ [*Set forth facts showing what defendants are doing that interferes with plaintiff's rights*].

4. _____ [*Set forth facts showing irreparable injury will be sustained if preliminary injunction is not issued*].

5. _____ [*Set forth facts showing inadequacy of legal remedy*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

MEMORANDUM

[*Add memorandum supporting motion*.]

NOTES.

Authority:
CCP § 527

Discussion:
See *8.27*, *8.29*

Related Form for Order:
See *8.71*

Related Discussion:
See California Points and Authorities, Ch. 116, Injunctions (Matthew Bender)

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1-8 MB Practice Guide: CA Debt Collection 8.71

8.71 Order Granting Preliminary Injunction and Requiring Undertaking

Order Granting Preliminary Injunction and Requiring Undertaking
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER ORDER GRANTING
_____ [*name*],	)	PRELIMINARY INJUNCTION
Defendant.	)	AND REQUIRING
	)	UNDERTAKING
	)	

_____

The _____ [application *or* motion] of plaintiff for the preliminary injunction came on regularly for hearing by the court this date in accordance with _____ [an order to show cause issued by this court on _____ (*date*), *or* plaintiff's motion for a preliminary injunction]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the court's satisfaction, and good cause appearing:

IT IS ORDERED that during the pendency of this action the above-named defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, are enjoined and restrained from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any of the following acts:

a. _____ [*Specify the various acts and types of conduct that are prohibited with sufficient clarity to apprise all of the persons enjoined of what they are prohibited from doing*];

b. _____ [*Continue with specifications if more than one*].

IT IS FURTHER ORDERED that the above-named defendants are required and ordered to:

a. _____ [*Specify each of the acts or courses of conduct defendants are required to do, commence, or continue, and each of the conditions they are to maintain*];

b. _____ [*Continue with specifications if more than one*].

IT IS FURTHER ORDERED that, before this order shall take effect, plaintiff must file a written undertaking in the sum of $_____, as required by *Code of Civil Procedure Section 529*, for the purpose of indemnifying defendants for the damages as they may sustain by reason of this preliminary injunction if the court finally decides that plaintiff is not entitled to it.

IT IS FURTHER ORDERED that the preliminary injunction as set forth above shall issue on plaintiff filing a written undertaking in the sum specified above. The court reserves jurisdiction to modify this injunction as the ends of justice may require.

Dated: _____

_____ [*signature*]
Judge of the Superior Court

NOTES.

Authority:
CCP § 527

Discussion:
See *8.37*, *8.31*

Related Form for Motion:
See *8.70*

Timing:
See *8.26*

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
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1-8 MB Practice Guide: CA Debt Collection 8.72

8.72 Application for Right to Attach Order, Temporary Protective Order, etc.--Judicial Council Form AT-105

Application for Right to Attach Order, Temporary Protective Order, etc.--Judicial Council Form AT-105

Click here to view image.

NOTES:

Authority:
CCP §§ 482.030, *484.020*; California Judicial Council Form AT-105, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Grounds:
CCP § 483.010; see *8.36*

Related Form for Notice:
See *8.73*

Related Form for Order:
See *8.74*

Related Discussion on Drafting Application:
See *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.05*

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1-8 MB Practice Guide: CA Debt Collection 8.73

8.73 Notice of Application and Hearing for Right to Attach Order and Writ of Attachment--Judicial Council Form AT-115

Notice of Application and Hearing for Right to Attach Order and Writ of Attachment--Judicial Council Form AT-115

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NOTES.

Authority:
CCP § 483.010; California Judicial Council Form AT-115, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Grounds:
CCP §§ 483.010; see *8.36*

Related Form for Application:
See *8.73*

Related Form for Order:
See *8.74*

Notice Requirements:
See *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 19.05*

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1-8 MB Practice Guide: CA Debt Collection 8.74

8.74 Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment After Hearing--Judicial Council Form AT-120

Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment After Hearing--Judicial Council Form AT-120

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NOTES.

Authority:

CCP § 483.010; see *8.36*; California Judicial Council Form AT-120, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Related Form for Application:

See *8.72*

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1-8 MB Practice Guide: CA Debt Collection 8.75

8.75 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment--Judicial Council Form AT-125

Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment--Judicial Council Form AT-125

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NOTES.

Authority:
CCP §§ 485.210, *485.220*; California Judicial Council Form AT-125, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Related Discussion:
See *8.42*

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1-8 MB Practice Guide: CA Debt Collection 8.76

8.76 Temporary Protective Order--Judicial Council Form AT-140

Temporary Protective Order--Judicial Council Form AT-140

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NOTES.

Authority:
CCP § 486.010; California Judicial Council Form AT-140, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Related Discussion:
See *8.44 -8.46*

Related Form for Complaint:
See *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 18.26*

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1-8 MB Practice Guide: CA Debt Collection 8.77

8.77 Undertaking by Personal Sureties--Judicial Council Form AT-160/CD-140

Undertaking by Personal Sureties--Judicial Council Form AT-160/CD-140

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NOTES.

Authority:
CCP § 489.210; California Judicial Council Form AT-160/CD-140, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *8.18*, *8.20*, *8.48*

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1-8 MB Practice Guide: CA Debt Collection 8.78

8.78 Application to Post Cash in Lieu of Bond

Application to Post Cash in Lieu of Bond
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER EX PARTE
_____ [*name*],	)	APPLICATION
Plaintiff,	)	TO POST CASH IN LIEU OF
vs.	)	BOND FOR ISSUANCE OF
_____ [*name*],	)	WRIT OF ATTACHMENT
Defendant.	)	AND ORDER
	)	Date: _____
	)	Time: _____
	)	Place: _____
	)	

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

Plaintiff, _____ [*name*], hereby applies ex parte pursuant to *Code of Civil Procedure Section 995.710* for an order authorizing the plaintiff to post $_____ [*amount*] cash in lieu of a bond in support of its application for the issuance of a writ of attachment pursuant to *Code of Civil Procedure Section 489.220(a)*.

Attached is a copy of _____ [*proof of payment, e.g.* a cashier's check in the sum of $_____ made payable to the Clerk of the Superior Court] which Plaintiff requests be posted with the clerk of this Court in lieu of a bond in the same amount for the issuance of a writ of attachment against the real property of Defendant, _____ [*name*]. Upon exoneration, Plaintiff requests that the funds be returned to _____ [*plaintiff' s name and mailing address*].

Dated: _____

_____ [*attorney signature*]
_____ [*attorney typed name*]

NOTES.

Authority:
CCP § 995.710

Discussion:
See *8.48*

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1-8 MB Practice Guide: CA Debt Collection 8.79

8.79 Writ of Attachment--Judicial Council Form AT-135

Writ of Attachment--Judicial Council Form AT-135

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NOTES.

Authority:

CCP § 483.010; California Judicial Council Form AT-135, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion:

See *8.36*

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
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1-8 MB Practice Guide: CA Debt Collection 8.80

8.80 Declaration in Support of Motion for Order Appointing Receiver

Declaration in Support of Motion for Order Appointing Receiver
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION IN
_____ [*name*],	)	SUPPORT OF MOTION
Defendant.	)	FOR ORDER
	)	APPOINTING RECEIVER
	)	

_____

I, _____ [*name*], declare:

1. I am the [attorney of record for the] Plaintiff John Smith.

2. _____ [*Specify facts showing that action is one in which appointment of a receiver is authorized, e.g.,* As shown by the verified complaint herein, this is an action to dissolve a partnership and for an accounting. As further shown by that complaint, (a) the partnership was formed by written agreement between the parties on _____ (*date*) to own and operate a business known as _____ (*name*) to buy and market gold and silver bullion; (b) defendant was the managing partner and he/she alone was authorized to draw checks on partnership accounts; (c) the business was enormously successful grossing in excess of $_____ for the fiscal year _____; and (d) since on or about _____ (*date*), defendant has excluded plaintiff from in any way participating in the management or conduct of the business and has failed and refused, and continues to fail and refuse, to account to plaintiff for either any or all of the profits)].

3. _____ [*State nature of emergency, e.g.*, As further shown by the verified complaint, defendant, contrary to his/her agreement with, and without any notice to, plaintiff, has left the country and has expressed an intent not to return; before leaving, he/she ceased operating the business and withdrew all balances from the accounts held by

him/her in both his/her personal name and under the firm's name; the remaining assets of the partnership consist of specified personal property, including art objects purchased with partnership funds, and of a stock of gold and silver bullion, all of which is in immediate danger of being removed from the jurisdiction of this court and will be removed if a receiver is not immediately appointed to take possession of them].

4. _____ [*State reasons why irreparable injury would be suffered by applicant during time necessary for hearing on notice, e.g.*, If the appointment of a receiver is delayed until after defendant is given notice, defendant will accelerate his/her plans for removal of the property out of the country where it will be dispersed and difficult, if not impossible, to trace and recover, and plaintiff will thereby be deprived of any source from which to receive payment of his/her share of the partnership profits as subsequently determined by the judgment of this court, all to plaintiff's irreparable injury].

5. _____ [*State name(s), address(es), and phone number(s) of person(s) in actual possession of property for which receiver is requested, or of president, manager, or principal agent of any corporation in possession of property, e.g.*, As shown by the attached declaration of _____ (*name*), the specified personal property, including the art objects, and gold and silver bullion, are in that declarant's possession under instructions from the defendant to make all arrangements for their shipment to _____ (*him/her or other designated consignee*) on further notice from defendant but no later than _____ (*date*). The address and telephone number of _____ (*name of declarant in possession*) are _____].

6. _____ [*Specify use being made of property by person(s) in possession, e.g.*, As shown by the declaration of _____ (*name*), attached hereto, _____ (*name of declarant in possession*) is making no use of the property; he/she has had the property and bullion boxed and crated and is holding it until arrangements are completed for their shipment out of the country].

7. [_____ *If property is part of the plant, equipment, or stock in trade of any business, specify the nature and approximate size or extent of the business and facts sufficient to show whether receiver's taking of property would stop or seriously interfere with operation of the business, e.g.*, Although the specified items of personal property, other than the art objects, described in the verified complaint are part of the equipment of the partnership business and the gold and silver bullion are its stock in trade, the partnership has ceased doing any business and will be dissolved on the judgment of this court; consequently, the taking of the property by a receiver would in no way stop or seriously interfere with the operation of the business.]

8. [_____ (*If any of the matters enumerated in paragraphs 3-7, above, are unknown to the applicant and cannot be ascertained with due diligence, state fully matters unknown and efforts made to acquire information*).]

WHEREFORE, Plaintiff John Smith requests an order appointing a receiver to take immediate possession of _____ [*describe property, e.g.*, the gold and silver bullion and all other property placed by _____ (*name*) in the custody of _____ (*name*) for shipment abroad] and to _____ [*specify powers to be given to receiver, e.g.*, preserve and care for the property] pending further order of this Court and for an order to show cause why the appointment should not be confirmed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

NOTES.

Authority:
CCP §§ 564-570

Timing:
See *8.56 -8.57*

Discussion:
See *8.60 -8.61*

Related Form for Order:
See *8.83*

Related Points and Authorities:
See California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

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1-8 MB Practice Guide: CA Debt Collection 8.81

8.81 Order to Show Cause and Temporary Restraining Order--Judicial Council Form RC-300

Order to Show Cause and Temporary Restraining Order--Judicial Council Form RC-300

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NOTES.

Authority:
CCP §§ 564-570; California Judicial Council Form RC-300, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Timing:
See *8.56 -8.57*

Discussion:
See *8.60 -8.61*

Related Points and Authorities:
See California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender).

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1-8 MB Practice Guide: CA Debt Collection 8.82

8.82 Order Appointing Receiver After Hearing and Preliminary Injunction--Judicial Council Form RC-310

Order Appointing Receiver After Hearing and Preliminary Injunction--Judicial Council Form RC-310

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NOTES.

Authority:
CCP §§ 564, *917.5*; California Judicial Council Form RC-310, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Grounds:
CCP § 564; see *8.60 -8.61*

Related Memoranda:
See California Points and Authorities, Ch. 200, Receivers (Matthew Bender).

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1-8 MB Practice Guide: CA Debt Collection 8.83

8.83 Ex Parte Order Appointing Receiver and Order to Show Cause--Judicial Council Form RC-200

Ex Parte Order Appointing Receiver and Order to Show Cause--Judicial Council Form RC-200

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NOTES.

Authority:
CCP § 564; *Cal Rules Ct, Rules 3.1201*, *3.1175*; California Judicial Council Form RC-200, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion:
See *8.62*

Related Form for Order Confirming Appointment:
See *8.84*

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Chapter 8 Preserving Assets During Litigation or Pending Enforcement of Judgment
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1-8 MB Practice Guide: CA Debt Collection 8.84

8.84 Order Confirming Appointment of Receiver and Preliminary Injunction--Judicial Council Form RC-210

Order Confirming Appointment of Receiver and Preliminary Injunction--Judicial Council Form RC-210

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NOTES.

Authority:
Cal Rules Ct, Rule 3.1176; California Judicial Council Form RC-210, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Grounds:
See *8.62[3]*

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Chapter 9 Planning Enforcement of Judgment

1-9 MB Practice Guide: CA Debt Collection 9.syn

AUTHOR: Mark V. Isola, Esq.

§ 9.syn Synopsis to Chapter 9: Planning Enforcement of Judgment

9.01 Scope.

9.02 Objective and Strategy.

9.03 CHECKLIST: Assessing Enforceability of Judgment.

9.04 Counsel Should Determine Court of Origin of Judgment to Be Enforced.

9.05 Counsel Should Determine Whether Judgment Has Been Entered, Corrected, or Modified.

9.06 Counsel Should Determine Whether Judgment Is Money or Nonmoney Judgment.
9.06[1] Money Judgment Requires Payment of Money, While Nonmoney Judgment Does Not.
9.06[2] Enforcement of Judgment for Nonmoney Relief Must Be Based on Type of Relief Awarded.

9.07 Counsel Should Determine Whether Enforcement of Judgment Is Stayed.
9.07[1] Ascertaining Whether Stay Prevents Creditor From Enforcing Judgment Can Save Counsel's Resources.
9.07[2] Order From Trial Court May Stay Enforcement.
9.07[3] Appeal Will Not Stay Enforcement Unless Undertaking is Posed.
9.07[4] Bankruptcy May Stay Enforcement.
9.07[5] Assignment for Benefit of Creditors Does Not Stay Enforcement.
9.07[6] Agreement With Judgment Debtor May Stay Enforcement.
9.07[7] Enforcement of Federal Judgment Automatically Stayed for 10 Days.

9.08 Counsel Should Determine Whether Judgment Has Been Properly Assigned.

9.09 Counsel Should Determine Whether Discharge or Satisfaction of Judgment Bars Enforcement.
9.09[1] Enforcement May Be Prohibited by Bankruptcy Discharge.
9.09[2] Enforcement May Be Prohibited by Setoff.
9.09[3] Enforcement May Be Prohibited by Satisfaction of Judgment.

9.10 Expiration of Judgment May Bar Enforcement.

9.10A Counsel Should Consider Whether Judgment Is Void or Voidable.

9.10B Out of State Debtor or Out of State Assets May Hinder Enforcement.

9.10C Limitations on Enforcement Apply If Debtor Is Deceased.

9.11 If Judgment Is Enforceable, Counsel Should Immediately Create Judgment Liens and Prepare Strategic Plan for Enforcement.

9.12 CHECKLIST: Developing a Strategy for Asset Recovery.

9.13 Developing Strategic Plan Is Important.

9.14 All Information Needed for Enforcement of Judgment Should Be Assembled.
9.14[1] Counsel Should Identify Everything Known About Judgment Debtor.
9.14[2] Property Subject to Immediate Enforcement Must Be Identified.
9.14[3] Other Useful Information Should Be Identified.

9.15 Counsel Should Create Plan for Recovering Known Assets.

9.16 Counsel Should Create Plan for Discovering Other Assets.
9.16[1] Plan Should Include Discovery of Other Assets of Judgment Debtor.
9.16[2] Plan Should Include Seeking and Adding Additional Judgment Debtors to Judgment.

9.17 CHECKLIST: Considering Available Methods for Recovering Assets.

9.18 Options and Strategies.

9.19 Type of Judgment Debtor Will Affect Methods to Consider.

9.20 Existence of Multiple Judgment Debtors Will Affect Methods to Consider.

9.21 Amount of Judgment Will Affect Methods to Consider.

9.22 Amount of Information Known About Judgment Debtor Will Affect Methods to Consider.

9.23 Individual Methods of Recovery Should Be Evaluated.
9.23[1] Writ of Execution Against Personal or Real Property.
9.23[1][a] Writ of Execution May Be Used Against Specifically Identified Personal Property.
9.23[1][b] Writ of Execution May Be Used to Recover From Real Property.
9.23[2] Garnishment of Judgment Debtor's Wages Can Be Effective Enforcement Method for Small Judgments.
9.23[3] Judgment Lien Establishes Judgment Creditor's Interest in Real or Personal Property.
9.23[4] Examination of Judgment Debtor Allows Immediate Recovery of Personal Property on Person of Judgment Debtor.
9.23[5] Additional Methods May Be Appropriate in Particular Circumstances.
9.23[5][a] Assignment Order Allows Recovery of Judgment Debtor's Receivables From Third Party.
9.23[5][b] Receivership Prevents Wrongful Transfer by Judgment Debtor.
9.23[5][c] Installation of Keeper Allows Recovery of Judgment Debtor's Receipts.
9.23[5][d] Petition for Involuntary Bankruptcy Forces Assets of Judgment Debtor Into Possession of Bankruptcy Trustee.

9.24 CHECKLIST: Determining What Assets to Execute Against.

9.25 Options and Strategies.

9.26 All of Judgment Debtor's Assets Generally Are Subject to Enforcement.

9.27 Determining Whose Assets to Proceed Against When There Are Multiple Judgment Debtors.
9.27[1] Judgment May Be Enforced Against Assets of Any Jointly and Severally Liable Judgment Debtor.
9.27[2] If Liability Is Several Only, One Debtor's Assets May Not Be Used to Satisfy Other Debtor's Liability.
9.27[3] Judgment Debtor's Surety or Guarantor May Be Liable for Unsatisfied Judgment.
9.27[4] Effect of Joint and Several Liability on Judgment Debtor's Surety or Guarantor.

9.28 Special Rules Govern Enforcement Against Specified Assets.
9.28[1] Community Property.
9.28[2] Non-Transferable Property.
9.28[3] Leasehold Interest in Real Property.
9.28[4] Business or Professional License.
9.28[5] Transferred or Encumbered Property Subject to Lien.

9.29 Identifying Assets Subject to Enforcement When Judgment Debtor Is Corporate or Other Artificial Entity.
9.29[1] Corporation.
9.29[2] Partnership.
9.29[3] Limited Liability Company.
9.29[4] Unincorporated Association.
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9.50 Memorandum in Support of Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

9.51 Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

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FOOTNOTES:

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Chapter 9 Planning Enforcement of Judgment
I. STRATEGY

1-9 MB Practice Guide: CA Debt Collection 9.01

AUTHOR: Mark V. Isola, Esq.

9.01 Scope.

This chapter covers:

- Objectives and strategy for planning enforcement of money judgments and nonmoney judgments [*see 9.02*].
- Assessing the enforceability of the judgment [*see 9.03*], including:
  - The jurisdiction of origin for the judgment [*see 9.04*].
  - The entry, correction, or modification of judgment [*see 9.05*].
  - The type of relief awarded: money or nonmoney [*see 9.06*].
  - Whether the judgment is stayed [*see 9.07*].
  - Whether the judgment has been assigned [*see 9.08*].
  - Whether the judgment has been discharged or satisfied [*see 9.09*].
  - Whether the judgment has expired [*see 9.10*].
- Developing a strategy for asset recovery [*see 9.12*].
- Considering all available methods for recovering assets to satisfy a money judgment [*see 9.17*].
- Determining what assets are available [*see 9.24* et seq.].

- Adding postjudgment interest, attorney's fees, and costs to the judgment [*see 9.32*].
- Amending the judgment to add additional judgment debtors [*see 9.37* et seq.].

Core Statutes:
CCP §§ 680.010-724.260; *Fed R Civ P 69*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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Chapter 9 Planning Enforcement of Judgment
I. STRATEGY

1-9 MB Practice Guide: CA Debt Collection 9.02

AUTHOR: Mark V. Isola, Esq.

9.02 Objective and Strategy.

Once a party obtains a judgment in a civil proceeding, that party needs to move quickly, efficiently, and effectively to enforce the judgment. The judgment creditor must strive to:

- Confirm the existence of an enforceable judgment.
- Establish a methodical plan to identify the judgment debtor's assets.
- Maximize the amount recovered relative to the time and expense involved

Strategic Point--Think About Collectibility of Judgment Even Before Suit Is Brought:

Planning for enforcement of a judgment really should begin even before bringing suit. From the outset, even before a complaint is filed, counsel should ask, "If this were not a claim being readied for suit, but rather a judgment, what would I do with it now to enforce it and get the client paid?" If there is no clear game plan as to how any judgment ultimately will be satisfied, counsel may wish to re-think bringing suit in the first place.

Strategic Point--Identification and Preservation of Assets:

The most efficient and effective enforcement of money judgments occurs when the creditor takes advantage of available mechanisms during the litigation to identify and/or preserve assets of the then-potential judgment debtor.

Cross Reference:

Identifying and preserving assets of potential judgment debtor during litigation, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Detailed Discussion/Forms:

See California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

Cross Reference:

For Tips on updating caselaw and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Chapter 9 Planning Enforcement of Judgment
II. ASSESSING ENFORCEABILITY OF JUDGMENT

1-9 MB Practice Guide: CA Debt Collection 9.03

AUTHOR: Mark V. Isola, Esq.

9.03 CHECKLIST: Assessing Enforceability of Judgment.

☐ Determine court of origin of judgment.

○ Determine whether judgment is from a California court or a federal court in California.

Authority:
CCP §§ 128, 1713-1713.8; *Fed R Civ P 69*

Discussion:
See *9.04*

○ If judgment is from a court outside California, follow enforcement procedures for out of state judgments.

Discussion:
See Ch. 25, Enforcing Out of State Judgments in California

☐ Determine whether judgment has been entered, corrected, or modified.

Authority:
CCP §§ 577, 664, 680.230

Discussion:
See *9.05*

☐ Determine if judgment is a money or nonmoney judgment.

Authority:

CCP §§ 577.5, 582.5, 680.270

Discussion:
See *9.06*

☐ Determine if judgment has been stayed by any of following:

○ Order of trial court.

Authority:
CCP § 918

Discussion:
See *9.07[2]*

○ Appeal of judgment.

Authority:
CCP § 917.1

Discussion:
See *9.07[3]*

○ Bankruptcy filing.

Authority:
11 USC § 362

Discussion:
See *9.07[4]*; see also Ch. 3, Effect of Bankruptcy

○ Assignment for benefit of creditors.

Authority:
Berg & Berg Enters., LLC v. Sherwood Partners, Inc. (2005) 131 CA4th 802, 828-829, 32 CR3d 325

Discussion:
See *9.07[5]*

○ Agreement with judgment debtor.

Discussion:
See *9.07[6]*

○ Federal rule.

Authority:
Fed R Civ P 62

Discussion:
See *9.07[7]*

☐ Determine if judgment has been assigned.

Authority:
CC § 954; *CCP § 681.020*

Discussion:
See *9.08*

☐ Determine if judgment has been discharged or satisfied.

Authority:
CCP § 724.010; *11 USC § 727*

Discussion:
See *9.09*

☐ Determine if judgment has expired.

Authority:
CCP § 683.020

Discussion:
See *9.10*

☐ Determine whether judgment is void or voidable.

Authority:
Taylor-Rush v. Multitech Corporation (1990) 217 CA3d 103, 111, 265 CR 672

Discussion:
See *9.10A*

☐ Determine whether an out of state debtor or out of state assets may hinder enforcement.

Discussion:
See *9.10B*

☐ Determine whether there are limitations on enforcement because debtor is deceased.

Authority:
CCP § 686.020; *Prob Code § 9300 et seq.*

Discussion:
See *9.10C*

☐ If judgment appears enforceable, consider sending judgment debtor demand letter specifying a deadline.

Discussion:
See *9.11*

Form:
See *9.44*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageEnforcement of JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsMoney Judgments

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Chapter 9 Planning Enforcement of Judgment
II. ASSESSING ENFORCEABILITY OF JUDGMENT

1-9 MB Practice Guide: CA Debt Collection 9.04

AUTHOR: Mark V. Isola, Esq.

9.04 Counsel Should Determine Court of Origin of Judgment to Be Enforced.

A quick review of the judgment's caption will indicate the court of origin. If it is by a federal court (i.e., United States District Court or United States Bankruptcy Court), counsel should determine whether it is a federal court located in California. California courts have power to compel obedience to their judgments [*see CCP § 128(a)(4)*].

Strategic Point--Out of State Judgments.

If the judgment was issued by a state court outside of California, counsel should take steps to obtain a judgment in California based on the out of state judgment. The enforceability of the judgment then must be determined in accordance with the law of the jurisdiction of the issuing court.

Cross Reference:

Discussion of steps necessary to enforce judgments by out of state courts, see Ch. 25, Enforcing Out of State Judgments in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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II. ASSESSING ENFORCEABILITY OF JUDGMENT

1-9 MB Practice Guide: CA Debt Collection 9.05

AUTHOR: Mark V. Isola, Esq.

9.05 Counsel Should Determine Whether Judgment Has Been Entered, Corrected, or Modified.

A judgment is the final determination of the rights of the parties in an action or proceeding [*see CCP § 577*]. The judgment of a California court must be entered before enforcement can begin [*see CCP §§ 664, 680.230*].

Strategic Point:

If the judgment for some reason has not been entered, counsel must take steps to have the issuing court enter the judgment, so that it may be enforced.

Enforcement can commence once the judgment is entered [*see CCP § 683.010*], unless enforcement of the judgment is stayed.

An entered judgment may have been corrected or modified, within the court's authority to correct clerical errors [*see CCP § 473(d)*]. Counsel enforcing a judgment that other counsel obtained should check court records for correction or modification of a judgment after its initial entry.

Cross References:

Obtaining entry of judgment, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 26, Entry of Judgment.

Compelling entry of judgment, see *Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, 19.13 et seq.*

Discussion of obtaining and vacating stays of enforcement of judgments, see Ch. 15, Staying Enforcement of Judgment.

Discussion of correction and modification of judgments generally, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 28, Correcting and Modifying Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Chapter 9 Planning Enforcement of Judgment
II. ASSESSING ENFORCEABILITY OF JUDGMENT

1-9 MB Practice Guide: CA Debt Collection 9.06

AUTHOR: Mark V. Isola, Esq.

9.06 Counsel Should Determine Whether Judgment Is Money or Nonmoney Judgment.

9.06[1] Money Judgment Requires Payment of Money, While Nonmoney Judgment Does Not. A judgment will either be a money judgment or a nonmoney judgment. A money judgment requires the payment of money [*see CCP § 680.270*]. If the judgment is a money judgment, the first step is to assess the monetary amount awarded in the judgment [*see CCP § 577.5*].

Strategic Point:

The amount awarded will impact decisions on what steps to pursue in enforcement of the judgment. If the amount of the judgment is small, the creditor's options to enforce it may be limited by the costs involved.

A nonmoney judgment does require the payment of money and can include:

- Judgment for possession of personal property [*see CCP § 681.010(b)*].
- Judgment for possession of real property [*see CCP § 681.010(c)*].
- Judgment for sale of real or personal property [*see CCP § 681.010(d)*].
- Any other judgment requiring performance of an act or requiring forbearance of performance of an act [*see CCP § 681.010(e)*].

Strategic Point:

If the creditor has been assigned possession of any assets, it its recommended that the judgment be enforced against those assets first, if they are of significant value. A preliminary matter is the determination of what the nonmoney portion of the judgment is worth.

Strategic Point--Combined Money and Nonmoney Judgments:

As a general rule, when a judgment involves both payment of money and something else (such as return of equipment, possession of real property, and so on), the creditor will want the nonmoney part of the judgment attended to first, because, in most situations, the longer the creditor is out of possession of the real or personal property, the greater the damage the creditor incurs. However, if the creditor's attorney knows of assets with which to satisfy the money portion of the judgment, there is nothing to prohibit the attorney from simultaneously enforcing, by appropriate writs, both the money and nonmoney portions of the judgment.

Cross Reference:

Discussion of effect of amount of money judgment on selection of enforcement methods, see *9.21*.

9.06[2] Enforcement of Judgment for Nonmoney Relief Must Be Based on Type of Relief Awarded. If the judgment is a nonmoney judgment, assessment of the type of nonmoney relief awarded is necessary before commencing enforcement procedures:

- A judgment for possession of personal property is enforceable as provided in *CCP §§ 714.010-714.030*.
- A judgment for possession of real property is enforceable as provided in *CCP §§ 715.010-715.050*.
- A judgment for sale of real or personal property is enforceable as provided in *CCP §§ 716.010-716.030*.
- Any other judgment requiring performance of an act or requiring forbearance of performance of an act is enforceable as provided in *CCP § 717.010*.

Cross Reference:

Assessing and enforcing nonmoney relief in judgments, see Ch. 22, Enforcing Nonmoney Judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Chapter 9 Planning Enforcement of Judgment
II. ASSESSING ENFORCEABILITY OF JUDGMENT

1-9 MB Practice Guide: CA Debt Collection 9.07

AUTHOR: Mark V. Isola, Esq.

9.07 Counsel Should Determine Whether Enforcement of Judgment Is Stayed.

9.07[1] Ascertaining Whether Stay Prevents Creditor From Enforcing Judgment Can Save Counsel's Resources. In some circumstances, a judgment may be stayed so that the judgment creditor is prohibited from enforcing the judgment [*see 9.07[2]* et seq.].

Strategic Point:

Counsel for the judgment creditor on a judgment obtained by other counsel should determine whether execution of the judgment is stayed before expending resources on initiating the enforcing of a judgment that cannot be enforced because of an existing stay.

Cross Reference:

For discussion of stay of judgment generally, see Ch. 15, Staying Enforcement of Judgment.

9.07[2] Order From Trial Court May Stay Enforcement. The trial court may order that enforcement of the judgment be stayed [*see CCP § 918*].

Cross Reference:

Discussion of trial court order to stay enforcement, see *Ch. 15, Staying Enforcement of Judgment, 15.08* et seq.

9.07[3] Appeal Will Not Stay Enforcement Unless Undertaking is Posed. The perfecting of an appeal does not stay enforcement of a money judgment unless the judgment debtor posts an undertaking [*see CCP § 917.1(a)*]. Some nonmoney judgments can be stayed on appeal by either posting an undertaking [*see CCP §§ 917.2, 917.4, 917.5*] or complying with the specific requirement applicable to that particular nonmoney judgment [*see CCP § 917.3*].

Cross Reference:

Discussion of stay of enforcement by appeal, see *Ch. 15, Staying Enforcement of Judgment, 15.16* et seq.

9.07[4] Bankruptcy May Stay Enforcement. The filing of a bankruptcy case by the judgment debtor will stay enforcement of the judgment from the inception of the bankruptcy case. However, some specified acts and proceedings by creditors are permitted. In specified instances, the automatic stay will expire in 30 days and in other instances, the stay is not automatic. If the stay is in place, the judgment creditor will need to obtain relief from the stay before taking any further steps to enforce the judgment [*see 11 USC § 362*].

Investigating Bankruptcy Filings Using Online Resources:

Many resources are available online for locating bankruptcy filings. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings
  - Sample Search: To find California bankruptcy filings of a judgment debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross References:

Discussion of stay of enforcement by bankruptcy, see *Ch. 3, Effect of Bankruptcy, 3.04*.

Discussion of acts and proceedings permitted by creditors of a debtor in bankruptcy, see *Ch. 3, Effect of Bankruptcy, 3.06*.

Discussion of limitations on automatic bankruptcy stay, see *Ch. 3, Effect of Bankruptcy, 3.07* et seq.

Discussion of obtaining relief from the bankruptcy stay, see *Ch. 3, Effect of Bankruptcy, 3.11* et seq.

9.07[5] Assignment for Benefit of Creditors Does Not Stay Enforcement. A judgment debtor who has satisfied all of the requirements for an assignment for the benefit of creditors (a voluntary process) [*see CCP § 493.010*] is not entitled to any statutory protection against enforcement of the judgment [*see Berg & Berg Enters., LLC v. Sherwood Partners, Inc. (2005) 131 CA4th 802, 820-822, 828-829, 32 CR3d 325]* .

Cross Reference:

Discussion of assignment for benefit of creditors, see *Ch. 20, Miscellaneous Creditors' Remedies, 20.40* et seq.

9.07[6] Agreement With Judgment Debtor May Stay Enforcement. A judgment creditor may enter into a forbearance agreement with the judgment debtor in which the judgment creditor agrees to forbear from enforcing the judgment for a specified period of time [*Bruton v. Tearle (1936) 7 C2d 48, 59-60, 59 P2d 953]* .

9.07[7] Enforcement of Federal Judgment Automatically Stayed for 10 Days. Judgments from federal courts (whether district or bankruptcy courts) are automatically stayed for 10 days after entry of the judgment [*see Fed R Civ P 62*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageEnforcement of JudgmentsBankruptcy LawState Insolvency LawsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsMoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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II. ASSESSING ENFORCEABILITY OF JUDGMENT

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AUTHOR: Mark V. Isola, Esq.

9.08 Counsel Should Determine Whether Judgment Has Been Properly Assigned.

An original judgment creditor who has assigned the judgment to a third party (the "assignee") is no longer entitled to enforce the judgment. An assignee of a judgment can enforce the judgment only if an acknowledgment of assignment of judgment to that assignee has been filed under *CCP § 673* or the assignee has otherwise become an assignee of record in accordance with California law [*CCP § 681.020*]. In accordance with those statutes, counsel for a judgment creditor who is assignee of the judgment should ensure that the assignment has been filed with the clerk of the court in which the judgment was entered.

Warning:

Assignment of the judgment to one of the joint and several co-obligors on the judgment will extinguish the debt and the judgment, and thereafter no action can be maintained on the judgment [*Great Western Bank v. Kong (2001) 90 CA4th 28, 32-33, 108 CR2d 266]* .

Cross Reference:

Discussion of assignment of judgments, see Ch. 14, Assigning a Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonparties

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II. ASSESSING ENFORCEABILITY OF JUDGMENT

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AUTHOR: Mark V. Isola, Esq.

9.09 Counsel Should Determine Whether Discharge or Satisfaction of Judgment Bars Enforcement.

9.09[1] Enforcement May Be Prohibited by Bankruptcy Discharge. A debt that has been discharged in bankruptcy cannot be enforced against the judgment debtor [*see 11 USC § 524*].

Strategic Point:

The judgment creditor must confirm that the debt has been discharged and if the bankruptcy is still pending, determine whether steps can be taken to prevent discharge of the judgment. Counsel should check with the bankruptcy court where the debtor filed on the court's PACER website and pull up the docket. This will show whether the debtor received a discharge. Next, counsel should pull up the debtor's schedule of creditors to see if the client's debt was listed and therefore subject to discharge. If it was not scheduled, and counsel's creditor was otherwise unaware of the bankruptcy filing, then the debt will not be discharged if the debtor, had he or she known of the filing, would have received a distribution or had a basis for challenging the discharge of his or her debt. If so, the debtor can move to re-open the bankruptcy. However, if the debtor would have ended up in the same position even if he or she had known of the bankruptcy (e.g.; there is a no-asset estate and the creditor had no basis to avoid discharge of the debt), the debt will be discharged notwithstanding the fact that it was not listed [*Beezley v. California Land Title Co. (9th Cir. 1993) 994 F.2d 1433*].

Investigating Bankruptcy Discharge Using Online Resources:

Many resources are available online for locating bankruptcy filings. These resources can help you determine the date of a debtor's discharge in bankruptcy. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings
  - Sample Search: To find California bankruptcy filings of a judgment debtor, use a

NAME segment search: *name (first name /3 last name)*.

Cross References:

Discussion of discharge of debt in bankruptcy, see *Ch. 3, Effect of Bankruptcy, 3.20* et seq.

Discussion of preventing discharge of judgment in bankruptcy, see *Ch. 3, Effect of Bankruptcy 3.23* et seq.

9.09[2] Enforcement May Be Prohibited by Setoff. The judgment debtor may be able to apply a claim back against the judgment creditor; if this type of setoff is large enough that the entire judgment is extinguished, enforcement may be prohibited [*Harrison v. Adams (1942) 20 C2d 646, 648-649, 128 P2d 9* ; *cf. CCP § 431.70*].

Cross References:

Discussion of equitable setoff of reciprocal claims as means of discharging judgment debtor from liability under judgment, see *Ch. 24, Discharge and Satisfaction of Judgments, 24.27[1].*

Further discussion, see *California Forms of Pleading and Practice, § 318.122* (Matthew Bender).

9.09[3] Enforcement May Be Prohibited by Satisfaction of Judgment. If the judgment debtor has satisfied the judgment in full, the judgment cannot be enforced [*see CCP §§ 724.010-724.100*].

Cross Reference:

Effect of satisfaction of judgment on enforcement efforts, see Ch. 24, Discharge and Satisfaction of Judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsSetoffsBankruptcy LawDischarge & DischargeabilityEffects of DischargeGeneral OverviewBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawDebtor & Creditor Relations

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II. ASSESSING ENFORCEABILITY OF JUDGMENT

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AUTHOR: Mark V. Isola, Esq.

9.10 Expiration of Judgment May Bar Enforcement.

A money judgment or a judgment for possession or sale of property is enforceable for 10 years from the date of entry of the judgment [*see CCP § 683.020*]. However, the judgment can be renewed before expiration [*see CCP §§ 683.110-683.220*]. Renewal of the judgment also will extend any judgment liens [*see CCP § 683.020*]. Under some circumstances, a judgment creditor can enforce an expired judgment [*see CCP § 683.040*].

Strategic Point:

The first thing to do when seeking to enforce any judgment is to verify its expiration date. If the judgment is more than five years old, counsel should consider renewing it. Sometimes enforcement procedures take a long time and the last thing counsel wants is to have the judgment expire in the middle of seeking enforcement.

Cross References:

Discussion of expiration of judgments, see *Ch. 13, Time Restrictions on Enforcement of Judgments, 13.05*.

Discussion of renewal of judgments, see *Ch. 13, Time Restrictions on Enforcement of Judgments, 13.07*.

Discussion of enforcement of expired judgments, see *Ch. 13, Time Restrictions on Enforcement of Judgments, 13.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsRevival of JudgmentsCivil ProcedureRemediesJudgment LiensRenewals

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1-9 MB Practice Guide: CA Debt Collection 9.10A

AUTHOR: Mark V. Isola, Esq.

9.10A Counsel Should Consider Whether Judgment Is Void or Voidable.

A void judgment theoretically cannot be enforced against the judgment debtor, although it may be enforced until the judgment debtor obtains an order that the judgment is void. The judgment debtor may claim that the judgment is void, for example, due to defective service of summons in the action in which judgment was entered. If service was improper, any subsequently obtained judgment is void, even if the debtor had actual knowledge of the proceedings *[Taylor-Rush v. Multitech Corporation (1990) 217 CA3d 103, 111, 265 CR 672]* .

Other bases for a judgment being rendered void include the following:

- A judgment is void if the court lacked subject matter jurisdiction to enter it *[Condor Enters., Ltd. v. Valley View State Bank (1994) 25 CA4th 734, 741, 30 CR2d 613]* .

- A default judgment in excess of the amount specified in the complaint is void [*CCP § 580*; *Heidary v. Yadollahi (2002) 99 CA4th 857, 864-865, 121 CR2d 695]* .

- A judgment entered either for or against a person who is not a party to the proceeding is void to that extent [*Fazzi v. Peters (1968) 68 C2d 590, 594, 68 CR 170, 440 P2d 242*].

- A judgment that goes beyond the issues litigated is void to that extent [*CCP § 1911*; *In re Wren (1957) 48 C2d 159, 163, 308 P2d 329]* .

If a judgment is void, the judgment debtor may seek an order quashing a writ of execution and vacating the levy of execution on the debtor's property motion *[Vest v. Superior Court (1956) 140 CA2d 91, 93, 294 P2d 988]* .

A judgment in excess of a court's subject matter jurisdiction is *void*, while judgments in excess of other kinds of jurisdiction are merely *voidable* *[Jovine v. FHP, Inc. (1998) 64 CA4th 1506, 1527, 76 CR2d 322]* . Once it becomes final, a judgment that is voidable generally is enforceable [*see* *People v. American Contractors Indemnity Co. (2004) 33 C4th 653, 665, 16 CR3d 76, 93 P3d 1020* (absent unusual circumstances, collateral attack on a voidable but final judgment is not available; voidable judgment must be challenged while trial court or appellate court can still correct mistake); *Morton Gas Engine Co. v. California Seeded Raisin Co. (1914) 24 CA 362, 364, 141 P 392* (execution may not be quashed if judgment is voidable but not void)].

Cross Reference:

Distinction between void and voidable judicial acts, see *California Forms of Pleading and Practice, § 324.42[1]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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II. ASSESSING ENFORCEABILITY OF JUDGMENT

1-9 MB Practice Guide: CA Debt Collection 9.10B

AUTHOR: Mark V. Isola, Esq.

9.10B Out of State Debtor or Out of State Assets May Hinder Enforcement.

If the judgment cannot be satisfied without reaching assets outside California, counsel will need to domesticate the judgment in the jurisdiction where the debtor's assets are located, making the enforcement effort more costly and time-consuming.

Strategic Point:

Certain types of assets (including those held in "Debt Protection Entities" based outside California) may be reachable only by having California or federal courts issue orders to the judgment debtor to repatriate those assets or face contempt *[Federal Trade Comm'n v. Affordable Media, LLC (9th Cir 1999) 179 F3d 1228, 1240]* . Because this process can prove expensive, the amount of the judgment and the value of the assets must be worth the investigative and court time, costs, and effort.

In addition, it may be difficult to conduct postjudgment discovery if the debtor is out of state because the court must have personal jurisdiction over the parties against whom discovery is sought. Unlike pretrial discovery, there appears to be no method of examining a person outside the state of California in postjudgment discovery, except by filing a sister state judgment enforcement proceeding in the foreign state.

Strategic Point:

If the sister state where the judgment was domesticated allows it, contact good collection counsel in that jurisdiction to plan how to proceed.

Decision Point:

As a practical matter, counsel ordinarily should not accept collection matters if the assets are not in California, because all enforcement proceedings will have to take place where the property (real or personal) is located, and collection will have to be referred to other counsel in that state.

Cross References:

Discussion of postjudgment discovery, see Ch. 10, Postjudgment Discovery.

Discussion of out of state judgments, see Ch. 25, Enforcing Out of State Judgments in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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1-9 MB Practice Guide: CA Debt Collection 9.10C

AUTHOR: Mark V. Isola, Esq.

9.10C Limitations on Enforcement Apply If Debtor Is Deceased.

Generally, enforcement of a judgment against a decedent is limited to filing a claim in the probate estate [*CCP § 686.020*; *Prob Code § 9300 et seq*.], although levy proceedings begun before death may be completed [*Prob Code § 9303*]. Liens on the decedent debtor's property may be foreclosed by waiving recourse to other assets [*Prob Code § 9391*].

Strategic Point:

Before waiving rights to other property in the estate, counsel should determine whether the property securing the debt is adequate to satisfy the debt. If not, counsel should consider filing a claim and asserting it as secured.

Cross Reference:

Spouse liability after death, see *1.42[5][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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1-9 MB Practice Guide: CA Debt Collection 9.11

AUTHOR: Mark V. Isola, Esq.

9.11 If Judgment Is Enforceable, Counsel Should Immediately Create Judgment Liens and Prepare Strategic Plan for Enforcement.

If counsel's review of all the foregoing factors shows that the judgment is enforceable, counsel should immediately create judgment liens on affected real and personal property and considering perfecting any liens that may have previously been obtained.

Cross References:

Discussion of enforcement plans, see Ch. 1, Planning Collection of Debt. Discussion of judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Counsel should create the balance of an enforcement plan, which may include contact with the judgment debtor by phone or letter, unless doing so would alert the judgment debtor to enforcement actions the judgment creditor is taking, or wants to take, without alerting the judgment debtor. This can include waiting until certain liens "season" for at least 90 days so that they will not be considered a preferences if the judgment debtor later files bankruptcy.

Warning:

Counsel must make certain to be in compliance with the Fair Debt Collection Practices Act in the letter, if applicable, and if this is counsel's first contact with the debtor on a consumer debt.

Cross References:

Discussion of Fair Debt Collection Practices Act, see *Ch. 5, Debt Collection Prior to Litigation, 5.10* et seq.

General discussion of prelitigation debt collection activities, see *Ch. 6, Debt Collection Prior to Litigation, 5.03* et seq.

Form for demand letter for satisfaction of judgment, see *9.44*.

Discussion of preparation of strategic plan, see *9.12* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawLandlord & TenantTenant's Remedies & RightsFair Debt Collection Practices Act

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III. DEVELOPING A STRATEGY FOR ASSET RECOVERY

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AUTHOR: Mark V. Isola, Esq.

9.12 CHECKLIST: Developing a Strategy for Asset Recovery.

☐ Review purpose and goals of developing strategic plan.

Discussion:
See *9.13*

☐ Identify known information about judgment debtor.

Discussion:
See *9.14*

☐ Create plan for recovering known assets.

Discussion:
See *9.15*

☐ Create plan for discovering other assets.

Discussion:
See *9.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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1-9 MB Practice Guide: CA Debt Collection 9.13

AUTHOR: Mark V. Isola, Esq.

9.13 Developing Strategic Plan Is Important.

It is important to develop a strategic plan before commencing enforcement procedures. At the very least, the plan should be developed after the judgment creditor takes some of the basic enforcement steps.

Strategic Point:

Creating a plan will help the judgment creditor understand that obtaining the judgment was possibly only the beginning of a whole new process.

Litigating the case and obtaining the judgment was likely time consuming and expensive. Unless the judgment debtor is both capable and willing to satisfy the judgment, the enforcement of judgment process is likely to be equally time consuming and possibly as expensive.

Strategic Point:

Developing the strategic plan will encourage discussion and analysis of the proper methods to employ for the particular judgment debtor and the particular judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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AUTHOR: Mark V. Isola, Esq.

9.14 All Information Needed for Enforcement of Judgment Should Be Assembled.

9.14[1] Counsel Should Identify Everything Known About Judgment Debtor. An initial step after obtaining the judgment is to identify all information known about the judgment debtor. The judgment creditor should create a list of all such information, including, but not limited to:

- Address of current residence.
- Addresses of former residences.
- Telephone numbers.
- Social security number.
- Date of birth.
- Driver's license number.
- Spouse's name and/or maiden name.
- Current employer.
- Former employers.
- Assets and liabilities.
- Transfers of assets.

Strategic Point:

Even if counsel conducted a thorough search concerning judgment debtor's assets before seeking judgment in collection of a debt, the identification of assets should be done anew after obtaining the judgment to clarify the full extent of assets known as a result of the litigation and accompanying discovery and presentation of evidence.

Cross Reference:

Discussion of locating debtor and debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Investigating Judgment Debtors Using Online Resources:

Many resources are available online for locating information about a judgment debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > CA Public Records, Combined
  - Sample Search: To find information including court filings, liens, real property records, professional licenses, and addresses related to the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > California > Filings > Docket Materials > CA Combined Civil Court Filings From Superior and Municipal Courts
  - Sample Search: To find California civil case filings where the judgment debtor is a party, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > California > Filings > Docket Materials > CA Criminal Case Filings
  - Sample Search: To find California criminal case filings where the judgment debtor is a defendant, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > California > Public Records > Licenses & Registrations > CA Professional Licenses
  - Sample Search: To find a judgment debtor's professional licenses, use a NAME segment search: *name (first name /3 last name)*.

9.14[2] Property Subject to Immediate Enforcement Must Be Identified. A critical component of the strategy for recovering assets is to identify the assets of the judgment debtor that are known to the judgment creditor.

Strategic Point:

To the extent that the judgment creditor can enforce the judgment against the judgment debtor's assets without having to obtain information about the assets from the judgment debtor, the judgment creditor will have a much greater likelihood of success in recovering the asset.

Locating Debtor Assets Using Online Resources:

Many resources are available online for locating real and personal property of a judgment debtor. For example, helpful resources at lexis.com include:

- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
  - Sample Search: To find real property assets when you know the judgment debtor's name, use a NAME segment search: *name (first name /3 last name)*.
  - Sample Search: To find real property assets when you know the address of the property, use an ADDRESS segment search: *name (property address)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Watercraft
  - Sample Search: To find boats owned by the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
  - Sample Search: To find aircraft owned by the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Watercraft
  - Sample Search: To find stock owned by the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Discussion of identifying assets of liable party, see *Ch. 2, Locating the Debtor and Identifying the Debtor's Assets, 2.17* et seq.

9.14[3] Other Useful Information Should Be Identified. All other information known about the judgment debtor will assist in creating the enforcement strategy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsReal Property LawPriorities & RecordingRecording ActsTransportation LawWater TransportationLicensing & Registration

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AUTHOR: Mark V. Isola, Esq.

9.15 Counsel Should Create Plan for Recovering Known Assets.

The judgment debtor's assets that are already known to the judgment creditor should be the early focus of the enforcement strategy. Known assets of all jointly liable judgment debtors should be considered in this plan. Overall, the strategy should set recovery of known assets as a high priority task.

Often, the most effective enforcement steps the judgment creditor can take are:

- Executing and levying against the judgment debtor's known personal property.
- Executing and levying against the judgment debtor's known real property.

Locating Debtor Assets Using Online Resources:

Many resources are available online for locating real and personal property of a judgment debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find Assets > Real Property
  - Sample Search: To find real property assets when you know the judgment debtor's name, use a NAME segment search: *name (first name /3 last name)*.
  - Sample Search: To find real property assets when you know the address of the property, use an ADDRESS segment search: *name (property address)*.
- Legal tab > States Legal--U.S. > California > Public Records > Public Records > Public Records > Find Assets > Watercraft
  - Sample Search: To find boats owned by the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.

- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft
    - Sample Search: To find aircraft owned by the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Stock Information > Stock Ownership
    - Sample Search: To find stock owned by the judgment debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross References:

Discussion of assessing joint liability situations, see *9.37* et seq.

Discussion of executing and levying against personal property generally, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of executing and levying against real property generally, see Ch. 17, Executing and Levying Against Real Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawPriorities & RecordingRecording ActsTransportation LawWater TransportationLicensing & Registration

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1-9 MB Practice Guide: CA Debt Collection 9.16

AUTHOR: Mark V. Isola, Esq.

9.16 Counsel Should Create Plan for Discovering Other Assets.

9.16[1] Plan Should Include Discovery of Other Assets of Judgment Debtor. If the judgment debtor's known assets cannot be recovered or, even if recovered, will not provide an amount sufficient to satisfy the judgment, the judgment creditor will need to discover additional assets against which the judgment can be enforced.

The plan should consider the use of postjudgment written discovery. The judgment creditor can serve written interrogatories and written requests for production of documents [*see CCP §§ 708.020*, *708.030*]. The plan also should consider the use of examinations of the judgment debtor and any third parties who might be in possession or control of the judgment debtor's assets [*see CCP §§ 708.110*, *708.120*]. Discovery of additional assets of all jointly liable judgment debtors should be considered in this plan.

Cross References:

Discussion of discovery of unknown assets of judgment debtor, see Ch. 10, Postjudgment Discovery.

Discussion of assessing joint liability situations, see *9.37* et seq.

9.16[2] Plan Should Include Seeking and Adding Additional Judgment Debtors to Judgment. If the known and potential unknown assets of all judgment debtors named in the judgment cannot be recovered or, even if recovered, will not provide an amount sufficient to satisfy the judgment, the judgment creditor should seek to discover additional jointly liable parties who can be added as judgment debtors to the judgment, against which the judgment can thereafter be enforced.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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IV. CONSIDERING AVAILABLE METHODS FOR RECOVERING ASSETS

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AUTHOR: Mark V. Isola, Esq.

9.17 CHECKLIST: Considering Available Methods for Recovering Assets.

☐ Determine type of judgment debtor.

Discussion:
See *9.19*

☐ Determine whether more than one judgment debtor is subject to enforcement.

Discussion:
See *9.20*

☐ Consider amount of judgment.

Discussion:
See *9.21*

☐ Determine amount of information known about judgment debtor.

Discussion:
See *9.22*

☐ Determine available methods of recovering assets.

Discussion:
See *9.23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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AUTHOR: Mark V. Isola, Esq.

9.18 Options and Strategies.

There is no prohibition against the judgment creditor invoking more than one--or even all--of the possible recovery methods at the same time.

The expense and time involved for some of the methods, however, makes it impractical to use more than one at a time. Unless the judgment is so substantial that no single method will result in a substantial recovery, the judgment creditor should pursue one method to its completion and then reevaluate the status of collection before engaging in another method.

Strategic Point--Tailor Enforcement Plan to Facts of Case:

The advantages and disadvantages of the various potentially available methods of enforcement are dependent on the particular facts of each case. For example, a judgment debtor might have a house, be engaged as a commission salesman (requiring an assignment order, not just a writ of execution and wage garnishment), and have a vehicle. Given the particular facts, counsel might obtain the assignment order and/or execute against the debtor's vehicle--or both at the same time (although vehicles often have no equity and are expensive).

Strategic Point--Coordinate Enforcement Efforts:

Counsel should coordinate all enforcement efforts. For example, if scheduling one or more judgment debtor examinations, counsel should serve them simultaneously with a subpoena duces tecum to bring documents to the examination. When levying on a bank account, counsel should make certain to list all accounts and safe deposit boxes held in the debtor's name and those in the name of the debtor's spouse and include the social security number (this is how most banks cross-reference accounts). Particularly when levying on cash or accounts, the quicker counsel acts the better, because the debtor is not forewarned in time to move assets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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AUTHOR: Mark V. Isola, Esq.

9.19 Type of Judgment Debtor Will Affect Methods to Consider.

The judgment creditor will need to assess the type(s) of judgment debtor(s) that are subject to enforcement of the judgment. The judgment debtor can be an individual or an entity. Entities can take several forms:

- General partnership.
- Limited partnership.
- Limited liability partnership.
- Limited liability company.
- Corporation.

Strategic Point:

Ascertaining which type of judgment debtor is subject to enforcement of the judgment is an important preliminary determination in the enforcement strategy process, because not all enforcement methods can, or should be, used in all situations.

A sole proprietorship (also known as a "dba" or "doing business under a fictitious business name") is not an entity separate from the individual owner. It is merely an asset of the individual doing business under that name [*Providence Washington Ins. Co. v. Valley Forge Ins. Co. (1996) 42 CA4th 1194, 1199-1200, 50 CR2d 192*].

Investigating Fictitious Business Names Using Online Resources:

Many resources are available online for investigating fictitious business names. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Business & Corporation Information

> CA Business Leads and Fictitious Business Name Information

- Sample Search: To find a fictitious business name used by an individual, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

For discussion of the effect of the type of debtor on collectibility of debt, see *Ch. 1, Planning Collection of Debt, 1.27* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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AUTHOR: Mark V. Isola, Esq.

9.20 Existence of Multiple Judgment Debtors Will Affect Methods to Consider.

Ascertaining the existence of multiple judgment debtors also will affect the enforcement methods to consider.

Strategic Point:

If several individuals are jointly and severally liable for the judgment, the judgment creditor should consider whether to conduct some limited postjudgment discovery, determine which individual judgment debtor has the most recoverable assets, and then pursue the judgment only against that individual.

Cross Reference:

Conducting postjudgment discovery, see Ch. 10, Postjudgment Discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

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1-9 MB Practice Guide: CA Debt Collection 9.21

AUTHOR: Mark V. Isola, Esq.

9.21 Amount of Judgment Will Affect Methods to Consider.

The amount of the judgment should affect which methods to consider using in enforcement of the judgment.

Strategic Point:

A large judgment against an individual will probably warrant more aggressive collection activity than simply making a wage garnishment, because the limitations in the amount that can periodically be garnished may make collection by garnishment of the amount due on the judgment too lengthy.

Cross Reference:

Discussion of garnishment generally, see Ch. 21, Garnishment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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AUTHOR: Mark V. Isola, Esq.

9.22 Amount of Information Known About Judgment Debtor Will Affect Methods to Consider.

The information known about the judgment debtor also will play a role in selecting enforcement methods. Enforcement efforts obviously must be directed at known assets, and the methods available to get at those assets may be limited. If the amount of the assets is insufficient or the methods available to recover against those assets are not ideal, continuing investigation of the judgment debtor's assets may be necessary.

Strategic Point:

A judgment creditor should consider the use of a private investigator to learn as much information about the judgment debtor as possible; investigators often have sources of information that others cannot access.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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1-9 MB Practice Guide: CA Debt Collection 9.23

AUTHOR: Mark V. Isola, Esq.

9.23 Individual Methods of Recovery Should Be Evaluated.

9.23[1] Writ of Execution Against Personal or Real Property.

9.23[1][a] Writ of Execution May Be Used Against Specifically Identified Personal Property. A writ of execution under *CCP § 699.510* may be used to obtain a judgment debtor's personal property. The writ of execution instructs the levying officer (police officer, sheriff, or, in some instances, registered process server) to seize the judgment debtor's personal property or money. Nonmonetary personal property is subsequently sold at an execution sale and the proceeds of sale are applied to satisfy the judgment. Items such as cash and checks can be collected by the levying officer and turned over to the judgment creditor [*see CCP § 699.710*].

Strategic Point:

The levying officer can only levy on property that is specifically identified at a known location. Although a blanket attempt to seize "all personal property" of the debtor will likely be rejected, there are ways around it. Counsel should call the sheriff and ask if a particular description will be sufficient or if more information needs to be added. It is possible that a description that includes more specific information, such as the type of description used on blanket UCC filings, will work.

Cross Reference:

Discussion of executing against judgment debtor's personal property, see Ch. 16, Executing and Levying Against Personal Property.

9.23[1][b] Writ of Execution May Be Used to Recover From Real Property. A judgment creditor can use a writ of execution obtained under *CCP § 699.510* to recover the judgment debtor's real property [*CCP § 699.710*].

Strategic Point:

Executing against the judgment debtor's real property can be a time-consuming and expensive process,

especially due to the homestead exemption. If the judgment debtor has sufficient personal property to satisfy the judgment, the judgment creditor should proceed against the personal property and not against the real property. Although levying on real property can be expensive, these costs are recoverable, and merely starting the levy can provoke a response in a debtor who was otherwise ignoring the judgment.

Cross Reference:

Discussion of executing against judgment debtor's real property, see Ch. 17, Executing and Levying Against Real Property.

9.23[2] Garnishment of Judgment Debtor's Wages Can Be Effective Enforcement Method for Small Judgments. Wage garnishment under *CCP § 706.010 et seq*. allows recovery from the judgment debtor's salary or wages from employment. A garnishment of the judgment debtor's wages can be easy to accomplish and can often force the judgment debtor to pay off the judgment.

Strategic Point:

The amount received through garnishment may not be enough to be used as the sole collection method for a large judgment. Although the amount to be recovered on a wage garnishment is limited, it serves as a constant reminder to the debtor that counsel is there and will not go away until paid or the matter is settled, and it does not preclude pursuing other enforcement remedies at the same time.

Cross Reference:

Discussion of enforcement of judgment by garnishment, see Ch. 21, Garnishment.

9.23[3] Judgment Lien Establishes Judgment Creditor's Interest in Real or Personal Property. A personal property judgment lien is created by recording a notice of judgment lien with the secretary of state. A real property judgment lien is created by recording an abstract of judgment with the county recorder for each county in which the judgment debtor owns real property [*see CCP § 708.510*].

Strategic Point:

The simple recording of a lien against the judgment debtor's personal property or real property will not by itself result in the recovery of any of the debtor's property. The lien will only preserve the judgment creditor's position in the asset until the judgment debtor tries to sell or refinance the asset or until the judgment creditor decides to execute a writ against the asset.

Strategic Point:

When filing abstracts, counsel should have several issued at the same time and record them in contiguous counties or counties in which counsel believes the debtor has ties. It is easier to get many issued at once than to repeat the effort several times for one abstract.

Cross Reference:

Discussion of creating judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

9.23[4] Examination of Judgment Debtor Allows Immediate Recovery of Personal Property on Person of Judgment Debtor. An examination of the judgment debtor pursuant to an order under *CCP § 708.110* may not only be an effective means of discovering the location of the judgment debtor's assets, but can also be used as a tool to

recovering assets. If the judgment debtor appears for the examination with cash, jewelry, or other valuable property, the judgment creditor has the right to seek the immediate turnover of that property or cash [*CCP § 708.205*].

A turnover order issued pursuant to *CCP § 708.205* does not permit the turnover of property (other than cash) to the judgment creditor, but only to the levying officer [*Palacio Del Mar Homeowners Association, Inc. v. McMahon (2009) 174 CA4th 1386, 95 CR3d 445]* .

Strategic Point:

Whenever conducting a judgment debtor examination, always bring a blank turnover order and fill in the blank for the court to enter it and order the debtor to turn over the property to the levying officer (unless it is cash, in which case it can be turned over directly to the judgment creditor).

Cross References:

Detailed discussion of debtor examinations, see Ch. 10, Postjudgment Discovery.

Discussion of turnover orders, see *22.07[4]*.

Form for application for turnover order, declaration in support of order, and turnover order, see *22.23 -22.25*.

9.23[5] Additional Methods May Be Appropriate in Particular Circumstances.

9.23[5][a] Assignment Order Allows Recovery of Judgment Debtor's Receivables From Third Party. An assignment order under *CCP § 708.510* instructs a third party who owes money to the judgment debtor to make payment instead to the judgment creditor.

Cross Reference:

Discussion of assignment orders, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.20* et seq.

9.23[5][b] Receivership Prevents Wrongful Transfer by Judgment Debtor. A receiver appointed under *CCP § 708.620* takes over and operates the judgment debtor's business, thereby ensuring that the judgment debtor does not conceal or wrongfully transfer any assets.

Cross References:

Discussion of receivership as a method of enforcement, see *Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment, 8.54* et seq., *Ch. 20, Miscellaneous Creditor's Remedies, 20.34* et seq.

9.23[5][c] Installation of Keeper Allows Recovery of Judgment Debtor's Receipts. A keeper installed under *CCP § 700.070*, usually a police officer or sheriff, enters the judgment debtor's premises and takes possession of all checks and cash paid to the judgment debtor, usually by taking the mail and by standing next to the cash register.

Strategic Point:

A keeper cannot take credit card charges, but can gather information about the account where charges are being credited for subsequent levy purposes. A less expensive method than a keeper is a "till tap," in which the levying officer goes into the premises once to take any funds on hand to "tap the till." When using a keeper, it is important to advise the sheriff whether the keeper will be on the premises 24 hours a

day or only during specific business hours. If the business is seasonal, counsel should try to coordinate the levy in advance so that the levy hits at the optimum time. For example, this means visiting a florist at Valentine's Day or Mother's Day, and retail stores at Christmas.

9.23[5][d] Petition for Involuntary Bankruptcy Forces Assets of Judgment Debtor Into Possession of Bankruptcy Trustee. In limited situations, a judgment creditor has the power to force a judgment debtor into bankruptcy under *11 USC § 303*. Once the debtor is in bankruptcy, the bankruptcy trustee will marshal the debtor's assets and distribute proceeds to creditors. Thus, the trustee essentially will assume responsibility for enforcing the judgment.

Warning:

An unsecured judgment creditor generally is not given high priority in distribution of assets in a bankruptcy proceeding.

Warning:

If counsel petitions for an involuntary bankruptcy and the debtor is not adjudicated a bankrupt, counsel can be held responsible for the debtor's damages, including attorney's fees.

Strategic Point:

An involuntary bankruptcy can force the debtor to liquidate assets and pay the creditors. If the judgment is large (for example, $100,000) and in spite of the judgment debtor's promises to pay, refinance, and so on, counsel is not getting anywhere with the judgment debtor, forcing the judgment debtor into bankruptcy generally compels the debtor to stop stalling and do what the debtor had promised all along--refinance, liquidate, and so on, to pay the judgment creditor and all other creditors once and for all. However, counsel should keep in mind that in a bankruptcy proceeding all creditors are paid on a pro rata basis, depending on their classification. If the judgment debtor has significant unsecured creditors and the judgment creditor is one of the smallest, it may not be in the judgment creditor's best interest to take this action for the benefit of everyone else, and it would be better to wait and see if the debtor pays. Counsel should also bear in mind that under California law the debtor can prefer one creditor over another, and pay the creditor who bothers the judgment debtor the most [*CC § 3342*]. Under federal bankruptcy law, no preferential payments are allowed.

Cross References:

Discussion of the effect of bankruptcy on enforcement efforts, see Ch. 3, Effect of Bankruptcy.

Discussion of involuntary bankruptcy petition, see Collier Bankruptcy Practice Guide, Ch. 14, Involuntary Proceedings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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Chapter 9 Planning Enforcement of Judgment
V. DETERMINING WHAT ASSETS TO EXECUTE AGAINST

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AUTHOR: Mark V. Isola, Esq.

9.24 CHECKLIST: Determining What Assets to Execute Against.

☐ Ascertain all assets of each judgment debtor.

Authority:
CCP §§ 695.010, 699.710

Discussion:
See *9.26*

☐ If there are multiple judgment debtors, determine whether they are jointly and severally liable.

Authority:
CC § 1431

Discussion:
See *9.27[1], [2]*

☐ Determine whether surety of judgment debtor is liable for judgment.

Authority:
CC § 2787 et seq.

Discussion:
See *9.27[3]*

☐ Determine whether special rules apply to enforcement against particular assets of judgment debtor, such as following:

○ Community property.

Authority:
CCP § 695.020; *Fam Code § 910 et seq*.

Discussion:
See *9.28[1]*

○ Non-transferable property.

Authority:
CCP § 695.030

Discussion:
See *9.28[2]*

○ Leasehold interests in real property.

Authority:
CCP § 695.035

Discussion:
See *9.28[3]*

○ Business and professional licenses.

Authority:
CCP § 695.060

Discussion:
See *9.28[4]*

○ Transferred or encumbered property subject to liens.

Authority:
CCP § 695.070

Discussion:
See *9.28[5]*

☐ If judgment debtor is corporate or other artificial entity, determine whether assets of any other person or entity are subject to enforcement.

Authority:
Corp Code §§ 16307, *17101*, *18260*, *18270*; *Sonora Diamond Corp. v. Superior Court (2000) 83 CA4th 523, 538-539, 99 CR2d 824*

Discussion:
See *9.29*

☐ If judgment debtor is individual, determine whether any assets are exempt from enforcement.

Authority:
CCP § 703.010 et seq.

Discussion:
See *9.30*

☐ Identify any fraudulently transferred assets.

Authority:
CC § 3439

Discussion:
See *9.31*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesContracts LawTypes of ContractsGuaranty Contracts

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AUTHOR: Mark V. Isola, Esq.

9.25 Options and Strategies.

Careful review of the available assets is essential to efficient enforcement of a money judgment. In addition to gathering information about the judgment debtor's assets, counsel should determine whether special rules apply to execution against any of the assets and which assets are exempt from enforcement.

If there are multiple judgment debtors, counsel should consider whether the debtors' liability is several only (rather than joint and several), which will limit the use of one debtor's assets to satisfy the liability of another debtor. Counsel should also determine whether to proceed against a surety of any judgment debtor.

If the judgment debtor is a corporation or other artificial entity, counsel should determine whether the circumstances are such that the personal assets of persons such as the shareholders, partners, or owners may be used to satisfy the judgment.

Cross References:

Discussion of special rules governing enforcement against certain assets, see *9.28*.

Discussion of individual debtor's exemptions, see *9.30*.

Discussion of enforcement against assets of multiple judgment debtors, see *9.27*.

Discussion of identifying assets subject to enforcement when judgment debtor is corporate or other artificial entity, see *9.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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9.26 All of Judgment Debtor's Assets Generally Are Subject to Enforcement.

Except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment [*CCP § 695.010(a)*; *see CCP § 699.710*].

Exception--Specified Assets Are Subject to Special Rules:
Special rules govern the use of some categories of assets to satisfy judgments [*see CCP §§ 695.020-695.035*, *695.060*, *695.070*].

Cross Reference:
Discussion of special rules for enforcement against specified assets, see *9.28*.

Exception--Assets Not Subject to Execution:
Although generally subject to other enforcement proceedings such as the imposition of a judgment lien [*CCP §§ 695.010(a)*, *699.710*, *699.720(b)*], the following kinds of assets are not subject to levy under a writ of execution to satisfy a money judgment [*CCP § 699.720(a)*]:

- An alcoholic beverage license that is transferable [*see B&P Code § 24070 et seq.*].
- The judgment debtor's interest as a partner in a partnership or as a member in a limited liability company, if the partnership or the limited liability company is not itself a judgment debtor.
- A cause of action that is the subject of a pending action or special proceeding.
- A judgment in favor of the judgment debtor prior to the expiration of the time for appeal from the judgment or, if an appeal is filed, prior to the final determination of the appeal.
- A debt (other than earnings) owing and unpaid by a public entity.
- The loan value of an unmatured life insurance, endowment, or annuity policy.

- A franchise granted by a public entity, along with all the rights and privileges of the franchise.
- The judgment debtor's interest as a beneficiary of a trust.
- A contingent remainder, executory interest, or other interest in property that is not vested.
- Property in a guardianship or conservatorship estate.

Exception--Individual Judgment Debtor's Exempt Property:

An individual judgment debtor has the right to claim specified types of property as exempt from any procedure for enforcement of a money judgment [*see CCP § 703.010 et seq.*].

Cross Reference:

Discussion of individual judgment debtor's exemptions from enforcement, see *9.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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AUTHOR: Mark V. Isola, Esq.

9.27 Determining Whose Assets to Proceed Against When There Are Multiple Judgment Debtors.

9.27[1] Judgment May Be Enforced Against Assets of Any Jointly and Severally Liable Judgment Debtor. If there are multiple judgment debtors who are jointly and severally liable for the judgment, the judgment creditor may enforce the entire judgment against any or all of the debtors [*see American Motorcycle Assn. v. Superior Court (1978) 20 C3d 578, 586-590, 146 CR 182, 578 P2d 899*] .

Strategic Point--Judgment Creditor:

In a case with multiple judgment debtors who are jointly and severally liable, counsel should review the available assets of all judgment debtors and proceed against the assets that will provide the quickest and most efficient satisfaction of judgment. If several individuals are jointly and severally liable for the judgment, the judgment creditor should consider whether to conduct some limited postjudgment discovery, determine which individual judgment debtor has the most recoverable assets, and then pursue the judgment only against that individual.

Cross Reference:

Discussion of postjudgment discovery, see Ch. 10, Postjudgment Discovery.

Strategic Point--Judgment Debtors:

A jointly and severally liable judgment debtor who satisfies more than his or her share of the judgment may require a proportionate contribution from the other judgment debtors [*see CC § 1432*; *American Motorcycle Assn. v. Superior Court (1978) 20 C3d 578, 586-590, 146 CR 182, 578 P2d 899* ; *but see CCP § 877* (no contribution right against defendant who made good faith settlement with plaintiff before judgment)].

Unless expressly provided otherwise, a judgment entered against more than one person is presumed to impose joint and several liability [*CC § 1431*].

Cross Reference:

Discussion of joint and several liability and judgment debtors' rights of contribution, see California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution (Matthew Bender).

9.27[2] If Liability Is Several Only, One Debtor's Assets May Not Be Used to Satisfy Other Debtor's Liability. If judgment debtors are severally liable only, the judgment will specify the portion for which each debtor is liable, and the judgment creditor may proceed against the assets of each debtor only to the extent of that debtor's portion of the total judgment [*see Douglas v. Bergere (1949) 94 CA2d 267, 270, 210 P2d 727]* .

Example--Several Liability Only:

In any action for personal injury, property damage, or wrongful death, based on principles of comparative fault, the liability of each defendant for non-economic damages will be several only. In such a case, a separate judgment will be rendered against each judgment debtor for the amount of non-economic damages allocated to that judgment debtor in direct proportion to his or her percentage of fault [*CC § 1431.2(a)*]. "Non-economic damages" in this context means subjective, nonmonetary losses such as pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*CC § 1431.2(b)(2)*].

Cross Reference:

Discussion of several liability, see California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution (Matthew Bender).

9.27[3] Judgment Debtor's Surety or Guarantor May Be Liable for Unsatisfied Judgment. Counsel for the judgment creditor should determine if a guaranty or surety agreement exists, and if so, the relevant terms of the agreement [*see Ohio Electric Car Co. v. Le Sage (1926) 198 C 705, 247 P 190]* .

A guarantor of a judgment debtor's debts may be liable for an unsatisfied judgment. A surety agreement is a promise by one party (the surety or guarantor) to answer for the debt of another (the principal) under the terms of the contract [*see CC § 2787*]. A guaranty obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor [*CC § 2806*].

A guarantor who has assumed liability for payment or performance is liable to the creditor immediately on the default of the principal, without demand or notice [*CC § 2807*; *see CC § 2808* (guarantor on conditional obligation is not entitled to notice of principal's default unless creditor has actual notice that guarantor is unable, through reasonable diligence, to learn of default)]. Thus, if the guaranty obligation is absolute and unconditional, the liability of the guarantor is fixed when the principal obligation matures. It is not predicated on exhaustion by the judgment creditor of remedies against the judgment debtor or on the exhaustion of other security for the debt, and it is immaterial whether the debtor can pay the debt [*Bank of America National Trust & Savings Assn. (1947) 81 CA2d, 1, 7, 183 P2d 385]* . However, notice may be made a condition precedent to a guarantor's liability [*see Schwab v. Bridge (1915) 27 CA 204, 206-207, 149 P 603]* .

Exception:

The judgment creditor must give the surety notice before proceeding against secured collateral [*see Com Code § 9611(b), (c)(2)*].

9.27[4] Effect of Joint and Several Liability on Judgment Debtor's Surety or Guarantor. A judgment creditor should especially try to discover whether the agreement guarantees payment (liability is immediate) or collection (liability attaches only after failing to collect from the principal debtor) [*see CC § 2807*], and if any other remedies must be pursued before going after the guarantor. More important, it is helpful to know any arrangements between guarantors as to joint and several liability. A judgment creditor can collect the entire amount due from guarantors who are jointly

and severally liable. The guarantors then use the principles of contribution and indemnity to apportion ultimate liability among themselves [*see generally American Motorcyle Ass'n v. Superior Court (1978) 20 C3d 578, 586-590, 146 CR 182, 578 P2d 899]* .

If counsel has real property collateral and a guarantee, counsel must make certain the guarantee language complies with *CC § 2856(a)(3)* for any waivers. Careful consideration must be given to the effect of the single form of action statute [*CCP § 726(a)*] and anti-deficiency statute [*CCP § 580(d)*] in planning collection strategy, as well as the complications that can arise when there is both personal property and real property collateral pledged. This is an extremely complex area of law and a wrong move can effectively exonerate the guarantee.

The law formerly was that the creditor had to exhaust his or her remedies against the principal debtor before or simultaneously with proceeding against the guarantor and/or surety. However, this is no longer the case the creditor can pick and choose who to proceed against in enforcing the claim. The best practice typically is to proceed in one action against all parties. However, there may be circumstances where the creditor might proceed against the guarantors only (such as when the debtor cannot be located, but the guarantor is accessible).

Cross References:

Discussion of conducting postjudgment discovery, see Ch 10, Postjudgment Discovery.

Discussion of apportioning joint and several defendants' liability, see *California Forms of Pleading and Practice, § 300.15* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

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AUTHOR: Mark V. Isola, Esq.

9.28 Special Rules Govern Enforcement Against Specified Assets.

9.28[1] Community Property. The judgment debtor's community property is generally subject to enforcement of a money judgment against the judgment debtor, whether the debt is incurred before or during marriage, 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 [*CCP § 695.020*; *Fam Code §§ 902*, *910(a)*]. For this purpose, a contractual debt is deemed "incurred" when the contract is made; a debt arising from a tort is incurred when the tort occurs; in any other case, the debt is incurred at the time the obligation arises [*Fam Code § 903*].

Exception:
A debt is not incurred "during marriage" if it is incurred while the spouses are living separate and apart before a judgment of dissolution of marriage or legal separation of the spouses [*Fam Code § 910(b)*].

Exception:
The earnings of a judgment debtor's spouse during marriage are not liable for a debt incurred by the judgment debtor before marriage. After the earnings of the judgment debtor's spouse are paid, they will not be liable for such a debt as long as they are held in a deposit account [*see Com Code § 9102(a)(29)*] in which the judgment debtor has no right of withdrawal and are not commingled with other property in the community estate, except property insignificant in amount [*Fam Code § 911(a)*, *(b)(1)*]. For this purpose, "earnings" means compensation for personal services performed, whether as an employee or otherwise [*Fam Code § 911(b)(2)*].

Distinguish--Separate Property:
The *separate* property of the judgment debtor's spouse generally is not subject to enforcement of a money judgment against the judgment debtor [*Fam Code § 913(b)*]. However, the spouse's separate property may be subject to enforcement if the underlying debt is incurred for necessaries of life of the judgment debtor [*Fam Code § 914(a)*].

Warning--Division of Property on Dissolution:
After a division of property in connection with a dissolution of marriage, the judgment debtor's spouse

(and the property he or she receives in the division) generally will not be liable for a debt incurred by the judgment debtor before or during marriage unless the debt was assigned for payment in the division of the property [*Fam Code § 916(a), (b)(2), (b)(3)*]. In effect, therefore, the property is transmuted from community property to separate property without notice to creditors who may have relied on community assets when extending the credit. For this reason, the judgment debtor's counsel should try to enforce the judgment before there is a final property distribution in the family law court. Therefore, the judgment creditor should proceed as quickly as possible if the judgment debtor has a pending marital dissolution. The judgment creditor also should notify the parties and attorneys in the marital dissolution proceeding regarding the existence of the judgment creditor's claim. Further, if the judgment creditor obtains an attachment lien on community property, and that lien is not dealt with in the family law court, a question exists as to whether the lien remains because it has not been "perfected" into a final judgment prior to the time the property transmutes on distribution. The law says liens remain [*see Fam. Code § 916(b)(2)*], but apparently there is no authority directly applying this rule to attachment liens. This provides still another reason for moving forward as quickly as possible.

Cross References:

Detailed discussion of enforcement of judgment against community property, see *Ch. 1, Planning and Collection of Debt, 1.09[3], 1.42[5].*

For further discussion, see California Forms of Pleading and Practice, Ch. 220, Dissolution of Marriage and Related Proceedings (Matthew Bender).

9.28[2] Non-Transferable Property. Property of the judgment debtor that is not assignable or transferable ordinarily is not subject to enforcement of a money judgment [*CCP § 695.030(a)*].

Example--Not Subject to Enforcement:

A tort claim that is not yet the subject of litigation is not assignable. Therefore, it is not an asset that may be used to satisfy a judgment [*see, e.g., Pony v. County of Los Angeles (9th Cir 2006) 433 F3d 1138, 1143* (right to sue in tort for personal injury is not assignable under California law); *Fifield Manor v. Finston (1960) 54 C2d 632, 634-643, 7 CR 377, 354 P2d 1073* (personal injury claim); *Baum v. Duckor, Spradling & Metzger (1999) 72 CA4th 54, 67-69, 84 CR2d 703* ; *Kracht v. Perrin, Gartland & Doyle (1990) 219 CA3d 1019, 1022-1024, 268 CR 637* (legal malpractice)].

Example--Non-Assignable Interest in Trust:

The judgment debtor's beneficial interest in a trust, if that interest is not assignable or transferable, is not subject to enforcement of a money judgment [*CCP § 695.030(b)(1); Prob Code § 15300*].

Exception--Pending Cause of Action:

The judgment debtor's cause of action for money or property that is the subject of a pending action or special proceeding is subject to enforcement of a money judgment [*CCP § 695.030(b)(2)*].

9.28[3] Leasehold Interest in Real Property. The judgment debtor's leasehold interest in real property may be applied to the satisfaction of a money judgment in any of the following circumstances [*CCP § 695.035(a)*]:

- If the judgment debtor has the right voluntarily to sublet the property or assign the interest in the lease.

- If the judgment debtor has the right voluntarily to sublet the property or assign the interest in the lease subject to standards or conditions, and the purchaser at the execution sale or other assignee agrees to comply with the standards or conditions that would have had to be complied with had the lessee voluntarily sublet the property or assigned the interest in the lease.

- If the judgment debtor has the right voluntarily to sublet the property or assign the interest in the lease with the consent of the lessor, in which case the obligation of the lessor to consent to the assignment is subject to the same standard that would apply had the judgment debtor voluntarily sublet the property or assigned the interest in the lease.

- In any other case, if the lessor consents in writing.

A provision in the lease for the termination or modification of the lease upon an involuntary transfer or assignment of the judgment debtor's leasehold interest is ineffective to the extent that the provision would prevent the application of the judgment debtor's interest to the satisfaction of the money judgment under the circumstances listed above [*CCP § 695.035(b)*].

Consider:

If the lease expressly prohibits the judgment debtor from subletting the property or assigning the interest in the lease, and the lessor refuses to consent, the judgment debtor's leasehold interest may not be used to satisfy the judgment [*CCP § 695.035(a)*].

9.28[4] Business or Professional License. A license issued by a public entity to engage in any business, profession, or activity generally is not subject to enforcement of a money judgment [*CCP § 695.060*].

Exception--Alcoholic Beverage License:

The judgment debtor's interest in any alcoholic beverage license may be applied to the satisfaction of a money judgment [*CCP § 708.630*]. Generally, the court may appoint a receiver for the purpose of transferring the judgment debtor's interest in the license [*see B&P Code § 24070 et seq.*], unless the judgment debtor shows that the amount of delinquent taxes [*see B&P Code § 24049*] and claims of creditors with priority over the judgment creditor [*see B&P Code § 24074*] exceed the probable sale price of the license [*CCP § 708.630(b)*].

9.28[5] Transferred or Encumbered Property Subject to Lien. If the judgment debtor's property has been subjected to an enforcement lien, the property generally will remain subject to the lien even after the judgment debtor transfers or encumbers the property, and even if the judgment debtor dies after transferring the property [*CCP § 695.070*; *see CCP §§ 697.390*, *697.610*, *697.720 et seq.*].

Similarly, if property of the judgment debtor was attached in the action but was transferred before entry of the money judgment in favor of the judgment creditor, the property will be subject to enforcement of the money judgment so long as the attachment lien remains effective [*CCP § 695.010(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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AUTHOR: Mark V. Isola, Esq.

9.29 Identifying Assets Subject to Enforcement When Judgment Debtor Is Corporate or Other Artificial Entity.

9.29[1] Corporation. A corporate judgment debtor is a separate legal entity from its shareholders, and the assets of those shareholders ordinarily are not subject to enforcement of the judgment [*see Sonora Diamond Corp. v. Superior Court (2000) 83 CA4th 523, 538-539, 99 CR2d 824]* .

Exception:

If a corporate judgment debtor and a shareholder or other person have an alter ego relationship, the judgment may under certain conditions be amended to add that alter ego as a judgment debtor, in which case the alter ego's assets would then become available to satisfy the judgment [*see McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 752, 107 CR2d 702*].

Cross Reference:

Discussion of amending judgment to add alter ego of corporate judgment debtor, see *9.40*.

9.29[2] Partnership. A judgment against a partnership is not by itself a judgment against a partner. Therefore, a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner [*Corp Code § 16307(c)*].

Consider--Availability of Judgment Against Partner:

A partner's potential liability for partnership obligations may be clear. For example, in a general partnership, the partners are liable jointly and severally for any obligation of the partnership unless otherwise agreed by the claimant or provided by law [*Corp Code § 16306(a)*]. In a limited partnership, the general partners, as well as the limited partners who participate in the control of the business, have the same liabilities as partners in a general partnership [*Corp Code §§ 15507*, *15509*, *15632*, *15643(b)*]. In a registered limited liability partnership, the partners may agree to be liable for partnership obligations [*Corp Code § 16306(c)*, *(d)*]. However, if the judgment creditor has not named, served, and obtained a judgment against the partner, the judgment creditor will not be able to reach the partner's assets to satisfy the judgment [*Corp Code § 16307(c)*]. In such a case, if the judgment is based on a contractual obligation of the partnership, and the partner was a named but unserved defendant, the judgment creditor may seek an amendment of the judgment to add the partner as a judgment debtor [*CCP § 989*; *Vincent*

v. Grayson (1973) 30 CA3d 899, 905, 106 CR 733] .

Cross References:

Discussion of amending judgment to add joint debtor, see *9.27*.

Coverage of liability of partners for partnership obligations, see California Forms of Pleading and Practice, Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties; Ch. 405, Partnerships: Actions Between Limited Partners or Partnerships and Third Parties (Matthew Bender).

Even if a judgment has been entered against a partner for an obligation of the partnership, the judgment creditor may not levy execution against the assets of the partner unless any of the following applies [*Corp Code § 16307(d)*]:

- A judgment based on the same claim has been obtained against the partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part.
- The partnership is a debtor in bankruptcy.
- The partner has agreed that the creditor need not exhaust partnership assets.
- A court grants permission to the judgment creditor to levy execution against the assets of the partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.
- Liability is imposed on the partner by law or contract independent of the existence of the partnership.

9.29[3] Limited Liability Company. A limited liability company (LLC) judgment debtor's members, and the assets of those members, generally are not subject to enforcement of a judgment against the LLC [*Corp Code § 17101(a)*].

Exception:

If an LLC judgment debtor actually has an alter-ego relationship with a shareholder or other person, the judgment may under certain conditions be amended to add that alter ego as a judgment debtor, in which case the added judgment debtor's assets would then become available to satisfy the judgment [*Corp Code § 17101(b)*].

Cross References:

Discussion of amending judgment to include alter ego of LLC judgment debtor, see *9.40*.

Discussion of alter egos of limited liability companies, see California Forms of Pleading and Practice, Ch. 346, Limited Liability Companies (Matthew Bender).

9.29[4] Unincorporated Association. A money judgment against an unincorporated association, whether organized for profit or not, may be enforced only against the property of the association [*Corp Code § 18260*]. Thus, the assets of a member, director, officer, or agent of the association may not be reached to enforce such a judgment.

Moreover, even if the judgment creditor also has a judgment against an individual member, director, officer, or agent of an unincorporated association based on the same claim that is the basis for the judgment against the unincorporated association, the judgment creditor may not levy execution against the assets of the individual unless one of the

following conditions is satisfied [*Corp Code § 18270(a)*]:

- A writ of execution on the judgment against the unincorporated association has been returned unsatisfied in whole or in part.

- The unincorporated association is a debtor in bankruptcy.

- The member, director, officer, or agent has agreed that the creditor need not exhaust the assets of the unincorporated association.

- A court grants permission to the judgment creditor to levy execution against the assets of a member, director, officer, or agent based on a finding that the assets of the unincorporated association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the unincorporated association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.

9.29[5] Individual Judgment Debtor's Sole Proprietorship. A business operated as a sole proprietorship is an asset of the individual judgment debtor, and does not have any independent existence apart from the individual owner [*see Providence Washington Ins. Co. v. Valley Forge Ins. Co. (1996) 42 CA4th 1194, 1199-1200, 50 CR2d 192*]. Therefore, a sole proprietorship is subject to enforcement of a judgment against the business owner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal LiabilityBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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V. DETERMINING WHAT ASSETS TO EXECUTE AGAINST

1-9 MB Practice Guide: CA Debt Collection 9.30

AUTHOR: Mark V. Isola, Esq.

9.30 Individual Judgment Debtor May Claim Enforcement Exemptions for Specified Property.

The Enforcement of Judgments Law provides exemptions from enforcement for a variety of real and personal property of the judgment debtor [*see CCP § 703.010 et seq.*]. Except as otherwise provided by statute, the exemptions apply to all procedures for enforcement of a money judgment [*CCP § 703.010(a)*].

An exemption for particular property does not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on that property (other than a lien created pursuant to the Enforcement of Judgments Law or the Attachment Law (*CCP § 481.010 et seq.*) [*CCP § 703.010(b)*].

The exemptions apply only to property of a natural person [*CCP § 703.020(a)*]. An exemption may be claimed by the judgment debtor or a person acting on behalf of the judgment debtor [*CCP § 703.020(b)(1)*]. In the case of community property, the spouse of the judgment debtor may also claim an exemption, whether or not the spouse is also a judgment debtor under the judgment [*CCP § 703.020(b)(2)*].

Warning--Judgment Debtor:

Generally, the judgment debtor must claim the exemption within the time and in the manner prescribed in the applicable enforcement procedure, or the exemption will be forfeited [*CCP § 703.030(a)*; *but see CCP § 703.030(c)* (court may, on terms as may be just, relieve judgment debtor from forfeiture)]. However, a claim is unnecessary to preserve an exemption for property that is described in any statute as exempt without making a claim [*CCP § 703.030(b)*].

Strategic Point--Judgment Creditor:

Unless certain that the property is exempt, counsel for the judgment creditor should levy and wait for the debtor to assert the exemption [*see CCP §§ 695.040, 703.510 et seq.*]. It is the debtor's burden to establish exemptions, not the levying creditor's burden to disprove them [*see CCP § 703.580(b)*].

Cross References:

Discussion of exemptions for personal property and procedure for claiming such exemptions, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of homestead exemption for real property and procedure for claiming exemption, see Ch. 17, Executing and Levying Against Real Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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AUTHOR: Mark V. Isola, Esq.

9.31 Fraudulently Transferred Assets Are Subject to Enforcement.

If the judgment debtor has transferred assets fraudulently, the judgment debtor may seek enforcement of the judgment by recovering the fraudulently transferred assets. There are two types of fraudulent transfers:

- Transfers made by the judgment debtor with the intent to hinder, delay, or defraud a creditor [*see CC § 3439.04(a)(1)*].

- Transfers for which the judgment debtor fails to receive reasonably equivalent value in return for the transfer [*see CC §§ 3439.04(a)(2)-3439.05*].

Cross Reference:

Discussion of fraudulent transfers, see Ch. 4, Fraudulent Conveyances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers

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VI. SEEKING RECOVERY OF POSTJUDGMENT INTEREST, ATTORNEY'S FEES, AND COSTS

1-9 MB Practice Guide: CA Debt Collection 9.32

AUTHOR: Mark V. Isola, Esq.

9.32 CHECKLIST: Seeking Recovery of Postjudgment Interest, Attorney's Fees, and Costs.

☐ To recover postjudgment interest:

○ Compute amount of postjudgment interest due.

☐ Postjudgment interest accrues at rate of 10 percent per annum, beginning on date of entry of judgment.

Authority:
CCP § 685.010

Discussion:
See *9.34[1]*

☐ Include postjudgment costs added to principal for purposes of calculating interest amount.

Authority:
CCP § 685.090(a), (b)

Discussion:
See *9.34[2]*

☐ Do not include interest after:

○ Date of levy, if proceeds of collection are paid in lump sum.

○ After money judgment is satisfied pursuant to earnings withholding order.

○ In other cases, on date proceeds of sale or collection are actually received.

Authority:
CCP § 685.030(a)

Discussion:
See *9.34[3][a]*

☐ If judgment has been partially satisfied, do not compute interest on part that was satisfied after date of partial satisfaction.

Authority:
CCP § 685.030(c)

Discussion:
See *9.34[3][b]*

○ Prepare declaration stating amount of interest on official form, either separately or as part of filing memorandum of costs.

Authority:
CCP § 685.050(a)(2)

Discussion:
See *9.34[4]*

Form:
See *9.45*

☐ To recover postjudgment costs:

○ Determine what costs would be recoverable by filing memorandum of costs without need for noticed motion.

Authority:
CCP § 685.070

Discussion:
See *9.35[1][a]*

☐ Prepare memorandum of costs on official form.

Authority:
CCP § 685.070(b)

Discussion:
See *9.35[1][b]*

Form:
See *9.45*

☐ File memorandum with court clerk.

Authority:
CCP § 685.070(b)

Discussion:
See *9.35[1][c]*

☐ Serve judgment debtor either personally or by mail.

Authority:
CCP § 685.070(b)

Discussion:
See *9.35[1][c]*

☐ If judgment debtor files motion to have costs taxed by court within 10 days after being served with memorandum of costs, court will order allowing or disallowing costs.

☐ If judgment debtor does not object, costs claimed in memo are automatically allowed.

Authority:
CCP § 685.070(c)

Discussion:
See *9.35[1][d]*

○ Determine what costs can be recovered only by noticed motion procedure.

☐ Do costs qualify as "reasonable and necessary"?

☐ Are costs not among those that may be recovered by filing memorandum of cost?

☐ Does amount of costs justify time and expense of noticed motion procedure?

Authority:
CCP §§ 685.040, 685.070, 685.080

Discussion:
See *9.35[2][a]*

☐ Prepare notice of motion and supporting affidavit.

Authority:
CCP § 685.080(b)

Discussion:
See *9.35[2][b]*

☐ File motion with court and serve it on judgment debtor either personally or by mail.

Authority:
CCP § 685.080(b)

Discussion:
See *9.35[2][c]*

☐ Court will issue order allowing or disallowing requested costs.

Authority:
CCP § 685.080(c)

Discussion:
See *9.35[2][c]*

☐ To recover postjudgment attorney's fees:

○ Determine whether attorney's fees were awarded in underlying judgment or otherwise allowable by law.

Authority:
CCP § 685.040(c)

Discussion:
9.36[1]

○ Seek recovery of allowable fees by either of following methods (as described for recovery of costs above):

☐ Memorandum of costs; or

☐ Noticed motion.

Authority:
CCP §§ 685.070(a)(6), 685.080

Discussion:
See *9.36[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestPostjudgment Interest

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AUTHOR: Mark V. Isola, Esq.

9.33 Options and Strategies.

Postjudgment interest and "reasonable and necessary" costs are recoverable [*see CCP §§ 685.040*, *685.050*, *685.070*; *see 9.34*, *9.35*] and can be an important component of the overall judgment. Because these costs increase with the passing of time and the amount of effort that the judgment creditor is required to expend to enforce the judgment, they can be a significant incentive for the judgment debtor to pay a judgment that he or she ultimately will be compelled to pay anyway.

Basic allowable postjudgment costs and interest can be recovered by a summary procedure under which the judgment creditor files a memorandum of costs and interest with the court [*see CCP § 685.070*]. Unless the judgment debtor objects, these costs are deemed approved [*CCP § 685.070(d)*]. Recovery of other postjudgment costs must be sought by a noticed motion procedure [*see CCP § 685.080*], which can be more expensive and time consuming and may discourage the judgment creditor from attempting to recover them unless the amount involved is substantial. In either event, allowed costs are recovered by the levying officer at the time of execution [*see CCP § 685.050(b)(1)*].

Postjudgment attorney's fees ordinarily are not recoverable, but may be recovered if the underlying judgment awards attorney's fees or are otherwise allowed by law [*see CCP § 685.040*; *see 9.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestPostjudgment Interest

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1-9 MB Practice Guide: CA Debt Collection 9.34

AUTHOR: Mark V. Isola, Esq.

9.34 Postjudgment Interest May Be Recovered on California Judgments.

9.34[1] Interest on Judgment Accrues at Rate of 10 Percent Per Annum From Date of Entry of Judgment.

Interest accrues on an unsatisfied California judgment at 10 percent per annum [*CCP § 685.010*]. Interest begins to accrue on a money judgment on the date of entry of the judgment [*CCP § 685.010*].

Consider:

Out of state judgments may accrue interest at different rates.

Distinguish--Federal Judgments:

Interest is allowed on any money judgment in a federal civil case [*28 USC § 1961(a)*]. It accrues on an unsatisfied federal court judgment at the rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment [*28 USC § 1961(a)*]. Because of this method of calculation, the postjudgment interest that accrues on a federal judgment generally is substantially lower than the interest that accrues on a California state court judgment.

Cross References:

Discussion of out of state judgments, see Ch. 25, Enforcing Out of State Judgments in California.

9.34[2] Postjudgment Costs Become Part of Principal for Purposes of Computing Postjudgment Interest.

Postjudgment costs added to the judgment become part of the principal and interest accrues on that increased principal [*CCP § 685.090(a), (b)*].

Distinguish:

Postjudgment interest accrues on the principal portion of the judgment, but pre judgment interest is included in the principal only when it is awarded under *CC § 3287* or *CC § 3288*. Prejudgment interest awarded under *CC § 3291* does not become part of the principal of the judgment [*Steinfeld v. Foote-Goldman Proctologic Med. Group, Inc. (1997) 60 CA4th 13, 17, 70 CR2d 41]* .

9.34[3] When Postjudgment Interest Ceases to Accrue.

9.34[3][a] Interest Ceases to Accrue on Full Satisfaction of Judgment. If a money judgment is satisfied in full pursuant to a writ, interest ceases to accrue on the judgment [*CCP § 685.030(a)*]:

- If the proceeds of collection are paid in a lump sum, on the date of levy.
- If the money judgment is satisfied pursuant to an earnings withholding order [*see CCP §§ 706.024(a)(4)* (addition of daily interest accruing after issuance of order), *706.028* (final earnings withholding order for cost and interest)].
- In any other case, on the date the proceeds of sale or collection are actually received by the levying officer.

If a money judgment is satisfied in full other than pursuant to a writ, interest ceases to accrue on the date the judgment is satisfied in full [*CCP § 685.030(a)*].

9.34[3][b] Interest Ceases to Accrue on Satisfied Portion When Judgment Is Partially Satisfied. If a money judgment is partially satisfied, interest ceases to accrue as to the part satisfied on the date the part of the judgment is satisfied [*CCP § 685.030(c)*].

9.34[3][c] Judgment Is Satisfied for Purposes of Postjudgment Interest When Satisfaction Actually Is Received or Tendered to Judgment Creditor. A money judgment is "satisfied" in full or in part, and postjudgment interest therefore ceases to accrue, at the earliest of the following times [*CCP § 685.030(d)*]:

- The date satisfaction is actually received by the judgment creditor.
- The date satisfaction is tendered to the judgment creditor or deposited in court for the judgment creditor.
- The date of any other performance that has the effect of satisfaction.

The court clerk may enter a writ of execution on a money judgment as returned wholly satisfied when the judgment amount, as specified on the writ, is fully collected and only an interest deficit of no more than $10 exists, due to automation of the continual daily interest accrual calculation [*CCP § 685.030(e)*].

Cross Reference:

Discharge and satisfaction of judgments, see Ch. 24, Discharge and Satisfaction of Judgments.

9.34[4] Judgment Creditor Must File Declaration With Court Clerk. In order to collect prejudgment interest in connection with a writ to enforce a judgment to be satisfied in a levy, the judgment creditor must file an affidavit or declaration with the court clerk stating the amount of that accrued interest. The amount claimed must be adjusted for the amount of any partial satisfaction [*CCP § 685.050(a)(2)*].

This declaration is contained within Judicial Council Form MC-012, which is a memorandum of costs included after judgment. Use of Form MC-012 is mandatory.

Strategic Point:

Recovery of interest generally is sought in conjunction with the recovery of postjudgment costs, and a single Form MC-012 is filed to recover both.

Strategic Point:

Local court rules may require the filing of Judicial Council Form MC-012 with every writ of execution proposed to be issued [*see, e.g.*, Sacramento Super Ct Rules, Rule 18.13]. Counsel should check local rules for filing requirements on postjudgment interest.

Cross References:

Discussion of filing Form MC-012 to recover postjudgment costs, see *9.35[1][b]*.

Illustration of Judicial Council Form MC-012, see *9.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPostjudgment InterestCivil ProcedureRemediesJudgment InterestPrejudgment Interest

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1-9 MB Practice Guide: CA Debt Collection 9.35

AUTHOR: Mark V. Isola, Esq.

9.35 Judgment Creditor May Recover Postjudgment Costs.

9.35[1] Specified Postjudgment Costs Are Recoverable by Filing Memorandum of Costs.

9.35[1][a] Statute Specifies Costs Recoverable by This Method. A judgment creditor may recover specified postjudgment costs authorized by statute, without filing a noticed motion, by filing and serving a memorandum of costs [*CCP § 685.070*]. The authorized statutory fees that can be sought through a memorandum of costs are [*CCP § 685.070*]:

- Fees for preparing, issuing, recording, and indexing an abstract of judgment.
- Fees for filing a notice of judgment lien on personal property.
- Fees for issuing a writ to the extent the fees are not satisfied by the levy.
- Costs of the levying officer.
- Costs incurred in postjudgment discovery, charging orders, judgment liens, creditors' actions against third parties, receivers, and other specified remedies [*see CCP §§ 708.010-709.010*], if those costs have been approved as to amount, reasonableness, and necessity by the judge or reference.
- Attorney's fees if allowed by *CCP § 685.040*.

Timing:

The above costs incurred while enforcing the judgment must be sought no later than two years after the costs have been incurred [*CCP § 685.070(a)*].

Distinguish--Costs of Enforcing Federal Judgment:

A creditor holding a federal court judgment can recover costs incurred in enforcing the judgment to the extent those costs are recoverable under California law [*see Fed R Civ P*

69(a)].

Cross Reference:

Discussion of postjudgment discovery, see Ch. 10, Postjudgment Discovery.

9.35[1][b] Judicial Council Form Must Be Used. The postjudgment memorandum of costs must be submitted on Judicial Council Form MC-012. Use of Form MC-012 is mandatory.

The memorandum of costs must be executed under oath by a person who has 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)*].

Strategic Point:

Local court rules may require the filing of Judicial Council Form MC-012 with every writ of execution proposed to be issued [*see, e.g.*, Sacramento Super Ct Rules, Rule 18.13]. Counsel should check local rules for filing requirements on postjudgment interest.

Cross Reference:

Illustration of Judicial Council Form MC-012, see *9.45*.

9.35[1][c] Memorandum Must Be Filed With Court Clerk and Served on Judgment Debtor. The memorandum of costs must be filed with the court clerk, and a copy must be served on the judgment debtor. Service may be made either personally or by mail [*CCP § 685.070(b)*]. Service must be made on the judgment debtor even in the case of a default judgment to give the judgment debtor the opportunity to make a motion to tax costs [*David S. Karton, a Law Corp. v. Dougherty (2009) 171 CA4th 133, 146, 89 CR3d 506]* .

9.35[1][d] Costs Specified in Memorandum Are Allowed Unless Judgment Debtor Moves to Have Costs Taxed by Court. The costs claimed in the memorandum are automatically allowed unless the judgment debtor files a noticed motion to have the costs taxed by the court [*CCP § 685.070(d)*].

Timing:

If the judgment debtor elects to file a motion to have costs taxed by the court, the motion must be filed within 10 days after the memorandum of costs is served on the judgment debtor [*CCP § 685.070(c), (f)*; *see CCP § 1013* (extension of time for service by mail)].

The notice of motion must be served on the judgment creditor either personally or by mail [*CCP § 685.080(c), (f)*; *see CCP § 1013* (extension of time for service by mail)]. The court then will issue an order allowing or disallowing the costs to the extent justified under the circumstances [*CCP § 685.070(c)*].

9.35[2] Postjudgment Costs Not Specified in Statute May Be Recovered Only on Noticed Motion.

9.35[2][a] "Reasonable and Necessary" Costs Are Recoverable on Noticed Motion. Costs that are not authorized to be recovered by filing and serving a memorandum of costs as described in 9.35[1][a] can be obtained only by filing a noticed motion [*CCP § 685.080*]. These costs include "reasonable and necessary" costs in addition to those listed in 9.35[1][a] [*CCP § 685.040(c)*].

Consider:

The judgment creditor should evaluate whether pursuing these discretionary costs is worth the effort,

based on time and expense involved and the likelihood of recovery against the judgment debtor.

Timing:

Recovery of costs must be sought no later than two years after they are incurred [*CCP § 685.080*].

Cross Reference:

Discussion of recovery of costs by judgment creditor, see *Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, 24.35*.

9.35[2][b] Notice of Motion Must State Costs and Amount and Be Supported by Affidavit. The notice of motion must [*CCP § 685.080(b)*]:

- Describe the costs claimed.
- State their amount.
- Be supported by an affidavit of a person who has knowledge of the facts, stating that to the person's best knowledge and belief the costs are correct, are reasonable and necessary, and have not been satisfied.

9.35[2][c] Notice of Motion Must Be Filed With Court and Served on Judgment Debtor. The notice of motion must be served on the judgment debtor either personally or by mail [*CCP § 685.080(b)*; *see CCP § 1013* (extension of time for service by mail)]. The court will issue an order allowing or disallowing the costs to the extent justified under the circumstances [*CCP § 685.080(c)*].

9.35[3] Costs Are Collected by Levying Officer. A levying officer executing a writ will collect the amount of costs and interest specified in the writ [*CCP § 685.050(b)(1)*]. The levying officer will also determine and collect the amount of the officer's statutory costs for performing his or her duties under the writ [*CCP § 685.050(a)(4)*, *(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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1-9 MB Practice Guide: CA Debt Collection 9.36

AUTHOR: Mark V. Isola, Esq.

9.36 Postjudgment Attorneys Fees Are Recoverable If Underlying Judgment Awarded Attorney's Fees.

9.36[1] Attorneys Fees Are Not Recoverable Unless Allowed by Law or Awarded in Underlying Judgment. Attorney's fees incurred in enforcing a judgment are not collectible unless allowed by law, but such fees are collectible if the underlying judgment includes an award of attorney's fees to the judgment creditor under *CCP § 1033.5(a)(10)* [*CCP § 685.040*]. Attorney's fees incurred in enforcing a federal court judgment are recoverable to the extent allowed under California law [*see Fed R Civ P 69(a)*].

9.36[2] Attorney's Fees May Be Recoverable via Memorandum of Costs or by Noticed Motion. The judgment creditor can recover allowable attorney's fees by filing a memorandum of costs with the court and serving a copy on the judgment debtor [*see CCP § 685.070(a)(6)*; see also *David S. Karton, a Law Corp. v. Dougherty (2009) 171 CA4th 133, 145, 89 CR3d 506]* . When this procedure is used, the attorney fees are on Judicial Council Form MC-012, and the procedures for the recovery of costs are applicable [*see CCP § 685.070*].

Alternatively, the judgment creditor can bring a motion before the court to claim the attorney's fees [*see CCP § 685.080*].

Trap:

When a writ, notice, order, or other paper is required to be served under the Enforcement of Judgments Law, it must be served on the judgment debtor instead of the attorney for the judgment debtor [*CCP § 684.020*].

Timing:

Attorney's fees incurred while enforcing the judgment, to the extent that those fees are allowed, must be sought no later than two years after incurring the fees [*CCP §§ 685.070, 685.080*].

Strategic Point:

Local court rules may require the filing of Judicial Council Form MC-012 with every writ of execution

proposed to be issued [*see, e.g.*, Sacramento Super Ct Rules, Rule 18.13]. Counsel should check local rules for filing requirements on postjudgment attorney's fees.

Cross References:

Discussion of procedures for filing memorandum of costs, see *9.34[4]*.

Illustration of Judicial Council Form MC-012, see *9.45*.

Discussion of attorney's fees generally, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 25, Attorney's Fees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.37

AUTHOR: Mark V. Isola, Esq.

9.37 CHECKLIST: Amending Judgment to Add Additional Judgment Debtor.

☐ If judgment is for contractual debt and judgment debtor's assets are insufficient to satisfy judgment:

○ Determine whether any named, unserved defendant meets requirements to be added to judgment as joint debtor.

Authority:
CCP § 989

Discussion:
See *9.39[1]*

○ Request issuance of summons to obtain addition of named, unserved defendant as joint debtor.

Authority:
CCP § 989

Discussion:
See *9.39[2]*

Forms:
See *9.46*, *9.46A*.

☐ If judgment debtor is corporation:

○ Determine whether nonparty has alter ego relationship with judgment debtor.

Authority:

CCP § 187

Discussion:
See *9.40*

○ Move for order adding alter ego as new judgment debtor.

Authority:
CCP § 187

Forms:
See *9.47 -9.51*

☐ Consider whether judgment may be amended to add other third parties as additional judgment debtors.

Authority:
CCP § 187

Discussion:
See *9.41*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.38

AUTHOR: Mark V. Isola, Esq.

9.38 Options and Strategies.

If the judgment debtor's assets are insufficient to satisfy the judgment, the judgment creditor may under certain circumstances be able to obtain an amendment of the judgment to add one or more new judgment debtors.

If an amendment of the judgment to add a proposed new judgment debtor is permissible, following that procedure will save the judgment creditor the time, expense, and uncertainty of pursuing new litigation to obtain a separate judgment against the proposed new debtor.

Cross References:

Discussion of amendment of judgment adding named, unserved defendants, see *9.39*.

Discussion of amendment of judgment adding alter ego of corporate judgment debtor, see *9.40*.

Discussion of amendment of judgment to add other nonparties, see *9.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Chapter 9 Planning Enforcement of Judgment
VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.39

AUTHOR: Mark V. Isola, Esq.

9.39 Amending Judgment to Add Unserved Defendant Who Is Jointly Liable on Contract.

9.39[1] Determining Whether Joint Debtor May Be Added.

9.39[1][a] Judgment Must Be Based on Contractual Obligation. When a judgment is entered against one or more of several persons who are jointly liable on a contractual obligation [*see CCP § 410.70*], those who were not originally served with the summons, and did not appear in the action, may be summoned under *CCP § 989* to appear before the court to show cause why they should not also be bound by the judgment [*CCP § 989*].

Prerequisite:

The judgment must be based on a contractual obligation; this procedure to add a new judgment debtor is unavailable in other kinds of cases. Although *CCP § 989* refers to "a judgment ... recovered against one or more of several persons, jointly indebted upon an obligation," it goes on to describe that judgment as having been obtained "by proceeding as provided in Section 410.70" [*CCP § 989*]. *CCP § 410.70* expressly provides that when multiple defendants are liable "on a contract," and fewer than all defendants have been served with process, the action may proceed to judgment against such of the defendants as are served as if they were the only defendants [*CCP § 410.70*]. To qualify as an action "on a contract," the complaint must allege that the obligation sued on is consensual in origin. Thus, for example, *CCP § 989* proceedings to add a new judgment debtor are not available in an action based on a common count for money had and received if the basis of the action does not appear to be a consensual obligation [*Hillco, Inc. v. Stein (1978) 82 CA3d 322, 326-327, 147 CR 108]* .

9.39[1][b] New Joint Debtor Must Be Named, Unserved Defendant; "Doe" Defendant Qualifies. The *CCP § 989* procedure for adding a joint debtor to the judgment is available only if the new joint debtor was named as a defendant in the complaint, but was not served and did not enter an appearance in the action before the entry of judgment [*CCP § 989*].

For this purpose, an unserved defendant sued under a fictitious name qualifies as a named defendant that may be added as a joint debtor, and the complaint must be amended to reflect the defendant's true name [*Meller & Snyder v. R & T Props., Inc. (1998) 62 CA4th 1303, 1311, 73 CR2d 740* ; *see CCP §§ 474, 993*].

Warning:

Amending a complaint to allege the true name of a fictitiously named defendant is improper if the plaintiff was aware of the named defendant's identity and of facts giving rise to the claim against that defendant when the plaintiff filed the original complaint [*Optical Surplus, Inc. v. Superior Court (1991) 228 CA3d 776, 782-784, 279 CR 194* ; *see CCP § 474*].

Cross Reference:

Discussion of fictitiously named defendants in pleadings, see California Forms of Pleading and Practice, Ch. 20, Allegations Commonly Used; Ch. 21, Amended and Supplemental Pleadings (Matthew Bender).

9.39[1][c] New Joint Debtor's Liability Must Be Based on Obligation on Which Judgment Was Entered. Proceedings to add a new joint debtor under *CCP § 989* are in the nature of an action on the judgment, and the joint debtor therefore can be held liable only for the obligation on which the judgment was rendered. If the original cause of action is changed, the joint debtor proceedings cannot be used [*Vincent v. Grayson (1973) 30 CA3d 899, 908, 106 CR 733]* .

9.39[2] Complying With Procedure to Add Joint Debtor.

9.39[2][a] Judgment Creditor Must Request Issuance of Summons. To obtain an amendment to a judgment to add a joint debtor under *CCP § 989*, the judgment creditor must request that the court issue a summons for the joint debtor to appear before the court to show cause why he or she should not be bound by the judgment [*CCP § 989*]. The judgment creditor may obtain the summons by presenting an affidavit or declaration to the clerk [*CCP §§ 990*, *991*; *see CCP § 2015.5* (declaration under penalty of perjury may be used instead of affidavit)]:

- Stating that the judgment, or some part of it, remains unsatisfied; and
- Specifying the amount due on the judgment.

Judicial Council Form SUM-120 is the official Judicial Council Form for a summons in a joint debtor action. Use of this form is mandatory.

The affidavit or declaration may be made by the judgment creditor or his or her agent, representative, or attorney [*CCP § 991*].

On presentation of the affidavit or declaration of unsatisfied judgment, the clerk (or if the clerk is not available, the judge) will issue the summons [*CCP § 990*].

Cross References:

Form for summons for joint debtor action, Judicial Council Form SUM-120, see *9.46*.

Form for declaration in support of issuance of summons to joint debtor, see *9.46A*.

9.39[2][b] Summons Must Be Served on Proposed Joint Debtor. The joint debtor summons must be served, along with a copy of the affidavit or declaration, in the same manner as an original summons [*CCP §§ 990*, *991*].

Timing:

The summons is returnable no later than 90 days after the time specified for the return of the original summons [*CCP § 990*; *see CCP § 583.210* (original summons generally must be served within three years after filing of complaint, and proof of service of original summons must be filed within 60 days

after service)].

Cross Reference:

Discussion of service of original summons, see California Forms of Pleading and Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).

9.39[2][c] Proposed Joint Debtor Must Respond to Summons. The proposed joint debtor must respond to the summons within the time specified in the summons (30 days after service) [*CCP § 992*; *see* Judicial Council Form SUM-120]. The proposed joint debtor may do the following [*CCP § 992*]:

- Deny the judgment;
- Set up any defense that may have arisen subsequent to the judgment; or
- Deny liability on the obligation underlying the judgment, by reason of any defense existing at the commencement of the action.

Cross Reference:

Illustration of Judicial Council Form SUM-120, see 9.46.

Warning:

If the joint debtor does not file a response to the summons, his or her default may be entered; the joint debtor would then be bound by the judgment in the same manner as though he or she had been originally served with the summons [*CCP § 989*].

9.39[2][d] Court Will Conduct Trial If Necessary. If the proposed joint debtor's answer denies the judgment or relies on a defense arising subsequent to the judgment, the issues will be tried on the basis of the allegations made in the summons, with its supporting affidavit or declaration, and the answer [*CCP § 993*]. If the proposed joint debtor's answer relies on a defense existing at the commencement of the action, the issues will be tried on the basis of the allegations made in the original complaint and judgment, the summons with its supporting affidavit or declaration, and the answer [*CCP § 993*].

Strategic Point--Discovery:

Although the provisions governing procedures to add a joint debtor do not specify whether the prospective joint debtor would have any right to conduct discovery, it appears that a right to discovery would exist under the broad language of the general statute governing availability of civil discovery [*see CCP § 2017.010*].

The issues will be tried as in other cases. A verdict against the proposed joint debtor is limited to the amount remaining unsatisfied on the original judgment, with interest [*CCP § 994*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Chapter 9 Planning Enforcement of Judgment
VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.40

AUTHOR: Mark V. Isola, Esq.

9.40 Amending Judgment to Add Nonparty Alter Ego of Judgment Debtor.

9.40[1] Court May Grant Motion to Amend Judgment to Substitute Nonparty Alter Ego of Judgment Debtor. The court has the power to amend or correct a judgment to reflect the true identity of the judgment debtor [*see CCP § 187*]. Thus, if the judgment debtor is a corporation or limited liability company that has an alter ego relationship with a nonparty that controlled the litigation, the court may grant the judgment creditor's motion to amend the judgment by adding that nonparty as an additional judgment debtor [*McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 752, 107 CR2d 702* ; *see Corp Code § 17101(b)*].

Strategic Point:

To obtain an order to amend a judgment to add an alter ego, the judgment creditor should file a noticed motion with the court to that effect [*see, e.g.,* *Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 CA4th 1551, 1554-1555, 49 CR2d 286]* . Alternatively, the judgment creditor may bring a separate action against the controlling person or entity to establish its liability for the original judgment [*Silverman v. Superior Court (1988) 203 CA3d 145, 151-152, 249 CR 724* .

Timing:

A motion or separate action to subject a nonparty alter ego to liability under the original judgment may be brought after the expiration of the statute of limitations on the cause of action alleged in the original complaint [*Hennessey's Tavern, Inc. v. Am. Air Filter Co. (1988) 204 CA3d 1351, 1359, 251 CR 859]* . An allegation that the nonparty is the alter ego of a corporate judgment debtor asks merely to have the fictitious identity of the corporation disregarded. In effect, the alter ego is substituted for the originally named defendant, and, if the action was filed in a timely manner with regard to that defendant, it is also timely as to the alter ego [*Most Worshipful Sons v. Sons etc. Lodge (1958) 160 CA2d 560, 565-567, 569, 325 P2d 606*].

Cross References:

Form for motion to amend judgment to add alter ego of corporate judgment debtor, see *9.47*.

Form for declaration in support of motion to amend judgment to add alter ego of corporate judgment debtor, see *9.48*.

Form for notice of motion to amend judgment to add alter ego of corporate judgment debtor, see *9.49*.

Form for memorandum in support of judgment creditor's motion to amend judgment to add alter ego of corporate judgment debtor, see *9.50*.

Grounds for granting or denying motion to amend judgment to add alter ego, see *9.40[2]*, *9.40[3]*.

Form for order amending judgment to add alter ego of corporate judgment debtor, see *9.51*.

Discussion of corporate alter ego liability generally, see California Forms of Pleading and Practice, Ch. 161, Corporations: Alter Ego Liability (Matthew Bender).

9.40[2] Judgment Creditor Must Establish Alter Ego Relationship.

9.40[2][a] Alter Ego Must Have Controlled Litigation. To obtain an amendment of the judgment adding a nonparty alter ego as a judgment debtor, the judgment creditor must establish both of the following [*NEC Electronics, Inc. v. Hurt (1989) 208 CA3d 772, 778-779, 256 CR 441*]:

- That the nonparty was the alter ego of the judgment debtor; and
- That the alter ego actually controlled the initial litigation, personally or through a representative, and had occasion to conduct it with a diligence corresponding to the risk of personal liability involved.

9.40[2][b] Unity of Interest and Ownership Must Be Shown. For a nonparty to qualify as an alter ego of a corporation, there must be such unity of interest and ownership that [*Automotriz del Golfo de Cal. S.A. de C.V. v. Resnick (1957) 47 C2d 792, 796, 306 P2d 1]* :

- The separate personalities of the corporation and the individual (or other alleged alter ego) no longer exist; and
- If the acts of the corporation are treated as those of the corporation alone, an inequitable result will follow.

9.40[2][c] Limited Liability Companies Subject to Same Rules as Corporations. The same test applicable to corporations applies to determine whether a member of a limited liability company should be treated as an alter ego of the company [*see Corp Code § 17101(b)*].

9.40[2][d] Evidence May Be Presented in Original Proceeding or Motion to Add Alter Ego as Judgment Debtor. The evidence establishing alter-ego liability may be presented in the original proceeding or on the hearing of the judgment creditor's motion to add the alter ego as a judgment debtor [*Jack Farenbaugh & Son v. Belmont Constr., Inc. (1987) 194 CA3d 1023, 1029, 240 CR 78* ; *Thomson v. L.C. Roney & Co., Inc. (1952) 112 CA2d 420, 425-426, 428-429, 246 P2d 1017* (hearing of motion); *Mirabito v. San Francisco Dairy Co. (1935) 8 CA2d 54, 57, 47 P2d 530* (original trial)].

Strategic Point:

The doctrine of alter ego is principally an equitable one, so the alleged alter ego is not entitled to a jury trial on the issue [*Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 147-148, 198 CR 457]* .

9.40[3] Court May Refuse Amendment If Judgment Creditor Has Not Acted With Diligence. In deciding whether to add a nonparty alter ego as a judgment debtor, the court must address equitable considerations and can refuse to correct the judgment if the plaintiff did not act with due diligence after learning of the alter-ego relationship [*Alexander v. Abbey of the Chimes (1980) 104 CA3d 39, 47-49, 163 CR 377]* .

A judgment creditor seeking to add a nonparty alter ego as judgment debtor also must establish that he or she attempted to satisfy the original judgment and that all or part of the original judgment has not been satisfied [*see Alexander v. Abbey of the Chimes (1980) 104 CA3d 39, 48, 163 CR 377*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Chapter 9 Planning Enforcement of Judgment
VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.41

AUTHOR: Mark V. Isola, Esq.

9.41 Amending Judgment to Add Nonparty Other Than Alter Ego of Judgment Debtor.

9.41[1] Judgment May Be Amended to Add Judgment Debtor's Successor Corporation. If the judgment debtor is a corporation that sells or transfers its assets to another corporation, the successor corporation may be added as a judgment debtor if it is a mere continuation of the judgment debtor [*see McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 753-756, 107 CR2d 702* ; *see Franklin v. USX Corp. (2001) 87 CA4th 615, 621, 105 CR2d 11* (successor corporation is not liable for predecessor's debts unless successor agreed to assume debts, transaction amounts to consolidation or merger of corporations, successor is merely continuation of predecessor, or transaction is fraudulent attempt to escape debts of predecessor)].

Relevant factors in determining whether a successor corporation is a mere continuation of its predecessor include [*see Katzir's Floor & Home Design, Inc. v. M-MLS.COM (9th Cir 2004) 394 F3d 1143, 1150]* :

- Whether inadequate consideration was paid for the transfer of corporate assets; and
- Whether the corporations have one or more common officers, directors, or shareholders.

Example--Successor Corporation:

The original judgment debtor was a homeowners' association organized as a corporation. After judgment was entered, that corporation went bankrupt and was succeeded by a new corporation with the same membership, directors, management company, and source of income. The court of appeal affirmed the trial court's order adding the successor corporation as a judgment debtor under the original judgment [*McClellan v. Northridge Park Townhome Owners Assn., Inc. (2001) 89 CA4th 746, 753-756, 107 CR2d 702*].

Strategic Point:

To obtain an order adding a successor corporation as a judgment debtor, the judgment creditor should follow standard procedure for a noticed motion. However, to eliminate any due process objection, personal service should be used to provide notice of the motion and the relevant pleadings to the

nonparty successor corporation [*see Nelson v. Adams USA, Inc. (2000) 529 US 460, 466-468, 472, 120 S Ct 1579, 146 L Ed2d 530* (due process requires that nonparty receive notice and opportunity to be heard before judgment is amended to impose liability on that nonparty).

Cross Reference:

Discussion of drafting, serving, and making noticed motions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

9.41[2] Judgment May Be Amended to Prevent Injustice. A court's inherent authority includes the power to amend a judgment to add a third party judgment debtor in the interest of serving justice and to prevent fraud [*CCP § 187*; *Carr v. Barnabey's Hotel Corp. (1994) 23 CA4th 14, 20-21, 28 CR2d 127]* .

Strategic Point:

To obtain an order adding a nonparty as a judgment debtor, the judgment creditor should follow standard procedure for a noticed motion. However, to eliminate any due process objection, personal service should be used to provide notice of the motion and the relevant pleadings to the nonparty [*see Nelson v. Adams USA, Inc. (2000) 529 US 460, 466-468, 472, 120 S Ct 1579, 146 L Ed2d 530* (due process requires that nonparty receive notice and opportunity to be heard before judgment is amended to impose liability on that nonparty).

Cross Reference:

Discussion of drafting, serving, and making noticed motions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

9.41[3] Judgment May Not Be Amended to Add Judgment Debtor's Spouse. Even though the community property of the judgment debtor and the debtor's spouse is subject to enforcement of the judgment [*see Fam Code § 910*], the judgment debtor's spouse cannot be added to the judgment solely for collection purposes if the judgment creditor did not and could not state a cause of action against the spouse [*11601 Wilshire Assocs. v. Grebow (1998) 64 CA4th 453, 457, 74 CR2d 912]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Mergers & Acquisitions LawLiabilities & Rights of SuccessorsMere ContinuationMergers & Acquisitions LawLiabilities & Rights of SuccessorsSuccessor Liability DoctrineCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.42

AUTHOR: Mark V. Isola, Esq.

9.42 Amending Judgment to Reflect Judgment Debtor's Changed Name.

The court may correct and amend a judgment to reflect a name change of the judgment debtor [*see CCP § 187*; *Chula v. Superior Court (1962) 57 C2d 199, 206, 18 CR 507, 368 P2d 107*].

Strategic Point:

To obtain an order correcting or amending the judgment to reflect a name change of the judgment debtor, the judgment creditor should follow standard procedure for a noticed motion.

Cross Reference:

Discussion of drafting, serving, and making noticed motions, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

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VII. AMENDING JUDGMENT TO ADD ADDITIONAL JUDGMENT DEBTOR

1-9 MB Practice Guide: CA Debt Collection 9.43

AUTHOR: Mark V. Isola, Esq.

9.43 Enforcement Plan Should Be Updated After New Judgment Debtor Is Added.

Once the court grants a motion to amend the judgment to add an additional judgment debtor or correct the name of the judgment debtor, the judgment itself should be amended to reflect the new information.

Thereafter, the judgment creditor should update the strategic enforcement plan by reevaluating all of the potential enforcement methods for all existing judgment debtors. Counsel should consider sending the new judgment co-debtor a demand letter for the amount of the unsatisfied judgment.

Cross References:

Form for demand letter for satisfaction of judgment, see *9.44*.

Discussion of preparing strategic plan, see *9.12* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.44

AUTHOR: Mark V. Isola, Esq.

9.44 Demand Letter to Judgment Debtor.

Demand Letter to Judgment Debtor
_____ [*date*]
_____ [*name of judgment debtor*]
_____ [*street address of judgment debtor*]
_____ [*city, state, and zip code of judgment debtor*]

Re: _____ [*name of judgment creditor*] v. _____ [*name of judgment debtor*]
Superior Court of California, County of _____, Case No. _____

Dear [Mr./Ms.] _____ [*last name of judgment debtor*]:

This firm represents _____ [*name of judgment creditor*]. [Mr./Ms.] _____ [*last name of judgment creditor*] obtained a judgment against you in the above-referenced action on _____ [*date of entry of judgment*], for the amount of $_____.

Interest has accrued on the judgment at the rate of 10 percent from the date the judgment was entered, and interest will continue to accrue at ten percent until you pay the judgment. The judgment is valid for 10 years, and may be renewed for successive 10-year periods until paid in full.

Our records indicate that you have failed to make any payments towards this judgment.

As a judgment creditor, [Mr./Ms.] _____ [*last name of judgment creditor*] has numerous legal rights, remedies, and options available to pursue you and your assets to obtain payment on the judgment. We hope that you will voluntarily pay the judgment so that we do not need to use any of those rights or remedies. If, however, you fail to make payment in the next 10 days, we will commence enforcement of the judgment.

I strongly urge you to act on this letter.

Sincerely,

_____ [*attorney signature*]

_____ [*attorney typed name*]

NOTES.

Discussion:
See *9.11*, *9.43*

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VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.45

AUTHOR: Mark V. Isola, Esq.

9.45 Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest--Judicial Council Form MC-012.

Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest--Judicial Council Form MC-012.

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NOTES.

Authority:
CCP §§ 685.040, *685.050(a)(2)*, *685.070*; California Judicial Counsel Form MC-012, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rules 1.31*]

Grounds:
See *9.34*, *9.36*, *9.35*

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.46

AUTHOR: Mark V. Isola, Esq.

9.46 Summons (Joint Debtor)--Judicial Council Form SUM-120.

Summons (Joint Debtor)--Judicial Council Form SUM-120.

Click here to view image.

NOTES.

Authority:
CCP § 989; California Judicial Council Form SUM-120, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Grounds:
See *9.39[1]*

Service and Return:
See *9.39[2]*

Related Form for Declaration in Support of Issuance of Summons to Joint Debtor:
see *9.46A*

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.46A

AUTHOR: Mark V. Isola, Esq.

9.46A Declaration in Support of Issuance of Summons to Joint Debtor

Declaration in Support of Issuance of Summons to Joint Debtor
SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, v. _____ [*name*], Defendant.	No. _____ DECLARATION OF _____ IN SUPPORT OF ISSUANCE OF SUMMONS TO JUDGMENT DEBTOR Date: _____ Time: _____ Dept: _____ Judgment Entered: _____

I, _____ [*name of declarant*], declare:

1. I am the [attorney for the] plaintiff in the above-entitled action.

2. On or about _____ [*date*], judgment in this action was entered in favor of plaintiff and against defendant _____ [*name*] in the sum of $_____ together with interest thereon at the rate of _____ percent per year.

3. _____ [No part of the judgment *or* The sum of $_____] has been paid on the judgment leaving the sum of $_____ remaining unsatisfied together with interest thereon and accrued costs for a total now due on the judgment of $_____.

4. _____ [*Name*] was named as a defendant in the above-entitled action and is jointly indebted on the obligation which is the subject of the action with defendant _____ [*name of defendant against whom judgment was entered*].

5. Summons was issued in the action but defendant _____ [*name*] was not served with summons and did not appear in the action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on this _____ day of _____, _____, at _____, California.

_____ [*signature*]
[Attorney for] Plaintiff

NOTES.

Authority:
CCP §§ 990, 991

Grounds:
See *9.39*

Related Form for Summons for Joint Debtor Action, Judicial Council Form SUM-120:
See *9.46*

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.47

AUTHOR: Mark V. Isola, Esq.

9.47 Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.
SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, v. _____ [*name*], Defendant.	No. _____ MOTION TO AMEND JUDGMENT TO ADD ALTER EGO OF CORPORATE JUDGMENT DEBTOR Date: _____ Time: _____ Dept: _____ Judgment Entered: _____

To _____ [*name*], judgment debtor, and to _____ [*name*], his/her attorney of record:

Judgment creditor _____ [*name*] ("judgment creditor") hereby moves this court for an order to amend the judgment to add _____ [*name of alter ego*] ("_____" [*reference to alter ego*]) as an additional judgment debtor to the _____ [*title of judgment, i.e, "First Amended Judgment on Jury Verdict*"] (the "judgment"), entered in this action on _____ [*date of judgment*].

This motion is based on judgment creditor's discovery, subsequent to entry of the judgment, of facts demonstrating that _____ [*reference to alter ego*] is the alter ego of the judgment debtor. Pursuant to *Code of Civil Procedure Section 187*, this court has the power to amend the judgment to add _____ [*reference to alter ego*] as a judgment debtor.

This motion is based on this notice of motion, the motion, the supporting memorandum, and the supporting declaration of _____ [*name of declarant*], and all of the files and papers on file with the court along with any argument presented at the hearing on this motion.

For all of the foregoing reasons, judgment creditor requests entry of an amended judgment adding _____ [*reference to alter ego*] as an additional judgment debtor.

Dated: _____.

_____ [*name of attorney and bar number*]

_____ [*name of firm*]

_____ [*firm address*]

_____ [*firm telephone number*]

_____ [*firm fax number*]
Attorneys for Judgment Creditor

NOTES.

Authority:
CCP § 187; *Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 198 CR 457*

Grounds:
See *9.40*

Related Form for Declaration in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.48*

Related Form for Notice of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.49*

Related Form for Memorandum in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.50*

Related Form for Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.51*

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VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.48

AUTHOR: Mark V. Isola, Esq.

9.48 Declaration in Support of Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

Declaration in Support of Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, v. _____ [*name*], Defendant.	No. _____ DECLARATION OF _____ IN SUPPORT OF JUDGMENT CREDITOR _____'S MOTION TO AMEND JUDGMENT TO ADD ALTER EGO OF CORPORATE JUDGMENT DEBTOR Date: _____ Time: _____ Dept: _____ Judgment Entered: _____

_____

I, _____ [*name of declarant*], declare:

1. I am the president of judgment creditor _____ [*name of judgment creditor*] ("judgment creditor"). It is in this capacity that I submit this declaration, and if called on, I could and would testify competently thereto.

2. _____ [*Describe judgment, e.g.*, On March 1, 2006, the judgment on jury verdict was entered, pursuant to which judgment Creditor was awarded compensatory damages against judgment debtor in the sum of $500,000].

3. _____ [*Describe postjudgment cost award, e.g.*, On June 1, 2006, a hearing was held on judgment creditor's motion for attorney's fees and costs under *Civil Code Section 1717*. Judgment creditor was granted $178,068.50 in attorneys' fees and $65,405.84 in costs.]

4. _____ [*Describe amended judgment, if any, e.g.*, On June 15, 2006, the court entered the First Amended Judgment on Jury Verdict (the "judgment"), which awarded judgment creditor compensatory damages in the sum of $500,000, attorney's fees in the sum of $178,068.50, and costs in the sum of $65,405.84, for a total sum of $743,437.34].

5. _____ [*Describe discovery of new evidence, e.g.*, Subsequent to entry of the judgment, judgment creditor has discovered evidence demonstrating that _____ is the alter ego of the judgment debtor. The evidence showing the alter ego relationship consists of the following:

a. There was a unity of interest and ownership between the judgment debtor and _____ [*name*].

b. _____ [*Name*] exercised complete and pervasive control over judgment debtor.

c. Judgment debtor ignored corporate formalities and its own policies with respect to inter-company transfers.

d. An inequitable result would obtain if _____ [*name*] is allowed to hide behind judgment debtor's allegedly separate corporate facade.

6. _____ [*Describe evidence of alter ego's control of judgment debtor's participation in litigation leading to judgment, e.g.*, In her examination, _____ (*name*) admitted that she controlled all aspects of the underlying litigation for judgment debtor].

I declare under penalty of perjury under the laws of the State of California that the facts stated herein are true and correct to the best of my knowledge and belief.

Executed on this _____ day of _____, _____, at _____, California.

_____

[*name of declarant*]

NOTES.

Authority:
CCP § 187; *Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 198 CR 457*

Grounds:
See *9.40*

Related Form for Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.47*

Related Form for Notice of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.49*

Related Form for Memorandum in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.50*

Related Form for Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.51*

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.49

AUTHOR: Mark V. Isola, Esq.

9.49 Notice of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

Notice of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.
SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, v. _____ [*name*], Defendant.	No. _____ NOTICE OF JUDGMENT CREDITOR _____'S MOTION TO AMEND JUDGMENT TO ADD ALTER EGO OF CORPORATE JUDGMENT DEBTOR Date: _____ Time: _____ Dept: _____ Judgment Entered: _____

_____

To _____ [*name*], judgment debtor, and to _____ [*name*], his/her attorney of record:

PLEASE TAKE NOTICE THAT on _____ [*date of hearing*], or as soon thereafter as the matter may be heard, judgment creditor _____ [*name*] ("Judgment Creditor") will move this court for an order to amend the judgment to add _____ [*name of alter ego*] ("_____" [*reference to alter ego*]) as an additional judgment debtor to the _____ [*title of judgment, i.e, "First Amended Judgment on Jury Verdict"*] (the "judgment"), entered in this action on _____ [*date of judgment*].

This motion is based on judgment creditor's discovery, subsequent to entry of the judgment, of facts demonstrating that _____ [*reference to alter ego*] is the alter ego of the judgment debtor. Pursuant to *Code of Civil Procedure Section 187*, this court has the power to amend the judgment to add _____ [*reference to alter ego*] as a judgment debtor.

This motion is based on this notice of motion, the motion, the memorandum of points and authorities, and the supporting declaration of _____ [*name of declarant in support of motion*], and all of the files and papers on file with the court along with any argument presented at the hearing on this motion.

For all of the foregoing reasons, judgment creditor requests entry of an amended judgment adding _____ [*reference to alter ego*] as an additional judgment debtor.

Dated: _____.

_____ [*name of attorney and bar number*]

_____ [*name of firm*]

_____ [*firm address*]

_____ [*firm telephone number*]

_____ [*firm fax number*]
Attorneys for Judgment Creditor

NOTES.

Authority:
CCP § 187; *Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 198 CR 457*

Grounds:
See *9.40*

Related Form for Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.47*

Related Form for Declaration in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.48*

Related Form for Memorandum in Support of Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.50*

Related Form for Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.51*

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.50

AUTHOR: Mark V. Isola, Esq.

9.50 Memorandum in Support of Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

Memorandum in Support of Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, v. _____ [*name*], Defendant.	No. _____ MEMORANDUM IN SUPPORT OF JUDGMENT CREDITOR _____'S MOTION TO AMEND JUDGMENT TO ADD ALTER EGO OF CORPORATE JUDGMENT DEBTOR Date: _____ Time: _____ Dept: _____ Judgment Entered: _____

Judgment creditor _____ [*name of alter ego*] ("judgment creditor") submits the following memorandum in support of his/her motion to amend judgment to add alter ego of corporate judgment debtor:

I. INTRODUCTION

Through this motion, judgment creditor seeks to amend the judgment obtained against judgment debtor _____ [*name of corporate judgment debtor*] ("judgment debtor"), to add _____ [*name of additional debtor*] as an additional judgment debtor.

II. STATEMENT OF FACTS

On March 1, 2006, the judgment on jury verdict was entered, pursuant to which judgment creditor was awarded compensatory damages against judgment debtor in the sum of $500,000.

On June 1, 2006, a hearing was held on judgment creditor's motion for attorney's fees and costs under *Civil Code Section 1717*. Judgment creditor was granted $178,068.50 in attorney's fees and $65,405.84 in costs.

On June 15, 20069, the court entered the first amended judgment on jury verdict (the "judgment"), which awarded judgment creditor compensatory damages in the sum of $500,000, attorney's fees in the sum of $178,068.50, and costs in the sum of $65,405.84, for a total sum of $743,437.34.

Subsequent to entry of the judgment, judgment creditor has discovered facts demonstrating that _____ [*name of additional debtor*] is the alter ego of the judgment debtor.

III. ARGUMENT

A. This Court Has Power to Amend the Judgment. Under *Code of Civil Procedure Section 187*, this court has the power to use "all the means necessary" to carry its jurisdiction into effect. *Code Civ. Proc. § 187*. Such means include amending the judgment so that a nonparty alter ego of the corporate judgment debtor is added to the judgment. (*Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 148-149, 198 CR 457*)

B. _____ [*Name of additional debtor*] Is The Alter Ego Of The Judgment Debtor. As a general rule, the prerequisites for piercing the corporate veil are satisfied when it is established that there is "such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not really exist" and there will "be an inequitable result if the acts in question are treated as those of the corporation alone." (*Sonora Diamond Corp. v. Superior Court (2000) 83 Cal. App. 4th 523, 538, 99 Cal. Rptr. 2d 824* ; *see also Associated Vendors, Inc. v. Oakland Meat Co., Inc. (1962) 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806* ("Two requirements are (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow").)

In prior cases involving the alter ego and single enterprise doctrines and the decision of whether or not to pierce the corporate veil, courts have considered several factors in reaching their decision including the following: the commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the identical equitable ownership in the two entities, the identification of the equitable owners thereof with the domination and control of the two entities, identification of the directors and officers of the two entities in the responsible supervision and management, and sole ownership of all of the stock in a corporation by one individual or the members of a family; the employment of the same employees and/or attorney; the failure to adequately capitalize a corporation; the total absence of corporate assets and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another. (*See Associated Vendors, Inc. v. Oakland Meat Co., Inc. (1962) 210 Cal. App. 2d 825, 839-840, 26 Cal. Rptr. 806*)

a. There was a unity of interest and ownership between the judgment debtor and _____

[*name of additional debtor*]. _____ [*Describe facts showing unity of interest*].

b. _____ [*Name of additional debtor*] exercised complete and pervasive control over the judgment debtor. _____ [*Describe facts showing control by additional debtor*].

c. Judgment debtor ignored corporate formalities and its own policies with respect to inter-company transfers. _____ [*Describe facts showing lack of formalities in inter-company transfers*].

d. An inequitable result would obtain if _____ [*name of additional debtor*] is allowed to hide behind judgment debtor's allegedly separate corporate facade.

One California court of appeals has stated, "[I]t would be unjust to permit those who control companies to treat them as a single or a unitary enterprise and then assert their ... separateness in order to commit fraud and other misdeeds with impunity." (*Tran v. Farmers Group, Inc. (2002) 104 Cal. App. 4th 1202, 1219, 128 Cal. Rptr. 2d 728* , *quoting Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1249, 1 Cal. Rptr. 2d 301*)

C. _____ [*Name of additional debtor*] **Controlled the Underlying Litigation.** In his/her examination, _____ [*name of additional debtor*] admitted that he/she controlled all aspects of the underlying litigation for judgment debtor. Accordingly, judgment debtor satisfies the requirement of showing that the person sought to be added as an additional judgment debtor was in control of the litigation giving rise to the judgment. (*Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 148-149, 198 Cal. Rptr. 457*)

IV. CONCLUSION

For all of the foregoing reasons, judgment creditor requests entry of an amended judgment adding _____ [*name of additional debtor*] as an additional judgment debtor.

_____ [*name of attorney and bar number*]

_____ [*name of firm*]

_____ [*firm address*]

_____ [*firm telephone number*]

_____ [*firm fax number*]

Attorneys for Judgment Creditor

NOTES.

Authority:

CCP § 187; *Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 198 CR 457*

Grounds:

See *9.40*

Related Form for Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.47*

Related Form for Declaration in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.48*

Related Form for Notice of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.49*

Related Form for Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:

See *9.51*

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Chapter 9 Planning Enforcement of Judgment
VIII. FORMS

1-9 MB Practice Guide: CA Debt Collection 9.51

AUTHOR: Mark V. Isola, Esq.

9.51 Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

Order Granting Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, v. _____ [*name*], Defendant.	No. _____ ORDER GRANTING JUDGMENT CREDITOR _____'S MOTION TO AMEND JUDGMENT TO ADD ALTER EGO OF CORPORATE JUDGMENT DEBTOR Date: _____ Time: _____ Dept: _____ Judgment Entered: _____

The motion of judgment creditor _____ [*name of judgment creditor*] ("judgment creditor") for an order to amend the judgment to add _____ [*name of alter ego*] as an additional judgment debtor to the _____ [*title of judgment, i.e, "First Amended Judgment on Jury Verdict"*] (the "judgment"), entered in this action on _____ [*date of judgment*], having come on regularly for hearing on _____ [*date of hearing*], and good cause appearing therefor,

IT IS HEREBY ORDERED that the motion is granted and _____ [*name of new judgment debtor*] will be added to the [*title of judgment, i.e, "First Amended Judgment on Jury Verdict"*] as an additional judgment debtor.

Dated: _____

_____
Judge of the Superior Court

NOTES.

Authority:
CCP § 187; *Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 198 CR 457*

Grounds:
See *9.40*

Related Form for Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.47*

Related Form for Declaration in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.48*

Related Form for Notice of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.49*

Related Form for Memorandum in Support of Judgment Creditor's Motion to Amend Judgment to Add Alter Ego of Corporate Judgment Debtor:
See *9.50*

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Chapter 10 Postjudgment Discovery

1-10 MB Practice Guide: CA Debt Collection 10.syn

AUTHOR: Arnold Levin

§ 10.syn Synopsis to Chapter 10: Postjudgment Discovery

10.01 Scope:

10.02 Objective and Strategy.

10.03 CHECKLIST: Determining Facts Needed to Enforce and Satisfy Judgment.

10.04 Counsel Should Determine Whether Property Is Subject to Enforcement of Money Judgment.

10.05 Counsel Should Determine What Property Is Subject to Levy.

10.06 Counsel Should Determine Net Market Value of Assets After Liens.

10.07 Counsel Should Scrutinize Judgment Debtor's Attempts to Avoid Satisfying Judgment.
10.07[1] Counsel Should Evaluate Veracity of Facts Supporting Judgment Debtor's Claim of Exemption.
10.07[2] Counsel Should Determine Validity of Transfers Made by Judgment Debtor.
10.07[3] Counsel Should Evaluate Veracity of Third-Party Responses to Levy of Execution.
10.07[4] Counsel Should Determine Whether Other Persons or Entities Are Judgment Debtor's Alter Ego.

10.08 CHECKLIST: Determining Necessity and Availability of Postjudgment Discovery.

10.09 Options and Strategies.

10.10 Conduct of Judgment Debtor Should Be Considered in Making Decision to Use Discovery.

10.11 Cost of Discovery Should Be Compared With Benefits.

10.12 Specific Times When Postjudgment Discovery May Be Used Should Be Determined.

10.13 Counsel Should Evaluate Whether In Personam Jurisdiction Can Be Obtained.
10.13[1] Jurisdiction Issues Should Be Considered.
10.13[2] Generally, Serve Judgment Debtor, Not Attorney of Record in Underlying Action, Post-Judgment Unless Notice Is Filed.

10.13[3] Jurisdiction Over Third Parties Must Be Obtained.

10.14 Counsel Should Review Local Court Rules Affecting Postjudgment Discovery.

10.15 CHECKLIST: Using Postjudgment Interrogatories.

10.16 Options and Strategies.

10.17 Postjudgment Rules Are Almost Identical to Prejudgment Rules.

10.18 Judgment Debtor May Object to Interrogatories.

10.19 Failure to Respond May Be Enforced to Extent Practicable.

10.20 CHECKLIST: Demanding Inspection of Documents.

10.21 Options and Strategies.

10.22 Counsel May Demand Inspection of Documents in Postjudgment Discovery.

10.23 Postjudgment Rules Are Almost Identical to Pre-Judgment Rules.

10.24 Judgment Debtor May Object to Demand.

10.25 CHECKLIST: Conducting Examination of Judgment Debtor.

10.26 Options and Strategies.

10.27 Counsel May Demand Examination of Judgment Debtor.

10.28 Judgment Creditor Must Apply for Court Order.

10.29 Order May Designate Persons to Appear on Behalf of Entity.

10.30 Judgment Debtor Must Be Personally Served.

10.31 Order Creates Lien on Judgment Debtor's Personal Property.

10.32 Place and Time of Examination Is Court Where Judgment Was Entered.
10.32[1] Procedure Under California Law.
10.32[2] Procedure Under Federal Law.

10.33 Either Party May Request Court Reporter.

10.34 Court May Appoint Referee.

10.35 Debtor's Failure to Appear Is Punishable by Contempt.

10.36 Court Must Award Attorney's Fees to Judgment Creditor If Debtor's Failure to Appear Was Without Good Cause.

10.37 Conducting the Examination.
10.37[1] Examination Is Broad in Scope and Similar to Trial.
10.37[2] Examinees May Invoke Same Privileges as Trial Witnesses.
10.37[3] Debtor's Questions Should Be Extensive.

10.38 Judge May Order Judgment Debtor to Answer Questions or Produce Documents.

10.38A Creditor May Obtain Turnover Order After Debtor Examination.

10.39 CHECKLIST: Conducting Examination of Third Parties.

10.40 Judgment Creditor May Compel Examination of Third Parties.

10.41 Judgment Creditor Must Make Application for Court Order.

10.42 Third Party Must Be Personally Served.

10.43 Proof of Service Must Be Filed.

10.44 Third Party Is Subject to Contempt and Attorney's Fees for Failure to Appear.

10.44A Creditor May Obtain Turnover Order After Third Party Examination.

10.45 Application of Judgment Creditor and Order to Examine Documents.

10.46 Application for Order and Appearance at Examination--Judicial Council Form AT-138/EJ-125.

10.46A Memorandum of Garnishee--Judicial Council Form AT-167/EJ-152.

10.47 Questions for Debtor Examination or Written Interrogatories.

10.48 Turnover Order After Debtor or Third Party Examination Proceeding.

Arnold Levin n*

FOOTNOTES:

(n10)Footnote *. Arnold Levin is a 1959 graduate of Harvard Law School. He practiced law for 17 years, primarily in civil litigation, and was a Commissioner of the Los Angeles County Superior Court for 26 years, most of it in civil departments. He has served as consultant to the BAJI and CALJIC committees. Mr. Levin retired from the court in November 2002 and since then has worked part time as a mediator, court appointed referee, and consultant.

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Chapter 10 Postjudgment Discovery
I. STRATEGY

1-10 MB Practice Guide: CA Debt Collection 10.01

AUTHOR: Arnold Levin

10.01 Scope:

This chapter covers:

- Objectives and strategies regarding postjudgment discovery [*see 10.02*].
- Determining the facts needed to enforce and satisfy the judgment [*see 10.03 -10.07*].
- Determining the necessity and availability of postjudgment discovery [*see 10.08 -10.12*].
- Obtaining in personam jurisdiction for postjudgment discovery [*see 10.13 -10.14*].
- Determining the legal and practical use of discovery tools in postjudgment proceedings [*see 10.15 -10.24*].
- Determining the requirements of superior court local rules in postjudgment discovery [*see 10.25*, *10.14*].

Core Statutes:

CCP §§ 684.010-684.050, *684.110-684.140*, *684.210-684.220* (manner of service of writs, notice and other papers), *CCP §§ 695.010-695.070* (enforcement of judgments), *CCP §§ 708.010-708.170* (postjudgment discovery options)

Cross References:

Evaluating debtor's assets, see Chapter 1, Planning Collection of Debt.

Planning discovery, see Chapter 2, Locating the Debtor and Identifying the Debtor's Assets.

Effect of bankruptcy, see Ch 3, Effect of Bankruptcy.

Executing and levying against personal property, see Chapter 16, Executing and Levying

Against Personal Property.

Practical use of specific types of discovery, see Matthew Bender[(R)] Practice Guide: California Civil Discovery.

Enforcing judgments, filing and serving writs, see California Forms of Pleading and Practice, Ch. 254, Execution and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
I. STRATEGY

1-10 MB Practice Guide: CA Debt Collection 10.02

AUTHOR: Arnold Levin

10.02 Objective and Strategy.

The need for postjudgment discovery assumes that the judgment debtor has not paid the judgment, may be evading or trying to delay payment, or may have transferred or hidden assets, and that there is no prejudgment lien for attachment or possession on sufficient property to satisfy the judgment. It is further assumed that assets do exist from which the judgment can be satisfied.

The purpose of discovery is to locate those assets. To do this effectively and avoid an open-ended search, sources of information about the debtor's finances other than discovery should be explored, in order to either avoid discovery or make the scope of discovery as narrow as possible. Because discovery may be renewed at frequent intervals by law, repetitious use can "wear down" the debtor. Postjudgment discovery requires precise use of the discovery tools and tenacity in pursuing it. It is also essential to make a record of all discovery proceedings in the event enforcement becomes necessary.

A more difficult use of discovery is to determine whether a person or entity other than the judgment debtor is the alter ego of the debtor and has possession of property that can be levied upon. The substantive law of alter ego sets forth a number of facts that must be proved to support a finding of alter ego, which would justify adding the person or entity as a party defendant to the judgment. If that cannot be achieved with the limited tools of postjudgment discovery, there may be sufficient evidence to justify bringing a new action based on an alter ego theory in which all pretrial discovery would be available [*see CCP §§ 708.210-708.290*].

Strategic Point:

Remaining calm and detached emotionally, while important in all legal work, is of special importance in postjudgment proceedings, when often the main objective of the judgment debtor is to prolong and frustrate the process.

Cross References:

Enforcement of postjudgment discovery, see *10.15 -10.24*.

Identifying debtor's assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Planning discovery, see Ch. 1, Planning Collection of Debt.

Amending a judgment to add an alter ego defendant, see *Ch. 9, Planning Enforcement of Judgment, 9.40* et seq.

For the law and practical use as to specific types of discovery, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 1, Strategy and Planning.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
II. DETERMINING FACTS NEEDED TO ENFORCE AND SATISFY JUDGMENT

1-10 MB Practice Guide: CA Debt Collection 10.03

AUTHOR: Arnold Levin

10.03 CHECKLIST: Determining Facts Needed to Enforce and Satisfy Judgment.

☐ Determine what property is subject to money judgments by law.

Authority:
CCP §§ 695.010-695.070, 708.630

Discussion:
See *10.04*

☐ Determine what property subject to levy exists, and the order in which levy should be made.

Discussion:
See *10.05*

☐ Determine net market value of debtor assets after liens.

Discussion:
See *10.06*

☐ Determine which liens are senior to that of judgment being enforced.

Discussion:
See *10.06*

☐ Scrutinize judgment debtor's actions in his or her attempt to avoid satisfying judgment.

○ Determine veracity of facts supporting judgment debtor's claim of exemption.

Authority:
CCP §§ 703.010-704.995

Discussion:
See *10.07[1]*

○ Determine validity of transfers made by judgment debtor.

Discussion:
See *10.07[2]*

○ Determine veracity of any third party response to a levy of execution.

Authority:
CCP §§ 701.010-701.070

Discussion:
See *10.07[3]*

○ Determine whether any persons or entities are judgment debtor's alter ego.

Discussion:
See *10.07[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 10 Postjudgment Discovery
II. DETERMINING FACTS NEEDED TO ENFORCE AND SATISFY JUDGMENT

1-10 MB Practice Guide: CA Debt Collection 10.04

AUTHOR: Arnold Levin

10.04 Counsel Should Determine Whether Property Is Subject to Enforcement of Money Judgment.

Except as specifically provided by statute, generally, all property of the judgment debtor, including community property in the possession, custody or control of the judgment debtor or the spouse, and all property attached prior to the judgment, is subject to enforcement of a judgment [*see Civ. Proc §§ 695.010-695.035*].

Strategic Point--Searching for Assets:

This is a good time to update a prior search. Counsel should remember to give as much information as is currently available to the asset searcher and advise that the judgment creditor will not pay for information already in his or her possession. If counsel has any idea about where bank accounts may be located, that information should be included, since cash is the easiest asset on which to levy.

Investigating Debtor Assets Using Online Resources:

Many resources are available online for locating the assets of a debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Find Assets > Real Property
  - Sample Search: To locate real property owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Watercraft
  - Sample Search: To locate aircraft owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > FAA Aircraft

- Sample Search: To locate boats owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.

- Legal tab > States Legal--U.S. > Public Records > Public Records > Find Assets > Stock Information > Stock Ownership
  - Sample Search: To locate stock owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.

Strategic Point--Analysis of Information:

Before pursuing discovery, an analysis of information obtained prior to entry of judgment should be made in order to focus the scope of discovery as much as possible.

Cross References:

For a detailed discussion of all types of property subject to the enforcement of a judgment, see *1.42*.
Supplementing information obtained prior to entry of judgment see Ch. 1, Planning Collection of Debt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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Chapter 10 Postjudgment Discovery
II. DETERMINING FACTS NEEDED TO ENFORCE AND SATISFY JUDGMENT

1-10 MB Practice Guide: CA Debt Collection 10.05

AUTHOR: Arnold Levin

10.05 Counsel Should Determine What Property Is Subject to Levy.

The need for discovery usually arises after some time has elapsed since the entry of judgment. Therefore, any information the judgment creditor has about the judgment debtor must be updated. Since discovery of assets generally is not permitted before judgment, and if no prejudgment remedy has been obtained, this is the first time the judgment creditor has to seek discovery. The categories of property available for levy are described in *CCP § 700.010 et seq* and include cash, real property (including the judgment debtor's residence), tangible personal property (such as vehicles, boats, inventory), intangible personal property (such as stocks, bonds, partnership interests, patents, trademarks) and perishable personal property (such as produce or frozen food).

Strategic Point--Priority of Levy:

Levy on a bank account should be the first priority because the only action required is a transfer to the levying officer and delivery to the judgment creditor. Other property requires a sale by the sheriff which is subject to senior liens and statutory exemptions. Obligations owed to the debtor may be found in public records noted above where the debtor appears as creditor and in records of pending actions where the judgment debtor is seeking a money judgment.

Cross References:

Executing and levying against personal property, see Ch. 16, Executing and Levying Against Personal Property.

Executing and levying against real property, see Ch. 17, Executing and Levying Against Real Property.

Execution Sales, see Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawNonmortgage LiensJudgment LiensReal Property

LawNonmortgage LiensLien Priorities

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Chapter 10 Postjudgment Discovery
II. DETERMINING FACTS NEEDED TO ENFORCE AND SATISFY JUDGMENT

1-10 MB Practice Guide: CA Debt Collection 10.06

AUTHOR: Arnold Levin

10.06 Counsel Should Determine Net Market Value of Assets After Liens.

Determining the net market value of assets after liens can be a simple undertaking, or may require more extensive research. Sources of this information include:

- The financial pages of the newspaper.
- A broker's opinion of value.
- An appraisal.

Consider:
Finding the net market value often requires an appraisal, as well as updating the balances owed on existing liens. The judgment creditor may be a source of this information because of knowledge of a particular business.

- Public records.

Warning:
The amount of the lien may be more or less than that shown in public records. It could be less if paid down, or more if unpaid and interest and penalties have accrued.

- Litigation guarantee, which is a form of title insurance that discloses liens of record encumbering real property, including the addresses of lienholders who may be entitled to notice in the event of a levy on the real property.

Consider:
There are various free websites on line now that can give some idea as to real property values, such as www.zillow.com. Counsel can also call a local realtor to ask for an approximate value of properties in their neighborhood. Counsel may also ask a local title company to provide copies of whatever liens of record they can find on the property so that counsel can assess potential equity. Most will do this at no charge for attorneys. For the values of vehicles, counsel may go to www.kbb.com (Kelley Blue Book).

Cross References:

Discussion of determining value of assets, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Planning collection of a debt, see Ch. 1, Planning Collection of Debt.

Planning enforcement of a judgment, see Ch. 9, Planning Enforcement of Judgment.

Once the market value has been determined, counsel should determine which liens are senior to that of the judgment being enforced.

Cross Reference:

Discussion of determining priority of liens, see Ch. 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsReal Property LawNonmortgage LiensJudgment Liens

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Chapter 10 Postjudgment Discovery
II. DETERMINING FACTS NEEDED TO ENFORCE AND SATISFY JUDGMENT

1-10 MB Practice Guide: CA Debt Collection 10.07

AUTHOR: Arnold Levin

10.07 Counsel Should Scrutinize Judgment Debtor's Attempts to Avoid Satisfying Judgment.

10.07[1] Counsel Should Evaluate Veracity of Facts Supporting Judgment Debtor's Claim of Exemption. A valid claim of exemption precludes a levy on any property up to the value allowed by law [*see CCP §§ 704.010-704.995*]. The judgment debtor makes a claim of exemption by filing a claim with the levying officer within 10 days after the notice of levy was served [*CCP § 703.520(a)*]. The application must include a description of the property, and in certain circumstances a financial statement [*CCP § 703.520(b)(3), (4)*]. Counsel should review both the description and financial statement to determine the veracity of those facts in support of the exemption and whether or not discovery on these issues is necessary.

Example:

A homestead exemption on a residence grants the debtor an exemption from the proceeds of sale up to the amount granted by law [*see CCP §§ 704.710-704.995*]. A fact worth disputing is whether the homestead is truly the judgment debtor's residence [*see CCP § 704.710(c)*].

Cross References:

Discussion of effect of bankruptcy (bankruptcy exemptions), see Ch. 3, Effect of Bankruptcy.

Executing levying against personal property (exemptions under California law), see Ch. 16, Executing and Levying Against Personal Property.

10.07[2] Counsel Should Determine Validity of Transfers Made by Judgment Debtor. In a real estate transfer, the public record shows what transfer tax was paid. The purchase price can be calculated from that figure to determine whether consideration was given for the transfer.

Information about transfers of personal property is more limited. Unless the transfer involved a loan for which there is a UCC-1 filing or transfer of a security documented by a filing with a state or federal agency, most personal property transfers are conducted in private and will require discovery.

Cross References:

Discussion of postjudgment discovery options, see *10.15 -10.24*.

Fraudulent conveyances, see Ch. 4, Fraudulent Conveyances.

10.07[3] Counsel Should Evaluate Veracity of Third-Party Responses to Levy of Execution. When a levy is made by serving a copy of the writ and notice of levy on a third party, that person must immediately, or shortly after, deliver to the levying officer any of the levied property in his or her possession or control at the time of levy, unless he or she claims the right to possession of the property or has other good cause not to surrender possession [*CCP § 701.010(a), (b)(1)*].

The third party must execute a garnishee's memorandum if he or she will not deliver the property described in the notice of levy [*see CCP § 701.030(b)*]. Judicial Council Form AT-167/EJ-152 is approved for optional use for this memorandum.

Cross Reference:

Form for memorandum of garnishee (Judicial Council Form AT-167/EJ-152), see *10.46A*.

When a levy is made on a third party in the form of a garnishment of funds, it is not unusual for the third party to have a relationship, even a close one, with the judgment debtor. Therefore, a reply in the garnishee's memorandum that nothing is owing is questionable. An examination of a third-party garnishee may be needed to confirm the truth and accuracy of the reply.

Cross Reference:

Examination of third party garnishee, see *10.13[3], 10.39 -10.44*.

10.07[4] Counsel Should Determine Whether Other Persons or Entities Are Judgment Debtor's Alter Ego. Alter ego is a complicated issue and may not be suitable for postjudgment discovery. A number of detailed facts must be established to make another person or entity liable for the judgment. If extensive discovery--particularly depositions--is needed, a new action is the best way to adjudicate the matter [*see, e.g., Riddle v. Leuschner (1959) 51 C2d 574, 334 P.2d 107*].

Strategic Point--Tracking Down Judgment Debtor's Alter Ego:

Counsel should determine if the judgment debtor has been doing business, either before or after judgment, under any other name. It is not uncommon for a judgment debtor to close down one corporation one day, and reopen the next at the same place and doing the same thing without paying off prior creditors. Under these circumstances, the chance of being able to amend the judgment is good.

Counsel should look for common business type, common location, common ownership, whether prior accounts receivable debtors have been notified to pay to the new entity or if such payments have been processed by the new entity when made payable to the old entity. If there was a website, counsel should see if the site is still up, if names have been changed, or if phone numbers are the same or email addresses are answered after the old entity has supposedly "shut down." It is a good idea, when a motion to amend is contemplated, to order the third party debtors in to be examined to establish a basis for a motion to amend the judgment to allege alter ego.

Cross References:

Discussion and forms, motions to amend judgment based on alter ego theory, see *Ch. 9, Planning Enforcement of Judgment, 9.40* et seq; see also California Forms of Pleading and Practice, Ch. 161,

Corporations: Alter Ego Liability (Matthew Bender).

Discussion, examination of third party debtors, see *10.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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Chapter 10 Postjudgment Discovery
III. DETERMINING NECESSITY AND AVAILABILITY OF POSTJUDGMENT DISCOVERY

1-10 MB Practice Guide: CA Debt Collection 10.08

AUTHOR: Arnold Levin

10.08 CHECKLIST: Determining Necessity and Availability of Postjudgment Discovery.

☐ Evaluate conduct of judgment debtor.

○ Consider discovery if debtor shows intent to avoid satisfying judgment.

Discussion:
See *10.10*

○ Consider requesting voluntary discovery if judgment debtor shows good faith.

Discussion:
See *10.10*

☐ Weigh cost of discovery against benefits.

Discussion:
See *10.11*

☐ Determine specific times when postjudgment discovery may be used:

○ May be initiated any time after appellate remedies exhausted.

Discussion:
See *10.12*

○ If appellate remedies are not exhausted, discovery may be initiated only if there is no undertaking

to stay enforcement of judgment.

Authority:
CCP § 708.101

Discussion:
See *10.12*

- Use postjudgment discovery to enforce a sister state judgment.

Authority:
CCP § 1710.10 et seq.

Discussion:
See *10.12*

☐ Review requirements for service to obtain jurisdiction over judgment debtor.

- Judgment debtor must be personally served unless judgment debtor requests service on attorney.

Authority:
CCP §§ 684.010-684.110

Discussion:
See *10.13[2]*

☐ Determine if jurisdiction can be obtained over third parties for purposes of postjudgment discovery.

Authority:
CCP §§ 684.110-684.140

Discussion:
See *10.13[3]*

☐ Review requirements for filing proof of service in postjudgment proceedings.

- Must be filed with court in clerk's office or where designated by local rules.

Timing:
Must be filed no later than five court days before time set for hearing.

Authority:
CCP §§ 684.210, *708.120*; *Cal Rules Ct, Rules 3.1300(c)*, *3.1302(a)*

Discussion:
See *10.13[2]*

☐ Determine whether relevant court has local rules for postjudgment discovery.

Discussion:

See *10.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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AUTHOR: Arnold Levin

10.09 Options and Strategies.

Discovery involves additional expense, so counsel should make an assessment of whether the judgment debtor will appeal, and whether that appeal will be successful, before making a decision to take discovery and enforce the judgment pending appeal.

The advantage of enforcement through discovery and any successful levies that may be made as a result is to secure the satisfaction of the judgment if the appeal is in the judgment creditor's favor. The disadvantage is that any property levied upon must be returned if the judgment debtor's appeal is successful.

Information about the property that the records show the judgment debtor owns can be a guide to discovery. It gives a starting point to discovery and at least some systematic way to approach an otherwise unknown area with limitless possibilities and expense.

Researching Postjudgment Discovery Using Online Resources:

Many resources are available online for researching postjudgment discovery in California. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined

Sample Search: To find California cases that discuss postjudgment discovery, use a HEADNOTES segment search: *headnotes(postjudgment or post judgment pre/15 discovery or interrogat! or (examin! /5 third party or debtor) or (demand! /5 inspect!))*.

Cross References:

Discussion, postjudgment discovery options, see *10.15 -10.24*.

Evaluating information about judgment debtor's assets, see Ch 2, Locating the Debtor and Identifying the

Debtor's Assets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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III. DETERMINING NECESSITY AND AVAILABILITY OF POSTJUDGMENT DISCOVERY

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AUTHOR: Arnold Levin

10.10 Conduct of Judgment Debtor Should Be Considered in Making Decision to Use Discovery.

When no property of the judgment debtor can be identified, discovery becomes the only avenue for judgment enforcement. When there is some good faith by the debtor, voluntary discovery may be arranged to confirm his or her present inability to pay, and if confirmed, the judgment remains in effect subject to review to determine a change in the debtor's financial condition.

Cross References:

Discussion of postjudgment discovery options, see *10.15 -10.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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AUTHOR: Arnold Levin

10.11 Cost of Discovery Should Be Compared With Benefits.

The cost of discovery must be balanced against all of the following:

- The amount of the judgment.
- The probability of substantial recovery.
- The amount of resistance offered by the judgment debtor.
- The future economic prospects of the judgment debtor.
- The probability of a bankruptcy filing.

Strategic Point--Advising Client:

Unlike the trial of the action in which judgment has been entered, there is no foreseeable end to enforcing the judgment until satisfaction is made. The client may need to set a cost limit, and this should be fully discussed. Incurring costs in addition to those for trial to enforce requires an assessment that the efforts probably will be successful. Alternatively, a contingency-fee attorney may be hired to enforce the judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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AUTHOR: Arnold Levin

10.12 Specific Times When Postjudgment Discovery May Be Used Should Be Determined.

Postjudgment discovery may be initiated at any time after the judgment is final unless enforcement is stayed [*CCP § 708.010*].

Exception:
When discovery has been taken previously, the judgment creditor may not serve interrogatories within 120 days after the judgment debtor has responded to interrogatories previously served or within 120 days after the judgment debtor has been examined [*CCP §§ 708.010(a)*, *708.020(b)*].

When the judgment has been entered but appellate remedies have not been exhausted, discovery may be commenced if there has been no undertaking pursuant to stay enforcement of the judgment [*CCP § 708.010*; *see CCP § 916 et seq.* (undertaking)].

Generally, a judgment entered based upon a sister state judgment it can be enforced after 30 days after notice of entry of judgment has been served on the judgment debtor, [CCP § 710.45].

Cross References:

Discussion, time limits on commencing new discovery, see *10.15 -10.24*.

Enforcing out of state judgments in California, see Ch. 25, Enforcing Out of State Judgments in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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1-10 MB Practice Guide: CA Debt Collection 10.13

AUTHOR: Arnold Levin

10.13 Counsel Should Evaluate Whether In Personam Jurisdiction Can Be Obtained.

10.13[1] Jurisdiction Issues Should Be Considered. In order to conduct postjudgment discovery, the court must have in personam jurisdiction over the parties against whom discovery is sought. Postjudgment jurisdiction over persons differs from the proceedings after initial service and prior to entry of judgment, in particular as to the judgment debtor, post-judgment, generally, there is be no attorney of record to serve, and if a long period of time has elapsed, it is necessary to confirm the location of the judgment debtor although most service on the judgment debtor may be made by mail [*see CCP § 700.010(b)]*. A postjudgment proceeding is like beginning a new action even though it bears the same case number as the judgment [*see 10.15 -10.24*].

Strategic Point:

The trial attorney may not be retained for postjudgment enforcement defense, as most retainer agreements usually end at trial. Service on the judgment debtor's attorney is not effective to establish personal jurisdiction over the judgment debtor unless counsel cleared that representation with the attorney [*see CCP § 684.020*]. It is a good idea to contact the attorney and inquire, and then send a confirming letter regarding the response.

Warning--No Examination of Out of State Persons:

Unlike pretrial discovery, there appears to be no method of examining a person outside the state of California in postjudgment discovery, except by filing a sister state judgment enforcement proceeding in the foreign state.

Cross Reference:

Discussion of out of state judgments, see Ch. 25, Enforcing Out of State Judgments in California.

10.13[2] Generally, Serve Judgment Debtor, Not Attorney of Record in Underlying Action, Post-Judgment Unless Notice Is Filed. Post-judgment, counsel must serve the judgment debtor with any papers, rather than the debtor's attorney, unless a notice has been filed and served on the judgment creditor [*CCP § 684.020*].

Generally, counsel can serve the judgment debtor by mail [*CCP §§ 700.010*, *708.410(c)*, *708.510(b)*]. There are exceptions, requiring personal service, for an order to appear for examination or for items that would cause the judgment debtor to be held in contempt [*CCP §§ 684.030*, *699.040(c)*, *708.110(d)*].

10.13[3] Jurisdiction Over Third Parties Must Be Obtained. Jurisdiction over third parties must be obtained through service made in the same manner as service of a summons, pursuant to *CCP § 415.10* or *415.20* [*CCP § 684.110(d)*], except that an order to appear for an examination must be personally served on the third person, as well as personally or by mail on the judgment debtor [*CCP § 708.120(b)*]. The judgment creditor must provide the levying officer with the address and location of the person to be served [*CCP § 684.130*]. A registered process server also may make the service [*CCP § 684.140*].

Warning:

Ascertaining the location of the third party prior to commencing any proceedings is essential to avoid dismissal or the transfer of the proceeding and the time delay that results if the residency requirements are not met. The issue of place of hearing can resolved by stipulation to hold the examination at a mutually convenient place for the third party in exchange for a waiver of the statutory residence requirement, and thus keep the matter in the originating court--which avoids the paperwork needed to bring the matter to a different court. However, all other requirements of obtaining and maintaining jurisdiction must be met.

Strategic Point--Locating Third Parties:

Because third party proceedings usually involve an examination and appearance in court of the third party, counsel should determine the location of those persons well before setting the hearing date. Service should be coordinated with the statutory time required for notice of the hearing [*CCP §§ 701.030(a)*, *708.120(b)*]. The notice requirements may be met by stipulation approved by the court. If there are attorneys on all sides, a stipulation is useful to work out dates available to all parties and counsel and thus avoid multiple court appearances and continuances.

Cross Reference:

Locating parties, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsLegal EthicsClient RelationsAttorney FeesFee Agreements

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1-10 MB Practice Guide: CA Debt Collection 10.14

AUTHOR: Arnold Levin

10.14 Counsel Should Review Local Court Rules Affecting Postjudgment Discovery.

The California Judicial Council has preempted local rules with statewide rules in many areas of procedure. In areas where there are no statewide rules, individual superior courts have adopted rules that apply within the county to certain proceedings. These local rules differ from county to county. There may be no local rules on certain types of matters, such as postjudgment discovery. The rules that do exist are usually published by local legal newspapers and are regularly updated. The rules are also usually available on line at the particular superior court's website. For a list of all county superior courts and their websites, see http://www.courtinfo.ca.gov/courts/trial/courtlist.htm.

Examples:

- Los Angeles Superior Court has one rule with several subparts that pertains to hearings on judgment debtor and third party examinations [*see* Los Angeles Super Ct Rules, Rule 3.4].

- San Diego Superior Court has one rule with several subparts that pertains to applications and order for judgment debtor and third party examinations [*see* San Diego Super Ct Rules, Rule 2.4.1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsGovernmentsCourtsRule Application & Interpretation

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Chapter 10 Postjudgment Discovery
IV. USING POSTJUDGMENT INTERROGATORIES

1-10 MB Practice Guide: CA Debt Collection 10.15

AUTHOR: Arnold Levin

10.15 CHECKLIST: Using Postjudgment Interrogatories.

☐ Determine whether use of postjudgment interrogatories makes sense under facts of case.

- ○ Is judgment debtor likely to respond truthfully, or at all?
- ○ Is it likely that follow-up proceedings will be required, thereby generating additional expense?
- ○ Would debtor examination be a more effective way of discovering information in this case?

Discussion:
See *10.16*.

☐ Prepare form interrogatories for judgment debtor.

Discussion:
See *10.17*

Form:
See *10.47*

☐ Proceed in same manner as for pre-judgment interrogatories, with following exceptions:

- ○ Statutory limit of *CCP § 2030.030* is inapplicable cumulatively to number of sets propounded to judgment debtor.

○ After submitting initial interrogatories, judgment creditor must wait 120 days before additional or follow up interrogatories may be submitted.

Authority:
CCP § 708.020

Discussion:
See *10.17*

☐ Judgment debtor may object to interrogatories.

Authority:
CCP § 2030.020

Discussion:
See *10.18*

☐ If judgment debtor fails to respond, seek monetary sanctions and contempt.

Authority:
CCP § 708.020

Discussion:
See *10.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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AUTHOR: Arnold Levin

10.16 Options and Strategies.

Because of their limitations, postjudgment interrogatories are used less frequently than other forms of discovery. Their best use is to provide a foundation and basis for organizing other discovery.

Postjudgment interrogatories may be of little benefit in ascertaining the existence, value, and/or location of assets that may be used to satisfy a judgment. The judgment debtor has not voluntarily satisfied the judgment, and may have considerable animosity towards the judgment creditor and his or her counsel. The probability that the judgment debtor will provide truthful and responsive answers--or any answers--to postjudgment interrogatories is not high. There is also the cost of preparing and serving the interrogatories and, if answers are either not served or are unsatisfactory, the cost of preparing, serving and attending a hearing on a motion to compel. The upshot of the motion to compel may be an order compelling responses or further responses, and monetary sanctions. The sanctions are added to the judgment, and the judgment creditor is back in the same position, months later, where he or she started, with a larger unsatisfied judgment, and no information regarding the judgment debtor's assets. For these reasons, it is usually better and less expensive in the long run (to avoid multiple appearances to seek sanctions and compel orders) to set up a judgment debtor examination rather than sending out interrogatories.

Nevertheless, there are some possible benefits associated with the use of postjudgment interrogatories, besides the obvious benefit if the judgment debtor actually provides useful responses. A court may punish a refusal to comply with a court order compelling responses or further responses by holding the judgment debtor in contempt. In addition, if the judgment debtor has an appeal of the underlying judgment pending, and refuses to respond to postjudgment interrogatories, the appellate court may dismiss the appeal [*TMS, Inc. v. Aihara (1999) 71 CA 4th 377, 379-380, 83 CR2d 834*].

If counsel decides to send interrogatories, he or she should send the same questions that one would want answered at a judgment debtor examination. This includes inquiring about the location of assets, or asking for information that would help to ferret out the location.

Cross Reference:

Discussion of debtor examinations, see *10.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesUseCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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AUTHOR: Arnold Levin

10.17 Postjudgment Rules Are Almost Identical to Prejudgment Rules.

Postjudgment interrogatories are governed by *CCP § 2030.010 et seq*.

Exceptions:

- The statutory limit on the number of interrogatories in *CCP § 2030.030* applies to the number of interrogatories in a set but does not apply cumulatively to the number of sets that may be propounded to the judgment debtor [*CCP § 708.020(d)*]. Therefore, subject to the statutory time limits, new sets of interrogatories can be propounded until the judgment is satisfied or is no longer enforceable because the time for enforcement has expired.

- If the judgment creditor, within 120 days of serving a set of interrogatories, has either served a set of interrogatories, served a demand for inspection of documents, or held an examination of the judgment debtor, no response is required from the judgment debtor [*CCP § 708.020(b)*]. The judgment creditor must wait until at least 120 days has elapsed before additional interrogatories may be propounded.

The form in 10.47 is a detailed set of debtor questions that can be used either for a debtor's examination or written interrogatories. It is recommended that these questions be used as a basic set of interrogatories for judgment debtors.

Consider--Interrogatories Present Limitations:

While interrogatories are one of the least expensive avenues of postjudgment discovery, they have the limitation of being unable to ask a follow-up question to a response for 120 days. Additionally, while Judicial Council form interrogatories can be used without modification [*see* California Judicial Council Forms DISC-001-DISC-004], the form interrogatories are tailored to prejudgment discovery in specific types of cases that do not apply to collecting money judgments. Therefore, interrogatories should be as specific and focused as possible on obtaining information about the existence and location of the debtor's assets.

Cross References:

Detailed discussion regarding use of interrogatories, see Matthew Bender[(R)] Practice Guide: California

Civil Discovery, Ch. 9, Interrogatories.

California Judicial Council Forms DISC-001-DISC-004 for interrogatories, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 9, Interrogatories.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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AUTHOR: Arnold Levin

10.18 Judgment Debtor May Object to Interrogatories.

The judgment debtor has the right to move for a protective order that answers need not be made, but the motion must be made "promptly" [*see CCP § 2030.090(a)*]. Common objections are that the interrogatories:

- Are overbroad;
- Ask for privileged information; or
- Are not in aid of enforcement of the judgment.

This right should be kept in mind and the reason for each interrogatory considered with a view to having to defend it in a motion for protective order. The grounds for the protective order are set forth in *CCP § 2030.090*. Objections can also be timely served by the judgment debtor, which requires a motion to compel answers by the judgment creditor in order to obtain a ruling on their validity [*see* CCP § 2300.240].

Cross Reference:

Discussion, objecting to interrogatories, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 9, Interrogatories.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryProtective OrdersCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
IV. USING POSTJUDGMENT INTERROGATORIES

1-10 MB Practice Guide: CA Debt Collection 10.19

AUTHOR: Arnold Levin

10.19 Failure to Respond May Be Enforced to Extent Practicable.

The enforcement procedure is the same as that for prejudgment interrogatories "to the extent practicable" [*CCP § 708.020(c)*]. The limitation of practicability in enforcement arises out of the fact that some of the sanctions available before judgment (dismissal of an action, entry of default, deeming certain allegations to be true, limiting the production of evidence at trial to the interrogatory responses) do not exist after entry of judgment [*see CCP §§ 2023(b)-2023(e)*]. Monetary sanctions and contempt are the primary tools the court has for enforcement that the court. An award of attorneys' fees and costs is added to the judgment, which still must be satisfied.

Strategic Point:

Monetary sanctions against a judgment debtor who has already refused to pay are not likely to precipitate a response. For that reason, the judgment debtor examination with the potential for a bench warrant tends to be more effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
V. DEMANDING INSPECTION OF DOCUMENTS

1-10 MB Practice Guide: CA Debt Collection 10.20

AUTHOR: Arnold Levin

10.20 CHECKLIST: Demanding Inspection of Documents.

☐ Determine whether to demand inspection and copying of documents, either:

- ○ In conjunction with debtor examination, or
- ○ Separately.

Authority:
CCP § 708.030(a)

Discussion:
See *10.21*

☐ Determine what types of documents to request.

Discussion:
See *10.21*, *10.23*, *10.47*

☐ Proceed in same manner as for pre-judgment demands for inspection of documents, with following exception:

- ○ Inspection demands may not be served within 120 days after judgment debtor has previously responded to demands.

Authority:
CCP §§ 708.030(a), (b)

Discussion:

See *10.23*

☐ Determine most effective use of postjudgment demands for inspection of documents.

○ Documents may contain evidence that will locate property.

○ Documents assist in guiding the direction of examination of debtor or third party.

Discussion:
See *10.23*

Form:
See *10.45*

☐ Judgment debtor may object to demand.

○ Dispute over objections will be resolved by court in accordance with local rules or order of presiding judge.

Authority:
CCP § 2031.210(a)(3)

Discussion:
See *10.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
V. DEMANDING INSPECTION OF DOCUMENTS

1-10 MB Practice Guide: CA Debt Collection 10.21

AUTHOR: Arnold Levin

10.21 Options and Strategies.

A demand for inspection and copying of documents has two uses:

- The documents themselves may contain or lead to evidence that will describe and locate property that can be levied upon; and

- The documents assist in guiding the direction of an examination of the judgment debtor or a third party.

A debtor examination coupled with a subpoena can be a far superior and more efficient way of obtaining information that is contained in written documents. Counsel should seek to have documents produced at the same time as the scheduled judgment debtor examination so that counsel can ask about documents that may lead to assets. For example, counsel should serve the debtor or third party with a subpoena duces tecum to produce bank statements, canceled checks, pay stubs, and title documents. Tax returns are privileged and counsel cannot seek to compel their production unless it is for the purpose of comparing the returns previously provided voluntarily by the debtor with the "real" ones. In that case, counsel may argue that the privilege has been waived. This has the added benefit of potentially continuing the examination for a shorter time period than the 120-day limitation, as most debtors will not bring all of the documents requested and counsel can have them ordered to return with those documents in a shorter time frame. Counsel should not have the court release the debtor or third party from the order to appear until counsel has received all of the requested documents that are not privileged.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenasCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
V. DEMANDING INSPECTION OF DOCUMENTS

1-10 MB Practice Guide: CA Debt Collection 10.22

AUTHOR: Arnold Levin

10.22 Counsel May Demand Inspection of Documents in Postjudgment Discovery.

The judgment creditor may demand that any judgment debtor produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made [*CCP § 708.030(a)*].

Strategic Point:

Under the *CCP § 708.030* process, the judgment debtor may not reply to the demand for inspection, and sanctions for the failure to reply may not be effective. In addition, this process does not create a lien on any relevant property of the judgment debtor, as does the process for a debtor's examination *[Lee v. Swansboro Country Property Owner's Association (2007) 151 CA4th 575, 581, 59 CR3d 934]* .

Cross References:

Discussion of debtor examinations under *CCP § 708.110*, see *10.20* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
V. DEMANDING INSPECTION OF DOCUMENTS

1-10 MB Practice Guide: CA Debt Collection 10.23

AUTHOR: Arnold Levin

10.23 Postjudgment Rules Are Almost Identical to Pre-Judgment Rules.

Postjudgment rules generally are the same as prejudgment rules for the production of documents. Postjudgment demands for inspection of documents are governed by *CCP § 2031.010 et seq*. The demand may be made upon the judgment debtor, and the judgment creditor has the right to both inspect and copy documents [*CCP § 708.030(a)*].

Exception--120-Day Rule Applies:

The judgment creditor may not serve interrogatories or inspection demands within 120 days after the judgment debtor has responded to interrogatories or demands previously served pursuant to *CCP § 708.020*, or within 120 days after the judgment debtor has been examined pursuant to *CCP § 708.110 et. seq*. [*CCP § 708.030(a), (b)*].

Strategic Point:

Counsel should ask recent creditors of the debtor to appear and bring the credit applications with them that the debtor provided to obtain credit. For example, if the debtor is driving a recently purchased or leased vehicle, have an order for the creditor to appear and see what assets/income the debtor listed to try to get that new car. If counsel is seeking the records of a third party (such as a non-debtor spouse whose assets may be subject to levy as community), it will be necessary to serve a Notice to Consumer pursuant to *CCP §§ 1985.3(b)* and *1985(e)* (Judicial Council Form SUBP-025) that such records are being requested.

Cross References:

Form, Application of Judgment Creditor for Inspection of Documents, see *10.45*.

Judicial Council form for notice to consumer (Judicial Council Form SUBP-025), see *Matthew Bender[(R)] Practice Guide: California Civil Discovery, 6.67*.

Detailed discussion of discovery rules for production of documents, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 10, Inspection of Documents, Tangible Things, and Land.

The demand should be as comprehensive as possible because of the 120-day waiting period before another demand can be made. Each item in the demand must be reviewed for valid objections and on any close issues the arguments in favor of the demand being sustained should be researched and developed.

Cross Reference:

Discussion of general rules governing demand for inspection of documents, see Matthew Bender[(R)] Practice Guide: California Civil Discovery, Ch. 10, Inspection of Documents, Tangible Things, and Land.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
V. DEMANDING INSPECTION OF DOCUMENTS

1-10 MB Practice Guide: CA Debt Collection 10.24

AUTHOR: Arnold Levin

10.24 Judgment Debtor May Object to Demand.

The judgment debtor may respond with timely served written objections to the demand [*CCP § 2031.210(a)(3)*]. Any dispute over the objections must be resolved by the court designated by local rules or order of the presiding judge by a motion pursuant to *CCP § 2031.300(b)*. An inability to comply with the demand is not an objection but a statement of fact that must be made in the response under penalty of perjury [*CCP § 2031.250(a)*].

Cross Reference:

Matthew Bender[(R)] Practice Guide: California Civil Discovery, 10.03 -10.43.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.25

AUTHOR: Arnold Levin

10.25 CHECKLIST: Conducting Examination of Judgment Debtor.

☐ Determine whether to seek examination of judgment debtor.

Discussion:
See *10.26*.

☐ Apply to proper court for examination order.

○ Submit application for order on official Judicial Council form.

Authority:
CCP § 708.110(a); *Fed R Civ P 69*

Discussion:
See *10.28*

Form:
See *10.46*

○ File application in accordance with applicable local filing requirements.

Discussion:
See *10.28*

○ Subpoena any needed documents from judgment debtor in connection with examination.

Discussion:
See *10.28*; see *10.20* et seq.

○ If judgment debtor is entity, name one or more persons to be examined as entity's representatives.

Authority:
CCP § 708.150(a), (b)

Discussion:
See *10.29*

☐ Serve copy of order on judgment debtor personally not less than 10 days before examination date.

Authority:
CCP § 708.110(d)

Discussion:
See *10.30*

☐ Determine time and place for examination.

Authority:
CCP § 708.160(b)

Discussion:
See *10.32*

○ Examination may be conducted at courthouse or another agreed-upon location.

○ Court will usually set time for court appearance.

☐ Request court reporter, if desired.

Discussion:
See *10.33*

☐ Request court-appointed referee to preside over examination, if desired.

Authority:
CCP § 708.110(a)

Discussion:
See *10.34*

☐ If debtor fails to appear:

○ Seek enforcement by issuance of arrest warrant or bench warrant for contempt of court in accordance with local practice.

Authority:
CCP § 708.170(a)(1)

Discussion:
See *10.35*

○ Seek reasonable attorney's fees incurred in examination proceeding.

Authority:
CCP § 708.170(a)(2)

Discussion:
See *10.36*

☐ Conduct examination.

○ Examination may be broad in scope.

Authority:
Kyne v. Eustice (1963) 215 CA 2d 627, 632, 30 CR 391 ; *Young v. Keele (1987) 188 CA 3d 1090, 1093, 233 CR 850*

Discussion:
See *10.37[1]*

○ Examinees may invoke same privileges as trial witnesses, except that privilege to not testify about a spouse or a domestic partner does not apply.

Authority:
CCP § 708.130(a), (b)

Discussion:
See *10.37[2]*

○ Examine debtor in detail regarding all possible sources of assets to pay judgment.

Discussion:
See *10.37[3]*

Form:
See *10.47*

☐ If examinee refuses to answer, seek court order requiring debtor to answer specific questions.

Discussion:
See *10.38*

☐ If examinee brings significant personal property or cash to examination, consider serving turnover order.

Authority:
CCP § 708.205(a)

Discussion:
10.38A

Form:
10.48

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureSanctionsContemptCivil Contempt

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.26

AUTHOR: Arnold Levin

10.26 Options and Strategies.

A debtor's examination, coupled with serving subpoenas for records on the debtor, on third parties, and on witnesses is the most effective postjudgment method for ascertaining the debtor's ability to pay the judgment and the sources of income and assets [*see Lee v. Swansboro Country Property Owner's Association (2007) 151 CA4th 575, 581, 59 CR3d 924* ; *CCP §§ 708.120*, *708.130(a)*].

Key advantages of the debtor's examination process are that (1) it provides for a lien on the judgment debtor's property, and (2) it is enforceable by contempt [*CCP § 708.110(d)*, *(e)*; *see Lee v. Swansboro Country Property Owner's Association (2007) 151 CA4th 575, 581, 59 CR3d 924*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.27

AUTHOR: Arnold Levin

10.27 Counsel May Demand Examination of Judgment Debtor.

The judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to furnish information to aid in enforcement of the money judgment [*CCP § 708.110(a)*]. This procedure is commonly referred to as a debtor's examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.28

AUTHOR: Arnold Levin

10.28 Judgment Creditor Must Apply for Court Order.

The judgment creditor must obtain an Order for Appearance of the Judgment Debtor ("ORAP") [*CCP § 708.110(a)*]. Judicial Council Form AT-138/EJ-125 (application and order) must be used for this purpose and is designated as mandatory by the California Judicial Council.

Cross Reference:

Judicial Council Form AT-138/EJ-125, Application and Order for Appearance and Examination, see *10.46*.

If the judgment debtor has been examined with the past 120 days, the application must set forth facts showing good cause for shortening the time for an additional examination [*CCP § 708.110(c)*].

The application for the order may be made ex parte, but notice of the hearing date must be served [*see CCP § 708.110(c)*].

Consider:

Local rules may prescribe specific filing requirements and should be reviewed prior to filing the application. For example, in Los Angeles County, a copy of the judgment must be provided with the application [Los Angeles Super Ct Rules, Rule 3.4(a)(3)]. The reason for this rule is that many of these proceedings occur many years after entry of judgment and the court file has been sent to archives and is not readily available. The Los Angeles County Superior Court is large and has many local branches called "districts" within the county. Therefore, the application and order must be filed in the district in which the judgment was entered [Los Angeles Super Ct Rules, Rule 3.4(a)(4)]. In San Diego County, the original application and order, and two copies, must be submitted to the civil business office with the required fees and a self addressed envelope in order to obtain a hearing date from the court [San Diego Super Ct Rules, Rule 2.4.1].

Strategic Point--Subpoena of Documents and Third Parties:

Counsel may (and should) subpoena documents from the judgment debtor in connection with the

examination by serving a subpoena duces tecum along with the Application and Order for Examination. [*see* Lee v. Swansboro Coun try Property Owner's Association (2007) 151 CA4th 575, 59 CR3d 934 ; *People v. Pereira (1989) 207 CA3d 1057, 1066, 255 CR 285]* . Subpoenas may include a request to produce (or permit inspection of) electronically stored information [*CCP § 1985.8*]. Counsel also may wish to subpoena third parties and/or witnesses for documents in conjunction with the examination of the judgment debtor [*see CCP §§ 708.120*, *708.130*, *1985.1 et seq*]. See the judgment debtor questions set out in 10.47 for the types of documents that should be included in the subpoena. However, the third party and witnesses may not provide those documents before the hearing and will have to deliver them to court under seal or appear at that time. This might be done when counsel wants to obtain information from another creditor such as bank deposit records for a spouse or car credit applications. The only downside is that because counsel will not receive the documents in advance, counsel will have to think on his or her feet about what to do with the information at the hearing--there is no time to prepare. Counsel should use Judicial Council Form SUBP-002, the same form used for a subpoena duces tecum used to subpoena a third party witness to a hearing or trial.

Cross References:

Questions for debtor's exams, see *10.37[3]*, *10.47* (form).

General discussion and forms for subpoena, see California Forms of Pleading and Practice, Ch. 535, Subpoena (Matthew Bender).

Standard Judicial Council form for subpoena duces tecum (Judicial Council Form SUBP-002, see *California Forms of Pleading and Practice, § 535.61* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsGovernmentsCourtsRule Application & Interpretation

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.29

AUTHOR: Arnold Levin

10.29 Order May Designate Persons to Appear on Behalf of Entity.

An order for appearance of a judgment debtor or third party that is a corporation, partnership, association, trust, or other organization may designate one or more officers, directors, managing agents, or other persons familiar with the debtor's property and debts to appear and be examined [*CCP § 708.150(a), (b)*]. That person must appear, but may be accompanied by other persons representing the entity [*CCP § 708.150(a)(b)*].

If no designation is made in the order, the order must advise the entity of its duty to designate one of the persons listed above to appear and be examined on behalf of the entity [*CCP § 708.150(c)*]. Any of those persons may appear and be examined, whether or not that person is an attorney [*CCP § 708.150(d)*]. The usual requirement that a corporation or other entity must be represented by an attorney appears not to apply to judgment debtor or third party examinations.

Strategic Point:

In Los Angeles County, the order for examination of an entity must include the name of a natural person unless the court orders otherwise for good cause. When subpoenaing an institution like a bank when it is difficult or impossible to determine a specific person to name, a declaration so stating will generally suffice to permit the avoidance of the requirement of the local rule. [Los Angeles Super Ct Rules, Rule 3.4(a)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsGovernmentsCourtsRule Application & Interpretation

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.30

AUTHOR: Arnold Levin

10.30 Judgment Debtor Must Be Personally Served.

The judgment creditor must personally serve a copy of the order on the judgment debtor not less than 10 days before the date set for the examination. Service must be made in the manner specified in *CCP § 415.10* i.e, personally served, but substituted service is not permitted [*CCP § 708.110(d)*].

A subpoena duces tecum can be served in conjunction with the order [*People v. Pereira (1989) 207 CA3d 1057, 1066, 255 Cal. Rptr. 285]* . Subpoenas may include a request to produce (or permit inspection of) electronically stored information [*CCP § 1985.8*] Alternatively, an order to produce documents can be served on the judgment debtor, but this may require a longer time period for service prior to the examination [*Lee v. Swansboro Country Property Owner's Association (2007) 151 CA4th 575, 580-582, 59 CR3d 924* ; *CCP § 1987(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenasCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.31

AUTHOR: Arnold Levin

10.31 Order Creates Lien on Judgment Debtor's Personal Property.

Service of the order and application on the judgment debtor creates a lien of the personal property of the judgment debtor for one year from the date of the order. The court may extend or terminate the time period of the lien [*CCP § 708.110(d)*].

An ORAP lien (as well as execution liens and other liens described in *CCP § 697.910*) continues its existence on money paid to third parties if those parties do not otherwise qualify for an exception; e.g., as a holder in due course [*Credit Suisse First Boston v. Danning, Gill, Diamond & Kollitz (2009) 178 CA4th 1290, 101 CR3d 192]* .

Example:

> Interpreting *CCP § 697.740(j)*, the court concluded that monies paid by a judgment debtor to an attorney for fees when the attorney was on notice of an ORAP lien (pursuant to *CCP § 708.110(d)*), were subject to the ORAP lien. The monies paid were not excepted by the reference to the term "money" in *CCP § 697.740(j)*, the court concluding that "money" had to be read in conjunction with a letter of credit and relate thereto in order to constitute an exception [*Credit Suisse First Boston v. Danning, Gill, Diamond & Kollitz (2009) 178 CA4th 1290, 101 CR3d 192]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensRenewals

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1-10 MB Practice Guide: CA Debt Collection 10.32

AUTHOR: Arnold Levin

10.32 Place and Time of Examination Is Court Where Judgment Was Entered.

10.32[1] Procedure Under California Law. The place for the court appearance for examination is the court in which the judgment was entered, unless the person to be examined does not reside or have a place of business in within 150 miles of the place for examination [*CCP § 708.160(b)*]. In such a case, the place of court hearing and examination must be in the county of residence or place of business or within 150 miles of such residence or place [*CCP § 708.160(c)*].

Consider:

The time for the court appearance usually is set by the court [*see, e.g.,* Los Angeles Super Ct Rules, Rule 3.4(a)(2)]. Many courts only hear these matters on certain days of the week or month and may require a date on the calendar to be reserved.

Consider:

In Los Angeles County, if the applicant fails to appear at the hearing, the matter is placed off calendar and cannot be renewed for 120 days without a showing of good cause [Los Angeles Super Ct Rules, Rule 3.4(c)(1)(2)].

Strategic Point--Timing of Examination:

Counsel should provide sufficient time between the date of issuance of the order for examination and the date of the examination, usually at least a month. Sometimes it is difficult to personally serve the judgment debtor with the order, and the process will have to be started again if the judgment debtor is not served at least 10 days before the scheduled examination date.

Strategic Point--Place of Examination:

If counsel does not expect absolute cooperation or truthfulness, it is best to have the examination held at the courthouse. The advantage is that counsel can seek a court order immediately if the examinee refuses to answer. However, most courthouses do not have facilities for hearing judgment debtor examinations.

The examination may take place in the jury room, cafeteria, or hallway. Often the only facility is the attorney's conference room, which is usually crowded with other cases or is so small as to not be able to accommodate the parties, counsel, court reporter, and referee. Further, it is not an informal setting like a settlement discussion, and the proceedings must be heard clearly by the court reporter. Therefore, in some cases it might be wise to have the examination at counsel's office or an agreed upon neutral place such as an alternative dispute resolution conference room. Often, if there is counsel on both sides, these details can be worked out by stipulation as to place, date, and time convenient to all parties. The courts are very accommodating to such arrangements.

If an examination is held at counsel's office, it should be held in advance of the scheduled date in court. That way, if counsel encounters refusals to respond or other issues that must be decided by the court, they can be brought to the court's attention on the scheduled court date without having to re-serve or file a motion.

10.32[2] Procedure Under Federal Law. Under federal law, the procedure in proceedings on and in aid of execution, are in accordance with the practice and procedure of the state in which the district court is held at the time the remedy is sought. However, any federal statute governs to the extent it is applicable. The judgment creditor may obtain discovery from any person, including the judgment debtor, in the manner provided in the federal rules or in the manner provided by the practice of the state in which the district court is held [*Fed R Civ P 69(a)*].

In a federal case, the district court had jurisdiction over the criminal defendant for a debtor examination under *Fed R Civ P 69* and *CCP § 708.110* to make restitution. Although the defendant's residence was Spain for purposes of the examination, the defendant was still required to appear for the examination because *CCP § 708.160(b)* does not apply to a foreign-based defendant and thus, the examination is proper in the court that ordered restitution *[United States v. Feldman (CD Cal 2004) 324 F Supp2d 1112, 1116-1117]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsGovernmentsCourtsRule Application & Interpretation

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VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.33

AUTHOR: Arnold Levin

10.33 Either Party May Request Court Reporter.

The judgment creditor or judgment debtor may request a court reporter to take down the examination proceedings. However, the court reporters are not provided by the court but must be arranged and paid for by the party making the request. The cost may be added to judgment if incurred by the judgment creditor. If there are objections or disputes, they can be set forth in declarations in a motion to compel or for protective order, but doing this without a court reporter's transcript can add an additional dispute as to what actually took place at the examination. The use of a court reporter is preferable if it can be afforded. The transcript also is of value for use in continued or subsequent examinations and for authenticating and laying a foundation for documents to used in motions or new litigation. It also may be valuable in establishing alter ego liability in appropriate cases.

Consider:

If the amount in controversy justifies the cost of employing a court reporter, counsel should have a reporter transcribe the examination. It will be useful in further examinations, to impeach third parties, to set up a motion to amend the judgment or a fraudulent conveyance action, or to defend against third party claims or claims of exemption.

Legal Topics:

For related research and practice materials, see the following legal topics:
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VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

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AUTHOR: Arnold Levin

10.34 Court May Appoint Referee.

A referee can be ordered by the court to preside over the examination and carry out most of the duties of the court as an extension of the court [*CCP § 708.110(a)*].

Strategic Point:

The benefits of using a referee are that evidentiary objections are ruled upon when made, an order for compliance with a subpoena duces tecum can be issued and the examination can be continued without going back to court [*see CCP § 708.140(a)*]. All of the alternate dispute resolution companies have rosters of retired judicial officers and lawyers who are qualified for appointment as referees. Current State Bar policy requires all retired judicial officials who engage in mediation to be active members of the Bar [*see* Cal Bar J, January 2006, at 1; *see also* Cal State Bar Rules and Regulations, Art I, § 2].

While the court can order a sitting judicial officer to be the referee, it is not the usual practice because they cannot be spared from their regular judicial duties. A referee who is not a sitting judicial officer must be paid for by the requesting party unless some other arrangement has been agreed upon by the parties. The referee must be a member of the California State Bar [*see CCP § 708.140(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.35

AUTHOR: Arnold Levin

10.35 Debtor's Failure to Appear Is Punishable by Contempt.

Failure to appear is punishable as contempt of court [*CCP § 708.170(a)(1)(A)*]. If the debtor fails to appear, the court may issue a bench warrant (officially known as an attachment for defaulter), have the debtor brought before the court to answer for the failure to appear, and punish the debtor for contempt [*CCP § 708.170(a)(1)(A)*]. As an alternative to holding the debtor in contempt, the court may issue an arrest warrant pursuant to *CCP § 1993* [*CCP § 708.170(a)(1)(B)*]. The judgment debtor can move to quash an examination subpoena if "reasonably made" [*see CCP § 1987.1*]. One appellate court has held that a motion to quash made seven days before the scheduled examination was reasonably made, stating that the time period for motions to quash is often short *[Lee v. Swansboro Country Property Owner's Association (2007) 151 CA4th 575, 583, 59 CR3d 934]* (citing five-day period of *CCP § 1985.3(g)*)].

Local practice as to enforcement varies to some extent. In some courts, it is common practice when the judgment debtor fails to appear to continue the matter to a new date and have the bench warrant issued and held until that date. The judgment creditor can then give the defaulting party notice of the new date and the issuing of the bench warrant and advise the defaulting party to come to court to avoid the consequences of violation of a court order. To quash the warrant the person in default can appear before the court before the new hearing date and be ordered to appear on the new date. This procedure is effective in the majority of cases. To have the warrant issued, the judgment creditor must provide the court clerk with a physical description of the defaulter, which must be set forth in the warrant.

If the party still fails to appear on the new date, the bench warrant is issued and bail is fixed. In order for the warrant to issue the fees required by *Gov Code § 26744* must be paid. The warrant is then sent to law enforcement (usually the sheriff) for execution. As a practical matter, the sheriff does not go searching for civil defaulters, but if the defaulting party is stopped by a law enforcement officer for any reason, e.g., a traffic violation, and an outstanding warrant search is made, the defaulter will be arrested and held pending a court appearance unless bail is posted.

Local practice may vary to some degree from that described above.

Examples:

- Failure to appear at the time and date ordered may result, in some jurisdictions (such as Santa Clara County), in the immediate issuance of a bench warrant for a nominal amount, such as $5,000. If the

judgment debtor fails to appear a second time, the amount of the warrant usually is increased substantially, sometimes to the full amount of the judgment (in the case of the examination of the judgment debtor, as opposed to third parties).

- In Los Angeles County, if the person fails to appear, a bench warrant will issue and be held [Los Angeles Super Ct Rules, Rule 3.4(d)(1)(2); *see 10.22*]. No continuance of the hearing will be granted without a valid proof of service [Los Angeles Super Ct Rules, Rule 3.4(e)].

- In San Diego County, if the person fails to appear and an order for a bench warrant is made, the judgment creditor has 30 days to file a completed bench warrant form, a set of instructions to the sheriff, and pay the required fees, if the warrant is to be enforced [San Diego Super Ct Rules, Rule 2.4.1(E)]. Continuances are allowed by stipulation approved by the court or upon a showing of good cause [San Diego Super Ct Rules, Rule 2.4.1(F)].

Strategic Point--Working With Judgment Debtor After Failure to Appear:

If counsel had a bench warrant issued, he or she should send a letter to the judgment debtor to advise the debtor of that fact and offer to discuss the resolution of the matter if the debtor contacts counsel. Counsel should be sure to advise the judgment debtor that counsel cannot promise that the court will not sanction him or her for failure to appear (remember, it was the court's order that was disobeyed), but in most instances the court will exonerate the judgment debtor from the warrant on advice of counsel that the matter has been resolved.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMisconductCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureSanctionsContemptCivil Contempt

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.36

AUTHOR: Arnold Levin

10.36 Court Must Award Attorney's Fees to Judgment Creditor If Debtor's Failure to Appear Was Without Good Cause.

If the judgment debtor's failure to appear is without good cause, the court must award the judgment creditor reasonable attorney's fees incurred in the examination proceeding. Attorney's fees awarded against the judgment debtor are added to and become part of the principal amount of the judgment [*CCP § 708.170(a)(2)*]. The award of attorney's fees is in addition to the court's contempt power.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.37

AUTHOR: Arnold Levin

10.37 Conducting the Examination.

10.37[1] Examination Is Broad in Scope and Similar to Trial. The judgment debtor examination is intended to be summary and factual, according "the widest scope for inquiry concerning the property and business affairs of the judgment debtor" [*Kyne v. Eustice (1963) 215 CA 2d 627, 632, 30 CR 391* ; *Young v. Keele (1987) 188 CA 3d 1090, 1093, 233 CR 850]* . Because the purpose of a judgment debtor examination is "to leave no stone unturned in the search for assets which might be used to satisfy the judgment," even seemingly remote questions are permitted. These may include questions regarding the judgment debtor's employment, birthplace, names and addresses of partners, coshareholders, co-officers and codirectors, and the contents of the judgment debtor's will [*Troy v. Superior Court (1986) 186 CA 3d 1006, 1014, 231 CR 108*].

Strategic Point--Use of Interpreters:

If the person being examined is not fluent or secure enough in English to testify without an interpreter, it is best to use an interpreter who is neutral and certified by the presiding judge of the court or by the California Judicial Council. Lists of qualified interpreters can be obtained from the office of the presiding judge or the California Judicial Council [*see Evid Code §§ 750-755.5*].

10.37[2] Examinees May Invoke Same Privileges as Trial Witnesses. Because the examination is to be conducted "in the same manner as upon trial of an issue" [*CCP § 708.130(a)*], examinees are entitled to invoke the same privileges as trial witnesses [*see Young v. Keele (1987) 188 CA3d 1090, 1092-1093*].

Exception:
However, the privilege to not testify about a spouse [*Evid Code § 970*] or a domestic partner [*Fam Code § 297.5*] does not apply in a judgment debtor examination [*CCP § 708.130(b)*].

10.37[3] Debtor's Questions Should Be Extensive. Counsel's questions should be scripted in advance, and should be extensive. Detailed inquiry should be made regarding each of the following categories:

- Identity of the debtor.

- Family and marital status.
- Residence.
- Employment status and other sources of income.
- Cash, bank deposits, other assets.
- Insurance information.
- Real and personal property.
- Books and records; tax returns.
- Loans and obligations; judgments against debtor; other court proceedings.
- How the debtor proposes to satisfy this judgment.

The form in 10.47 is a detailed set of debtor questions that can be used either for a debtor's examination or written interrogatories. It is recommended that these questions be used as a basic script for debtors' examinations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsEvidenceCompetencyInterpretersEvidencePrivilegesGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsExceptions

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VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.38

AUTHOR: Arnold Levin

10.38 Judge May Order Judgment Debtor to Answer Questions or Produce Documents.

If the examination is held at the courthouse, a judge may order the judgment debtor to answer specific questions and to produce certain documents. Failure to do so may be punishable by contempt. Otherwise, an ex parte application for an order to answer questions or produce documents and an order to show cause why the person should not be held in contempt should be made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureSanctionsContemptCivil Contempt

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Chapter 10 Postjudgment Discovery
VII. CONDUCTING EXAMINATION OF JUDGMENT DEBTOR

1-10 MB Practice Guide: CA Debt Collection 10.38A

AUTHOR: Arnold Levin

10.38A Creditor May Obtain Turnover Order After Debtor Examination.

After an examination proceeding, the court may order the judgment debtor's interest in property that is in the possession or under the control of the judgment debtor or the third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment if the property is not exempt from enforcement of a money judgment. The order creates a lien on the property or debt [*CCP § 708.205(a)*; *see Jogani v. Jogani (2006) 141 CA4th 158, 173, 45 CR3d 792]* .

The statute only intends the turnover of cash to a judgment debtor and any other property to a levying officer. Thus, a court cannot order a judgment debtor to turn over a domain name to a judgment creditor at a debtor's examination pursuant to *CCP § 708.205* [*Palacio Del Mar Homeowners Association, Inc. v. McMahon (2009) 174 CA4th 1386, 95 CR3d 445* (order was incorrectly directed at judgment debtor because domain name was registered in spouse's name and serviced by another party; court stated that *CCP § 699.040* applied only to tangible property and noted that a domain name is an intangible contractual right, but never actually ruled that a proper order pursuant to *CCP § 708.205* would not permit the turnover of intangible property)].

Strategic Point--Judgment Creditor:

When conducting a judgment debtor examination, counsel for the judgment creditor should always bring a blank turnover order and fill in the blank for the court to enter it and order the debtor to turn over that property to the judgment creditor after personal service on the debtor in court.

Strategic Point--Judgment Debtor:

It is recommended that a judgment debtor not bring any property or cash to an examination that he or she does not want to risk having property turned over to the levying officer (unless it is cash, in which case it can be turned over directly to the judgment creditor.

The court may not order the property or debt to be applied toward the satisfaction of the money judgment if a third person examined pursuant to *CCP § 708.120* claims an interest in the property adverse to the judgment debtor or denies the debt and the court does not determine the matter as provided in *CCP § 708.180(a)*. In that case, the court may make

an order pursuant to *CCP § 708.180(c)* or *(d)* forbidding transfer or payment [*CCP § 708.205(b)*]. In addition, the summary process under *CCP § 708.180*, and the identical process under *CCP § 491.170*, is inappropriate if a third party denies the debt in good faith and the court determines that the interests in the property or the existence of the debt should be determined in a creditor's suit [*Sea Foods Co., Ltd. v. O.M. Foods Co., Ltd. (2007) 150 CA4th 769* , (complicated multi-party international goods transaction)].

Cross References:

Form for turnover order after examination, see *10.48*.

Discussion of turnover orders generally, see *22.23 -22.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 10 Postjudgment Discovery
VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.39

AUTHOR: Arnold Levin

10.39 CHECKLIST: Conducting Examination of Third Parties.

☐ Determine whether third party is subject to examination in connection with collection of judgment.

○ Third party must have possession or control of property in which judgment debtor has an interest; or

○ Third party is indebted to judgment debtor in amount exceeding $250.

○ Person can be examined in California.

Authority:
CCP § 708.120(a)

Discussion:
See *10.40*

☐ Make application to court in same manner as for debtor's examination, with following exceptions:

Authority:
CCP § 708.120(a)

Discussion:
See *10.41*, *10.25 -10.34*

○ Accompany application with declaration that third party has possession or control of property in which judgment debtor has an interest or is indebted to the judgment debtor in an amount in excess of

$250.

○ Tender fees for mileage from persons residence or place of business to place of examination (required for service to be effective).

Authority:
CCP § 708.120(f)

☐ Have order personally served on third party.

Authority:
CCP § 708.120(b)(1); see *CCP § 684.130*

Discussion:
See *10.42*

☐ Have order served personally or by mail on the judgment debtor.

Authority:
CCP § 708.120(b)(2)

Discussion:
See *10.42*

☐ File proof of service.

Authority:
Cal Rules Ct, Rule 3.1300(c), 3.1302(a)

Discussion:
See *10.43*

☐ Seek contempt and recovery of attorney's fees if third party fails to appear.

Authority:
CCP § 708.140(a)

Discussion:
See *10.44*

☐ Conduct examination in same manner as examination of judgment debtor.

Discussion:
See *10.37*

☐ If examinee brings significant personal property or cash to examination, consider serving turnover order.

Authority:

CCP § 708.205(a)

Discussion:
10.44A

Form:
10.48

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.40

AUTHOR: Arnold Levin

10.40 Judgment Creditor May Compel Examination of Third Parties.

Upon ex parte application by a judgment creditor who has a money judgment, and proof by the judgment creditor by affidavit or otherwise to the satisfaction of the proper court that a 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, the court must order the third person to appear before the court, or before a referee appointed by the court, at a time and place specified in the order, to answer concerning the property or debt [*CCP § 708.120(a)*].

Warning--No Examination of Out of State Persons:

Unlike pretrial discovery, there appears to be no method of examining a person outside the state of California in postjudgment discovery, except by filing a sister state judgment enforcement proceeding in the foreign state.

Cross Reference:

Discussion of enforcing out of state judgments, see Ch. 25, Enforcing Out of State Judgments in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.41

AUTHOR: Arnold Levin

10.41 Judgment Creditor Must Make Application for Court Order.

The procedure for the application and order is the same as that for the examination of a judgment debtor [*see 10.27*], with specified exceptions:

- The application must be accompanied by a declaration that the third party has possession or control of property in which the judgment debtor has an interest or the third party is indebted to the judgment debtor in an amount in excess of $250. The declaration may be based on the information and belief of the declarant [*CCP § 708.120(a)*].

Strategic Point:

Courts vary in their interpretation of the above requirement. Some allow a general statement in the language of the code, on the rationale that if the judgment creditor had detailed information to support the declaration, the examination would be unnecessary. Other courts require a detailed statement about the property or obligation even if on information and belief. There are no appellate cases that have ruled on the matter since the major revision of the postjudgment sections of the Code of Civil Procedure in 1984. One case decided before the 1984 revisions allows a general statement on information and belief to be sufficient for appointment of a postjudgment receiver [*Tucker v. Fontes (1945) 70 CA2d 768, 772, 161 P2d 697*].

Strategic Point--Applications in Los Angeles County:

Los Angeles County has its own form for seeking to have the examination of a third party, but the space for reasons to have the third party appear is small and must be supplemented in order to assure the success of the application.

- If the declaration in support of the application describes the property in possession and control of the third party in a way that the property can be identified, service of the order creates a lien on the property for a one year unless the time is extended or terminated by the court [*CCP § 708.120(c)*].

- The statutory notice set forth in *CCP § 708.120(e)(1), (2)* must be contained in the order. This requirement is automatically met by using the mandatory California Judicial Council Form AT-138 and EJ-125.

- For service on a the third party to be effective, fees for mileage from the person's residence or place of business to the place of the examination must be tendered [*CCP § 708.120(f)*].

Consider:

Counsel should calculate the fees in advance so that a check can be given to the process server.

Cross References:

Procedure for application and order for examination of judgment debtor, see *10.27*.

Application and order for appearance and examination--Judicial Council Form AT-138, EJ-125, see *10.46*.

Discussion and sample questions for debtor examination, see *10.37[3]* (discussion), 10.47 (form).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 10 Postjudgment Discovery
VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.42

AUTHOR: Arnold Levin

10.42 Third Party Must Be Personally Served.

The order must be personally served on the third person [*CCP§ 708.120(b)(1)*]. Service by mail is not authorized. A copy of the order also must be served on the judgment debtor, either personally or by mail [*CCP § 708.120(b)(2)*].

The judgment creditor must provide the levying officer with the address and location of the person to be served [*CCP § 684.130*]. A registered process server also may make the service [*CCP § 684.140*].

Strategic Point--Locating Third Party:

Because third party proceedings usually involve an examination and appearance in court of the third party, counsel should determine the location of those persons well before setting the hearing date. Service should be coordinated with the statutory time required for notice of the hearing [*CCP § 708.120(b)*]. The notice requirements may be met by stipulation approved by the court. If there are attorneys on all sides, a stipulation is useful to work out dates available to all parties and counsel and thus avoid multiple court appearances and continuances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.43

AUTHOR: Arnold Levin

10.43 Proof of Service Must Be Filed.

Proof of service must be filed with the court in the clerk's office or in the department designated by local rules [*Cal Rules Ct, Rule 3.1302(a)*]. For service to be valid, fees for mileage must be tendered to the party [*CCP § 708.120(f)*]. The court has discretion to consider or not consider late filed papers [*Cal Rules Ct, Rule 3.1300(d)*].

Timing:

The Code of Civil Procedure merely requires that proof of service be filed before or at the time set for hearing to the satisfaction of the court [*CCP § 684.210*]. However, the rules of court specify that proof of service must be filed no later than five court days before the time set for hearing [*Cal Rules Ct, Rule 3.1300(c)*]. If filed on the day the proof of service is due, it is deemed timely filed [*Cal Rules Ct, Rule 3.1300(e)*].

In Los Angeles County, proof of service must be filed in the assigned court three court days before the hearing [Los Angeles Super Ct Rules, Rule 3.4(b)(1)]; failure to comply can result in the matter going off calendar with an order that it cannot be renewed for 120 days without a showing of good cause [Los Angeles Super Ct Rules, Rule 3.4(b)(2)].

In San Diego County, proof of service must be filed five days before the hearing. Consideration of the matter if there is no proof of service and it is filed late is at the court's discretion [San Diego Super Ct Rules, Rule 2.4.1(A)].

Consider:

If there is no local rule for filing and therefore the proof of service must be made in the clerk's office, it is wise to have a confirmed copy of the proof submitted to the court that will hear the matter as soon as that is known in case the original does not reach the department. Some judges will not prepare a matter set for hearing when there is no proof of service because the court's first determination in a postjudgment proceeding is whether there is in personam jurisdiction and proper statutory notice. If proper jurisdiction and notice are not established, there is no point in looking at the merits.

Consider:

In Los Angeles County, disputes over the validity of service or the facts of the application are heard by

the court. If after hearing the application is dismissed, cost may be awarded to the cited party [Los Angeles Super Ct Rules, Rule 3.4(g)].

Cross Reference:

Locating parties, see Ch. 2, Locating the Debtor and Identifying the Debtor's Assets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofCertificatesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.44

AUTHOR: Arnold Levin

10.44 Third Party Is Subject to Contempt and Attorney's Fees for Failure to Appear.

If all residence, notice and service requirements have been met, the third party must appear before the court or be subject to punishment for contempt and/or pay attorney's fees [*CCP § 708.140(a)*]. These remedies are the same as for the judgment debtor's failure appear.

Strategic Point:

The sanctions of attorney's fees may be more effective against a nonappearing third party than against the judgment creditor. The third party may not be in the same financial position as the judgment debtor and may have concern about his or her own credit. The threat of contempt is also more effective since most third parties--even those with ties to the judgment debtor--want to avoid multiple hearings and the risks of being found in contempt over money owed by someone else.

Cross References:

Discussion of contempt of court for debtor's failure to appear at examination, see *10.35*.

Award of attorney's fees for failure to appear without good cause, see *10.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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VIII. CONDUCTING EXAMINATION OF THIRD PARTIES

1-10 MB Practice Guide: CA Debt Collection 10.44A

AUTHOR: Arnold Levin

10.44A Creditor May Obtain Turnover Order After Third Party Examination.

After an examination proceeding, the court may order the judgment debtor's interest in property that is in the possession or under the control of a third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment [*CCP § 708.205(a)*].

Strategic Point--Judgment Creditor:

Whenever conducting a third party examination, counsel for the judgment creditor should always bring a blank turnover order and fill in the blank for the court to enter it and order the third party to turn over that property to the judgement creditor after personal service on the third party in court.

Cross Reference:

Discussion of turnover order after debtor examination, see *10.38A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 10 Postjudgment Discovery
IX. FORMS

1-10 MB Practice Guide: CA Debt Collection 10.45

AUTHOR: Arnold Levin

10.45 Application of Judgment Creditor and Order to Examine Documents.

Application of Judgment Creditor and Order to Examine Documents.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	APPLICATION OF JUDGMENT CREDITOR PUR-
_____[*name*],	)	SUANT TO *CCP § 708.120* AND ORDER THERE-
Defendant.	)	ON
	)	DATE: _____
	)	TIME: _____
		DEPT: _____

_____

To:_____ [*party, i.e.*, Custodian of Records]:

Judgment Creditor _____ [*name of judgment creditor*] seeks to examine the books, records, and other items as more clearly set forth in the list of items to be produced pursuant to the Subpoena Duces Tecum being served concurrent herewith, a true and correct copy of which is attached as Exhibit "1" and incorporated herein by this reference. It is necessary for Plaintiff to examine _____ [*third party, such as debtor of judgment debtor*], the Custodian of Records for _____ [*third party*], in order to determine the financial condition of the Judgment Debtor _____ [*judgment debtor*], and to find assets to satisfy this unpaid judgment.

Dated:

_____ [firm name]
By: _____ [signature]
_____ [typed name]
Attorney for_____

ORDER

IT IS ORDERED, ADJUDGED AND DECREED that Judgment Creditor, _____ [*name of judgment creditor*], be allowed to examine _____ [*third party*] to determine the financial condition of Judgment Debtor _____ [*name of judgment debtor*] and further, that they are directed by this court to turn over any and all monies and/or other assets in their possession and/or control standing in the Judgment Debtor's name. Further, _____ [*third party*] are to produce all items set forth in Schedule "1" to the Subpoena Duces Tecum, a copy of which is attached as Exhibit "1" and incorporated herein by this reference.

Dated: _____

Honorable _____
[*name of County Commissioner*]
Superior Court of California,

County of _____
[*County*]

NOTES.

Authority:
CCP § 708.120

Discussion:
See *10.22*

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Chapter 10 Postjudgment Discovery
IX. FORMS

1-10 MB Practice Guide: CA Debt Collection 10.46

AUTHOR: Arnold Levin

10.46 Application for Order and Appearance at Examination--Judicial Council Form AT-138/EJ-125.

Application for Order and Appearance at Examination--Judicial Council Form AT-138/EJ-125.

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NOTES.

Authority:
CCP § 708.110 (judgment debtor), *CCP § 708.120* (third party); California Judicial Council Form AT-138/EJ-125, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *10.28* (judgment debtor), see *10.41* (third party)

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Chapter 10 Postjudgment Discovery
IX. FORMS

1-10 MB Practice Guide: CA Debt Collection 10.46A

AUTHOR: Arnold Levin

10.46A Memorandum of Garnishee--Judicial Council Form AT-167/EJ-152.

Memorandum of Garnishee--Judicial Council Form AT-167/EJ-152.

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NOTES.

Authority:

CCP § 701.030; Judicial Council Form AT-167/EJ-152, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35(b)*]

Discussion:

See *21.22[7]*

Cross Reference:

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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Chapter 10 Postjudgment Discovery
IX. FORMS

1-10 MB Practice Guide: CA Debt Collection 10.47

AUTHOR: Arnold Levin

10.47 Questions for Debtor Examination or Written Interrogatories.

Questions for Debtor Examination or Written Interrogatories.

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. It is 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 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, 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 ave 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 institutions' 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, 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 for each policy:

(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: _____

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, mileage, 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 deed 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: _____

(m) Joint ventures or other business enterprise?

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 detail: _____

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 or money other than those already describe?

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, 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 disbursement do you keep?

(a) Where do you keep them?

(b) Are you willing to produce these for inspections after the adjournment of this hearing?

74. Did you file federal or state income tax returns in the last five 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 five years?

If so, what was the result of that application?

81. If a loan was obtained, what did you do with the proceeds?

82. Have you in the past five years acted as a comaker, endorser, or guarantor of any loan?

If so, give full details: _____

83. Have you issued any financial statement in the past five 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, 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 or record against you?

If so, give all dates, amounts court where rendered, and names of judgment creditors: _____

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 any 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?

NOTES.

Discussion:
See *10.15 -10.19* (interrogatories), *10.37[3]* (judgment debtor examination)

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Chapter 10 Postjudgment Discovery
IX. FORMS

1-10 MB Practice Guide: CA Debt Collection 10.48

AUTHOR: Arnold Levin

10.48 Turnover Order After Debtor or Third Party Examination Proceeding.

Turnover Order After Debtor or Third Party Examination Proceeding.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*] Defendant.	NO. _____. ORDER APPLYING PROPERTY TO SATISFACTION OF MONEY JUDGMENT Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____

The above-entitled matter came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*] [; defendant appeared by counsel _____ (*name*); *and/or* third party appeared by counsel _____ (*name*)].

It appearing to the satisfaction of the court from the _____ [testimony introduced or declaration(s) of _____ (*name(s)*)] that plaintiff and judgment creditor _____ [*name*] did, on _____ [*date*], recover judgment in the above-entitled action against _____ [*name*], defendant and judgment debtor, for the sum of $_____ [and for costs in the sum of $_____]; that the judgment remains unsatisfied; that _____ [*name of third person*] _____ [is indebted to _____ (*name of defendant and judgment debtor*) in the sum of

$_____; and that this debt is due and payable and is not denied by _____ (*name of third person*); *and/or* has property in his/her possession that belongs to _____ (*name of defendant and judgment debtor*); and that _____ (name of third person) does not claim any interest in the property adverse to the title or right of possession of _____ (*name of defendant and judgment debtor*);] and that the _____ [property *or* debt] is not exempt from execution;

[EITHER]

IT IS ORDERED that you, _____ [*name of judgment debtor or third person*], deliver the property consisting of _____ [*describe property*] to _____ [*e.g.,* the judgment creditor *or* the Sheriff of Los Angeles County] within _____ [*number*] days, and that the property be applied to the satisfaction of the money judgment entered herein.

[AND/OR]

IT IS ORDERED that you, _____ [*name of judgment debtor or third person*], pay to _____ [*e.g.,* the judgment creditor or the Sheriff of Los Angeles County] the sum of $_____, to be applied to the satisfaction of the money judgment entered herein, within _____ days.

Date: _____.

_____ [*signature*]
Judge of the _____ Court

NOTES.

Authority:
See *CCP § 708.205(a)*

Discussion:
See *10.38A*, *10.44A*

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Chapter 11 Obtaining and Removing Postjudgment Liens

1-11 MB Practice Guide: CA Debt Collection 11.syn

§ 11.syn Synopsis to Chapter 11: Obtaining and Removing Postjudgment Liens

11.01 Scope.

11.02 Objective and Strategy.

11.03 CHECKLIST: Obtaining Judgment Lien on Real Property.

11.04 Options and Strategies for Judgment Creditor.

11.05 Judgment Lien Is for Amount Required to Satisfy Judgment.

11.06 Judgment Lien Is Created by Recording Abstract of Judgment in County Where Real Property Is Located.

11.07 Preparing and Recording Abstract of Judgment to Create Judgment Lien.
11.07[1] Use of Judicial Council Form EJ-001 Is Mandatory.
11.07[2] Record Abstract of Judgment in County Where Judgment Debtor Owns Property.
11.07[3] Creditor May, but Is Not Required to, Serve Judgment Debtor.
11.07[4] Judgment Lien May Be Obtained at Any Time During 10 Years When Judgment Is Enforceable.

11.08 Special Rules Apply to Specific Types of Judgments.
11.08[1] Judgment Lien Under Judgment for Lump Sum Workers' Compensation Award Is Obtained by Recording Abstract of Judgment.
11.08[2] Judgment Lien Under Judgment for Workers' Compensation Award Payable in Installments Is Obtained by Recording Certified Copy of Judgment.
11.08[3] Judgment Lien Based on Judgment for Child, Family, or Spousal Support Payable in Installments Is Obtained by Recording Abstract of Support Judgment and Additional Documents With County Recorder.

11.09 Creating Lien Under Judgment Entered in Another State.
11.09[1] Judgment Creditor Must Apply for Entry of Judgment in California Before Lien on California Real Property May Be Obtained.
11.09[2] Filing Application for Entry of Another State's Judgment Reduces It to California Judgment.
11.09[2][a] Application Requirements for Entry of Another State's Judgment.
11.09[2][b] File Application in Superior Court.
11.09[2][c] Clerk Enters Judgment Based on the Application.

11.09[2][d] Notice of Entry of Judgment Must Be Served Promptly on Judgment Debtor.

11.10 Duration of Judgment Lien on Real Property.
11.10[1] Unsatisfied Lien Continues for 10 Years From Date Judgment Was Entered.
11.10[2] Renewal of Judgment Extends Lien Until 10 Years From Date of Filing of Renewal Application, If Certified Copy of Renewal Application Is Recorded With County Recorder Where Property Is Located Before Judgment Lien Expires.
11.10[3] Specific Steps Must Be Taken to Extend Judgment Lien If Subject Property Has Been Transferred and Transfer Has Been Recorded Before Application for Renewal Was Filed.

11.11 Most Current and After-Acquired Property Is Subject to Judgment Lien.
11.11[1] Judgment Lien Attaches to Judgment Debtor's Interests in Real Property in County Where Lien Is Recorded.
11.11[2] Judgment Lien Attaches to All Real Property in County That Debtor Acquires at Any Time Within 10-Year Life of Lien.
11.11[3] Judgment Lien Attaches to Any Increase in Value of Debtor's Property Subject to Lien.
11.11[4] Lien Remains Attached to Real Property If Property Is Transferred or Encumbered Without Satisfying Lien.
11.11[5] Judgment Lien Attaches to Particular Interests.
11.11[5][a] Judgment Lien Attaches to Joint Tenancy Interests.
11.11[5][b] Lien Attaches to Interest Held by Tenant in Common.
11.11[5][c] Lien Under Judgment Against Heir or Devisee Attaches to Heir's or Devisee's Interest in Estate's Real Property.
11.11[6] Judgment Lien Is Subject to Prior Interests.

11.12 Some Types of Property Are Not Subject to Judgment Lien.
11.12[1] Judgment Lien Does Not Attach to Judgment Debtor's Rights to Rents or to a Leasehold.
11.12[2] Judgment Lien Does Not Attach to Beneficiary's Interest Under Trust.
11.12[3] Judgment Lien Does Not Attach to Real Property Subject to Attachment Lien in Favor of Creditor That Was Transferred Before Judgment.
11.12[4] Judgment Lien Does Not Attach to Real Property Transferred Before Judgment.
11.12[5] Judgment Lien Attaches Only to Certain Surplus Equity When Declared Homestead Is Recorded Before Judgment Lien Was Created.

11.13 CHECKLIST: Removing Judgment Lien on Real Property.

11.14 Judgment Lien May Be Extinguished by Satisfying Judgment or May Be Released by Judgment Creditor.

11.15 Recording Acknowledgment of Satisfaction of Judgment Extinguishes Judgment Lien.
11.15[1] Acknowledgment of Satisfaction of Lump Sum Judgment.
11.15[2] Acknowledgment of Satisfaction of Matured Judgments Under Installment Judgment.

11.16 Release of Judgment Lien Must Contain Specified Items.
11.16[1] Release Must Contain Specified Information.
11.16[2] Release Can Be Recorded If Properly Executed.

11.17 Lien on Property of Person Erroneously Identified as Judgment Debtor May Be Released.
11.17[1] Property Owner Must Serve Judgment Creditor With Written Demand That Creditor File Recordable Document Releasing Lien.
11.17[2] Property Owner Must Provide Proof Satisfactory to Judgment Creditor That Property Owner Is Not Judgment Debtor.
11.17[3] Judgment Creditor Must Deliver to Property Owner Recordable Document Releasing Judgment Lien.
11.17[4] Property Owner Must Record Release in County Where Subject Property Is Located.

11.17[5] If Judgment Creditor Fails to Comply With Demand, Property Owner May File Noticed Motion for Order Releasing Judgment Lien on Property.

11.18 CHECKLIST: Obtaining Judgment Lien on Personal Property.

11.19 Options and Strategies for Judgment Creditor.

11.20 Judgment Lien Is Created on Personal Property by Filing Notice of Judgment Lien With Secretary of State.

11.21 When Judgment Lien on Personal Property May Be Obtained.
11.21[1] Judgment Lien Based on Lump Sum Judgment May Be Created at Any Time During Period of Enforceability.
11.21[2] Judgment Lien Generally May Not Be Created Under Judgment Payable in Installments Unless All Installments Under Judgment Have Become Due and Payable at Time Notice of Judgment Lien Is Filed.

11.22 Notice of Judgment Lien Must Meet Specified Criteria.
11.22[1] Notice of Judgment Lien Must Be Submitted on Secretary of State Form JL-1.
11.22[2] Notice Must Be Executed Under Oath.
11.22[3] Notice Must Be Filed With Office of Secretary of State.
11.22[4] Notice Must Be Filed No More Than 10 Days After the Date of Notice.
11.22[5] Notice Must Be Served on Judgment Debtor Promptly After Filing.

11.23 Judgment Lien Generally Is for Full Amount Required to Satisfy Judgment.

11.24 Duration of Judgment Lien on Personal Property.
11.24[1] Judgment Lien Continues for Five Years From Date of Filing, Unless Judgment Is Satisfied or Lien Is Continued, Terminated, or Released.
11.24[2] Judgment Lien on Personal Property Can Be Continued.
11.24[3] Lien Generally Continues Despite Sale, Exchange, or Other Disposition of Subject Property.
11.24[4] Judgment Lien Continues As to Identifiable Proceeds of Personal Property When Sold.
11.24[5] Judgment Lien Generally Continues With Same Priority in Property's Proceeds.

11.25 Types of Personal Property Subject to Judgment Lien.

11.26 Types of Personal Property Not Subject to Judgment Lien.

11.27 CHECKLIST: Removing Judgment Lien on Personal Property.

11.28 Options and Strategies for Judgment Creditor.

11.29 Judgment Lien Terminates Five Years From Date of Filing, Unless Continued, or When Judgment Is Satisfied or Lien Is Released.

11.30 Filing Acknowledgment of Satisfaction of Judgment and Required Statement Extinguishes Judgment Lien.

11.31 Preparing and Filing Acknowledgment and Statement.
11.31[1] Persons Authorized by Statute May File Acknowledgment of Satisfaction of Judgment.
11.31[2] Statement Must Be Filed With Satisfaction of Judgment.
11.31[3] Acknowledgment Must Be Executed.
11.31[4] File Acknowledgment and Statement in Office of Secretary of State.

11.32 Judgment Lien on Personal Property Is Released by Filing Secretary of State Form JL-3.
11.32[1] Use of Secretary of State Form JL-3 Is Mandatory.

11.32[2] Form Must Be Filed With Office of Secretary of State.

11.33 Procedures to Release Judgment Lien on Property of Person Erroneously Identified as Judgment Debtor.
11.33[1] Person Making Demand May Serve Judgment Creditor With Written Demand to File Statement Releasing Judgment Lien.
11.33[2] Person Making Demand Must Provide Proof Satisfactory to Judgment Creditor That Property Owner Is Not Judgment Debtor.
11.33[3] Judgment Creditor Must File Statement Releasing Judgment Lien.
11.33[4] If Judgment Creditor Fails to Comply With Demand for Release, Person Making Demand May File Noticed Motion for Order Releasing Judgment Lien.

11.34 CHECKLIST: Obtaining Lien in Judgment Debtor's Pending Cause of Action.

11.35 Options and Strategies for Judgment Creditor.

11.36 Judgment Creditor With Judgment Against Judgment Debtor May Obtain Lien in Debtor's Pending Cause of Action.

11.37 Judgment Creditor May Obtain Lien to Extent Required to Satisfy Judgment.

11.38 Filing Notice of Lien and Abstract or Certified Copy of Judgment in Pending Action Creates Lien on Judgment Debtor's Pending Cause of Action.

11.39 Preparing and Filing Notice and Abstract of Judgment or Certified Copy of Judgment in Pending Action.
11.39[1] Use of Judicial Council Form AT-180/EJ-185 Is Optional.
11.39[2] Judgment Creditor Must File Notice of Lien and Abstract or Certified Copy of Judgment.
11.39[3] Judicial Creditor Must Serve Copy of Notice and Statement of Date Notice Filed on All Parties.
11.39[4] Failure to Serve All Parties as Required Does Not Affect Lien Created by Filing.

11.40 Court May Allow Judgment Creditor Who Has Obtained Lien to Intervene in Pending Action.

11.41 CHECKLIST: Removing Lien From Judgment Debtor's Pending Cause of Action.

11.42 Lien May Be Satisfied, Released, or Terminated Based on Claim That Property or Money Is Exempt From Enforcement of Judgment.

11.43 Lien Is Extinguished by Filing Acknowledgment of Satisfaction of Lien.

11.44 Lien Is Extinguished When Released.

11.45 Lien Is Extinguished When Court Orders Termination.

11.46 CHECKLIST: Suspending Driver's License for Failure to Pay Judgment.

11.47 Options and Strategies for Suspending Driver's License of Uninsured Judgment Debtor Who Fails to Pay.

11.48 Department of Motor Vehicles Must Suspend Driving Privilege on Application.
11.48[1] Suspension Is Mandatory If Requirements Are Met.
11.48[2] Judgment Must Arise From Motor Vehicle Accident.
11.48[3] Suspension May Be Granted Against Nonresident.

11.49 Form Must Be Filed With Department of Motor Vehicles.
11.49[1] Judgment Creditor May Initiate Process 30 Days After Judgment Becomes Final.

11.49[2] DMV Form DL 30 Must Be Used.
11.49[3] Clerk of Court Issues Copies of Judgment and Certificate of Facts.
11.49[4] Application and Fee Must Be Filed With DMV.

11.50 Judgment Debtor May Escape Suspension by Filing Affidavit of Insurance.

11.51 Suspension Remains in Effect Until Judgment Is Paid.

11.52 Judgment Is Deemed Satisfied When Specified Amount Is Deposited in Fund.

11.53 Court May Order Payment of Judgment in Installments.
11.53[1] Requirements Must Be Met for Installment Payments.
11.53[2] Failure to Pay Installments Results in Suspension.

11.54 Privileges May Be Re-Suspended.

11.55 Abstract of Judgment--Civil and Small Claims--Judicial Council Form EJ-001.

11.56 Release of Judgment Lien on Real Property.

11.57 Judgment Lien on Personal Property--Notice and Addendum--Secretary of State Form JL-1.

11.58 Judgment Lien on Personal Property--Notice of Judgment Lien Release or Subordination--Secretary of State Form JL-3.

11.59 Judgment Creditor's Lien on Cause of Action of Judgment Notice of Lien: Attachment--Enforcement of Judgment Debtor--Judicial Council Form AT-180/EJ-185.

11.60 Judgment Creditor's Lien on Cause of Action of Judgment Debtor--Acknowledgment of Satisfaction of Lien.

11.61 Certificate of Facts Re Unsatisfied Judgment--Department of Motor Vehicles Form DL-30.

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Chapter 11 Obtaining and Removing Postjudgment Liens
I. STRATEGY

1-11 MB Practice Guide: CA Debt Collection 11.01

11.01 Scope.

This chapter covers:

- Objectives and strategy for obtaining and removing a judgment lien [*see 11.02*].
- Obtaining a judgment lien on real property [*see 11.06 -11.08*; Form: *see 11.55*].
- Obtaining a judgment lien on real property in California under a judgment entered in another state [*see 11.09*].
- Renewing a judgment lien on real property [*see 11.10*].
- Determining what real property may be subject to a judgment lien [*see 11.11*, *11.12*].
- Removing a judgment lien on real property [*see 11.13 -11.17*; Form: *see 11.56*].
- Obtaining a judgment lien on personal property [*see 11.18-11.24*; Form: *see 11.57*].
- Determining what property may be subject to a judgment lien on personal property [*see 11.25*, *11.26*].
- Removing a judgment lien on personal property [*see 11.27 -11.33*; Form: *see 11.58*].
- Obtaining a lien on a judgment debtor's cause of action [*see 11.34*-11.40; Form: *see 11.59*].
- Removing a lien from a judgment debtor's pending cause of action [*see 11.41*-11.45; Form: *see 11.60*].
- Suspending driver's license for failure to pay judgment as a result of an automobile accident [*see 11.46*-11.53; Form: *see 11.61*].

Core Statutes:
CCP §§ 697.010-697.670, *708.410-708.480*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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Chapter 11 Obtaining and Removing Postjudgment Liens
I. STRATEGY

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11.02 Objective and Strategy.

A judgment lien gives a judgment creditor immediate security for the subsequent enforcement of the judgment [*Laubisch v. Roberdo (1954) 43 C2d 702, 707, 277 P2d 9* (prior law)]. The lien secures the priority of the judgment creditor over third persons who may acquire rights in the property between the creation of the judgment lien and the sale of the property by an execution levy in satisfaction of the judgment [*Corp. of Am. v. Marks (1937) 10 C2d 218, 220, 73 P2d 1215* (decided under prior law)].

During the judgment debtor's lifetime, a judgment lien ordinarily is enforced by an execution levy within the statutory period of the lien [*Corp. of Am. v. Marks (1937) 10 C2d 218, 220, 73 P2d 1215* (prior law)].

Strategic Point--Judgment Creditor:

The levying of a writ of execution is not essential to the existence or continuance of a judgment lien, but it is necessary to obtain an order to enforce the lien [*In re Wiley's Estate (1903) 138 C 301, 304-305, 71 P 441* (prior law)].

Cross References:

Discussion/forms for planning the enforcement of judgment, see Ch. 9, Planning Enforcement of Judgment.

Detailed discussion/forms for writs of execution and execution sales, see *California Forms of Pleading and Practice, § 254.40 et seq., § 254.130* et seq. (Matthew Bender).

The judgment creditor creates security for a judgment against the judgment debtor by obtaining:

- A lien on the judgment debtor's real property [*see CCP §§ 697.310-697.410*].
- A lien on the judgment debtor's pending cause of action [*see CCP §§ 708.410-708.480*].

A judgment creditor also may obtain a judgment lien on certain types of personal property [*see CCP §§ 697.510-697.670*], as an alternative or in addition to a lien created by levy under a writ of execution [*see CCP §§ 699.010-701.830*] or by use of the miscellaneous creditors' remedies in [*CCP §§ 708.010-709.030*] [*CCP § 697.520*].

Strategic Point--Judgment Creditor:

Unless the judgment is satisfied or judgment lien on real property is released, renewing the judgment extends the lien for 10 years from the date of the renewal application, provided that a certified copy of that application is recorded with the county recorder where the property is located before the judgment lien expires [*CCP § 683.180(a)*]. However, a judgment lien on personal property cannot be renewed [*see CCP § 697.510(b)*], although the lien will continue to attach to identifiable cash proceeds of the personal property when sold [*see CCP § 697.530(a)*].

Cross References:

Lien of judgment debtor's real property, see *11.03 -11.12*.

Lien on judgment debtor's personal property, see *11.18 -11.26*.

Lien on judgment debtor's pending cause of action, see *11.41*- 45.

Renewal of judgment, see *11.10[2]*.

Discussion of miscellaneous creditor's remedies, see Ch. 20, Miscellaneous Creditor's Remedies.

For tips on updating your case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.03 CHECKLIST: Obtaining Judgment Lien on Real Property.

☐ Determine timing:

Timing:

Obtain judgment lien at any time during 10 years in which initial judgment is enforceable.

Authority:

Dieden v. Schmidt (2002) 104 CA4th 645, 653, 128 CR2d 365

Discussion:

See *11.07[4]*

Timing:

If judgment remains unsatisfied, renew judgment lien before expiration of 10-year lien period.

Authority:

CCP § 683.180(a)

Discussion:

See *11.10[2]*

☐ Determine what types of property may be subject to judgment lien.

Authority:

CCP §§ 697.340, 704.950; Kinney v. Vallentyne (1975) 15 C3d 475, 478-479, 124 CR 897, 541 P2d 537

Discussion:

See *11.11, 11.12*

☐ Prepare abstract of judgment (Judicial Council Form EJ-001)

Authority:
CCP § 674(a)

Discussion:
See *11.07[1]*

Form:
See *11.55*

☐ Record abstract of judgment in county in which judgment debtor's real property is located, and in any county in which the judgment debtor has family or business connections that increase the likelihood that the judgment debtor may acquire property there.

Authority:
CCP § 697.310(a)

Discussion:
See *11.07[2]*

☐ Determine whether to serve copy of abstract of judgment on judgment debtor, it is optional.

Authority:
Gov Code § 27297.5(a)

Discussion:
See *11.07[3]*

Form:
See *11.55*

☐ Determine if particular type of judgment requires different and/or additional filings:

○ Judgment for lump-sum workers' compensation award.

Authority:
CCP § 697.330(a)(1)

Discussion:
See *11.08[1]*

○ Judgment for workers' compensation award payable in installments.

Authority:
CCP § 697.330(a)(2)

Discussion:

See *11.08[2]*

- ○ Support judgment payable in installments.

Authority:
CCP § 697.320(a)(1)

Discussion:
See *11.08[3]*

☐ Determine if judgment entered in another state has been reduced to California judgment.

Authority:
CCP §§ 1710.10-1710.35

Discussion:
See *11.09*

☐ Determine if judgment can be renewed.

- ○ Calendar to renew judgment prior to end of 10-year period.

- ○ Renewing after five years compounds interest into principal.

Authority:
CCP §§ 683.150(d)(4), , 683.180(a)

Discussion:
See *11.10*

☐ Determine if property was transferred subject to the lien.

☐ Determine if any exceptions apply.

Authority:
CCP § 683.180(b)

Discussion:
See *11.10[3]*

☐ Determine what real property of debtor is subject to judgment lien.

- ○ Real property in county where lien is recorded.

Authority:
CCP § 697.340(a)

Discussion:
See *11.11[1]*

○ Real property acquired in county within 10-year life of lien.

Authority:
CCP § 697.340(b)

Discussion:
See *11.11[2]*

○ Increase in value of property is subject to lien.

Authority:
Kinney v. Vallentyne (1975) 15 C3d 475, 478-479, 124 CR 897, 541 P2d 537 (prior law)

Discussion:
See *11.11[3]*

○ Transferred property remains subject to lien.

Authority:
CCP § 697.390

Discussion:
See *11.11[4]*

○ Lien attaches to joint tenancy interest.

Authority:
Grothe v. Cortlandt Corp. (1992) 11 CA4th 1313, 1318, 15 CR2d 38

Discussion:
See *11.11[5][a]*

○ Lien attaches to interest held by tenant in common.

Authority:
Dieden v. Schmidt (2002) 104 CA4th 645, 650-652, 128 CR2d 365

Discussion:
See *11.11[5][b]*

○ Lien against heir or devisee attaches to interest in estate's real property.

Authority:
McGee v. Allen (1936) 7 C2d 468, 473-474, 60 P2d 1026 (prior law)

Discussion:
See *11.11[5][c]*

☐ Determine if property is not subject to lien.

Authority:
CCP § 697.340(a)

Discussion:
See *11.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 11 Obtaining and Removing Postjudgment Liens
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11.04 Options and Strategies for Judgment Creditor.

The judgment creditor creates a judgment lien on a judgment debtor's real property by recording the abstract of judgment in the county, or counties, in which the judgment debtor owns property. Therefore, recording the abstract of judgment is at the core of obtaining a lien on real property.

The judgment creditor must ensure that the abstract of judgment contains all of the items mandated by *CCP § 674*. No court has validated a judgment lien when mandated information was omitted from an abstract.

Examples:

- The Second Appellate District, Division Six, held that omission of the judgment debtor's known Social Security number prevented proper recordation and nullified the lien because this information was mandated by statute [*Keele v. Reich (1985) 169 CA3d 1129, 1132-1133, 215 CR 756*].

- The Ninth Circuit, in addition to upholding *Keele v. Reich*, held that a creditor is prohibited from amending an earlier judgment because doing so would violate the automatic stay, the discharge injunction, or both [*11 USC §§ 362*, *524*; *Alcove Inv., Inc. v. Conceicao (2005) 331 BR 885, 892*].

- The Second Appellate District, Division Six, held that judgments for support, to be paid in periodic installments, were treated differently from other judgments, which generally are created by recording an abstract of judgment with the county recorder of the county where the real property is located. Thus, the abstract of judgment recorded in this case was inadequate (and its recording a nullity), because the statute required a certified copy of the judgment. The court also held that even if defendant's use of *CCP § 674* (*now see CCP § 697.310*) had been proper, an abstract of judgment that contained the amount of monthly payments owed by the judgment debtor but omitted the amount of judgment was a nullity because governing law required the amount of judgment and that amount could not be ascertained from the abstract [*Ellrott v. Bliss (1983) 147 CA3d 901, 905, 195 CR 446*].

On the other hand, courts have found substantial compliance in situations in which all of the required data was included, but there is a dispute about the form.

Examples:

- The First Appellate District, Division Five, held that a county's district attorney had created a valid lien against real property under *CCP § 697.320*, by recording a certified copy of an order directing payment to the county of amounts owed under the child support judgment, which was attached and incorporated by reference. The fact that the judgment for child support was recorded as an exhibit, and not as the face document, "would mislead no one" [*In re Marriage of Orchard (1990) 224 CA3d 155, 159, 273 CR 499*].

- The Second Appellate District, Division Three, held that the date of entry of judgment included on all documents except one did not render the abstract void because the information was not omitted entirely [*Commonwealth Land Title Co. v. Kornbluth (1985) 175 CA3d 518, 530-531, 220 CR 774*].

- The Second Appellate District, Division Three, held that a judgment lien was established when the abstract of judgment contained all of the factual data required by *CCP § 674* (*now see CCP § 697.310*), but included more data than the statute required by transcribing the judgment in full [*Robbins Inv. Co. v. Robbins (1942) 49 CA2d 446, 448-449, 122 P2d 91*].

- The Fourth Appellate District held that an abstract substantially complied with *CCP § 674* (*now see CCP § 697.310*) when dollar signs did not appear before the figures indicating the amount of judgment [*Weadon v. Shahen (1942) 50 CA2d 254, 259, 123 P2d 88*].

The better practice is to ensure that both the form and content of the abstract of judgment comply with the applicable statute.

Strategic Points--Judgment Creditor:

- Because obtaining a lien on real property is potentially of great value in enforcing a judgment, an abstract should be prepared and filed as soon as possible, i.e., as soon as a judgment has been entered. A failure to promptly obtain and record abstracts may be malpractice, if the failure to do so promptly resulted in property being transferred, encumbered or otherwise made unavailable to levy.

- Even when postjudgment motions may result in an award of attorney's fees and costs, the abstract or abstracts should be recorded based on the original judgment. An amended abstract may be recorded later to include any postjudgment fees and costs awarded.

- One important reason to record as soon as possible is to "season" the judgment lien on real property. If the judgment debtor files a bankruptcy petition within 90 days after the abstract is recorded, the judgment creditor will lose its judgment lien as a preference under the Bankruptcy Code, *11 USC § 547*.

Cross References:

Filing abstract of judgment, see *11.07[2]*.

Form, see *11.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.05 Judgment Lien Is for Amount Required to Satisfy Judgment.

A judgment lien to enforce a judgment is a lien for the amount required to satisfy the judgment [*CCP § 697.010*].

However, if the lien is created under [*CCP § 697.320*] (specified judgments for support or against health care provider), the lien is for the amount of installments as they mature, plus accrued interest and costs [*CCP § 697.350(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.06 Judgment Lien Is Created by Recording Abstract of Judgment in County Where Real Property Is Located.

A judgment lien on real property is created by recording an abstract of judgment in the county where the judgment debtor's real property is located [*see CCP § 697.310(a)*].

Strategic Points--Judgment Creditor:

- The judgment creditor should record the abstract of judgment in all counties in which the judgment debtor owns property. Some county tax assessors will confirm whether or not a judgment debtor owns real property over the telephone.

- In addition to recording in counties where the judgment debtor is known to own property, it is often advisable to record in neighboring counties, or counties where the debtor may be doing business, or has family. If the judgment debtor does acquire property subsequent to the recordation of the abstract, the judgment lien will immediately attach.

- Counsel should check with the client, particularly if the client is an institutional lender, for information about the debtor's assets. Often the client has information, such as financial statements, that show where the debtor may own property or does business, or has family. In addition, there are asset-finding databases on *lexis.com*.

Finding Real Property Using Online Resources:

Many resources are available online for locating a debtor's real property. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Real Property Locator > CA Deed Transfers, Tax Assessor Records and Mortgage Records--Selected Counties

  - Sample Search: To find real property owned by a debtor, use a NAME segment search: *name(first name /3 last name)*

Cross Reference:

See Ch. 2, Locating the Debtor and Identifying Debtor's Assets.

Warning:

A lien to enforce a simple contractual obligation cannot be created unless the party has reduced the obligation to a judgment and an abstract of judgment is filed in the county recorder's office [*Isaac v. City of Los Angeles (1998) 66 CA4th 586, 598-599, 77 CR2d 752]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.07 Preparing and Recording Abstract of Judgment to Create Judgment Lien.

11.07[1] Use of Judicial Council Form EJ-001 Is Mandatory. Use of Judicial Council Form EJ-001 (Abstract of Judgment--Civil and Small Claims) is mandatory [*See Cal Rules Ct, Rule 1.31*]. The abstract is prepared and submitted to the court which entered the judgment. After the court issues the abstract, the abstract is then recorded with the appropriate county recorder.

Cross References:

Form: see *11.55*.

For discussion of enforcement generally, see Ch. 9, Planning Enforcement of Judgment.

Detailed discussion of abstract of judgment, see *California Forms of Pleading and Practice, § 318.380* (Matthew Bender).

Warning:

This form should not be used when the judgment or decree involves an order for spousal, child, or family support [*see Fam Code § 4506(a), (b)* (special requirements for abstract of judgment ordering support)].

Cross References:

Order for spousal, child or family support, see *11.08[3]*.

For detailed discussion, see *California Forms of Pleading and Practice, § 258.51[2]* (Matthew Bender).

11.07[2] Record Abstract of Judgment in County Where Judgment Debtor Owns Property. The abstract of judgment is recorded with the county recorder of the county or counties in which the judgment debtor owns property [*CCP § 697.310(a)*].

Strategic Point--Judgment Creditor:

It is good practice to record in multiple counties, because the judgment debtor may move around. This is

particularly important in urban areas, such as San Francisco and Los Angeles, where people frequently move to adjacent counties. If the judgment is large enough (i.e., in excess of $1 million), it may be worthwhile to file abstracts of judgment in every county in California, but this is rare.

11.07[3] Creditor May, but Is Not Required to, Serve Judgment Debtor. The judgment creditor may, but is not required to, serve a copy of the abstract of judgment on the judgment debtor by personal delivery, leaving it at the person's residence or place of business, or by registered or certified mail [*Gov Code § 27297.5(b)(1)-(3)*].

If the county recorder has not received proof of service from the judgment creditor when the abstract is recorded, the county recorder, within 10 days, may notify the judgment debtor or the debtor's attorney of record by mail of the recordation [*Gov Code § 27297.5(a)*]. However, the county recorder's or the judgment creditor's failure to notify the judgment debtor does not affect the constructive notice imparted by recording the abstract, or the effect or priority otherwise given the lien [*Gov Code § 27297.5(f)*].

11.07[4] Judgment Lien May Be Obtained at Any Time During 10 Years When Judgment Is Enforceable. There is no time specified to record an abstract of judgment to create a judgment lien on real property. Therefore, a judgment lien may be obtained and enforced at any time during the 10 years in which the initial judgment is enforceable [*see Dieden v. Schmidt (2002) 104 CA4th 645, 653, 128 CR2d 365* ; *CCP § 683.020(a)*]. Judgment liens on real property are renewable [*see CCP § 683.110 et seq.*].

Timing:

The 10-year period of enforceability begins on the date of entry by the clerk. This rule applies to any judgment, regardless of whether it is a modified or amended judgment and without regard to finality [*Iliff v. Dustrud (2003) 107 CA4th 1201, 1207, 132 CR2d 848*].

If a judgment is payable in installments, the 10-year period of enforceability for each installment runs from the date the installment becomes due. For costs, the 10-year period of enforceability runs from the date the costs are added to the judgment [*CCP §§ 683.030, 685.090*].

Strategic Point--Judgment Creditor:

Although a judgment lien can be obtained and enforced at any time during the 10-year period the initial judgment is valid, the better practice is to obtain and record the lien as early as possible. If the judgment creditor later discovers real property in another county that belongs to the judgment debtor, the judgment creditor can then record an abstract of judgment in that county.

In addition, if a judgment lien is created on property that is already subject to an existing attachment lien under the same claim [*see CCP § 481.010 et seq.*], the priority of the later lien relates back to the date the earlier lien was created [*CCP § 697.020(a)*]. Therefore, an important reason to consider attachment is to preserve a judgment creditor's lien priority.

Cross References:

Duration and renewing of a judgment lien on real property, see *11.10*.

See Ch. 9, Planning Enforcement of Judgment.

See Ch. 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.08 Special Rules Apply to Specific Types of Judgments.

11.08[1] Judgment Lien Under Judgment for Lump Sum Workers' Compensation Award Is Obtained by Recording Abstract of Judgment. If a workers' compensation award is for a lump sum, a judgment lien on real property is created by recording an abstract of the judgment [*CCP § 697.330(a)(1)*].

Cross Reference:

Recording abstract of judgment, see *11.06*.

11.08[2] Judgment Lien Under Judgment for Workers' Compensation Award Payable in Installments Is Obtained by Recording Certified Copy of Judgment. If a workers' compensation award is for the payment of money in installments, a judgment lien on real property is created by recording a certified copy of the judgment [*CCP § 697.330(a)(2)*].

11.08[3] Judgment Lien Based on Judgment for Child, Family, or Spousal Support Payable in Installments Is Obtained by Recording Abstract of Support Judgment and Additional Documents With County Recorder. A judgment lien on real property based on a judgment for child, family, or spousal support payable in installments is created by recording an abstract, a notice of support judgment, or a certified copy of the judgment with the county recorder [*CCP § 697.320(a)(1)*].

Cross References:

Detailed discussion/forms, see *California Forms of Pleading and Practice, § 258.51[2]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.09 Creating Lien Under Judgment Entered in Another State.

11.09[1] Judgment Creditor Must Apply for Entry of Judgment in California Before Lien on California Real Property May Be Obtained. A judgment from another state must first be reduced to a California judgment before it may serve as a basis for a judgment lien on real property located in California [*Kahn v. Berman (1988) 198 CA3d 1499, 1504-1507, 244 CR 575* ; *see CCP § 697.310*].

The judgment creditor may apply for the entry of another state's judgment by filing an application under [*CCP § 1710.20*] [*CCP § 1710.15(a)*]. With certain exceptions, the new judgment has the same effect as an original California judgment and may be enforced or satisfied in the same manner [*CCP § 1710.35*]. Therefore, once the judgment has been reduced to a California judgment, the same procedures for obtaining a judgment lien on real property apply.

Strategic Point:

Filing in federal court requires the judgment creditor to obtain a certification of judgment from the district court where the judgment was issued and then to file that in district court in California to be able to enforce the judgment in federal court.

Cross References:

Application for entry of another state's judgment, see *11.09[2]*.

Creating and enforcing judgment liens, see *11.05 -11.07*; see also Ch. 25, Enforcing Out of State Judgments in California.

11.09[2] Filing Application for Entry of Another State's Judgment Reduces It to California Judgment.

11.09[2][a] Application Requirements for Entry of Another State's Judgment. The application must include all of the following [*CCP § 1710.15(b)*]:

- A statement that an action in California on another state's judgment is not barred by the applicable statute of limitations.

- A statement, based on the applicant's information and belief, that no stay of enforcement of the other state's judgment is currently in effect in that state.
- A statement of the amount remaining unpaid under the other state's judgment.
- If the judgment creditor wants accrued interest to be included:
  - A statement of its amount.
  - A statement of the rate of interest applicable under the law of the other state (by which the amount stated must be computed).
  - A citation to the other state's law establishing the rate of interest.
- A statement that no action based on the other state's judgment is currently pending in any court in California.
- A statement that no judgment based on the other state's judgment has previously been entered in any proceeding in California.
- A statement identifying the judgment debtor:
  - If the judgment debtor is an individual, a statement setting forth the name and last known residence address of the judgment debtor.
  - If the judgment debtor is a corporation, a statement of the corporation's name, place of incorporation, and whether the corporation, if foreign, has qualified to do business in California.
  - If the judgment debtor is a partnership, a statement of the name of the partnership, whether it is a foreign partnership, and whether it has filed a statement designating an agent for service of process.
- A statement setting forth the name and address of the judgment creditor.

The application must be executed under oath [*CCP § 1710.15(b)*]. Except for facts that are matters of public record in California, the statements required may be made on the basis of the judgment creditor's information and belief.

A properly authenticated copy of the other state's judgment must be attached to the application [*CCP § 1710.15(c)*].

Cross Reference:

General requirements for enforcement of out of state judgments, see Ch. 25, Enforcing Out of State Judgments in California.

11.09[2][b] File Application in Superior Court. If the other state's judgment amounts to $25,000 or less, the application must be filed in a superior court as a limited civil case [CCP § 1720.20(a), (c)]. In all other cases, the application must be filed in a superior court as other than a limited civil case [CCP § 1720.20(a)].

Subject to the court's power to transfer the proceedings under the venue statutes [*CCP §§ 392-404.9*], the proper county for the filing of the application is (1) the county where the judgment debtor resides; or (2) any county in California if no judgment debtor is a resident [*CCP § 1710.20(b)*].

Cross Reference:

Detailed discussion/forms relating to venue, see California Forms of Pleading and Practice, Ch. 571, Venue (Matthew Bender).

11.09[2][c] Clerk Enters Judgment Based on the Application. Once the application is filed, the clerk enters a judgment for the total of the following amounts as shown in the application [*CCP § 1710.25(a)*]:

- The amount remaining unpaid under the other state's judgment.
- The amount of interest accrued on the other state's judgment.
- The amount of the fee for filing the application for entry of the other state's judgment.

The interest on the other state's judgment is computed at the rate of interest applicable to the judgment under the law of the other state [*CCP § 1710.25(a)*]. Once a judgment is entered, interest accrues on the judgment at the rate of interest applicable to a judgment in California [*CCP § 1710.25(b)*].

Cross Reference:

Amending judgments based on clerical error, see *California Forms of Pleading and Practice, § 318.70 et seq*. (Matthew Bender).

11.09[2][d] Notice of Entry of Judgment Must Be Served Promptly on Judgment Debtor. The judgment creditor must serve the notice of entry of judgment promptly on the judgment debtor [*CCP § 1710.30*; *see CCP §§ 415.10-415.95*]. Notice must be in a form prescribed by the Judicial Council, and must inform the judgment debtor that he or she has 30 days within which to make a motion to vacate the judgment [*CCP § 1710.30*].

Warning:

The judgment debtor's actual knowledge of entry of judgment does not begin the running of the 30-day period [*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 CA4th 74, 84, 15 CR2d 585*].

Cross References:

Discussion/form for notice of entry of judgment, see *California Forms of Pleading and Practice, § 318.464* (Matthew Bender).

Detailed discussion of service, see *California Forms of Pleading and Practice, § 518.16* (Matthew Bender).

Legal Topics:

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11.10 Duration of Judgment Lien on Real Property.

11.10[1] Unsatisfied Lien Continues for 10 Years From Date Judgment Was Entered. A judgment lien on real property continues for 10 years from the date of the entry of the judgment, unless the judgment is satisfied or the lien is released [*CCP § 697.310(b)*].

Cross Reference:

Detailed discussion of duration of judgment liens, see Ch. 13, Time Restrictions on Enforcement of Judgments.

11.10[2] Renewal of Judgment Extends Lien Until 10 Years From Date of Filing of Renewal Application, If Certified Copy of Renewal Application Is Recorded With County Recorder Where Property Is Located Before Judgment Lien Expires. Renewal of a judgment extends the duration of the judgment lien until 10 years from the date of the filing of the application for renewal if, before the expiration of the judgment lien, a certified copy of the application for renewal is recorded with the county recorder of the county where the property is located [*CCP § 683.180(a)*].

Warning:

Merely renewing the judgment in court does not extend the judgment lien. Rather, to extend the judgment lien, a certified copy of the renewal application must be recorded with the country recorder in the county where the property is located before the judgment lien expires.

Strategic Point--Judgment Creditor:

A lump sum judgment may be renewed at any time before the expiration of the 10-year period of enforceability [*see CCP § 683.130(a)*] and every five years thereafter [*CCP § 683.110(b)*]. Therefore, good practice dictates renewing the judgment after five years, because doing so compounds the interest into principal [*see CCP § 683.150(b)*].

Cross References:

Detailed discussion of renewal of judgments, see Ch. 13, Time Restrictions on Enforcement of

Judgments, Expiration and Renewal of Judgments.

Discussion/Forms for Notice and Application for Renewal of Judgment, see *California Forms of Pleading and Practice, §§ 318.382, 318.383* (Matthew Bender).

11.10[3] Specific Steps Must Be Taken to Extend Judgment Lien If Subject Property Has Been Transferred and Transfer Has Been Recorded Before Application for Renewal Was Filed. If property has been transferred subject to the lien, and if the transfer was recorded before the application for renewal was filed, specific steps must be taken to extend the lien on that property [*CCP § 683.180(b)*].

Exception:

A judgment lien on an interest in real property may be extended if the transfer was recorded before the application for renewal was filed if [*CCP § 683.180(b)(1), (2)*]:

- A copy of the application for renewal is personally served on the transferee; and
- Proof of service is filed with the court clerk within 90 days after filing the application.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsReal Property LawNonmortgage LiensJudgment Liens

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11.11 Most Current and After-Acquired Property Is Subject to Judgment Lien.

11.11[1] Judgment Lien Attaches to Judgment Debtor's Interests in Real Property in County Where Lien Is Recorded. The judgment lien attaches to the judgment debtor's interests in real property in the county where the lien is recorded, provided the property is subject to enforcement of a judgment at the time the lien is perfected [*CCP § 697.340(a)*]. The attachable interests may be present, future, vested or contingent, legal or equitable [*CCP § 697.340(a)*]. A judgment lien attaches to declared homesteads only to the extent of any excess over prior liens and the homestead exemption [*see CCP § 704.950*].

Example:

When an abstract of judgment is recorded by the judgment creditor after a court has awarded judgment, a judgment lien attaches to all of the judgment debtor's ownership interests in the real property in the county where the abstract is recorded [*Federal Deposit Ins. Corp. v. Charlton (1993) 17 CA4th 1066, 1070, 21 CR2d 686]* .

Exception:

Exemption Not Available When Abstract Was Recorded Before Property Was Acquired. A judgment debtor is not entitled to a homestead exemption on real property purchased subsequent to the recording of an abstract of judgment (in the county in which the real property is located), unless and to the extent the property was purchased with exempt proceeds [*SBAM Partners v. Wang (2d Dist. 2008) 164 CA4th 903, 79 CR3d 752, 2008 Cal. App. LEXIS 1035* ; *see also CCP §§ 704.710(c)*].

Cross Reference:

Declared homestead, see *11.12[5]*.

11.11[2] Judgment Lien Attaches to All Real Property in County That Debtor Acquires at Any Time Within 10-Year Life of Lien. A judgment lien attaches not only to all real property owned by the judgment debtor in the county at the time the lien is perfected, but also to all real property in the county that the debtor may subsequently acquire at any time within the life of the lien, which generally is 10 years unless it is extended [*CCP § 697.340(b)*; *Kinney v. Vallentyne (1975) 15 C3d 475, 478-479, 124 CR 897, 541 P2d 537* (prior law)].

However, a purchase money first trust deed on newly acquired property is a higher priority than the pre-existing abstract lien [*CC § 2898*; *Mercantile Collection Bureau v. Roach (1961) 195 CA2d 355, 359, 15 CR 710*].

Strategic Points--Judgment Creditor:

- The judgment creditor can reach wholly distinct parcels of property that the judgment debtor did not even own when the abstract of judgment was recorded [*see Kinney v. Vallentyne (1975) 15 C3d 475, 478-479, 124 CR 897, 541 P2d 537* (prior law)].

- In addition to recording in counties where the judgment debtor is known to own property, it is often advisable to record in neighboring counties, or counties where the debtor may be doing business, or has family. If the judgment debtor does acquire property subsequent to the recordation of the abstract, the judgment lien will immediately attach.

Cross Reference:

Priority of liens, see Ch. 12, Determining Priority and Sources of Liens.

11.11[3] Judgment Lien Attaches to Any Increase in Value of Debtor's Property Subject to Lien. The judgment creditor can reach any increases in the value of the equity in property owned by the judgment debtor at the time of recordation and already subject to the lien [*see Kinney v. Vallentyne (1975) 15 C3d 475, 478-479, 124 CR 897, 541 P2d 537* (prior law)]. When the judgment creditor enforces the judgment lien, the creditor is entitled to satisfy the judgment to the fullest extent possible out of the real property owned by the debtor--that is, out of the debtor's entire equity in the property valued as of the date of enforcement, regardless of how or when the debtor may have acquired the equity [*Kinney v. Vallentyne (1975) 15 C3d 475, 478-479, 124 CR 897, 541 P2d 537* (prior law)].

11.11[4] Lien Remains Attached to Real Property If Property Is Transferred or Encumbered Without Satisfying Lien. If an interest in real property that is subject to a lump sum judgment lien is transferred or encumbered without satisfying the lien, that interest remains subject to the lien in the same amount as if the interest had not been transferred or encumbered [*CCP § 697.390(a)*].

If the interest transferred or encumbered is subject to an installment lien under [*CCP § 697.320*], it remains subject to that lien in the amount of the lien at the time of transfer or encumbrance, plus interest that accrues on that amount [*CCP § 697.390(b)*].

Because the property remains subject to the lien after the transfer or encumbrance, a judgment may be enforced against the property in the same manner and to the same extent as if the property had not been transferred or encumbered [*CCP § 695.070(a)*]. If the judgment debtor dies after the transfer of the property, the judgment may be enforced against the property [*CCP § 695.070(b)*].

Strategic Point:

In the event of a sale of the property to which an abstract has attached without the lien being paid, it is good practice to advise the new owner of the fact that the lien remains outstanding and suggest that they provide creditor's counsel with information about their title policy so that a demand can be made directly on the title insurance company. It also is a good practice to review status or real property title periodically to make certain no transfers have occurred without the lienholder being notified.

Cross Reference:

See Ch. 9, Planning Enforcement of Judgment.

11.11[5] Judgment Lien Attaches to Particular Interests.

11.11[5][a] Judgment Lien Attaches to Joint Tenancy Interests. A judgment lien will attach to the interest of a joint tenant [*see Grothe v. Cortlandt Corp. (1992) 11 CA4th 1313, 1318, 15 CR2d 38*].

However, a lien that has attached to the interest of a joint tenant expires on the death of that tenant [*Grothe v. Cortlandt Corp. (1992) 11 CA4th 1313, 1318, 15 CR2d 38*].

Strategic Point:

When a judgment lien attaches to a joint tenant's interest, the creditor has a choice. The creditor can immediately execute and sell the interest of the judgment debtor, severing the joint tenancy [*Zeigler v. Bonnell (1942) 52 CA2d 217, 221, 126 P2d 118* (prior law)]. Alternatively, the creditor can wait to see if the judgment debtor survives the cotenant, in which case the judgment lien will attach to the entire property [*Zeigler v. Bonnell (1942) 52 CA2d 217, 221, 126 P2d 118* (prior law)]. If the creditor gambles on the judgment debtor's survival, the creditor assumes the risk of losing the lien [*Zeigler v. Bonnell (1942) 52 CA2d 217, 221, 126 P2d 118* (prior law); *accord Grothe v. Cortlandt Corp. (1992) 11 CA4th 1313, 1324, 15 CR2d 38*].

Cross Reference:

Determining what assets to attack, see *Ch. 1, Planning Collection of Debt, 1.40* et seq.

11.11[5][b] Lien Attaches to Interest Held by Tenant in Common. A judgment lien attaches to a real property interest held by a tenant in common. That lien may survive both a change in the title to joint tenancy and the death of the debtor joint tenant. A right of survivorship created after the judgment lien has no effect on a judgment lien [*Dieden v. Schmidt (2002) 104 CA4th 645, 650-652, 128 CR2d 365*].

11.11[5][c] Lien Under Judgment Against Heir or Devisee Attaches to Heir's or Devisee's Interest in Estate's Real Property. When an abstract of a judgment against an heir or devisee is recorded, the judgment lien attaches to the heir's or devisee's interest in the real property of the estate [*McGee v. Allen (1936) 7 C2d 468, 473-474, 60 P2d 1026* (prior law)]. The probate court is legally bound to distribute the interest of that heir according to the judgment lien [*In re Polito's Estate (1921) 51 CA 752, 754, 197 P 976* (prior law)].

11.11[6] Judgment Lien Is Subject to Prior Interests. Because a judgment lien creditor is not a bona fide purchaser, the judgment lien is subject to all prior interests in the real property, recorded or unrecorded [*Whitney v. Sherman (1918) 178 C 435, 439-440, 173 P 931*]. Thus, for example, the lien of an unrecorded mortgage of deed of trust has priority over a subsequent judgment lien [20th *Century Plumbing Co. v. Sfregola (1981) 126 CA3d 851, 854, 179 CR 144* ; *Wells Fargo v. PAL Investments, Inc. (1979) 96 CA3d 431, 438, 154 CR 818*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensJudgment Liens

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11.12 Some Types of Property Are Not Subject to Judgment Lien.

11.12[1] Judgment Lien Does Not Attach to Judgment Debtor's Rights to Rents or to a Leasehold. A judgment lien does not extend to the debtor's right to rents or to a leasehold estate with an unexpired term of less than two years [*CCP § 697.340(a)*].

11.12[2] Judgment Lien Does Not Attach to Beneficiary's Interest Under Trust. A judgment lien does not attach to a beneficiary's interest under a trust [*CCP § 697.340(a)*].

11.12[3] Judgment Lien Does Not Attach to Real Property Subject to Attachment Lien in Favor of Creditor That Was Transferred Before Judgment. A judgment lien does not extend to real property that is subject to an attachment lien in favor of the creditor and that was transferred before judgment [*CCP § 697.340(a)*].

11.12[4] Judgment Lien Does Not Attach to Real Property Transferred Before Judgment. A judgment lien does not attach to real property that has been previously transferred [*see CCP § 697.310(a)*]. Property is "previously transferred" if the purchase price is paid and no equitable interest is retained, even if some formality of transfer is incomplete when the abstract is recorded [*Casey v. Gray (1993) 13 CA4th 611, 614, 16 CR2d 538*].

Example:

A judgment is entered against a judgment debtor, but the judgment creditor does not record an abstract of judgment. Two years later, the judgment debtor transfers his interest in a particular parcel by quitclaim deed, but the transferee does not record the deed. Three weeks later, the judgment creditor finally records the abstract of judgment. Then, four months after the transfer, the transferee records the quitclaim deed. On these facts, it was held that, assuming delivery of the quitclaim deed had occurred, the transfer of the property was complete at the moment of delivery, without regard to whether the deed was recorded. Therefore, there was nothing to which the later-recorded abstract could attach [*see Casey v. Gray (1993) 13 CA4th 611, 613, 16 CR2d 538*].

11.12[5] Judgment Lien Attaches Only to Certain Surplus Equity When Declared Homestead Is Recorded Before Judgment Lien Was Created. A judgment lien attaches only to certain surplus equity, described below, when [*CCP § 704.950(a)*]:

- The declaration is recorded before the judgment lien is obtained; and

- The homestead declaration names the judgment debtor or his or her spouse as a declared homestead owner.

However, the lien will attach to any surplus equity beyond [*CCP § 704.950(c)*]:

- All the liens and encumbrances at the time the abstract of judgment (or certified copy of judgment) [*see 11.07*]) is recorded to create the judgment lien.

- The homestead exemption [*see CCP § 704.730*].

Cross References:

Discussion of homestead exemption, see *Ch. 17, Executing and Levying Against Real Property, 17.40* et seq.

Detailed discussion/forms relating to exemptions, see *California Forms of Pleading and Practice, §§ 254.40 et seq., 254.110* et seq. (Matthew Bender); see also California Forms of Pleading and Practice, Ch. 294, Homesteads (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawHomestead Exemptions

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11.13 CHECKLIST: Removing Judgment Lien on Real Property.

☐ Confirm that judgment has been satisfied or that judgment creditor will release judgment lien.

Authority:
CCP §§ 697.370(a), 697.400(a)

Discussion:
See *11.14*, *11.15*

☐ If judgment has been satisfied:

○ Draft and execute acknowledgment of satisfaction, or obtain court clerk's certificate of satisfaction of judgment.

Authority:
CCP §§ 697.400(a), 724.060, 724.100

Discussion:
See *11.15[1]*

○ Record either acknowledgment of satisfaction of judgment or court clerk's certificate of satisfaction of judgment to extinguish lien.

Authority:
CCP § 697.400(a)

Discussion:
See *11.14*

☐ If judgment lien will be released:

○ Draft release.

Authority:
CCP §§ 697.370(b), (c), 724.250

Discussion:
See *11.16*

Form:
See *11.56*

○ Record release.

Authority:
CCP § 697.400(c)

Discussion:
See *11.17[4]*

☐ If recorded abstract of judgment or certified copy of judgment erroneously creates judgment lien on real property of person who is not judgment debtor:

○ Draft and deliver to judgment creditor written demand for recordable document releasing lien.

Authority:
CCP § 697.410(a)

Discussion:
See *11.17[1]*

○ Provide proof satisfactory to judgment creditor that property owner is not judgment debtor.

Authority:
CCP § 697.410(a)

Discussion:
See *11.17[2]*

Timing:
Deliver recordable document to property owner releasing lien within 15 days after receipt of demand.

Authority:
CCP § 697.410(b)

Discussion:
See *11.17[3]*

☐ If judgment creditor fails to deliver a recordable document releasing judgment lien:

○ Serve notice of motion and motion for order releasing lien.

○ On proper satisfaction and proof, court must order judgment creditor to prepare and deliver document releasing judgment lien.

Authority:
CCP § 697.410(c)

Discussion:
See *11.17[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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11.14 Judgment Lien May Be Extinguished by Satisfying Judgment or May Be Released by Judgment Creditor.

A judgment lien may be extinguished by satisfying the judgment, or may be released or subordinated by the judgment creditor [*see CCP § 697.400(a), (c)*].

Warning:

An abstract of judgment makes a judgment creditor a secured creditor and, by statute, can be extinguished *only* by recording an acknowledgment of satisfaction of the underlying judgment or by a judgment creditor's release of the lien [*Fed. Deposit Ins. Corp. v. Charlton (1993) 17 CA4th 1066, 1070, 21 CR2d 686]* .

Strategic Point:

Care should be taken when releasing real property subject to a judgment lien, such as when one of several properties is being released to facilitate a sale, or one of several judgment debtors is being released in exchange for payment and a release of their property from the lien. The lien release should be very clear to specify exactly which property and/or judgment debtor is being released, and to note that it is not a satisfaction of the judgment or a release of any other party or property.

It also is prudent when entering into a release to include language that will, if at all possible, retain the property under the lien for 90 days in order to avoid potential preference liability under *11 USC § 547*, and consequent loss of the payment received and the real property security.

Cross Reference:

For detailed discussion, see Ch. 24, Discharge and Satisfaction of Judgments.

Bankruptcy references, see Ch. 3, Effect of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsPreference PeriodsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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11.15 Recording Acknowledgment of Satisfaction of Judgment Extinguishes Judgment Lien.

11.15[1] Acknowledgment of Satisfaction of Lump Sum Judgment. Recording either an acknowledgment of satisfaction of judgment or a court clerk's certificate of satisfaction of judgment in the county recorder's office extinguishes the judgment lien under a lump sum judgment [*CCP § 697.400(a)*]. The judgment creditor, judgment debtor, or owner of real property subject to a judgment lien on real property may record either of these documents [*CCP § 697.400(a)*].

The acknowledgment of satisfaction of judgment must be executed and acknowledged by one of the following [*CCP §§ 697.400(a), 724.060(c)*]:

- The judgment creditor.
- The assignee of record.
- The attorney for the judgment creditor or assignee of record, unless a revocation of the attorney's authority is filed.

The court clerk's certificate of satisfaction of judgment must be issued on application and payment of the required fee [*CCP §§ 697.400(a), 724.100*].

Once the acknowledgment is recorded, the judgment lien created under that judgment is extinguished as a matter of record [CCP § 397.400(a)].

Cross Reference:

See Ch. 24, Discharge and Satisfaction of Judgments.

11.15[2] Acknowledgment of Satisfaction of Matured Judgments Under Installment Judgment. Recording an acknowledgment of satisfaction of matured installments under an installment judgment in the county recorder's office extinguishes a judgment lien to the extent of the satisfied installments described in the acknowledgment of satisfaction [*CCP § 697.400(b)*].

The judgment creditor, judgment debtor, or owner of real property subject to a judgment lien for installments under a support judgment for child, family, or spousal support, or a judgment against a health care provider, may record the acknowledgment [*CCP § 697.400(b)*].

The acknowledgment of satisfaction of matured installments must be executed in accordance with the provisions relating to execution of an acknowledgment of satisfaction of judgment [CCP §§ 397.400(b), *724.250*].

On recording, the judgment lien is extinguished as a matter of record to the extent of the satisfied installments described in the acknowledgment of satisfaction [CCP § 397.400(b)].

Strategic Point:

When recording a release of matured installments, counsel should make certain that the satisfaction reflects a partial release only, as most title carriers will not read the content of the document to determine if remaining installments are still outstanding and will reflect the recordation of a full satisfaction.

Cross References:

Discussion of judgment lien based on support judgment payable in installments, see *11.08[3]*.

Acknowledgment of satisfaction requirements, see *11.15[1]*.

Discussion/form for acknowledgment of satisfaction of matured installments under an installment judgment, see *Ch. 24, Discharge and Satisfaction of Judgments, 24.11[3]*, *24.30*.

Detailed discussion of acknowledgment of satisfaction of matured installments under installment judgment, see *California Forms of Pleading and Practice, § 318.120 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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11.16 Release of Judgment Lien Must Contain Specified Items.

11.16[1] Release Must Contain Specified Information. A judgment creditor may release from the judgment (or subordinate to another lien or encumbrance) all or part of the real property subject to a lien [*CCP § 697.370(a)*]. The release must contain [*CCP § 697.370(b)*]:

- One of the following:
  - A description of the real property being released; or
  - If all of the judgment debtor's real property in a county where the lien is recorded is being released, or if the judgment debtor has no known interest in any real property in that county, a statement substantially as follows: "This is a release from the judgment lien described herein of all of the interests in real property in _____ County presently owned or hereafter acquired of the herein named judgment debtor subject to the lien."
- If the judgment debtor does not have an interest of record in the real property, the name of the record owner.
- The date the judgment lien was created and where in the records of the county the abstract of judgment or certified copy of the judgment was recorded to create the lien.
- The title of the court in which the judgment is entered and the cause and number of the action.
- The date of entry of the judgment and of any subsequent renewals, and where entered in the court's records.
- The name and address of the judgment creditor, the judgment creditor's assignee, if any, and the judgment debtor whose interest in real property is released from the judgment lien or with respect to whom the judgment lien is subordinated.

A release that substantially complies with these requirements is effective even if it contains minor errors that are not seriously misleading [*CCP § 697.370(c)*].

Cross Reference:

Form, see *11.56*.

11.16[2] Release Can Be Recorded If Properly Executed.

The judgment creditor, judgment debtor, or owner of real property subject to a judgment lien, including an erroneously identified property owner may record a release of the judgment lien in the county recorders office, if the release is properly executed [*CCP § 697.400(c)*].

The release must be executed by the judgment creditor in the same manner as an acknowledgment of satisfaction of judgment [*CCP §§ 697.370(b), 724.250*]. The release may require notarization in order to be filed with the county recorder. Check local rules.

Strategic Point--Judgment Creditor:

The execution of a release of a judgment lien does not release or subordinate the judgment lien for judgment debtors not named in the release [*CCP § 697.370(d)*].

Cross References:

Erroneously identified judgment debtor, see *11.17*.

Recording acknowledgment of satisfaction of judgment, see *11.15*.

Form: see *11.56*; see also Ch. 24, Discharge and Satisfaction of Judgments.

Detailed discussion of release of a judgment lien for real property generally, see *California Forms of Pleading and Practice, § 318.402* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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11.17 Lien on Property of Person Erroneously Identified as Judgment Debtor May Be Released.

11.17[1] Property Owner Must Serve Judgment Creditor With Written Demand That Creditor File Recordable Document Releasing Lien. A property owner who has the same name as, or a name similar to, the judgment debtor, is sometimes erroneously identified as the judgment debtor [*see CCP § 697.410(a)*]. If a recorded abstract of a judgment or certified copy of a judgment creates a judgment lien on real property of a person who is not the judgment debtor, the erroneously identified property owner may deliver to the judgment creditor a written demand for a recordable document releasing the judgment lien [*CCP § 697.410(a)*].

Warning:

Identity theft is commonplace. *CC §§ 1798.92-1798.97* outline the procedure to bring an action against a claimant to establish that a person is a victim of identity theft. There is a potential for attorney's fee awards and sanctions for failure to provide a release if sufficient evidence of an error is provided.

Cross References:

Detailed discussion/forms related to demand for release, see *California Forms of Pleading and Practice, §§ 318.396*, *318.398*, *318.399*, *318.400* (Matthew Bender).

11.17[2] Property Owner Must Provide Proof Satisfactory to Judgment Creditor That Property Owner Is Not Judgment Debtor. The written demand must be accompanied by proof to the satisfaction of the judgment creditor that the property owner is not the judgment debtor [*CCP § 697.410(a)*].

11.17[3] Judgment Creditor Must Deliver to Property Owner Recordable Document Releasing Judgment Lien. The judgment creditor must deliver a recordable document to the property owner releasing the judgment lien [*CCP § 697.410(b)*].

Timing:

The judgment debtor must deliver the recordable document within 15 days after receipt of the demand and satisfactory proof [*CCP § 697.410(b)*].

Cross Reference:

Discussion/Form for Proceedings to Release Real Property of Erroneously Identified Property Owner, see *California Forms of Pleading and Practice, § 318.397* (Matthew Bender).

11.17[4] Property Owner Must Record Release in County Where Subject Property Is Located. To extinguish the lien, the property owner must record the release in the office of the county recorder in the county where the subject property is located [*see CCP § 697.410(b)*].

11.17[5] If Judgment Creditor Fails to Comply With Demand, Property Owner May File Noticed Motion for Order Releasing Judgment Lien on Property. If the judgment creditor fails to deliver a recordable document releasing the judgment lien, the property owner may apply to the court on noticed motion for an order releasing the judgment lien [*CCP § 697.410(c)*].

Notice must be served, either personally or by mail, on the judgment creditor [*CCP § 697.410(c)*].

On proper satisfaction and proof that the property is not subject to enforcement of the judgment, the court must order the judgment creditor to prepare and deliver a recordable document releasing the judgment lien [*CCP § 697.410(c)*]. The court may itself order the release of the lien [*CCP § 697.410(c)*].

The court order may be recorded in the office of the county recorder with the same effect as the recordable document demanded by the property owner [*CCP § 697.410(c)*].

Cross References:

Detailed discussion/forms relating to right of misidentified owner to release lien on real property, see *California Forms of Pleading and Practice, §§ 318.398, 318.399, 318.400, 518.16* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCriminal Law & ProcedureCriminal OffensesProperty CrimesLarceny & TheftGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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IV. OBTAINING JUDGMENT LIEN ON PERSONAL PROPERTY

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11.18 CHECKLIST: Obtaining Judgment Lien on Personal Property.

☐ Determine timing:

Timing:

Obtain judgment lien based on lump sum judgment any time during period in which judgment is enforceable.

Authority:
CCP §§ 697.510-697.650

Discussion:
See *11.21[1]*

○ Obtain judgment lien based on installment when all installments have become due and payable.

Authority:
CCP § 697.510(a)

Discussion:
See *11.21[2]*

☐ Determine amount of judgment lien.

Authority:
CCP § 697.540

Discussion:
See *11.23*

☐ Determine whether property in question is of a type subject to lien.

Authority:
CCP §§ 697.530, 697.620

Discussion:
See *11.25, 11.26*

☐ Prepare notice of judgment lien (Secretary of State form JL-1).

Authority:
CCP §§ 697.510, 697.550

Discussion:
See *11.22[1]*

Form:
See *11.57*

☐ Execute notice under oath.

Authority:
CCP § 697.550

Discussion:
See *11.22[2]*

Form:
See *11.57*

☐ File notice of judgment lien in office of Secretary of State.

Timing:
Notice must be filed not more than 10 days after date of notice.

Authority:
CCP §§ 697.530, 697.570, 697.620

Discussion:
See *11.20, 11.22[3], 11.22[4]*

Form:
See *11.57*

☐ Serve copy of the notice on judgment debtor:

○ At time of filing or promptly after filing.

○ Personally or by mail.

Authority:
CCP § 697.560

Discussion:
See *11.22[5]*

Form:
See *11.57*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.19 Options and Strategies for Judgment Creditor.

A judgment creditor has the option of obtaining a judgment lien on certain types of personal property, as an alternative or in addition to a lien created by levy under a writ of execution [*see CCP §§ 699.010-701.830*] or by use of the miscellaneous creditors' remedies in *CCP §§ 708.010-709.030* [*CCP § 697.520*]. In particular, a lien created by service of an Order for Appearance covers *all* personal property, not just those specific items covered by a judgment lien on personal property [*CCP § 708.110(d)*].

Strategic Point--Judgment Creditor:

A judgment lien on personal property is general and attaches to most property without distinction or description [*see 11.25*], subject to statutory exceptions [*see 11.26*]. For example, the judgment lien on personal property does not extend to titled vehicles [*see CCP §§ 697.530(d)(1)* (judgment lien does not attach to registered vehicle, vessel, mobilehome, or commercial coach), 697.710) (levy on property creates execution lien)]. Counsel should consider a levy when there is an item of personal property that has some significant value, either by itself or to the debtor in particular, so the creditor can recoup the money as soon as possible.

Cross References:

Type of personal property subject to lien, see *11.25*.

Judgment liens on pending causes of action, see *11.34 -11.40*.

Discussion of execution liens on personal property, see *Ch. 16, Executing and Levying Against Personal Property, 16.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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11.20 Judgment Lien Is Created on Personal Property by Filing Notice of Judgment Lien With Secretary of State.

A judgment lien is created on personal property by filing a notice of judgment lien in the office of the Secretary of State [*CCP §§ 697.510(a), 697.570*].

Warning:

If the debtor is a non-California corporation, a judicial lien on California personal property cannot be perfected by this method. Instead, perfection of a lien against such collateral can be accomplished only by an appropriate filing under the laws of the state where the corporation is incorporated *[Aura Sys. v. Barovich (In re Aura Sys.) (Bankr CD Cal 2006) 347 BR 720, 725]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsGeneral Overview

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11.21 When Judgment Lien on Personal Property May Be Obtained.

11.21[1] Judgment Lien Based on Lump Sum Judgment May Be Created at Any Time During Period of Enforceability. A judgment lien on personal property based on a lump sum judgment may be created at any time during the period in which the judgment may be enforced. Continuation statements may be filed with regard to a judgment lien on personal property to continue the lien for successive five year periods [*see CCP §§ 697.510-697.650*].

Cross References:

Duration of judgment lien on personal property, see *11.24*.

Renewal of judgments, see Ch. 13, Expiration and Renewal of Judgments.

11.21[2] Judgment Lien Generally May Not Be Created Under Judgment Payable in Installments Unless All Installments Under Judgment Have Become Due and Payable at Time Notice of Judgment Lien Is Filed. A judgment lien on personal property may not be created based on an installment judgment unless all of the installments have become due and payable at the time the notice of judgment lien is filed [*CCP § 697.510(a)*].

Exceptions:

A judgment lien on personal property may be created on a judgment payable in installments under *CCP § 582.5* (municipal courts) or under *CCP § 117* (small claims courts) or *Veh Code § 16380* (financial responsibility laws) [*CCP § 697.540(b)*]. The lien is for the full amount required to satisfy the judgment. However, the lien may not be enforced for the amount of unmatured installments without court order [*CCP § 697.540(b)*].

Cross References:

Amount of judgment lien, see *11.23*; see also Ch. 13, Expiration and Renewal of Judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.22 Notice of Judgment Lien Must Meet Specified Criteria.

11.22[1] Notice of Judgment Lien Must Be Submitted on Secretary of State Form JL-1. The notice must be submitted using the Secretary of State Form JL-1 (Notice of Judgment Lien and Addendum) [http://www.ss.ca.gov/business/ucc/ra_9_jl-1_page.htm]. The notice must contain all of the following [*CCP § 697.550(a)-(g)*]:

- The name and mailing address of the judgment creditor.
- The name and last known mailing address of the judgment debtor.
- A statement that: "All property subject to enforcement of a judgment against the judgment debtor to which a judgment lien on personal property may attach under [*CCP § 697.530*] is subject to this judgment lien."
- The title of the court where the judgment is entered, and the cause and number of the action.
- The date of entry of the judgment and of any subsequent renewals and where entered in the records of the court.
- The amount required to satisfy the judgment at the date of the notice.
- The date of the notice.

Cross Reference:

Form, see *11.57*.

11.22[2] Notice Must Be Executed Under Oath. The notice must be executed under oath by the judgment creditor's attorney if the judgment creditor has an attorney of record or, if the judgment creditor has no attorney of record, by the judgment creditor [*CCP § 697.550*].

11.22[3] Notice Must Be Filed With Office of Secretary of State. The notice must be filed with the office of the

Secretary of State [*CCP § 697.570*].

11.22[4] Notice Must Be Filed No More Than 10 Days After the Date of Notice. The notice must be filed not more than 10 days after the date of the notice [*CCP § 697.570*]. If more than 10 days have lapsed, the process must be started over again.

11.22[5] Notice Must Be Served on Judgment Debtor Promptly After Filing. The judgment creditor must serve a copy of the notice on the judgment debtor at the time of filing the notice of judgment lien or promptly after filing [*CCP § 697.560*]. Service must be made personally or by mail [*CCP § 697.560*]. However, failure to comply with this requirement does not affect the validity of the judgment lien [*CCP § 697.560*].

Cross Reference:

Detailed discussion of service of process, see California Forms of Pleading and Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of Sale

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11.23 Judgment Lien Generally Is for Full Amount Required to Satisfy Judgment.

A judgment lien on personal property is for the full amount required to satisfy a judgment, except as otherwise provided by statute [*CCP § 697.540(a)*].

A judgment lien on personal property created on a judgment payable in installments is for the full amount required to satisfy the judgment [*CCP § 697.540(b)*]. However, the lien may not be enforced for the amount of unmatured installments without court order [*CCP § 697.540(b)*].

Cross References:

See Ch. 9, Planning Enforcement of Judgment; Ch. 16, Executing and Levying Against Personal Property.

Detailed discussion of payment of judgments, see *California Forms of Pleading and Practice, § 318.90* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.24 Duration of Judgment Lien on Personal Property.

11.24[1] Judgment Lien Continues for Five Years From Date of Filing, Unless Judgment Is Satisfied or Lien Is Continued, Terminated, or Released. The judgment lien continues for five years from the date of filing, unless the judgment is satisfied or the lien is continued, terminated, or released [*CCP § 697.510(a)*].

Cross References:

Timing, see *11.21[1]*.

Form, see *11.58*.

11.24[2] Judgment Lien on Personal Property Can Be Continued. A judgment lien on personal property can be continued for successive five year periods by filing continuation statements within the period six months prior to the expiration of the lien. The lien then continues from the day after the lien would have expired.

11.24[3] Lien Generally Continues Despite Sale, Exchange, or Other Disposition of Subject Property. A judgment lien on personal property generally continues despite the sale, exchange, or other disposition of the property.

Exceptions:

A judgment lien on personal property will not continue if the person receiving the property is one of the following [*CCP § 697.610*]:

- A buyer in the ordinary course of business who, under *Com Code § 9320*, would take free of a security interest created by the seller.

- A lessee in the ordinary course of business, who, under *Com Code § 9321*, would take free of a security interest created by the lessor.

- A holder to whom a negotiable document of title has been duly negotiated within the meaning of *Com Code § 7501*.

- A purchaser of chattel paper who, under *Com Code § 9330*, would have priority over another

security interest in the chattel paper.

Cross References:

See *California Forms of Pleading and Practice, §§ 213.30 et seq., 503.24[3], 503.50[3]* (Matthew Bender).

11.24[4] Judgment Lien Continues As to Identifiable Proceeds of Personal Property When Sold. A judgment lien on personal property generally continues as to identifiable proceeds received on the sale, collection, or other disposition of the property, to the extent provided by *CCP § 697.620* [*CCP § 697.530(c)*].

11.24[5] Judgment Lien Generally Continues With Same Priority in Property's Proceeds. The judgment lien generally continues with the same priority in the proceeds of the property [*CCP § 697.620(b)*].

Exception:

If insolvency proceedings are instituted by or against the judgment debtor, the lien continues only in proceeds that are [*CCP § 697.620(c)*]:

- In a separate deposit account containing only proceeds.
- In the form of money that are not commingled with other money.
- In the form of checks or similar instruments that are not deposited in a deposit account before the insolvency proceedings.

Cross References:

Discussion/forms concerning insolvency, see Ch. 3, Effect of Bankruptcy.

See Ch. 9, Planning Enforcement of Judgment.

See Ch. 12, Determining Priorities and Sources of Liens.

Discussion on enforcement of judgments, see *California Forms of Pleading and Practice, § 318.90 et seq.* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsContracts LawTypes of ContractsPersonal Property

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11.25 Types of Personal Property Subject to Judgment Lien.

A judgment lien on personal property is a lien on all interests in the following types of property [*CCP § 697.530(a)*]:

- Accounts receivable, if the judgment debtor is located in California.
- Tangible chattel paper (as defined in *Com Code § 9102(a)(70)*), if the judgment debtor is located in California.
- Equipment located within California.
- Farm products located within California.
- Inventory, located within California.
- Negotiable documents of title, located within California.

If, after the judgment lien is created, the judgment debtor acquires any interest in personal property on which a judgment lien could be created, the judgment lien attaches to the interest at the time it is acquired [*CCP § 697.530(b)*]. However, a perfected purchase money filing under *Com Code § 9324* has priority over a pre-existing personal property lien under [*CCP § 697.590(d)*].

If property subject to a judgment lien becomes a fixture [*see Com Code § 9102(a)(41)* (definition)], the lien is extinguished [*CCP § 697.530(e)*].

In most cases, a judgment lien on personal property continues on the identifiable proceeds received on the sale, collection, or other disposition of the property that is subject to the judgment lien [*see CCP §§ 697.530(c), 697.620(a)(2)*].

Cross References:

Continuation of judgment lien as to proceeds, see *11.24[4], [5]*.

Identifying Assets, see *Ch. 2, Locating the Debtor and Identifying the Debtor's Assets, 2.17* et seq.

Discussion of rules for determining priority of judgment liens and security interests in personal property, see *Ch. 12, Determining Priority and Sources of Liens, 12.14* et seq.

Discussion of fixtures, see California Forms of Pleading and Practice, §§ 503.97, *503.110*, *503.160* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesProceeds

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11.26 Types of Personal Property Not Subject to Judgment Lien.

A judgment lien on personal property does not attach to the following [*CCP § 697.530(d)*]:

- Vehicles or vessels required to be registered with the Department of Motor Vehicles.
- Mobilehomes or commercial coaches required to be registered under the Health and Safety Code.
- As-extracted collateral, as specifically defined in *Com. Code § 9102(a)(6)* (oil, gas, or other minerals that are subject to a security interest as specified in that section).
- Timber to be cut.
- Inventory of a retail merchant held for sale, except durable goods with a unit retail value of at least $500.

Exception:
In this context, "retail merchant" does not include [*CCP § 697.530(d)(2)*]:

- Persons whose sales for resale exceeded 75 percent in dollar volume of the total sales of all goods during the 12 months preceding the filing of the notice of judgment lien.
- Agricultural cooperatives organized under F&A Code § 54001 et seq.
- Fishery associations organized under the Fish Marketing Act [*Corp Code § 13200 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensPriority & SourcesGeneral OverviewAdmiralty LawShippingRegulations & StatutesLicensing & RegistrationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & Titling

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11.27 CHECKLIST: Removing Judgment Lien on Personal Property.

☐ Confirm that judgment has been satisfied or that judgment creditor will release judgment lien.

Authority:
CCP §§ 697.640(a), 697.650

Discussion:
See *11.29*

☐ If judgment has been satisfied:

○ Draft and execute either acknowledgment of satisfaction or obtain court clerk's certificate of satisfaction of judgment.

Authority:
CCP §§ 697.640(a), 724.060, 724.100

Discussion:
See *11.31[1], [3]*

○ Draft statement required by *CCP § 697.640(a)*.

Authority:
CCP § 697.640(a)

Discussion:
See *11.31[2]*

○ File either acknowledgment of satisfaction of judgment or court clerk's certificate of satisfaction of judgment to extinguish lien, along with required statement and filing fees in office of Secretary of State.

Authority:
CCP § 697.640(a)

Discussion:
See *11.31[4]*

☐ If judgment creditor will release judgment lien:

○ Complete Secretary of State Form JL-3 (Notice of Judgment Lien Release or Subordination).

Authority:
CCP § 697.650

Discussion:
See *11.32[1]*

Form:
See *11.58*

○ File Secretary of State Form JL-3 in office of Secretary of State, along with filing fee.

Authority:
CCP § 697.650(b)

Discussion:
See *11.32[2]*

Form:
See *11.58*

☐ If judgment lien is on personal property of person who is not judgment debtor:

○ Serve judgment creditor with written demand to file statement releasing lien.

Authority:
CCP § 697.660(a)

Discussion:
See *11.33[1]*

○ Provide proof satisfactory to judgment creditor that property owner is not judgment debtor.

Authority:
CCP § 697.660(a)

Discussion:
See *11.33[2]*

○ File statement releasing lien in office of Secretary of State.

Authority:
CCP § 697.660(a)

Discussion:
See *11.33[3]*

Timing:
File statement within 15 days of receiving demand and satisfactory proof.

Authority:
CCP § 697.660(b)

Discussion:
See *11.33[3]*

If judgment creditor fails to comply with demand for release, apply to court on noticed motion for order releasing judgment lien on personal property [*CCP § 697.660(c)*].

Authority:
CCP § 697.660(c)

Discussion:
See *11.33[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementGovernmentsCourtsClerks of Court

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11.28 Options and Strategies for Judgment Creditor.

The judgment creditor with a judgment lien on personal property may do any of the following:

- Release the judgment lien on all the personal property subject to the lien of a sole judgment debtor or of all the judgment debtors [*CCP § 697.650(a)(1)*].

- If the notice of judgment lien names more than one judgment debtor, release the judgment lien on all the personal property subject to the lien of one or more but of less than all the judgment debtors [*CCP § 697.650(a)(2)*].

- Release the judgment lien on all or a part of the personal property subject to the lien [*CCP § 697.650(a)(3)*].

- Subordinate to a security interest, or other lien, or encumbrance, the judgment lien on all or a part of the personal property subject to the judgment lien [*CCP § 697.650(a)(3)*].

Cross Reference:

Form, see *11.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral Overview

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11.29 Judgment Lien Terminates Five Years From Date of Filing, Unless Continued, or When Judgment Is Satisfied or Lien Is Released.

A judgment lien on personal property continues for five years from date of filing (if not continued), unless the judgment is satisfied or the lien is terminated or released [*CCP § 697.510(b)*,(c),(d)].

Cross Reference:

Discussion of duration of judgment lien on personal property, see *11.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.30 Filing Acknowledgment of Satisfaction of Judgment and Required Statement Extinguishes Judgment Lien.

Filing an acknowledgment of satisfaction of judgment, or a court's certificate of satisfaction of judgment, along with a statement, as specified by *CCP § 697.640(a)*, and the required filing fee, extinguishes a judgment lien on personal property as a matter of record [*CCP § 697.640(a)*].

Cross Reference:

Additional discussion of filing acknowledgment of satisfaction of judgment, see *Ch. 24, Discharge and Satisfaction of Judgments, 24.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.31 Preparing and Filing Acknowledgment and Statement.

11.31[1] Persons Authorized by Statute May File Acknowledgment of Satisfaction of Judgment. The following persons may file the acknowledgment of satisfaction of judgment and the required statement [*CCP § 697.640(a)*]:

- The judgment creditor.
- The judgment debtor.
- The owner of property subject to a judgment lien on personal property created under the judgment.
- A person with a security interest in or a lien on the property subject to the judgment lien.

11.31[2] Statement Must Be Filed With Satisfaction of Judgment. A statement must be filed along with the satisfaction of judgment. The statement must contain the name and address of the judgment debtor and the file number of the notice of judgment lien [*CCP § 697.640(a)*].

11.31[3] Acknowledgment Must Be Executed. The acknowledgment of satisfaction of judgment must be executed, or the court clerk's certificate of satisfaction of judgment must be issued, as provided by the law governing satisfaction of judgments [*CCP § 697.640(a)*; *see* CCP §§ 724.06, *724.100*].

Cross Reference:

Acknowledgment of satisfaction of judgment, see *11.15[1]*.

11.31[4] File Acknowledgment and Statement in Office of Secretary of State. The acknowledgment of satisfaction of judgment, or the court's certificate of satisfaction of judgment, along with the required statement and filing fee, must be filed in the office of the Secretary of State [*CCP § 697.640(a)*].

Cross Reference:

Acknowledgment of satisfaction of judgment, see *11.15[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsGovernmentsCourtsClerks of Court

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11.32 Judgment Lien on Personal Property Is Released by Filing Secretary of State Form JL-3.

11.32[1] Use of Secretary of State Form JL-3 Is Mandatory. A judgment lien on personal property is released as a matter of record by filing Secretary of State Form JL-3 (Notice of Judgment Lien Release or Subordination), along with the appropriate filing fee [*see CCP § 697.650(b), (c)*]. Use of Secretary of State Form JL-3 is mandatory [*CCP § 697.650(b)*]. The form is available on the website of the Secretary of State at http://www.ss.ca.gov/business/ucc/ra_jl-3_page.htm.

Cross References:

Form JL-3, see *11.58*.

For a list of judgment creditor's options when releasing judgment lien on personal property lien, see *11.27*, *11.58*.

11.32[2] Form Must Be Filed With Office of Secretary of State. Form JL-3 (Notice of Judgment Lien Release or Subordination) must be filed in the office of the Secretary of State [*CCP § 697.640(a)*]. The form may be completed and submitted to the office of the Secretary of State online, along with the appropriate filing fee [http://www.ss.ca.gov/business/ucc/ra_9_ucc_formsfees.htm; *see CCP § 697.650(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11.33 Procedures to Release Judgment Lien on Property of Person Erroneously Identified as Judgment Debtor.

11.33[1] Person Making Demand May Serve Judgment Creditor With Written Demand to File Statement Releasing Judgment Lien. An erroneously identified property owner may serve the judgment creditor with a written demand to file a recordable document releasing the judgment lien on the owner's property [*CCP § 697.660(a)*]. The demand may also be made by a person holding a security interest in or a lien on the property [*CCP § 697.660(a)*].

The demand must be filed in the office of the Secretary of State in Sacramento [*CCP § 697.660(a)*].

11.33[2] Person Making Demand Must Provide Proof Satisfactory to Judgment Creditor That Property Owner Is Not Judgment Debtor. The person making the demand must provide proof satisfactory to the judgment debtor that he or she is not the judgment debtor and that the property is not subject to enforcement of the judgment against the debtor [*CCP § 697.660(a)*].

11.33[3] Judgment Creditor Must File Statement Releasing Judgment Lien. On receipt of the written demand and satisfactory proof, the judgment creditor must file a statement releasing the judgment lien in the office of the Secretary of State [*CCP § 697.660(b)*].

Timing:

The release must be filed within 15 days of receiving the demand and satisfactory proof [*CCP § 697.660(b)*].

11.33[4] If Judgment Creditor Fails to Comply With Demand for Release, Person Making Demand May File Noticed Motion for Order Releasing Judgment Lien. If the judgment creditor fails to comply with the demand, the person making the demand may apply to the court on noticed motion for an order releasing the judgment lien on the property [*CCP § 697.660(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral Overview

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1-11 MB Practice Guide: CA Debt Collection 11.34

11.34 CHECKLIST: Obtaining Lien in Judgment Debtor's Pending Cause of Action.

☐ Determine:

- ○ Whether to intervene in pending action or proceeding; or
- ○ Whether claimant's needs would be satisfied by lien against prospective judgment.

Authority:
CCP § 708.430(a); *In re Marriage of Kerr (1986) 185 CA3d 130, 134, 229 CR 610*

Discussion:
See *11.40*

☐ To obtain lien, file the following in pending action or special proceeding:

- ○ Notice of lien.
- ○ Abstract or certified copy of judgment creditor's judgment.

Authority:
CCP § 708.410(b)

Discussion:
See *11.38*

Forms:
See *11.55*, *11.59*

☐ Serve on all parties who have appeared in action or proceeding:

- ○ Copy of notice.
- ○ Statement of date notice was filed.
- ○ Serve documents either personally or by mail.

Timing:

Serve these papers when notice is filed, or promptly after filing.

Authority:

CCP § 708.410(c)

Discussion:

See *11.39[3]*

Form:

See *11.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.35 Options and Strategies for Judgment Creditor.

In addition to obtaining a lien on a judgment debtor's pending cause of action, the judgment debtor should consider other available remedies, including obtaining a judgment lien on the judgment debtor's real or personal property.

Strategic Point--Judgment Creditor:

Before filing a lien in a cause of action, the judgment creditor's attorney may want to try to work something out with the judgment debtor's attorney because it is difficult to tell how much of a chilling effect the filing of the lien will have on settlement value of the claim, bearing in mind that the whole point of the lien is to get paid as much as possible as quickly as possible. If the judgment debtor's attorney and the judgment debtor agrees to treat the lien like a medical lien and honor it even if it is not filed, the creditor's attorney should consider doing so if the circumstances suggest that such a treatment may be appropriate.

Cross References:

Judgment on real property, see *11.03 -11.12*.

Judgment on personal property, see *11.18 -11.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsReal Property LawNonmortgage LiensGeneral Overview

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11.36 Judgment Creditor With Judgment Against Judgment Debtor May Obtain Lien in Debtor's Pending Cause of Action.

A judgment creditor who has a judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien on the following:

- The judgment debtor's cause of action for money or property that is the subject of the action or proceeding [*CCP § 708.410(a)(1)*]; and

- The judgment debtor's rights to money or property under any judgment subsequently procured in the action or proceeding [*CCP § 708.410(a)(2)*].

An action or proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined [*CCP § 708.410(d)*].

Warning:

The lien statutes relate only to the liens of judgment creditors, and do not apply to contractually created liens for attorney fees [*Brown v. Superior Court (2004) 116 CA4th 320, 323-324, 9 CR3d 912*].

Cross Reference:

See Ch. 9, Planning for Enforcement of Liens; Ch. 12, Determining Priorities and Source of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsCivil ProcedureAppealsReviewabilityGeneral Overview

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11.37 Judgment Creditor May Obtain Lien to Extent Required to Satisfy Judgment.

The judgment creditor may obtain a lien on the judgment debtor's pending cause of action, or on the judgment debtor's rights to money or property under the subsequent judgment, to the extent required to satisfy the judgment [*CCP § 708.410(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.38 Filing Notice of Lien and Abstract or Certified Copy of Judgment in Pending Action Creates Lien on Judgment Debtor's Pending Cause of Action.

To obtain a lien on a judgment debtor's pending cause of action, the judgment creditor must file both of the following [*CCP § 708.410(b)*]:

- A notice of lien; and
- An abstract or certified copy of the judgment creditor's judgment.

Cross References:

Filing Abstract of Judgment, see *11.39*.

Form, see *11.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.39 Preparing and Filing Notice and Abstract of Judgment or Certified Copy of Judgment in Pending Action.

11.39[1] Use of Judicial Council Form AT-180/EJ-185 Is Optional. The judgment creditor must file a notice of lien and an abstract or certified copy of the judgment creditor's judgment [*CCP § 708.410(b)*]. The notice of lien must contain all of the information prescribed by statute [*see CCP § 708.420*]. Use of Judicial Council Form AT-180/EJ-185 (Notice of Lien: Attachment--Enforcement of Judgment) is optional [*see Cal Rules Ct, Rule 1.35*; *CCP § 708.420*].

Cross Reference:

Form, see *11.59*.

11.39[2] Judgment Creditor Must File Notice of Lien and Abstract or Certified Copy of Judgment. The judgment creditor must file a notice of lien and an abstract or certified copy of the judgment creditor's judgment in the pending action or special proceeding [*CCP § 708.410(b)*].

11.39[3] Judicial Creditor Must Serve Copy of Notice and Statement of Date Notice Filed on All Parties. The judgment creditor must serve a copy of the notice and a statement of the date the notice was filed on all parties who have appeared in the action or proceeding [*CCP § 708.410(c)*]. Service must be made personally or by mail [*CCP § 708.410(c)*].

Timing:

Judgment creditor must serve the notice and statement at the time of filing the notice, or promptly after filing [*CCP § 708.410(c)*].

Cross Reference:

Detailed discussion of service, see California Forms of Pleading and Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).

11.39[4] Failure to Serve All Parties as Required Does Not Affect Lien Created by Filing. The failure to serve all parties does not affect the lien created by filing under [*CCP § 708.410(b)*].

Warning:

However, a party's rights are not affected by the lien until the party has notice of the lien [*CCP § 708.410(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.40 Court May Allow Judgment Creditor Who Has Obtained Lien to Intervene in Pending Action.

The court in which the action or special proceeding is pending may permit a judgment creditor who has obtained a lien to intervene in the action or proceeding [*CCP § 708.430(a)*]. There is no federal law to the contrary [*see United States v. Alisal Water Corp. (9th Cir. 2004) 370 F3d 915, 919*].

Strategic Point--Judgment Creditor:

Ordinarily a lien claimant would have no need to participate in the main action--unless the amount of the lien relative to the potential recovery causes the judgment debtor to lose interest in the action [*McClearen v. Superior Court (1955) 45 C2d 852, 856, 291 P2d 449* (prior law)]. However, intervention normally must be permitted unless it will disrupt the suit or change the position of the original parties [*In re Marriage of Kerr (1986) 185 CA3d 130, 134, 229 CR 610*].

A creditor who has not intervened is nevertheless considered a party to the action for purposes of opposing a claim of exemption or seeking an order applying the property to satisfaction of the creditor's judgment [*CCP § 708.430(b)*].

Cross References:

Discussion of enforcement, compromise and settlement: see Ch. 9, Planning Enforcement of Judgment.

Detailed discussion/forms for application of judgment to satisfy lien: see *California Forms of Pleading and Practice, §§ 318.385 -318.395* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureRemediesJudgment LiensGeneral Overview

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11.41 CHECKLIST: Removing Lien From Judgment Debtor's Pending Cause of Action.

☐ Confirm that:

- ○ Money judgment has been satisfied; or
- ○ Judgment creditor will release lien; or
- ○ Court has ordered termination based on judgment debtor's claim of exemption.

Authority:
CCP §§ 708.420(g), (h), 708.450(c), 708.480

Discussion:
See *11.42*

☐ If judgment has been satisfied:

- ○ Draft acknowledgment of satisfaction of judgment.

Authority:
CCP §§ 708.420(g)(3), 708.480

Discussion:
See *11.43*

Form:
See *11.60*

- ○ File acknowledgment of satisfaction in court in which action or special proceeding is pending or

judgment procured.

Authority:
CCP §§ 708.420(g)(3), 708.740

Discussion:
See *11.43*

Form:
See *11.60*

☐ If judgment creditor will release lien:

○ Draft release.

Authority:
CCP § 708.420(g)(2)

Discussion:
See *11.44*

○ File release in court in which action or special proceeding is pending or judgment procured.

Authority:
CCP § 708.420(g)(2)

Discussion:
See *11.44*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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11.42 Lien May Be Satisfied, Released, or Terminated Based on Claim That Property or Money Is Exempt From Enforcement of Judgment.

A lien on the judgment debtor's cause of action may be terminated based on:

- Satisfaction of the lien [*see CCP §§ 708.420(g)(3), 708.480*].
- Release by the judgment creditor [*see CCP § 708.420(g)(2)*].
- A court's order of termination if the judgment debtor establishes an exemption for all or any portion of the money or property [*see CCP §§ 708.420(h), 708.450(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensGeneral Overview

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11.43 Lien Is Extinguished by Filing Acknowledgment of Satisfaction of Lien.

A lien on the judgment debtor's cause of action is extinguished by filing an acknowledgment of satisfaction in the court in which the action or special proceeding is pending or the judgment procured [*see CCP §§ 708.420(g)(3)*, *708.740*].

Cross Reference:

Form, see *11.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensGeneral Overview

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11.44 Lien Is Extinguished When Released.

A lien on the judgment debtor's cause of action is extinguished by the judgment creditor's written consent or release [*see CCP § 708.420(g)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral Overview

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11.45 Lien Is Extinguished When Court Orders Termination.

The court will order termination of a lien on the judgment debtor's cause of action if the judgment debtor establishes that the debtor's right to money or property under the judgment in the action or special proceeding is all or partially exempt from enforcement of a judgment [*CCP § 708.450(c)*].

Cross References:

Detailed discussion/forms related to exemption of money or property from judgment, see *California Forms of Pleading and Practice, §§ 318.389 -318.391* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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Chapter 11 Obtaining and Removing Postjudgment Liens
VIII. SUSPENDING DRIVER'S LICENSE FOR FAILURE TO PAY JUDGMENT

1-11 MB Practice Guide: CA Debt Collection 11.46

11.46 CHECKLIST: Suspending Driver's License for Failure to Pay Judgment.

☐ Determine whether suspension is available:

○ Was judgment as a result of operation by defendant or any other person of any motor vehicle upon a highway in California?

○ Was property damage in excess of $750, or was there bodily injury to or death of any person?

Authority:
Veh Code § 16251

Discussion:
See *11.48*, *11.49*

○ Will judgment debtor be able to escape suspension by filing proof of insurance?

Authority:
Veh Code § 16375

Discussion:
See *11.50*

File application after 30 days from date judgment became final, if judgment remains unpaid.

Authority:
Veh Code § 16370

Discussion:
See *11.49[1]*

☐ Obtain from clerk of court:

○ Certified copy of judgment, or certified copy of register of actions (or comparable court record of another jurisdiction); and

○ Certificate of facts relative to the judgment on DMV Form DL 30.

☐ File claim with Department of Motor Vehicles.

○ Complete remainder of Form DL 30.

○ Indicate that judgment debtor failed to satisfy judgment for 30-day period.

○ Include fee for processing and issuing suspension order.

○ File claim and fee with DMV in Sacramento.

Authority:
Veh Code §§ 16370, 16370.7, 16373

Discussion:
See *11.49[2], [4]*

Form:
See *11.61*

☐ If representing party whose license has been suspended for nonpayment of judgment, determine whether relief from suspension is available.

○ File all of following with Department of Motor Vehicles:

☐ Affidavit stating all of following:

○ That at time of accident on which judgment was rendered, judgment debtor was insured;

○ That insurer is liable to pay that judgment; and

○ Reason, if known, why insurance company has not paid judgment.

☐ Original or certified copy of insurance policy.

☐ Any other documents requested by DMV showing that loss, injury, or damage for which

judgment was rendered, was covered by insurance.

Authority:
Veh Code § 16375

Discussion:
See *11.50*

○ Alternatively, deposit with state treasurer:

☐ $15,000 on any single judgment or on all judgments, collectively, which together total in excess of $15,000, for personal injury to or death of one person as a result of any one accident.

☐ $30,000 on any single judgment or on all judgments, collectively, which together total in excess $30,000, for personal injury to or death of more than one person as a result of any one accident.

☐ $5,000 on any single judgment in excess of $5,000 or on all judgments, collectively, each of which exceed $750, and which together total in excess of $5,000, for damage to property of others as a result of any one accident.

Authority:
Veh Code § 16377

Discussion:
See *11.52*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtGovernmentsCourtsCourt RecordsTortsTransportation TortsGeneral Overview

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11.47 Options and Strategies for Suspending Driver's License of Uninsured Judgment Debtor Who Fails to Pay.

The Department of Motor Vehicles (DMV) must suspend the driving privilege of any person on receiving a certified copy of a judgment, or a certified copy of the register of actions (or a comparable court record of another jurisdiction) in an action resulting in a judgment for damages, and a certificate of facts relative to the judgment. The judgment must be for property damage in excess of $750 or for any amount of damage for bodily injury to or death of any person as a result of the operation by the defendant or any other person of any motor vehicle on a highway in California [*Veh Code § 16251*]. The judgment debtor must have failed for a period of 30 days to satisfy a judgment [*Veh Code § 16370*].

The judgment debtor can escape the suspension if he or she has insurance covering the judgment up to specified amounts, so the effect of the statute is to suspend the licenses of drivers who were uninsured at the time of the accident giving rise to the judgment [Veh Code § 16275; *see 11.52*].

Strategic Point--Use of Remedy in Auto Accident Cases:

If a judgment results from a motor vehicle accident, the judgment creditor may be able to have the judgment debtor's driver's license suspended if the judgment debtor fails to pay the judgment. This remedy, under some circumstances, may provide a significant incentive for a recalcitrant judgment debtor to pay an outstanding judgment, and attorneys who are attempting to enforce judgment liens obtained in auto accident cases should be aware of the existence of this device.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementGovernmentsCourtsCourt RecordsTortsTransportation TortsMotor VehiclesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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11.48 Department of Motor Vehicles Must Suspend Driving Privilege on Application.

11.48[1] Suspension Is Mandatory If Requirements Are Met. The DMV must suspend the driving privilege of any person on receiving a certified copy of a judgment, or a certified copy of the register of actions (or a comparable court record of another jurisdiction) in an action resulting in a judgment for damages, and a certificate of facts relative to the judgment [*Veh Code § 16370*].

11.48[2] Judgment Must Arise From Motor Vehicle Accident. The judgment must be for property damage in excess of $750 or for any amount of damage for bodily injury to or death of any person as a result of the operation by the defendant or any other person of any motor vehicle upon a highway in California [*Veh Code § 16251*].

Exception:
This does not apply to a judgment from a cause of action based upon statutory liability for signing the application of a minor for a driver's license [*Veh Code § 16251*].

11.48[3] Suspension May Be Granted Against Nonresident. If the person against whom judgment is rendered is a nonresident and the person fails to satisfy the judgment, all privileges of operating a motor vehicle in California must be suspended while the judgment remains unsatisfied or gives proof of financial responsibility. The DMV also must forward a certified copy of the judgment to the appropriate officer in charge of driver's licenses in the state where the debtor is a resident [*Veh Code § 16376*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsTransportation LawPrivate VehiclesGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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11.49 Form Must Be Filed With Department of Motor Vehicles.

11.49[1] Judgment Creditor May Initiate Process 30 Days After Judgment Becomes Final. The judgment creditor may initiate the process by requesting the court clerk to provide the required documentation. The request may be made beginning 30 days after the judgment has become final if the judgment has not been stayed or satisfied [*see Veh Code § 16373(b)*].

11.49[2] DMV Form DL 30 Must Be Used. The application must be made on a form prescribed by the DMV [*Veh Code § 16370*]. DMV Form DL 30 is used for this purpose. This form must be completed by the clerk of the court [*see 11.49[3]*], and certified by the judgment creditor or attorney. The form must indicate that the judgment debtor failed for a period of 30 days to satisfy a judgment [*Veh Code § 16370*].

Cross Reference:

Form, see *11.61*.

11.49[3] Clerk of Court Issues Copies of Judgment and Certificate of Facts. On the judgment creditor's request, the clerk of a court must issue a certified copy of any judgment or a certified copy of the register of actions in an action resulting in a judgment for damages, and a certificate of facts relative to the judgment on a form provided by the Department of Motor Vehicles (DMV Form DL 30). The judgment creditor may request the documents 30 days after the judgment has become final, if the judgment has not been stayed or satisfied [*Veh Code § 16373*].

This form is available on the DMV website at http://www.dmv.ca.gov/forms/dl/dl30.htm.

Cross References:

Satisfaction of judgment, see *11.53*.

Form: Certificate of facts, see *11.61*.

11.49[4] Application and Fee Must Be Filed With DMV. After the court has provided a copy of the judgment and completed the portion of Form DL 30 that must be filled out by the court, and the judgment creditor or attorney has made the required certification on the form, the form may be filed with the DMV in Sacramento.

The filing must be accompanied by the required processing fee [*Veh Code § 16370.7* (fee limited to $20 by statute)].

The judgment debtor's license will be suspended on receipt of the application and fee [*see Veh Code § 16370*].

Cross Reference:

Form, see *11.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtGovernmentsCourtsCourt RecordsTransportation LawPrivate VehiclesGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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11.50 Judgment Debtor May Escape Suspension by Filing Affidavit of Insurance.

The judgment debtor may escape the suspension by filing an affidavit of insurance before or after the suspension. The affidavit must state [*Veh Code § 16375*]:

- That at the time of the accident upon which the judgment was rendered, the judgment debtor was insured;
- That the insurer is liable to pay the judgment; and
- The reason, if known, why the insurance company has not paid the judgment.

The judgment debtor also must also file the original or a certified copy of the insurance policy, and any other documents the DMV may require to show that the loss, injury, or damage for which the judgment was rendered, was covered by the policy of insurance [*see Veh Code § 16375*].

If the DMV is satisfied that the insurer was authorized to issue the policy in California at the time of issuing the policy, and that the insurer is liable to pay the judgment, at least to the extent and for the amounts stated in 11.52, the department will not suspend the license, or reinstate it if it had already been suspended [*see Veh Code § 16375*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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11.51 Suspension Remains in Effect Until Judgment Is Paid.

The suspension remains in effect, and no license will be issued to the judgment debtor, until the judgment is satisfied in full or to the extent specified in *11.52*, unless the judgment debtor satisfies the proof of insurance requirements specified in *11.50* [*Veh Code § 16379*]. In addition, the judgment debtor must give the DMV proof of financial responsibility [*Veh Code § 16379*; *see Veh Code § 16430 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageCertificates of InsuranceInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial Responsibility

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Chapter 11 Obtaining and Removing Postjudgment Liens
VIII. SUSPENDING DRIVER'S LICENSE FOR FAILURE TO PAY JUDGMENT

1-11 MB Practice Guide: CA Debt Collection 11.52

11.52 Judgment Is Deemed Satisfied When Specified Amount Is Deposited in Fund.

A judgment is deemed satisfied for purposes of driver's license suspension when [*Veh Code § 16377*]:

- $15,000 is deposited on any single judgment or on all judgments, collectively, which together total in excess of $15,000, for personal injury to or death of one person as a result of any one accident.

- $30,000 is deposited on any single judgment or on all judgments, collectively, which together total in excess of $30,000, for personal injury to or death of more than one person as a result of any one accident.

- $5,000 is deposited on any single judgment in excess of $5,000 or on all judgments, collectively, each of which exceed $750, and which together total in excess of $5,000, for damage to property of others as a result of any one accident.

- The judgment debtor or a person designated by him or her has deposited with the DMV a sum equal to the amount of the unsatisfied judgment for which the suspension action was taken, and presents proof of inability to locate the judgment creditor.

The money must be deposited in a special fund with the state treasurer. It will be made payable to the judgment creditor on presentation of a valid claim establishing that the claimant is the judgment creditor for which the deposit was made and that the judgment remains unsatisfied [*Veh Code § 16378*]. If the deposit remains unclaimed by the judgment creditor for a period of two years following the date of the deposit, it will be refunded to the judgment debtor [*Veh Code § 16378*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 11 Obtaining and Removing Postjudgment Liens
VIII. SUSPENDING DRIVER'S LICENSE FOR FAILURE TO PAY JUDGMENT

1-11 MB Practice Guide: CA Debt Collection 11.53

11.53 Court May Order Payment of Judgment in Installments.

11.53[1] Requirements Must Be Met for Installment Payments. The trial court may order the payment of a judgment in installments only if:

- The defendant is not insured; or

- The insurance policy covering the automobile involved in the accident, for the ownership or operation of which the defendant is held liable, is not sufficient to pay the amount of the judgment, and then only as to the portion of the judgment not covered by the insurance policy.

The order must fix the amounts and times of payment of the installments and be without prejudice to any other legal remedies available to the judgment creditor [*Veh Code § 16380*].

11.53[2] Failure to Pay Installments Results in Suspension. If the court finds that the judgment debtor failed to pay any installment as required by the court order, on the payment of required fees by the judgment creditor, the court must provide notice of the default to the DMV. The DMV must then suspend the driving privilege of the judgment debtor until the judgment is satisfied [*Veh Code § 16381*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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Chapter 11 Obtaining and Removing Postjudgment Liens
VIII. SUSPENDING DRIVER'S LICENSE FOR FAILURE TO PAY JUDGMENT

1-11 MB Practice Guide: CA Debt Collection 11.54

11.54 Privileges May Be Re-Suspended.

After a judgment is satisfied and proof of financial responsibility is given, if another judgment is rendered against the same person for any accident occurring prior to the date of the giving of the proof, and judgment debtor fails to satisfy the latter judgment within 15 days after the latter judgment became final, the DMV must again suspend the driver's license and may not issue any driver's license while the latter judgment remains unsatisfied [*Veh Code § 16374*].

Cross Reference:

Relief from suspension, see *11.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageJudgmentsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License Suspensions

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.55

11.55 Abstract of Judgment--Civil and Small Claims--Judicial Council Form EJ-001.

Abstract of Judgment--Civil and Small Claims--Judicial Council Form EJ-001.

Click here to view image.

NOTES.

Authority:
CCP §§ 674(a), 697.310(a); California Judicial Council Form EJ-001, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*].

Filing and Service:
See *11.07*

Timing:
See *11.22[4]*

Release of Lien on Real Property:
See *11.56*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.56

11.56 Release of Judgment Lien on Real Property.

Release of Judgment Lien on Real Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff	)	NO. _____
vs.	)	RELEASE FROM
_____ [name],	)	JUDGMENT LIEN
Defendant	)	
	)	
	)	

In accordance with *Code of Civil Procedure Section 697.370*, the judgment creditor, Plaintiff John Smith, releases the judgment lien against the property of the judgment debtor, Defendant Mary Jones, as follows:

1. On _____ [*date*] in _____ [*court*] in _____ [*cause and number of action*], a judgment was entered in favor of Plaintiff John Smith, 123 Main Street, Farallon City, California, and against Defendant Mary Jones, 1003 Ocean Avenue, Farallon City, California.

2. The judgment creditor, Plaintiff John Smith, obtained a judgment lien on real property of the judgment debtor by recording an _____ [abstract *or* certified copy] of the judgment in the office of the country recorder in San Francisco County, California, on _____ [*date*], as _____ [*volume and page of records*].

[*ADD, if appropriate*]

3. The judgment was renewed on _____ [*date*] and entered in _____ [*court record*].

[*ADD, if appropriate*]

4. The judgment creditor assigned the judgment to _____ [*assignee's name and address*].

[*CONTINUE*]

RELEASE

[*EITHER*]

In consideration of payment of _____ [*payment received*], the judgment creditor, Plaintiff John Smith, releases from the judgment lien the real property located at _____ [*property location, e.g.,* 456 Oak St., Farallon City, California], and legally described as _____ [*legal description*].

[*OR*]

This is a release from the judgment lien described above of all of the interests in real property in Farallon County, California, presently owned or later acquired by judgment debtor, Defendant Mary Jones, subject to the lien.

[*CONTINUE*]

Dated: _____

_____
[*Signature of judgment creditor, judgment creditor's attorney, or assignee*]

NOTES.

Authority:
CCP §§ 697.370(a), 697.400(a)

Requirements:
See *11.16*

Erroneous Identification:
See *11.17*

Abstract of Judgment:
See *11.55*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.57

11.57 Judgment Lien on Personal Property--Notice and Addendum--Secretary of State Form JL-1.

Judgment Lien on Personal Property--Notice and Addendum--Secretary of State Form JL-1.

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NOTES.

Authority:
CCP §§ 697.510, 697.550

Requirements:
See *11.22*

Notice of Judgment Lien Release:
See *11.58*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.58

11.58 Judgment Lien on Personal Property--Notice of Judgment Lien Release or Subordination--Secretary of State Form JL-3.

Judgment Lien on Personal Property--Notice of Judgment Lien Release or Subordination--Secretary of State Form JL-3.

Click here to view image.

NOTES.

Authority:
CCP § 697.650(b)

Requirements:
See *11.32*

Notice of Judgment Lien on Personal Property:
See *11.57*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensRenewals

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.59

11.59 Judgment Creditor's Lien on Cause of Action of Judgment Notice of Lien: Attachment--Enforcement of Judgment Debtor--Judicial Council Form AT-180/EJ-185.

Judgment Creditor's Lien on Cause of Action of Judgment Notice of Lien: Attachment--Enforcement of Judgment Debtor--Judicial Council Form AT-180/EJ-185.

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NOTES.

Authority:
CCP §§ 697.410, 697.420; California Judicial Council Form EJ-185/AT-180, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Filing:
See *11.38*

Requirements:
See *11.39*

Satisfaction of Lien on Cause of Action:
See *11.60*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.60

11.60 Judgment Creditor's Lien on Cause of Action of Judgment Debtor--Acknowledgment of Satisfaction of Lien.

Judgment Creditor's Lien on Cause of Action of Judgment Debtor--Acknowledgment of Satisfaction of Lien.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff	)	NO. _____
vs.	)	ACKNOWLEDGMENT OF SATISFACTION OF
_____ [name],	)	JUDGMENT LIEN
Defendant	)	
	)	
	)	

In consideration of payment of _____ [*payment received*], the judgment creditor, Plaintiff John Smith, acknowledges the satisfaction of the lien previously created in _____ [*title of court*], in _____ [*cause and number of action*] on _____ [*date*] and releases the judgment debtor, _____ [*name, e.g.,* Defendant, Mary Jones], from all obligations, including principal, costs, and interest, in connection with the lien.

Dated: _____

_____
[*Signature of judgment creditor or judgment creditor's attorney*]

NOTES.

Authority:
CCP § 708.420(g)(3), 708.740

Notice of Lien on Cause of Action:
See *11.59*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 11 Obtaining and Removing Postjudgment Liens
IX. FORMS

1-11 MB Practice Guide: CA Debt Collection 11.61

11.61 Certificate of Facts Re Unsatisfied Judgment--Department of Motor Vehicles Form DL-30.

Certificate of Facts Re Unsatisfied Judgment--Department of Motor Vehicles Form DL-30.

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NOTES.

Authority:
Veh C § 16370

Application Requirements:
See *11.49*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 12 Determining Priority and Sources of Liens

1-12 MB Practice Guide: CA Debt Collection 12.syn

§ 12.syn Synopsis to Chapter 12: Determining Priority and Sources of Liens

12.01 Scope.

12.02 Objective and Strategy.

12.03 CHECKLIST: Determining Priorities Among Liens on Real Property.

12.04 Establishing Priority.
12.04[1] For Judgment Liens, Priority Generally Dates From First Recorded Abstract of Judgment.
12.04[2] For Security Interests, Priority Generally Dates From Time of First Filing or Perfection.

12.05 "First in Time" Rule: Competing Liens Generally Have Priority According to Time of Their Creation.

12.06 Priority Among Competing Judgment Liens Generally Goes to Judgment Recorded First.
12.06[1] First-Recorded Lump Sum Judgment Lien Has Priority Over Other Lump Sum Judgment Liens.
12.06[2] Lump Sum Judgment Lien Has Priority Over Competing Installment Judgment Lien on Installments That Mature After Lump Sum Judgment Lien Is Created.
12.06[3] Earlier Installment Judgment Lien Has Priority Over Later Created Lump Sum Judgment Lien Only on Installments That Mature Before Lump Sum Judgment Lien Is Created.
12.06[4] First-Recorded Installment Judgment Lien Has Priority Over Second-Recorded Installment Judgment on Installments That Have Matured at Time Second Installment Lien Is Created.
12.06[5] Priorities of Competing Installment Judgment Liens on Installments That Have Not Yet Matured Are Determined by Time at Which Each Installment Matures.
12.06[6] When Two Judgment Liens Attach at Same Time to Judgment Debtor's After-Acquired Property, Lien Created First Has Priority on All Amounts Payable on That Judgment When Property Is Acquired.
12.06[7] Party May Agree to Waive or Subordinate Priority.

12.07 Purchase Money Trust Deed or Mortgage Recorded Before Debtor Acquires Real Property Generally Has Priority Over Previously Recorded Judgment Liens.

12.08 Unrecorded Trust Deed or Mortgage Executed and Delivered Before Abstract of Judgment Is Recorded Generally Has Priority.

12.09 Federal Tax Lien Recorded Before Debtor Acquires Real Property Generally Has Priority Over Previously

Recorded Judgment Liens.

12.10 State Tax Lien Is Subordinate to Specified Interests Acquired or Perfected Before State Tax Lien Is Recorded.

12.11 Priority of Competing Tax Liens Is Governed by "First in Time" Rule.

12.12 Priority of Later Lien May Relate Back to Date of Earlier Lien.
12.12[1] Priority of Judgment Lien Created on Property That Is Already Subject to Existing Attachment Lien Under Same Claim Relates Back to Date Attachment Lien Was Created.
12.12[2] Priority of Judgment Lien Created on Property That Is Already Subject to Existing Judgment Lien Under Same Claim Relates Back to Priority Date Earlier Lien Was Created.
12.12[3] Priority of Execution Lien Created on Property That Is Already Subject to Existing Judgment Lien Under Same Claim Relates Back to Date Judgment Lien Was Recorded.
12.12[4] Priorities of Third Parties Established While Earlier Lien Was Still in Effect Under Law Governing Earlier Lien Are Unaffected by "Relation Back" Rule.

12.13 "First in Time" Rule May Be Modified by Equitable Considerations.
12.13[1] Equities of Competing Lienholders Must Be Equal.
12.13[2] Equitable Considerations Include Detrimental Reliance or Unjust Enrichment.
12.13[3] Parties May Agree to Create Equitable Lien on Subsequently Acquired Property.

12.14 CHECKLIST: Determining Priorities Among Liens on Personal Property

12.15 Establishing Priority.
12.15[1] For Judgment Lien, Priority Dates From First Filing Covering Personal Property.
12.15[2] For Security Interests, Priority Generally Dates From Time of First Filing or Perfection, Whichever Is Earlier.
12.15[3] Date of Filing or Perfection for Personal Property Is Also Date of Filing or Perfection for Proceeds.

12.16 "First in Time" Rule: Competing Liens Generally Have Priority According to Time of Their Creation.

12.17 Judgment Lien or Execution Lien Has Priority Over Unperfected Security Interests.

12.18 Judgment Lien Generally Has Priority Over Subsequently Filed Judgment Liens or Other Security Interests.

12.19 Continuation of Judgment Lien on Personal Property Permits Priority From Date of Original Lien.

12.20 Security Interests Perfected Before Judgment Lien Attached Have Priority.

12.21 Purchase Money Security Interest Generally Has Priority Over Previously Filed Judgment Lien.

12.22 Security Interest in Inventory That Has Priority Over Purchase Money Security Interest in Same Property Also Has Priority Over Conflicting Judgment Lien.

12.23 Earlier Filed or Perfected Security Interest Has Priority Over Judgment Lien on Future Advances If Specified Conditions Are Met.

12.24 Blanket Lien on Personal Property Created When Judgment Debtor Is Served With Order of Examination (OEX) Takes Priority Over Liens of Judgment Creditors Obtained After Service of OEX.

12.25 Federal Tax Lien May Trump Prior Perfected Security Interest or Lien.

12.26 State Tax Lien Filed With Secretary of State May Be Subordinate to Specified Security Interests and

Judgment Liens.

12.27 Priority of Competing Tax Liens Is Governed by "First in Time" Rule.

12.28 Child Support Lien May Have Priority Over State Tax Lien.

12.29 CHECKLIST: Determining Priorities of Mechanics' Liens and Design Professionals' Liens

12.30 Mechanics' Liens for Labor and Materials Furnished In Connection With Works of Improvement Generally Have Priority Over Other Liens, Mortgages, or Trust Deeds.

12.31 Mechanics' Liens for Site Improvements Are Generally Preferred Over Any Mortgage, Trust Deed, or Other Encumbrance That Attaches Subsequent to Site Work.

12.32 Mechanics' Liens Have No Priority Until Construction Has Begun.

12.33 Mortgage or Trust Deed That Provides for Advancements for Construction of Improvement Retains Priority Over Mechanics' Liens.

12.34 Design Professionals' Lien Recorded After Encumbrancer's Interest Is Recorded Is Subordinate to That Interest.

12.35 CHECKLIST: Determining Priority of Other Commonly Encountered Liens and Preferences.

12.36 Priority of Liens Against Compensation in Workers' Compensation Cases Is Determined by Appeals Board.

12.37 Preference for Wage Claims Does Not Create Lien on Debtor's Property.

12.38 Stipulation Creating Equitable Lien on Cause of Action.

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Chapter 12 Determining Priority and Sources of Liens
I. STRATEGY

1-12 MB Practice Guide: CA Debt Collection 12.01

12.01 Scope.

This chapter covers:

- Objective and strategy for determining priorities among competing liens [*see 12.02*].
- Determining priorities among competing liens on real property [*see 12.03 -12.13*].
- Preserving priority in liens on real property by obtaining a pre-judgment writ of attachment [*see 12.12[1]*].
- Determining priorities among competing liens on personal property [*see 12.14 -12.28*].
- Determining priorities of mechanics' liens [*see 12.29 -12.33*].
- Determining priorities of design professionals' liens [*see 12.34*].
- Determining preferences for wage claims in the distribution of proceeds resulting from a levy by a nonlabor, secured creditor [*see 12.35*, *12.37*].
- Determining priorities of allowable liens against compensation in workers' compensation cases [*see 12.35*, *12.36*].
- Waiving or subordinating "first in time" priority [*see 12.06[7]*].
- Understanding the equitable considerations that may modify the general first-in-time rule [*see 12.13*, *12.38*].

Core Statutes:
CC §§ 2897 et seq., *3081.9(b)*, *3134 et seq.*; *CCP §§ 697.020*, *697.380*, *697.510*, *697.590*, *697.600*, *1204 et seq.*; *Fam Code § 17523*; *Gov Code §§ 7170*, *7170.5*; *Lab Code § 4903*

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawSecured TransactionsPerfection & PriorityPriorityLiensMechanics' LiensReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien Priorities

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Chapter 12 Determining Priority and Sources of Liens
I. STRATEGY

1-12 MB Practice Guide: CA Debt Collection 12.02

12.02 Objective and Strategy.

The assets of a judgment debtor often are subject to pre-existing liens imposed by other creditors. Real property mortgages, secured outstanding balances on personal property, and tax liens are common examples. Discovering the existence and amount of these liens is a critical step in determining whether or not to seek recovery from those assets, and figuring out what portion of the total value of those assets--if any--might be available to satisfy the judgment creditor. In order to make such a determination, it is important to understand both the potential sources of liens and whether or a particular lien is likely to take precedence over the judgment lien of the judgment creditor. If a particular asset is subject to another lien, and that lien takes priority over the lien of the judgment creditor, there may be no point in seeking to execute against that particular asset, and the judgment creditor may have to look to the judgment debtor's other resources.

Other things being equal, different liens on the same property generally have priority according to the time of their creation [*see CC § 2897*]. Therefore, being "first in time" in filing a prejudgment attachment lien, filing an abstract of judgment to create a judgment lien, or taking the requisite steps to perfect a security interest, secures the priority of the creditor over third persons who may acquire rights in the property between the creation of the lien (or the perfection of the security interest) and the sale of the property [*see Corp. of Am. v. Marks (1937) 10 C2d 218, 220, 73 P2d 1215]* . By being "first in time," the creditor stands the best chance of collecting on the debt secured by the lien, ahead of competing creditors.

Strategic Point:

"Stand alone" complaints to determine priority are rare. The common practice is to bring an action to enforce a lien and, in that action, request an adjudication of priority. For example, plaintiff might file a complaint for judicial foreclosure or quiet title, and in the complaint ask for an adjudication that defendants' liens are subsequent and subordinate to plaintiff's lien or deed of trust.

Examples:

- Complaint by junior lienholders for judicial foreclosure of the encumbered real property and for appointment of a receiver, after amendments were made to a note and the senior deed of trust held by the senior lienholders; cross-complaint brought by senior lienholders for judicial foreclosure of its deed of trust, for declaratory relief regarding the priority of the liens, and injunctive relief to stop plaintiff's

foreclosure action [*Lennar Northeast Partners v. Buice (1996) 49 CA4th 1576, 1581, 57 CR2d 435]* .

- Complaint for judicial foreclosure and declaratory relief to determine whether plaintiff's deed of trust had priority over defendant's deed of trust [*DMC, Inc. v. Downey Sav. & Loan Assn. (2002) 99 CA4th 190, 192, 120 CR2d 761]* .

- Complaint by purchaser of a condominium at a nonjudicial foreclosure sale under an assessment lien, seeking a declaration that the later-recorded assessment lien had priority over the lender's earlier-recorded second deed of trust, and to quiet title [*Thaler v. Household Fin. Corp. (2000) 80 CA4th 1093, 1096, 95 CR2d 779]* .

- Complaint for declaratory relief filed by a foreclosed property owner and a junior lienholders against a judgment creditor who had filed a lien against the property, to determine that their deeds of trust had priority over defendant's judgment lien and to determine distribution of the remaining proceeds of the sale after payment of the first deed of trust [*Smith v. James A. Merrill, Inc. (1998) 64 CA4th 94, 96-98, 75 CR2d 108]* .

Cross References:

For discussion of creating liens on real property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.03* et seq.

For discussion of obtaining judgment liens on personal property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.18* et seq.

For discussion of creating judgment liens on a judgment debtor's pending cause of action, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.34* et seq.

Obtaining attachment, see *California Forms of Pleading and Practice, § 62.30 et seq.* (Matthew Bender).

Creation, perfection, and priorities of security interests, see *California Forms of Pleading and Practice, § 503.20 et seq.* (Matthew Bender).

For tips on updating your case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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Chapter 12 Determining Priority and Sources of Liens
II. DETERMINING PRIORITIES AMONG LIENS ON REAL PROPERTY

1-12 MB Practice Guide: CA Debt Collection 12.03

12.03 CHECKLIST: Determining Priorities Among Liens on Real Property.

☐ Determine dates on which competing liens or other security interests were created:

○ Judgment liens.

Authority:
CCP § 697.380(c)

Discussion:
See *12.04[1]*

Form:
See 12.55

○ Security interests.

Authority:
Com Code §§ 9308-9316

Discussion:
See *12.04[2]*

☐ Determine whether party has waived or subordinated priority.

Authority:
Collins v. Home Sav. & Loan Ass'n (1962) 205 CA2d 86, 95, 22 CR 817

Discussion:
See *12.06[7]*

☐ Determine relative priorities of competing judgment liens, as applicable, absent waiver or subordination:

○ Liens generally.

Authority:
CC § 2897

Discussion:
See *12.05*

○ Lump sum judgment liens.

Authority:
CC § 2897; *CCP § 697.380(a), (c)*

Discussion:
See *12.06[1]*

○ Lump sum judgment lien and installment judgment lien.

Authority:
CCP § 697.380(a), (d)

Discussion:
See *12.06[2], [3]*

○ Installment judgment liens.

Authority:
CCP §§ 697.350(c), 697.380(f)

Discussion:
See *12.06[4], [5]*

○ Judgment liens on after-acquired real property.

Authority:
CCP § 697.380(g)

Discussion:
See *12.06[6]*

☐ Determine relative priorities of other competing interests, absent waiver or subordination:

○ Purchase money trust deed or mortgage recorded before debtor acquires real property judgment and previously recorded judgment lien.

Authority:

CC § 2892(a); *Walley v. P.M.C. Inv. Co. (1968) 262 CA2d 218, 220, 68 CR 711*

Discussion:
See *12.07*

○ Unrecorded trust deed or mortgage executed and delivered before abstract of judgment is recorded.

Authority:
20th *Century Plumbing Co. v. Sfregola (1981) 126 CA3d 851, 854, 179 CR 144*

Discussion:
See *12.08*

○ Federal tax lien recorded before debtor acquires real property and judgment lien.

Authority:
CC § 2892(a); *IRC § 6323(a)*; *IRS v. McDermott (1993) 507 US 447, 453-455, 113 S Ct 1526, 123 L Ed2d 128*

Discussion:
See *12.09*

○ State tax lien and competing interests.

Authority:
Gov Code § 7170(b)

Discussion:
See *12.10*

☐ Determine whether equities of lienholders are equal.

Authority:
Thaler v. Household Fin. Corp. (2000) 80 CA4th 1093, 1099, 95 CR2d 779 ; *Bluxome St. Assocs. v. Fireman's Fund Ins. Co. (1988) 206 CA3d 1149, 1159, 254 CR 198*

Discussion:
See *12.13*

☐ Determine whether priority of later enforcement lien relates back to date of earlier attachment lien on same real property.

Authority:
CCP § 697.020(a)

Discussion:
See *12.12[1]*

☐ Determine whether priority of later enforcement lien relates back to date of earlier enforcement lien on same real

property.

Authority:
CCP § 697.020(b)

Discussion:
See *12.12[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property LawPriorities & RecordingGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesGeneral Overview

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12.04 Establishing Priority.

12.04[1] For Judgment Liens, Priority Generally Dates From First Recorded Abstract of Judgment. For judgment liens, priority generally dates from the first recorded abstract of judgment [*see CC § 2897*; *CCP § 697.380(c)*].

Cross References:

How to create a money judgment lien on real property by filing an abstract of judgment, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.06* et seq.

Form for abstract of judgment, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.55*.

"Relation back" rules, see *12.12*.

Equitable considerations, see *12.13*.

12.04[2] For Security Interests, Priority Generally Dates From Time of First Filing or Perfection. For security interests, priority generally dates from the time of the filing or perfection [*see Com Code §§ 9308-9316*].

Cross Reference:

For discussion of when perfection occurs, see *California Forms of Pleading and Practice, § 503.22* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral OverviewReal Property LawNonmortgage LiensLien Priorities

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12.05 "First in Time" Rule: Competing Liens Generally Have Priority According to Time of Their Creation.

"Other things being equal," competing liens in the same property generally have priority according to the time of their creation [*see CC § 2897*; *Thaler v. Household Fin. Corp. (2000) 80 CA4th 1093, 1099, 95 CR2d 779]* .

Strategic Point--Judgment Creditor:

The first-in-time rule makes it imperative that counsel for a judgment creditor record the abstract lien as soon as possible after judgment is entered. Counsel should establish a failsafe system in his or her practice to ensure that immediate filing of abstracts of judgments has high priority and that retrievable records of the filings are preserved.

Examples:

- A judgment creditor's lien created under *CCP § 708.410* had priority over a second creditor's lien for attorney fees incurred in prosecuting the fraudulent conveyance action and was evidenced by a notice of lien filed in fraudulent conveyance action before the second creditor requested amendment of an order to provide for attorney fees. The "first in time, first in right" rule of *CC § 2897* controlled [*Fleet Credit Corp. v. TML Bus Sales, Inc. (9th Cir 1995) 65 F3d 119, 122]* .

- Contractual liens for attorney's fees and medical costs entered into before initiating legal action had priority over a divorce judgment creditor's lien created by filing notice once the action was pending [*Wujcik v. Wujcik (1994) 21 CA4th 1790, 1793-1794, 27 CR2d 102]* .

However, this "first in time" rule may be modified on the basis of equities [*Bluxome St. Assoc. v. Fireman's Fund Ins. Co. (1988) 206 CA3d 1149, 1159, 254 CR 198]* .

Unless a statute provides otherwise, the priority accorded under *CC § 2897* to the first lien created is not altered by the fact that no notice was given of that lien, while notice was given of a subsequently created lien [*Bluxome St. Assocs. v. Fireman's Fund Ins. Co. (1988) 206 CA3d 1149, 1158, 254 CR 198]* .

Example:

A subsequent attachment lien, for which notice was required by *CCP § 491.410*, was subordinate to a

lien created earlier, for which no notice was given [*Bluxome St. Assocs. v. Fireman's Fund Ins. Co. (1988) 206 CA3d 1149, 1158, 254 CR 198]* .

Cross Reference:

Equitable considerations, see *12.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewReal Property LawPurchase & SaleFraudulent Transfers

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12.06 Priority Among Competing Judgment Liens Generally Goes to Judgment Recorded First.

12.06[1] First-Recorded Lump Sum Judgment Lien Has Priority Over Other Lump Sum Judgment Liens. A lump sum judgment lien created under *CCP § 697.310* by recording the abstract of judgment has priority over any other subsequently created lump sum judgment lien [*CCP § 697.380(a), (c)*].

Strategic Point--Judgment Creditor:

If the judgment creditor has constructed the judgment so that it is fully due and payable, but allows the debtor to satisfy it if, and only if, certain installment payments are made, the judgment creditor avoids the maturity issue, discussed in *12.06[2] -[5]*, of whether partial installment payment on the judgment is prior in time to someone who has crafted a judgment, lump sum or otherwise, to be fully due and payable.

Cross Reference:

Creating judgment liens on real property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.03* et seq.

12.06[2] Lump Sum Judgment Lien Has Priority Over Competing Installment Judgment Lien on Installments That Mature After Lump Sum Judgment Lien Is Created. A lump sum judgment lien has priority over a competing installment lien created under *CCP § 697.320* on installments that mature, interest that accrues, and costs added after creation of the lump sum judgment [*CCP § 697.380(a), (d)*].

Cross Reference:

Creating liens on installment judgments, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.20* et seq.

12.06[3] Earlier Installment Judgment Lien Has Priority Over Later Created Lump Sum Judgment Lien Only on Installments That Mature Before Lump Sum Judgment Lien Is Created. An installment judgment lien has priority over a competing lump sum judgment lien on installments that have matured, plus interest that has accrued, and costs that have been added to the installment judgment before the lump sum lien is created [*CCP § 697.380(e)*].

Cross Reference:

Creating liens on installment judgments, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.20* et seq.

12.06[4] First-Recorded Installment Judgment Lien Has Priority Over Second-Recorded Installment Judgment on Installments That Have Matured at Time Second Installment Lien Is Created. A first-recorded installment judgment has priority over a second-recorded installment judgment lien on installments that have matured at the time the second installment lien is created [*CCP §§ 697.350(c), 697.380(f)*].

Cross Reference:

Creating liens on installment judgments, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.20* et seq.

12.06[5] Priorities of Competing Installment Judgment Liens on Installments That Have Not Yet Matured Are Determined by Time at Which Each Installment Matures. Priorities of competing installment judgment liens on installments that have not yet matured are determined by the time at which each installment matures, the time the interest accrues, and the time costs are added to a judgment under *CCP § 685.010 et seq.* [*CCP § 697.380(f)*].

Cross References:

Creating liens on installment judgments, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.20* et seq.

For discussion of costs, see *California Forms of Pleading and Practice, § 174.10 et seq.* (Matthew Bender).

12.06[6] When Two Judgment Liens Attach at Same Time to Judgment Debtor's After-Acquired Property, Lien Created First Has Priority on All Amounts Payable on That Judgment When Property Is Acquired. When two judgment liens attach at the same time to a judgment debtor's after-acquired property, the judgment lien created first has priority on all amounts due and payable on that judgment when the property was acquired [*CCP §§ 697.340(b), 697.380(g)*].

Cross Reference:

Attachment of judgment liens on after-acquired property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.11.*

12.06[7] Party May Agree to Waive or Subordinate Priority. Although different liens on the same property have priority according to the time of their creation [*CC § 2897*], a party may agree to waive or subordinate priority [*Bratcher v. Buckner (2001) 90 CA4th 1177, 1185, 109 CR2d 534* ; *Collins v. Home Sav. & Loan Ass'n (1962) 205 CA2d 86, 95, 22 CR 817]* .

An agreement to subordinate a mortgage or a deed of trust may also be made subject to particular terms or conditions [*Collins v. Home Sav. & Loan Ass'n (1962) 205 CA2d 86, 95, 22 CR 817]* . However, the priority rights fixed by a subordination agreement are strictly limited by the terms of that agreement [*Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman (1998) 65 CA4th 1469, 1491, 77 CR2d 479]* . A subsequently executed mortgage or deed of trust that does not comply with the terms specified in an automatic subordination clause does not gain priority over the mortgage or trust deed containing the clause [*Miller v. Citizens Sav. & Loan Ass'n (1967) 248 CA2d 655, 663, 56 CR 844* ; *Collins v. Home Sav. & Loan Ass'n (1962) 205 CA2d 86, 95, 22 CR 817]* .

Strategic Point--Judgment Creditor:

When counsel considers a request for subordination, such as when a large investment needs to be made to finish construction or bring something up to code, or when a new lender is coming in, counsel should evaluate whether the investment can markedly improve the judgment creditor's lien position (for example, when the value of the property in its "before" condition does not cover the lien, but the improvement will render the judgment lien fully secured). Even when that position probably will be improved, counsel may consider countering with a demand for monetary compensation to the judgment creditor in exchange for the subordination agreement. Obtaining partial payment of the amount owed reduces the amount subordinated to the new loan and, therefore, the amount of the judgment creditor's interest remaining at risk.

Examples:

- Subordination agreements typically involve a situation in which a seller sells unimproved land to a developer, taking back a trust deed that the seller agrees will be subordinate to a construction loan to be made by another lender to build improvements on the property. The seller is in a very vulnerable position. If the improvements are not built as planned, the property will not increase in value enough to provide adequate security for both the construction loan and the subordinate lien of the original seller. Because of this vulnerability, courts have insisted "that rights of priority under an agreement of subordination extend to and are limited strictly by the express terms and conditions of the agreement" [*Smith v. State Savings & Loan Ass'n (1985) 175 CA3d 1092, 1097, 223 CR 298*].

- Subordination agreement was effective to give lender priority over sellers' deeds of trust because it expressly superseded prior subordination agreements and clearly notified sellers that lender would not supervise the disbursement of funds [Swiss Prop. Mgmt. Co. v. Southern Cal. IBEW-NECA Pension Plan, No. E017501 *(1997) 60 CA4th 839, 847-849, 70 CR2d 587]* .

- *Collins v. Home Sav. & Loan Ass'n (1962) 205 CA2d 86, 22 CR 817* addressed the relative priority of the liens of a purchase-money trust deed held by landowners as sellers and a deed of trust on the same land that was given to the bank as security for money advanced to the borrower (a subdivision builder) for construction purposes. The borrower made a down payment to the seller and fraudulently represented that the balance of the purchase price, to be secured by a purchase money deed of trust, would be subordinated only to a $75,000 "partial construction" loan and other construction loans for house building purposes. When the escrow holder (not a party) realized that the escrow instructions called for construction loan deeds of trust on individual lots, it asked for a new subordinating agreement, which was signed by plaintiff-seller. The trial court properly held that the second subordination agreement was ambiguous, and inferred that "it would be rather incredible" for the landowners to have subordinated the lien of their purchase money deed of trust to those of other tremendously larger liens that would have made the landowners' trust deed of questionable worth [*Collins v. Home Sav. & Loan Ass'n (1962) 205 CA2d 86, 95, 22 CR 817]* .

Cross References:

For discussion of waiver, see *California Forms of Pleading and Practice, § 140.113* (Matthew Bender).

Subordination, see *California Legal Forms, § 25B.10* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsReal Property LawDeedsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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12.07 Purchase Money Trust Deed or Mortgage Recorded Before Debtor Acquires Real Property Generally Has Priority Over Previously Recorded Judgment Liens.

Purchase money trust deeds or mortgages recorded before the debtor acquires the real property generally have priority over previously recorded judgment liens [*see CC § 2898(a)*; *Walley v. P.M.C. Inv. Co. (1968) 262 CA2d 218, 220, 68 CR 711*].

Example:

To secure a loan, the original owners executed and recorded a purchase money deed of trust in favor of the deed of trust holders. A judgment had been entered in favor of a lienholder before the original owners executed the deed. An abstract of the judgment had also been recorded before the loan. A writ of execution was issued under the judgment. At the execution sale, the original owners' interest was sold to the lienholder. The lienholder conveyed his interest to the buyer. The buyer filed an action to quiet title and the deed of trust holders filed a cross-complaint for declaratory relief, alleging that they had a superior interest. The court of appeal held that under *CC § 2898* a purchase money deed of trust had priority over a judgment lien recorded earlier, and therefore, the deed of trust holders were entitled to a judgment in their favor [*Walley v. P.M.C. Inv. Co. (1968) 262 CA2d 218, 220, 68 CR 711*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawDeedsGeneral Overview

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12.08 Unrecorded Trust Deed or Mortgage Executed and Delivered Before Abstract of Judgment Is Recorded Generally Has Priority.

An unrecorded trust deed or mortgage executed and delivered before the abstract of judgment is recorded generally has priority, because the judgment creditor is not a bona fide purchaser for value [20th *Century Plumbing Co. v. Sfregola (1981) 126 CA3d 851, 854, 179 CR 144* ; *Livingston v. Rice (1955) 131 CA2d 1, 2-4, 280 P2d 52] .*

Strategic Point--Judgment Creditor:

When there is such an unrecorded deed, counsel for the judgment creditor should scrutinize it under the Uniform Fraudulent Transfers Act [*CC § 3439 et seq.*] to see if it can be set aside under the circumstances.

Cross Reference:

For discussion of avoiding fraudulent conveyances under the Uniform Fraudulent Transfers Act, see Chapter 4, Fraudulent Conveyances.

Example:

A judgment creditor's claim to the judgment debtor-owner's title was inferior to the deed holder's unrecorded deed of trust because the judgment holder had constructive notice of the deed of trust, and therefore was not a bona fide purchaser [20th *Century Plumbing Co. v. Sfregola (1981) 126 CA3d 851, 854, 179 CR 144] .*

Exception:

The deed holder can be defeated if the judgment creditor became a bona fide purchaser at the execution sale [*see McCune v. McCune (1937) 23 CA2d 295, 297, 72 P2d 883] .*

Cross Reference:

After-acquired title, see *California Forms of Pleading and Practice, § 184.13* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersContracts LawTypes of

ContractsBona Fide PurchasersReal Property LawOwnership & TransferTransfer Not By DeedAcquisition by After-Acquired TitleReal Property LawPurchase & SaleFraudulent Transfers

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12.09 Federal Tax Lien Recorded Before Debtor Acquires Real Property Generally Has Priority Over Previously Recorded Judgment Liens.

A federal tax lien recorded before the debtor acquires real property generally has priority over any previously recorded judgment liens [*see CC § 2898(a)*; *IRC § 6323(a)*; *IRS v. McDermott (1993) 507 US 447, 453-455, 113 S Ct 1526, 123 L Ed2d 128]* .

Prerequisite:

Federal tax liens are not valid against a secured creditor, judgment lien creditor, purchaser, or mechanics' lienor until the IRS files notice of the lien, whether or not the creditor, purchaser, or lienor has actual knowledge of the tax lien [28 USC 6323(a), (f); *Treas Reg § 301.6323(a)-1(a)*; *see United States v. Estate of Romani (1998) 523 US 517, 531-534, 140 L Ed2d 710*].

Example:

Under *IRC § 6323(a)*, the filing of notice by the IRS created the federal tax lien for "first in time" priority purposes, regardless of whether it had yet attached to identifiable property. A strong "first to record" presumption was inappropriate, because the general rule under the tax lien statutes (*IRC §§ 6321*, *6322*) was that the tax collector prevailed even if he or she had not recorded at all. Accordingly, the federal tax lien was given priority [*IRS v. McDermott (1993) 507 US 447, 453-455, 113 S Ct 1526, 123 L Ed2d 128]* .

Warning:

The law dealing with federal tax liens is complex, and beyond the scope of this practice guide. A practitioner confronted with priority issues for competing federal tax liens and security interests in or liens on real property should consult a specialist with practical experience in this area.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Property & Rights Subject to Lien

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12.10 State Tax Lien Is Subordinate to Specified Interests Acquired or Perfected Before State Tax Lien Is Recorded.

A state tax lien is subordinate to the interests of the following persons, if their interests have been acquired or perfected before a notice of state tax lien is recorded in the officer of the county recorder of the county in which the real property is located [*Gov Code § 7170(b)*]:

- A successor in interest of the taxpayer without knowledge of the lien.
- A holder of a security interest.
- A mechanics' lienor.
- A judgment lien creditor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawTaxationState TaxReal Property LawNonmortgage LiensLien PrioritiesTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsTax LiensTax LawState & Local TaxesNatural Resources TaxGeneral Overview

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12.11 Priority of Competing Tax Liens Is Governed by "First in Time" Rule.

For competing state tax liens or a competing state tax lien and federal lien, the lien that first comes into existence has priority over a later lien [*Gov Code § 7170.5*]. This priority is not affected by recording or filing under *Gov Code § 7171* or under *CCP § 2100* (Uniform Federal Lien Registration Act) of a notice of either or both of the liens [*Gov Code § 7170.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)General OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Federal Tax Lien Priority

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12.12 Priority of Later Lien May Relate Back to Date of Earlier Lien.

12.12[1] Priority of Judgment Lien Created on Property That Is Already Subject to Existing Attachment Lien Under Same Claim Relates Back to Date Attachment Lien Was Created. If a judgment lien is created on property that is already subject to an existing attachment lien under the same claim [*see CCP § 481.010 et seq*.], the priority of the later lien relates back to the date the earlier lien was created [*CCP § 697.020(a)*].

Example:

The priority of the title received by an execution sale purchaser relates back to the date the attachment lien was recorded, and the title received by the purchaser at the execution sale is free and clear of any title or lien interest in the property that was recorded after the attachment was recorded, even though the later lien is perfected before the execution sale [*Bank of Am. Nat'l Trust &Sav. Asso. v. Hill (1937) 9 C2d 495, 500-501, 72 P2d 156* ; *Bank of San Francisco v. Pike (1921) 53 CA 524, 527-528, 200 P 752]* .

Strategic Point--Judgment Creditor:

Obtaining priority is an important reason to consider pre-judgment attachment.

Cross References:

Obtaining attachment, see *California Forms of Pleading and Practice, § 62.30 et seq*. (Matthew Bender).

Preserving priority of attachment liens, see *California Forms of Pleading and Practice, § 62.43[2]* (Matthew Bender).

12.12[2] Priority of Judgment Lien Created on Property That Is Already Subject to Existing Judgment Lien Under Same Claim Relates Back to Priority Date Earlier Lien Was Created. If a judgment lien is created on property that is already to subject to an existing judgment lien under the same claim, the priority of the later lien relates back to the date the earlier lien was created [*CCP § 697.020(b)*].

Strategic Point--Judgment Creditor:

In light of this rule, counsel should calendar judgment expiration and renewal dates and obtain renewal of expiring judgments as soon as possible, so that no intervening liens can trump the judgment creditor's lien priority.

Cross References:

Creation of judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

For discussion of renewal of judgment liens on real property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.10[2], [3].*

12.12[3] Priority of Execution Lien Created on Property That Is Already Subject to Existing Judgment Lien Under Same Claim Relates Back to Date Judgment Lien Was Recorded. If an execution lien is created under *CCP § 697.710* by recording a writ of execution, and the real property is subject to a prior judgment lien created by recording an abstract of judgment, the priority of the execution lien relates back to the date the abstract was recorded [*CCP § 697.020*]. In this case, the purchaser at the execution sale receives the same title held by the judgment debtor on the date the judgment lien was recorded [*Carpenter v. Devitt (1942) 49 CA2d 473, 475, 122 P2d 79]* . A title or lien interest created after the judgment lien is recorded, but before the date the writ of execution is recorded, is junior to the title of the execution purchaser, and the purchaser receives title free and clear of the intervening interest [*CCP §§ 697.020*, *701.640*, *701.810*].

Strategic Point--Judgment Creditor:

The relation back of an execution lien to a prior recorded abstract of judgment is important because a judgment creditor who sells (or purchases by way of a credit bill) real property subject to a prior lien created by recording an abstract of judgment will be able to sell (or purchase) the property free and clear of any intervening liens recorded after the abstract [*see CCP §§ 697.020*, *701.640*, *701.810*].

Cross References:

Execution liens, see generally Ch. 17, Executing and Levying Against Real Property.

Execution sales, see generally Ch. 18, Execution Sales.

Enforcement of judgments, see generally Ch. 9, Planning Enforcement of Judgment.

Detailed discussion of execution, see *California Forms of Pleading and Practice, § 254.40 et seq.* (Matthew Bender).

12.12[4] Priorities of Third Parties Established While Earlier Lien Was Still in Effect Under Law Governing Earlier Lien Are Unaffected by "Relation Back" Rule. Priorities of third parties established while the earlier lien was in effect under the law governing the earlier lien are unaffected by *CCP § 697.020* [*CCP § 697.020(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensRenewalsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewReal Property LawTitle QualityGeneral Overview

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12.13 "First in Time" Rule May Be Modified by Equitable Considerations.

12.13[1] Equities of Competing Lienholders Must Be Equal. The "first in time" rule applies only if all other things are equal [*see CC § 2897*]. A judgment creditor's subsequent lien may be held superior on the basis of equities. Therefore, analysis of the priority of liens requires not only a determination of which lien was created first, but also a determination that the equities of the lienholders are equal [*Bluxome St. Associates v. Fireman's Fund Ins. Co. (1988) 206 CA3d 1149*]. Whether interests are equal in equity is determined on a case-by-case basis [*Del Conte Masonry Co. v. Lewis (1971) 16 CA3d 678, 681, 94 CR 439* (construing former *CCP 688.1*, *now see CCP § 708.410 et seq.*)].

Examples:

- A benefit administrator sued a plumbing company for failing to fund the company's employees' benefit plan. The benefit administrator recovered a judgment against the company, making the company a debtor of the benefit administrator, the creditor. The debtor subsequently filed a claim against its own accounting firm and retained a law firm, giving it a contractual lien to proceeds of the accounting litigation. The creditor gave notice to all parties to the pending litigation that the creditor was asserting a judgment lien against any proceeds debtor might obtain. The trial court treated the creditor's judgment lien as having priority over debtor's law firm's contractual lien. The court of appeal disagreed. Public policy and equitable considerations favored giving the attorneys' contractual liens for legal services priority over judgment creditor's liens, because it was the firm's labor, skills, and material that resulted in recovery [*Pangborn Plumbing Corp. v. Carruthers & Skiffington (2002) 97 CA4th 1039, 1050, 119 CR2d 416* ; *see also Gilman v. Dalby (2009) 176 CA4th 606, 98 CR3d 231* (attorney liens held to take priority over earlier in time medical liens)].

- Attorney's contractual liens were held subordinate to adverse party's right to offset a judgment acquired in the same action and based upon the same transaction [*Pou Chen Corporation v. MTS Products (2010) 183 CA4th 188, 107 CR3d 57]* . The court distinguished *Brienza v. Tepper (1995) 35 CA4th 1839, 42 CR2d 690* , in which an attorney's lien was held superior to an offset judgment not entered in the same action when the attorney lien did not entirely defeat the offset (being for a lesser amount) and the offset judgment was purchased at a significant discount since the party against whom the offset was asserted was insolvent.

- First in time rule applied when the secured creditors had perfected their security interests two years before the vendor gave its law firm a lien over any moneys obtained from note proceeds. The law firm knew or should have known, given that the security interests were recorded, that the attorney's fees lien was third in terms of time. No equitable considerations, such as the doctrine of unjust enrichment, applied to change this result. The secured creditors had not asked the vendor's law firm (or the vendor) to prosecute the action, nor had they offered to pay any litigation costs, and their mere acquiescence to the collection action did not make them liable for the vendor's litigation expenses [*Atascadero Factory Outlets, Inc. v. Augustini & Wheeler (2000) 83 CA4th 717, 721-722, 99 CR2d 911]* .

When determining the priority of equitable claims, time of creation is the last element to be considered, and a "claim can predominate by reason of antedating [another] equity only if the two interests are in all other respects equal" [*Del Conte Masonry Co. v. Lewis (1971) 16 CA3d 678, 681, 94 CR 439* (construing former *CCP 688.1, now see CCP § 708.410 et seq.*)].

Example:

Before judgment in a civil action, plaintiff moved for an order determining the priority of specified liens on the anticipated judgment. After one of plaintiff's creditors had moved for an order granting him a lien on the anticipated judgment, but before his motion was heard or granted, plaintiff had entered into a written agreement granting his attorney a lien on the judgment both personally, to secure payment of attorney's fees, and as trustee, to secure payment to specified suppliers to whom plaintiff was indebted. Although the attorney's lien had been created before the creditor's lien, the trial court properly gave priority to the creditor's lien because the creditor had been first to assert his claim [*Del Conte Masonry Co. v. Lewis (1971) 16 CA3d 678, 681, 94 CR 439* (construing former *CCP 688.1, now see CCP § 708.410 et seq.*)].

Although an equitable lien is not judicially recognized until a judgment declares its existence, the lien relates back to the time it was created by the conduct of the parties [*Hise v. Superior Court (1943) 21 C2d 614, 627, 134 P2d 748* ; *Holder v. Williams (1959) 167 CA2d 313, 317, 334 P2d 291]* .

Cross Reference:

For discussion of equitable considerations, see *12.13[2].*

For discussion of equitable liens, see *California Forms of Pleading and Practice, § 342.40 et seq.* (Matthew Bender).

12.13[2] Equitable Considerations Include Detrimental Reliance or Unjust Enrichment. Appropriate considerations on equity include whether one lienholder detrimentally relied on the availability of the property subject to the lien, and whether or not a lienholder's efforts or services resulted in the creation of the fund or property subject to the lien [*Farmers Ins. Exchange v. Zerin (1997) 53 CA4th 445, 455, 61 CR 2d 707* ; *Bluxome St. Assocs. v. Fireman's Fund Ins. Co. (1988) 206 CA3d 1149, 1159, 254 CR 198]* .

Examples:

- An attorney was entitled to the imposition of an equitable lien on the basis of an oral agreement, and a letter to the county, for fees arising from a different matter. The attorney had expended time and effort in representing the contractor in several matters, including negotiating a settlement with the county, which resulted in the payment by the county of the interpleaded amount. In representing the contractor in its negotiations with the county, the attorney relied on his understanding, not disputed by the contractor, that a substantial sum that the contractor owed him was secured by a lien. In continuing to work for the

contractor even while he was not being paid, the attorney acted responsibly and in a manner that merited the application of an equitable remedy--an equitable lien [*County of Los Angeles v. Constr. Laborers Trust Funds for So. California (2006) 137 CA4th 410, 414-416* , 39 CR3d 3d 917].

- "[W]here labor and material suppliers enhance the value of property, justifiably relying upon assurances they will be paid from a construction loan fund, an equitable lien on such fund will be recognized" [*Farmers Ins. Exch. v. Zerin (1997) 53 CA4th 445, 455, 61 CR 2d 707]* .

- When the provider of a service, such as a doctor or lawyer, has entered into a contract for a lien on any recovery his or her efforts may secure, equity and public policy require that lien to have priority [*see, e.g., Cetenko v. United Cal. Bank (1982) 30 C3d 528, 535-536, 179 CR 902, 638 P2d 1299* (lawyers); *Nicoletti v. Lizzoli (1981) 124 CA3d 361, 368, 177 CR 685* (doctors and other medical lienors)].

12.13[3] Parties May Agree to Create Equitable Lien on Subsequently Acquired Property. Parties may agree to create an equitable lien on subsequently acquired property or property not yet in existence [*CC § 2883*; *see Garter v. Metzdorf Associates (1963) 217 CA2d 812, 821, 32 CR 113]* .

Example:

A debtor may grant an equitable lien on a cause of action to creditors such as materialmen [*Del Conte Masonry Co. v. Lewis (1971) 16 CA3d 678, 680, 94 CR 439* (construing former *CCP 688.1*, *now see CCP § 708.410 et seq.*)].

Cross References:

For discussion of considerations in determining when an equitable lien is appropriate, see *12.13[2]*.

Form for stipulation creating equitable lien in cause of action, see *12.38*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawConsiderationEnforcement of PromisesGeneral OverviewContracts LawDebtor & Creditor Relations

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12.14 CHECKLIST: Determining Priorities Among Liens on Personal Property

☐ Determine dates on which competing liens or other security interests were created:

○ Judgment liens.

Authority:
CCP § 697.590(a)(1)(A), (b)

Discussion:
See *12.15[1]*

Form:
See *11.57*

○ Security interests.

Authority:
CCP § 697.590(a)(1)(B), (b)

Discussion:
See *12.15[2]*

○ Proceeds.

Authority:
CCP § 697.590(c)

Discussion:
See *12.15[3]*

☐ Determine relative priorities of competing interests, as applicable:

○ Liens generally.

Authority:
CC § 2897

Discussion:
See *12.16*

○ Judgment lien or execution lien and unperfected security interests or agricultural liens in the same property.

Authority:
CCP § 697.590(b), (c); People v. Green (2004) 125 CA4th 360, 377, 22 CR3d 736

Discussion:
See *12.17*

○ Judgment lien and subsequently filed judgment liens or other security interests.

Authority:
CCP §§ 697.590(b), 697.600(a)

Discussion:
See *12.18, 12.19*

○ Security interests perfected before judgment lien attached.

Authority:
CCP § 697.590(b)

Discussion:
See *12.20*

○ Security interests and previously filed judgment lien.

Authority:
CCP § 697.590(d)

Discussion:
See *12.21*

○ Security interests in inventory and judgment lien.

Authority:
CCP § 697.590(e)

Discussion:

See *12.22*

○ Earlier filed or perfected security interest and judgment lien on optional future advances of additional funds.

Authority:
CCP § 697.590(f)

Discussion:
See *12.23*

○ "Secret" liens created by order of examination and other judicial liens.

Authority:
CCP §§ 708.110(d), 708.120; Kipperman v. Proulx (In re Burns) (9th Cir 2003) 291 BR 846, 852-854

Discussion:
See *12.24*

○ Federal tax lien and prior perfected lien or security interest.

Authority:
IRC § 6323(d)

Discussion:
See *12.25*

○ State tax lien filed with Secretary of State and specified security interests and judgment liens.

Authority:
Gov Code § 7170(c)(2), (5)

Discussion:
See *12.26*

○ Competing state tax liens.

Authority:
Gov Code § 7170.5

Discussion:
See *12.27*

○ State tax lien and federal tax lien.

Authority:
Gov Code § 7170.5

Discussion:
See *12.27*

○ Child support lien and state tax lien.

Authority:
Fam Code § 17523(e), (f)

Discussion:
See *12.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)General Overview

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12.15 Establishing Priority.

12.15[1] For Judgment Lien, Priority Dates From First Filing Covering Personal Property. For judgment liens, priority dates from the first filing covering personal property [*see CCP § 697.590(a)(1)(A), (b)*].

Cross Reference:

Creating money judgment lien on personal property by filing notice of judgment lien, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.20* et seq.

12.15[2] For Security Interests, Priority Generally Dates From Time of First Filing or Perfection, Whichever Is Earlier. For security interests or agricultural liens, priority dates from the first filing covering the personal property, or the time the security interest is perfected, whichever is earlier, provided there is no period thereafter without either filing or perfection [*see CCP § 697.590(a)(1)(B), (b)*].

Cross Reference:

Priority of judgment lien on personal property does not relate back to date of earlier lien, see *12.19*.

12.15[3] Date of Filing or Perfection for Personal Property Is Also Date of Filing or Perfection for Proceeds. For purposes of determining priority, the date of filing or perfection for personal property is also the date of filing or perfection for the property's proceeds [*CCP § 697.590(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsFinancing StatementsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral Overview

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12.16 "First in Time" Rule: Competing Liens Generally Have Priority According to Time of Their Creation.

Subject to perfection requirements, competing liens in the same property generally have priority according to the time of their creation [*see CC § 2897*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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12.17 Judgment Lien or Execution Lien Has Priority Over Unperfected Security Interests.

A judgment lien obtained on personal property by filing a notice of lien with the Secretary of State [*see CCP §§ 697.510(a), 697.530(a)*] has priority over unperfected security interests or agricultural liens in the same property [*CCP § 697.590(b), (c)*; *People v. Green (2004) 125 CA4th 360, 377, 22 CR3d 736]* .

Cross Reference:

Obtaining a judgment lien on personal property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.18* et seq.

Similarly, an execution lien, obtained by levying on personal property of the judgment debtor [*see CCP § 697.710*], has priority over an unperfected security interest [*Com Code, §§ 9102(a)(52), 9317(a)(2)*; see *People v. Green (2004) 125 CA4th 360, 377, 22 CR3d 736]* .

Cross Reference:

Obtaining an execution lien on personal property, see *Ch. 16, Executing and Levying Against Personal Property, 16.46* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral Overview

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12.18 Judgment Lien Generally Has Priority Over Subsequently Filed Judgment Liens or Other Security Interests.

A judgment lien on personal property generally has priority over subsequently filed judgment liens, other security interests, or agricultural liens [*CCP §§ 697.590(b), 697.600(a)*].

Distinguish:

If two or more judgment liens attach to after-acquired property at the same time under *CCP § 697.530(b)*, the judgment lien first filed has priority [*CCP § 697.600(a)*].

Cross Reference:

Creating a judgment lien on personal property, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.20* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsAttachment of Security InterestsAfter-Acquired Property & Future AdvancesContracts LawSecured TransactionsPerfection & PriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsFinancing StatementsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral Overview

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12.19 Continuation of Judgment Lien on Personal Property Permits Priority From Date of Original Lien.

A judgment lien on personal property can be continued by filing a continuation statement during the period six months prior to the expiration of the lien [*CCP § 697.510(c),(d)*].

Priorities of third parties established while the earlier lien was in effect under the law governing the earlier lien are unaffected by *CCP § 697.020* [*CCP § 697.020(c)*].

Examples:

- If an earlier judgment lien on personal property was subject to the priority of a later purchase money security interest [*see CCP § 697.590*], a later execution lien on the same property is subject to the earlier established priority [Legislative Committee Comment, *CCP § 697.020(c)*].

- If the earlier judgment lien on personal property is no longer in existence at the time of execution because it was terminated by the transfer of the property subject to the judgment lien to a buyer in the ordinary course of business [*see CCP § 697.610*], the relation back doctrine of *CCP § 697.020* does not apply [Legislative Committee Comment, *CCP § 697.020(c)*].

- A transfer by a defendant in violation of a temporary protective order under the Attachment Law [*see CCP § 481.010 et seq.*] to a good faith purchaser terminates the lien created by the temporary protective order [*see CCP § 486.110*] and the relation back doctrine does not apply [Legislative Committee Comment, *CCP § 697.020(c)*].

Cross Reference:

Relation back of subsequently filed security interest, see *12.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesPurchase-Money Security InterestsContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral Overview

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12.20 Security Interests Perfected Before Judgment Lien Attached Have Priority.

Security interests in personal property or agricultural liens that are perfected, either by filing a UCC financing statement or otherwise, before the notice of judgment lien was filed have priority [*see CCP § 697.590(b)*].

Example:

Former wife's perfected security interest in stock owned by her former husband, based on an award in a dissolution judgment, took priority over the later judgment lien of her former husband's creditor [*In re Marriage of Braendle (1996) 46 CA4th 1037, 1043-1045, 54 CR2d 397]* .

Warning:

A child support lien under *Fam Code § 17523* is also subordinate to security interests that were perfected before lien attached [*see Fam Code § 17523(d)(2)*].

Cross Reference:

Creation, perfection, and priorities of security interests, see *California Forms of Pleading and Practice, § 503.20 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensFamily LawChild SupportObligationsEnforcementLiens

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12.21 Purchase Money Security Interest Generally Has Priority Over Previously Filed Judgment Lien.

A purchase money security interest perfected when the debtor receives possession of personal property or within 20 days thereafter has priority over a previously filed judgment lien on the same personal property [*CCP § 697.590(d)*].

Cross References:

For discussion of creation, perfection, and priorities of security interests, see *California Forms of Pleading and Practice, § 503.20 et seq*. (Matthew Bender).

For detailed discussion of priority of purchase money security interests, see *California Legal Forms, § 42.15[9]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsFinancing StatementsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesPurchase-Money Security InterestsContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesGeneral Overview

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12.22 Security Interest in Inventory That Has Priority Over Purchase Money Security Interest in Same Property Also Has Priority Over Conflicting Judgment Lien.

If a purchase money security interest [*see Com Code § 9103*] applies to inventory, any conflicting security interest that has priority over a purchase money security interest in the same inventory under *Com Code § 9324* also has priority over a judgment lien on personal property [*CCP § 697.590(e)*].

Example:

CCP § 697.590(e) avoids the following circular priority problem. A secured party (SP #1) with a perfected security interest in after-acquired inventory has priority over a secured party (SP #2) with a purchase money security interest in the inventory (because, for example, SP #2 failed to take a step necessary under former *Com Code § 9312(3)* (now *Com Code § 9324*) to obtain priority over SP #1). In this situation, a creditor who filed a notice of judgment lien before SP #1 filed a financing statement would have priority over SP #1 under *CCP § 697.590(b)*. The judgment lien would not have priority over SP #2, however, if SP #2 filed within 10 days after the debtor received possession of the inventory, even though SP #1 has priority over SP #2 [*see CCP § 697.590(d)*]. To resolve this problem, under *CCP § 697.590(e)*, the judgment lien creditor is demoted to last place after SP #2 even though the judgment lien creditor would normally have priority over SP #1 under *CCP § 697.590(e)* [Law Revision Commission Comment to *CCP § 697.590(e)*].

Cross References:

For discussion of priorities of judgment lien and conflicting security interest under *CCP § 697.590(b)*, see *12.18*, *12.20*.

For discussion of priorities of purchase money security interest and conflicting judgment lien under *CCP § 697.590(d)*, see *12.21*.

For detailed discussion of priority of purchase money security interests under *Com Code § 9324*, see *California Legal Forms, § 42.15[9]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsGeneral

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12.23 Earlier Filed or Perfected Security Interest Has Priority Over Judgment Lien on Future Advances If Specified Conditions Are Met.

An earlier filed or perfected purchase money security interest has priority over a judgment lien on optional future advances of additional funds only if the advances are made [*CCP § 697.590(f)*]:

- Before or within 45 days after the judgment lien attached;
- Without knowledge of the judgment lien; or
- In accordance with a commitment entered into without knowledge of the judgment lien.

A secured party has "knowledge" of the judgment lien if [*CCP § 697.590(f)*]:

- The judgment creditor has served the secured party with a copy of the notice of judgment lien; and
- The secured party has actual knowledge of the judgment lien [*see Com Code § 1202(b)*].

Under *Com Code § 1202(b)*, a person "knows" or has "knowledge" of a fact when the person has actual knowledge of it.

If none of these requirements is met, the judgment lien has priority over future advances made under the security interest [*CCP § 697.590(f)*].

Cross Reference:

For discussion of purchase money security interests in after-acquired property, see *California Legal Forms, § 42.15[5], [9]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsAttachment of Security InterestsAfter-Acquired Property & Future AdvancesContracts LawSecured TransactionsPerfection & PriorityGeneral Overview

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12.24 Blanket Lien on Personal Property Created When Judgment Debtor Is Served With Order of Examination (OEX) Takes Priority Over Liens of Judgment Creditors Obtained After Service of OEX.

A lien is created on all of the debtor's nonexempt personal property when the debtor is served with an order to appear for a debtor's examination [*CCP § 708.110(d)*]. A lien also is created on the debtor's personal property in the hands of a third party when the third party is served with notice to appear for an examination [*CCP § 708.120*]. These two liens, referred to as "OEX" or "ORAP" liens, are senior to priority creditors in bankruptcy and superior to the rights of the bankruptcy trustee [*So. Cal. Bank v. Zimmerman (In re Hilde) (1997) 120 F3d 950, 956]* . Courts have characterized the liens as "secret," because other creditors and a bankruptcy trustee will not know whether a judgment creditor has served an order for examination or appearance of a judgment debtor, creating such a lien [*So. Cal. Bank v. Zimmerman (In re Hilde) (1997) 120 F3d 950, 956* ; *see Kipperman v. Proulx (In re Burns) (9th Cir 2003) 291 BR 846, 862-854]* .

Example:

Debtors filed for bankruptcy. When the trustee sold items belonging to the debtor, plaintiff bank demanded payment of the proceeds. After plaintiff obtained its judgment, it had filed an order to appear for a debtor's examination. Under *CCP § 708.110*, an ORAP lien was created simply by service on the debtor. This lien had priority over the claim of defendant trustee in a bankruptcy proceeding, because the bankruptcy proceeding was filed more than 90 days after the ORAP lien was created. Given that the ORAP lien covered all of the debtor's nonexempt personal property, defendant could not avoid plaintiff's lien [*So. Cal. Bank v. Zimmerman (In re Hilde) (1997) 120 F3d 950, 956]* .

Cross Reference:

For discussion of examination of judgment debtor or third parties, see *Ch. 10, Postjudgment Discovery, 10.25* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawCase AdministrationExaminations of Debtors

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12.25 Federal Tax Lien May Trump Prior Perfected Security Interest or Lien.

There is a "45-day rule" after which a federal tax lien may trump a prior perfected lien or security interest in personal property [*see IRC § 6323(d)*]. Under this "catch all exception," a lender's security interest takes priority over a filed federal tax lien during the 45-day window after the tax lien is filed, if:

- The interest secures [*Treas Reg § 301.6323(d)-1(a)*]:
  - Credit extended under a written agreement entered into before the tax lien is filed; and
  - Credit extended any time before the 46th day after the tax lien is filed;
- In a case when credit is extended after the tax lien filing, the lender does not have actual notice or knowledge of the tax lien [*see Treas Reg § 301.6323(d)-1(a)*]; and
- The credit extended is protected under local law against a judgment lien arising, as of the time of the tax lien filing, out of an unsecured obligation [*IRC § 6323(d)(2)*].

Strategic Point:

Tax lien preemptions most commonly occur when the collateral is changing in nature, i.e., it consists of inventory that is going in and out and accounts receivable that are constantly being created and paid.

Consider:

The law dealing with federal tax liens is complex, and beyond the scope of this practice guide. An attorney confronted with priority issue for competing federal tax liens and other security interests in or liens on personal property should consult a specialist with expertise in this area.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPerfectionGeneral OverviewContracts LawSecured

TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesCredits, Overassessments & Refunds (IRC secs. 6401-6427)General Overview

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12.26 State Tax Lien Filed With Secretary of State May Be Subordinate to Specified Security Interests and Judgment Liens.

A state tax lien is not valid over personal property against [*Gov Code § 7170(c)(2), (5)*]:

- Any person (other than the taxpayer) who acquires an interest in the property under California law without knowledge of the lien or who perfects an interest in accordance with California law before the notice of state tax lien is filed.

- A judgment lien creditor whose lien was created by the filing of a notice of judgment lien on personal property with the Secretary of State before the notice of state tax lien is filed.

- Additional holders of security interests filed or perfected under Commercial Code that may trump the state's tax lien [*see Gov Code § 7170(c)(1), (3), (4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of SaleCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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12.27 Priority of Competing Tax Liens Is Governed by "First in Time" Rule.

For competing state tax liens or a competing state tax lien and federal tax lien, the lien that first comes into existence has priority over a later lien. This priority is not affected by the recording or filing under *Gov Code § 7171* or under *CCP § 2100* (Uniform Federal Lien Registration Act) of a notice of either or both of the liens [Gov Code § 7171.5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)General OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Federal Tax Lien Priority

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12.28 Child Support Lien May Have Priority Over State Tax Lien.

A child support lien on personal property has priority over a state tax lien if [*see Fam Code § 17523(e), (f)*]:

- The child support lien is filed with the Secretary of State;
- The notice of child support lien is filed in a proceeding in which the obligor may become entitled to property or money judgment; or
- The levy for child support on personal property is made before the notice of state tax lien is filed.

Cross Reference:

Child support lien is subordinate to security interests that were perfected before lien attached, see *12.20* [*see Fam Code § 17523(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementLiensFamily LawChild SupportTaxation

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Chapter 12 Determining Priority and Sources of Liens
IV. DETERMINING PRIORITIES OF MECHANICS' LIENS AND DESIGN PROFESSIONALS' LIENS

1-12 MB Practice Guide: CA Debt Collection 12.29

12.29 CHECKLIST: Determining Priorities of Mechanics' Liens and Design Professionals' Liens

☐ Determine whether mechanics' lien has attached.

Authority:
CC § 3135; *Walker v. Lytton Sav. & Loan Asso. (1970) 2 C3d 152, 156-157, 84 CR 521, 465 P2d 497* ; *D'Orsay Int'l Partners v. Superior Court (2004) 123 CA4th 836, 844, 20 CR3d 399*

Discussion:
See *12.32*

☐ Determine priorities of different types of mechanics' liens and competing liens, mortgages, or deeds of trust:

○ Non-site improvement liens.

Authority:
CC §§ 3110-3111, 3134

Discussion:
See *12.30*

○ Site improvement liens.

Authority:
CC §§ 3112, 3137

Discussion:
See *12.31*

☐ Determine priorities of design professionals' liens and competing interest of purchaser, lessee, or encumbrancer in real property.

Authority:
CC § 3081.9(b)

Discussion:
See *12.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensMechanics' LiensReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien Priorities

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12.30 Mechanics' Liens for Labor and Materials Furnished In Connection With Works of Improvement Generally Have Priority Over Other Liens, Mortgages, or Trust Deeds.

Unless a holder of a mortgage or deed of trust procures a payment bond [*see CC § 3138*], all mechanics' liens other than site improvement liens are preferred to any lien, mortgage, deed of trust, or other encumbrance on the work of improvement and the site that attaches subsequent to the work's commencement [*CC § 3134*]. These liens are sometimes referred to as nonsite improvement liens and are granted to persons who have furnished labor or materials in connection with works of improvement [*see CC §§ 3110-3111*]. Nonsite improvement liens also are preferred to any lien, mortgage, deed of trust, or other encumbrance of which the claimant had no notice and that was unrecorded when the work of improvement began [*CC § 3134*].

Cross References:

For discussion of site improvement liens, see *12.31*.

Types of mechanics' liens, see *California Forms of Pleading and Practice, § 361.23* (Matthew Bender).

For discussion, checklists, and forms for perfection and foreclosure of mechanics' liens, see *California Forms of Pleading and Practice, §§ 361.31*, *361.161*, *361.192* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensMechanics' LiensReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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12.31 Mechanics' Liens for Site Improvements Are Generally Preferred Over Any Mortgage, Trust Deed, or Other Encumbrance That Attaches Subsequent to Site Work.

Unless the owner or holder of any mortgage or deed of trust procures a payment bond as provided in *CC § 3139*, site improvement liens [*see CC § 3112*] are preferred over [*CC § 3137*]:

- Any mortgage, deed of trust, or other encumbrance that attaches subsequent to the time the site improvement work begins.

- Any mortgage, deed of trust, or other encumbrance of which the claimant had no notice and that was unrecorded at the time of the site improvement work begins.

- Any mortgage, deed of trust, or other encumbrance recorded before the site improvement work begins, given for the sole or primary purpose of financing the site improvements. This rule does not apply, however, if the loan proceeds are, in good faith, placed in the lender's control under a binding agreement with the borrower to the effect that the proceeds are to be applied to the payment of claims and that no portion of the proceeds will be paid to the borrower, absent satisfactory evidence that all claims have been paid or that the time for recording claims of liens has expired and no claims have been recorded.

Example:

After a construction company installed site improvements at a subdivision and was not paid for the work, it brought an action against the developer, a bank, and others for breach of contract and to foreclose on a mechanics' lien. Plaintiff settled with the developer before trial. The court of appeal held that plaintiff's mechanics' lien took priority over the bank's prior recorded deed of trust under *CC § 3137*. The bank did not have a binding construction loan agreement for site improvements within the meaning of *CC § 3137* that would have given the bank's construction deed of trust priority over plaintiff's mechanics' lien, because the bank's form construction loan agreement contained no reference to site improvements. Also absent was any reference to the *CC § 3139* payment bond [*Schmitt v. Tri Counties Bank (1999) 70 CA4th 1234, 1240-1245, 83 CR2d 257]* .

Cross Reference:

Types of mechanics' liens, see *California Forms of Pleading and Practice, § 361.23* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensMechanics' LiensContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien Priorities

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12.32 Mechanics' Liens Have No Priority Until Construction Has Begun.

To establish priority, the mechanics' lien must attach. A mechanics' lien does not attach "unless and until construction has been undertaken by the doing of actual visible work on the land or the delivery of construction materials thereto" [*D'Orsay Int'l Partners v. Superior Court (2004) 123 CA4th 836, 844, 20 CR3d 399* , quoting *Walker v. Lytton Sav. & Loan Asso. (1970) 2 C3d 152, 156-157, 84 CR 521, 465 P2d 497*]. This rule applies to both mechanics' liens for labor and materials for works of improvement and for site improvement [*see Walker v. Lytton Sav. & Loan Asso. (1970) 2 C3d 152, 156-158, 84 CR 521, 465 P2d 497*].

Warning:

Advances made by a bondholder to complete construction may trump other liens, such as those of a financing creditor of the construction company whose bond comes into effect. In those circumstances, the bondholder takes priority on payments made on the work performed to the extent that it has advanced funds on the bond ahead of a recorded lien creditor.

Examples:

- Plaintiff architects--who completed drawings, plans and specifications for a 42-unit apartment building and later for a 67-unit structure--could not foreclose on their mechanics' lien. Although demolition and excavation were performed, no building was built. Because plaintiffs' lien could not attach until construction materials were delivered or visible construction was begun, defendant lender's deed of trust had priority [*Walker v. Lytton Sav. & Loan Asso. (1970) 2 C3d 152, 159, 84 CR 521, 465 P2d 497* (decided under former CCP § 1188.1, *now see CC § 3134*)].

- A general contractor who performed design-related services for a proposed hotel/commercial development could not record a mechanics' lien against the property because no construction had ever begun on project [*D'Orsay Int'l Partners v. Superior Court (2004) 123 CA4th 836, 844, 20 CR3d 399]* .

If a contract for a site improvement is provided for separately from a contract to build residential units or other structures on the site, the date on which any lien attaches to work or materials furnished in connection with a site improvement is separate from the date on which any lien attaches in connection with an erection of a unit or structure [*see CC § 3135*].

Strategic Point--Judgment Creditor:

In *Walker v. Lytton Sav. & Loan Asso. (1970) 2 C3d 152, 159, 84 CR 521, 465 P2d 497* , the Supreme Court held that the architects' lien did not attach "before any work had been done on the owners' property or materials delivered thereto for a planned improvement." The Court considered delivery of material to be sufficient to constitute the "commencement" of the work of improvement. This is significant because no matter when any given mechanics' lien comes into existence, it "relates back" to the "commencement" of the work of improvement [*CC § 3134*; *Connolly Development, Inc. v. Superior Court (1976) 17 C3d 803, 808, 132 CR 477, 553 P2d 637]* .

Cross Reference:

California Mechanic's Lien Law and Construction Industry Practice, § 4.157 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsPerfection & PriorityPriorityLiensMechanics' LiensReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien Priorities

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12.33 Mortgage or Trust Deed That Provides for Advancements for Construction of Improvement Retains Priority Over Mechanics' Liens.

When a loan agreement secured by a mortgage or deed of trust recorded before a work of improvement on the secured property begins provides for obligatory advancements to be made for the construction of the improvement, the mortgage or deed of trust for the advances retains priority over mechanics' liens, even though the advances are made after the improvement was begun [*Hayward Lumber & Inv. Co. v. Corbett (1934) 138 CA 644, 648, 33 P2d 41]* . The mortgage or deed of trust also retains its priority for nonobligatory advances when they are used in payment of any claim of lien recorded at the date or dates of the advances and thereafter as payment for costs of the work of improvement [*CC § 3136*].

Cross References:

Advancements from secured lenders, see *California Forms of Pleading and Practice, § 361.29[4]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensMechanics' LiensContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral Overview

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12.34 Design Professionals' Lien Recorded After Encumbrancer's Interest Is Recorded Is Subordinate to That Interest.

A design professionals' lien (for professional architectural, engineering, or surveying services rendered prior to construction [*see CC §§ 3081.2*, *3081.10*]) recorded after the interest of a purchaser, lessee, or encumbrancer in the real property is recorded does not affect or take priority over the earlier recorded interest [*CC § 3081.9(a)*]. The lien also does not affect or take priority over an encumbrance of a construction lender that funds the loan to begin the work of improvement for which the design professional furnished services at the landowner's request [*CC § 3081.9(b)*].

Cross References:

For discussion of the amount of lien and the procedure for obtaining lien, see *California Forms of Pleading and Practice, § 361.24* (Matthew Bender).

For lien claim forms, see *California Forms of Pleading and Practice, §§ 361.192 -361.194* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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12.35 CHECKLIST: Determining Priority of Other Commonly Encountered Liens and Preferences.

☐ Determine priorities of allowable liens against any compensation in workers' compensation cases:

Authority:
Lab Code § 4903

Discussion:
See *12.36*

☐ Determine whether preference for wage claims under *CCP § 1206* exists.

Authority:
CCP § 1206

Discussion:
See *12.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral Overview

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12.36 Priority of Liens Against Compensation in Workers' Compensation Cases Is Determined by Appeals Board.

Priority of allowable liens against compensation in workers' compensation cases is determined by the appeals board [*Lab Code § 4903*].

Allowable liens include those for [*Lab Code § 4903*]:

- Reasonable attorney's fees for legal services pertaining to any claim for compensation either before the appeals board or before any of the appellate courts.

- Reasonable expense incurred by or on behalf of the injured, to the extent the employee is entitled to reimbursement under *Lab Code § 4621*.

- Reasonable value of the living expenses of an injured employee or of his or her dependents, subsequent to the injury.

- Reasonable burial expenses of the deceased employee.

- Reasonable living expenses of the spouse and/or minor children of the injured employee, subsequent to the date of the injury, if the employee has deserted or is neglecting his or her family.

- Amount of unemployment compensation disability benefits, under conditions specified in *Lab Code § 4904*.

- Amount of family temporary disability insurance benefits that have been paid to the injured employee at the same time that employee receives, or is entitled to receive, temporary total disability indemnity payments.

- Amount of indemnification under California Victims of Crime Program [*Gov Code § 13959 et seq*.].

- Amount of compensation, including expenses of medical treatment, and recoverable costs that have been paid by the Asbestos Workers' Account [*Lab Code § 4401 et seq*.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationClaim Procedures

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V. DETERMINING PRIORITY OF OTHER COMMONLY ENCOUNTERED LIENS AND PREFERENCES

1-12 MB Practice Guide: CA Debt Collection 12.37

12.37 Preference for Wage Claims Does Not Create Lien on Debtor's Property.

Although often mistaken for liens on property, the preference for wage claims under *CCP § 1206* provides a preferred claim--it does not create a lien on the debtor's property [*see Winrod v. Wolters (1903) 141 C 399, 402, 74 P 1037]* .

If a non-labor, secured creditor obtains a levy of attachment or execution, a person who has claims against the defendant for work or personal services performed within 90 days before the levy has a preferred claim of up to $900 for each claim, unless the levy is disputed by the procedures outlined in *CCP § 1207* [*CCP § 1206*]. This preference is not available if the original levy is founded on a labor claim [*Levitt v. Faber (1937) 20 CA2d Supp 758, 762-764, 64 P2d 498]* .

Example:

The claimant rendered services to the debtor, soliciting interior decorating work, for which the debtor agreed to pay a commission. The claimant sued to recover his commissions, and the trial court found that his claim was not covered by *CCP § 1206*, and therefore was inferior to the lienholders' claims. On appeal, the court held that the word "labor" in *CCP § 1206* was not limited to the dictionary definition of "bodily exertion or physical toil," but included services such as those rendered by the claimant. In light of this interpretation, the claimant's levy of attachment took priority over the lienholders' *CCP § 1206* claim for labor performed within 90 days of the levy of attachment [*Levitt v. Faber (1937) 20 CA2d Supp 758, 762-764, 64 P2d 498]* .

Worker's compensation claims have the same preference. This preference is for the entire amount of the compensation to be paid [*see Lab Code § 4908*].

Cross References:

For discussion of dispute of claims, see *California Forms of Pleading and Practice, § 342.62 et seq*. (Matthew Bender).

For forms and discussion of their use for an unpaid wage claimant to obtain priority on a wage claim, see *California Forms of Pleading and Practice, § 342.200 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewEvidenceDocumentary EvidenceBest Evidence RuleGovernmentsState & Territorial GovernmentsClaims By & AgainstWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsClaim Periods

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Chapter 12 Determining Priority and Sources of Liens
VI. FORM

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12.38 Stipulation Creating Equitable Lien on Cause of Action.

Stipulation Creating Equitable Lien on Cause of Action.
_____ [*attorney's name*]
_____ [*street address*]
_____ [*city, state, and zip*]
_____ [*area code and phone number*]
_____ [*attorney's state bar number*]
Attorney for _____ [*party's name*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name of plaintiff*],	)	
Plaintiff,	)	
vs.	)	Case No. _____
_____[*name of defendant*],	)	[STIPULATION]
Defendant.	)	
	)	
	)	

_____

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

STIPULATION FOR FIRST LIEN AGAINST RECOVERY IN CAUSE OF ACTION

It is hereby stipulated by and between plaintiff above-named and _____ [*name of lien claimant*] through their respective attorneys that _____ [*name of lien claimant*] may have a first lien in the sum of $ _____ [*amount of lien*] against any judgment recovered by plaintiff in the above-entitled action or against any recovery by way of settlement in the above-entitled action.

The lien of _____ [*name of lien claimant*] is based on _____ [*state reasons for lien,*

e.g., the value of medical services furnished plaintiff].

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff
_____ [*signature*]
Attorney for Lien Claimant

NOTES.

Authority:

CC § 2883; *Del Conte Masonry Co. v. Lewis (1971) 16 CA3d 678, 680, 94 CR 439* (construing former *CCP 688.1*, *now see CCP § 708.410 et seq*.)

Cross Reference:

See *12.13[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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Chapter 13 Expiration and Renewal of Judgments

1-13 MB Practice Guide: CA Debt Collection 13.syn

§ 13.syn Synopsis to Chapter 13: Expiration and Renewal of Judgments

13.01 Scope.

13.02 Objective and Strategy.

13.03 CHECKLIST: Determining Time Restrictions on Enforcement of Judgments.
13.03[1] Checklist for Judgment Creditor.
13.03[2] Checklist for Judgment Debtor.

13.04 Judgment Is Enforceable for 10 Years.
13.04[1] Judgment May Not Be Enforced After 10 Years.
13.04[2] Rule Applies to All Judgments, With Limited Exceptions.
13.04[3] Period Commences on Date Clerk Enters Judgment.
13.04[4] Ten-Year Period Is Not Extended or Tolled.
13.04[5] Ten-Year Period Runs From Date Each Installment Becomes Due.
13.04[6] Affidavit Required With Application to Enforce Judgment More Than 10 Years Old.

13.05 Judgment May Be Renewed.

13.06 Party Seeking Renewal Must File Application for Renewal.
13.06[1] Time for Filing.
13.06[1][a] Renewal Application Must Be Filed Before Expiration of 10-Year Period or Judgment Becomes Unenforceable.
13.06[1][b] Application for Renewal of Past Due Installments Under Installment Judgment Not Previously Renewed Must Be Filed Before 10-Year Period Expires as to Those Installments.
13.06[1][c] Application for Renewal of Installment Judgment Previously Renewed Must Be Filed Within 10 Years of Previous Renewal.
13.06[1][d] Application to Renew Amended Judgment Must Be Filed Within 10 Years of Entry of Amended Judgment.
13.06[1][e] Application to Renew Deficiency Judgment Must Be Filed Within 10 Years of Entry of Deficiency Judgment.
13.06[1][f] Judgment May Be Renewed While Appeal Is Pending.
13.06[2] Application Must Include Specified Information.

13.06[3] Judicial Council Form May Be Used.
13.06[4] Application Must Be Filed in Court Where Judgment Was Entered.
13.06[5] Filing Renews Judgment for Another 10 Years.

13.07 Renewed Installment Judgment Is Treated as Lump Sum.

13.08 Clerk Must Enter Renewal in Court Records.
13.08[1] Record Must Show Amount of Money Judgment.
13.08[2] Calculation of Amount of Installment Judgment.
13.08[2][a] Amount of Installment Judgment Not Previously Renewed Includes Past Due Installments, Costs, Interest, and Application Fee.
13.08[2][b] Amount of Installment Judgment Previously Renewed Includes Amount of Judgment as Renewed, Subsequent Past Due Installments, Costs, Interest, and Application Fee.
13.08[3] Renewal of Judgment for Possession or Sale of Property Must Describe Remaining Performance Due.

13.09 Notice of Renewal of Judgment Must Be Given.
13.09[1] Notice Must Be Filed and Served.
13.09[2] Notice Must Inform Judgment Debtor of Renewal Period.
13.09[3] Judicial Council Form Must Be Used.

13.10 Renewal Extends Duration of Judgment Liens.
13.10[1] Judgment Liens on Real Property.
13.10[1][a] Judgment Lien Generally Is Extended for 10 Years.
13.10[1][b] Lien on Transferred Real Property Is Not Extended Unless Application Is Served on Transferee.
13.10[2] Renewal Extends Other Liens for 10 Years.

13.11 Effect of Renewal on Enforcement Proceedings.
13.11[1] Enforcement Proceedings May Be Continued.
13.11[2] Judgment May Be Renewed During Stay of Enforcement.
13.11[3] Renewal Commences Limitation Period.

13.12 Renewal May Be Vacated.
13.12[1] Renewal May Be Vacated on Any Ground That Would Be Defense to Action on Judgment.
13.12[2] Judgment Debtor Bears Burden of Proof.
13.12[3] Application for Order to Vacate Is Made by Noticed Motion.
13.12[4] Court May Vacate Renewal or Enter Different Renewal.
13.12[5] Order Denying Motion to Vacate Renewal Is Appealable.

13.13 Exclusions From 10-Year Limit on Enforcement of Judgments.
13.13[1] Judgment Under Family Code Is Excluded.
13.13[2] Money Judgment Against Public Entity Is Excluded.

13.14 Judgment Creditor May Bring Action on Judgment After 10 Years If Statute of Limitations Has Not Run.

13.15 Judgment That Is No Longer Enforceable May Be Used As Offset.

13.16 Declaration in Support of Application for Writ of Enforcement of Judgment.

13.17 Application for Renewal of Judgment--Judicial Council Form EJ-190.

13.18 Notice of Renewal of Judgment--Judicial Council Form EJ-195.

13.19 Notice of Motion for Order Vacating Renewal of Judgment.

13.20 Complaint on Judgment by Judgment Creditor Against Out-of-State Judgment Debtor After 10-Year Period When Statute of Limitations Has Not Yet Expired.

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Chapter 13 Expiration and Renewal of Judgments
I. STRATEGY

1-13 MB Practice Guide: CA Debt Collection 13.01

13.01 Scope.

This chapter covers:

- Objective and strategy relating to time limits on the enforcement of judgments [*see 13.02*].
- The 10-year period of enforceability for most California judgments [*see 13.04*].
- Procedural requirements governing the renewal of judgments [*see 13.05 -13.09*].
- The effect of renewal of a judgment on liens and enforcement proceedings [*see 13.10 -13.11*].
- Vacating renewal of a judgment [*see 13.12*].
- Types of judgments that are not subject to a 10-year period of enforceability [*see 13.13*].
- Additional options available to a judgment creditor after the 10-year period of enforceability has expired [*see 13.14 -13.15*].

Core Statutes:
CCP § 683.010 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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Chapter 13 Expiration and Renewal of Judgments
I. STRATEGY

1-13 MB Practice Guide: CA Debt Collection 13.02

13.02 Objective and Strategy.

Most money judgments or judgments for possession or sale of property remain enforceable for only 10 years after the date of entry of the judgment [*see 13.04*]. A judgment creditor who is unable to enforce a judgment within that time can extend the life of the judgment for an additional 10 years by renewing it before the initial 10-year period expires [*see 13.05*]. If a judgment is renewed, the judgment debtor should consider whether grounds exist to vacate the renewal [*see 13.12*].

Once the 10-year period of enforceability has expired, a judgment creditor still may be able to benefit from a judgment. If the 10-year statute of limitations provided in *CCP § 337.5* has not yet run, the creditor may bring an independent action on the judgment [*see 13.14*].

Warning--Calendar Renewal Dates:

Creditor's counsel should calendar all judgments in a judgment book or other renewal system for renewal between five and nine years after the date of entry. Counsel should never wait until less than six months before the deadline to renew. Renewal should always be initiated well in advance of the expiration date.

Consider:

An additional benefit of renewing the judgment as soon as permitted is that renewal is the only possible way to accrue compound interest on a judgment.

Strategic Point--Continue Monitoring Judgment Debtor:

In the event that the judgment initially is uncollectible, or there has been no successful collection of the judgment, it may be necessary to wait a long time before the judgment may be successfully enforced. Periodically, it may be useful to examine or investigate the judgment debtor to determine whether assets may have been acquired by the judgment debtor in the interim. Since judgments are renewable potentially for eternity, it may be appropriate to renew judgments as a matter of course.

Trap:

Many practitioners fall into the trap of thinking that a renewal of judgment must be filed *and* served upon the debtor within the 10-year period. This is not true. *CCP § 683.150(a)* requires only that the application for renewal of judgment be *filed*. By doing this within the 10-year period of time, the creditor's judgment

remains valid and enforceable. However, for the creditor to *take action on the judgment* (that is, obtain a writ of execution so as to levy against property of the judgment debtor), the application to renew judgment must first be served on the debtor before a writ of execution will be issued [*CCP § 683.160*].

Warning--Attorney-Client Communication:

The attorney must MAKE SURE that once the attorney obtains a judgment, there is a clear understanding between attorney and client as to whether the attorney will automatically be undertaking responsibility to renew the unpaid judgment after 10 years, or doing so only at the request of the client. When closing a file in a case in which a judgment has been entered and remains unsatisfied, counsel should always advise the client of the renewal dates, and either advise that counsel will not renew unless instructed or that counsel will not renew at all. Failure to do so may expose counsel to liability. The same practice should be followed when substituting out of a case in which an unsatisfied judgment remains extant.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 13 Expiration and Renewal of Judgments
II. DETERMINING TIME RESTRICTIONS ON ENFORCEMENT OF JUDGMENTS

1-13 MB Practice Guide: CA Debt Collection 13.03

13.03 CHECKLIST: Determining Time Restrictions on Enforcement of Judgments.

13.03[1] Checklist for Judgment Creditor.

☐ If possible, enforce money judgment or judgment for possession or sale of property within 10 years after date of entry of judgment.

○ 10-year limit on enforcement does not apply to judgments or orders under Family Code or to money judgments against public entities.

Authority:
CCP §§ 683.020, 683.310, 683.320

Discussion:
See *13.04*, *13.13*

☐ If judgment cannot be enforced within 10 years, apply for renewal of judgment before 10-year period expires.

○ File application for renewal of judgment with the court in which the judgment was entered.

Authority:
CCP §§ 683.110, 683.120(a), 683.130

Discussion:
See *13.06*

Form:
See *13.17* (application for renewal of judgment)

○ After court clerk enters renewal of judgment in court records, serve notice of renewal of judgment on judgment debtor.

☐ Serve notice personally or by first-class mail.

☐ File proof of service with court clerk.

☐ Attach copy of application for renewal of judgment to notice.

Authority:
CCP § 683.160(a), Cal Rules Ct, Rule 3.1900

Discussion:
See *13.09*

Form:
See *13.18* (notice of renewal of judgment)

○ Before judgment lien expires, record copy of application for renewal with county recorder of county where real property subject to judgment lien is, or may be, located.

Authority:
CCP § 683.180(a)

Discussion:
See *13.10[1]*

○ If real property has been transferred subject to a judgment lien, and transfer was recorded before application for renewal was filed:

☐ Personally serve copy of application for renewal on transferee; and

☐ File proof of service with court clerk within 90 days after filing of application for renewal.

Authority:
CCP § 683.180(b)

Discussion:
See *13.10[1]*

○ If a lien other than judgment lien on real property or an execution lien has been created pursuant to judgment, before expiration of lien serve or file certified copy of application with same person and in same manner as notice or order that created lien.

Authority:
CCP § 683.190

Discussion:
See *13.10[2]*

○ If any enforcement proceedings were previously commenced pursuant to judgment, or to a writ or order issued pursuant to judgment, before expiration of 10-year period, file certified copy of application for renewal with levying officer, receiver, or other officer acting pursuant to a writ or order or, in other cases, in enforcement proceeding.

Authority:
CCP § 683.200

Discussion:
See *13.11[1]*

☐ If 10-year period of enforceability has expired, determine whether 10-year statute of limitations has not yet run, making possible an independent action on judgment.

Authority:
CCP §§ 337.5, 683.050

Discussion:
See *13.14*

13.03[2] Checklist for Judgment Debtor.

☐ If judgment has been renewed, determine whether grounds exist to vacate renewal.

○ Renewal may be vacated on any ground that would be a defense to an action on judgment, including ground that amount of renewed judgment as entered is incorrect.

○ Renewal must be vacated if application for renewal was filed within five years from time judgment was previously renewed.

Authority:
CCP § 683.170(a)

Discussion:
See *13.12[1]*

☐ If grounds exist, within 30 days after service of notice of renewal, apply by noticed motion for order vacating renewal.

○ Notice of motion must be served on judgment creditor personally or by mail.

Authority:
CCP § 683.170(b)

Discussion:
See *13.12[3]*

Form:

See *13.19* (notice of motion for order vacating renewal of judgment)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensRenewalsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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13.04 Judgment Is Enforceable for 10 Years.

13.04[1] Judgment May Not Be Enforced After 10 Years. A money judgment or judgment for possession or sale of property remains enforceable for 10 years after the date of entry of the judgment [*CCP § 683.020*]. Except as otherwise provided by statute, upon the expiration of 10 years after the date of entry [*CCP § 683.020*]:

- The judgment may not be enforced.
- All enforcement procedures pursuant to the judgment or to a writ or order issued pursuant to the judgment must cease.
- Any lien created by an enforcement procedure pursuant to the judgment is extinguished.

Warning:

Alonso Inv. Corp. v. Doff (1976) 17 C3d 539, 131 CR 411, 551 P2d 1243 held that a writ of execution issued before the expiration of the 10-year period could be enforced after the expiration of the 10-year period. That case was decided before the enactment of *CCP § 683.020* in 1983 and is no longer good law.

Compare:

Federal judgments are good for 20 years, and may be renewed for one additional 20-year period [*28 USC § 3201(c)*].

Investigating Enforcement of Judgments Using Online Resources:

Many resources are available online for investigating the enforcement of judgments. These resources can aid you in determining how California courts have interpreted the 10-year time limit when enforcing judgments. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined

Sample Search: To find California cases that discuss the 10-year limit on enforcing judgments, use a HEADNOTES segment search: *headnotes(judgment /5 enforc! or unenforc! /15 ten years or (ccp or c.c.p. or civ! proc! /5 683!))*.

13.04[2] Rule Applies to All Judgments, With Limited Exceptions. The 10-year limitation applies to any money judgment or judgment for possession or sale of property, regardless of whether it is a modified or amended judgment, and without regard to finality [*Iliff v. Dustrud (2003) 107 CA4th 1201, 1207, 132 CR2d 848*].

Exceptions:

The 10-year limit on enforcement does not apply to judgments or orders under the Family Code [*see CCP § 683.310*] or to a money judgment against a public entity [*see CCP § 683.320*].

Cross Reference:

Discussion of exceptions to 10-year limit, see *13.13*.

13.04[3] Period Commences on Date Clerk Enters Judgment. The 10-year period commences on the date of entry by the clerk [*CCP § 683.010*; *Fidelity Creditor Serv., Inc. v. Browne (2001) 89 CA4th 195, 201, 106 CR2d 854*].

Investigating Entry Date of Judgments Using Online Resources:

Many resources are available online for determining the date a judgment was entered. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Judgment and Lien Filings

Sample Search: To locate the entry date for a judgment in California, use a NAME segment search: *name (first name /3 last name)*.

Most courts now provide free online access to cases where counsel can determine the date a judgment was entered. Some systems require that counsel know the case number, but others allow searching for all cases by party name.

13.04[4] Ten-Year Period Is Not Extended or Tolled. The 10-year period is not extended when enforcement of the judgment has been stayed or enjoined by court order or by operation of law. Nor is the 10-year period tolled for any reason [Law Revision Comm'n Comment to *CCP § 683.020*, 15 Cal L Rev Comm'n Reports 2192 (1980)].

Distinguish--Renewal:

A judgment may be extended by renewal. In addition, a judgment creditor may be able to bring an independent action on a judgment even after the 10-year enforceability period has expired if the 10-year statute of limitations provided in *CCP § 337.5* has not yet run [Law Revision Comm'n Comment to *CCP §§ 683.020*, *683.050*, *15* Cal L Rev Comm'n Reports 2001, 2191, 2194-2195 (1980)].

Cross References:

Discussion of renewal, see *13.06 -13.07*.

Discussion of independent action on a judgment, see *13.15*.

13.04[5] Ten-Year Period Runs From Date Each Installment Becomes Due. If a money judgment is payable in installments, the 10-year period of enforceability under *CCP § 683.020* runs as to each installment from the date the

installment becomes due, and runs as to costs from the date the costs are added to the judgment pursuant to *CCP § 685.090* [*CCP § 683.030*].

13.04[6] Affidavit Required With Application to Enforce Judgment More Than 10 Years Old. If a judgment creditor applies for a writ for the enforcement of a judgment more than 10 years after the date the judgment was entered or renewed, the application must be accompanied by an affidavit of a person having knowledge of the facts stating facts showing that the issuance of the writ sought in the application is not barred under *CCP § 683.020*. A copy of the affidavit must be attached to the writ when issued [*CCP § 683.040*].

Example:

In an application for a writ for the enforcement of a money judgment payable in installments, the affidavit should state that the 10-year limitation period has not run as to the installment or installments covered by the application for the writ [Law Revision Comm'n Comment to *CCP § 683.040*, *15* Cal L Rev Comm'n Reports 2181, 2198 (1980)].

Cross Reference:

Form for declaration in support of application for writ of enforcement of judgment, see *13.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLegislationStatutes of LimitationsTime Limitations

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13.05 Judgment May Be Renewed.

The period of enforceability of a money judgment or judgments for the possession or sale of property may be extended by renewal of the judgment for a period of 10 years from the date the application for renewal is filed [*CCP § 683.110*]. A judgment creditor seeking renewal of a judgment is not required to demonstrate diligence in attempting to enforce the judgment during the first 10 years [Law Revision Comm'n Comment to *CCP § 683.110*, *15* Cal L Rev Comm'n Reports 2181, 2198 (1980)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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13.06 Party Seeking Renewal Must File Application for Renewal.

13.06[1] Time for Filing.

13.06[1][a] Renewal Application Must Be Filed Before Expiration of 10-Year Period or Judgment Becomes Unenforceable. An application for renewal of a lump-sum money judgment or judgment for possession or sale of property may be filed at any time before the expiration of the 10-year period of enforceability [*CCP § 683.130(a)*]. A creditor may apply for a subsequent renewal once five years have passed since the last renewal [*CCP § 683.110(b)*]. If the judgment is not renewed within 10 years after entry of the judgment, the judgment becomes unenforceable [Law Revision Comm'n Comment to *CCP § 683.110*, *15* Cal L Rev Comm'n Reports 2181, 2198 (1980)].

Strategic Point:

There is no limit on the number of times a judgment may be renewed [Law Revision Comm'n Comment to *CCP § 683.130*, *15* Cal L Rev Comm'n Reports 2181, 2198 (1980)].

Strategic Point--Renew Early:

Counsel should calendar renewal for five years after the date of judgment. This results in compounding accrued interest into the renewed principal amount, and avoids the potential problems with the 10-year renewal limitations period later on. Similarly, any renewed judgment must be renewed within 10 years, and should be renewed every five years.

13.06[1][b] Application for Renewal of Past Due Installments Under Installment Judgment Not Previously Renewed Must Be Filed Before 10-Year Period Expires as to Those Installments. An application for renewal of an installment judgment that has not previously been renewed may be filed at any time as to past due amounts that at the time of filing are not barred by the expiration of the 10-year period of enforceability [*CCP § 683.130(b)(1)*].

13.06[1][c] Application for Renewal of Installment Judgment Previously Renewed Must Be Filed Within 10 Years of Previous Renewal. An application for renewal of an installment judgment that has previously been renewed must be filed within 10 years of the previous renewal as to the amount previously renewed and, as to any past due amounts that became due and payable after the previous renewal, at any time before the expiration of the 10-year period

of enforceability [*CCP § 683.130(b)(2)*].

13.06[1][d] Application to Renew Amended Judgment Must Be Filed Within 10 Years of Entry of Amended Judgment. The 10-year limit runs from the entry of any judgment, including a modified or amended judgment. Thus an application for renewal filed more than 10 years after entry of an original judgment, but within 10 years of entry of an amended judgment, is timely [*Iliff v. Dustrud (2003) 107 CA4th 1201, 1207-1208, 132 CR2d 848*].

13.06[1][e] Application to Renew Deficiency Judgment Must Be Filed Within 10 Years of Entry of Deficiency Judgment. The 10-year renewal period runs from the entry of a deficiency judgment, not the date of the related foreclosure decree [*Kinsmith Fin. Corp. v. Gilroy (2003) 105 CA4th 447, 449, 129 CR2d 478*].

13.06[1][f] Judgment May Be Renewed While Appeal Is Pending. A judgment creditor may file an application for renewal, and a court may renew a judgment, while an appeal of that judgment is pending [*Jonathan Neil & Assocs., Inc. v. Jones (2006) 138 CA4th 1481, 1488, 42 CR3d 350*].

13.06[2] Application Must Include Specified Information. The application for renewal of the judgment must be executed under oath and must include all of the following [*CCP § 683.140*]:

- The title of the court where the judgment is entered and the cause and number of the action.
- The date of entry of the judgment and of any renewals of the judgment and where entered in the records of the court.
- The name and address of the judgment creditor and the name and last known address of the judgment debtor.
- In the case of a money judgment, the information necessary to compute the amount of the judgment as renewed. In the case of a judgment for possession or sale of property, a description of the performance remaining due.

13.06[3] Judicial Council Form May Be Used. Judicial Council Form EJ-190 may be used to make the application for renewal of a judgment. Use of Form EJ-190 is optional. However, ordinarily there is no good reason not to use the Judicial Council form, and court clerks may more readily accept it. Many clerks may not even be aware that attorneys have the option not to use the Judicial Council form.

Cross Reference:

Judicial Council Form EJ-190, form for application for renewal of judgment, see *13.17*.

13.06[4] Application Must Be Filed in Court Where Judgment Was Entered. The judgment creditor must file the application for renewal of the judgment with the court in which the judgment was entered [*CCP § 683.120(a)*]. The court has jurisdiction to renew the judgment even if the debtor has moved out of state [*Goldman v. Simpson (2008) 160 CA4th 255, 263-264, 72 CR3d 729]* .

13.06[5] Filing Renews Judgment for Another 10 Years. The filing of the application renews the judgment and extends the period of enforceability of the judgment as renewed for a period of 10 years from the date the application is filed [*CCP § 683.120(b)*].

Trap:

Many practitioners fall into the trap of thinking that a renewal of judgment must be filed *and* served upon the debtor within the 10-year period. This is not true. *CCP § 683.150(a)* only requires that the application

for renewal of judgment be *filed*. By doing this within the 10 year period of time, the creditor's judgment remains valid and enforceable. However, for the creditor to *take action on the judgment* (that is, obtain a writ of execution so as to levy against property of the judgment debtor), the application to renew judgment must first be served on the debtor before a writ of execution will be issued [*CCP § 683.160*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency Judgments

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13.07 Renewed Installment Judgment Is Treated as Lump Sum.

In the case of a money judgment payable in installments, for the purposes of enforcement and of 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)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcement

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13.08 Clerk Must Enter Renewal in Court Records.

Upon the filing of the application, the court clerk must enter the renewal of the judgment in the court records [*CCP § 683.150(a)*].

13.08[1] Record Must Show Amount of Money Judgment. The entry of renewal of a money judgment must show the amount of the judgment as renewed. This amount is the amount required to satisfy the judgment on the date of the filing of the application for renewal and includes the fee for the filing of the application for renewal [*CCP § 683.150(b), (c)*; *Gov Code § 70626(b)(4)*].

13.08[2] Calculation of Amount of Installment Judgment.

13.08[2][a] Amount of Installment Judgment Not Previously Renewed Includes Past Due Installments, Costs, Interest, and Application Fee. In the case of a money judgment payable in installments not previously renewed, the amount of the judgment as renewed is the total of the past due installments, the costs added to the judgment pursuant to *CCP § 685.090*, and the accrued interest that remains unsatisfied and is enforceable on the date of the filing of the application for renewal, and includes the fee for the filing of the application for renewal [*CCP § 683.150(d)*; *Gov Code § 70626(b)(4)*].

Strategic Point:

Although a child support judgment remains enforceable after 10 years and thus need not be renewed, renewing a child support judgment provides an economic benefit to the judgment creditor. When an installment money judgment is renewed, the amount of the lump-sum renewed judgment includes past due installments, costs, and accrued interest. Thus, renewal allows for compounding of interest [*In re Marriage of Thompson (1996) 41 CA4th 1049, 1057, 48 CR2d 882*].

13.08[2][b] Amount of Installment Judgment Previously Renewed Includes Amount of Judgment as Renewed, Subsequent Past Due Installments, Costs, Interest, and Application Fee. In the case of a money judgment payable in installments previously renewed, the amount of the judgment as renewed under the latest renewal is the total of the following which remains unsatisfied and is enforceable on the date of the filing of the application for the latest renewal [*CCP § 683.150(e)*]:

- The amount of the judgment as renewed under the previous renewal.

- The past due installments that became due and payable after the previous renewal.

- The costs that have been added to the judgment pursuant to *CCP § 685.090* after the previous renewal.

- The interest that has accrued on the amounts described above since the last renewal.

- The fee for filing the application for renewal.

13.08[3] Renewal of Judgment for Possession or Sale of Property Must Describe Remaining Performance Due. The entry of renewal of a judgment for possession or sale of property must describe the performance remaining due [*CCP § 683.150(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage JudgmentsGovernmentsCourtsClerks of Court

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13.09 Notice of Renewal of Judgment Must Be Given.

The judgment creditor must serve a notice of renewal of the judgment on the judgment debtor [*CCP § 683.160(a)*].

13.09[1] Notice Must Be Filed and Served. The notice must be served personally or by first class mail. Proof of service must be filed with the court clerk [*CCP § 683.160(a)*]. A copy of the application for renewal of judgment must be attached to the notice [*Cal Rules Ct, Rule 3.1900*].

Until proof of service is filed, no writ may be issued, nor may any enforcement proceedings be commenced to enforce the judgment, except to the extent that the judgment would be enforceable had it not been renewed [*CCP § 683.160(b)*].

Timing:

The notice of renewal may be served after the 10-year period has expired if the application for renewal is timely filed [Law Revision Comm'n Comment to *CCP § 683.160*, *15* Cal L Rev Comm'n Reports 2001, 2200-2201 (1980)].

Strategic Point:

Although not required, it is strongly recommended that service be made by express mail delivery with return receipt requested, so that evidence will exist that the notice actually was delivered.

13.09[2] Notice Must Inform Judgment Debtor of Renewal Period. The notice must inform the judgment debtor that the judgment debtor has 30 days within which to make a motion to vacate or modify the renewal [*CCP § 683.160(a)*].

13.09[3] Judicial Council Form Must Be Used. Use of Judicial Council Form EJ-195 for notice of renewal of judgment is mandatory. [*Cal Rules Ct, Rule 1.31*; *see CCP § 683.160(a)*].

Cross Reference:

Judicial Council Form EJ-195, form for notice of renewal of judgment, see *13.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendGovernmentsCourtsClerks of Court

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13.10 Renewal Extends Duration of Judgment Liens.

13.10[1] Judgment Liens on Real Property.

13.10[1][a] Judgment Lien Generally Is Extended for 10 Years. If a judgment lien on an interest in real property has been created by recording an abstract of judgment and the judgment is renewed, the duration of the judgment lien is extended until 10 years from the date of the filing of the application for renewal if, before the expiration of the judgment lien, a certified copy of the application for renewal is recorded with the county recorder of the county where the real property subject to the judgment lien is located [*CCP § 683.180(a)*; *see Beneficial Fin. v. Durkee (1988) 206 CA3d 912, 917, 254 CR 351* (judgment lien expired because creditor failed to record certified copy of renewal application while lien still in effect)].

Strategic Point:

The renewal should be recorded in all counties in which the judgment creditor had previously recorded abstracts, in case there is or was a property ownership interest of which the judgment debtor was not previously aware.

Strategic Point--Judgment Creditor:

A creditor who renews a judgment but fails to extend a judgment lien before it expires may record an abstract of a renewed judgment to obtain a new judgment lien *dating from the recording of that abstract* [Law Revision Comm'n Comment to *CCP § 683.180*, *15* Cal L Rev Comm'n Reports 2001, 2203 (1980)]. Thus, recording a new abstract after the prior abstract expires results in a loss of lien priority from the prior recorded abstract. In other words, if a gap in time exists between expiration of the prior lien and the time the new one takes effect, any lien priority that would have existed by virtue of the earlier recorded abstract is lost.

Warning:

There is a debate among practitioners about the effect of bankruptcy discharge of a debt that was "collateralized" by an abstract recorded against real property owned by the debtor. The lien on the

property remains even after the underlying judgment debt is discharged and the debtor exonerated from personal liability. When the renewal date comes up, some attorneys argue that merely renewing the judgment lien to keep the lien position is an exception to the automatic stay which allows "ministerial acts." Others argue that doing so violates the automatic stay received on discharge. Counsel who decides to renew should be prepared for the potential argument, and advise the client of the potential for sanctions by the bankruptcy court if it rules against the client. Renewal has been held to be a "ministerial act" under California law [*Jonathan Neil & Assocs., Inc. v. Jones (2006) 138 CA4th 1481, 1487, 42 CR3d 350*], but authority to the contrary also exists [*see In re Lobherr (2002) 282 BR 912*].

13.10[1][b] Lien on Transferred Real Property Is Not Extended Unless Application Is Served on Transferee. A judgment lien on an interest in real property that has been transferred subject to the lien is not extended if the transfer was recorded before the application for renewal was filed unless (1) a copy of the application for renewal is personally served on the transferee, and (2) proof of such service is filed with the court clerk within 90 days after the filing of the application for renewal [*CCP § 683.180(b)*].

Strategic Point:

Counsel should obtain an updated preliminary title report on renewal in order to avoid problems with this issue if counsel knows of a property previously owned by the judgment debtor.

13.10[2] Renewal Extends Other Liens for 10 Years. If a lien other than a judgment lien on real property or an execution lien has been created pursuant to the judgment, renewal of the judgment extends the duration of the lien until 10 years from the date of filing of the application for renewal if, before expiration of the lien, a certified copy of the 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*].

Warning:

Under *CCP § 683.190*, a lien of limited duration, such as a judgment lien on personal property (five years), is not increased in duration after a judgment is renewed, but the lien is permitted to continue past the 10-year period specified in *CCP § 683.020* [Law Revision Comm'n Comment to *CCP § 683.190*, *15* Cal L Rev Comm'n Reports 2001, 2192 (1980)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensRenewalsReal Property LawBankruptcyDischarge & Dischargeability

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13.11 Effect of Renewal on Enforcement Proceedings.

13.11[1] Enforcement Proceedings May Be Continued. After a judgment is renewed, any enforcement proceedings previously commenced pursuant to the judgment or to a writ or order issued pursuant to the judgment that would have ceased had the judgment not been renewed may be continued by the renewal if, before expiration of the prior 10-year period, a certified copy of the application for renewal is filed with the levying officer, receiver, or other officer acting pursuant to a writ or order, or in other cases, is filed in the enforcement proceeding [*CCP § 683.200*].

Example:

A sale of real property pursuant to a writ of execution may proceed after the expiration of 10 years from the date of entry of the judgment if the judgment is renewed within the time allowed and a certified copy of the application for renewal is filed with the levying officer in charge of the sale before the expiration of the 10-year period [Law Revision Comm'n Comment to *CCP § 683.200*, *15* Cal L Rev Comm'n Reports 2001, 2192 (1980)].

13.11[2] Judgment May Be Renewed During Stay of Enforcement. A judgment may be renewed even if a stay of enforcement is in effect. The renewal does not affect the stay [*CCP § 683.210*].

Distinguish:

A creditor may not renew a judgment against a debtor during the pendency of the automatic stay in a bankruptcy case without first obtaining relief from the automatic stay [*In re Lobherr (Bankr CD Cal 2002) 282 BR 912, 917*]. Note, however, that this case involved an attempted renewal during the bankruptcy, and does not address renewal after the stay under 11 USC § 352 is deemed lifted by operation of law or fact. Since the law expressly provides for a tolling period during the bankruptcy, there was no need to try to renew until after that case was over.

Warning--Renewal During Appeal:

A renewal must be filed during an appeal in order to preserve the status quo and not allow the judgment to lapse [*see Jonathan Neil & Associates., Inc. v. Jones (2006) 138 CA4th 1481, 42 CR3d 350]* .

Cross References:

Stays of enforcement, see Ch 15, Staying Enforcement of Judgment.

Bankruptcy stays, see Ch. 3, Effect of Bankruptcy.

13.11[3] Renewal Commences Limitation Period. If a judgment is renewed, the filing date of the application for renewal commences the limitation period for actions on the renewed judgment [*CCP § 683.220*; *see CCP § 337.5* (action on judgment must be brought with 10 years)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysAppealsBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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Chapter 13 Expiration and Renewal of Judgments
II. DETERMINING TIME RESTRICTIONS ON ENFORCEMENT OF JUDGMENTS

1-13 MB Practice Guide: CA Debt Collection 13.12

13.12 Renewal May Be Vacated.

13.12[1] Renewal May Be Vacated on Any Ground That Would Be Defense to Action on Judgment. Renewal of a judgment may be vacated on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment as entered is incorrect [*CCP § 683.170(a)*].

Renewal of a judgment must be vacated if the application for renewal was filed within five years from the time the judgment was previously renewed [*CCP § 683.170(a)*].

Examples:

- An undisputed failure to serve the judgment debtor with the summons and complaint in the action underlying the judgment is a basis for vacating the renewal [*Fidelity Creditor Serv., Inc. v. Browne (2001) 89 CA4th 195, 201-203, 106 CR2d 854*]. The defendant is not required to show it had a meritorious defense to the underlying action [*Fidelity Creditor Serv., Inc. v. Browne (2001) 89 CA4th 195, 204-206, 106 CR2d 854*]. The fact that the judgment debtor actually knows of the judgment despite being not served with the summons and complaint in the underlying action does not render a motion untimely that is otherwise timely under *CCP § 683.170(b)* [*Fidelity Creditor Serv., Inc. v. Browne (2001) 89 CA4th 195, 204, 106 CR2d 854*].

- Renewal of a judgment may be vacated on the ground of accord and satisfaction [*In re Marriage of Thompson (1996) 41 CA4th 1049, 1058, 48 CR2d 882* (vacating renewal of child support judgment was not justified where there was no evidence of accord and satisfaction)].

- Renewal of a judgment by a suspended corporation must be vacated because a suspended corporation is not entitled to invoke the benefits of California laws or the assistance of the California judicial system [*Timberline v. Jaisinghani (1997) 54 CA4th 1361, 1368, 64 CR2d 4*].

Strategic Point:

A challenge to renewal because of a bankruptcy discharge should probably be brought in the Bankruptcy

Court and not in state court.

13.12[2] Judgment Debtor Bears Burden of Proof. The judgment debtor bears the burden of proving by a preponderance of the evidence that renewal of a judgment should be vacated under *CCP § 683.170* [*Fidelity Creditor Serv., Inc. v. Browne (2001) 89 CA4th 195, 199, 106 CR2d 854*].

13.12[3] Application for Order to Vacate Is Made by Noticed Motion. Within 30 days after service of the notice of renewal, the judgment debtor may apply by noticed motion for an order vacating the renewal [*CCP § 683.170(b)*]. The notice of motion must be served on the judgment creditor personally or by mail [*CCP § 683.170(b)*]. The time limitations in *CCP § 473.5* for a motion to set aside a default or default judgment do not apply to a motion under *CCP § 683.170* [*Fidelity Creditor Serv., Inc. v. Browne (2001) 89 CA4th 195, 203-204, 106 CR2d 854*].

Cross Reference:

Form for notice of motion for order vacating renewal of judgment, see *13.19*.

13.12[4] Court May Vacate Renewal or Enter Different Renewal. On hearing the motion, the court may order the renewal vacated on any ground that would be a defense to an action on the judgment [*CCP § 683.170(c)*]. The court may enter a different renewal, including, but not limited to, the renewal of the judgment in a different amount [*CCP § 683.170(c)*; *see In re Marriage of Henderson (1990) 225 CA3d 531, 535, 275 CR 226* (remanding for determination of correct amount of renewed judgment)].

13.12[5] Order Denying Motion to Vacate Renewal Is Appealable. The Court of Appeal has jurisdiction to review an order denying a motion to vacate and, upon a finding of prejudicial error, to reverse that order and vacate the renewal of judgment [*Jonathan Neil & Assocs., Inc. v. Jones (2006) 138 CA4th 1481, 1487, 42 CR3d 350*].

Distinguish:

Renewal of a judgment is *not* appealable [*Jonathan Neil & Assocs., Inc. v. Jones (2006) 138 CA4th 1481, 1487, 42 CR3d 350*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationNoticeBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAlimony, Divorce Settlements & SupportCivil ProcedurePretrial JudgmentsGeneral Overview

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13.13 Exclusions From 10-Year Limit on Enforcement of Judgments.

13.13[1] Judgment Under Family Code Is Excluded. The time restrictions and renewal procedures in *CCP § 683.010 et seq*. do not apply to judgments or orders under the Family Code [*CCP § 683.310*; *In re Marriage of Wilcox (2004) 124 CA4th 492, 499-500, 21 CR3d 315*].

Cross References:

Discussion and forms relating to enforcement of judgments and orders in family law proceedings, see California Forms of Pleading and Practice, Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, and Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

13.13[2] Money Judgment Against Public Entity Is Excluded. The time restrictions and renewal procedures contained in *CCP § 683.010 et seq*. do not apply to money judgments against public entities [*CCP § 683.320*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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13.14 Judgment Creditor May Bring Action on Judgment After 10 Years If Statute of Limitations Has Not Run.

Even if the 10-year period of enforceability has expired, a judgment creditor may extend the life of a judgment by bringing an independent action on the judgment, as long as the 10-year statute of limitations provided in *CCP § 337.5* has not yet run [*CCP § 683.050*; *Fidelity Creditor Service v. Browne (2001) 89 CA4th 195, 200-201, 106 CR2d 854*].

Strategic Point:

The 10-year enforcement period of *CCP § 683.020* and the 10-year limitations period of *CCP § 337.5* are not coterminous. The period prescribed in *CCP § 683.020* commences on the date of entry of judgment and is not tolled for any reason, whereas the statute of limitations commences when the judgment is final, and may be tolled [Law Revision Comm'n Comment to *CCP § 683.050*]. However, if the judgment was obtained by stipulation, the 10-year statute runs from the date of entry of judgment and not when the appeal period ends, unless the parties stipulated to judgment to facilitate an appeal [*Cadle Co. II, Inc. v. Sundance Financial, Inc. (2007) 154 CA4th 622, 624, 64 CR3d 824]* .

Personal jurisdiction exists over a nonresident judgment debtor in an independent action to renew the judgment even though the judgment debtor had no additional contacts with California between the date of the original judgment and the date the renewal action was filed [*Cadle Co. II, Inc. v. Fiscus (2008) 163 CA4th 1232, 1240-1241, 78 CR3d 238]* .

A judgment creditor may bring an action on a judgment even though a previous renewal of the judgment has been vacated because the application for renewal was not properly and timely filed [*Green v. Zissis (1992) 5 CA4th 1219, 1222, 7 CR2d 406*].

Examples:

- Although the 10-year period to renew a judgment had expired, a judgment creditor could bring an independent action on the judgment 12 years after it was entered. The 10-year statute of limitations had not run because it was tolled under *CCP § 351* during the time the judgment debtor was out of the state [*Pratali v. Gates (1992) 4 CA4th 632, 637-639, 5 CR2d 733*].

- Judgment creditor's action on a judgment was not time-barred even though it was filed more than 10 years after entry of judgment; the limitations period was tolled by the debtor's petition for bankruptcy

and the resulting automatic stay [*Kertesz v. Ostrovsky (2004) 115 CA4th 369, 372-376, 8 CR3d 907*].

Consider:

A complaint to enforce the judgment may be brought in California even if the defendant has moved out of the state, since the judgment was originally entered under the argument that the cause of action for a judgment on the judgment arose out of activity carried on in California at a time when the judgment debtor was domiciled here. Thus the quality and nature of the activity (i.e., failure to pay on a California judgment) in relation to the fair and orderly administration of the laws (i.e., entering a judgment on the judgment) which it was the purpose of due process to ensure, justifies subjecting the judgment debtor to the jurisdiction of the California court [*Owens v. Superior Court (1959) 52 C2d 822, 345 P2d 921*].

Cross Reference:

Form for complaint on judgment by judgment creditor against out-of-state judgment debtor after 10-year period when statute of limitations has not yet expired, see 13.20.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysGovernmentsLegislationStatutes of LimitationsGeneral Overview

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13.15 Judgment That Is No Longer Enforceable May Be Used As Offset.

A judgment that is no longer enforceable because the 10-year period of enforceability has expired may be used by the judgment creditor as an offset against a claim of the judgment debtor that existed during the 10-year period [Law Revision Comm'n Comment to *CCP § 683.020*; *see CCP § 431.70*; Law Revision Comm'n Comment to *CCP § 431.70*, *10* Cal L Rev Comm'n Reports 501, 563 (1970) (expired judgment may be used as offset as long as claims coexisted at any point in time when neither demand was time-barred)].

Consider:

The theory behind the statute of limitations is that one should only have so long to *affirmatively* pursue a right. However, if someone is instead taking action against a party, there is nothing stopping that party from using a right that the party has not affirmatively pursued independently, and use it against the one taking the action [*see* Law Revision Comm'n Comment to *CCP § 431.70*, *10* Cal L Rev Comm'n Reports 501, 563 (1970)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementGovernmentsLegislationStatutes of LimitationsGeneral Overview

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Chapter 13 Expiration and Renewal of Judgments
III. FORMS

1-13 MB Practice Guide: CA Debt Collection 13.16

13.16 Declaration in Support of Application for Writ of Enforcement of Judgment.

Declaration in Support of Application for Writ of Enforcement of Judgment.
[*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ DECLARATION OF _____ [*name*] IN SUPPORT OF APPLICATION FOR WRIT OF ENFORCEMENT OF JUDGMENT Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the judgment creditor in the above-entitled action *or other statement as appropriate*].

2. _____ [*State facts showing that although the application for a writ of enforcement is made more than 10 years after the date the judgment was entered or renewed, the issuance of the writ is not barred, e.g.,* The 10-year limitation period has not run as to the installments due _____ and _____, as set forth in the attached copy of the judgment entered _____ (date) because _____ (*state reason, e.g.,* the Defendant was outside the State of California for the period between _____ and _____)].

3. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.

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*]

NOTES.

Authority:
CCP § 683.040

Application to Enforce Judgment More Than 10 Years Old:
See *13.04[6]*

Discussion and Forms Concerning Affidavits and Declarations:
See California Forms of Pleading and Practice, Ch. 15, Affidavits, Certificates, and Declarations (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCriminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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III. FORMS

1-13 MB Practice Guide: CA Debt Collection 13.17

13.17 Application for Renewal of Judgment--Judicial Council Form EJ-190.

Application for Renewal of Judgment--Judicial Council Form EJ-190.

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Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP § 683.140

Application for Renewal of Judgment:
See *13.06*; California Judicial Council Form EJ-190, pictured above, has been approved for optional use [*Cal R Ct, Rule 1.35*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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III. FORMS

1-13 MB Practice Guide: CA Debt Collection 13.18

13.18 Notice of Renewal of Judgment--Judicial Council Form EJ-195.

Notice of Renewal of Judgment--Judicial Council Form EJ-195.

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Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP § 683.160; California Judicial Council Form EJ-195, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Notice of Renewal of Judgment:
See *13.09*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewals

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Chapter 13 Expiration and Renewal of Judgments
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1-13 MB Practice Guide: CA Debt Collection 13.19

13.19 Notice of Motion for Order Vacating Renewal of Judgment.

Notice of Motion for Order Vacating Renewal of Judgment.
[*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION FOR ORDER VACATING RENEWAL OF JUDGMENT Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*] or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

name] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 683.170* vacating the renewal of judgment entered by the above court on _____ [*date*], at _____ [*specify where renewal is entered in court records*], on the grounds that _____ [*specify grounds, e.g.,* the application for renewal was filed within five years from the time the judgment was previously renewed under *Code of Civil Procedure Section 683.110*].

The motion will be based on this notice of motion, on the memorandum served and filed herewith, on the records and file with this motion, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES.

Authority:
CCP § 683.170

Vacating Renewal of Judgment:
See *13.12*

General Notice and Motion Procedure:
See Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure; see also California Forms of Pleading and Practice, Ch. 372, Motions and Orders

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesJudgment LiensRenewalsContracts LawNegotiable InstrumentsEnforcementProof of Signature

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Chapter 13 Expiration and Renewal of Judgments
III. FORMS

1-13 MB Practice Guide: CA Debt Collection 13.20

13.20 Complaint on Judgment by Judgment Creditor Against Out-of-State Judgment Debtor After 10-Year Period When Statute of Limitations Has Not Yet Expired.

Complaint on Judgment by Judgment Creditor Against Out-of-State Judgment Debtor After 10-Year Period When Statute of Limitations Has Not Yet Expired.
[*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____COMPLAINT ON JUDGMENT
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Plaintiff _____ [*name*] alleges as follows:

1. _____ [*Allege plaintiff's capacity and residence*].

2. _____ [*Allege defendant's capacity and residence*].

3. That the obligation which was the subject of the underlying action was entered into by Defendant, and Defendant was at all times relevant to that action a resident of the jurisdictional boundaries of this Court; and that this Court is the proper court for the trial of this action.

4. On _____ [*date*], Plaintiff recovered a [default] judgment in the amount of $_____ against Defendant in the case of _____ v. _____, Case No. _____. A true and correct copy of that judgment is attached to this complaint as Exhibit A and incorporated by this reference.

5. Judgment in the above referenced action has become final. It has not been vacated, modified, stayed, or set aside, and the time for appeal has expired.

6. Plaintiff is informed and believes and thereon alleges that the Defendant has resided outside of the state of California for the past _____ [*number*] years. As a result, this complaint is filed after the expiration of 10 years from the date the above referenced judgment became final.

7. That subsequent to the entry of the above referenced judgment interest has accrued upon the judgment; the total of that interest amounting to $_____ through _____ [*date complaint filed*] and continuing thereafter at the per diem rate of $_____ from _____ [*date complaint filed*] until paid in full.

10. Plaintiff has demanded that Defendant pay Plaintiff the amounts due on the judgment, but Defendant has failed and refused to pay all or any part of the amounts due.

11. That there is now due and owing on the judgment the total sum of $_____.

WHEREFORE, Plaintiff prays judgment:

1. For the sum of _____ against Defendant, with interest thereafter at the rate of 10 percent per annum from _____ [*date complaint is filed*] until paid in full or the date of entry of judgment.

2. For reasonable attorneys' fees;

3. For costs of suit herein incurred; and

4. For such other and further relief as this Court may deem just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES:

Authority:

CCP § 683.050

Filing Complaint Against Defendant After 10-Year Period Has Expired When Statute of Limitations Has Not Run:

See *13.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureRemediesJudgment InterestGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 14 Assigning a Judgment

2-14 MB Practice Guide: CA Debt Collection 14.syn

§ 14.syn Synopsis to Chapter 14: Assigning a Judgment

14.01 Scope.

14.02 Objective and Strategy.

14.03 CHECKLIST: Assigning a Judgment.

14.04 Judgment May Be Assigned.
14.04[1] Creditor May Assign Judgment to Third Party.
14.04[2] Judgment Is Assignable Even If Underlying Claim Was Not.
14.04[3] Assignee Acquires All Rights of Assignor.
14.04[4] Assignment of Joint and Several Debt to One Co-Obligor Extinguishes Debt.

14.05 Validity of Assignment Generally Is Governed by Contract Law.
14.05[1] Contract Law Determines Validity of Assignment.
14.05[2] Consideration Is Not Required.

14.06 Partial Assignment Requires Judgment Debtor's Consent or Ratification.

14.07 Delivering Written Assignment to Assignee Perfects Transfer As Against Third Parties.
14.07[1] Assignment Should Be Made in Writing.
14.07[2] Contents of Written Assignment.
14.07[3] Delivery to Assignee Perfects Assignment As Against Third Parties.

14.08 Filing Acknowledgment of Assignment of Judgment With Court Makes Judgment Enforceable by Assignee.
14.08[1] Generally, Assignee Must File Acknowledgment of Assignment With Court As Prerequisite to Use of Judicial Enforcement Remedies.
14.08[2] Contents of Acknowledgment of Assignment.
14.08[3] Acknowledgment of Assignment Also Establishes Assignee's Priority As Against Other Assignees of Same Judgment Rights.

14.09 Assignee Can Protect Right to Payment by Giving Notice to Judgment Debtor.
14.09[1] Giving Notice of Assignment to Judgment Debtor Cuts Off Judgment Debtor's Ability to Pay Assignor.
14.09[2] Debtor's Lack of Notice of Assignment Is Defense to Suit by Assignee.

14.09[3] Actual Notice Is Required.

14.10 Judgment Debtor May Assert Setoff or Other Defense Against Creditor's Assignee.
14.10[1] Assignee Acquires Judgment Subject to Judgment Debtor's Defenses Against Assignor.
14.10[2] Actual Notice of Assignment Is Necessary to Defeat Debtor's Right of Setoff.
14.10[3] Judgment Debtor Who Acquires Separate Claim Against Judgment Creditor Can Receive Setoff.
14.10[4] Setoff May Be Sought By Bringing Either Motion or Independent Action.

14.11 Judgment Debtor Retains Right to Appeal.

14.12 Assignee May Be Substituted As Party to Action.
14.12[1] Substitution Is Optional.
14.12[2] Procedure for Substitution.
14.12[2][a] Substitution of Parties in Superior Court May Be Made on Noticed Motion, by Stipulation, or by Ex Parte Application.
14.12[2][b] Substitution of Parties in Court of Appeal Must Be Made By Motion for Substitution.

14.13 Assignment Agreement--Contract Form With Warranties.

14.14 Acknowledgment of Assignment of Judgment.

14.15 Notice of Motion and Supporting Declaration and Memorandum for Order Substituting Assignee As Party to Action or Proceeding and Allowing Supplemental Pleading to Be Filed--Superior Court.

14.16 Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Assignee As Party--Superior Court

14.17 Request for Substitution of Party--Court of Appeal.

14.18 Notice of Assignment to Judgment Debtor and Attorney.

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Chapter 14 Assigning a Judgment
I. STRATEGY

2-14 MB Practice Guide: CA Debt Collection 14.01

14.01 Scope.

This chapter covers:

- Objective and strategy for assigning a judgment [*see 14.02*].
- The assignability of a judgment [*see 14.04*].
- The validity of an assignment of judgment [*see 14.05*].
- The effect of a partial assignment of a judgment [*see 14.06*].
- Perfecting an assignment of judgment by delivering a written assignment to the assignee [*see 14.07[1]*].
- Establishing priority between assignees [*see 14.07[2]*].
- The assignment of a joint and several debt to one of the co-obligors [*see 14.07[3]*].
- Making a judgment enforceable by filing an acknowledgment of assignment of judgment [*see 14.08*].
- The importance of giving notice of the assignment to the judgment debtor [*see 14.09*].
- The right of the judgment debtor to assert a claim of setoff or other defense against the assignee [*see 14.10[1]*].
- The right of a judgment debtor who acquires a claim against the judgment.
- The right of the judgment debtor to appeal a judgment that has been assigned [*see 14.11*].
- The procedure by which an assignee of a judgment can be substituted as a party [*see 14.12*].

Core Statutes:
CC § 954.5(b); *CCP §§ 368*, *368.5*, *673*, *681.020*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesManagement Duties & LiabilitiesCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral Overview

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Chapter 14 Assigning a Judgment
I. STRATEGY

2-14 MB Practice Guide: CA Debt Collection 14.02

14.02 Objective and Strategy.

A judgment creditor may assign a judgment to an assignee. An assignment need not take any particular form, and its validity is governed by general principles of contract law [*see 14.05*]. In order to protect its interests in the judgment, the assignee should take the following steps:

- If the assignment is only a partial assignment, obtain the judgment debtor's consent [*see 14.06*].
- Perfect the assignment as against third persons by having the assignor execute and deliver a written assignment to the assignee [*see 14.07[1]*].
- File an acknowledgment of assignment of judgment in the court that entered the judgment, so that the assignee will be able to enforce the judgment through a writ of execution or other enforcement remedy [*see 14.08*].
- Give actual notice of the assignment to the judgment debtor to:
  - Ensure that the judgment debtor will receive credit only for payments made to the assignee and not those made to the assignor [*see 14.09*].
  - Cut off any defenses or claims that the judgment debtor may have against the assignor that are acquired after notice of the assignment [*see 14.10*].
- Substitute itself as a party in any action pending before a court to ensure that the assignee receives notice of filings and proceedings in the action [*see 14.12*].

Strategic Point:

Substituting the new third party rather than accepting the assignment in the original creditor's name makes it easier to execute documents because it is easier to have the new party sign than to locate the original creditor. To reduce the risk of confusing the courts or title companies, the original creditor should also be listed when substituting the new third party [i.e., "ABC Corp., as Assignee of XYZ Inc. (Original Judgment Creditor/Plaintiff)"].

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 14 Assigning a Judgment
II. ASSIGNING A JUDGMENT

2-14 MB Practice Guide: CA Debt Collection 14.03

14.03 CHECKLIST: Assigning a Judgment.

☐ Determine if claim in question is assignable.

○ Has claim been reduced to a judgment?

○ If claim has not been reduced to judgment, is it a claim that is assignable?

Authority:
Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 CA4th 1373, 1381, 36 CR2d 424

Discussion:
See *14.04[1] -[3]*

○ Is judgment creditor attempting to assign a joint and several debt to one or more other co-obligors, thereby extinguishing debt?

Authority:
Great W. Bank v. Kong (2001) 90 CA4th 28, 32, 108 CR2d 266

Discussion:
See *14.04[4]*

☐ If assignment was of only a portion of judgment, obtain judgment debtor's consent to or ratification of assignment.

Authority:
Buckeye Ref. Co. v. Kelly (1912) 163 C 8, 12, 124 P 536

Discussion:
See *14.06*

☐ Perfect assignment by preparing and delivering written assignment to assignee.

Authority:
CC § 954.5(a); *Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353*

Discussion:
See *14.07[1]*

Form:
See *14.13* (assignment of judgment)

☐ Make judgment enforceable by assignee by having assignee file acknowledgment of assignment of judgment in court that entered judgment.

Authority:
CCP §§ 673, 681.020; *Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353*

Discussion:
See *14.08[1], [2]*

Form:
See *14.14* (acknowledgment of assignment of judgment)

☐ Have assignee give actual notice of assignment to judgment debtor, to prevent debtor from receiving credit for future payments made to assignor.

Authority:
CC § 954.5(c); *St. Paul Fire & Marine Ins. Co. v. James I. Barnes Constr. Co. (1968) 267 CA2d 931, 937, 73 CR 618*

Discussion:
See *14.09*

☐ If defending claim against judgment debtor being asserted by assignee:

○ Determine whether judgment debtor has any right to setoff or other defense existing at time of or before notice of assignment.

Authority:
CCP § 368

Discussion:
See *14.10[1]*

○ Determine whether judgment debtor's claims against creditor are invalid because they were acquired after judgment debtor received notice of assignment of judgment.

Authority:

CCP § 368; *Harrison v. Adams (1942) 20 C2d 646, 649, 128 P2d 9* ; *Highsmith v. Lair (1955) 44 C2d 298, 303, 281 P2d 865*

Discussion:
See *14.10[1], [2]*

○ Determine whether judgment debtor has been assigned a judgment against judgment creditor that may be offset against first judgment.

Authority:
Harrison v. Adams (1942) 20 C2d 646, 649, 128 P2d 9

Discussion:
See *14.10[3]*

○ Determine whether judgment debtor has any arguments it could have presented on appeal against assignor that it can assert against assignee.

Authority:
Northam v. Gordon (1863) 23 C 255

Discussion:
See *14.11*

☐ Decide whether action will proceed with assignor as named party, with assignee substituted as a party, or with both named.

Authority:
CCP § 368.5; *Kaplan v. Hacker (1952) 113 CA2d 571, 573, 248 P2d 464*

Discussion:
See *14.12[1]*

○ If case is in superior court, request court's permission for assignee to be substituted as party and file supplemental pleading showing substitution.

Authority:
CCP § 464(a)

Discussion:
See *14.12[2][a]*

Forms:
See *14.15*, *14.16*

○ If case is in court of appeal, serve and file motion for substitution of party.

Authority:
Cal Rules of Ct, Rule 8.36(a)

Discussion:
See *14.12[2][b]*

Form:
See *14.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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14.04 Judgment May Be Assigned.

14.04[1] Creditor May Assign Judgment to Third Party. A judgment creditor may assign a judgment to a third person [*CC § 954*; *Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353]* .

Consider:

An assignment to a third party typically revives interest in enforcing the judgment. A drawback to assignment is that the judgment debtor may try to confuse the issue of enforcement with tales of payments not credited or other issues they have had against the assignor/judgment creditor.

Investigating Assigning Judgments Using Online Resources:

Many resources are available online for investigating whether a judgment can be assigned. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases >CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined

Sample Search: To find California cases that discuss assigning a judgment to a third party, use a HEADNOTES segment search: ***headnotes (assign! /5 judgment /10 third party).***

14.04[2] Judgment Is Assignable Even If Underlying Claim Was Not. Certain claims for personal injuries arising out of a tort, such as legal malpractice claims, are not assignable [*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 CA4th 1373, 1381, 36 CR2d 424]* . Once the claim has been reduced to a judgment, however, the debt represented by the judgment is assignable [*Pacific Gas & Elec. Co. v. Nakano (1939) 12 C2d 711, 713, 87 P2d 700]* .

14.04[3] Assignee Acquires All Rights of Assignor. The assignee acquires all the rights represented by the judgment [*Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353]* .

14.04[4] Assignment of Joint and Several Debt to One Co-Obligor Extinguishes Debt. When a judgment creditor settles with one or more co-obligors and assigns a joint and several debt to them, the debt is extinguished, and the settling co-obligors cannot enforce the judgment against the non-settling co-obligor [*Great W. Bank v. Kong (2001) 90 CA4th 28, 32, 108 CR2d 266]* .

Example:

A bank obtained a deficiency judgment against a partnership and its partners. All but one of the partners settled with the bank, and the bank assigned the judgment debt to the settling partners. The court of appeal held that the settling partners could not enforce the judgment against the non-settling partner because the bank's assignment of the joint and several debt to some of the co-obligors extinguished the debt. They could, however, seek equitable contribution from the non-settling partner [*Great W. Bank v. Kong (2001) 90 CA4th 28, 32-33, 108 CR2d 266]* .

Distinguish:

When a party whose liability is secondary, such as a surety or guarantor, pays a judgment debt, the debt is not extinguished, and the surety or guarantor can enforce the debt against the original debtor [*Great W. Bank v. Kong (2001) 90 CA4th 28, 32-33, 108 CR2d 266* (citing *Collection Control Bureau v. Weiss (1975) 50 CA3d 865, 869, 123 CR 625* ; *Com Code § 3419(e)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsRevival of JudgmentsCivil ProcedureRemediesBondsSuretiesLiabilityTortsProcedureSettlementsMultipartiesContribution

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14.05 Validity of Assignment Generally Is Governed by Contract Law.

14.05[1] Contract Law Determines Validity of Assignment. The validity of an assignment generally is governed by the law of contracts [*Northern Counties Bank v. Earl Himovitz & Sons Livestock Co. (1963) 216 CA2d 849, 855-856, 31 CR 551]* . While no particular form of assignment is necessary, the assignment must be a manifestation by the owner of the right indicating the owner's intention to transfer the right to another person, without further action or manifestation of intention [*United Cal. Bank v. Behrends (1967) 251 CA2d 720, 725, 60 CR 128]* .

14.05[2] Consideration Is Not Required. An assignment of judgment carries the legal title to the judgment, and the transfer of title does not require valuable consideration [*Curtin v. Kowalsky (1904) 145 C 431, 434, 78 P 962]* .

Warning:

While the assignment of a judgment does not require consideration, the assignment without consideration could be challenged as a fraudulent transfer by a creditor of the transferor [*See* Ch. 4, Fraudulent Conveyances].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersReal Property LawPurchase & SaleFraudulent Transfers

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14.06 Partial Assignment Requires Judgment Debtor's Consent or Ratification.

An assignment of a portion of a judgment has no effect against the judgment debtor unless made with the judgment debtor's consent or ratified by the judgment debtor [*Buckeye Ref. Co. v. Kelly (1912) 163 C 8, 12, 124 P 536]* .

Although a partial assignment transfers to the assignee no legal title to any part of the judgment demand, it does transfer an equitable interest [*Buckeye Ref. Co. v. Kelly (1912) 163 C 8, 13, 124 P 536]* .

Example:

After making a partial assignment, the assignor may not settle the case on appeal and stipulate to a final judgment that would defeat the rights of the assignee to payments due on the partial assignment [*Rowe v. Holmes (1944) 63 CA2d 46, 53, 146 P2d 45]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesGeneral Overview

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14.07 Delivering Written Assignment to Assignee Perfects Transfer As Against Third Parties.

14.07[1] Assignment Should Be Made in Writing. Prudent practice dictates that an assignment should always be made in writing. Although case law states that an assignment of judgment is not required to be in writing in order to be valid [*Painter v. Berglund (1939) 31 CA2d 63, 66, 87 P2d 360*]. The assignment cannot be perfected as against third parties unless a written assignment is made [*CC § 954.5(a)*; *see 14.07[3]*].

Strategic Point--All Parties.

As a practical matter, it may be difficult to prove that an assignment was made--or to convince the judgment debtor that the debt should be paid to the assignee--without a writing memorializing the assignment. A judgment debtor will not want to pay the debt to a third party without some tangible evidence that payment is being made to the proper person. Therefore, the assignee's attorney should always prepare a written assignment.

Strategic Point--All Parties.

CC § 954.5 does not require the filing of an acknowledgment of assignment of judgment with the court in order to accomplish the transfer of the interest in the judgment [*compare CCP § 673*, discussed in *14.08[1]*]. *CC § 954.5* merely covers the priorities between conflicting bona fide assignees of the same right for value and without notice and protects the judgment debtor who pays the judgment creditor without notice of the assignment [*CC § 954.5*, Law Revision Commission Comment, 15 Cal. L. Revision Comm'n Reports 2001, 2610-2611 (1980)].

14.07[2] Contents of Written Assignment. *CC § 954.5* does not specify any particular content requirements for a written assignment [*compare CCP § 673(b)*, discussed in *14.08[2]*, which contains very specific requirements for an acknowledgment of assignment of judgment]. However, to preclude any subsequent question regarding whether an assignment occurred, or what was assigned, good practice suggests that the assignment should contain the following:

- Reference to the action (court, caption, and case number) in which the judgment in question was rendered [*see 14.13*, Paragraph 1].

- The date the judgment was rendered [*see 14.13*, Paragraph 1].

- The parties against whom and in favor of whom the judgment was rendered [*see 14.13*, Paragraph 1].

- If the assignment is not the first assignment of the judgment, a statement of the chain of assignments and the parties to those assignments, up to and including the current assignor.

- The identities and current addresses of the assignor and assignee [*see 14.13*, introductory language].

- The fact that the judgment is being assigned in its entirety, or, if less than all of the judgment is being assigned, a clear and exact description of what rights are being assigned under the judgment and what is being retained by the assignor [*see 14.13*, Paragraph 2; *see also 14.06* (debtor's consent to partial assignment is required)].

- The amount assigned, including credits for any payment made and interest accrued [*see 14.13*, Paragraph 2].

- Representation that the judgment has not been previously assigned and that no third party has any claim to it [*see 14.13*, Paragraph 5(d)].

- Representation that the judgment debtor has no setoff rights [*see 14.13*, Paragraph 5(f)].

- Representation that the judgment has or has not been renewed. The renewal date should be included, if applicable [*see 14.13*, Paragraph 1].

- Representation as to whether there are any liens for the judgment [*see 14.13*, Paragraph 5(f)].

- Warranty that the information and amounts are true and correct [*see 14.13*, Paragraph 5(e)].

- An indemnity provision that applies if the representations are incorrect [*see 14.13*, Paragraph 5(i)].

- A provision that the assignor will cooperate, execute all documents required, and provide further information and documents as required by the assignee to enforce the judgment [*see 14.13*, Paragraph 8].

- The assignor's signature.

Consider:

The list of provisions above assumes that the assignment is being made between two unrelated parties in an arms-length transaction. If that is not the case--for example, if the assignor and assignee are different subsidiaries of the same company--the warranty and indemnity provisions, cooperation clause, and similar provisions, are unnecessary and can be eliminated, resulting in a simpler and more streamlined form.

Strategic Point--Importance of Cooperation Clause:

Once an assignor assigns, there is little incentive for the assignor to cooperate or provide evidence in the event that questions later arise from the judgment debtor's resistance to enforcement. Thus, the assignment should detail the terms of the assignment and require the assignor to fully cooperate with the

assignee with all enforcement issues and questions regarding the judgment.

Strategic Point--Filing the Assignment With Court; Form of Assignment:

An assignment of judgment is not required to be filed with the court [*see Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353* ; *see 14.08*. If the assignment is filed, its terms will be available to any interested party, including the judgment debtor, who would then be able to ascertain, among other things, the amount the assignee paid for the judgment. To preserve the confidentiality of the terms of the assignment, therefore, it is recommended here that the assignment not be filed with the court. Thus, the assignment form in this chapter [*see 14.13*] is drafted in "contract" form rather than "pleading" form, and contains standard provisions typically incorporated into other types of contracts.

Cross References:

Form for written assignment of judgment, see *14.13*.

General forms for assignment of rights and obligations, with discussion, see California Legal Forms, Ch. 76, Assignment of Rights and Obligations (Matthew Bender).

14.07[3] Delivery to Assignee Perfects Assignment As Against Third Parties. An assignment of judgment is perfected as against third persons when a written assignment is executed and delivered to the transferee [*CC § 954.5(a)*; *Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353* ; *Great W. Bank v. Kong (2001) 90 CA4th 28, 32, 108 CR2d 266]* .

Example:

A judgment creditor with a lien on the judgment debtor's real property assigned the judgment to an assignee. After the county sold the judgment debtor's property to satisfy past due taxes, the assignee filed a claim with the county for excess proceeds from the tax sale. The county approved payment of the excess proceeds to other claimants but denied the assignee's claim because the assignee had not recorded an assignment of judgment. The court agreed with the assignee that she was entitled to share in the excess proceeds, because an assignment of judgment is perfected and becomes enforceable against third persons upon execution and delivery to the assignee of an assignment in writing, regardless of whether the assignment has been recorded or filed [*Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 437-440, 258 CR 353]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawContract Conditions & ProvisionsIndemnityReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment LiensTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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14.08 Filing Acknowledgment of Assignment of Judgment With Court Makes Judgment Enforceable by Assignee.

14.08[1] Generally, Assignee Must File Acknowledgment of Assignment With Court As Prerequisite to Use of Judicial Enforcement Remedies. In order to obtain a writ of execution or use other enforcement remedies provided in [*CCP §§ 680.010-724.260*], generally the assignee must file an acknowledgment of assignment of judgment in the court that entered the judgment [*CCP §§ 673, 681.020*; *Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353* ; *Great W. Bank v. Kong (2001) 90 CA4th 28, 32, 108 CR2d 266]* .

Distinguish:

An assignment of judgment need not be filed with the court in order to accomplish the transfer of the interest in the judgment [*Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353* ; *see 14.07*].

Strategic Point:

As long as an assignee of a judgment creditor complies with the requirements of CC § 673 (obtaining an acknowledgment of assignment of judgment and filing it with the court), the assignee may enforce the judgment and the judgment debtor may not attack the validity of the underlying assignment in opposing or appealing the enforcement activity, but must do so in a separate proceeding. In response to the appellant's contention that the acknowledgment recited that the assignment was temporary, the court concluded that there is no authority requiring an assignment to be permanent and no reason to invalidate an enforcement proceeding absent evidence that the assignment had expired [*California Coastal Com. v. Allen (2008) 167 CA4th 322, 327-328, 83 CR3d 906]* .

Cross Reference:

Writ of execution, see Ch. 16, Executing and Levying Against Personal Property.

14.08[2] Contents of Acknowledgment of Assignment. An acknowledgment of assignment of judgment must contain the following [*CCP § 673(b)*]:

- The title of the court where the judgment was entered, and the cause and number of the action.

- The date of entry of the judgment and of any renewals of the judgment, and where they are entered in the records of the court.

- The name and address of the judgment creditor and name and last known address of the judgment debtor.

- A statement describing the right represented by the judgment that is assigned to the assignee.

- The name and address of the assignee.

The acknowledgment of assignment of judgment must be made in the manner of an acknowledgment of a conveyance of real property and must be executed and acknowledged by the judgment creditor or by the prior assignee of record if there is one [*CCP § 673(c)*].

Cross Reference:

Form for acknowledgment of assignment, see *14.14*.

14.08[3] Acknowledgment of Assignment Also Establishes Assignee's Priority As Against Other Assignees of Same Judgment Rights. In addition to allowing the assignee to enforce the judgment, the filing of an acknowledgment of assignment of judgment also establishes the assignee's priority in relation to other assignees of the same judgment rights in the event that the original judgment creditor assigns his or her rights in the judgment to more than one assignee [*CC § 954.5(b)*]. If the original judgment creditor assigns his or her rights in the judgment to more than one assignee, the assignee who first files an acknowledgment of assignment of judgment has priority over other assignees [*CC § 954.5(b)*; *Fjaeran v. Board of Supervisors (1989) 210 CA3d 434, 440, 258 CR 353]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawPriorities & RecordingGeneral Overview

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14.09 Assignee Can Protect Right to Payment by Giving Notice to Judgment Debtor.

14.09[1] Giving Notice of Assignment to Judgment Debtor Cuts Off Judgment Debtor's Ability to Pay Assignor. By giving notice of the assignment to the judgment debtor, the assignee can prevent the debtor from receiving credit for payments made to the assignor after the assignment. Once the judgment debtor receives notice of the assignment, any payments the judgment debtor makes to the assignor are invalid, and the judgment debtor remains liable to the assignee for satisfaction of the judgment [*St. Paul Fire & Marine Ins. Co. v. James I. Barnes Constr. Co. (1968) 267 CA2d 931, 937, 73 CR 618]* .

Distinguish:

The filing of an acknowledgment of assignment of judgment pursuant to [*CCP § 673*] does not operate as constructive notice to the judgment debtor so as to invalidate any payments made by the judgment debtor that would otherwise be applied to the satisfaction of the judgment [*CC § 954.5(c)*].

Cross Reference:

Discussion of filing acknowledgment of assignment of judgment, see *14.08*.

Strategic Point:

A proof of service on the judgment debtor should be included when filing the acknowledgment because it serves as evidence of notice.

Strategic Point:

The attorney for the debtor in the underlying action may not be the attorney of record for postjudgment purposes, and there may be no such attorney [*see CCP § 684.020(b)*]. Nevertheless, it is good practice to send a separate pleading notice to both the judgment debtor and the attorney representing the judgment debtor in the action if there is no new attorney of record.

Cross Reference:

For sample notice of assignment to judgment debtor and attorney, see *14.17*.

14.09[2] Debtor's Lack of Notice of Assignment Is Defense to Suit by Assignee. A judgment debtor who pays the assignor without notice of the assignment is protected from suit by the assignee [*Ornbaun v. First Nat'l Bank (1932) 215 C 72, 76, 8 P2d 470* ; *Mutual Bldg. & Loan Ass'n v. Corum (1936) 16 CA2d 212, 215, 60 P2d 316]* .

Cross Reference:

Defenses to action seeking enforcement of judgment, see Ch. 1, Planning Collection of Debt.

14.09[3] Actual Notice Is Required. The judgment debtor must be given actual notice of the assignment of judgment [*Buckeye Ref. Co. v. Kelly (1912) 163 C 8, 13, 124 P 536* ; *Kaplan v. Hacker (1952) 113 CA2d 571, 573, 248 P2d 464]* .

Cross Reference:

Lack of actual notice as a defense to assignee's right of setoff, see *14.10[2].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationPleading StandardsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral Overview

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14.10 Judgment Debtor May Assert Setoff or Other Defense Against Creditor's Assignee.

14.10[1] Assignee Acquires Judgment Subject to Judgment Debtor's Defenses Against Assignor. An assignee's action against a judgment debtor is subject to any setoff or other defense existing at the time of or before notice of the assignment [*CCP § 368*]. The debtor may set off claims against the creditor that were acquired after the assignment of the judgment to a third person but prior to notice to the debtor of the assignment [*Harrison v. Adams (1942) 20 C2d 646, 649, 128 P2d 9]* .

Cross Reference:

Claims and defenses that may be asserted by a judgment debtor, see Ch. 1, Planning and Collection of Debt.

14.10[2] Actual Notice of Assignment Is Necessary to Defeat Debtor's Right of Setoff. Actual notice to the judgment debtor of the assignment is necessary to defeat the right of setoff [*Highsmith v. Lair (1955) 44 C2d 298, 303, 281 P2d 865]* .

Example:

After the plaintiff filed an action against the defendant, the government filed notices of tax lien against the plaintiff. The plaintiff won a judgment against the defendant, who then acquired four judgments against the plaintiff. The defendant did not receive notice of the tax lien until after it acquired the judgments against the plaintiff. Comparing the government to an assignee of the plaintiff, the court held that because the defendant had no notice of the government's liens at the time it acquired the judgments against the plaintiff, those judgments were properly offset against the judgment in favor of the plaintiff [*Highsmith v. Lair (1955) 44 C2d 298, 302-304, 281 P2d 865]* .

14.10[3] Judgment Debtor Who Acquires Separate Claim Against Judgment Creditor Can Receive Setoff. A judgment debtor who has been assigned a judgment that was rendered against the judgment creditor may appear in the court in which the judgment against the judgment debtor was rendered and have that judgment offset against the judgment against the judgment creditor [*Harrison v. Adams (1942) 20 C2d 646, 649, 128 P2d 9]* .

Example:

The plaintiff recovered a judgment against the defendant. Subsequently, a third party assigned to the defendant a judgment it held against the plaintiff. The defendant filed a motion to offset the assigned

judgment against the plaintiff's judgment against the defendant. The court granted the defendant's motion for setoff, although it also held that the plaintiff's attorney's contractual lien for attorney's fees had priority over the defendant's equitable right of offset [*Brienza v. Tepper (1995) 35 CA4th 1839, 1847-1850, 42 CR2d 690*].

Exception:

A judgment debtor who has been assigned a judgment merely for the purpose of collection does not have the right to assert that judgment as a setoff against a judgment against the judgment debtor [*Harrison v. Adams (1942) 20 C2d 646, 649-650, 128 P2d 9*].

Cross Reference:

Priority of liens, see Ch 12. Determining Priority and Source of Liens.

14.10[4] Setoff May Be Sought By Bringing Either Motion or Independent Action. A judgment debtor who has been assigned a third person's judgment against the judgment creditor may bring a motion for setoff in the action in which the creditor recovered the judgment against the debtor [*Norman v. Berney (1965) 235 CA2d 424, 434, 45 CR 467*]. Alternatively, the judgment debtor may bring an independent action against the judgment creditor to set off one judgment against the other [*Harrison v. Adams (1942) 20 C2d 646, 649, 128 P2d 9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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14.11 Judgment Debtor Retains Right to Appeal.

The assignee of a judgment takes the assignment subject to the right of the judgment debtor to present on appeal whatever arguments it could have presented against the assignor [*Northam v. Gordon (1863) 23 C 255*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsMoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas Bonds

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14.12 Assignee May Be Substituted As Party to Action.

14.12[1] Substitution Is Optional. An action may proceed with the assignor remaining as a named party or, with the court's permission, the assignee may be substituted as a party [*CCP § 368.5*; *Kaplan v. Hacker (1952) 113 CA2d 571, 573, 248 P2d 464]* .

Warning:

An assignee who is not substituted as a party may not be entitled to receive notice of filings and proceedings in the action, although filing a proper acknowledgment and giving notice of the assignment to the judgment debtor will likely avoid the need for substitution [*Kaplan v. Hacker (1952) 113 CA2d 571, 573-574, 248 P2d 464]* .

Strategic Point:

Substituting the new third party makes it easier to execute documents because it is easier to have the new party sign rather than locating the original creditor. To reduce the risk of confusing the courts or title companies, the assignee's status and the identity of the original creditor should be noted when substituting the new third party [e.g., "ABC Corp., as Assignee of XYZ Inc. (Original Judgment Creditor/Plaintiff)"].

14.12[2] Procedure for Substitution.

14.12[2][a] Substitution of Parties in Superior Court May Be Made on Noticed Motion, by Stipulation, or by Ex Parte Application. If no appeal has yet been filed, and the case in which judgment was rendered remains before the superior court, the assignee must request the court's permission to be substituted as a party and to file a supplemental pleading showing the substitution [*CCP § 464(a)*]. Although it is better practice to make this request on noticed motion, there is no such requirement, and an order of substitution may be obtained by stipulation or by ex parte application [*Chatten v. Martell (1958) 166 CA2d 545, 553, 333 P2d 364*].

Cross Reference:

Form for request for substitution of party in superior court, see *14.15* (motion), see *14.16* (order).

14.12[2][b] Substitution of Parties in Court of Appeal Must Be Made By Motion for Substitution. After an appeal has been filed, an assignee who wishes to be substituted as a party must serve and file a motion for substitution of party in the reviewing court. The clerk of that court must notify the superior court of any ruling on the motion [*Cal Rules of Ct, Rule 8.36(a)*].

Cross Reference:

Form for request for substitution of party on appeal, see *14.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for Substitution

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14.13 Assignment Agreement--Contract Form With Warranties.

Assignment Agreement--Contract Form With Warranties.

ASSIGNMENT AND ACCEPTANCE AGREEMENT

This Assignment and Acceptance Agreement (hereinafter "Assignment") is dated _____, by and between _____ ("Assignor"), _____ [*address*], and _____ ("Assignee"), _____ [*address*]. Assignor and Assignee are hereinafter cumulatively referred to in this Assignment as the "Parties."

1. Judgment. The subject matter of this Assignment is that certain Judgment (the "Judgment") entered on _____ [*date*], in favor of Assignor and against _____ [*name(s) of judgment debtor(s)*] in the sum of $_____, in the case of _____ vs. _____, case number _____ filed in _____ [*name of court*], a true and correct copy of which Judgment is attached as Exhibit 1. [Abstracts of judgment and personal property business liens have been filed and recorded in _____, true and correct cop(ies) of which is/are attached hereto, marked Exhibit(s) _____]. The Judgment _____ [has not been renewed *or* was renewed on _____ (date), and a copy of the renewal is attached as Exhibit _____]. [The judgment has not been satisfied in whole or in part.]

2. Assignment of Judgment. Assignor hereby [, and without recourse,] sells and assigns to Assignee, and Assignee hereby purchases and accepts [, without recourse,] from Assignor, any and all interest that Assignor has in and to the Judgment, under the terms and conditions set forth in this Assignment. The rights represented by the Judgment that are assigned to the Assignee are the rights of the Assignor to receive payments in satisfaction of the judgment and all other rights under the Judgment. This is an absolute assignment of the full amount of the Judgment in the sum of $_____, with accrued interest thereon at the legal rate from and after the date of entry of the Judgment.

3. Payment by Assignee. In consideration for the rights assigned to Assignee under this Assignment, Assignee agrees to pay to Assignor on or before _____ [*specify date*] (the "Closing Date"), in immediately available funds and in lawful money of the United States of America, the total sum of $_____ plus interest at the daily rate of $_____ from _____ [*date on which interest will begin to accrue*] until paid as the purchase price of the Assignment. The Parties agree that title to the Judgment may be transferred from Assignor to Assignee's designee,

as long as Assignor is notified by Assignee in writing of any such designee prior to the Closing Date.

4. Duties of Parties On or Before Closing Date. On or before the Closing Date, the parties shall do all of the following:

(a) Assignor shall deliver or cause to be delivered to Assignee the original executed Assignment of Judgment and an acknowledgment of assignment in recordable form.

(b) Assignee shall deliver or cause to be delivered to Assignor the sums set forth in Paragraph 3, above, together with a fully executed original of this Assignment.

5. Warranties of Assignor. Assignor makes only the following representations and warranties to Assignee:

(a) Assignor is the sole party in whose favor the Judgment was entered.

(b) As of the Closing Date, Assignor has not received any funds in satisfaction of the Judgment [, except for the following payment received on the respective dates indicated after the amounts: $ _____ (*specify*)].

(c) Assignor has the right, power, legal capacity, and authority to execute and deliver this Assignment and Acceptance Agreement and to perform all obligations required of Assignor hereunder.

(d) As of _____ [*date of agreement, or specify another date*], Assignor has made no previous assignment of the Judgment to any other person or entity, and has not transferred, excused or forgiven any part of the Judgment or any person or entity obligated thereon.

(e) As of _____ [*date of agreement, or specify another date*], there is due, owing and payable on the Judgment the following:

Principal	$_____
Interest	$_____
Costs	$_____
Attorney fees	$_____
Other	$_____
TOTAL	$_____

(Interest continues to accrue on the Judgment at the per diem rate of $_____ from _____ [*date*].)

(f) No claim has been made known to Assignor as of the date of this Assignment which seeks to attack, avoid, set aside or invalidate the interests which are being assigned herein, and no appeal of the Judgment has been filed. The Judgment is fully enforceable and not subject to any stay of enforcement. Further, Assignor has no knowledge of any defense, offset, or claim of recoupment with regard to the Judgment, except for _____ [*describe*], of which all Parties are aware.

(g) Assignor has not entered into any agreements or modifications to the Judgment other than as set forth herein. Assignor is unaware of any claims that the Judgment is not fully enforceable.

(h) Except as set forth in this Paragraph 5, Assignor makes absolutely no representations or warranties and assumes no responsibility with respect to the Judgment, the obligations and indebtedness evidenced thereby, the Assignment or any

documents executed in connection herewith and the execution, legality, enforceability, genuineness, sufficiency or value of the Judgment.

(i) Assignor agrees to indemnify Assignee and hold Assignee harmless from and against any loss, cost, or expense, including attorney fees and court costs, that may result from Assignor's breach of any of the warranties set forth in this Paragraph 5.

6. Warranties of Assignee. Assignee makes only the following representations and warranties to Assignor:

(a) Except as otherwise expressly set forth in this Assignment, Assignee confirms that it has done its own due diligence with respect to its purchase of the Judgment and has received copies of the Judgment, and further agrees that it has independently and without reliance upon Assignor, and based upon its own due diligence and all other actions as it has deemed appropriate, made its own independent decision to purchase the Judgment from Assignor.

(b) Assignee represents and warrants to Assignor that it has the right, power, legal capacity and authority to execute and deliver this Assignment and to perform all obligations of Assignee in accordance with the terms of this Assignment.

(c) Upon the execution of this Assignment and the documents executed in connection herewith, the Assignee, to the extent provided in this Assignment, shall have the rights and obligations of the Judgment Creditor, and the Assignor, to the extent provided in this Assignment, shall relinquish its rights under the Judgment.

7. Limitation of Liability. Assignee acknowledges and confirms to Assignor that Assignee (except for the representations and warranties herein) has itself been, and will continue to be, independent and without reliance on Assignor, based on such documents and information as it has deemed appropriate (including, without limitation, the Judgment), solely responsible for making its own independent appraisal of and investigation into the Judgment and its own credit analysis and decision to enter into this Assignment. Apart from any liability of Assignor to Assignee for any breach of any express provision of this Assignment, Assignor shall not directly or indirectly have, suffer, or incur any liability whatsoever to Assignee or any of Assignor's successors or assigns.

8. Assignor's Duty of Cooperation. Assignor agrees to cooperate with Assignee and its designees to the extent Assignee deems reasonably necessary to assist Assignee in enforcement of the Judgment and the execution of any further documents or testimony required in connection with any such enforcement. Assignee shall not be obligated to pay Assignor for any such further actions Assignee may deem necessary to enforce the Judgment or this Assignment.

9. Indemnification of Assignor. Assignee agrees to indemnify Assignor and hold Assignor harmless from and against any loss, cost, or expense, including attorney fees and court costs relating to the enforcement by Assignee of the Judgment under this Assignment.

10. No Third Party Beneficiaries. This Assignment is made and entered into for the protection and benefit of the Parties and their successors and assigns, and no other person or entity shall be a direct or indirect beneficiary of or have any direct or indirect cause of action or claim in connection with this Assignment or with the Judgment.

11. Counterparts. This Assignment may be executed may be executed in any number of counterparts, each of which shall be deemed and original, and any and all of which counterparts, taken together, shall constitute but one and the same. Facsimile signatures are acceptable if followed by delivery of "*hard copy*" originals within three days following execution. Each of the Parties shall execute and deliver any and all additional papers, documents, and other assurances, and shall do any and all acts and things reasonably necessary in connection with the performance of their obligations hereunder and to carry out the intent of the Parties as set forth in this Assignment.

12. Attorney's Fees. If any judicial action shall be brought to enforce the provisions of this Assignment, the prevailing

party shall be entitled to recover from the party prevailed against all costs and expenses incurred or expended in that action, including reasonable attorneys' fees.

13. Forum. The Parties agree that all actions or proceedings arising in connection with this Assignment shall be tried and litigated only in the state and federal courts located in the State of California.

14. Entire Agreement. This Assignment, and the exhibits attached, constitutes the entire and exclusive Agreement between the Parties with respect to the subject matter of this Assignment, and may be altered and amended only by a writing signed by the party to be charged. All prior or contemporaneous oral agreements relating to the subject matter of this Assignment are merged into this written Assignment.

15. Governing Law. This Assignment shall be governed by and construed in accordance with California law.

16. Severability. If any provision of this Assignment shall be determined by a court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of this Assignment shall not be affected thereby, and shall be valid and shall be enforced to the fullest extent permitted by law.

17. Time Is of the Essence. The Parties agree that time is of the essence with respect to any act or performance of payment set forth in this Assignment.

18. Independent Legal Representation. The Parties at all relevant times have had the opportunity to be represented by legal counsel of their choice concerning their rights with respect to the form and content of this Assignment and the advisability of executing it.

Executed by the Parties on the dates indicated below:

ASSIGNOR
Dated: _____
_____ [*signature of assignor*]
[*typed name*]
ASSIGNEE
Dated: _____
_____ [*signature of assignee*]
[*typed name*]

NOTES.

Authority:
CC §§ 954, 954.5(a)

Delivering Written Assignment to Assignee:
See *14.07[1] -[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensRenewalsContracts LawThird PartiesBeneficiariesGeneral OverviewContracts LawThird PartiesDelegation of Performance

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14.14 Acknowledgment of Assignment of Judgment.

Acknowledgment of Assignment of Judgment.
_____ [*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ACKNOWLEDGMENT OF
vs.	)	ASSIGNMENT OF JUDGMENT
_____ [*name*],	)	[LIMITED CIVIL CASE]
Defendant.	)	Judge: _____
	)	Department: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

1. On _____ [*date*], this court entered judgment in favor of _____ [*name of judgment creditor*] against _____ [*name of judgment debtor*] in the above-entitled action. Judgment was entered in judgment book volume _____ [*number*], page _____ [*number*]. _____ [No renewals of the judgment have been entered in the records of the court *or* Judgment was renewed on _____ (*date*), and renewal of the judgment was entered in judgment book volume _____ (*number)*, page _____ (*number)*].

2. _____ [*Name of judgment creditor*], as Assignor, hereby acknowledges that he/she/it has assigned the above-referenced judgment to _____ [*name of assignee*], as Assignee.

3. The name of the Judgment Creditor in the above-entitled action is _____. The address of the Judgment Creditor is _____.

4. The name of the Judgment Debtor in the above-entitled action is _____. The last known address of the Judgment Debtor is _____.

5. The name of the Assignee of this judgment is _____. The address of the Assignee is _____.

6. The rights represented by this judgment that are assigned to the assignee are _____ [*specify (e.g., for a money judgment):* the rights of the assignor to receive payments in satisfaction of the judgment and all other rights under the judgment. This is an assignment of the full amount of the judgment in the sum of $ _____ with accrued interest thereon at the legal rate from and after the date of entry of this judgment].

Dated: _____

_____
[*signature of judgment creditor (or prior assignee of record, if any)*]

_____ [*typed name*]

ACKNOWLEDGMENT

State of California,)
County of _____)

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that, by his/her signature on the instrument, the person, or the entity on behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____ [*signature*] [*Seal*]
_____ [*name of office*]

NOTES.

Authority:
CC § 954.5; *CCP §§ 673*, *681.020*

Filing Acknowledgment of Assignment of Judgment:
See *14.08*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewContracts LawGeneral OverviewContracts LawNegotiable InstrumentsEnforcementProof of Signature

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2-14 MB Practice Guide: CA Debt Collection 14.15

14.15 Notice of Motion and Supporting Declaration and Memorandum for Order Substituting Assignee As Party to Action or Proceeding and Allowing Supplemental Pleading to Be Filed--Superior Court.

Notice of Motion and Supporting Declaration and Memorandum for Order Substituting Assignee As Party to Action or Proceeding and Allowing Supplemental Pleading to Be Filed--Superior Court.

_____ [*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER SUBSTITUTING ASSIGNEE FOR _____ [*identify party, e.g., plaintiff*], DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Judge: _____ Department: _____ Date Action Filed: _____ [Trial Date: _____]

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*] or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of assignee*] will, and hereby does, move for an order allowing this _____ [action *or* proceeding] to be continued _____ [by *or* against] him/her as the successor in interest of _____ [*name of assignor*], _____ [*identify party, e.g.,* plaintiff] herein, and allowing a supplemental _____ [*specify pleading, e.g.,* complaint] to be filed showing substitution, a copy of which is attached. The motion will be made on the ground that, since the commencement of this _____ [action *or* proceeding], _____ [*name of assignee*] has _____ [purchased *or* acquired by assignment] all of the interest of _____ [*name of assignor*],_____ [*identify party, e.g.,* plaintiff] herein, in the subject of this _____ [action *or* proceeding].

The motion will be based on this notice of motion, on the declaration of _____ [*name of assignor*] and the memorandum served and filed herewith, on the supplemental _____ [*specify pleading, e.g.,* complaint], on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name of assignor*]

I, _____ [*name of assignor*], declare:

1. I am the _____ [*specify, e.g., plaintiff*] in the above-entitled action.

2. On _____ [*date*], I _____ [*set forth fact of transfer of interest, e.g.,* transferred all my rights and interest in the cause of action which is the subject of the above-entitled case,] to _____ [*name of assignee*]. [A copy of the agreement under which this transfer was made is attached as Exhibit "A."]

3. _____ [*Name of assignee*] has ever since been, and now is, the real party in interest as the _____ [*identify party, e.g.,* plaintiff] in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

_____ [*date*]

_____ [*signature*]

MEMORANDUM

_____ [*Name of assignee*] hereby moves this court pursuant to *Code of Civil Procedure Section 464* for an order substituting it as _____ [*identify party, e.g.,* plaintiff] and allowing it to file a supplemental _____ [*specify pleading, e.g.,* complaint] showing substitution, a copy of which is attached. As stated in the accompanying declaration of _____ [*name of assignor*], after the commencement of this _____ [action *or* proceeding], [*name of assignee*] [purchased *or* acquired by assignment] all of the interest of _____ [*name of assignor*], _____ [*identify party, e.g.,* plaintiff] herein, in the judgment that is the subject of this _____ [action *or* proceeding]. _____ [*Name of assignee*] has ever since been, and now is, the real party in interest as the _____ [*identify party, e.g.,* plaintiff] in this action. Accordingly, _____ [*name of assignee*] respectfully requests that the court exercise its authority under *Code of Civil Procedure Section 368.5* to allow _____ [*name of assignee*] to be substituted as the _____ [*identify party, e.g.,* plaintiff] in this _____ [action *or* proceeding] and to file a supplemental _____ [*specify pleading, e.g.,* complaint].

Dated: _____.

Respectfully submitted,

_____[*firm name, if any*]

By: _____ [*signature*]
_____[*typed name*]

Attorney for _____
[*party's status and name*]

NOTES.

Authority:
CCP §§ 368.5, 464

Substitution of Assignee:
See *14.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedurePartiesReal Parties in InterestAssignees

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14.16 Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Assignee As Party--Superior Court

Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Assignee As Party--Superior Court

_____ [*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ ORDER SUBSTITUTING ASSIGNEE FOR _____ [*identify party, e.g., plaintiff*] Date: _____ Time: _____ Judge: _____ Department: _____ Date Action Filed: _____ [Trial Date: _____]

_____

The motion of _____ [*name of assignor*] for an order allowing this _____ [action *or* proceeding] to be continued [by *or* against] him/her/it as the successor of _____ [*name of assignee*], _____ [*identify party, e.g.,* plaintiff] herein, and allowing a supplemental _____ [

specify pleading, e.g., complaint] to be filed showing that substitution came on regularly for hearing by the court on _____ [*date*]. The moving party appeared by counsel _____ [*name of assignee's attorney*]; _____ [*identify party, e.g.,* defendant] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted, IT IS ORDERED that the motion be, and it hereby is, granted and that this _____ [action *or* proceeding] continue _____ [by *or* against] _____ [*name of assignee*] in place of _____ [*name of assignor*], as _____ [*identify party, e.g.,* plaintiff] herein, and leave is granted to file the original of the supplemental _____ [*specify pleading, e.g.,* complaint], a copy of which is attached to the notice of motion, showing substitution.

Dated: _____

_____ [*signature*]
Judge of the Superior Court

NOTES.

Authority:
CCP §§ 368.5, 464

Substitution of Assignee:
See *14.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsTransfers of Interests

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2-14 MB Practice Guide: CA Debt Collection 14.17

14.17 Request for Substitution of Party--Court of Appeal.

Request for Substitution of Party--Court of Appeal.
_____ [*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff and [*Appellant/Respondent*],	)	CASE NO. _____ [*appellate case number*]
vs.	)	Superior Court No. _____ [*superior*
_____ [*name*],	)	*court number of case from which*
Defendant and [*Appellant/Respondent*].	)	*appeal was taken*]
	)	
	)	

_____

On Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*number*].

The Honorable _____ [*name*], Judge.

REQUEST FOR SUBSTITUTION OF PARTY

_____ [*name of assignee*] hereby requests an order substituting _____ [*name of assignee*] in the place of _____ [*name of assignor*] in this court. _____ [*name of assignee*] makes this request on the ground that since the commencement of this appeal, _____ [*name of assignee*] has _____ [purchased *or* acquired by assignment] all of the interest of

_____ [*name of assignor*], _____ [*identify party, e.g.,* plaintiff and respondent] herein, in the subject of this _____ [action *or* proceeding]. [A copy of the acknowledgement of assignment of this interest is attached as Exhibit A.]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
Cal Rules of Ct, Rule 8.36(a)

Substitution of Assignee:
See *14.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsTransfers of Interests

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2-14 MB Practice Guide: CA Debt Collection 14.18

14.18 Notice of Assignment to Judgment Debtor and Attorney.

Notice of Assignment to Judgment Debtor and Attorney.
_____ [*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar no. of attorney*]
Attorney for _____ [*name of party*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF ASSIGNMENT TO
vs.	)	JUDGMENT DEBTOR
_____ [*name*],	)	_____ [*identify*] AND
Defendant.	)	[HIS *or* HER *or* ITS] ATTORNEY
	)	OF RECORD
	)	

_____

PLEASE TAKE NOTICE that the judgment in the within action in the amount of $_____ has been assigned to _____ [*name of assignee*] effective _____ [*date*]. All payments to satisfy the judgment are to be paid to _____ [*name of assignee*]. In the event payments are made to the prior judgment creditor after the date of this notice, those payments will not be applied to satisfy any part of this judgment pursuant to *Civil Code Section 945.5*.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

NOTES.

Authority:
CC § 454.5

Substitution of Assignee:
See *14.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & Assignors

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Chapter 15 Staying Enforcement of Judgment

2-15 MB Practice Guide: CA Debt Collection 15.syn

§ 15.syn Synopsis to Chapter 15: Staying Enforcement of Judgment

15.01 Scope.

15.02 Objective and Strategy.

15.03 CHECKLIST: Determining Whether Any Type of Stay Is Available

15.04 Stays of Enforcement Can Be Based on Statute or Judgment.
15.04[1] Judgment May Be Enforced Unless Otherwise Provided in Statute or Judgment.
15.04[2] Statutory Exception Authorizes Stays Related to Appeals.
15.04[3] Statutory Exceptions Authorize Stays Based on Military Service.

15.05 Stays of Enforcement Also Can Be Based on Case Law or Court's Inherent Authority.

15.06 Automatic Stays Are Available Pending Appeal.

15.07 Discretionary Stays May Be Available at Other Times.

15.08 CHECKLIST: Seeking or Opposing Discretionary Trial Court Stay.

15.09 Trial Court May Grant Discretionary Stay.

15.10 Length of Discretionary Stay Is Within Trial Court's Discretion, But Limit Applies If Security Would Be Required to Effect Stay on Appeal.

15.11 Discretionary Stay May Be Granted Regardless of Intention to Appeal.

15.12 Stay Should Be Sought by Noticed Motion If Possible.

15.13 CHECKLIST: Seeking or Opposing Stay to Determine Priority of Competing Liens.

15.14 Parties May Seek Stay for Determination of Competing Liens on Judgment.
15.14[1] Parties Can Seek Stay If Judgment Debtor Has Another Action Pending on a Disputed Claim Against the Judgment Creditor.
15.14[2] Parties May Be Able to Obtain Stay to Determine Priority of Competing Liens in Other Situations.

15.15 Stay Should Be Sought by Noticed Motion If Possible.

15.16 CHECKLIST: Relying on or Opposing Automatic Stay Relating to Appeal.

15.17 Automatic Stay Relating to Appeal Is Available.

15.18 Instances in Which Security Is Required for Automatic Stay.

15.19 Instances in Which Automatic Stay Is Available Absent Security.

15.20 Instances in Which Automatic Stay Is Not Available.

15.21 Trial Court Has Discretion to Require Additional Security for Automatic Stays.

15.22 Automatic Stay Only Extends to Enforcement of Judgment; Trial Court Retains Jurisdiction of Other Matters.

15.23 Automatic Stay Applies Without Action, or on Posting of Security When Required.
15.23[1] Purpose and Types of Security.
15.23[2] Procedures for Posting Security When Required.
15.23[3] Proponent of Automatic Stay May Seek Court Confirmation.

15.24 Party Opposing Automatic Stay Can Challenge Its Applicability, or Adequacy of Security Offered.
15.24[1] Opposition to Automatic Stay Should Be Pursued by Steps for Enforcement.
15.24[2] Challenge to Adequacy of Security Should Be by Noticed Motion.

15.25 CHECKLIST: Seeking or Opposing Stay From Appellate Court.

15.26 Stay by Writ of Supersedeas Is Available.
15.26[1] Appellate Court or Judge Has Power to Issue Writ of Supersedeas.
15.26[2] Supersedeas or Stay Relief From Appellate Court Should Not Be Sought If Trial Court Relief Is Available.
15.26[3] Supersedeas Petitions Should Be Filed Pursuant to Cal Rules Ct, Rules 8.112, 8.116, and CCP § 923.
15.26[4] Opposition to Petition Must Be Filed in 15 Days.
15.26[5] Reply Not Covered by Rules.

15.27 Procedure for Supreme Court or Appellate Court Temporary Stay in Connection with Appeal or Original Proceeding.

15.28 Stays in Connection With Trial Court Writ of Mandate Proceedings Are Governed by Special Rules.

15.29 CHECKLIST: Seeking or Opposing Stay Based on Military Service.

15.30 Stays Are Available to Persons on Active Military Service.
15.30[1] Protection Is Available Under Both Federal and State Law.
15.30[2] Current and Recent Servicemembers Are Eligible, But Eligibility Periods Differ Under State and Federal Law.
15.30[3] Protections Extend to Dependents of Servicemembers.

15.31 Pending Actions or Proceedings May Be Stayed.
15.31[1] Pending Action or Proceeding Involving Servicemember May Be Stayed.
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15.34 No Procedure Specified for Requesting Military Stays.

15.35 Undertaking for Security on Automatic Stay Relating to Appeal.

15.36 Motion for Discretionary Stay by Trial Court, With Supporting Memorandum.

15.37 Motion for Stay Based on Competing Liens in Trial Court, With Supporting Memorandum.

15.38 Motion for Military Stay in Pending Court, With Supporting Memorandum.

15.39 Motion for Writ of Supersedeas or Other Relief in Court of Appeal, With Supporting Memorandum.

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Chapter 15 Staying Enforcement of Judgment
I. SCOPE

2-15 MB Practice Guide: CA Debt Collection 15.01

15.01 Scope.

This chapter covers:

- Objectives and strategies regarding stays of enforcement of judgments [*see 15.02*].
- Stays of enforcement based on statute or terms of judgment [*see 15.04*].
- Stays of enforcement based on case law or court's authority [*see 15.05*].
- Automatic stays pending appeal [*see 15.06*, *15.16 -15.24*; Form: see *15.35*].
- Discretionary stays [*see 15.07 -15.12*; Form: *see 15.36*].
- Stays to determine priority of lien [*see 15.13 -15.15*; Form: *see 15.37*].
- Stays from appellate court [*see 15.25 -15.28*; Form: *see 15.39*].
- Stays based on military service [*see 15.30 -15.34*; Form: *see 15.38*].

This chapter does not address stays in family law or probate matters. Bankruptcy stays are discussed in Ch. 3, Effect of Bankruptcy.

Core Statutes:

CCP §§ 916-924 (automatic and discretionary stays pending appeal and determination of the priority of competing liens); *CCP §§ 1110b*, *1094.5(g)* (stays of traditional and administrative writs of mandate); M&V Code §§ 403, 409.3 and *50 USC app § 501 et seq*. (military stays).

Cross References:

Stays in bankruptcy, see Chapter 3, Effect of Bankruptcy.

Stays in family law matters, see California Family Law Practice and Procedure (Matthew Bender); California Pleading and Practice (Matthew Bender), Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies; Ch. 259, Family Law Enforcement: Special Remedies for

Support Enforcement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysAppealsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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Chapter 15 Staying Enforcement of Judgment
I. SCOPE

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15.02 Objective and Strategy.

A party opposing enforcement of a court order or judgment will want to review possible available stays to identify the course of action providing the most secure stay with the least burdensome security for a client. In some cases, more than one type of stay may be possible. A party opposing enforcement generally will want to seek a stay from the trial court first.

Counsel for a judgment creditor should have at least a general idea before getting a judgment as to how he or she will seek enforcement, and should try to make certain that potential stay issues are dealt with beforehand. For example, counsel should make certain that no stay is provided in the judgment itself. If counsel is negotiating a stipulation for judgment, the stipulation should provide for a termination of any stay against enforcement in specific circumstances.

A party seeking enforcement of a judgment will want to do the following:

- Challenge grounds for all possible stays.
- Challenge the adequacy of security within the mandatory statutory requirements.
- Argue that additional security should be required if a stay is issued.

The primary objective from a judgment creditor's standpoint is to ensure that there will be there will be sufficient funds available to satisfy the judgment. If the judgment debtor has not taken action to stay enforcement of the judgment, then the judgment creditor should take immediate steps to enforce the judgment, which may then prompt the posting of security to stay enforcement. It is often a benefit to the judgment creditor if the judgment debtor posts a bond or undertaking to stay enforcement of the judgment, since this will usually mean that the judgment will be collectable, and with minimal expense.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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Chapter 15 Staying Enforcement of Judgment
II. DETERMINING WHETHER ANY TYPE OF STAY IS AVAILABLE

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15.03 CHECKLIST: Determining Whether Any Type of Stay Is Available

☐ Review whether judgment or order provides for stay or statutory exception applies.

- ○ Does judgment or order provide for stay?
- ○ Does stay relate to an appeal?
- ○ Is a party currently in or recently discharged from military service?
- ○ Does judgment debtor have a disputed claim against judgment creditor?

Authority:
CCP § 683.010

Discussion:
See *15.04*, *15.13 -15.15*.

☐ Determine whether automatic stay is available pending appeal.

- ○ Assess whether the matter is an "action" or a "special proceeding."
- ☐ If matter is an "action," code sections for stays pending appeal apply.
- ☐ If matter is a "special proceeding," argue that either:
- ○ Trial court has inherent discretion to grant stay, or
- ○ If matter is a writ of traditional or administrative mandate, special rules apply.

○ In either case, be prepared to seek or respond to request for relief from appellate court if trial court relief is unavailable or denied.

Authority:
CCP §§ 22, 23, 916-923; *Agric. Labor Relations Bd. v. TexCal Land Mgmt., Inc. (1987) 43 C3d 696, 707, 238 CR 780, 739 P2d 140* ; *Sun-Maid Raisin Growers v. Paul (1964) 229 CA2d 368, 374, 40 CR 352* ; *Walker v. Superior Court (1991) 53 C3d 257, 266, 279 CR 576, 807 P2d 418* , *but see In re Melvin A (2000) 82 CA4th 1243, 1249, 98 CR2d 844*

Discussion:
See 15.4[2],15.05-15.06, 15.25-15.28

☐ If party is recent or current servicemember, review whether state or federal statutes allow or require stay or other relief.

Authority:
M&V Code §§ 400-409.13; *50 USC app §§ 501 et seq*.

Discussion:
See *15.04[3]*, *15.29 -15.34*.

☐ Determine whether court may grant discretionary stay.

Authority:
CCP § 918(a), (c); *Sun-Maid Raisin Growers v. Paul (1964) 229 CA2d 368, 374-375, 40 CR 352*

Discussion:
See *15.07*; *15.08 -15.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesWritsCommon Law WritsMandamus

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Chapter 15 Staying Enforcement of Judgment
II. DETERMINING WHETHER ANY TYPE OF STAY IS AVAILABLE

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15.04 Stays of Enforcement Can Be Based on Statute or Judgment.

15.04[1] Judgment May Be Enforced Unless Otherwise Provided in Statute or Judgment. A judgment is enforceable under the Enforcement of Judgments Law [*CCP §§ 683.030 et seq.*] "except as otherwise provided by statute or in the judgment" [*CCP § 683.010*].

15.04[2] Statutory Exception Authorizes Stays Related to Appeals. The code sections governing stays related to appeals [*CCP § 916-924*] apply to all "actions" as that term is broadly defined in *CCP § 22*, but not "special proceedings" under *CCP § 23* [*Agric. Labor Relations Bd. v. TexCal Land Mgmt., Inc. (1987) 43 C3d 696, 707, 238 CR 780, 739 P2d 140]* .

"Action" is defined as an "ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense" [*CCP § 22*]. A "special proceeding" is defined as "[e]very other remedy" [*CCP § 23*].

15.04[3] Statutory Exceptions Authorize Stays Based on Military Service. State and federal law authorize stays of execution of judgment for persons in military service, or recently returned from such service, under specified conditions [*see* M&V Code §§ 403, 409.3; *50 USC app § 522*].

Strategic Point:

Note that the federal act precludes even commencing suit against someone called up to active duty, and the action certainly cannot continue even if started before active duty commenced [*see 50 USC app § 511(2)(A)(i)*]. However, the federal stay does not preclude initiating action against someone who was active at the time the obligation was incurred, but no longer is active [*see 50 USC app § 501 et seq.*]. The stay does apply if a person is called up for foreign posting [*see 50 USC app § 501 et seq.*].

Cross References:

Military stays, see *15.29 -15.34*.

Planning enforcement of judgments generally, see Ch. 9, Planning Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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Chapter 15 Staying Enforcement of Judgment
II. DETERMINING WHETHER ANY TYPE OF STAY IS AVAILABLE

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15.05 Stays of Enforcement Also Can Be Based on Case Law or Court's Inherent Authority.

Although the language of [*CCP § 683.010*] appears to limit stays to circumstances specified by statute or in the judgment, there are other instances in which stays may be available.

Examples:

- An appellate court may issue a writ of supersedeas to protect its own jurisdiction even when it is not authorized to do so under *CCP § 923* [*Sun-Maid Raisin Growers v. Paul (1964) 229 CA2d 368, 374, 40 CR 352]* .

- Some cases suggest that a trial court has an inherent power to stay proceedings in the interest of justice [*see, e.g.*, *Walker v. Superior Court (1991) 53 C3d 257, 266, 279 CR 576, 807 P2d 418]* , although there is contrary language in other cases [*see, e.g., In re Melvin A (2000) 82 CA4th 1243, 1249, 98 CR2d 844* (suggesting only statutes provide authority to trial court to grant stays), *Mannix v. Superior Court (1910) 157 C 730, 731, 109 P 264* (pre-*CCP § 918* case, finding no authority other than by statute)].

Strategic Point--Moving Party:

A party seeking a stay should argue that a court has inherent authority to grant a stay, particularly in a "special proceeding" to which the usual stay statutes do not apply. In *Carpenter v. Pacific Mut. Life Ins. (1939) 13 C2d 306, 312, 89 P2d 637* , a "special proceeding," the court assumed that an inherent "supersedeas" power existed, although it may not have meant that this power was limited to the court of review.

Strategic Point--Responding Party:

A party opposing a stay should argue that the trial court has no inherent authority, or that the trial court has no jurisdiction to issue such a stay after the time for it to rule on a new trial motion [*Wenzoski v. Central Banking Sys., Inc. (1987) 43 C3d 539, 542, 237 CR 167, 736 P2d 753]* .

Cross References:

Distinction between "actions" and "special proceedings," see *15.04[2]*.

Stays in general by appellate court, see *15.25 -15.28*.

Discretionary stays in general by trial court, see *15.08 -15.12*.

Automatic stays, see *15.16 -15.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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II. DETERMINING WHETHER ANY TYPE OF STAY IS AVAILABLE

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15.06 Automatic Stays Are Available Pending Appeal.

Automatic stays pending appeal are available, generally with the posting of security, in many of the most common types of civil cases [*CCP §§ 916(a), 917.1-917.9, 116.810*].

Strategic Point--Party Opposing Enforcement.

If a party is planning an immediate appeal of the judgment or order in question, counsel for the party opposing enforcement should consider taking steps--such as the posting of required security--relating to the automatic stay first, since a trial court would most readily grant that type of stay if the criteria have been met. If the order in question is an interim one not immediately subject to appeal, a discretionary stay probably will be the only option available.

Cross References:

Automatic stays, see *15.16 -15.24*.

Discretionary stays by trial court, see *15.08 -15.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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Chapter 15 Staying Enforcement of Judgment
II. DETERMINING WHETHER ANY TYPE OF STAY IS AVAILABLE

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15.07 Discretionary Stays May Be Available at Other Times.

Discretionary stays may be available at other times either from the trial court or court of appeal [*CCP § 918(a), (c)* (applicable to "actions" but not "special proceedings"); *Sun-Maid Raisin Growers v. Paul (1964) 229 CA2d 368, 374-375, 40 CR 352* ; *Food & Grocery Bureau v. Garfield (1941) 18 C2d 174, 177, 114 P2d 579* ; *see also CCP § 923*].

Cross References:

Distinction between "actions" and "special proceedings," see *15.04[2]*.

Discretionary stays by trial court, see *15.08 -15.12*.

Supersedeas and other stays by appellate court, see *15.25 -15.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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Chapter 15 Staying Enforcement of Judgment
III. SEEKING OR OPPOSING DISCRETIONARY TRIAL COURT STAY

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15.08 CHECKLIST: Seeking or Opposing Discretionary Trial Court Stay.

☐ Determine whether matter is an "action" or a "special proceeding."

○ If matter is an "action," trial court may stay enforcement of "any judgment or order," whether or not an appeal has been or will be taken, without posting of security.

○ If matter is a "special proceeding," argue that discretionary stay is or is not within trial court's inherent authority.

Authority:
CCP § 918(a), (c); *Sun-Maid Raisin Growers v. Paul (1964) 229 CA2d 368, 374, 40 CR 352* ; *Walker v. Superior Court (1991) 53 C3d 257, 266, 279 CR 576, 807 P2d 418* ; *but see In re Melvin A. (2000) 82 CA4th 1243, 1249, 98 CR2d 844*

Discussion:
See *15.04[2]*, *15.05*, *15.09*.

☐ Determine how long a discretionary stay to request.

○ If stay would be granted for an appeal only if undertaking was given, discretionary stay cannot last longer than 10 days beyond last date on which notice of appeal could be filed.

☐ If want stay to last longer, seek consent of opposing party.

○ If no undertaking would be required, length of stay is up to court's discretion.

Authority:
CCP § 918(a), (b)

Discussion:
See *15.10*

○ Matter should be addressed by noticed motion or under law and motion rules.

Authority:
Cal Rules Ct, Rule 3.1103(a)(2)

Discussion:
See *15.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

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Chapter 15 Staying Enforcement of Judgment
III. SEEKING OR OPPOSING DISCRETIONARY TRIAL COURT STAY

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15.09 Trial Court May Grant Discretionary Stay.

A trial court has the authority to stay the enforcement of "any judgment or order," whether or not an appeal has been or will be taken, without the posting of security [*CCP § 918(a), (c)* (applicable to "actions" but not "special proceedings")].

Strategic Points--Moving Party:

Especially in a case in which an order that may be enforced prior to judgment is entered, counsel should consider seeking the trial court's discretionary stay before any other type of stay, because:

- No security is required.
- It can last indefinitely if no appeal is sought.
- It can even last thereafter if the matter is not one for which security is required pending appeal.

However, if an automatic stay is available, seeking a discretionary stay sometimes may be counterproductive.

Cross References:

Distinction between "actions" and "special proceedings," see *15.04[2]*.

Automatic stays, see *15.16 -15.24*.

Stay relief from appellate court, see *15.25 -15.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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Chapter 15 Staying Enforcement of Judgment
III. SEEKING OR OPPOSING DISCRETIONARY TRIAL COURT STAY

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15.10 Length of Discretionary Stay Is Within Trial Court's Discretion, But Limit Applies If Security Would Be Required to Effect Stay on Appeal.

If the judgment or order would be stayed on appeal only by the giving of an undertaking, a discretionary stay cannot last longer than 10 days beyond the last date on which a notice of appeal could be filed, without the consent of the adverse party [*CCP § 918(b)*]. Other than this time limitation, the length of the stay is within the trial court's discretion [*CCP § 918(a)*].

Strategic Point--Nonmoving Party.

Although a *CCP § 918* stay therefore could potentially last indefinitely if security would not be required on appeal, the court is unlikely to intend such a result. Therefore, it is advisable to ask that the court limit the stay until 10 days after the time for an appeal, or earlier if the court will consider it (keeping in mind that any new application for a stay would likely be addressed to the same court).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

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Chapter 15 Staying Enforcement of Judgment
III. SEEKING OR OPPOSING DISCRETIONARY TRIAL COURT STAY

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15.11 Discretionary Stay May Be Granted Regardless of Intention to Appeal.

Although one case suggests that the *CCP § 918* stay may only be granted in contemplation of an appeal [*In re Melvin A (2000) 82 CA4th 1243, 1249, 98 CR2d 844*], this conclusion is contrary to the wording of *CCP § 918(c)* ("This section applies whether or not an appeal will be taken from the judgment or order") and the Law Revision Commission's Comment on *CCP § 918*'s change from formerly applicable statute *CCP § 681a* (repealed, 1987) (asserting that trial court stay is now authorized whether or not appeal has been or will be taken).

Strategic Point--Moving Party.

The party seeking a stay should also argue that it is within the trial court's inherent authority.

Cross Reference:

Stays based on inherent authority, see *15.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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15.12 Stay Should Be Sought by Noticed Motion If Possible.

The Civil Law and Motion Rules of the California Rules of Court (*Cal Rules Ct, Rules 3.1100*-3.1370) apply to applications for orders relating to the enforcement of a judgment [*Cal Rules Ct, Rule 3.1103(a)(2)*]. Accordingly, parties seeking orders relating to any stay of enforcement should do so by noticed motion or on a motion for shortened time.

Strategic Point--Nonmoving Party.

Counsel for a party against whom an order is entered may seek a stay of such an order orally as a modification of the order itself at the hearing at which it is granted; counsel for a party opposing an order should be prepared to do so if the outcome of the hearing on the underlying order or judgment is unfavorable.

Cross Reference:

Procedure for noticed motion, Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Chapter 15 Staying Enforcement of Judgment
IV. SEEKING OR OPPOSING STAY TO DETERMINE PRIORITY OF COMPETING LIENS

2-15 MB Practice Guide: CA Debt Collection 15.13

15.13 CHECKLIST: Seeking or Opposing Stay to Determine Priority of Competing Liens.

☐ Determine whether judgment debtor has another action pending on a disputed claim against judgment creditor.

○ Trial court may have inherent constitutional authority to grant stay, but it must consider:

☐ Likelihood of judgment debtor prevailing in the other action;

☐ Amount of judgment compared with the amount of the probable recovery in the other action; and

☐ Judgment creditor's ability to satisfy a judgment in other action if judgment is rendered against the creditor in that action.

Authority:
CCP § 918.5; *cf. Walker v. Superior Court, 53 C3d 257, 266-268, 279 CR 576, 807 P2d 418*

Discussion:
See *15.14*

☐ Request stay by noticed motion, if possible.

Authority:
Cal Rules Ct, Rule 3.1103(a)(2)

Discussion:
See *15.15*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & PartiesCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral Overview

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Chapter 15 Staying Enforcement of Judgment
IV. SEEKING OR OPPOSING STAY TO DETERMINE PRIORITY OF COMPETING LIENS

2-15 MB Practice Guide: CA Debt Collection 15.14

15.14 Parties May Seek Stay for Determination of Competing Liens on Judgment.

15.14[1] Parties Can Seek Stay If Judgment Debtor Has Another Action Pending on a Disputed Claim Against the Judgment Creditor. The trial court has statutory authority to stay the enforcement of judgments or orders when the judgment debtor has another action pending on a disputed claim against the judgment creditor, although it must consider [*CCP § 918.5*]:

- The likelihood of the judgment debtor prevailing in the other action;
- The amount the judgment compared with the amount of the probable recovery in the other action; and
- The judgment creditor's ability to satisfy a judgment in the other action if judgment is rendered against the creditor in that action.

Cross Reference:

Priority of liens, see Ch. 12, Determining Priority and Sources of Liens.

15.14[2] Parties May Be Able to Obtain Stay to Determine Priority of Competing Liens in Other Situations. The trial court has inherent constitutional authority to stay proceedings before it and to conduct hearings to evaluate its jurisdiction [*cf. Walker v. Superior Court (1991) 53 C3d 257, 266-268, 279 CR 576, 807 P2d 418]* .

Strategic Point:

The same principle probably would permit a trial court to stay enforcement to determine the priority of competing liens in situations other than that covered by *CCP § 918.5*--for example, when competing creditors assert liens exceeding the amount of the debtor's assets. However, this issue has not specifically been addressed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral Overview

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Chapter 15 Staying Enforcement of Judgment
IV. SEEKING OR OPPOSING STAY TO DETERMINE PRIORITY OF COMPETING LIENS

2-15 MB Practice Guide: CA Debt Collection 15.15

15.15 Stay Should Be Sought by Noticed Motion If Possible.

The Civil Law and Motion Rules of the California Rules of Court (*Cal Rules Ct, Rules 3.1100*-3.1370) apply to applications for orders relating to the enforcement of a judgment [*Cal Rules Ct, Rule 3.1103(a)(2)*]. Accordingly, parties seeking orders relating to any stay of enforcement should do so by noticed motion or on shortened time.

Cross Reference:

Procedure for noticed motion, *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 26, Law and Motion Procedure, 26.03 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysGovernmentsCourtsRule Application & Interpretation

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Chapter 15 Staying Enforcement of Judgment
V. RELYING ON OR OPPOSING AUTOMATIC STAY RELATING TO APPEAL

2-15 MB Practice Guide: CA Debt Collection 15.16

15.16 CHECKLIST: Relying on or Opposing Automatic Stay Relating to Appeal.

☐ Determine whether matter is an "action" or a "special proceeding."

○ If matter is an "action," automatic stay may be available.

○ If matter is a "special proceeding," automatic stay is not available; and counsel must argue for discretionary stay.

Authority:
CCP §§ 22, 23, 917.1-917.9

Discussion:
See *15.04[2]*, *15.17*

☐ Determine whether security is required for automatic stay.

○ Court may require additional security if:

☐ Appellant is found to possess money or other property belonging to respondent;

☐ Appellant is required to perform an act for respondent's benefit pursuant to judgment or order appealed from; or

☐ Judgment is solely for costs not covered by *CCP § 917.1*.

Authority:
CCP §§ 917.1-922

Discussion:
See *15.18*, *15.21*

☐ Determine whether automatic stay may be granted without security.

○ Requirements that must be met:

☐ Security is not required for a stay under *CCP §§ 917.1-917.9* or *CCP § 116.810*.

☐ Case is not a "special proceeding," unless it is traditional writ of mandate; and

☐ If case is one for traditional writ of mandate, court has not determined that party opposing stay will suffer irreparable damage to its business or profession as a result of stay.

Authority:
CCP §§ 916(a), *1110b*

Discussion:
See *15.19*

☐ Determine whether action is one of following types for which automatic stay is not available:

○ Environmental cleanup orders and compliance orders under *H&S Code § 25358.3* and *H&S Code § 25181*, regardless of posting of security [*see CCP § 917.15*].

○ Writs of administrative mandate under CCP § 1095.4, unless trial court orders otherwise [*CCP § 1094.5(g)*].

○ "Special proceedings" not governed by [*CCP §§ 917-924*].

○ Appeal of prohibitory injunction.

Authority:
Hayworth v. City of Oakland (1982) 129 CA3d 723, 727-728, 181 CR 214

Discussion:
See *15.20*

☐ Determine procedure for posting security:

○ Determine whether automatic stay provisions themselves impose requirements concerning required undertakings, bonds, or other security.

○ Review Bond and Undertaking Law [*CCP § 995.010 et seq.*], which applies to any bond or undertaking given as security under any California statute, except to extent statute prescribes different rule or is inconsistent.

○ Unless statutes apply otherwise, bond or undertaking is effective at time it is given or time it is approved, if approval is required.

Authority:
CCP §§ 917.1-917.9, 995.020, 995.420; Lewin v. Anselmo (1997) 56 CA4th 694, 699-700, 65 CR2d 682

Discussion:
See *15.23*

☐ Determine whether to challenge automatic stay or adequacy of security.

○ Seek enforcement of judgment by trial court;

○ Bring motion for contempt for noncompliance.

Timing:
Bring noticed motion regarding adequacy of security within 10 days of receipt of bond.

Authority:
CCP § 995.930

Discussion:
See *15.24[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesWritsCommon Law WritsMandamus

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15.17 Automatic Stay Relating to Appeal Is Available.

An automatic stay takes effect upon the filing of an appeal in cases other than "special proceedings," unless security is required and not posted [*CCP §§ 116.810*, *916(a)*, *917.1-917.9*].

An "action" is an ordinary proceeding in a court by which one party prosecutes another for the declaration, enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense [*CC § 22*]. Every other remedy is a "special proceeding" [*CC § 23*].

Security is often required [*see CCP §§ 917.1-917.9*]. Therefore, immediately upon issuance of a judgment or order that may be subject to challenge, counsel should determine if an automatic stay relating to appeal may be available, and what the required security, if any, will be.

Cross Reference:

Posting or objecting to security in general, California Pleading and Practice, Ch. 538, Suretyship, Bonds and Undertakings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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15.18 Instances in Which Security Is Required for Automatic Stay.

Automatic stays require security to protect the interests of judgment creditors, with specific requirements, on the following types of orders [*see CCP §§ 917.1-922*]:

- Orders for the payment of money and certain types of court-awarded costs require an undertaking for double the amount of the judgment or order unless the security is given by an admitted surety insurer, in which case it must be for one and a half times the amount [*CCP § 917.1*].

- Orders assigning or requiring the delivery of personal property or documents require an undertaking in a sum and on conditions fixed by the trial court, which can include the deposit of property in the custody of an officer designated by the court [*CCP § 917.2*].

- Orders requiring the execution of documents require the posting of security, unless those documents are executed and deposited with the clerk of the trial court pending disposition by the reviewing court [*CCP § 917.3*].

- Orders directing the sale, conveyance, or delivery of real property require the posting of security for potential direct and consequential losses [*CCP § 917.4*].

- Orders appointing a receiver require the posting of an undertaking, fixed by the trial court, sufficient to permit the judgment creditor to recover damages as a result of the stay [*CCP § 917.5*].

- Orders granting a right to attach require a posting by the opponent of the attachment of the security required by the right to attach order, with agreement that the appellant will pay interest [*CCP § 917.65*].

- Orders granting a right to levy an attachment requite the posting of security when the party who has levied the attachment appeals, but only if the appeal is taken in five days and the levying party posts an undertaking equal to double the amount of the debt or such other amount as ordered by the trial court [*CCP § 921*].

Warning:

The statutory provisions for security relating to automatic stays are very specific and more detailed than can be repeated here. Practitioners should review the specific provisions in question directly.

Cross References:

Additional security for automatic stay, see *15.21*.

Stays in family law matters, California Family Law Practice and Procedure (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysInsurance LawClaims & ContractsCosts & Attorney FeesAward Calculations

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15.19 Instances in Which Automatic Stay Is Available Absent Security.

An automatic stay can apply after the filing of a notice of appeal without any requirement for security in several instances. First, this can occur if the case is one for a traditional writ of mandate and the court has determined that the petitioner will not suffer irreparable damage to its business or profession if the execution is stayed [*CCP § 1110b*].

Second, an automatic stay also will apply upon the appeal of a mandatory, but not a prohibitory, injunction, on the basis that a prohibitory injunction becomes immediately self-executing [*Hayworth v. City of Oakland (1982) 129 CA3d 723, 727-728, 181 CR 214]* .

Finally, under some circumstances, the court has discretion to stay enforcement without the posting of security [*see CCP § 917.7, 917.8*].

Cross References:

Distinction between "actions" and "special proceedings," see *15.04[2]*.

Court's authority to stay enforcement of judgment or order, see *15.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsReviewabilityGeneral Overview

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15.20 Instances in Which Automatic Stay Is Not Available.

Automatic stays are not available for [*Hayworth v. City of Oakland (1982) 129 CA3d 723, 727-728, 181 CR 214]* :

- Environmental cleanup orders and compliance orders under *H&S Code § 25358.3* and *H&S Code § 25181*, regardless of the posting of security [*see CCP § 917.15*].

- Writs of administrative mandate under CCP § 1095.4, unless the trial court orders otherwise [*CCP § 1094.5(g)*].

- "Special proceedings" not governed by [*CCP §§ 917-924*].

- Appeal of a prohibitory injunction.

Strategic Point--All Parties:

Since writs of mandate also function as injunctions, in some instances it is possible that a writ of mandate that would be subject to an automatic stay under *CCP § 1110b* could be considered a prohibitory injunction not subject to a stay, and vice versa [*cf. Hayworth v. City of Oakland (1982) 129 CA3d 723, 727-728, 181 CR 214*], and counsel should seek out the most favorable characterization of a court's judgment on this point.

Strategic Point--Moving Party.

A party seeking relief when an automatic stay is not available may want to seek a discretionary stay under *CCP § 918*, if applicable, or to argue that a discretionary stay should be available on analogous grounds or based on the trial court's inherent authority.

Strategic Point--Opposing Party.

A party opposing a stay can argue persuasively that the legislature did not intend that the trial court be permitted to issue a discretionary stay that lasts indefinitely without the posting of security in situations

in which the legislature apparently deemed that a stay should not be permissible even with the posting of security. In any event, the Legislature could have specifically said so in the *CCP § 918* provision for discretionary stays, and it did not. However, this argument will not help a stay opponent in the appellate court, where an inherent supersedeas power is well established.

Cross Reference:

Special proceedings and trial court's possible inherent authority to issue stay, see *15.05*.

Distinction between "actions" and "special proceedings," see *15.04[2]*.

Supersedeas and stays from appellate court, see *15.25 -15.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesWritsCommon Law WritsMandamus

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15.21 Trial Court Has Discretion to Require Additional Security for Automatic Stays.

The trial court has the discretion to order security before an automatic stay issues when [*CCP § 917.9*]:

- The appellant is found to possess money or other property belonging to the respondent;
- The appellant is required to perform an act for respondent's benefit pursuant to the judgment or order appealed from; or
- The judgment is solely for costs not covered by [*CCP § 917.1*].

Additionally, the language of [*CCP § 922*], stating that the trial court may determine that security is inadequate based on objections by the respondent, suggests that the trial court may have discretion to require security in other sorts of cases, although earlier case law suggests that this provision may be procedural only [*Stevens v. Superior Court (1972) 28 CA3d 1, 4, 104 CR 369* (holding that the policy of former *[CCP § 917.1]* is to permit the debtor to stay enforcement upon the posting of "adequate" security, and that it is an abuse of discretion for the superior court to refuse a stay if such security has been provided)]. More recent case law makes clear that the trial court at least retains jurisdiction while an appeal is pending to increase the amount of a required bond under [*CCP § 917.1*] to cover increased postjudgment interest due to a lengthy appeal [*Grant v. Superior Court (1990) 225 CA3d 929, 939, 275 CR 564* , *citing CCP § 996.010*].

Cross Reference:

Requirements for security in automatic stay matters generally, see *15.18*.

Stays as part of trial court's inherent authority, see *15.05*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionLower Court Jurisdiction

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15.22 Automatic Stay Only Extends to Enforcement of Judgment; Trial Court Retains Jurisdiction of Other Matters.

The automatic stay bars proceedings in the trial court on the judgment or order appealed from and on the matters therein or affected thereby [*CCP § 916(a), Gold v. Superior Court (1970) 3 C3d 275, 280, 90 CR 161, 475 P2d 193]* . However, the trial court may proceed upon any other matter in the action that is not affected by the judgment or the matter appealed from [*CCP § 916(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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15.23 Automatic Stay Applies Without Action, or on Posting of Security When Required.

15.23[1] Purpose and Types of Security. The purpose of security is to protect the favored party's interest in a judgment and to prevent that judgment from becoming uncollectible while a matter is on appeal [*City of Lodi v. Randtron (2004) 118 CA4th 337, 363, 13 CR3d 107]* . An "undertaking" is a promise executed by a one or more third parties (sureties) to pay a sum of money to cover the value of the judgment an d relevant costs [*CCP § 995.190*]. A "bond" is executed by both the appellant and one or more sureties, or simply by one or more sureties, in which case it is both a "bond" and an "undertaking" [*CCP § 995.190*].

15.23[2] Procedures for Posting Security When Required. Two sources of law govern posting of security for an automatic stay. First, the automatic stay provisions themselves impose requirements concerning required undertakings, bonds or other security [*CCP §§ 917.1-917.9*]. Second, the general Bond and Undertaking Law [*CCP § 995.010 et seq*.] applies to any bond or undertaking given as security under any California statute, except to the extent the statute prescribes a different rule or is inconsistent [*CCP § 995.020*].

Under the Bond and Undertaking Law, unless [*CCP §§ 917.1-917.9*] provide otherwise, a bond or undertaking is effective at the time it is given or the time it is approved, if approval is required [*CCP § 995.420*; *Lewin v. Anselmo (1997) 56 CA4th 694, 699-700, 65 CR2d 682]* . A bond under *CCP § 917.1* is effective immediately, as no approval is required [*Lewin v. Anselmo (1997), 56 CA4th 694, 699-700, 65 CR2d 682*]. Under the Bond and Undertaking Law, a beneficiary of the bond or undertaking may object to the adequacy of security by noticed motion within 10 days of the service of a copy of the bond [*CCP § 995.930*].

15.23[3] Proponent of Automatic Stay May Seek Court Confirmation. Since security must be posted for an automatic stay to take effect in most cases, the proponent of the stay often will know in advance if the opponent contends that an automatic stay does not apply because the stay is not available as a matter of law or because the security posted by the stay proponent is not adequate. However, in some instances when a stay may apply and security is not required, the first time a party may learn of the opposing party's belief that there is no stay is when the first party seeks enforcement or files for contempt if the opposing party is required to perform in some way. Accordingly, counsel supporting a stay may wish to make a motion to confirm a stay or, in the alternative, seek a discretionary stay.

Strategic Point:

Counsel should consider sending a letter or other communication to opposing counsel to clarify the issue before a motion is filed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesBondsGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & Parties

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15.24 Party Opposing Automatic Stay Can Challenge Its Applicability, or Adequacy of Security Offered.

15.24[1] Opposition to Automatic Stay Should Be Pursued by Steps for Enforcement. Unless some other type of stay is in effect, counsel for a party favored by a judgment or order who does not believe that an automatic stay applies simply can seek enforcement of the judgment by the trial court, or bring a motion for contempt if a party has not complied with actions required as the result of the issuance of a judgment.

15.24[2] Challenge to Adequacy of Security Should Be by Noticed Motion. A beneficiary not satisfied with the amount of security must assert any challenges to the adequacy of security or the adequacy of the sureties by noticed motion within 10 days of receipt of a copy of the bond [*CCP § 995.930(b)*]. The precise objections to the security or surety must be included in the notice of motion, along with an estimate of the adequate amount of security if that is at issue [*CCP § 995.930(a)*].

Strategic Points:

- Counsel should make certain in advance that if a corporate surety is used, it is *admitted in California*. Many carriers do not qualify in California, and their surety certificates/bonds are subject to objection.

- Objecting to a personal surety will require an evidentiary hearing as to the adequacy of the assets held by the person acting as surety and may allow the court to place a lien on real property owned by that person. As soon as possible, a good valuation of the property should be obtained, as well as a certification of all liens and encumbrances of record on the property. The motion should request the court to require the surety to issue a litigation guaranty.

Cross Reference:

Bond and Undertaking Law requirements and procedures, see *15.23[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageLiensCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesBondsSuretiesLiability

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Chapter 15 Staying Enforcement of Judgment
VI. SEEKING OR OPPOSING STAY FROM APPELLATE COURT

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15.25 CHECKLIST: Seeking or Opposing Stay From Appellate Court.

☐ Assure that any possible trial court relief has been pursued to extent possible.

Authority:
Faulkner v. Faulkner (1957) 148 CA2d 102, 105, 306 P2d 585 ; *Nuckolls v. Bank of Cal. (1936) 7 C2d 574, 577, 61 P2d 927*

Discussion:
See *15.26[2]*

☐ Determine whether court of appeal or Supreme Court may issue stay.

○ Temporary stay, supersedeas, is available from court of appeal during the pendency of appeal.

○ Supersedeas also may be used to protect an appellate court's jurisdiction even if underlying order is not appealable.

○ California Supreme Court issues temporary stays, not supersedeas, in connection with petitions for review.

Authority:
CCP 923; *Cal Rules Ct, Rule 8.116*

Discussion:
See *15.26[1]*

☐ Request for supersedeas from appellate court or temporary stay in the Supreme Court should comply with format requirements of *Cal Rules Court, Rules 8.112* and *8.116*, including:

- Facts that are verified;
- Supporting memorandum;
- Trial court, department number, and trial judge's telephone number on cover or at beginning of the text;
- Words "STAY REQUESTED";
- Description of relief requested from trial court's order; and
- Appeal name and docket number.

☐ There are no rules for reply to opposition of a petition.

Authority:
CCP § 923; *Cal Rules Ct, Rules 8.112*, *8.116*

Discussion:
See *15.26[3]*, [5], *15.27*

Timing:
File opposition to petition for supersedeas within 15 days of receipt of petition.

Authority:
Cal Rules Ct, Rule 8.112(b)

Discussion:
See *15.26[4]*

☐ Request relief from appellate court in special cases relating to writs of mandate:

- Stay of denial of administrative mandate may be sought from appellate court.
- Relief from stay of grant of traditional mandate may be sought from appellate court, although petitioner should seek relief from trial court in first instance.

Authority:
CCP §§ 1094.5(g), *1110b*

Discussion:
See *15.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court Review

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15.26 Stay by Writ of Supersedeas Is Available.

15.26[1] Appellate Court or Judge Has Power to Issue Writ of Supersedeas. The court of appeal has inherent authority, separate from statute or rule, to issue supersedeas to protect its appellate jurisdiction [*see Sun-Maid Raisin Growers v. Paul (1964) 229 CA2d 368, 374-375, 40 CR 352* ; *Food & Grocery Bureau v. Garfield (1941) 18 C2d 174, 177, 114 P2d 579* ; *see also CCP § 923* ("the provisions of this chapter shall not limit the power of a reviewing court or a judge thereof to stay proceedings")]. The statutes governing stays of appellate proceedings do not limit the power of a reviewing court, or a judge of such a court, to issue a writ of supersedeas [*CCP § 923*].

15.26[2] Supersedeas or Stay Relief From Appellate Court Should Not Be Sought If Trial Court Relief Is Available. Supersedeas relief may *not* be granted unless relief from the trial court is unavailable, such as for a prohibitory injunction, or the trial court has denied relief [*Faulkner v. Faulkner (1957) 148 CA2d 102, 105, 306 P2d 585* ; *Nuckolls v. Bank of Cal. (1936) 7 C2d 574, 577, 61 P2d 927]* .

Cross References:

Prohibitory injunctions are self-executing, see *15.19*.

Stay of proceedings on appeal, *California Forms of Pleading and Practice, § 43.21* (Matthew Bender).

15.26[3] Supersedeas Petitions Should Be Filed Pursuant to Cal Rules Ct, Rules 8.112, 8.116, and CCP § 923. A request for supersedeas must include [*Cal Rules Ct, Rules 8.112(a), 8.116*]:

- Facts that are verified;
- A supporting memorandum;
- A statement of the case showing petitioner will raise substantial issues or appeal;
- The trial court, department number, and trial judge's telephone number on the cover or at the beginning of the text;
- The words "STAY REQUESTED"; and

- A description of the relief requested from the trial court's order.

Petitioners also must include an appeal name and docket number [*CCP § 923*, *Cal Rules Ct, Rule 8.112(a)*].

Strategic Point:

If the underlying order is not reviewable by appeal and the party challenging the order does so by an original writ, that party complies with the *Cal Rules Ct, Rule 8.112(a)* requirement of an appeal number and name by including the writ number and name (or, in the Supreme Court, a request for temporary stay with a petition for review).

15.26[4] Opposition to Petition Must Be Filed in 15 Days. Unless the court otherwise orders, an opposition to a supersedeas petition, stating all relevant facts not included in the petition and including a memorandum, must be filed within 15 days [*Cal Rules Ct, Rule 8.112(b)*].

15.26[5] Reply Not Covered by Rules. The rules make no provision for a reply.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsGovernmentsLegislationStatutes of LimitationsTime Limitations

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15.27 Procedure for Supreme Court or Appellate Court Temporary Stay in Connection with Appeal or Original Proceeding.

Parties seeking stays to the Supreme Court or the court of appeal in connection with an original proceeding must include contact information for the trial court department and trial judge on the cover or at the beginning of the text [*Cal Rules Ct, Rule 8.116(b)*]. The cover must prominently display the legend "STAY REQUESTED" and identify the nature and date of the proceeding sought to be stayed [*Cal Rules Ct, Rule 8.116(a)*]. Failure to do so may preclude consideration of the request [*Cal Rules Ct, Rule 8.116(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsMoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsNonmoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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15.28 Stays in Connection With Trial Court Writ of Mandate Proceedings Are Governed by Special Rules.

Trial court rulings denying writs of administrative mandate under [*CCP § 1094.5*] are stayed only on order of the court to which the appeal is taken [*CCP § 1094.5(g)*]. If there is a stay of an agency decision under [*CCP § 1094.5(g)*] in a case in which administrative mandate is denied, any stay of the agency decision in effect at the time of the filing of a notice of appeal will remain in effect by operation of law for 20 days thereafter [*CCP § 1094.5(g)*].

Trial court orders granting writs of traditional mandate under [*CCP § 1085*] are automatically stayed by an appeal, unless the trial court or court of appeal determines on a showing that the petitioner will suffer irreparable damage to its business or profession if execution is stayed [*CCP § 1110b*]. Relief should be sought from the trial court first.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

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Chapter 15 Staying Enforcement of Judgment
VII. SEEKING OR OPPOSING STAY BASED ON MILITARY SERVICE

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15.29 CHECKLIST: Seeking or Opposing Stay Based on Military Service.

☐ Review stay provisions under both California and federal law and determine whether person seeking stay will rely on California statutes or federal statutes.

☐ Determine whether person seeking stay is on or has recently completed covered service.

- ○ Determine whether person seeking stay is covered under federal law.
- ☐ Is person currently, or was person within the last 90 days, engaged in any of following:
  - ○ Active duty in regular armed forces.
  - ○ Service as member of National Guard for over 30 consecutive days under call to active service based on national emergency.
  - ○ Commissioned member of Public Health Service or National Oceanographic and Atmospheric Administration.

☐ Is person either of following:

- ○ Member of reserve component who has been ordered to report for military service.
- ○ Person ordered to report for induction.

Authority:
50 USC app §§ 511(2), 516, 522(b)(1), 524(b)

Discussion:
See *15.30[1]*

○ Determine whether servicemember is covered under California law, which provides coverage on or 60 days after full-time service for seven days in any 14-day period to:

☐ Members of National Guard called to active state or federal service.

☐ United States military reservists called to active duty.

Authority:
M&V Code § 403(a)

Discussion:
See *15.30[1]*

○ Request that United States Department of Defense verify that person in question currently is serving on active duty.

Discussion:
See *15.30[1]*

☐ Determine what type of stay will be requested:

○ Stay of pending action of proceeding.

○ Stay of execution of judgment, attachment, or garnishment.

○ Other relief.

Authority:
M&V Code § 403(a), (c); *50 USC app §§ 522(b)*, *524(a)*

Discussion:
See *15.30[1]*, *15.31 -15.33*

☐ If seeking stay of action or proceeding:

○ Under California law, request stay at any stage of proceeding.

○ Under federal law, request stay at any stage before final judgment.

Authority:
M&V Code § 403(a); *50 USC app § 522 (b)*

Discussion:
See *15.31[2]*

○ File application for stay with court in which action or proceeding is pending.

Authority:
M&V Code § 403(a); *50 USC app § 522 (b)(1)*

Discussion:
See *15.31[3]*

Form:
15.38

○ If requesting stay under California statutes, make showing that military service will affect servicemember's ability to conduct action or proceeding.

Authority:
M&V Code § 403(a)

Discussion:
See *15.31[3][b]*

○ If requesting stay under federal statutes, include the following:

☐ Letter or other communication setting forth both of following:

○ Facts stating manner in which current military duty will materially affect servicemember's ability to appear; and

○ Date when servicemember will be able to appear.

☐ Letter or other communication from servicemember's commanding officer stating that servicemember's duty prevents appearance and that military leave is not authorized for servicemember at time of letter.

Authority:
50 USC app § 522(b)

Discussion:
See *15.31[3][c]*

○ If requesting stay under federal statutes and term of initial stay is likely to be inadequate, apply for additional stay based on continuing material affect of military duty on servicemember's ability to appear.

☐ Submit application for additional stay either at same time as initial application, or later when it appears servicemember will be unavailable.

☐ Include same information that would be required in an application for an initial stay.

Authority:
50 USC app § 522(d)(1)

Discussion:
See *15.31[4][c]*

☐ If opposing grant of military stay of action or proceeding, argue that:

○ If servicemember is proceeding under California statutes:

☐ Military service will not impede servicemember's ability to conduct action; and/or

☐ Term of stay should be shorter than requested by servicemember.

○ If servicemember is proceeding under federal statutes:

☐ Servicemember has not included the required communications; and/or

☐ Servicemember has not shown that military duty requirements materially affect servicemember's ability to appear; and/or

☐ Term of stay should be shorter than requested by servicemember.

Authority:
M&V Code § 403(a); *50 USC app § 522(d)(1)*

Discussion:
See *15.31[3], [4]*

☐ If seeking stay of execution of judgment, attachment, or garnishment, or vacate any attachment or garnishment:

○ Verify that action in which order or judgment was rendered was:

☐ Before or during period of service, or within 60 days thereafter, if stay is requested under California law.

☐ Commenced in a court against servicemember before or during period of service or within 90 days after termination of service, if stay is requested under federal law.

Authority:

M&V Code § 403(c); *50 USC app § 524(b)*

Discussion:
See *15.32[2]*

○ If proceeding under California law, apply in same manner as for stay of action or proceeding.

○ If proceeding under federal law, apply to court that issued order and make showing that servicemember's ability to comply with judgment or order was materially affected by reason of military service.

Authority:
M&V Code § 403(c); *50 USC app § 524(a)*

Discussion:
See *15.32[3]*

☐ If opposing grant of military stay of execution of judgment, attachment, or garnishment, argue that:

○ If servicemember is proceeding under California statutes:

☐ Action in which judgment or order was rendered was commenced more than 60 days after period of military service ended.

☐ Military service did not impede servicemember's ability to comply with judgment or order; and/or

☐ Term of stay should be shorter than requested by servicemember.

○ If servicemember is proceeding under federal statutes:

☐ Action in which judgment or order was rendered was commenced more than 90 days after period of military service ended.

☐ Military service did not affect servicemember's ability to comply with judgment or order.

☐ Term of stay should be shorter than requested by servicemember.

Authority:
M&V Code § 403(a); *50 USC app § 522(d)(1)*

Discussion:
See *15.31[3]*, *[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewMilitary & Veterans LawServicemembersU.S. National Guard

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Chapter 15 Staying Enforcement of Judgment
VII. SEEKING OR OPPOSING STAY BASED ON MILITARY SERVICE

2-15 MB Practice Guide: CA Debt Collection 15.30

15.30 Stays Are Available to Persons on Active Military Service.

15.30[1] Protection Is Available Under Both Federal and State Law. Both the federal Servicemembers Civil Relief Act [*50 USC app § 501 et seq*.] and corresponding provisions of California law [M&V Code § 400 et seq.] provide various forms of relief to qualifying persons on active military service, and persons recently returned from such service (referred to as "servicemembers"). In the context of debt collection and enforcement of judgment, the most relevant of these protections are:

- A stay of any actions or proceedings pending against a servicemember [M&V Code § 403(a); *50 USC app § 522 (b)*; *see 15.31*].

- A stay of execution of any judgments, attachments, and garnishments [M & V Code § 403(c); *50 USC app § 524(a)*; *see 15.32*].

Strategic Point:

The California and federal laws both apply in state court proceedings [*see 50 USC app §§ 511(5)*, *512*].

Warning:

While the federal and California statutes generally offer similar protections and in many instances contain virtually identical language, they are not identical in all respects. Counsel should be aware of the differences between federal and California law, as noted in the discussion here. For example, some provisions for stay and relief for servicemembers differ, and "military service" for purposes of the stay provisions is defined differently under the California and federal statutes [*see* M&V Code § 400 (California definition), *50 USC app §§ 511*, *516*; *10 USC § 101(d)(1)*; *32 USC § 502(f)* (statutes encompassing federal definition)].

Cross Reference:

Military stays under state and federal law, California Points and Authorities, Ch. 48, Continuance of Proceedings (Matthew Bender).

15.30[2] Current and Recent Servicemembers Are Eligible, But Eligibility Periods Differ Under State and Federal Law. Under federal law, a servicemember is eligible for relief during and up to 90 days after any of the following [*50 USC app § 511(2)* (defining "military service"), *50 USC app §§ 522(b)(1), 524(b)*]:

- Active duty in the regular armed forces.
- Service as a member of National Guard for over 30 consecutive days under a call to active service based on national emergency.
- Active service as a commissioned member of the Public Health Service or National Oceanographic and Atmospheric Administration.

The following persons also are eligible under the federal statutes [*50 USC app § 516*]:

- A member of a reserve component who is ordered to report for military service is eligible during the period beginning on the date of the member's receipt of the order and ending on the date on which the member reports for military service (or, if the order is revoked before the member so reports, on the date on which the order is revoked).
- Persons ordered to report for induction are eligible during the period beginning on the date of receipt of the order for induction and ending on the date on which the person reports for induction (or, if the order to report for induction is revoked before the date on which the person reports for induction, on the date on which the order is revoked).

Under California law, a servicemember is eligible for relief during and up to 60 days after full-time service for seven days in any 14-day period as [M&V Code §§ 400, 403(a), (c)]:

- A member of the National Guard called to active state or federal service; or
- A United States military reservist called to active duty.

Strategic Point--Verification of Military Service:

The United States Department of Defense will verify if someone is currently serving on active military duty. The website is located at www.defenselink.mil/faq/people_records.html and links to the verification form at https://www.dmdc.osd.mil/scra/owa /home.

15.30[3] Protections Extend to Dependents of Servicemembers. Both the federal and the California law explicitly extend these protections to dependents of servicemembers if they may be materially affected [M&V Code § 409.5; *50 USC app § 538*].

Strategic Point:

Counsel should evaluate protections under both laws.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewMilitary & Veterans

LawServicemembersU.S. National GuardPublic Health & Welfare LawHealthcareGeneral Overview

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VII. SEEKING OR OPPOSING STAY BASED ON MILITARY SERVICE

2-15 MB Practice Guide: CA Debt Collection 15.31

15.31 Pending Actions or Proceedings May Be Stayed.

15.31[1] Pending Action or Proceeding Involving Servicemember May Be Stayed. Under both California and federal law, qualifying servicemembers [*see 15.30[2]*] are entitled to a stay of any pending actions or proceedings involving the servicemember [*see 15.31[4]*; M&V Code § 403(a); *50 USC app § 522(b)*].

Cross Reference:

Duration of stay, see *15.31[4]*.

15.31[2] Stay May Be Requested at Any Stage of Proceeding. Under California law, a stay may be requested "at any stage" in any action or proceeding in which an eligible service member is involved, either as plaintiff or defendant [M&V Code § 403(a)]. Under federal law, a stay may be requested "at any stage before final judgment" [*50 USC app § 522(b)*].

Cross Reference:

Eligibility periods under federal and California law, see *15.30[2]*.

15.31[3] Showing Required for Stay of Action or Proceeding.

15.31[3][a] Stay May Be Granted on Application or on Court's Own Motion. The servicemember may apply for a stay, and the court is required to grant it if the requirements discussed in this section 15.31[3] are met [M & V Code § 403(a); *50 USC app § 522 (b)(1)*]. California law specifies that the application may be made by the servicemember "or some person on his or her behalf" [M&V Code § 403(a)]. The federal statute does not contain similar language.

Cross Reference:

Form for application, see *15.38*.

Consider:

The court may also grant a stay on its own motion [M&V Code § 403(a); *50 U.S.C. app. § 522(b)(1)*].

15.31[3][b] Stay Is Mandatory Under California Law Unless Servicemember's Ability to Conduct Action Is Not Materially Affected. On application by the service member or some other person on the servicemember's behalf,

the court is required to stay the action or proceeding unless, in the opinion of the court, the ability of the servicemember to prosecute the action or conduct his or her defense is not materially affected by reason of his or her military service thereafter [M&V Code § 403(a)].

Strategic Point:

Although the statute does not require that the servicemember make an affirmative showing that his or her ability to conduct the action is materially affected, it is advisable to do so. Conversely, in appropriate circumstances, the opposing party may seek to affirmatively persuade the court that the military service will not impede the servicemember's ability to conduct the action.

15.31[3][c] Stay Is Mandatory Under Federal Law If Application Includes Specified Documentation. Federal law imposes more specific requirements than California law for a stay of an action or proceeding. On application by the servicemember, the court is required to stay the action or proceeding if the application includes both of the following [*50 USC app § 522(b)*]:

- A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear, and stating a date when the servicemember will be available to appear.

- A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

15.31[4] Duration of Stay.

15.31[4][a] California Stay Is Limited to Duration of Military Service and Three Months Thereafter. Under California law, any stay of an action, proceeding, attachment, or execution ordinarily may be ordered for the period of military service and three months thereafter, or any part of that period. The court may also impose such terms as may be just, including terms with respect to installment payments [M&V Code § 403(d)].

Unlike federal law, California law does not provide for an additional stay upon expiration of the initial stay period.

Cross Reference:

Extension of stay available under federal law, see *15.31[4][c]*.

15.31[4][b] Duration of Initial Federal Stay Must Be at Least 90 Days. Federal law does not specify a precise duration for the initial stay, but merely states that the court must stay the action for a period of not less than 90 days [*50 USC app § 522(b)(1)*].

15.31[4][c] Additional Stay Is Available Under Federal Law. A servicemember who has been granted an initial stay under federal law may apply for an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. Such an application may be made at the time the servicemember makes the initial application, or when it appears that the servicemember is unavailable to prosecute or defend the action. The same information required for an application for an initial stay [*see 15.31[3][b]*] is required in an application for an additional stay [*50 USC app § 522(d)(1)*].

Strategic Point:

If the court refuses to grant an additional stay of proceedings as described above, it is required to appoint counsel to represent the servicemember in the action or proceeding [*50 USC app § 522(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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2-15 MB Practice Guide: CA Debt Collection 15.32

15.32 Execution of Judgments, Attachments, and Garnishments May Be Stayed.

15.32[1] Court Has Authority to Stay Execution or Vacate. Qualifying servicemembers [*see 15.30[2]*] are eligible for a stay of execution of any judgments, attachments, and garnishments under both California and federal law [M&V Code § 403(c); *50 USC app § 524(a)*]. Specifically, the court may do either or both of the following [M&V Code § 403(c); *50 USC app § 524(a)*]:

- Stay the execution of any judgment or order entered against a service member.

- Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment.

Distinguish:

Stays of default judgments are available under federal law, and are governed by a different set of procedures [*see 50 USC app § 521*].

15.32[2] Action or Proceeding Must Have Been Commenced During Specified Period. Relief is available under California law "in any action or proceeding against a service member, before or during the period of the service, or within 60 days thereafter." [M&V Code § 403(c)].

Federal relief is available in "an action or proceeding commenced in a court against a servicemember before or during the period of the servicemember's military service or within 90 days after [that] service terminates" [*50 USC app § 524(b)*].

15.32[3] Showing Required for Relief. Under federal law, on application by the service member, the court is required to grant relief if the servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order [*50 USC app § 524(a)*].

Strategic Point:

While the federal statute does not expressly require the same documentation that is required in the case of a stay of a pending action or proceeding [*50 USC app § 524(a)*; *see 50 USC app § 522 (b)*; *see also*

15.31[3][b]], good practice suggests that counsel should provide sufficient documentation to clearly demonstrate that the servicemember's ability to comply with the judgment or order is materially affected.

Under California law, the showing required for relief is identical to that required with respect to a stay of an action or proceeding, as discussed in *15.31[3]* [M&V Code § 403(c)].

15.32[4] Duration of Stay Not Specified. Neither California nor federal law specifies a minimum or maximum term for a stay of enforcement of a judgment, attachment, or garnishment. Obviously, if an attachment or garnishment is vacated, a new one would have to be initiated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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15.33 Servicemembers May Be Granted Relief from Default and Discretionary Stay From Specified Obligations.

Both California and federal statutes limit inadvertent entries of default judgments against servicemembers, and allow relief from default judgments on the ground that the servicemember was entitled to a stay of the action [M&V Code § 402; *50 USC app § 521*]. Both California and federal statutes also limit actions against active servicemembers under contracts, mortgages, and leases [M&V Code §§ 405-409.7; *50 USC app §§ 523, 527-537*].

Cross Reference:

Military stays, see *15.29 -15.30*.

Applicability of protections to family members, see *15.30*.

Substantive protections for servicemembers, California Points and Authorities, Ch. 48, Continuance of Proceedings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertence

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15.34 No Procedure Specified for Requesting Military Stays.

California and federal law merely state that stay will be granted "on application" of the servicemember [*see* M&V Code §§ 403(a), (c); *50 USC app §§ 522(b)(1), 524(a)*]. A noticed motion is not expressly required, although such a procedure is preferable if possible.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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VIII. FORMS

2-15 MB Practice Guide: CA Debt Collection 15.35

15.35 Undertaking for Security on Automatic Stay Relating to Appeal.

Undertaking for Security on Automatic Stay Relating to Appeal.
SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	UNDERTAKING
_____ [*name*],	)	FOR AUTOMATIC
Defendant.	)	STAY RELATING
	)	TO APPEAL
	)	

WHEREAS the _____ [*identify party,* e.g., plaintiff and appellant] desires to give an undertaking for an automatic stay of enforcement pending appeal as provided by *CCP § 917.1*;

NOW, THEREFORE, the undersigned _____ [surety *or* sureties], _____ [*name(s)*] hereby obligate(s) myself/ourselves [, jointly and severally,] to _____ [*name of beneficiary*] under the statutory obligations, in the amount of $_____. The sureties recognize that if the [judgment/order] is affirmed or the appeal is withdrawn or dismissed, they shall be jointly and severally liable for the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs which may be awarded against the appellant on appeal.

[*ADD, if amount of bond is based on value of property or interest in property*]

The [interest in] property on which the amount of this _____ [bond *or* undertaking] is based, and which is relied on by the _____ [surety *or* sureties] as qualifying them on the _____ [bond *or* undertaking] is as follows: _____ [*describe the property or properties or interest in property*].

The estimate of the _____ [principal *or* beneficiary *or* court] as to the fair market value of the above-described [interest in] property is as follows: _____ [*specify fair market value of each property or interest*]. The undertaking is thus worth at least twice the amount of the judgment or order appealed from.

[*CONTINUE*]

The addresses at which the sureties may be served with notices, papers, and other documents are:

_____ [*name of surety*] _____ [*address*]

_____ [*name of surety*] _____ [*address*]

[*If using personal sureties:* Affidavits of qualification of each surety are attached.]

An affidavit of service on the beneficiary is attached.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

SURETIES
_____ _____ [*signature of surety*]
[*typed name*]
_____ _____ [*signature of surety*]
[*typed name*]
PRINCIPAL
_____ _____ [*signature of principal*]
[*typed name*]

NOTES.

Authority:
CCP §§ 917.1, 995.010 et seq.

Discussion:
See *15.16 -15.24*

Cross Reference:

California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds and Undertakings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewContracts LawNegotiable InstrumentsNegotiationIndorsementQualified Indorsements

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Chapter 15 Staying Enforcement of Judgment
VIII. FORMS

2-15 MB Practice Guide: CA Debt Collection 15.36

15.36 Motion for Discretionary Stay by Trial Court, With Supporting Memorandum.

Motion for Discretionary Stay by Trial Court, With Supporting Memorandum.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff	)	NO. _____
vs.	)	NOTICE OF MOTION
_____ [*name*],	)	AND MOTION FOR
Defendant.	)	DISCRETIONARY STAY
	)	
	)	

_____

TO THE COURT, _____ [*list parties*], AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____ [*date*] at _____ [*time*], or as soon thereafter as this matter may be heard, in the Courtroom of the Honorable _____ [*Judge name*], located at _____ [*address*], Defendant/Plaintiff _____ [*name*] will move, and hereby does move, for a discretionary stay of enforcement of the trial court's [order/judgment] entered on _____ [*date*], that _____ [*describe judgment, e.g.,:* that awarded Plaintiff, John Smith, $100,000 in compensatory damages, as entered in the Judgment Book on November 1, 2006]. This motion is made pursuant to *Code of Civil Procedure Section 918* and the Court's inherent power to stay proceedings and manage its own calendar. This motion is based on the accompanying memorandum and declarations filed with this motion, such further papers as may be filed on this matter, the pleadings and records on file in this action, and the argument on this motion.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*specify party*]

MEMORANDUM

Defendant, _____ [*name*], hereby moves for a stay of the Court's order/judgment in favor of Plaintiff _____ [*name*]. Defendant will be irreparably harmed if this order is not stayed [*if appropriate* and any appeal by Defendant, will be for naught if such a stay is not granted]. [*If appropriate*: Defendant has offered to provide an undertaking to protect Plaintiff's interest in the judgment]. This Court has discretion to grant such a stay pursuant to *Code of Civil Procedure Section 918*, which allows the Court to grant stays whether or not an appeal is or will be taken, at least until 10 days after the time for an appeal if security is required for an automatic stay and is not given [*CCP § 918(b)*]. The Court also has inherent discretion to stay proceedings in order to manage its calendar and in the interests of justice [*see, e.g.*, *Walker v. Superior Court (1991) 53 C3d 257, 266, 279 CR 576, 807 P2d 418]* . Accordingly, this Court should issue a stay until _____ [*date*].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*specify party*]

NOTES.

Authority:

CCP § 918(b); *Walker v. Superior Court (1991) 53 C3d 257, 266, 279 CR 576, 807 P2d 418*

Discussion:

See *15.08 -15.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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15.37 Motion for Stay Based on Competing Liens in Trial Court, With Supporting Memorandum.

Motion for Stay Based on Competing Liens in Trial Court, With Supporting Memorandum.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff	)	NOTICE OF MOTION
vs.	)	AND MOTION FOR
_____ [*name*],	)	STAY TO DETERMINE
Defendant.	)	PRIORITY OF COMPETING
	)	LIENS
	)	

_____

TO THE COURT, _____ [*list parties*], AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____ [*date*] at _____ [*time*], or as soon thereafter as this matter may be heard, in the Courtroom of the Honorable _____ [*judge's name*], located at _____ [*address*], Defendant/Plaintiff _____ [*name*] will move, and hereby does move, for a stay of enforcement of the trial court's order/judgment entered on _____ [*date*] that _____[*describe order or judgment, e.g.,* awarded Plaintiff $100,000 in compensatory damages, as entered in the Judgment Book on November 1, 2006], so that the Court may address competing liens [*if appropriate, add:* as to the property addressed by the order/judgment]. This motion is made pursuant to _____ [*insert if possible, as preferable ground: Code of Civil Procedure Section 918.5*, as well as] *Code of Civil Procedure Section 918* and the trial court's inherent power to stay proceedings and manage its own calendar. This motion is based on the accompanying memorandum and declarations filed with this motion, such further papers as may be filed on this matter, the pleadings and records on file in this action, and the argument on this motion.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*specify party*]

MEMORANDUM IN SUPPORT OF MOTION FOR STAY

This motion is made to prevent unnecessary litigation in a situation in which different parties have different claims against each other. In order to prevent unnecessary litigation or a proper judgment being unenforceable based on the mere happenstance of which action was resolved in court first, the trial court has statutory authority to stay the enforcement of judgments or orders when the judgment debtor has another action pending on a disputed claim against the judgment creditor [*CCP § 918.5*]. While the Court must consider (1) the likelihood of the judgment debtor prevailing in the other action, (2) the amount the judgment compared to the amount of the probable recovery in the other action, and (3) the judgment creditor's ability to satisfy a judgment in the other action if judgment is rendered against the creditor in that action [*CCP § 918.5*], all three factors militate in favor of a stay here. _____ [*Discuss why factors favor stay*].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*specify party*]

NOTES.

Authority:
CCP § 918.5; *Walker v. Superior Court, 53 C3d 257, 266-268, 279 CR 576, 807 P2d 418*

Discussion:
See *15.13 -15.15*

Cross Reference:

When competing liens are not between judgment debtor and creditor, see the memorandum for discretionary stays in 15.36.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays of

ProceedingsMultiple Claims & PartiesContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral Overview

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2-15 MB Practice Guide: CA Debt Collection 15.38

15.38 Motion for Military Stay in Pending Court, With Supporting Memorandum.

Motion for Military Stay in Pending Court, With Supporting Memorandum.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff	)	NOTICE OF MOTION
vs.	)	AND MOTION FOR
_____ [*name*],	)	FOR A STAY OF
Defendant.	)	PROCEEDINGS BY
	)	_____
	)	[*servicemember name*]
	)	

_____

TO THE COURT, _____ [*list parties*], AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on _____ [*date*] at _____ [*time*], or as soon thereafter as this matter may be heard, at the Courtroom of the Honorable _____ [*judge's name*] at _____ [*address*], _____ [*name of servicemember*] will move, and hereby does move, for a stay of _____ [the above entitled proceeding *or* the enforcement of that _____ (judgment *or* garnishment order *or* attachment order) entered on _____ (*date*) in favor of _____ (*name of other party*) and against _____ (*name of servicemember*) in the above entitled proceeding, a copy of which is attached as Exhibit A], under the provisions of _____ [the federal Servicemembers Civil Relief Act, *50 USC app § 501 et seq. or* Millitary and Veterans Code Section 403].

This motion will be based on the attached memorandum, the accompanying letters and declarations of _____ [*servicemember*], _____ [*servicemember's commanding officer*], and _____ [*counsel*], the pleadings and records on file in this case, further written submissions on this

motion, and the argument at the hearing.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*specify party*]

MEMORANDUM

A CONTINUANCE SHOULD BE GRANTED TO AN ABSENT PARTY IN MILITARY SERVICE

[*For a stay of an action or proceeding under the California statutes:*]

California law [M&V Code § 400 et seq.] authorizes stays of actions or proceedings for persons who are either (1) officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President; or (2) reservists of the United States Military Reserve who have been called to full-time active duty [M&V Code §§ 400(a)(2), 403(a)]. At any stage in any action or proceeding in which a service member is involved, either as plaintiff or defendant, during the period of military service or within 60 days thereafter, the Court may, in its discretion on its own motion, and must, on application to it by the servicemember or some person on his/her behalf, stay the action or proceeding unless, in the opinion of the Court, the ability of the _____ [plaintiff to prosecute the action *or* defendant to conduct his/her defense] is not materially affected by reason of his/her military service [M&V Code § 403(a)]. The letters [and declarations] provided as a part of this application demonstrate that _____ is a qualifying servicemember and that his/her ability to _____ [prosecute the action or conduct his/her defense] has been materially affected by his/her military service. Accordingly, this Court should grant a stay in proceedings until _____ [*date*].

[*OR, For a stay of an action of proceeding under the federal statutes:*]

The federal Servicemembers Civil Relief Act [*50 USC app § 501 et seq*.] authorizes stays of actions or proceedings for any person who is a _____ [*select alternative appropriate to servicemember in question:* member of the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty *or* member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency declared by the President and supported by Federal funds *or* commissioned officer of the _____ (Public Health Service *or* National Oceanic and Atmospheric Administration) on active service] [*50 USC app §§ 511(2)(a), 522*] [*or specify other category authorized under 50 USC app § 516*] and who, at the time of filing an application for a stay, (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding [*50 USC app § 522(a)*]. At any stage before final judgment in a civil action or proceeding in which a servicemember described above is a party, the court may on its own motion and must, upon application by the servicemember, stay the action for a period of not less than 90 days, if the application includes (1) a letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear, and stating a date when the servicemember will be available to appear; and (2) a letter or other communication from the

servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter [*50 USC app § 522(b)*]. As both such letters are attached to this motion, a 90-day continuance is mandatory. [*Optional:* In addition, servicemembers may apply for an additional stay based on the continuing effect of military duty on the servicemember's ability to appear. Such an application may be made at the time of the initial application for a stay, or when it appears that the servicemember is unavailable to prosecute or defend the action [*50 USC app § 522(d)*]. Because the documents submitted with this motion demonstrate that _____ (*name*) will be unavailable for at least _____ (*specify term, e.g.,* the six months remaining on his/her current overseas tour of duty in Iraq), the court should grant and additional stay of _____ (*term requested*)].

[*OR, for a stay of judgment, garnishment order, or attachment order under the California statutes:*]

California law [M&V Code § 400 et seq.] authorizes stays of judgments, garnishment orders, and attachment orders for persons who are either (1) officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President; or (2) reservists of the United States Military Reserve who have been called to full-time active duty [M&V Code §§ 400(a)(2), 403(c)]. In any action or proceeding against a service member, before or during the period of the service, or within 60 days thereafter, the court may, in its discretion on its own motion, or must, upon application to it by the service member or some person on his or her behalf, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his or her military service _____ [*either, as appropriate:* stay the execution of any judgment or order entered against the service member *or* vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment] [M&V Code § 403(c)]. The letters [and declarations] provided as a part of this application demonstrate that _____ is a qualifying servicemember and that his/her ability to comply with the judgment [*or* order] entered against him/her has been materially affected by his/her military service. Accordingly, this Court should grant a stay of execution of this judgment [*or* order] until _____ [*date*].

[*OR, for a stay of judgment, garnishment order, or attachment order under the federal statutes:*]

The federal Servicemembers Civil Relief Act [*50 USC app § 501 et seq.*] authorizes stays of judgments, garnishments, and attachments against any person who is a _____ [*select alternative appropriate to servicemember in question:* member of the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty *or* member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency declared by the President and supported by Federal funds *or* commissioned officer of the _____ (Public Health Service *or* National Oceanic and Atmospheric Administration) on active service] [*50 USC app §§ 511(a)(2), 524*] [*or specify other category authorized under 50 USC app § 516*] in any action or proceeding commenced in a court against a servicemember before or during the period of the servicemember's military service or within 90 days after that service terminates [*50 USC app § 524(b)*]. In such a case, if a servicemember, in the opinion of the court, is materially affected by reason of military service in complying with a court judgment or order, the court may on its own motion and must, on application by the servicemember _____ [*select appropriate alternative:* stay the execution of any judgment or order entered against the servicemember *and/or* vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment] [*50 USC app § 524(b)(1)*]. The letters [and declarations] provided as a part of this application demonstrate that _____ is a qualifying servicemember and that his/her ability to comply with the judgment [*or* order] entered against him/her has been materially affected by his/her military service. Accordingly, this Court should grant a stay of execution of this judgment [*or* order] until _____ [*date*].

[*CONTINUE*]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*specify party*]

NOTES.

Authority:

M&V Code § 400 et seq.; 50 USC app § 501 et seq.

Discussion:

See *15.29 -15.34*

Cross Reference:

Stay of proceedings or continuance based on military service, California Points and Authorities, Ch. 48, Continuance of Proceedings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewMilitary & Veterans LawDefense PowersU.S. Secretary of Defense

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Chapter 15 Staying Enforcement of Judgment
VIII. FORMS

2-15 MB Practice Guide: CA Debt Collection 15.39

15.39 Motion for Writ of Supersedeas or Other Relief in Court of Appeal, With Supporting Memorandum.

Motion for Writ of Supersedeas or Other Relief in Court of Appeal, With Supporting Memorandum.
[IN THE] SUPREME COURT OF CALIFORNIA
[*OR*]
[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*], Plaintiff and Respondent/Appellant, vs. _____ [*name*]. Defendant and Appellant/Respondent.	NO. _____ [*appeal number or original proceeding number*] Trial Court No. _____ PETITION FOR WRIT OF SUPERSEDEAS [*if requested, include*: **TEMPORARY STAY REQUESTED:** Trial Court: _____ Department _____ Trial Judge: _____ Telephone no.: (_____) _____-_____]

Petitioner and appellant petitions this Court for a writ of supersedeas to stay enforcement of the _____ [judgment *or* order] of the Superior Court of California, County of _____, _____ [*describe judgment or order*] and all further proceedings thereon, until final determination, and alleges:

1. The [judgment, rule, or order] appealed from was entered on _____ [*date*], [*and, if appropriate*: and appears in Volume 857, page 72 of the Judgment Book]. A copy of the judgment is attached as part of this petition as Exhibit "A."

2. Petitioner and appellant filed his/her/its notice of appeal from the _____ [judgment *or* order] on _____ [*date*].

3. The nature of the action is _____ [*state*].

4. The appeal is based on _____ [*summarize alleged errors of the trial court sufficiently to advise the reviewing court of the question, or questions, involved*].

5. A stay of enforcement is unavailable from the trial court _____ [*either:* as a matter of law *or* because the trial court denied such a stay on _____ (*date*), for the stated reasons that the procedural requirements were not met].

6. Issuance of the writ is necessary for the following reason[s]: _____ [*specify*].

[*If temporary stay is being requested, include:*

7. Petitioner requests a temporary stay of the _____ (judgment *or* order) to allow this Court to consider the merits before irreparable damage is done to the petitioner's interests. The _____ (judgment *or* order) appealed from was issued by the _____ Court of _____ County, Department _____ (*department number*), by the Honorable _____ (*judge's name*), whose chambers telephone number is _____.]

WHEREFORE, petitioner and appellant prays that this Court issue a writ of supersedeas staying enforcement of the judgment, and all proceedings thereon, pending determination of the appeal herein.

[Petitioner and appellant further prays that this Court grant a temporary stay of execution of the judgment, and all proceedings thereon, pending determination of this petition.]

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner and Appellant

VERIFICATION

I, _____ [*name*], am _____ [the appellant *or* the attorney of record for the appellant] in the above-entitled appeal. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true].

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*]

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS [AND MOTION FOR TEMPORARY STAY]

On _____ [*date*] the trial court in this matter issued an _____ [order *or* judgment] which threatens appellant/petitioner _____ [*name*] with irreparable harm, in that _____ [*elaborate*]. This Court must issue a _____ writ of supersedeas *or* temporary stay] because _____ [*either:* the trial court denied a requested stay on _____ (*date*) *or* stay relief is unavailable from the trial court as a matter of law]. This relief is necessary because _____ [*elaborate on necessity*]. Appellant/Petitioner _____ [*name*] _____ [has offered to post an undertaking to protect _____ (*opponent's name*)'s interest in the _____ (judgment *or* order) *or* cannot post security because _____ (*explain*), and _____ (*opponent's name*)'s interest in the judgment rests secure because _____ (*explain*)]. This Court has inherent and statutory authority to issue a _____ [writ of supersedeas *or* temporary stay] to protect its own jurisdiction and in the interests of justice [*Faulkner v. Faulkner (1957) 148 CA2d 102, 306 P2d 585* ; *Nuckolls v. Bank of Cal. (1936) 7 C2d 574, 577, 61 P2d 927* ; *CCP § 923*]. _____ [*name*] respectfully requests that this Court do so in this case.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner and Appellant

NOTES.

Authority:
CCP § 923; *Cal Rules Ct, Rule 8.116*; *Faulkner v. Faulkner (1957) 148 CA2d 102, 105, 306 P2d 585* ; *Nuckolls v. Bank of Cal. (1936) 7 C2d 574, 577, 61 P2d 927*

Discussion:
See *15.25 -15.28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 16 Executing and Levying Against Personal Property

2-16 MB Practice Guide: CA Debt Collection 16.syn

§ 16.syn Synopsis to Chapter 16: Executing and Levying Against Personal Property

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16.02 Objective and Strategy.

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16.51[8][a] Officer Must Serve Personal Representative.
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16.51[8][c] Execution Lien Continues After Decree Is Final.

16.52 Levying Officer May Levy on Property Subject to Pending Action or Proceeding.
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16.55 Creditor May Apply for Order Directing Transfer of Possession After Issuance of Writ of Execution.
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16.58 CHECKLIST: Levy on Personal Property Used As Permanent Residence.

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16.60 Officer May Levy on Personal Property Used As Dwelling.

16.61 Levying Officer Must Serve Copy of Writ and Notice of Levy on an Occupant.

16.62 Levying Officer May Install Keeper on Property.

16.63 Creditor May Move for Order to Remove Occupants.

16.64 CHECKLIST: Bringing or Opposing Proceedings to Recall and Quash Execution and Vacate Levy.

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16.66 Judgment Debtor May Seek Order Recalling and Quashing Writ.
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16.69 Claim Exemption Within 10 Days of Notice of Levy.

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16.73 Writ of Execution--Judicial Council Form EJ-130.

16.74 Notice of Levy--Judicial Council Form EJ-150.

16.75 List of Exemptions From Enforcement of Judgments--Judicial Council Form EJ-155.

16.76 Notice of Motion of Proceedings to Obtain Property or Documentary Evidence of Title or Both (Turnover Order).

16.77 Notice of Motion to Remove Occupants From Personal Property Used As Dwelling.

16.78 Notice of Motion of Proceedings to Recall and Quash Execution and Vacate Levy.

16.79 Proceedings to Claim Exemption After Levy--Claim of Exemption, Financial Statement--Judicial Council Forms EJ-160, WG-007/EJ-165.

16.80 Proceedings to Claim Exemption After Levy--Notice of Opposition to Claim of Exemption--Judicial Council Form EJ-170.

2 of 197 DOCUMENTS

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Chapter 16 Executing and Levying Against Personal Property
I. STRATEGY

2-16 MB Practice Guide: CA Debt Collection 16.01

16.01 Scope.

This chapter covers:

- Objectives and strategy for executing and levying against personal property [*see 16.02*].
- Seeking or opposing a writ of execution [*see 16.03 -16.10*].
- Giving a notice of levy [*see 16.11 -16.16*].
- Asserting or opposing exemptions from execution and levy [*see 16.17 -16.45*].
- Conducting proceedings to levy on personal property [*see 16.46 -16.52*].
- Conducting proceedings to obtain property or documentary evidence of title [*see 16.53 -16.57*].
- Executing against personal property used as permanent residence [*see 16.58 -16.63*].
- Initiating or opposing proceedings to recall and quash execution and vacate levy [*see 16.64 -16.66*].
- Initiating or opposing proceedings to claim an exemption after levy has been made [*see 16.67 -16.72*].

Core Statutes:
CCP §§ 699.010-701.830, 703.010-703.610, 704.010-704.210

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLevy & Distraint (IRC secs. 6330-6344, 7429)General Overview

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Chapter 16 Executing and Levying Against Personal Property
I. STRATEGY

2-16 MB Practice Guide: CA Debt Collection 16.02

16.02 Objective and Strategy.

Obtaining a writ of execution is fundamental to levying on a judgment debtor's personal property. Thus, a judgment creditor's first step in executing on the judgment is to determine where the debtor has personal property that is subject to execution [*see CCP §§ 699.720*, *704.010-704.210*; *see also 16.03[1]*], and obtain a writ of execution in each county where a levy may be made [*see CCP § 699.510*; *see also 16.07*].

In opposing execution and levy, a judgment debtor's first step is ascertain what personal property is not subject to execution or is exempt from execution [*see CCP §§ 699.720*, *704.010-704.210*; *see also 16.06*].

Strategic Point:

Many time limits in the execution/levy proceedings are short. For example, a judgment debtor has 10 days to file a claim of exemption after notice of levy [*CCP § 703.520(a)*], and a creditor opposing a claim of exemption has 10 days after receiving the notice of claim to file a notice of opposition [*CCP § 703.550*]. Failure to act within these time limits can have permanent consequences. For example, a judgment debtor's failure to claim an exemption serves as a waiver of the exemption, and the property is rendered subject to enforcement of the money judgment [*CCP § 703.030(a)*]. If the creditor fails to file an opposition to the claim of exemption, the levying officer must release the property to the extent it is claimed to be exempt [*CCP § 703.550*; *see 16.69 -16.72*].

In conducting proceedings to levy on personal property, in many situations, the judgment creditor has the option of using a registered process server rather than the sheriff or marshal. This option may be useful to expedite a levy when the sheriff has a backlog [*see CCP § 699.080*; *see also 16.49*].

In all cases, a levying officer file must be opened with the local levying officer. Separate instructions should be provided to both the levying officer and to the process server.

An advantage to using a registered process server to effect a levy is that the judgment creditor may be able to better control the timing and coordination of levies. For example, the judgment creditor may want to levy on several bank accounts simultaneously, or to levy on a particular account when the account balance is likely to be higher than at other times, e.g., at the end of the month.

Counsel who is contemplating using a private process server should check with both the sheriff and the process server

to make sure that all aspects of levy are covered and that each of them knows what the other is doing. Generally, the process server will be much more expensive, so it is a good idea to see what those fees are up front, and compare them with the sheriff's fees. It is possible that the court may reduce the allowable costs to match the sheriff's under these circumstances. If a private process server is used, counsel should make certain that the server is in compliance with time frames under the levy statutes, some of which are very short. Failure to comply with the statutes requires doing things over, at additional cost.

Warning:

Registered process servers may levy under a writ of execution only on specified types of property [*see CCP § 699.080*; *see also 16.49[2]*]. If a process server fails to comply with certain fee and filing requirements, the levy is ineffective and the levying officer may issue a release for any property sought to levied on [*see CCP § 699.080(e)*; *see also 16.49[2][e]*].

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Cross Reference:

For Tips on updating case law and expanding your research with additional resources, see **How to Use lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsFinance

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Chapter 16 Executing and Levying Against Personal Property
II. SEEKING OR OPPOSING WRIT OF EXECUTION

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16.03 CHECKLIST: Seeking or Opposing Writ of Execution.

16.03[1] Judgment Creditor's Checklist.

☐ Determine what personal property debtor owns, in whose name it is held, and where it is located.

Authority:
CCP § 699.510

Discussion:
See *16.07*

☐ Determine whether identified property is subject to enforcement of money judgment.

Authority:
CCP §§ 695.010-695.070, 699.710

Discussion:
See *16.06[1]*

☐ Determine whether identified property is subject to execution.

Authority:
CCP § 699.720(a)

Discussion:
See *16.06[2]*

☐ Determine whether identified property is exempt from execution.

Authority:
CCP §§ 704.010-704.210, 704.710-704.995

Discussion:
See *16.06[3]*

☐ Identify name of judgment debtor as listed on the judgment, and any additional names by which judgment debtor is known.

Authority:
CCP § 699.510(c)(1)

Discussion:
See *16.07[2]*

☐ Determine whether registered process server may levy on identified property.

Authority:
CCP § 699.080(a)

Discussion:
See *16.07[4]*

☐ Draft writ of execution and accompanying documents.

Authority:
CCP § 699.520

Discussion:
See *16.07*

Form:
See *16.73*

16.03[2] Judgment Debtor's Checklist.

☐ Determine whether writ of execution correctly states name of judgment debtor as listed on the judgment.

Authority:
CCP § 699.510(c)(1)

Discussion:
See *16.07[2]*

☐ Determine whether debtor may obtain stay of enforcement of writ.

○ Determine whether judgment debtor should request stipulation from counsel for judgment creditor.

○ Determine whether judgment debtor has any other action pending on a disputed

claim against the judgment creditor.

Authority:
CCP §§ 918(a), 918.5

Discussion:
See *16.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.04 Options and Strategy for Judgment Creditor.

The judgment creditor must keep in mind that a separate writ is required for each county in which levy of the debtor's property will be made [*CCP § 699.510(a)*].

Another consideration is the debtor's name. A writ of execution is issued in the name of the judgment debtor as listed on the judgment. If the debtor is known by or holds property in other names, the creditor must file an affidavit of identity with the application for issuance of the writ [*CCP § 699.510(c)(1)*].

Cross References:

Discussion of levying against real property, see Ch. 17, Executing and Levying Against Real Property.

Form for affidavit of identity, see *Ch. 17, Executing and Levying Against Real Property, 17.51*.

As an alternative to an affidavit of identity, if the names are very dissimilar, the judgment creditor should consider a motion to amend the judgment to add additional judgment creditor names, as for example when a debtor has purported to transfer assets into a wholly owned corporation [*see Dow Jones Co. v. Avenel (1984) 151 CA3d 144, 149, 198 CR 457* ; *Alexander v. Abbey of Chimes (1980) 104 CA3d 39, 48, 163 CR 377*] .

Cross Reference:

Discussion of counties and names, see *16.07*, *16.08*.

Strategic Point:

It is a good idea to think about the name issue when first bringing the action. For a debtor named Bill, but who likely holds property in the name of William, the action should be brought against William Doe, also known as Bill Doe. This also applies to people with maiden names and/or changed names. However, if counsel discovers post-judgment that a debtor with one name on the judgment holds property in another name, counsel then may go to court and ask for the judgment to be amended to include all aliases the debtor uses, or use the affidavit of identity procedure.

Locating Personal Property With the Help of Online Resources:

Many resources are available online for locating personal property. For example, helpful resources at

lexis.com include:

- Legal tab > States Legal--U.S. > California > Public Records > Personal Property Locator > Federal Aviation Administration Aircraft Registrations
    - Sample Search: To find aircraft owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.
- Legal tab > States Legal--U.S. > California > Public Records > Personal Property Locator > US Coast Guard Merchant and Recreational Vessel Registrations
    - Sample Search: To find boats owned by a debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross Reference:

Locating personal property, see Ch 2, Locating the Debtor and Identifying the Debtor's Assets.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawBankruptcyGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewTransportation LawWater TransportationLicensing & Registration

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16.05 Options and Strategy for Judgment Debtor.

A judgment debtor should try to shield personal property from execution and levy by timely asserting any applicable exemptions [*see CCP §§ 699.720, 704.010-704.210*].

Further, a judgment debtor might consider doing some advance asset protection planning before a judgment is entered and a write of execution issued, or, better yet, before the underlying claim arises in the first place. Another strategy is to file a bankruptcy case to obtain the protection of the automatic stay, and a discharge of the debt.

Cross Reference:

Discussion of impact of bankruptcy, see Ch. 3, Effect of Bankruptcy.

The debtor should also verify how the debtor's name is listed on the judgment, as the writ is issued in the name shown on that judgment [*CCP § 699.510(c)(1)*].

Counsel for the judgment debtor should consider obtaining a stay of enforcement under *CCP § 918(a)* if appropriate.

Counsel for the debtor can also move the court to accept payments on installments.

Cross Reference:

Discussion of installment payments by debtor, see Ch. 11 Obtaining and Removing Judgment Liens, 11.53.

If the matter will be appealed, this is a good time to file an appeal bond.

Cross Reference:

Discussion of bond to obtain stay of proceedings, see *California Forms of Pleading and Practice, § 43.12* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysAppealsBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral OverviewCivil ProcedureJudgmentsEntry of

JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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16.06 Property Must Be Subject to Execution.

16.06[1] Unless Excepted, Property Is Subject to Enforcement of Money Judgment. Except as otherwise provided by law, all property subject to enforcement of a money judgment pursuant to *CCP § 695.010 et seq.* is subject to levy under a writ of execution to satisfy a money judgment [*CCP § 699.710*].

Cross Reference:

Discussion of code sections governing enforcement of money judgments, see *Ch. 1, Planning Collection of Debt, 1.42*.

16.06[2] Property That Is Not Subject to Execution. The following types of property are not subject to execution [*CCP § 699.720(a)*]:

- An alcoholic beverage license that is transferable under Article 5 of Chapter 6 of Division 9 of the Business and Professions Code [*see B&P Code § 24070 et seq.*].

Strategic Point:

An alcoholic beverage license may be sold by a postjudgment court-appointed receiver; this specific purpose is reason enough to have a receiver appointed.

Locating Alcoholic Beverage Licenses Using Online Resources:

Many resources are available online for determining if a debtor holds a California alcoholic beverage license. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Licenses & Registrations > CA Liquor Licenses
  - Sample Search: To find an alcoholic beverage license, use a NAME segment search: *name (first name /3 last name)*.

- The interest of a partner in a partnership or member in a limited liability company if the entity is not a judgment debtor.

Strategic Point:

A partnership interest is liquidated pursuant to a court-issued charging order.

- A cause of action that is the subject of a pending action or special proceeding.

- A judgment in favor of the judgment debtor before the expiration of the time for appeal from the judgment or, if an appeal is filed, before the final determination of the appeal.

- A debt (other than earnings) owing and unpaid by a public entity.

- The loan value of an unmatured life insurance, endowment, or annuity policy.

Strategic Point:

Payments from an annuity that are not otherwise exempt are subject to attachment once they are distributed.

- A franchise granted by a public entity and all the rights and privileges of the franchise.

- The interest of a trust beneficiary.

- A contingent remainder, executory interest, or other interest in property that is not vested.

- Property in a guardianship or conservatorship estate.

16.06[3] Exempt Property Is Not Subject to Execution. A judgment debtor may be able to claim an exemption for property listed in *CCP §§ 704.010 et. seq*.

Cross Reference:

Discussion of these exemptions, see *16.17 -16.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionEstate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsExecutory Interests

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16.07 Judgment Creditor Should Apply for Writ of Execution in Each County Where Levy Will Be Made.

16.07[1] Clerk Issues Separate Writ for Each County of Levy. After entry of a money judgment, the judgment creditor may apply for a writ of execution. The court clerk will issue a separate writ for each county where a levy will be made [*CCP § 699.510(a)*]. The writ requires the levying officer to whom it is directed to enforce the money judgment [*CCP § 699.520*].

Cross Reference:

Locating debtor's property, see Ch.2, Locating the Debtor and Identifying the Debtor's Assets.

16.07[2] Writ Must Be Issued in Name of Debtor. The clerk issues the writ in the name of the judgment debtor as listed on the judgment. The writ may include any additional names by which the judgment debtor is known, as set forth in an affidavit of identity filed by the creditor with the application for issuance of the writ [*CCP § 699.510(c)(1)*].

Judicial Council Form EJ-130 is a standard form for a writ of execution [*Cal Rules Ct, Rule 1.35*; *CCP § 699.520*]. Use of this form is optional, but is recommended.

Cross References:

Judicial Council Form EJ-130, see *16.73*.

Forms, see *California Forms of Pleading and Practice, §§ 254.680* (writ of execution), 254.681 (affidavit of identity) (Matthew Bender).

16.07[3] Writ Must Be Directed to Levying Officer. The writ of execution is directed to the levying officer in the county where the levy will be made [*CCP § 699.510(a)*].

16.07[4] Registered Process Server May Levy on Specified Categories of Property. A registered process server may levy under a writ of execution on certain types of property [*CCP § 699.080(a)*].

Strategic Point:

Counsel for a judgment creditor who is using a registered process server to levy on property should make

a motion to recover the process server's fees as costs [*see CCP § 685.080(f)*].

Cross References:

List of type of property for which registered process server may levy, see *16.49[2][a]*.

Discussion of registered process servers, see *16.49*.

Discussion of costs, see *California Forms of Pleading and Practice, § 174.26[5]* (Matthew Bender).

16.07[5] Successive Writs May Be Issued. The clerk may issue successive writs until the money judgment is satisfied. However, a new writ may not be issued for a county until 180 days after issuance of a prior writ for that county, unless the prior writ was returned [*CCP § 699.510(a)*].

Strategic Point:

Counsel for the judgment creditor should prepare, serve, and file a memorandum of costs [*see CCP § 685.070*]. Counsel should also prepare an affidavit stating the amount of postjudgment interest that has accrued [*see CCP §§ 685.050(a), 699.510, 699.520*]. If costs and interests are not significant and if there is an immediate need to levy the writ (such as obtaining funds in a bank account or levying against a large account receivable), a judgment creditor may prefer to obtain the writ for the principle amount of the judgment only, since the memorandum of costs would need to be served on the judgment debtor's counsel, and that would tip off the judgment debtor who could then take action to prevent collection.

Strategic Point:

Attorney's fees are allowed as post-judgment costs when the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to *CCP 1033.5(a)(10)(A)*; in other words, when attorney's fees were included in a judgment pursuant to a contractual provision for attorney's fees. In such a situation, attorney's fees incurred in related cases may also be permitted as a post-judgment cost--for example, in a bankruptcy case when attempting to avoid the discharge of the debt represented by the judgment [*Jaffe v. Pacelli (2008) 165 CA4th 927, 82 CR3d 423]* , or in a case in which attorney fees were incurred in defending a separate suit to avoid the reduction of the amount of the judgment [*Globalist Internet Technologies, Inc. v. Reda (2008) 167 CA4th 1267, 84 CR3d 725]* .

Cross Reference:

Form, see *California Forms of Pleading and Practice, § 254.682* (Matthew Bender).

Timing:

Practice varies by jurisdiction as to whether counsel may immediately obtain a writ of execution when a memorandum of costs is filed simultaneously with the writ. Some courts will not issue a writ until the adverse party has had sufficient time to file a motion to tax costs under *Cal Rules Ct, Rule 3.1700(b)(1)*. To enforce the entire judgment including costs, counsel must wait for this period to expire before seeking the writ of execution [*see Cal Rules Ct, Rule 3.1700(b)(4)* (clerk to enter costs on judgment after time for motion to strike or tax costs or time for determination of that motion has expired)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsCourtsClerks of CourtGovernmentsLocal GovernmentsFinance

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16.08 Writ Must Be Served.

The writ of execution, together with the notice of levy, must be served on the judgment debtor at the time of levy or promptly afterward. It may be served personally or by mail [*CCP § 700.010(a)*; *see CCP § 684.020*].

Cross Reference:

Discussion of service, see *16.49*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.09 Writ Must Be Returned After Levy.

16.09[1] Writ Generally Must Be Returned Within Two Years. The levying officer to whom the writ is directed must return the writ to the court, with a report of the officer's actions and an accounting of amounts collected and costs incurred, at the earliest of the following times [*CCP § 699.560(a)*]:

- Two years from the date of issuance of the writ.
- Promptly after all duties under the writ are performed.
- When return is requested in writing by the judgment creditor.
- If no levy takes place under the writ within 180 days after its issuance, promptly after expiration of the 180-day period.
- On expiration of the time for enforcement of the money judgment.

If a levy was made under the Wage Garnishment Law [*see CCP § 706.010 et seq.*] and the earnings withholding order remains in effect, the writ of execution must be returned as provided in [*CCP § 699.560(a)*] (noted above). A supplemental return must be made as provided in *[CCP § 706.033]* [*CCP § 699.560(d)*].

This procedure enables a judgment creditor who has an outstanding writ of execution and a levy by an earnings withholding order to have the writ returned and obtain a successive writ, even though the earnings withholding order remains in effect [*see CCP § 699.510*; Stats 1992, Ch 283, § 19(b)]. The creditor is not required to choose between continuing a wage garnishment and levying on other property to enforce the judgment [*see* Stats 1992, Ch 283, § 19(b)].

Cross Reference:

Discussion of earnings withholding orders generally, see *Ch. 21, Garnishment, 21.14*.

16.09[2] Writ Must Be Returned Within One Year for Levy on Decedent's Estate. If a levy has been made under [*CCP § 700.200*] on an interest in the personal property of a decedent's estate, the writ must be returned not later than one year after the date the court decree distributing the interest becomes final [*CCP §§ 699.560(b), 700.200(e)*].

16.09[3] Writ Must Be Returned Within One Year for Levy on Employee Pension Benefits. A writ of execution pursuant to which a levy is made on the judgment debtor's right to payment of benefits from an employee pension benefit plan under *Fam Code § 5103* must be returned not later than one year after the date the execution lien expires [*CCP § 699.560(c)*; *see Fam Code §§ 5100*, *5103* (requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.10 Creditor May Seek Turnover Order After Issuance of Writ.

If a writ of execution is issued, the judgment debtor then may apply to the court for a turnover order in aid of execution directing the judgment creditor to transfer to the levying officer either possession of the property, or of documentary evidence of title to property *[CCP § 699.040(a)*]. The court may issue the order on a showing of need for the order *[CCP § 699.040(b)]*; *see Imperial Bank v. Pim Elec. (1995) 33 CA4th 540, 553, 39 CR2d 432]* .

Strategic Point:

The term "need" is not defined in [*CCP § 699.040*] and no case has construed it, but it probably refers to property that is in danger of being hidden or moved if not ordered turned over.

The order must be personally served on the judgment debtor, containing a notice to the debtor that failure to comply with the order can subject him or her to arrest and punishment for contempt [*CCP § 699.040(c)*].

Cross Reference:

Discussion of turnover orders, see *22.07[4]*.

Strategic Point--Judgment Creditor:

The turnover order is a very important tool that can easily be overlooked. It can happen that at the debtor's examination hearing, a defendant will arrive in his or her vehicle, wearing an expensive watch, jewelry, earrings, and the like. This is the opportune time to seek a turnover order as to those items if counsel has brought blank turnover order forms to the hearing. However, it is important to distinguish between the requirements for, scope of, and use of the turnover in aid of execution under *CCP § 699.040*, and the turnover order issued in connection with a debtor's examination under [*CCP § 708.205*].

Strategic Point--Judgment Debtor:

If the time for appeal of the underlying judgment plus 10 days has not passed, counsel for the judgment debtor may want to obtain a stay of enforcement under *[CCP § 918(a)*], which applies 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].

Cross References:

Discussion for turnover orders, see *22.07[4]*.

Form of application for turnover order, declaration in support of order, and turnover order, see *22.23 -22.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCriminal Law & ProcedureAppealsProceduresTime Limitations

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Chapter 16 Executing and Levying Against Personal Property
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16.11 CHECKLIST: Giving Notice of Levy.

☐ Provide all information required by statute in notice of levy.

Authority:
699.540, *CCP §§ 700.010*

Discussion:
See *16.13*

Form:
See *16.74*

☐ Determine whether to serve additional forms with writ and notice:

○ If debtor is natural person, copy of Judicial Council form listing exemptions and exemption amounts must also be served.

○ If debtor is identified by additional names in writ of execution, affidavit of identity must also be served.

Authority:
CCP §§ 680.135, *681.030*, *699.540*, *700.010*, *703.150*

Discussion:
See *16.15*

Form:
See *16.75*

☐ Serve all required documents on judgment debtor.

Authority:
699.540, CCP §§ 700.010

Discussion:
See *16.14 -16.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.12 Options and Strategy.

Counsel for the judgment creditor should ensure that all required forms are served on the debtor. The writ of execution and notice of levy are always necessary [*CCP § 700.010(a)(1), (2)*]. If the debtor is a natural person, a copy of Judicial Council form listing exemptions and exemption amounts must also be served [*CCP § 700.010(a)(3)*]. Finally, if the debtor is identified by additional names in the writ of execution, an affidavit of identity also must be served [*CCP § 700.010(a)(4)*].

Practically speaking, these forms normally are prepared and served by the levying officer or registered process server. The directions to the levying officer should direct the officer or process server to serve the required documents.

Cross References:

Discussion of use of forms, see *16.14, 16.15*.

Form listing exemptions, see *16.75*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.13 Notice of Levy Must Contain Specific Information.

The required notice of levy must inform the person being notified of all of the following [*CCP § 699.540(a)*]:

- The capacity in which the person is notified.
- The property that is levied on.
- The person's rights under the levy, including the right to claim an exemption [*see CCP § 703.010*] and the right to make a third party claim [*see CCP § 720.010*].
- The person's duties under the levy.
- Any names listed in the writ of execution pursuant to an affidavit of identity [*see CCP § 680.135*].

Judicial Council Form EJ-150 is a standard form for a notice of levy. Use of this form is optional, but recommended [*Cal Rules Ct, Rule 1.35*; *CCP § 699.540*].

Cross References:

Judicial Council Form EJ-150; see *16.74*.

Discussion of claiming exemption to levy, see *16.17 -16.45*.

Discussion of affidavit of identity, see *16.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.14 Notice and Writ of Execution Must Be Served on Debtor.

At the time of levy or promptly afterward, the levying officer must serve a copy of both the writ of execution and the notice of levy on the judgment debtor [*CCP § 700.010(a)(1), (2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.15 Service of Additional Forms May Be Required.

16.15[1] Copy of Judicial Council Form Listing Exemptions From Execution Must Be Included If Required. If the debtor is a natural person, a copy of the Judicial Council form listing exemptions and exemption amounts must also be served with the writ and notice of levy [*CCP § 700.010(a)(3)*; *see CCP §§ 681.030*, *703.150*].

Cross References:

Discussion of claiming exemption to levy, see *16.17 -16.45*.

Form listing exemptions, see *16.75*.

16.15[2] Affidavit of Identity Must Be Included If Required. At the time of levy or promptly afterward, the levying officer must also serve a copy of any affidavit of identity [*see CCP § 680.135*] for names of the debtor listed on the writ of execution [*CCP § 700.010(a)(4)*].

Cross Reference:

Form, see *California Forms of Pleading and Practice, § 254.681* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.16 Creation of Execution Lien.

16.16[1] Levy on Property Creates Execution Lien. A levy on property under a writ of execution creates an execution lien on the judgment debtor's interest in the property [*CCP § 697.710*]. However, no lien is created until all acts necessary to levy on the property are completed. Mere issuance of the writ or delivery to the levying officer does not create a lien, although service of a notice of levy is not necessary to create the lien; *see Grover v. Bay View Bank (2008) 87 CA4th 452, 459, 104 CR2d 677* .

Personal property subject to an execution lien generally remains subject to the lien on transfer or encumbrance regardless of whether it is in the custody of the levying officer; intangible personal property is subject to special provisions. There are exceptions for transfers in the ordinary course of business, holders in due course, and others [*CCP §§ 697.730, 697.740*].

If property subject to an execution lien is sold at an execution sale, the execution lien and any subordinate liens are extinguished [*CCP § 701.630*].

If the property levied on under a writ of execution is subject to an attachment lien, the priority of the execution "relates back" to the date that the other lien was created [*CCP § 697.020*].

Cross References:

Discussion of judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Discussion of execution liens on real property, see Ch. 17, Executing and Levying Against Real Property.

Detailed discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

16.16[2] Term and Extinguishment of Execution Lien. The execution lien commences on the date of levy and continues until:

- Two years after the date of issuance of the writ unless the judgment is sooner satisfied [*CCP §*

697.710];

- The 10-year period for enforcement of the judgment elapses [*CCP §§ 683.020*, *699.030*];
- The lien is renewed or continued [*CCP §§ 697.020(b)*, 688.200, *697.030*]; or
- Enforcement of the judgment is stayed and a bond is filed, if required.

16.16[3] Failure to Serve Writ and Notice of Levy Does Not Affect Execution Lien Created by Levy. If property is levied on and copies of the writ and notice were required to be posted, served on, or mailed to the judgment debtor or another person, the failure to post, serve, or mail does not affect the execution lien created by the levy [*CCP § 699.550*].

Similarly, failure to serve on or mail to the judgment debtor a list of exemptions does not affect the execution lien created by the levy [*CCP § 699.550*].

16.16[4] Release From Levy. The levying officer will release property from levy on written instructions from the judgment creditor's attorney of record or on receipt of a certified copy of court order for release [*CCP § 699.060(a)*]. The release distinguishes the execution lien.

Strategic Point:

A release may occur by operation of law, such as when a judgment creditor fails to oppose a claim of exemption or third party claim. When the levying officer has collected the full amount necessary to satisfy the writ, all other property under the levy must be released.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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16.17 CHECKLIST: Asserting or Opposing Exemptions From Execution and Levy.

☐ Determine whether judgment debtor could claim that property to be levied on is exempt from execution.

Authority:
CCP §§ 704.010-704.210

Discussion:
See *16.20 -16.45* (exemptions); see *16.67 -16.72* (claiming exemption).

Form:
See *16.75* (list of exemptions)

☐ Determine whether judgment debtor is person entitled to claim exemption:

○ Exemptions apply only to property of natural persons.

○ Only judgment debtor, person acting on his or her behalf, or spouse of debtor in case of community property, can claim exemptions.

Authority:
CCP § 703.020

Discussion:
See *16.67*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of

JudgmentsEnforcement & ExecutionWrits of ExecutionEstate, Gift & Trust LawCommunity PropertyGeneral Overview

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16.18 Options and Strategy for Judgment Debtor.

The judgment debtor should determine if any property to be levied on is exempt from execution. All exemptions and exemption limits are listed in Judicial Council Form EJ-155 [*see CCP §§ 704.010-704.210*].

The dollar amounts of exemptions are adjusted at three-year intervals [*CCP § 703.150*].

Cross Reference:

Discussion of exemptions, see *16.20* et seq.

Judicial Council Form EJ-155 listing exemptions, see *16.75*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionEstate, Gift & Trust LawCommunity PropertyGeneral Overview

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16.19 Options and Strategy for Judgment Creditor.

In opposing a claim of exemption, consider that only the judgment debtor, a person acting on the debtor's behalf, or the debtor's spouse in case of community property, can claim the exemptions. These exemptions apply only to property of natural persons [*CCP § 703.020*]. Exemption statutes generally are construed in favor of the judgment debtor, and exceptions to the exemption statutes are strictly construed [*see Roosevelt v. Roosevelt (1981) 117 CA3d 397, 402, 172 CR 641*]. However, the exemptions are purely statutory, and courts may not expand or increase them [*Estate of Silverman (1967) 249 CA2d 180, 183, 57 CR 379*]. The judgment debtor has the burden of proof at exemption hearings [*CCP § 703.580*].

Strategic Point--Judgment Debtor:

Because most exemptions must be timely asserted or are deemed waived, it is important that the judgment debtor promptly claim all applicable exemptions on receipt of the notice of levy.

Cross Reference:

Discussion of opposing exemption, see *16.67*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyTax LawState & Local TaxesPersonal Property TaxExempt PropertyLimitations

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16.20 List of Possible Exemptions From Enforcement of Judgment.

Possible exemptions from enforcement of judgment that can be asserted or opposed (which may change over time) include the following:

- Appliances.
- Art and heirlooms.
- Boats.
- Books.
- Building materials.
- Business licenses and tools.
- Cars and trucks.
- Cash.
- Cemetery plots and proceeds.
- Charity.
- Claims, actions, and awards.
- Clothing.
- Condemnation proceedings.
- Death benefits.
- Deposit accounts.

- Direct deposit accounts.
- Disability insurance benefits.
- Dwelling house.
- Earnings.
- Employment benefit payments.
- Employment bonds.
- Financial assistance.
- Fuel.
- Furniture.
- General assignment for benefit of creditors.
- Health aids.
- Health insurance benefits.
- Homestead and home.
- Household furnishings.
- Insurance.
- Jewelry.
- Licenses.
- Pension plans.
- Personal injury and wrongful death damages.
- Prisoner's funds.
- Property not subject to enforcement of money judgments.
- Prosthetic and orthopedic devices.
- Provisions for residence.
- Public assistance.
- Railroad benefits.

- Retirement benefits.
- Relocation benefits.
- Segregated benefit funds.
- Servicemembers' property.
- Social security.
- Strike benefits.
- Student aid.
- Travelers' check sales proceeds.
- Unemployment benefits.
- Uniforms.
- Vacation credits.
- Veterans' benefits.
- Wages.
- Welfare benefits.
- Workers' compensation.

Judicial Council Form EJ-155, approved for optional use, lists all the current exemptions and their statutory bases [*Cal Rules Ct, Rule 1.35*; *CCP §§ 681.030*, *700.010*].

Cross Reference:

Judicial Council Form EJ-155, see *16.75*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewPublic Health & Welfare LawSocial SecurityDisability Insurance & SSI BenefitsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAwardsCreditsWorkers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & WaiversWorkers' Compensation & SSDIBenefit DeterminationsGeneral Overview

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16.21 $2,550 From Sale of Motor Vehicles Is Exempt From Execution and Levy.

16.21[1] $2,550 Combined Equity and Proceeds Is Exempt. Any combination of the following is exempt in the amount of $2,550 [*CCP § 704.010(a)*]:

- The aggregate equity in motor vehicles.
- The proceeds of an execution sale of a motor vehicle.
- The proceeds of insurance or other indemnification for loss, damage, or destruction of a motor vehicle.

Consider:

The dollar amounts of exemptions provided in *CCP § 704.010 et seq*. in effect immediately before that date will be adjusted at three-year intervals, beginning on April 1, 2007 [*CCP § 703.150(b)*]. The Judicial Council determines the amount of the adjustment [*see CCP § 703.150(c)* (factors used in adjustment)]. A list of the amounts of exemptions from a judgment under *CCP § 703.150*, starting April 1, 2007, is available from the clerk of the court and on the California Courts website at www.courtinfo.ca.gov/forms/documents/exemptions.pdf.

Cross Reference:

Judicial Council Form EJ-155 listing exemptions from enforcement of judgments, see *16.75*.

16.21[2] Fair Market Value Is Determined by Customary Guides. To determine the equity of a vehicle, the fair market value of the vehicle is determined by reference to used car prices in guides customarily used by California automobile dealers, unless the vehicle is not listed in those guides [*CCP § 704.010(c)*].

Strategic Point:

The Kelly Blue Book online is a good reference for most California courts [*see* www.kbb.com]. Another source, the NADA listings [*see* www.nada.com], is not as widely used in California.

16.21[3] Exemption Period Is 90 Days. Proceeds that are exempt under [*CCP § 704.010(a)*] are exempt for a period of 90 days after the time they are actually received by the judgment debtor [*CCP § 704.010(b)*].

16.21[4] Owner of Only One Vehicle Need Not Make Claim. If the judgment debtor has only one motor vehicle and it is sold at an execution sale, the proceeds of the sale are exempt in the amount of $2,300 without making a claim [*CCP § 704.010(d)*].

Strategic Point:

The levying officer must consult, and may rely on, DMV records in determining whether the judgment debtor has only one motor vehicle. If this exemption is relied on, the exemption in [*CCP § 704.010(a)*] for combined equity is not available [*CCP § 704.010(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsCourtsClerks of Court

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16.22 Household Furnishings and Personal Effects Are Exempt From Execution and Levy.

16.22[1] Furnishings and Effects Must Be Ordinarily and Reasonably Necessary to Debtor and Family. Household furnishings, appliances, provisions, wearing apparel, and other personal effects are exempt if they are [*CCP § 704.020(a)*]:

- Ordinarily and reasonably necessary to, and personally used or procured for use by, the judgment debtor and members of the debtor's family at his or her principal place of residence.

- Ordinarily and reasonably necessary to, and personally used or procured for use by, the spouse and members of his or her family at the spouse's principal place of residence, if the debtor and his or her spouse live separate and apart.

16.22[2] Court Determines What Is "Ordinarily and Reasonably Necessary." In determining whether an item of property is "ordinarily and reasonably necessary," the court must take into account both [*CCP § 704.020(b)*]:

- The extent to which the particular type of item is ordinarily found in a household.

- Whether the particular item has extraordinary value as compared with the value of items of the same type found in other households.

If an item is of a type ordinarily found in a household, but is determined not to be exempt because it has extraordinary value as compared with the value of items of the same type found in other households, the proceeds obtained at an execution sale of the item are exempt in the amount determined by the court to be a reasonable amount sufficient to purchase a replacement of ordinary value if the court determines that a replacement is reasonably necessary. The proceeds are exempt for a period of 90 days after they are actually received by the judgment debtor [*CCP § 704.020(c)*].

Strategic Point:

Works of art and musical instruments can have far more value than might be apparent. For example, harps can cost upwards of $35,000.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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16.23 $2,700 in Materials for Repair or Improvement of Residence Is Exempt From Execution and Levy.

Material that in good faith is about to be applied to the repair or improvement of a residence is exempt in the following cases if the equity in the material does not exceed $2,700 [*CCP § 704.030*]:

- If purchased in good faith for use in the repair or improvement of the judgment debtor's principal place of residence.

- If purchased in good faith for use in the repair or improvement of the spouse's principal place of residence, when the judgment debtor and his or her spouse live separate and apart.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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16.24 $6,750 in Jewelry, Heirlooms, and Works of Art Is Exempt From Execution and Levy.

Jewelry, heirlooms, and works of art are exempt to the extent that the aggregate equity in them does not exceed $6,750 [*CCP § 704.040*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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16.25 Health Aids Are Exempt From Execution and Levy.

Health aids reasonably necessary to enable the judgment debtor, spouse, or dependant to work or sustain health are exempt. Prosthetic and orthopedic appliances are also exempt [*CCP § 704.050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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16.26 $6,750 in Trade, Business, or Professional Property Is Exempt From Execution and Levy.

16.26[1] $6,750 Is Allowed Each for Debtor and Spouse. Tools, implements, instruments, materials, uniforms, furnishings, books, equipment, one commercial motor vehicle, one vessel, and other personal property are exempt to the extent that the aggregate equity in them does not exceed [*CCP § 704.060(a)*]:

- $6,750 if reasonably necessary to, and actually used by, the judgment debtor in the exercise of the trade, business, or profession by which he or she earns a livelihood.

- $6,750 if reasonably necessary to, and actually used by, the debtor's spouse in the exercise of the trade, business, or profession by which the spouse earns a livelihood.

- Twice the above amounts if reasonably necessary to and actually used by the judgment debtor and his or her spouse in the exercise of the same trade, business, or profession by which both earn a livelihood.

Warning:

If the debtor claims the third exemption above, the other two exemptions are not available [*CCP § 704.060(a)*].

A motor vehicle is not exempt under [*CCP § 704.060(a)*] if there is a motor vehicle exempt under [*CCP § 704.010(a)*] that is reasonably adequate for use in the trade, business, or profession for which the exemption is claimed [*CCP § 704.060(c)*].

Cross Reference:

Discussion of general motor vehicle exemption, see *16.21*.

Discussion and exemption limit on commercial motor vehicles, see *16.26[3]*.

16.26[2] Proceeds From Execution Sale or Insurance Are Exempt for 90 Days. If trade, business, or personal property is sold at an execution sale or is lost, damaged, or destroyed, the proceeds of the execution sale, insurance, or other indemnification are exempt for 90 days after they are actually received by the judgment debtor or his or her

spouse. The exempt amount is the amount specified in [*CCP § 704.060(a)*] that applies to the particular case, less the aggregate equity of any other property to which the exemption provided in [*CCP § 704.060(a)*] for the particular case has been applied [*CCP § 704.060(b)*].

Cross Reference:

Discussion of trade, business, and personal property exemption, see *16.26*.

16.26[3] $4,850 Is Maximum Exemption for Commercial Motor Vehicles. The amount of the exemption for a commercial motor vehicle under [*CCP § 704.060(a)(1), (2)*] is $4,850. The exemption amount for a commercial motor vehicle under [*CCP § 704.060(a)(3)*] is limited to twice that amount [*CCP § 704.060(d)*].

Consider:

Commercial vehicles include large, business-oriented vehicles like buses and construction equipment, as compared with a family SUV or pickup truck, even a very large one, used primarily for personal transportation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawBankruptcyGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal Property

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16.27 Paid Earnings Are Exempt From Execution and Levy.

Paid earnings that can be traced into deposit accounts or in the form of cash or its equivalent [*see CCP § 703.080*] are exempt as follows [*CCP § 704.070(b)*]:

- All of the paid earnings are exempt if, before payment to the employee, they were subject to an earnings withholding order [*see CCP §§ 704.070(a)(1), 706.010*] or an earnings assignment order for support [*see CCP §§ 704.070(a)(3), 706.011*].

- 75 percent of the paid earnings that are levied on are exempt if, before payment to the employee, they were not subject to an earnings withholding order or an earnings assignment order.

"Paid earnings" are earnings [*see CCP § 706.011*] that were paid to the employee during the 30-day period ending on the levy date [*CCP § 704.070(a)(2)*].

Exception:

"Paid earnings" do not include earnings of judgment debtors who are self-employed [*Moses v. DeVersecy (1984) 157 CA3d 1071, 1073, 203 CR 906]* .

Cross Reference:

Discussion of employees and self-employed persons, see *Ch. 21, Garnishment 21.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal Property

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16.28 $1,350 in Social Security Benefits in Deposit Accounts Are Exempt From Execution and Levy.

Deposit account in which payments of public benefits or social security benefits are directly deposited by the government or its agent are exempt up to specified amounts without making a claim. The exemption amount varies from $1,350 to $4,050 depending on the number of depositors and the source of the payments [*CCP § 704.080(a), (b)*]. The amount of a deposit account that exceeds the exemption amount is exempt to the extent that it consists of payments of public benefits or social security benefits [*CCP § 704.080(c)*].

Strategic Point:

If uncertain about where the funds in an account came from, it is advisable to levy and wait for the debtor to raise the exemption. The judgment creditor's counsel should keep in mind that the levy also hits any other funds that may be in the account.

Warning:

The Ninth Circuit has held that [*CCP § 704.080*] is expressly preempted by [*12 CFR § 557.12*] because it imposes improper state requirements on various deposit-related activities of a federal savings institution [*see Lopez v. Washington Mut. Bank (9th Cir 2002) 2002 US App LEXIS 24344, *18* (amended opinion) *311 F3d 928* , amending opinion previously reported at *302 F3d 900*]. It is prudent not to execute against account or benefits relating to social security.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal Property

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16.29 $1,350 in Inmate Trust Accounts Are Exempt From Execution and Levy.

An incarcerated judgment debtor's funds held in trust for or to the credit of the judgment debtor in an inmate's trust account or similar account by the state, county, or city, or any agency, are exempt without making a claim in the amount of $1,350. This exemption applies to a judgment debtor who is confined [*CCP § 704.090(a)*]:

- In a prison or facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.

- In any county or city jail, road camp, industrial farm, or other local correctional facility.

If the judgment debtor is married, each spouse is entitled to a separate exemption or the spouses may combine their exemptions [*CCP § 704.090(a)*]. If the judgment is for certain restitution fines or orders, the funds are exempt only in the amount of $300 without making a claim [*CCP § 704.090(b)*; *see Pen Code § 1202.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal Property

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16.30 Unmatured Life Insurance Policies Are Exempt From Execution and Levy.

Unmatured life insurance policies are exempt without making a claim [*CCP § 704.100(a)*]. The aggregate loan value of unmatured life insurance policies, however, is subject to the enforcement of a money judgment but is exempt in the amount of $9,700 [*CCP § 704.100(b)*]. Notwithstanding that the statute parenthetically excludes endowments and annuities as exempt, the courts have held that they are exempt only when they really constitute a life insurance policy (i.e., the death of the debtor must be a factor in the contract) [*see* Simpson v. Burkhart (In *Re Simpson) (B.A.P. 9th Cir. 2007) 366 B.R. 64, 2007 Bankr LEXIS 1015]* .

If the judgment debtor is married, each spouse is entitled to a separate exemption, or the spouses may combine their exemptions [*CCP § 704.100(b)*]. Benefits from matured life insurance polies are exempt to the extent reasonably necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor [*CCP § 704.100(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionInsurance LawLife InsuranceLoans

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16.31 Public Retirement Benefits and Contributions Are Exempt From Execution and Levy.

Amounts held, controlled, or in the process of distribution by a public entity derived from contributions by the public entity or by an officer or employee of the public entity for public retirement benefit purposes, and all rights and benefits accrued or accruing to any person under a public retirement system, are exempt without making a claim [*CCP § 704.110(b)*], except in the entorchment of a support judgement [*CCP § 704.110(c)*].

A "public entity" is the state, a city, city and county, county, or other political subdivision of the state, a public trust, public corporation, or public board, or the governing body of any of them, but does not include the United States except when expressly provided [*CCP § 704.110(a)*]. All amounts received by a California resident as a public retirement benefit or as a return of contributions and interest from the United States or a public entity or from a public retirement system are exempt [*CCP § 704.110(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionInsurance LawLife InsuranceLoans

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16.32 Public Employment Vacation Credits Are Exempt From Execution and Levy.

Vacation credits accumulated by a state employee under *Gov Code § 18050* or by any other public employee pursuant to any law for the accumulation of vacation credits are exempt without making a claim [*CCP § 704.113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal Property

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16.33 Private Retirement Benefits and Contributions Generally Are Exempt From Execution and Levy.

Amounts held, controlled, or in the process of distribution by a private retirement plan for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt except in the enforcement of a support judgement [*CCP § 704.115(b)(c)*; *see Yaesu Elecs. Corp. v. Tamura (1994) 28 CA4th 8, 10, 33 CR2d 283* (exemption did not apply to gift to son derived from defined benefit pension plan because plan was not designed and used for retirement purposes)].

A "private retirement plan" includes [*CCP § 704.115(a)*]:

- Private retirement plans, including union retirement plans.
- Profit-sharing plans designed and used for retirement purposes.
- Self-employed retirement plans and individual retirement annuities or accounts provided for in the Internal Revenue Code. Self-employed retirement plans are exempt only to the extent they are not necessary for retirement [*CCP § 704.115(e)*]. When amounts from employer plans are rolled over into self-employed plans, the funds retain their character and are wholly exempt [*McMullen v. Haycock (2007) 147 CA4th 753, 54 CR3d 660*].

Strategic Point:

Individual retirement annuities or accounts may be subject to enforcement to the extent not needed for support during retirement [*CCP § 704.115(e),(f)*]. If funds from a private retirement plan are rolled over into an IRA, they will retain the complete exemption they had before the rollover [*McMullen v. Haycock (2007) 147 CA4th 753, 54 CR3d 660]* . Therefore, if possible, counsel should determine if the income from the annuity was listed in the credit application that might have supported the extension of the debt that became the judgment. Under these circumstances it may be possible to argue that it is not exempt. This will also reveal how much is being distributed and when.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresPensions &

Benefits LawEmployee Benefit PlansDefined Benefit PlansPensions & Benefits LawEmployee Benefit PlansIndividual Retirement AccountsPensions & Benefits LawEmployee Benefit PlansKeogh Plans

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16.34 Unemployment Benefits and Contributions and Strike Benefits Are Exempt From Execution and Levy.

Contributions by workers payable to the Unemployment Compensation Disability Fund and by employers payable to the Unemployment Fund are exempt without making a claim [*CCP § 704.120(a)*]. Before payment, amounts held for payment of the following benefits are exempt without making a claim [*CCP § 704.120(b)*]:

- Benefits payable under *UI Code § 100 et seq*.
- Benefits payable under *UI Code § 5000 et seq*.
- Benefits payable under an employer's plan or system to supplement unemployment compensation benefits of the employees generally or for a class or group of employees.
- Unemployment benefits payable by a fraternal organization to its bona fide members.
- Benefits payable by a union due to a labor dispute.

After payment, the benefits described above are exempt [*CCP § 704.120(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityVoluntary Unemployment

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16.35 Disability and Health Insurance Benefits Are Exempt From Execution and Levy.

Before payment, benefits from a disability or health insurance policy or program are exempt without making a claim. After payment, the benefits are exempt [*CCP § 704.130(a)*]. This exemption does not apply to benefits that are paid or payable to cover the cost of health care if the creditor is a health care provider whose claim is the basis on which the benefits are paid or payable exempt [*CCP § 704.130(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawInsuranceReimbursementGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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16.36 Personal Injury Causes of Action Are Exempt But Awards May Not Be.

A cause of action for personal injury is exempt without making a claim [*CCP § 704.140(a)*; *see CCP § 708.410* (exception for interests subject to lien)]. An award of damages or a settlement arising from personal injury is exempt to the extent necessary for the support of the debtor and the debtor's spouse and dependents [*CCP § 704.140(b)*; *see also CCP § 704.140(d)* (rules for periodic payments)]. This exemption does not apply if the creditor is a health care provider whose claim is based on providing health care for the personal injury for which the award or settlement was made [*CCP § 704.140(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral OverviewTortsProcedureSettlementsGeneral OverviewTortsProcedureSettlementsStructured SettlementsGeneral Overview

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16.37 Wrongful Death Cause of Action Is Exempt But Award May Not Be.

A cause of action for wrongful death is exempt without making a claim [*CCP § 704.150(a)*; *see CCP § 708.410* (exception for interests subject to lien)]. An award of damages or a settlement arising out of the wrongful death of the debtor's spouse or a person on whom the debtor or spouse was dependent is exempt to the extent reasonably necessary for support of the debtor and the debtor's spouse and dependents [*CCP § 704.150(b)*; *see also CCP § 704.150(c)* (rules for periodic payments)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsWrongful Death & SurvivalDependentsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesGeneral Overview

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16.38 Workers' Compensation Payments Are Exempt From Execution and Levy.

A claim for workers' compensation or workers' compensation awarded or adjudged is exempt without making a claim [*CCP § 704.160(a)*; *see Lab Code § 4900 et seq*. (exceptions regarding payment and assignment)]. After payment, the award is exempt, except with respect to a support judgment debtor [*CCP § 704.160(a)*; *see CCP § 704.160(b)-(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionWorkers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & Waivers

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16.39 Welfare Benefits Are Exempt From Execution and Levy.

Before and after payment, aid provided pursuant to *W&I Code § 10000* or similar aid provided by a charitable organization or fraternal benefit society [*see Ins Code § 10990*] is exempt without making a claim. [*CCP § 704.170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionWorkers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & Waivers

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16.40 Relocation Benefits Are Exempt From Execution and Levy.

Before and after payment, relocation benefits for displacement from a dwelling that are paid pursuant to *Gov Code § 7260 et seq*. or *42 USC § 4601 et seq*. are exempt without making a claim. [*CCP § 704.180*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.41 Student Financial Aid Is Exempt From Execution and Levy.

Before and after payment, financial aid for expenses while attending school provided to a student by an institution of higher education is exempt without making a claim. [*CCP § 704.190(b)*; *see* USC § 1141(a) ("institution of higher education" defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionWorkers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & Waivers

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16.42 Cemetery Plots Are Exempt From Execution and Levy.

A family burial plot [*see H&S Code §§ 7022*, 8056 (definitions)] is exempt without making a claim [*CCP § 704.200(b)*]. A cemetery plot for both debtor and spouse is exempt [*CCP § 704.200(c)*]. Land held for sale or disposition as cemetery plots or otherwise is not exempt [*CCP § 704.200(d)*; *see CCP § 704.200(a)* (definitions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionWorkers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & Waivers

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16.43 Property Not Subject to Enforcement of Judgment Is Exempt Without Making Claim.

Property that is not subject to enforcement of a money judgment is exempt without making a claim [*CCP § 704.210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.44 Homestead Exemption May Apply.

The homestead exemption, applicable to sales of a debtor's principal dwelling, may apply. The exemption, which is complex, is governed by [*CCP §§ 704.710-704.995*].

Cross References:

Discussion of homestead exemption, see *Ch. 17, Executing and Levying Against Real Property, 17.40 -17.50*.

Further discussion, see *California Forms of Pleading and Practice, § 294.50 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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16.45 Judgment Debtor or Spouse May Claim Exemptions.

The exemptions listed in *CCP §§ 703.010-704.210* apply only to property of a natural person [*CCP 703.020(a)*]. They may be claimed by any of the following persons [*CCP 703.020(b)*]:

- In all cases, by the judgment debtor or a person acting on behalf of the judgment debtor.

- In the case of community property, by the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment.

Cross Reference:

Discussion of specific exemptions, see *16.20 -16.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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16.46 CHECKLIST: Bringing or Opposing Proceedings to Levy on Personal Property.

16.46[1] Judgment Creditor's Checklist.

☐ Determine which tangible personal property of debtor is subject to levy.

Authority:
CCP § 700.030

Discussion:
See *16.50*

☐ Determine which intangible personal property of debtor is subject to levy.

Authority:
CCP § 700.100

Discussion:
See *16.51*

☐ Determine if debtor's property subject to any pending action or proceeding is subject to levy.

Authority:
CCP § 700.180

Discussion:
See *16.52*

☐ Determine whether to use registered process server as levying officer.

Authority:
CCP § 699.080

Discussion:
See *16.49*

16.46[2] Judgment Debtor's Checklist.

☐ Determine whether tangible personal property of debtor is not subject to levy.

Authority:
CCP § 700.030

Discussion:
See *16.50*

☐ Determine whether intangible personal property of debtor is not subject to levy.

Authority:
CCP § 700.100

Discussion:
See *16.51*

☐ Determine if debtor's property subject to pending action or proceeding is not subject to levy.

Authority:
CCP § 700.180

Discussion:
See *16.52*

☐ If registered process server acted as levying officer, determine whether server failed to comply with statutory requirements for levy.

○ Determine whether debtor's property is not subject to levy by registered process server.

○ Determine whether registered process server has not complied with statutory filing and fee requirements for levy.

Authority:
CCP § 699.080

Discussion:
See *16.49*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsContracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties

& RightsProperty RightsCharacterizationCommunity Property

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16.47 Options and Strategy for Judgment Creditor.

In deciding whether to levy on personal property, the judgment creditor first should asses whether it is worth going after the property at all, by considering:

- The probable sale price (which often is far less than actual value, such as for jewelry).
- The amount of the exemption on the property.
- The amount of existing liens.
- The costs of levy, storage and sale, which can be large for items such as automobiles or large commercial vehicles.

The party seeking a levy on the debtor's property should consider using a registered process server rather than the sheriff or marshal. This option may be useful to expedite a levy when the sheriff has a backlog of cases [*see CCP § 699.080*]. Although registered process servers cost slightly more than sheriffs, they are more effective, efficient, and time sensitive. In any case, any increased cost eventually is borne by the debtor.

Strategic Point--Judgment Creditor:

Registered process servers may levy under a writ of execution only on certain types of property; generally, the registered process server cannot levy when the process requires taking property into custody [*see CCP § 699.080*; *see also 16.49[2]*]. On a process server's failure to comply with certain fee and filing requirements, the levy will be ineffective and the levying officer may issue a release for any property sought to levied on [*see CCP § 699.080(e)*; *see also 16.49[2][e]*]. Because the process of levying through a registered process server involves so many requirements, it is important to carefully review those requirements with the process server in advance, to provide written instructions to the process server on how to carry out the levy and then report back to the sheriff and, perhaps must importantly, to use a registered process server who is very familiar with the procedure and has done it before.

Cross Reference:

Discussion of sheriffs and process servers, see *16.49*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.48 Options and Strategy for Judgment Debtor.

The party opposing levy should determine if tangible and intangible personal property of the debtor are not subject to levy [*see CCP §§ 700.030*, *700.100*] and if any property subject to a pending action or proceeding is not subject to levy [*CCP § 700.180*].

If the levying party uses a registered process server as the levying officer, determine if the process server failed to comply with statutory requirements for levy [*CCP § 699.080*].

Strategic Point--Judgment Debtor:

Registered process servers may levy under a writ of execution only on certain types of property [*see CCP § 699.080*; *see also 16.49[2]*]. On a process server's failure to comply with fee and filing requirements, the levy is ineffective and the levying officer may issue a release for any property sought to levied on [*see CCP § 699.080(e)*; *see also 16.49[2][e]*].

Cross Reference:

Discussion of process serves and treatment of personal property, see *16.49 -16.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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16.49 Who May Act As Levying Officer.

16.49[1] Sheriff or Marshall May Act As Levying Officer. The levying officer ordinarily is a sheriff or marshal [*CCP § 680.260*].

There may be specialists in the sheriff's department who are particularly knowledgeable about the levy process and its requirements. It is a good idea to contact those people and see if there are any special requirements or particularities in advance of submitting paperwork, and also to find out how long levies are taking. This can also help counsel get an idea of timing, and perhaps some special attention on a particular levy. Counsel should also contact the sheriff to coordinate the levy. This is important, for example, when the personal property is a vehicle and the sheriff needs to know where it will be at a particular time to get it.

Strategic Point:

Some levying officers (for example, the Santa Clara County Sheriff's Office) will not perform levies that can be performed by a registered process server, such as wage garnishments, bank levies, third party levies. In addition, many sheriffs' offices have unskilled deputies conduct their levying duties. In most instances, when permissible, it is more effective to use a registered process server.

Cross Reference:

Discussion of registered process server as levying officer, see *16.49[2]*.

16.49[2] Registered Process Server May Act As Levying Officer.

16.49[2][a] Process Server May Act As Levying Officer on Specified Types of Property. A registered process server may levy under a writ of execution on the following types of property [*CCP § 699.080(a)*]:

- Real property [*see CCP § 700.015(a)*].

- Growing crops, timber to be cut, minerals to be extracted or accounts receivable resulting from sale at the wellhead or minehead [*see CCP § 700.020*].

- Personal property in the custody of a levying officer [*see CCP § 700.050*].
- Personal property used as a dwelling [*see CCP § 700.080(a)*].
- Deposit accounts [*see CCP § 700.140*].
- Property in a safe deposit box [*see CCP § 700.150*].
- Accounts receivable or general intangibles [*see CCP § 700.170*].
- Final money judgments [*see CCP § 700.190*].
- Interest of a judgment debtor in personal property in the estate of a decedent [*see CCP § 700.200*].

A "registered process server" is a person registered as a process server under applicable provisions of the Business and Professions Code [*CCP § 680.330*; *see B&P Code § 22350 et seq*.].

Cross Reference:

Discussion of sheriff or marshall as levying officer, see *16.49[1]*.

Discussion of levying against tangible personal property, see *16.50*.

Discussion of levying against intangible personal property, see *16.51*.

16.49[2][b] Process Server Must Deposit Writ and Pay Fee. Before levying under a writ of execution, a registered process server must deposit a copy of the writ with the levying officer and pay the fee set forth in *Gov Code § 26721* [*CCP § 699.080(b)*].

16.49[2][c] General Levy, Posting, and Service Requirements Apply to Process Server. A registered process server who levies on property must comply with the applicable levy, posting, and service provisions [*CCP § 699.080(c)(1)*; *see CCP § 700.010 et seq*.].

The registered process server must request any third person served to give a garnishee's memorandum to the levying officer on a form provided by the registered process server [*CCP § 699.080(c)(2)*; *see CCP § 701.030*].

Cross Reference:

Discussion of levy, posting, and service requirements, see *16.08*, *16.49*.

16.49[2][d] Process Server Must File Documents With Levying Officer. Within five court days of levy, the registered process server must file all following documents with the levying officer [*CCP § 699.080(d)*]:

- The writ of execution.
- A proof of service of the registered process server stating the manner of levy performed.
- Proof of service of the copy of the writ and notice of levy on other persons [*see CCP § 700.010 et seq*.].
- Instructions from judgment creditor in writing required by *CCP § 687.010*.

16.49[2][e] Process Server May Perform Duties Under Writ. If the fee required by *Gov Code § 26721* has been paid, the levying officer may perform all other duties under the writ as if the levying officer had levied under the writ, and must return the writ to the court officer [*CCP § 700.080(e)*].

Warning:

If the registered process server does not comply with *CCP § 699.080(b), (d)* [*see 16.49[2][b], [d]*] concerning fees and filing requirements, the levy is ineffective, and the levying officer is not required to perform any duties under the writ and may issue a release for any property sought to be levied on [*CCP § 699.080(e)*].

16.49[2][f] Process Server's Fees Can Be Recovered As Costs. The fees for services of a registered process server are allowed as a recoverable cost [*CCP § 699.080(f)*; *see CCP § 1033.5*].

16.49[2][g] Process Server May Levy Multiple Times If Needed. A registered process server may levy more than once under the same writ of execution, provided that the writ is still valid [*CCP § 699.080(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLevy & Distraint (IRC secs. 6330-6344, 7429)General Overview

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16.50 Levying Officer May Levy on Tangible Personal Property.

16.50[1] Officer May Levy on Property in Possession or Under Control of Judgment Debtor. To levy on tangible personal property in the possession or under the control of the judgment debtor, the levying officer must take the property into custody unless another method of levy is required by statute [*CCP § 700.030*; *see CCP § 680.370* ("tangible personal property" defined)].

Consider:

Registered process servers may not levy on personal property in the judgment debtor's possession [*see CCP § 699.080*].

Cross Reference:

Discussion of process server's duties, see *16.49[2]*.

16.50[2] Officer May Levy on Property in Private Place.

16.50[2][a] Officer Must Demand Delivery of Property. If the judgment debtor holds personal property subject to levy in a private place, the levying officer must demand delivery of the property by the debtor. The officer will advise the debtor that the debtor may be liable for costs and attorney's fees incurred in any further proceedings to obtain delivery of the property. If the debtor does not deliver the property, the officer will make no further effort to obtain custody, but will notify the creditor of the failure to obtain custody [*CCP § 699.030(a)*].

16.50[2][b] Creditor May Apply for Order Directing Seizure. The 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 a private place [*see CCP § 699.030(b)* (statute does not define "private place")].

The application may be made whether or not a writ has been issued and whether or not a demand has been made by the levying officer for delivery of the property. This is extremely important as many attorneys and judges are under the impression that a writ of execution must have been issued first, which is not the case [*CCP § 699.030(b)*]. Thus, if the investigation of the debtor's assets discloses that the debtor have an interest in a particular piece of property, and there is a chance of the property not being available by the time counsel can obtain a writ of execution and levy, apply ex parte for this relief. Explain to the judge the reasons for doing this, and use by analogy the prejudgment attachment statutes if the judge is reluctant to issue the necessary orders.

The application must describe with particularity both the property sought to be levied on, and the place where it is to be found and must establish probable cause to believe that the property sought to be levied upon is located in the place described [*CCP § 699.030(b)*].

16.50[2][c] Officer May Break Into Building to Seize Property. The levying officer making the levy must announce his or her identity, purpose, and authority. If the property is not voluntarily delivered, the levying officer may cause the building or enclosure where the property is believed to be located to be broken open in the manner that the levying officer reasonably believes will cause the least damage, but if the levying officer reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, the levying officer must refrain from entering and must promptly make a return to the court setting forth the reasons for believing that the risk exists. In such a case, the court will make such orders as may be appropriate [*CCP § 699.030(b)*].

Strategic Point:

Break-in orders are very rare and difficult to obtain, as the showing of good cause must be made with specificity (i.e. perishable goods, debtor is about to flee taking property along, etc.).

Many sheriff's offices in major metropolitan areas use deputies who in fact are retirees (civilians) and think of civil levies as more administrative in nature. If counsel believes that the situation is one where the levying officer may need to break into a building or other private place to enforce the levy, do not use private process servers for this assignment, even though it is permissible to do so for certain levies. Also, advise the supervising officer of the sheriff's office of the particular facts so they can have a sworn deputy sheriff execute on such a levy.

16.50[3] Officer May Levy on Property in Possession of Third Party. To levy on tangible personal property in the possession, or under the control, of a third person, the officer must personally serve a copy of the writ and notice of levy on the third person [*CCP § 700.040(a)*].

16.50[4] Officer May Levy on Property in Possession of Bailee. Goods that are in the possession of a bailee who has issued a negotiable document of title may not be levied on. However, the negotiable document may be levied on [*CCP § 700.040(b) ; see CCP § 700.120* (method of levy)]. If goods are in the possession of a bailee who has not issued such a document, the goods may be levied on [*CCP § 700.040(b)*; *see CCP § 700.160* (method of levy)].

16.50[5] Levy May Be Made on Property in Possession of Levying Officer. To levy on personal property in the levying officer's custody, if the writ is directed to that officer, the judgment creditor must deliver the writ to the officer. If the writ is directed to another levying officer, that levying officer must serve (personally or by mail) a copy of the writ and notice of levy on the levying officer with custody [*CCP § 700.050(a)*].

16.50[6] Officer May Levy on Tangible Personal Property of Going Business. To levy on tangible personal property of a going business in the possession or under the control of the debtor, the levying officer must comply with *CCP § 700.030*, applicable to private places, unless the creditor instructs that a keeper be placed in charge of the business for a specified period [*CCP § 700.070*].

To levy on tangible personal property of a going business in the possession or under the control of the judgment debtor, the levying officer may take either cash ("till tap") or inventory, equipment, and all other personal property pursuant to *CCP § 708.030*, or, if instructed by the creditor's attorney, install a keeper for specific periods of time to collect all monies during the time the keeper is there, and/or to take an inventory and then seize the goods [CCP § 708.070].

Cross Reference:

Discussion of levying on property in private place, see *16.50[2]*.

Warning:

The costs of levying and taking property into possession by the sheriff may far exceed the property's value, and counsel will have to pay those fees up front. For example, large construction machinery might have to be removed by specialists, or inventory moved and stored in a warehouse. Counsel should thoroughly check into this before taking any action. It is possible instead to arrange for a keeper and try to negotiate with the sheriff and the owner/landlord to conduct a sale on the premises, thus increasing the return of an execution sale.

16.50[7] Officer May Levy on Vehicle or Vessel. If a vehicle or vessel is levied on and the DMV has issued a certificate of ownership for that vehicle or vessel and the certificate of ownership is still in effect (or if a manufactured home, mobilehome, or commercial coach is levied on and the Department of Housing and Community Development has established a permanent title record for that manufactured home, mobilehome, or commercial coach), the levying officer must determine from the agency the name and address of the legal owner and each junior lienholder of the property levied on [*CCP § 700.090*].

If the legal owner or junior lienholder is not the judgment debtor and is not in possession of the vehicle, vessel, manufactured home, mobilehome, or commercial coach, the levying officer must at the time of levy or promptly afterward serve a copy of the writ of execution and a notice of levy on the legal owner or junior lienholder, either personally or by mail [*CCP § 700.090*].

16.50[8] Officer May Levy on Judgment Debtor's Interest in Personal Property of Decedent's Estate.

16.50[8][a] Officer Must Serve Personal Representative. The levying officer may levy on the interest of a debtor in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession. The officer must personally serve a copy of the writ and a notice of levy on the personal representative of the decedent. The levy does not impair the powers of the representative over the property for the purposes of administration [*CCP § 700.200(a)*].

16.50[8][b] Personal Representative Must Report Levy to Court. The personal representative must report the levy to the court in which the estate is being administered when any petition for distribution is filed. If a decree orders distribution to the judgment debtor, the court making the decree must order the property levied upon to be delivered to the levying officer. The property may not be delivered to the levying officer until the decree distributing the property has become final. To the extent the property delivered to the levying officer is not necessary to satisfy the money judgment, it will be released to the judgment debtor [*CCP § 700.200(b)*].

16.50[8][c] Levying Officer Must Serve Judgment Debtor. The levying officer must serve a notice describing the property on the judgment debtor, personally or by mail, promptly after receiving delivery. Notwithstanding *[CCP § 703.520]* (exemption claim procedure), a claim of exemption for the property may be made within 10 days after the notice was served [*CCP § 700.200(c)*].

16.50[8][d] Execution Lien Continues After Final Decree. An execution lien created by this type of levy continues for a period of one year after the decree distributing the interest has become final unless the judgment is satisfied sooner [*CCP § 700.200(c)*]. A writ under which a levy is made must be returned no later than one year after the date the decree distributing the interest has become final [*CCP § 700.200(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil

ProcedureRemediesWritsAncillary WritsGeneral OverviewContracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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Chapter 16 Executing and Levying Against Personal Property
V. CONDUCTING PROCEEDINGS TO LEVY ON PERSONAL PROPERTY

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16.51 Levying Officer May Levy on Intangible Personal Property.

16.51[1] Officer May Levy on Chattel Paper. If chattel paper is in the possession of the debtor, the levying officer must take the chattel paper into custody [*CCP § 700.100(a)(1)*; *see CCP § 680.140* ("chattel paper" defined)]. If it is in the possession of a third person, the officer must personally serve a copy of the writ of execution and notice of levy on the third person [*CCP § 700.100(a)(2)*]. If the officer obtains custody of the chattel paper or, if pursuant to a security agreement the debtor may collect or compromise the paper or accept the return of goods or make repossessions, the officer may serve a copy of the writ of execution and notice of levy on the debtor personally or by mail carrier [*CCP § 700.100(b)*]. The levy creates a lien on the debtor's rights in specific goods subject to the chattel paper [*CCP § 700.100(b)*].

16.51[2] Officer May Levy on Instruments and Negotiable Documents of Title. If an instrument is in the possession of the debtor, the levying officer must take the instrument into custody [*CCP § 700.110(a)(1)*; *see CCP § 680.220* ("instrument" defined)]. If the instrument is in the possession of a third person, the officer must personally serve a copy of the writ of execution and notice of levy on the third person [*CCP § 700.110(a)(2)*]. If the officer obtains custody of the instrument, the officer must serve a copy of the writ of execution and notice of levy on the obligor personally or by mail [*CCP § 700.110(b)*].

To levy on a negotiable document of title that is in the possession of the debtor, the officer must take the negotiable document of title into custody [*CCP § 700.120(a)*; *see CCP § 680.180* ("document of title" defined)]. If the document is in the possession of a third person, the officer must personally serve a copy of the writ of execution and notice of levy on the third person [*CCP § 700.120(b)*].

Strategic Point:

It is possible to do postjudgment discovery to ascertain the location and description of the assets on which to have the sheriff levy (recalling that the sheriff will need a description with sufficient particularity for identification and levy). For example, counsel can serve an order for appearance of a judgment debtor, examine the debtor, and ask the custodian (by use of a subpoena) to bring an up-to-date list of accounts receivable, including the names and addresses of the accounts receivable debtors. The sheriff cannot notify account receivable debtors of the levy without this information. Similar documentary evidence, such as inventory and equipments lists, can be obtained in the same way.

Cross Reference:

For general discussion of postjudgment discovery methods, see Ch. 10, Postjudgment Discovery.

16.51[3] Officer May Levy on Securities.

16.51[3][a] Officer Can Seize Security Certificate. The interest of a debtor in a certificated security can be reached by a creditor only by actual seizure of the security certificate by the officer making the attachment or levy. However, a certificated security for which the certificate has been surrendered to the issuer can be reached by a creditor by legal process on the issuer as required by the state in which the chief executive office of the issuer of the security is located. When the chief executive office of the issuer is located in California, the levying officer must personally serve a copy of the writ of execution and notice of levy on the person who is to be served [*CCP § 700.130*; *Com Code § 8112(a)*; *see CCP § 680.345* ("security" defined)].

16.51[3][b] Creditor Can Reach Uncertificated Security. The interest of a debtor in an uncertificated security can be reached by a creditor only by legal process on the issuer at its chief executive office in the United States. When the chief executive office of the issuer is located in California, the levying officer must personally serve a copy of the writ of execution and notice of levy on the person who is to be served [*CCP § 700.130*; *Com Code § 8112(b)*].

16.51[3][c] Creditor Can Reach Security Entitlement. The interest of a debtor in a security entitlement can be reached by a creditor only by legal process on the securities intermediary with whom the debtor's securities account is maintained. When the chief executive office of the issuer is located in California, the levying officer must personally serve a copy of the writ of execution and notice of levy on the person who is to be served [*CCP § 700.130*; *Com Code § 8112(c)*].

Strategic Point:

If the securities are publicly traded stocks held by a broker, the sheriff will instruct the broker to liquidate and pay over the net proceeds.

16.51[3][d] Creditor Can Reach Security in Name or Possession of Secured Party. The interest of a debtor in a certificated security for which the certificate is in the possession of a secured party, or in an uncertificated security registered in the name of a secured party, or a security entitlement maintained in the name of a secured party, can be reached by a creditor by legal process on the secured party [*CCP § 700.130*; *Com Code § 8112(d)*].

16.51[3][e] Creditor Is Entitled to Injunctive or Other Relief. A creditor whose debtor is the owner of a certificated security, uncertificated security, or security entitlement is entitled to aid from a court of competent jurisdiction, by injunction or otherwise, in reaching the certificated security, uncertificated security, or security entitlement or in satisfying the claim by means allowed at law or in equity in regard to property that cannot readily be reached by other legal process [*Com Code § 8112(e)*].

Cross Reference:

Discussion of transfer of securities, see California Forms of Pleading and Practice, Ch. 163, Corporations: Transfers of Shares (Matthew Bender).

16.51[4] Officer May Levy on Deposit Accounts.

16.51[4][a] Officer Must Serve Writ on Financial Institution. To levy on a deposit account, the levying officer must personally serve a copy of the writ of execution and a notice of levy on the financial institution where the deposit account is maintained or personally serve the writ of execution and notice of levy to a centralized location within the state designated by the financial institution. If the writ of execution is received at the designated central location, it will

apply to all deposit accounts held by the financial institution regardless of the location of that property [*CCP § 700.140(a)*; *see CCP § 680.170* ("deposit account" defined)]. If no centralized location is designated by the financial institution, the levy must be served at the office or branch at which the deposit account is carried by the financial institution [*CCP § 684.110*].

Exception:

A deposit account in the name of a person other than the judgment debtor (and not also in the name of the judgement debtor or spouse), either alone or together with other third persons, generally is not subject to levy unless authorized by court order [*CCP § 700.140(a)*; *see CCP § 700.160* (exceptions); *but see CCP § 700.160(b)*, discussed *below*].

The execution lien reaches only amounts in the deposit account at the time of service on the financial institution, including any item in the deposit account that is in the process of being collected, unless the item is returned unpaid to the financial institution [*CCP § 700.140(a)*]. When the amount levied on is paid to the levying officer, the execution lien on the deposit account levied on ends [*CCP § 700.140(e)*].

Strategic Point:

Because the levy hits only funds in the account at the exact time of levy, counsel should plan the date on which the levy is served in advance. For example, if counsel knows that funds are transferred into the account on certain dates or times, counsel should call the sheriff and see if they will agree to levy on that date. This pattern can be ascertained by reviewing account statements, which can be subpoenaed as part of a judgment debtor examination. Although the particular account statement brought to the hearing may not be used any longer, if counsel knows where the new account is, the chances are that the same pattern of deposits will continue.

A court order is not required to levy on a deposit account that is held in [*CCP § 700.160(b)(1)-(4)*]:

- The name of the judgment debtor and a third person or persons.
- The name of the judgment debtor's spouse, whether alone or with other third persons.
- A fictitious business name under which only the judgment debtor and/or the debtor's spouse are doing business.
- The additional name of a judgment debtor listed on the writ of execution pursuant to an affidavit of identity, whether alone or with third persons.

If the account is held in the name of the judgment debtor's spouse, the judgment creditor must prepare a declaration or affidavit attesting to the martial relationship and file it with the financial institution at the time of levy. Service of the declaration is essential to the validity of the levy [*CCP § 700.160(b)(2)*]. A declaration must also be filed when the account is in a fictitious business name and the fictitious business statement names the judgment debtor's spouse as well as the judgment debtor [*CCP § 700.160(b)(3)*].

Consider:

Counsel should remember that community property is subject to the judgment, so an account held only in the name of the spouse can be levied on by filing an affidavit re community property [*CCP § 700.160(b)(2)*]. It is then the spouse's burden to file a third party claim and prove that the funds are not community property. To the extent that the spouse's wages or income are deposited or commingled in the account, there is a presumption of community property.

If the account is held in the name of a fictitious business, the judgment creditor must include with the writ and notice of levy a certified copy of the unexpired fictitious business name statement showing that only the judgment debtor and/or spouse are doing business under the fictitious business name [*CCP § 700.160(b)(3)*].

Regardless of whether a court order is required, at the time of levy or promptly afterward, the judgment creditor must serve a copy of the writ and notice of levy on the judgment debtor and any third persons named on the account or safe deposit box [*CCP §§ 700.010(a)*, *700.140(b)*, *700.150(b)*].

When an account held in the name of a third person is levied on, the levying officer must wait 15 days before requiring the financial institutions to pay over the funds levied on [*CCP § 700.160(c)*].

16.51[4][b] Officer Must Serve Writ on Third Person Account Holder. At the time of levy or promptly afterward, the levying officer must serve a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account stands, personally or by mail [*CCP § 700.140(b)*].

16.51[4][c] Financial Institution May Not Reduce Deposit Account. When the execution lien is in effect, the financial institution may not honor a check or other order for the payment of money drawn against, and must not pay a withdrawal from, the deposit account that would reduce the deposit account to an amount that is less than the amount levied on. In determining the amount of the deposit account, the financial institution may not include the amount of items deposited to the credit of the deposit account that are in the process of being collected [*CCP § 700.140(c)*].

16.51[4][d] Financial Institution Is Not Liable for Certain Acts. When the execution lien is in effect, the financial institution is not liable for any of the following [*CCP § 700.140(d)*]:

- Performance of the duties of a garnishee under the levy.

- Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account if the nonpayment is pursuant to the requirements of *CCP § 700.140(c)*.

- Refusal to pay a withdrawal from the deposit account if the refusal is pursuant to the requirements of *CCP § 700.140(c)*.

16.51[5] Officer May Levy on Safe Deposit Boxes.

16.51[5][a] Officer Must Serve Writ on Financial Institution. To levy on property in a safe deposit box, the levying officer must personally serve a copy of the writ of execution and a notice of levy on the financial institution where the safe deposit box is maintained [*CCP § 700.150(a)*].

Exception:

A safe deposit box in the name of a person other than the judgment debtor (and not also in the name of the judgement debtor or spouse), either alone or together with other third persons, is subject to levy only on court order [*CCP § 700.150(a) ; see CCP § 700.160*].

If the safe deposit box or deposit account or is in the name of the debtor's spouse, an affidavit showing that the person in whose name the account stands is the debtor's spouse must be delivered to the financial institution at the time of levy [*CCP § 700.160(b)(2)*; *see Grover v. Bay View Bank (2001) 87 CA4th 452, 104 CR2d 677* (creditor's failure to deliver affidavit meant bank had no right or duty to freeze accounts of debtor's spouse without proper levy papers)].

Strategic Point:

When sending a levy to a bank on accounts, counsel should be sure to list "any and all safe deposits held in the name of the judgment debtor" as well, because counsel will rarely know if deposit boxes are maintained, and people usually will keep their bank accounts and safe deposit boxes at the same facility.

16.51[5][b] Officer Must Serve Writ on Third Person Safe Deposit Box Holder. At the time of levy or promptly afterward, the levying officer must serve a copy of the writ of execution and a notice of levy on any third person in whose name the safe deposit box stands, personally or by mail [*CCP § 700.150(b)*].

16.51[5][c] Safe Deposit Box Contents May Not Be Removed. During the time the execution lien is in effect, the financial institution may not permit the removal of any of the contents of the safe deposit box except as directed by the levying officer [*CCP § 700.150(c)*].

Strategic Point:

Banks charge $100 and up to have a locksmith drill open a safe deposit box, which must be done in the presence of the sheriff, and usually a bank employee witness as well. If possible, counsel should arrange to attend, or have someone else attend to see what is actually in the box. An inventory of the box contents will be prepared and a bank officer will be required to sign it as a witness. Because the sheriff does not have the ability to assess value or exact content of things like jewelry, a more generic description will be used, such as "gold colored metal" and "faceted clear stones." When the sheriff actually sells these items, unless counsel has had a certified jeweler or other qualified expert inspect the items and issue a report, the sheriff will not advertise or sell them as gemstones or precious metal. Counsel should discuss this with the sheriff in advance of the sale.

16.51[5][d] Judgment Creditor Must Pay Fees and Costs. On receipt of a garnishee's memorandum from the financial institution indicating a safe deposit box is under levy [*see CCP § 701.030*], the levying officer promptly must mail a written notice to the judgment creditor demanding an additional fee [*see Gov Code § 26723*], plus the costs to open the safe deposit box and seize and store the contents. The levying officer must release the levy on the safe deposit box if the judgment creditor does not pay the required fee, plus costs, within three business days plus the extended time period specified in *CCP § 1013(a)* for service by mail by the levying officer [*CCP § 700.150(d)*].

16.51[5][e] Safe Deposit Box Owner May Open Box. The levying officer may first give the person in whose name the safe deposit box stands an opportunity to open the safe deposit box to permit the removal pursuant to the levy of the property levied on. The financial institution may refuse to permit the forcible opening of the safe deposit box to permit the removal of the property levied on unless the judgment creditor pays in advance the cost of forcibly opening the safe deposit box and of repairing any resulting damage [*CCP § 700.150(e)*].

16.51[5][f] Financial Institution Is Not Liable for Certain Acts. When the execution lien is in effect, the financial institution is not liable for any of the following [*CCP § 700.150(f)*]:

- Performance of the duties of a garnishee under the levy.
- Refusal to permit access to the safe deposit box by the person in whose name it stands.
- Removal of any of the contents of the safe deposit box pursuant to the levy.

16.51[6] Officer May Levy on Accounts Receivable and General Intangibles. To levy on an account receivable or general intangible, the levying officer must personally serve a copy of the writ of execution and notice of levy on the account debtor [*CCP § 700.170*]. If a levy is made, and payments on the account receivable or general intangible are made to a person other than the judgment debtor (whether pursuant to a security agreement, assignment for collection,

or otherwise), the levying officer must personally serve a copy of the writ of execution and a notice of levy on that third person. Service of the copy of the writ and notice of levy on the third person is a levy on any amounts owed to the judgment debtor by the third person [*CCP § 700.170(b)*].

Example:

Funds withheld by an employer for spousal support at the time of levy and not yet paid to the supported spouse under a wage assignment order are subject to a writ of execution on a judgment against the supported spouse and do not constitute exempt property. In one case, the part of the husband's wages assigned to the wife were held to be a general intangible owned by wife and subject to a writ of execution [*Vineyard v. Sisson (1990) 223 CA3d 931, 935, 937-938, 272 CR 914*].

16.51[7] Officer May Levy on Final Money Judgments.

16.51[7][a] Officer Must File Writ With Court. To levy on a final money judgment, the levying officer must file a copy of the writ of execution and a notice of levy with the clerk of the court that entered the final money judgment. The court clerk will endorse on the judgment a statement of the existence of the execution lien and the time it was created. If an abstract of the judgment is issued, it will include a statement of the execution lien in favor of the judgment creditor [*CCP § 700.190(b)*].

A "final money judgment" is a money judgment after the time for appeal from the judgment has expired or, if an appeal is filed, after the appeal has been finally determined [*CCP § 700.190(a)*].

16.51[7][b] Officer Must Serve Judgment Debtor. At the time of levy or promptly afterward, the levying officer must serve a copy of the writ of execution and a notice of levy personally or by mail on the judgment debtor obligated to pay the final money judgment levied on [*CCP § 700.190(c)*].

16.51[8] Officer May Levy on Interest in Decedent's Estate.

16.51[8][a] Officer Must Serve Personal Representative. To levy on the interest of the judgment debtor in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession, the levying officer must personally serve a copy of the writ and a notice of levy on the personal representative of the decedent. The levy does not impair the powers of the representative over the property for the purposes of administration [*CCP § 700.200(a)*].

16.51[8][b] Personal Representative Must Report Levy to Administering Court. The personal representative must report the levy to the court in which the estate is being administered when any petition for distribution is filed. If a decree orders distribution to the judgment debtor, the court making the decree will order the property levied upon to be delivered to the levying officer. The property may not be delivered to the levying officer until the decree distributing the property has become final. To the extent the property delivered to the levying officer is not necessary to satisfy the money judgment, it will be released to the judgment debtor [*CCP § 700.200(b)*]. Promptly after the property is delivered to the levying officer, the levying officer must serve a notice describing the property on the judgment debtor personally or by mail [*CCP § 700.200(c)*]. A claim of exemption for the property described in the notice may be made within 10 days after the notice was served on the judgment debtor [*CCP § 700.200(c)*].

16.51[8][c] Execution Lien Continues After Decree Is Final. An execution lien created by this type of levy continues for a period of one year after the decree distributing the interest has become final unless the judgment is sooner satisfied [*CCP § 700.200(d)*]. A writ under which a levy is made must be returned not later than one year after the date the decree distributing the interest has become final [*CCP § 700.200(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Investment Securities (Article 8)Security EntitlementsContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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Chapter 16 Executing and Levying Against Personal Property
V. CONDUCTING PROCEEDINGS TO LEVY ON PERSONAL PROPERTY

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16.52 Levying Officer May Levy on Property Subject to Pending Action or Proceeding.

16.52[1] Officer May Levy on Real and Personal Property. An officer may levy on the following types of property, notwithstanding that it is the subject of a pending action or special proceeding [*CCP § 700.180(a)*]:

- Real property.
- Growing crops, timber to be cut, minerals to be extracted, or accounts receivable resulting from sale at the wellhead or minehead.
- Tangible personal property in the possession or under the control of the judgment debtor or in the custody of a levying officer.
- The interest of a judgment debtor in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession.

16.52[2] Levy on Other Types of Property Is Not Effective. Other than these types of levies, a levy on property that is the subject of a action or special proceeding pending at the time of the levy is not effective [*CCP § 700.180(b)*].

Cross Reference:

Discussion of specific property levies, see *16.52[1]*.

16.52[3] Action Is "Pending" From Commencement Through Appeal. An action or proceeding is "pending" from the time it is commenced unti l judgment has been entered and the time for appeal has expired or, if an appeal is filed, until the appeal has been finally determined [*CCP § 700.180(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsPersonalty & Realty Interests

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Chapter 16 Executing and Levying Against Personal Property
VI. CONDUCTING PROCEEDINGS TO OBTAIN PROPERTY OR DOCUMENTARY EVIDENCE OF TITLE (TURNOVER ORDER)

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16.53 CHECKLIST: Bringing or Opposing Proceedings to Obtain Property or Documentary Evidence of Title (TURNOVER ORDER).

☐ Determine whether creditor can show need for court order directing transfer of possession of property.

Authority:
CCP § 699.040

Discussion:
See *16.55[1]*

Form:
See *16.76* (notice of motion)

☐ Determine whether application should be made ex parte or on noticed motion.

Authority:
CCP § 699.040(a)

Discussion:
See *16.55[1]*

☐ Determine whether debtor will claim property is exempt.

Authority:
CCP §§ 704.010-704.210

Discussion:
See *16.17 -16.45*

Form:

See *16.75* (list of exemptions)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Investment Securities (Article 8)Security EntitlementsContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsGeneral Overview

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VI. CONDUCTING PROCEEDINGS TO OBTAIN PROPERTY OR DOCUMENTARY EVIDENCE OF TITLE (TURNOVER ORDER)

2-16 MB Practice Guide: CA Debt Collection 16.54

16.54 Options and Strategy.

The judgment creditor may obtain an order directing transfer of possession only on a showing of need [*CCP § 699.040(b)*]. This type of order is usually referred to as a "turnover order." The motion may be made ex parte or on noticed motion [*CCP § 699.040(a)*]. Failure to comply with such an order may subject the judgment debtor to arrest and punishment for contempt [*CCP § 699.040(c)*].

Cross References:

Discussion of transferring possession, see *16.55 -16.57*.

Discussion of using turnover orders after issuance of writ, see h

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Investment Securities (Article 8)Security EntitlementsContracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsGeneral Overview

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16.55 Creditor May Apply for Order Directing Transfer of Possession After Issuance of Writ of Execution.

16.55[1] Order May Direct Transfer of Possession of Property. If a writ of execution is issued, the judgment creditor may apply to the court for an order directing the judgment debtor to transfer to the levying officer possession of the relevant property if that property is sought to be levied on by taking it into custody [*CCP § 699.040(a)(1)*].

16.55[2] Order May Direct Transfer of Possession of Documentary Evidence of Title to Property. The judgment creditor may apply to the court for an order directing the debtor to transfer to the levying officer possession of documentary evidence of title to property of, or a debt owed to, the judgment debtor that is sought to be levied on. The order may be served when the property or debt is levied on or afterward [*CCP § 699.040(a)(2)*].

Strategic Point:

Application may be ex parte or on noticed motion if required by court or court rule [*CCP § 699.040(a)*]. Counsel shold inquire regarding local practice if unfamiliar with practice in the particular court.

Cross Reference:

Form for notice of motion, see *16.76*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionEvidenceDocumentary EvidenceGeneral Overview

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16.56 Court May Issue Order on Showing of Need.

The court may issue an order pursuant to [*CCP § 699.040*] on a showing of need for the order [*CCP § 699.040(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionEvidenceDocumentary EvidenceGeneral Overview

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16.57 Order Must Be Personally Served on Debtor.

The order must be personally served on the judgment debtor. It must contain a notice to the debtor that failure to comply with the order may subject the debtor to arrest and punishment for contempt [*CCP § 699.040(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionEvidenceDocumentary EvidenceGeneral Overview

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16.58 CHECKLIST: Levy on Personal Property Used As Permanent Residence.

☐ Serve copy of writ and notice of levy either:

- ○ On one occupant or with suitable person who is member of family or household.
- ○ In that person's absence, by posting in conspicuous place on property.

Authority:
CCP § 700.080(a)

Discussion:
See *16.61*

Form:
See *16.77* (notice of motion)

☐ Determine whether judgment creditor wishes to install keeper in charge of property, and for what length of time.

Authority:
CCP § 700.080(b)

Discussion:
See *16.62*

☐ Determine whether judgment creditor wishes to apply for order directing removal of occupants.

Authority:
CCP § 700.080(c)

Discussion:

See *16.63*

Legal Topics:

For related research and practice materials, see the following legal topics:
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16.59 Options and Strategy.

To levy against personal property, such as a mobilehome, used as a dwelling, the judgment creditor should ensure that service of the writ and notice of levy are made on the appropriate person or posted in the appropriate place [*CCP § 700.080(a)*]. Additional choices for the creditor include whether to install a keeper in charge of the property, and whether to seek an order for removal of the occupants of the property [*CCP § 700.080(b), (c)*].

The value of a mobilehome diminishes drastically if it is removed from its site. Counsel should negotiate in advance with the landlord where the mobilehome is located to ensure that it is not removed, and thus can be sold on site. Some mobilehomes themselves are insignificant in value, but the site they are located on may have an intrinsic value, for example when it is located at a park at a beach where sites are rarely available.

Cross Reference:

Discussion of dealing with personal property as dwelling, see *16.61 -16.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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16.60 Officer May Levy on Personal Property Used As Dwelling.

A levying officer may levy on personal property used by the judgment debtor as a dwelling. "Personal property used as a dwelling" includes a mobilehome, whether th e mobilehome is occupied or unoccupied at the time of the levy [*CCP § 700.080(d)*].

Consider:

Although there are no reported cases on this point, it is likely that this statute applies strictly to operational mobilehome structures that can be readily moved on a street, not affixed to a foundation and therefore considered real property [*see CC § 798.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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16.61 Levying Officer Must Serve Copy of Writ and Notice of Levy on an Occupant.

The levying officer must serve a copy of the writ of execution and a notice of levy on one occupant of the property. Service on the occupant must be made by leaving the copy of the writ and the notice of levy with the occupant personally. In the occupant's absence, service may be made by leaving the document with a person of suitable age and discretion found at the property when service is attempted who is a member of the occupant's family or household. If the levying officer is unable to serve the occupant when service is attempted, the officer must make the levy by posting the copy of the writ and the notice of levy in a conspicuous place on the property [*CCP § 700.080(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLevy & Distraint (IRC secs. 6330-6344, 7429)General Overview

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16.62 Levying Officer May Install Keeper on Property.

If the judgment creditor so instructs, the levying officer must place a keeper in charge of the property for a period requested by the judgment creditor [*CCP § 700.080(b)* (statute does not define "keeper")].

Strategic Point:

A "keeper" is usually an employee of the sheriff, although not a sworn officer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLevy & Distraint (IRC secs. 6330-6344, 7429)General Overview

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16.63 Creditor May Move for Order to Remove Occupants.

The judgment creditor may apply to the court on noticed motion for an order directing the levying officer to remove the occupants from the property. The notice of motion must be served personally or by mail on [*CCP § 700.080(c)* (statute does not state whether officer must be sworn peace officer)]:

- Any legal owner and any junior lienholder who was served pursuant to *CCP § 700.090*;
- The occupant; and
- If the judgment debtor is not the occupant, the judgment debtor.

At the hearing on the motion the court will determine the occupant's right to possession and will make an order including terms and conditions that are appropriate under the circumstances of the case [*CCP § 700.080(c)*].

Cross References:

Discussion of service pursuant to *CCP § 700.090*, see *16.50[7]*.

Form for notice of motion to remove occupants, see *16.77*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 16 Executing and Levying Against Personal Property
VIII. BRINGING OR OPPOSING PROCEEDINGS TO RECALL AND QUASH EXECUTION AND VACATE LEVY

2-16 MB Practice Guide: CA Debt Collection 16.64

16.64 CHECKLIST: Bringing or Opposing Proceedings to Recall and Quash Execution and Vacate Levy.

☐ Determine whether party is entitled to make motion, as either:

○ Party to action who is subject to injury.

○ Subsequent purchaser, lienholder, or execution and judgment creditor when judgment or writ is void on its face.

Authority:
Vest v. Superior Court (1956) 140 CA2d 91, 93, 294 P2d 988

Discussion:
See *16.66[1]*

☐ Determine whether judgment debtor can establish facts justifying order quashing the writ.

Authority:
Lohman v. Lohman (1946) 29 C2d 144, 150, 173 P2d 657

Discussion:
See *16.66[2]*

☐ File notice of motion.

Form:
See *16.78*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLevy & Distraint (IRC secs. 6330-6344, 7429)General Overview

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VIII. BRINGING OR OPPOSING PROCEEDINGS TO RECALL AND QUASH EXECUTION AND VACATE LEVY

2-16 MB Practice Guide: CA Debt Collection 16.65

16.65 Options and Strategy.

The judgment debtor may make a motion to quash execution and vacate the levy only if the debtor is a party to the action and is subject to injury. The debtor has the burden to establish facts justifying an order quashing the writ [*Lohman v. Lohman (1946) 29 C2d 144, 150, 173 P2d 657*].

Cross References:

Discussion of quashing execution, see *16.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 MB Practice Guide: CA Debt Collection 16.66

16.66 Judgment Debtor May Seek Order Recalling and Quashing Writ.

16.66[1] Only Judgment Debtor May Make Motion. Generally, only a party to the action who is liable to be injured can move for recall of the writ. However, if the judgment or writ is void on its face, subsequent purchasers, lienholders, and execution and judgment creditors may also make the motion [*Vest v. Superior Court (1956) 140 CA2d 91, 93, 294 P2d 988*].

16.66[2] Debtor Has Burden of Proof to Justify Quashing Writ. The burden is on the judgment debtor to establish facts justifying an order quashing the writ [*Lohman v. Lohman (1946) 29 C2d 144, 150, 173 P2d 657*]. Once the writ of execution issues, the judgment debtor must present reasons why the writ should be quashed [*Slevats v. Feustal (1963) 213 CA2d 113, 119, 28 CR 517*]. A writ is quashed when the judgment is vacated [*Stegge v. Wilkerson (1961) 189 CA2d 1, 5, 10 CR 867*].

Cross References:

Form for notice of motion, see *16.78*.

Discussion/forms of memorandum of points and authorities to be served and filed with notice of motion to quash the writ of execution, see California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender).

Discussion/form for memorandum in support of motion for an order recalling and quashing writ of execution, see California Points and Authorities, § 13.140 et seq. (Matthew Bender).

Contention supporting writ of mandate to compel lower court to recall and quash writ of execution, see *California Points and Authorities, § 150.34 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureRemediesWritsCommon Law

WritsMandamus

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2-16 MB Practice Guide: CA Debt Collection 16.67

16.67 CHECKLIST: Bringing or Opposing Proceedings to Claim Exemption After Levy Has Been Made.

16.67[1] Claimant's Checklist.

☐ File claim of exemption and a copy with levying officer within 10 days of notice of levy.

Authority:
CCP § 703.520(a)

Discussion:
See *16.69*

Form:
See *16.79* (claim of exemption)

☐ File appeal, if necessary, to court's order determining claim of exemption within allowable time.

Authority:
CCP § 703.600

Discussion:
See *16.72[6]*

16.67[2] Opposing Party's Checklist.

☐ File following with court within 10 days after service of notice of claim of exemption:

- ○ Notice of opposition to claim of exemption.
- ○ Notice of motion for order determining claim of exemption.

Authority:
CCP § 703.550

Discussion:
See *16.72[2]*

Form:
See *16.80* (notice of opposition to claim of exemption)

☐ File copy of notice of opposition and notice of motion with levying officer.

☐ Serve notice of hearing and copy of notice of opposition to claim on claimant (and on judgment debtor, if different) not less than 10 days before hearing.

Authority:
CCP § 703.570(b)

Discussion:
See *16.72*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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IX. BRINGING OR OPPOSING PROCEEDINGS TO CLAIM EXEMPTION AFTER LEVY HAS BEEN MADE

2-16 MB Practice Guide: CA Debt Collection 16.68

16.68 Options and Strategy.

The debtor and creditor are subject to short time limits in claiming or opposing an exemption. The judgment debtor has 10 days to file a claim of exemption after notice of levy [*CCP § 703.520(a)*]. A creditor opposing a claim of exemption has 10 days after receiving the notice of claim to file a notice of opposition [*CCP § 703.550*].

Failure to act within these time limits has serious consequences. The debtor's failure to claim an exemption acts as a waiver of the exemption, and the property is rendered subject to enforcement of the money judgment [*CCP § 703.030(a)*]. The creditor's failure to file an opposition to the claim of exemption requires the levying officer to release the property to the extent it is claimed to be exempt [*CCP § 703.550*].

Cross References:

Discussion of time limits, see *16.69 -16.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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16.69 Claim Exemption Within 10 Days of Notice of Levy.

Except as otherwise provided by statute, property that has been levied on may be claimed to be exempt [*CCP § 703.510(a)*]. An exemption for property described in *CCP § 703.010 et seq*. that has been levied on may be claimed within 10 days after the date the notice of levy was served on the judgment debtor. The claim is made by filing the original and a copy of the claim with the levying officer [*CCP § 703.520(a)*; *see CCP § 703.520(b)* (contents of claim)].

Judicial Council Form EJ-160 has been approved for optional use to file a claim of exemption [*Cal Rules Ct, Rule 1.35*; *CCP §§ 703.520*, *703.530*].

Cross Reference:

Judicial Council Form EJ-160 to claim exemption after levy, see *16.79*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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16.70 Specified Property Is Deemed Exempt Without Claim Being Made.

Property deemed exempt without making a claim is not subject to any procedure for enforcement of a money judgment [*CCP § 703.030*].

Cross Reference:

Discussion of property deemed exempt, see *16.17* et seq.

If the property is nonetheless levied on, its release is obtained through these same procedures (claiming exemption after levy) [*CCP § 703.510(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 MB Practice Guide: CA Debt Collection 16.71

16.71 Failure to Claim Exemption Serves As Waiver.

Failure to claim an exemption serves as a waiver of the exemption, and the property is rendered subject to enforcement of the money judgment [*CCP § 703.030(a)*; *see Imperial Bank v. Pim Elec. Inc. (1995) 33 CA4th 540, 548-549, 39 CR2d 432* (if debtor claims that property for which turnover order pursuant to *CCP § 708.205* is sought is exempt, claim of exemption may be raised after issuance of order or it is waived)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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2-16 MB Practice Guide: CA Debt Collection 16.72

16.72 Creditor May Oppose Claim of Exemption Within 10 Days of Notice.

16.72[1] Officer Must Serve Claim on Creditor. Promptly after the filing of the claim of exemption, the levying officer must serve on the judgment creditor personally or by mail [*CCP § 703.540*]:

- A copy of the claim of exemption; and
- A notice of the claim of exemption stating that a claim has been made and that the officer will release the property unless, within the specified time, both of the following are filed:
  - A copy of a notice of opposition to the claim of exemption.
  - A copy of a notice of motion for an order determining the claim of exemption.

16.72[2] Creditor Must File Notice of Opposition and Notice of Motion for Order. A judgment creditor who opposes the claim of exemption must file with the court a notice of opposition and a notice of motion for an order determining the claim of exemption within 10 days after service of the notice of claim of exemption. The creditor must also file with the levying officer a copy of the notice of opposition and notice of motion. When the copies are filed, the levying officer must promptly file the claim of exemption with the court [*CCP § 703.550*; *see CCP § 703.560* (contents of notice of opposition)].

Strategic Point--Creditor:

If no opposition is filed with 10 days, the levying officer must release the property to the extent it is claimed to be exempt [*CCP § 703.550*].

Judicial Council Form EJ-170 has been approved for optional use to file a notice of opposition to a claim of exemption [*CCP §§ 703.550*, *703.560*; *Cal Rules Ct, Rule 1.35*].

Cross Reference:

Form for notice of opposition, see *16.80*.

16.72[3] Hearing Must Be Held Within 20 Days. The hearing on the motion must be held not later than 20 days from the date the notice of motion was filed with the court, unless the court continues the hearing for good cause [*CCP § 703.570(a)*]. Not less than 10 days before the hearing, the creditor must serve personally or by mail a notice of the hearing and a copy of the notice of opposition to the claim of exemption on the claimant (and on the judgment debtor, if different) [*CCP § 703.570(b)*].

The exemption claimant has the burden of proof at the hearing [*CCP § 703.580(b)*].

The court's decision may be based on the information in the claim of exemption and notice of opposition or the court may continue the hearing for production of oral or documentary evidence [*CCP § 703.580(c)*].

At a the end of the hearing, the court must make an order determining whether the property is subject to an exemption in whole or in part. This order is determinative of the judgment creditor's right to apply the property toward the judgment. The court is not required to make any findings [*CCP § 703.580(d)*].

16.72[4] Levying Officer May Not Dispose of Property Until Final Determination of Exemption. The levying officer may not release, sell, or otherwise dispose of the property for which an exemption is claimed until an appeal is waived, the time to file an appeal has expired, or the exemption is finally determined [*CCP § 703.610(a)*]. While the exemption proceedings are pending, the court may make any orders for disposition of the property that may be proper under the circumstances of the case on the motion of the creditor or a claimant or on its own motion. The order may be modified or vacated by the court at any time during the proceedings on just terms [*CCP § 703.610(b)*].

16.72[5] Court May Extend Time for Determination of Exemption. If time for determination of an exemption or other act is extended by the court, written notice of the extension must be filed with the levying officer. Unless notice is waived, the notice must be served promptly on the opposing party personally or by mail [*CCP § 703.590*].

16.72[6] Party May Appeal Order. A party may appeal from any order made under [*CCP §§ 703.510-703.610*]. An appeal is taken in the manner provided for appeals in the court in which the proceeding takes place [*CCP § 703.600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsReviewabilityGeneral Overview

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Chapter 16 Executing and Levying Against Personal Property
X. FORMS

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16.73 Writ of Execution--Judicial Council Form EJ-130.

Writ of Execution--Judicial Council Form EJ-130.

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NOTES.

Authority:
CCP § 699.520; California Judicial Council Form EJ-130, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Grounds:
See *16.07*

Timing:
See *16.08*

Detailed Discussion of Judicial Council Form/Requirements.
See *California Forms of Pleading and Practice, § 254.680* (Matthew Bender).

Related Form for Affidavit of Identity:
See *California Forms of Pleading and Practice, § 254.681* (Matthew Bender).

Related Form for Declaration of Amount of Interest Accrued on Judgment:
See *California Forms of Pleading and Practice, § 254.682* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 16 Executing and Levying Against Personal Property
X. FORMS

2-16 MB Practice Guide: CA Debt Collection 16.74

16.74 Notice of Levy--Judicial Council Form EJ-150.

Notice of Levy--Judicial Council Form EJ-150.

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NOTES.

Authority:
CCP § 699.540; California Judicial Council Form EJ-150, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Required Contents:
See *16.13*

Detailed Discussion of Judicial Council Form/Requirements:
See *California Forms of Pleading and Practice, § 254.683* (Matthew Bender)

Related Form for Instructions to Levying Officer:
See *California Forms of Pleading and Practice, § 254.685* (Matthew Bender)

Related Forms for Notice of Motion, Declaration, and Order for Seizure of Property in Private Place:
See *California Forms of Pleading and Practice, §§ 254.688 -254.690* (Matthew Bender)

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X. FORMS

2-16 MB Practice Guide: CA Debt Collection 16.75

16.75 List of Exemptions From Enforcement of Judgments--Judicial Council Form EJ-155.

List of Exemptions From Enforcement of Judgments--Judicial Council Form EJ-155.

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NOTES.

Authority:

CCP §§ 681.030, 700.010; California Judicial Council Form EJ-155, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Timing:

See *16.14*

Detailed Discussion of Judicial Council Form/Requirements:

See *California Forms of Pleading and Practice, § 254.684* (Matthew Bender)

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2-16 MB Practice Guide: CA Debt Collection 16.76

16.76 Notice of Motion of Proceedings to Obtain Property or Documentary Evidence of Title or Both (Turnover Order).

Notice of Motion of Proceedings to Obtain Property or Documentary Evidence of Title or Both (Turnover Order).
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER TO OBTAIN POSSESSION OF _____ [PROPERTY *and/or* DOCUMENTARY EVIDENCE OF TITLE] [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

To _____ [*specify judgment debtor, e.g.,* Defendant Mary Jones] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court,

located at _____ [*street address*], _____ [*city*], _____ [*specify judgment creditor, e.g.,* Plaintiff John Smith] will, and hereby does, move for an order directing the transfer to the levying officer of _____ [the property *and/or* documentary evidence of title to the _____ (property *or* debt)] sought to be levied on.

The motion will be made on the grounds that a writ of execution has been issued in the above-mentioned action and the property for which custody is sought is subject to levy under Section _____ [*specify*] of the Code of Civil Procedure, and that the order is necessary to obtain the property or title or both.

The motion will be based on this notice of motion, on the _____ [affidavit *or* declaration] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on any evidence that may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if applicable*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES.

Authority:
CCP § 699.040

Grounds:
See *16.53 -16.66*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 254.691* (Matthew Bender)

Related Form for Declaration and Order:
See *California Forms of Pleading and Practice, §§ 254.692*, *254.693* (Matthew Bender)

Related Form for Memoranda:
See California Forms of Pleading and Practice, Ch. 417, Points and Authorities (Matthew Bender)

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Chapter 16 Executing and Levying Against Personal Property
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2-16 MB Practice Guide: CA Debt Collection 16.77

16.77 Notice of Motion to Remove Occupants From Personal Property Used As Dwelling.

Notice of Motion to Remove Occupants From Personal Property Used As Dwelling.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER DIRECTING REMOVAL OF OCCUPANTS FROM PERSONAL PROPERTY [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.,* judgment debtor, Defendant Mary Jones] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* judgment creditor, Plaintiff John Smith] will, and hereby does, move for an order directing the removal of persons occupying the personal property levied on under the writ of execution in the above-entitled action. The motion will be made on the grounds that the property which is being occupied has been levied on under the above-mentioned

writ of execution.

The motion will be based on this notice of motion, on the _____ [affidavit *or* declaration] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on any evidence that may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if applicable*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES.

Authority:
CCP § 700.080(c)

Grounds:
See *16.63*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 254.694* (Matthew Bender)

Related Form for Declaration:
See *California Forms of Pleading and Practice, § 254.695* (Matthew Bender)

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Chapter 16 Executing and Levying Against Personal Property
X. FORMS

2-16 MB Practice Guide: CA Debt Collection 16.78

16.78 Notice of Motion of Proceedings to Recall and Quash Execution and Vacate Levy.

Notice of Motion of Proceedings to Recall and Quash Execution and Vacate Levy.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER TO RECALL AND QUASH EXECUTION AND VACATE LEVY [Telephone Appearance] Date:_____ Time:_____ Location:_____ Judge:_____ Date Action Filed: _____ Trial Date:_____

_____

To _____ [*name*], Sheriff of the County of _____, California, to _____ [*identify party, e.g.,* Plaintiff John Smith], and to _____[*name*], his/her attorney of record.

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* Defendant Mary Jones] will, and hereby does, move for an order recalling and quashing the writ of execution and vacating the levy of execution made on the following property:

_____ [*describe property*]. The motion will be made on the grounds that _____ [*specify legal grounds, e.g.*, there is no unsatisfied judgment on which a writ of execution could issue in the above-entitled action *or* the parties to the action have entered into a contract that satisfies the judgment heretofore existing in the action].

The motion will be based on this notice of motion, on the _____ [affidavit *or* declaration] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if applicable*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party, e.g.*, Defendant Mary Jones]

NOTES.

Authority:
Slevats v. Feustal (1963) 213 CA2d 113, 119, 28 CR 517

Grounds:
See *16.66*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 254.707* (Matthew Bender)

Related Form for Declaration and Order:
See *California Forms of Pleading and Practice, §§ 254.708 -254.709* (Matthew Bender)

Related Form for Memoranda:
See California Forms of Points and Authorities, Ch. 131, Judgments (Matthew Bender)

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Chapter 16 Executing and Levying Against Personal Property
X. FORMS

2-16 MB Practice Guide: CA Debt Collection 16.79

16.79 Proceedings to Claim Exemption After Levy--Claim of Exemption, Financial Statement--Judicial Council Forms EJ-160, WG-007/EJ-165.

Proceedings to Claim Exemption After Levy--Claim of Exemption, Financial Statement--Judicial Council Forms EJ-160, WG-007/EJ-165.

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NOTES.

Authority:
CCP §§ 703.520, *703.530*; California Judicial Council Form EJ-160, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]. California Judicial Council Form EJ-165, pictured above, also numbered WG-007, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*].

Grounds:
See *16.71*

Timing:
See *16.69*

Detailed Discussion of Judicial Council Form/Requirements:
See *California Forms of Pleading and Practice, § 254.710* (Matthew Bender)

Related Form for Opposition to Claim:
See *16.79*

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Chapter 16 Executing and Levying Against Personal Property
X. FORMS

2-16 MB Practice Guide: CA Debt Collection 16.80

16.80 Proceedings to Claim Exemption After Levy--Notice of Opposition to Claim of Exemption--Judicial Council Form EJ-170.

Proceedings to Claim Exemption After Levy--Notice of Opposition to Claim of--ExemptionJudicial Council Form EJ-170.

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NOTES.

Authority:
CCP §§ 703.550, *703.560*; California Judicial Council Form EJ-170, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Timing:
See *16.72*

Detailed Discussion of Judicial Council Form/Requirements:
See *California Forms of Pleading and Practice, § 254.712* (Matthew Bender)

Related Form for Claim of Exemption:
See *16.79*

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Chapter 17 Executing and Levying Against Real Property

2-17 MB Practice Guide: CA Debt Collection 17.syn

§ 17.syn Synopsis to Chapter 17: Executing and Levying Against Real Property

17.01 Scope.

17.02 Objective and Strategy.

17.03 CHECKLIST: Obtaining Judgment Lien Against Real Property.

17.04 Judgment Lien on Real Property Is Created by Filing Abstract of Judgment.

17.05 Judgment Lien on Real Property Lasts for 10 Years.

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17.07 Judgment Lien May Be Created for Installment Judgments for Support or Against Health Care Provider.

17.08 Sister-State Money Judgment Must Be Reduced to a California Judgment.

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17.17 Court Clerk Issues Writ of Execution.
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17.19 Judgment Creditor Delivers Writ to Levying Officer With Instructions for Service.

17.20 Levying Officer Records Copy of Writ of Execution and Notice of Levy.

17.21 Levy Creates Execution Lien.

17.22 Transfer or Encumbrance of Property Does Not Affect Lien.

17.23 Levy May Be Made on Property Subject to Pending Action or Proceeding.

17.24 Levying Officer May Not Levy Property 180 Days After Writ Issue Date.

17.25 Levying Officer Must Serve a Notice of Levy.

17.26 Levying Officer Must Serve Specified Parties.
17.26[1] Levying Officer Must Serve Judgment Debtor.
17.26[2] Levying Officer Must Serve Third Party in Whose Name Judgment Debtor's Interest Is Recorded.
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17.27 Levying Officer Must Obey Time Limits for Returning Writ.

17.28 Levying Officer Must Serve Notice on Judgment Creditor of Requirement of Application for Sale.

17.29 CHECKLIST: Applying for Order of Sale of Real Property Used As a Dwelling.

17.30 Court Order Is Required for Sale of Dwelling.

17.31 Court Order Not Required for Sale of Personal Property Dwellings.

17.32 Only Judgment Debtor's Interest May Be Sold.

17.33 Judgment Creditor Must Apply for Order of Sale Within 20 Days After Notice of Levy Is Served.

17.34 Application Must State Whether Dwelling Is Homestead and Amount of Any Liens or Encumbrances.

17.35 Judgment Creditor Must Apply to Superior Court of County Where Dwelling Is Located If Dwelling Is Located in Another County.

17.36 Court Determines Whether Dwelling Is Exempt Before Ordering Sale.
17.36[1] Court Sets Hearing Date.
17.36[2] Creditor Must Serve Notice of Hearing.
17.36[3] Burden of Proof.
17.36[4] Court Will Order Sale of Dwelling.
17.36[5] Court May Appoint Appraiser.
17.36[6] Procedure When Judgment Debtor Fails to Appear at Hearing.
17.36[6][a] Judgment Creditor Must Serve Order.
17.36[6][b] Court May Hold Second Hearing.

17.37 Court May Grant Extension of Time.

17.38 Parties Have Right to Appeal.

17.39 Judgment Creditor Should Request Bond Pending Appeal.

17.40 CHECKLIST: Claiming Homestead Exemption.

17.41 Property Must Qualify As Homestead.

17.42 Homestead Exemption May Be Declared or Automatic.

17.43 Declared Homestead Must Meet Statutory Requirements.
17.43[1] Owner Must Record Declaration.
17.43[2] Declaration Must Contain Specified Information.
17.43[3] Declaration Must Be Executed and Acknowledged.

17.44 Only Real Property Is Subject to Declared Homestead.

17.45 Homestead Declarations Are Liberally Construed.

17.46 Declared Homestead Provides a Variety of Advantages.
17.46[1] Recordation Provides Protections.
17.46[2] Proceeds From Sale of Declared Homestead Are Exempt.
17.46[3] Homestead May Be Conveyed or Encumbered.
17.46[4] Protection From Liens Continues After Death of Declared Homestead Owner.

17.47 Declared Homestead Does Not Protect Against Some Judgment Liens.
17.47[1] Declared Homestead Does Not Protect Against Support Orders.
17.47[2] Declared Homestead Does Not Protect Surplus Equity.

17.48 Declared Homestead May Be Abandoned.
17.48[1] Declared Homestead May Be Abandoned by Declaration.
17.48[1][a] Declaration of Abandonment Must Be Executed and Acknowledged.
17.48[1][b] Abandonment Is Limited to Declarant's Interest.
17.48[2] Declared Homestead May Be Abandoned by Operation of Law.

17.49 Homestead Exemption Applies to Both Automatic and Declared Homesteads.
17.49[1] Homestead Need Not Be Declared Homestead.
17.49[2] Scope of Homestead Exemption.
17.49[2][a] Exemption Applies to Money Judgment.
17.49[2][b] Exemption Is Inapplicable to Judgment for Foreclosure of Mortgage or Other Encumbrance.

17.49[2][c] Exemption Not Available When Abstract Was Recorded Before Property Was Acquired.
17.49[3] Proceeds From Sale of Dwelling Are Exempt.
17.49[4] If Spouses Reside in Separate Homesteads Only One Homestead Is Exempt.

17.50 Homestead Exemption May Amount to $75,000, $100,000 or $175,000.
17.50[1] Judgment Debtor Generally May Claim Homestead Exemption of $75,000 or $100,000.
17.50[2] Judgment Debtor's Age, Disability, or Income May Increase Homestead Exemption to $175,000.

17.51 Abstract of Judgment--Judicial Council Form EJ-001.

17.52 Affidavit of Identity.

17.53 Declaration of Community Property Presumption.

17.54 Instructions to Levying Officer.

17.55 Application for Issuance of Order of Sale of Dwelling.

17.56 Order to Show Cause Why Order of Sale of Dwelling Should Not Be Made.

17.57 Notice of Hearing on Right to Homestead Exemption--Judicial Council Form EJ-180.

17.58 Order Granting Application for Order of Sale of Dwelling.

17.59 Declaration of Homestead by Owner or Representative.

17.60 Declaration of Abandonment of Homestead.

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Chapter 17 Executing and Levying Against Real Property
I. STRATEGY

2-17 MB Practice Guide: CA Debt Collection 17.01

17.01 Scope.

This chapter covers:

- Obtaining judgment liens against real property [*see 17.03 -17.14*].
- Executing and levying against real property [*see 17.15 -17.28*].
- Applying for an order of sale of real property [*see 17.29 -17.39*].
- Obtaining and claiming homestead exemptions [*see 17.40 -17.50*].

Core Statutes:
CCP §§ 695.010-724.260.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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Chapter 17 Executing and Levying Against Real Property
I. STRATEGY

2-17 MB Practice Guide: CA Debt Collection 17.02

17.02 Objective and Strategy.

After a party to a lawsuit obtains a judgment against another party, the judgment creditor has several means to satisfy the judgment. The most common way to enforce a judgment is by levying a writ of execution on the judgment debtor's property. This chapter discusses enforcing judgments and liens by levying on real property. All the judgment debtor's real property is available to satisfy judgments, except for exempt property. The judgment creditor wants to maximize the property available to satisfy the judgment, while the judgment debtor wants to maximize the property that is exempt from judgment.

Strategic Point:

In deciding whether or not to levy on property, the judgment creditor should consider whether it is worth going after the property by considering the probable sale price (which often is far less than actual value), the amount of the exemption, the amount of existing liens, the costs of levy, and the costs of obtaining an order of sale. Unless there is significant equity after the liens and the homestead exemption are considered, executing against real property by enforcing a writ of execution may not be worth it. It may be preferable simply to record the abstract of judgment and then wait until the debtor sells or refinances the property, especially because increases in the property value benefit the judgment creditor.

Cross References:

Discussion of obtaining and removing judgment liens, and related forms, see Ch. 11, Obtaining and Removing Judgment Leins.

Discussion of process for executing and levying against personal property, including exemptions and related forms, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of process for conducting execution sales, see Ch. 18, Execution of Sales.

Discussion of process for obtaining writ of execution, see *17.16*.

Discussion of homestead exemption for real property, see *17.49*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawHomestead Exemptions

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Chapter 17 Executing and Levying Against Real Property
II. OBTAINING JUDGMENT LIEN AGAINST REAL PROPERTY

2-17 MB Practice Guide: CA Debt Collection 17.03

17.03 CHECKLIST: Obtaining Judgment Lien Against Real Property.

☐ Determine whether or not money judgment is from a sister state.

○ Reduce a sister-state judgment to a California judgment.

Authority:
CCP § 680.230

Discussion:
See *17.08*

☐ Create judgment lien on real property by filing abstract of judgment with county recorder in county in which property is located.

Authority:
CCP §§ 697.310, 697.340(a)

Discussion:
See *17.04*, *17.09*

☐ Determine whether lien arises from workers' compensation, or for payment in installments.

Authority:
CCP §§ 697.310, 697.320

Discussion:
See *17.06*

☐ Determine whether lien arises for installment judgment for support or against health care provider.

Authority:
CCP § 697.320

Discussion:
See *17.07*

☐ Determine which property interests are subject to judgment lien.

Authority:
CCP § 697.340

Discussion:
See *17.09*

☐ Release lien against erroneously identified real property owner.

○ Property owner may demand release.

○ Creditor must deliver release within 15 days after receiving property owner's demand and satisfactory proof.

○ Owner may seek court order if creditor fails to deliver release.

Authority:
CCP § 697.410

Discussion:
See *17.14*

☐ Enforce lien by execution sale.

Authority:
CCP § 697.380(a)

Discussion:
See *17.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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Chapter 17 Executing and Levying Against Real Property
II. OBTAINING JUDGMENT LIEN AGAINST REAL PROPERTY

2-17 MB Practice Guide: CA Debt Collection 17.04

17.04 Judgment Lien on Real Property Is Created by Filing Abstract of Judgment.

A judgment lien on real property is created by filing an abstract of the money judgment with the county recorder in the county in which the judgment debtor's real property is located [*CCP § 697.310(a)*; *see CCP § 674(a)*]. This provides security for the judgment on the real property of the judgment debtor that he or she owns or later acquires [*see CCP §§ 697.310-697.410*].

Judicial Council Form EJ-001 is the official form for an abstract of judgment. Use of this form is mandatory.

Strategic Points:

A judgment debtor may own property in multiple counties, or may own property that borders more than one county. In either case, the judgment creditor can obtain multiple abstracts of judgment and file them in each county where the judgment debtor may own property.

One important reason to record as soon as possible is to "season" the judgment lien on real property. If the judgment debtor files a bankruptcy petition within 90 days after the abstract is recorded, the judgment creditor will lose its judgment lien as a preference [*see 11 USC § 547*; for discussion, *see 17.12*].

Warning:

Failure to promptly obtain and record abstracts of judgment may be malpractice if, as a result of that failure, the property is transferred, encumbered, or otherwise made unavailable to levy. When postjudgment motions may result in attorney's fees and costs, counsel should immediately record the abstract of the original judgment. An amended abstract may be recorded later to include any postjudgment fees and costs awarded.

Cross References:

Judicial Council Form EJ-001 for abstract of judgment, see *17.51*.

Lien generally survives bankruptcy, see *17.12*.

Judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Priority of liens generally, see Ch. 12, Determining Priority and Sources of Liens.

Detailed discussion of use, amendment, service and notice of abstract of judgment form, see *California Forms of Pleading and Practice, § 318.380* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewGovernmentsLocal GovernmentsFinanceReal Property LawBankruptcyGeneral OverviewReal Property LawBankruptcySecured ClaimsReal Property LawNonmortgage LiensJudgment Liens

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Chapter 17 Executing and Levying Against Real Property
II. OBTAINING JUDGMENT LIEN AGAINST REAL PROPERTY

2-17 MB Practice Guide: CA Debt Collection 17.05

17.05 Judgment Lien on Real Property Lasts for 10 Years.

Unless the judgment is satisfied or the judgment lien is released, a judgment lien continues for 10 years from the date of the entry of the judgment [*CCP § 697.310(b)*]. Renewal of a judgment extends the duration of the judgment lien until 10 years from the date the application for renewal was filed if, before the judgment lien expires, a certified copy of the application for renewal is recorded with the county recorder of the county where the property is located [*CCP § 683.180(a)*].

Exception:

The lien does not extend to property that has been transferred subject to the lien if the transfer was recorded before the application for renewal was filed, unless a copy of the application for renewal is personally served on the transferee and proof of service is filed with the court clerk within 90 days after the filing of the application [*CCP § 683.180(b)*].

Cross References:

Discussion and forms for obtaining judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Discussion and forms for renewal of judgment, Ch. 13, Expiration and Renewal of Judgments, 13.06 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensRenewalsGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt RecordsReal Property LawNonmortgage LiensJudgment Liens

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Chapter 17 Executing and Levying Against Real Property
II. OBTAINING JUDGMENT LIEN AGAINST REAL PROPERTY

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17.06 Judgment Lien May Be Created for Workers' Compensation Awards.

Liens on real property arising from judgments entered pursuant to *Lab Code §§ 3200-6002* (workers' compensation awards) are created by recording an abstract of the judgment as provided in *[CCP § 697.310*], or, if the judgment is for payment in installments, by recording a certified copy of the judgment as provided by *[CCP § 697.320]* [*CCP § 697.330(a)*]. Except as provided in *Lab Code §§ 3200-6002*, these liens are governed by *[CCP § 697.310]* (lump sum judgments) or *[CCP § 697.320*] (installment judgments) [*CCP § 697.330*].

Cross Reference:

Recording abstract of judgment, see *17.04*.

Judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensRenewalsGovernmentsCourtsClerks of CourtReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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17.07 Judgment Lien May Be Created for Installment Judgments for Support or Against Health Care Provider.

A judgment lien on real property for installment judgments for support or against health care providers is created by recording one of the following with the county recorder [*CCP § 697.320*]:

- An abstract of judgment.
- An interstate lien form promulgated by the federal Secretary of Health and Human Services [*see 42 USC § 652(a)(11)*].
- A certified copy of either:
  - A judgment for child, family, or spousal support payable in installments; or
  - A judgment against a health care provider requiring periodic payments.

Cross References:

Recording abstract of judgment, see *17.04*.

Duration of judgment lien for support or against health care provider, see *California Forms of Pleading and Practice, § 318.94[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewHealthcare LawInsuranceReimbursementGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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17.08 Sister-State Money Judgment Must Be Reduced to a California Judgment.

Because *[CCP § 697.310]* applies only to judgments, orders, or decrees entered in a California court [*see CCP § 680.230*], a judgment creditor must reduce a sister state judgment to a California judgment before it may serve as a basis for a judgment lien on real property located in California [*Washoe Dev. Co. v. Irving Sav. Ass'n (1996) 47 CA4th 1518, 1522, 55 CR2d 479*].

Strategic Point:

Federal money judgments are enforced by a writ of execution, using the procedure of the state in which the federal district court sits [*Fed R Civ P 69(a)*]. Judgments may be registered in other districts for enforcement [*28 USC § 1963*].

Cross References:

Discussion and forms enforcing sister-state and federal court judgments, see Ch. 25, Enforcing Out of State Judgments in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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17.09 Judgment Lien Attaches to Most Real Property Interests.

17.09[1] Lien Attaches to Real Property Interests in County Where Lien Is Created. Once the abstract of judgment is recorded, a judgment lien attaches to the judgment debtor's interests in real property in the county where the lien is created that are subject to enforcement of a money judgment at the time the lien is created [*CCP § 697.340(a)*]. These interests may be present, future, vested, contingent, legal, or equitable [*CCP § 697.340(a)*]. Any after-acquired interest in real property in the county on which a lien may be created is also subject to the judgment lien from the time of acquisition [*CCP § 697.340(b)*].

Locating Real Property Interests Using Online Resources:

Many resources are available online for locating the real property assets of a judgment debtor. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Real Property Locator > CA Deed Transfers, Tax Assessor Records and Mortgage Records--Selected Counties

  - Sample Search: To find the real property assets of a judgment debtor, use a NAME segment search: *name (first name /3 last name)*.

Cross References:

Recording abstract of judgment, see *17.04*.

Discussion and example of scope of lien, see *California Forms of Pleading and Practice, § 318.94[5]* (Matthew Bender).

17.09[2] Lien Attaches to Joint Tenancy Interests. A judgment lien attaches to a joint tenant's interest. The mere recording of an abstract of judgment by a joint tenants creditor, prior to the death of the joint tenant/judgment debtor, does not operate as a severance. The survivor takes the whole free from the lien of the judgment unless the creditor takes additional steps to sever the title [*Hammond v. McArthur (1947) 30 C2d 512, 515*].

When a creditor has a judgment lien against the interest of one joint tenant, the creditor can immediately execute and

sell the judgment debtor's interest and thereby sever the joint tenancy. Alternatively, the creditor can keep the lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost [*Tenhet v. Boswell (1976) 18 C3d 150, 159, 133 CR 10, 554 P2d 330*].

Warning--Enforce Judgment Quickly If Debtor Has Pending Marital Dissolution.

Although the general Family Code rule is that community property is liable for all debts [*Fam Code § 910*; *see CCP §§ 487.010(d), 695.020*], when the property is divided on dissolution of marriage the property given to the non-debtor spouse is not subject to creditors' claims unless the non-debtor spouse has been "assigned" the debt [*Fam Code § 916(b)(2), (3)*]. In effect, therefore, the property is transmuted from community property to separate property without notice to creditors who may have relied on community assets when extending the credit. For this reason, judgment debtor's counsel should try to enforce the judgment before there is a final property distribution in the family law court.

Cross References:

Form for declaration of community property presumptions, see *17.53*.

Discussion of joint tenancy, see California Forms of Pleading and Practice, Ch. 316, Joint Tenancy and Tenancy in Common (Matthew Bender).

17.09[3] Lien Attaches to Increase in Value of Equity. A judgment lien attaches to all real property owned by the judgment debtor in the county at the time it is perfected [*CCP § 697.340*]. It also attaches to all real property in the county which the debtor may afterwards acquire at any time within the 10-year life of the lien [*CCP § 697.310*]. Because the creditor can reach wholly distinct parcels of property that the debtor did not even own when the abstract of judgment was recorded, the judgment creditor can reach all increases in the value of the equity in property owned by the debtor at the time of such recordation and already subject to the lien. Therefore, when the creditor enforces the lien, the creditor is entitled to satisfy the judgment out of the debtor's entire equity in the property valued as of that date, regardless of how or when the debtor acquired the equity [*Teaman v. Wilkinson (1997) 59 CA4th 1259, 1266-1267, 69 CR2d 705]* .

Strategic Point:

A purchase money first trust deed on newly acquired property has priority over all other liens [*see CC § 2898*, *Mercantile Collection Bureau v. Roach (1961) 195 CA2d 355, 15 CR 710*].

17.09[4] Lien Does Not Attach to Some Property Interests. A judgment lien does not extend to the following [*CCP § 697.340(a)*]:

- The debtor's right to rents.
- A leasehold estate with an unexpired term of less than two years.
- The interest of a beneficiary under a trust or to real property that is subject to an attachment lien in favor of the creditor and that was transferred before judgment.
- Real property that the debtor previously transferred.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesTortsPremises Liability & PropertyLessees & LessorsGeneral Overview

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17.10 Lien Is Enforced by Execution Sale.

The most common method of enforcing a judgment lien is by execution sale. The judgment lien secures the judgment creditor's priority over third persons who may acquire rights in the property after the creation of the judgment lien and before the sale of the property on execution in satisfaction of the judgment [*CCP § 697.380(a)*].

Consider:

Because the lien is recorded, any transferee of the property has constructive notice of the amount of the judgment and the remaining life of the lien. The transferee is presumed to know that if the value of the property at the time of transfer is insufficient to satisfy the judgment debt as it then stands, the creditor is entitled to reach any future increase in the equity in the property occurring before the lien is enforced. Knowing this risk, during the life of the lien, the transferee contributes to the equity in the property at his or her peril.

Cross References:

Detailed discussion, procedure and forms for execution sales, see Ch. 18, Execution Sales.

Discussion of priority of liens, see Ch. 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral Overview

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17.11 Property Subject to Lien May Be Released or Subordinated.

The judgment creditor may release from the judgment, or subordinate to another lien or encumbrance, all or a part of the real property subject to the lien [*CCP § 697.370(a)*]. All affected debtors must be named.

Cross References:

Detailed discussion of release or subordination of real property subject to lien, see *California Forms of Pleading and Practice, § 318.95[3]* (Matthew Bender).

Form and discussion of using form for release or subordination of judgment lien on real property, see *California Forms of Pleading and Practice, § 318.402* (Matthew Bender).

Strategic Points:

A release or subordination substantially complying with the requirements of *CCP § 697.370* is effective even though it contains minor errors that are not seriously misleading [*CCP § 697.370(c)*].

It is important to be very specific about what property and which defendants are being released, as ambiguities may result in losing the lien on other parcels or as to specific defendants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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17.12 Lien Generally Survives Bankruptcy.

Generally, a valid, perfected judicial lien which precedes bankruptcy by 90 days survives and is enforceable after bankruptcy. A discharge in bankruptcy voids a judgment only to the extent of the debtor's personal liability [*Songer v. Cooney (1989) 214 CA3d 387, 391, 264 CR 1*]. A discharge does not affect a judgment to the extent that it supports a lien perfected prior to bankruptcy. A perfected abstract lien cannot be stripped down in bankruptcy if it does not impair the homestead exemption in Chapter 7 cases [*Concannon v. Imperial Capital Bank (BAP 9th Cir 2006) 338 BR 90]* .

A trustee in bankruptcy may avoid "judicial liens," as defined in the Bankruptcy Code [*see 11 USC § 101(36)*], under *11 USC § 547(b)* when those liens are created within 90 days of filing for bankruptcy (or within one year when the lienholder is an "insider") [*see* Collier on Bankruptcy, Ch. 547 (Matthew Bender 15th ed. revised)].

Exception:

An exception to the general rule of survivability of liens arises when the debtor has obtained an order in the bankruptcy proceeding avoiding the lien. For example, a judgment lien can be avoided to the extent of a homestead exemption [*Songer v. Cooney (1989) 214 CA3d 387, 391, 264 CR 1*].

Strategic Points:

Because the filing of bankruptcy within 90 days of obtaining a judicial lien may be avoided in a bankruptcy, it often makes sense to record the abstract of judgment and then wait 90 days before taking further action against real property.

- The judgment debtor has the burden of filing a motion to avoid liens [*Fed R Bankr P 9014*]. The lien remains if the debtor fails to do so, even though the debt is discharged. Failure to file a motion to avoid liens is a potential malpractice claim against debtor's bankruptcy counsel.

- Contrary to California law regarding lien priorities, the bankruptcy court can consider subsequent consensual liens in calculating whether or not an involuntary lien impairs the homestead exemption [*see Moldo v. Charnock (In re Charnock) (BAP 9th Cir 2004) 318 BR 720* ; *11 USC § 522(f)*].

Investigating Bankruptcy Filings Using Online Resources:

Many resources are available online for determining if and when a judgment debtor filed for bankruptcy. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings
    - Sample Search: To determine if a judgment debtor has filed for bankruptcy, use a NAME segment search: *name (first name /3 last name)*.

Cross References:

Discussion of effects of bankruptcy on enforcement of judgments, see Ch. 3, Effect of Bankruptcy.

Judgment debtor may give notice that bankruptcy petition has been filed, see *Ch. 18, Execution Sales, 18.19*.

Discussion of debtor's pre-bankruptcy preferences, see Collier on Bankruptcy, Ch. 547 (Matthew Bender 15th ed. revised).

Discussion and form for motion to avoid lien, see *California Forms of Pleading and Practice, § 94.82* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsPreference PeriodsBankruptcy LawExemptionsState LawSpecific ExemptionsReal Property LawBankruptcyGeneral OverviewReal Property LawBankruptcyAutomatic StaysReal Property LawBankruptcyDischarge & Dischargeability

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17.13 Stay of Enforcement Extinguishes Existing Liens and Prevents Creation of New Liens.

If enforcement of a judgment is stayed on appeal by giving a sufficient undertaking under *[CCP §§ 916-923]*, existing liens created under *[CCP §§ 695.010-709.030*] are extinguished. Furthermore, new liens may not be created during the period of the stay [*CCP § 697.040(a)*; *California Commerce Bank v. Superior Court (1992) 8 CA4th 582, 586, 10 CR2d 418*].

Cross References:

Discussion and forms for stay of enforcement of judgments, see Ch. 15, Staying Enforcement of Judgment.

Strategic Point: Creditor May Record Abstract Prior to Filing of Appeal Bond.

A judgment creditor has the right to record an abstract of judgment before the appeal bond is filed. Despite the fact that existing liens are extinguished when enforcement of a judgment is stayed on appeal [*see CCP § 697.040*], the creditor may keep any money that has already been collected from the debtor [*California Commerce Bank v. Superior Court (1992) 8 CA4th 582, 584-585, 10 CR2d 418*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureAppealsRecords on AppealContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral Overview

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17.14 Lien Against Erroneously Identified Real Property Owner Must Be Released.

17.14[1] Owner May Demand Release. When a recorded abstract creates a judgment lien on the real property of a person who is not the judgment debtor because the name of the property owner is the same as or similar to the judgment debtor's, the erroneously identified owner may deliver to the judgment creditor a written demand for a recordable document releasing the lien [*CCP § 697.410(a)*].

The demand must be accompanied by proof to the judgment creditor's satisfaction that the property owner is not the judgment debtor and that the property is not subject to enforcement of the judgment [*CCP § 697.410(a)*].

Strategic Tip--Satisfactory Proof:

In verifying identification, counsel should try to arrange for a personal meeting, and request that the erroneously charged owner bring two forms of identification, including photo identification, as well as proof of social security number. If these types of "proof" are provided, failure to release the lien may risk serious sanctions.

Cross References:

Detailed discussion of procedure for releasing lien on property of person erroneously identified as real property owner, see *11.17*.

Form for release of judgment lien, see *11.56*.

17.14[2] Creditor Must Deliver Release. Within 15 days after receiving the property owner's demand and satisfactory proof, the judgment creditor must deliver to the property owner a recordable document releasing the lien on the property. If the judgment creditor fails to deliver a recordable release within this period, he or she is liable to the property owner for all damages sustained from the failure, plus $100 [*CCP § 697.410(b)*].

Cross Reference:

Detailed discussion of procedure for releasing lien, see *11.17*.

17.14[3] Owner May Seek Court Order If Creditor Fails to Deliver Release. The person making the demand

may apply to the court on noticed motion for an order releasing the judgment lien on the property if the judgment creditor fails to comply with the demand [*CCP §§ 697.410(c), 697.660(c)*]. The prevailing party may recover reasonable attorney's fees in connection with proceedings for the order [*CCP §§ 697.410(d), 697.660(d)*].

Cross Reference:

Discussion and form for erroneously identified owner of property to seek release of judgment lien, see *California Forms of Pleading and Practice, § 318.398* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCriminal Law & ProcedureEyewitness IdentificationPhoto IdentificationsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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17.15 CHECKLIST: Executing and Levying Against Real Property.

☐ Apply to court clerk for writ of execution.

Authority:
CCP § 699.510(a)

Discussion:
See *17.16*

○ Judgment creditor must include affidavit of identity when seeking to include additional names of judgment debtor on the writ.

Authority:
CCP § 680.135

Discussion:
See *17.16[2]*

☐ Court clerk will issue writ of execution in debtor's name.

Discussion:
See *17.17[1]*

☐ Deliver writ to levying officer with instructions for service.

Authority:
CCP § 687.010

Discussion:

See *17.19*

☐ Levying officer will record copy of writ of execution to create execution lien.

Authority:
CCP § 700.015(a)

Discussion:
See *17.20*

Timing:
Levying officer may not levy on property 180 days after issue date.

Authority:
CCP § 699.530

Discussion:
See *17.24*, *17.27*

☐ Levying officer must serve copies of following on judgment debtor:

○ Writ of execution.

○ Notice of levy.

○ If judgment debtor is a natural person, copy of form listing exemptions prepared by Judicial Council pursuant to *[CCP § 681.030(c)*], and list of exemptions published pursuant to *[CCP § 703.150(d)]*.

○ Any affidavit of identity for names of debtor listed on writ of execution.

Discussion:
See *17.26[1]*

☐ Levying officer must serve copy of following on occupant of property and third party in whose name judgment debtor's interest is recorded:

○ Writ of execution.

○ Notice of levy.

Authority:
CCP §§ 700.015, *700.015*

Discussion:
See *17.26[2]*, *17.26[3]*

Timing:

Levying officer must return writ to court, together with report of levying officer's actions and accounting of amounts collected and costs incurred, at earliest of following times:

- Two years from date of issuance of writ.
- Promptly after all of duties under writ are performed.
- When return is requested in writing by judgment creditor.
- If no levy takes place under writ within 180 days after issuance, promptly after expiration of the 180-day period.
- Upon expiration of time for enforcement of the money judgment.

Authority:
CCP § 699.560(a)

Discussion:
See *17.27*

☐ Levying officer will serve notice on judgment creditor that levy has been made.

☐ Judgment creditor must obtain an order for sale.

Discussion:
See *17.29* et seq.

- Apply for order for sale and file copy with levying officer within 20 days, or property will be released.

Authority:
CCP § 704.750(a)

Discussion:
See *17.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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17.16 Judgment Creditor Initiates Process by Applying for Writ of Execution.

17.16[1] Judgment Creditor Applies to Court Clerk for a Writ of Execution. After entry of a money judgment, the judgment creditor may apply to the court clerk for a writ of execution [*CCP § 699.510(a)*]. This is done by sending the form and fee to the court clerk.

Judicial Council Form EJ-130 may be used for a writ of execution. Use of Form EJ-130 is optional but recommended.

The writ of execution is directed to the levying officer in the county where the levy is to be made, or to any registered process server [*CCP § 699.510(a)*].

Cross References:

Judicial Council Form EJ-130 for writ of execution, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

Form for declaration of community property presumption, see *17.53*.

17.16[2] Judgment Creditor Must Include Affidavit of Identity When Seeking to Include Additional Names of Judgment Debtor on Writ. If the judgment creditor wants to include in the writ other names by which the judgment debtor is known, the judgment creditor may include an affidavit of identity with the application for the writ of execution. The affidavit of identity sets forth any additional names by which the judgment debtor is known [*see CCP § 680.135*].

Before the court clerk may issue a writ of execution containing any additional name by which the judgment debtor is known that is not listed on the judgment, the court must approve the affidavit of identity. If the court determines, without a hearing or notice, that the affidavit of identity states sufficient facts upon which the judgment creditor has identified any additional names of the judgment debtor, the court will authorize the issuance of the writ of execution with the additional names [*CCP § 699.510(c)(1)*].

Strategic Point:

Alternatively, if the judgment creditor discovers additional aliases of the judgment debtor, the creditor

may file a motion to amend the judgment to include debtor's additional names [*see Alexander v. Abbey of Chimes (1980) 104 CA3d 39, 163 CR 377*].

Consider:

Usually there is not a need for an affidavit of identity because the names of the judgment debtor is known before the judgment is obtained and should be included in the judgment. However, a creditor sometimes may discover other names later, and then will need to file the affidavit of identity.

Warning--Judgment Creditor May Be Liable for Attorney's Fees to Person Erroneously Served With Writ of Execution:

If a person who is not the judgment debtor has property erroneously subject to an enforcement of judgment proceeding based on an affidavit of identity, the person may recover reasonable attorney's fees and costs from the judgment creditor incurred in releasing the property from the writ of execution, in addition to any other damages or penalties to which an aggrieved person may be entitled to by law [*CCP § 699.510(c)(3)*].

Cross References:

Form for affidavit of identity, see *17.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionEstate, Gift & Trust LawCommunity PropertyGeneral OverviewGovernmentsCourtsClerks of Court

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17.17 Court Clerk Issues Writ of Execution.

17.17[1] Court Clerk Issues Writ of Execution in Debtor's Name. The court clerk issues the writ of execution in the name of the judgment debtor as listed on the judgment. The writ may include any additional names by which the judgment debtor is known as set forth in the affidavit of identity [*see CCP § 680.135*].

Caution--Delay Results If Writ of Execution Includes Name Not Listed on Judgment:
If the writ of execution lists any name other than that listed on the judgment, the person in possession or control of the levied property, if other than the judgment debtor, is not required to deliver the property being levied upon until being notified to do so by the levying officer. The levying officer may not require the person, if other than the judgment debtor, in possession or control of the levied property to pay the amount or deliver the property levied upon until the expiration of 15 days after service of notice of levy [*CCP § 699.510(c)(2)*].

Cross References:

Discussion of application for writ of execution, see *17.16[1]*.

Filing affidavit of identity, see *17.16[2]*.

Service of writ of execution, see *17.19*.

Discussion of application for writ of execution, see *17.16[1]*.

17.17[2] Court Clerk May Issue Multiple Writs of Execution. The court clerk may issue a separate writ of execution for each county where a levy is to be made [*CCP § 699.510(a)*]. Writs may be issued successively until the money judgment is satisfied, but a new writ may not be issued for a county until the expiration of 180 days after the issuance of a prior writ for that county unless the prior writ is returned [*CCP § 699.510(a)*].

Cross References:

Discussion and forms for satisfaction of money judgments, see Ch. 24, Discharge and Satisfaction of Judgments.

17.17[3] Court Clerk Gives Priority to Specified Family Code Applications. The court clerk must give priority to the application for, and issuance of, writs of execution on orders or judgments for child support and spousal support [*CCP § 699.510(a)*]. If the judgment creditor seeks a writ of execution to enforce a judgment made, entered, or enforceable pursuant to the Family Code, the judgment creditor must also satisfy the requirements of any applicable provisions of the Family Code [*CCP § 699.510(b)*].

Cross References:

Discussion and forms for enforcement of family law, see California Forms of Pleading and Practice, Ch. 258, Family Law Enforcement: General Enforcement, Principles, and Remedies (Matthew Bender).

17.17[4] Contents of Writ of Execution. The writ of execution must include the following [*CCP § 699.520*]:

- The date the writ is issued.
- The title of the court where the judgment was entered and the cause and number of the action.
- The judgment creditor's name and address and the judgment debtor's name and last known address.
- The date of the entry of the judgment and of any subsequent renewals, and where they are entered in the court records.
- The total amount of the money judgment as entered or renewed, together with costs added to the judgment [*see CCP § 685.090*] and the accrued interest on the judgment from the date of entry or renewal of the judgment to the date of issuance of the writ, reduced by any partial satisfactions and by 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 any person has requested notice of sale under the judgment and, if so, that person's name and mailing address.
- The sum of the fees and costs added to the judgment pursuant to *Gov Code §§ 6103.5*, 68638 which is in addition to the amount owing to the judgment creditor on the judgment.
- Whether the writ of execution includes any additional names of the judgment debtor pursuant to an affidavit of identity [*see CCP § 680.135*; *see 17.16[2]*].

Judicial Council Form EJ-130 may be used for a writ of execution. Use of Form EJ-130 is optional but recommended.

Cross References:

Judicial Council Form EJ-130 for writ of execution, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

Form for affidavit of identity, see *17.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsFinance

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17.18 Levying Officer Is Sheriff, Marshal, or Registered Process Server.

The levying officer is the sheriff or marshal [*CCP § 680.260*]. Registered process servers are also authorized to levy on real property [*CCP § 699.080(a)(1)*]. A registered process server must deposit a copy of the writ with the levying officer and pay the necessary fee before carrying out the levy [*CCP § 699.080(b)*].

Cross References:

Discussion of levying officers, see *California Forms of Pleading and Practice, § 254.16* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsFinance

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17.19 Judgment Creditor Delivers Writ to Levying Officer With Instructions for Service.

After the court clerk issues the writ of execution, the judgment creditor delivers the writ to the levying officer with instructions for service [*CCP § 687.010*; Form, *see 17.54*]. The instructions must be signed by the judgment creditor's attorney of record or, if the judgment creditor does not have an attorney of record, by the judgment creditor. The instructions must include the information needed or requested by the levying officer to levy on the debtor's property, including but not limited to [*CCP § 687.010*]:

- An adequate description of the property to be levied upon.
- A statement whether the property is a dwelling.
- If the property is a dwelling, whether it is real or personal property.

Upon delivering the instruction to the levying officer, the judgment creditor pays the fees and any other required deposits [*CCP § 685.100*].

Warning--Fees Are Substantial:

Deposits for real property levies may be substantial ($1,000 in Los Angeles County).

Warning--Check With Sheriff's Office Regarding Fees and Filing Requirements:

The fees sheriffs charge vary. If the instructions are mailed to the sheriff, counsel should check with the sheriff's office to ascertain the fee that will be required. In addition, the number of copies of the legal description of the property that sheriffs require varies. Counsel also should check with the sheriff's office to find out how many copies they need. Levying officers also differ regarding the number of copies of the writ of execution they will require.

Warning--Check With Levying Officer Regarding Local Requirements for Instructions:

Counsel should also check with the particular county's levying officer before finalizing levying officer instructions because some jurisdictions require the use of specific forms for real property levies. A quick telephone call can ensure compliance with local rules and customs. It is also good practice to develop a cordial relationship with the personnel who will be executing the writ. In smaller jurisdictions there may be only one person designated to do this job, and the designated person or persons may work only on a

part-time basis.

Cross Reference:

Form for instructions to levying officer, see *17.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsCourtsClerks of Court

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17.20 Levying Officer Records Copy of Writ of Execution and Notice of Levy.

To levy on real property, the levying officer records a copy of the writ of execution and a notice of levy with the recorder in the county where the judgment debtor's property is located [*CCP § 700.015(a)*]. If the judgment debtor's interest in the real property is listed in the county records in the name of a person other than the judgment debtor, the notice of levy must identify the third person and the recorder must index the copy of the writ and notice of levy in the names of both the judgment debtor and the third person [*CCP § 700.015(a)*].

Judicial Council Form EJ-150 is an official form for a notice of levy. Use of Form EJ-150 is optional, but is recommended. Typically the attorney completes the relevant portions of the form and forwards it to the levying officer, who signs it.

Cross Reference:

Judicial Council Form EJ-150 for Notice of Levy, see *Ch. 16, Executing and Levying Against Personal Property, 16.74*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewGovernmentsLocal GovernmentsFinance

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17.21 Levy Creates Execution Lien.

A levy on property under a writ of execution creates an execution lien on the property from the time of levy until two years after the date the writ was issued, unless the judgment is satisfied sooner [*CCP § 697.710*]. A "levy" in the context of execution on real property is the act by which property to be taken and sold is designated or set aside [*Grothe v. Cortlandt Corp. (1992) 11 CA4th 1313, 1320, 15 CR2d 38*].

Cross Reference:

Discussion of process for applying for writ of execution, see *17.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.22 Transfer or Encumbrance of Property Does Not Affect Lien.

If an interest in real property that is subject to a judgment lien is transferred or encumbered without satisfying the lien, that interest remains subject to the lien in the same amount as if the interest had not been transferred or encumbered [*CCP § 697.390(a)*]. A money judgment may be enforced against the transferred or encumbered 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 the property, the money judgment may still be enforced against the property [*CCP § 695.070(b)*]. An execution lien on any interest in real property remains in effect after transfer or encumbrance of the property unless the property was sold at an execution sale [*see CCP §§ 697.720*, *697.730(a)*, *701.630*].

Cross References:

Discussion of property types that are not subject to judgment lien, see *Ch. 11, Obtaining and Removing Judgment Leins, 11.12*.

Discussion of judgment holder options upon death of judgment debtor, see *California Forms of Pleading and Practice, § 318.100* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment LiensReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview

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17.23 Levy May Be Made on Property Subject to Pending Action or Proceeding.

Real property may be levied on even if it is the subject of a pending action or proceeding [*CCP § 700.180(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensJudgment LiensReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview

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17.24 Levying Officer May Not Levy Property 180 Days After Writ Issue Date.

After the writ of execution and any written instructions are delivered to the levying officer to whom the writ is directed, the levying officer must execute the writ in the manner prescribed by law [*CCP § 699.530(a)*] and may not levy on any property under the writ after the expiration of 180 days from the date the writ was issued [*CCP § 699.530(b)*].

Cross Reference:

Discussion of judgment creditor's duty to deliver writ to levying officer with instructions for service, see *17.19*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.25 Levying Officer Must Serve a Notice of Levy.

The notice of levy must inform the person notified of all of the following [*CCP § 699.540*]:

- The capacity in which the person is notified.
- The property that is levied upon.
- The person's rights under the levy, including the right to claim an exemption [*see CCP § 703.010 et seq.*] and the right to make a third-party claim pursuant to *CCP § 720.010* et seq.
- The person's duties under the levy.
- All names listed in the writ of execution pursuant to an affidavit of identity, as defined in *CCP § 680.135* [*see 17.16[2]*], if any.

Judicial Council Form EJ-150 is an official form for a notice of levy. Use of Form EJ-150 is optional, but is recommended. Typically the attorney completes the relevant portions of the form and forwards it to the levying officer, who signs it.

Cross References:

Judicial Council Form EJ-150 for Notice of Levy, see *Ch. 16, Executing and Levying Against Personal Property, 16.74.*

Form for affidavit of identity, see *17.52.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.26 Levying Officer Must Serve Specified Parties.

17.26[1] Levying Officer Must Serve Judgment Debtor. The levying officer must serve a copy of the following on the judgment debtor [*CCP § 700.010(a)*]:

- The writ of execution.
- A notice of levy.
- If the judgment debtor is a natural person, a copy of the form listing exemptions prepared by the Judicial Council pursuant to *CCP § 681.030(c)* and the list of exemptions published pursuant to *CCP § 703.150(d)* (Judicial Council Form EJ-155).
- Any affidavit of identity for names of the debtor listed on the writ of execution [*see 17.16[2]*].

Service may be made personally or by mail [*CCP § 700.010(b)*].

Strategic Point: Levying Officer May Serve Copy of Notice of Levy.

A copy of the original notice of levy that has been served on a third party holding the property sought to be levied on and the affidavit of identity [*see 17.17[2]*], if served on the judgment debtor or any other party, suffices as the notice of levy to that person [*CCP § 699.545*].

Cross References:

Judicial Council Form EJ-155 Listing Exemptions from Enforcement of Judgment, See *Ch. 16, Executing and Levying Personal Property, 16.75*.

Form for affidavit of identity, see *17.52*.

Discussion of contents of notice of levy, see *17.25*.

Discussion of service, see *California Forms of Pleading and Practice, § 254.13* (Matthew Bender).

17.26[2] Levying Officer Must Serve Third Party in Whose Name Judgment Debtor's Interest Is Recorded. At the time of levy or promptly thereafter, the levying officer must serve a copy of the writ and notice of levy on any third person in whose name the judgment debtor's interest in the real property stands on the records of the county [*CCP § 700.015(b)*]. Service may be made personally or by mail. If service on the third person is by mail, it must be sent to the person at the address for such person, if any, shown by the records of the office of the tax assessor of the county where the real property is located or, if no address is shown, to the person at the address used by the county recorder for the return of the instrument creating the third person's interest in the property [*CCP § 700.015(b)*].

17.26[3] Levying Officer Must Serve Occupant of Real Property. At the time of levy or promptly thereafter, the levying officer must serve a copy of the writ and notice of levy on one occupant of the real property [*CCP § 700.015(c)*]. Service may be made either by leaving the copy and notice with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found on the property when service is attempted who is either an employee or agent of the occupant or a member of the occupant's household. If service on an occupant is not possible when attempted, the copy and writ must be posted in a conspicuous place on the property [*CCP § 700.015(c)*].

If the property described in the notice consists of more than one distinct lot, parcel, or governmental subdivision and any of them lie with relation to the others so as to form one or more continuous, unbroken tracts, only one service or posting is required as to each tract [*CCP § 700.015(c)*].

17.26[4] Failure to Serve Papers Does Not Affect Execution Lien. If property has been levied on and, pursuant to a levy, a copy of the writ of execution and a notice of levy are required to be posted or to be served on or mailed to the judgment debtor or other person, failure to post, serve, or mail the copy of the writ and the notice does not affect the execution lien created by the levy [*CCP § 699.550*]. Failure to serve on or mail to the judgment debtor a list of exemptions does not affect the execution lien created by the levy [*CCP § 699.550*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsFinance

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17.27 Levying Officer Must Obey Time Limits for Returning Writ.

The levying officer to whom the writ of execution is delivered must return the writ to the court, together with a report of the levying officer's actions and an accounting of amounts collected and costs incurred, at the earliest of the following times [*CCP § 699.560(a)*]:

- Two years from the date the writ was issued.
- Promptly after all of the duties under the writ are performed.
- When return is requested in writing by the judgment creditor.
- If no levy takes place under the writ within 180 days after its issuance, promptly after the expiration of the 180-day period.
- Upon expiration of the time for enforcement of the money judgment.

Strategic Point:

Not all levying officers are sufficiently familiar with the process to be in compliance. It is advisable to keep track of timing and deadlines and call the levying officer to make certain they follow the timelines.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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17.28 Levying Officer Must Serve Notice on Judgment Creditor of Requirement of Application for Sale.

Promptly after the judgment creditor has caused a dwelling, other than a personal property dwelling or a real property dwelling in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of the levy [see *CCP § 704.740(b)*] to be levied on, the levying officer must serve notice on the creditor that the levy has been made and that the execution levy will be released unless the creditor applies for an order for sale and files a copy of the application with the levying officer within 20 days (of the levying officer's notice to the judgement creditor [*See CCP § 704.750(a)*].

Cross Reference:

Discussion of procedure for applying for an order of sale, see *17.30*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.29 CHECKLIST: Applying for Order of Sale of Real Property Used As a Dwelling.

☐ If judgment debtor is natural person, apply for court order to sell judgment debtor's real property.

○ State in application whether county tax assessor's records indicate that there are any exemptions.

Authority:
CCP §§ 704.740(a), 704.760(a)

Discussion:
See *17.30*, *17.34*

○ Court order is not required for sale of personal property dwellings, such as a mobile home, trailer, or houseboat.

Authority:
CCP § 704.740(b)

Discussion:
See *17.31*

Timing:
Judgment creditor must apply for order of sale within 20 days after notice of levy is served on judgment debtor, or property is released.

Authority:
CCP § 704.750(a)

Discussion:
See *17.33*

☐ Court must set hearing date no later than 45 days after application is filed, but may set hearing for later time on showing of good cause.

Authority:
CCP § 704.770(a)

Discussion:
See *17.36[1]*

☐ No later than 30 days before time set for hearing, serve judgment debtor with copies of order to show cause, judgment creditor's application, and notice of hearing.

Authority:
CCP § 704.770(b)(1)

Discussion:
See *17.36[2]*

☐ Serve copies of order to show cause, judgment creditor's application, and notice of hearing on occupant of dwelling.

○ If no occupant is present at time service is attempted, post copy of each document in conspicuous place at dwelling.

Authority:
CCP § 704.770(b)(2)

Discussion:
See *17.36[2]*

☐ Court determines whether dwelling is exempt.

○ If court determines dwelling is exempt, court must also determine amount of homestead exemption and fair market value of dwelling.

○ If court determines dwelling is not exempt, court must order sale of property.

Authority:
CCP § 704.780(b)

Discussion:
See *17.36*

☐ Court will issue order for sale of dwelling subject to homestead exemption, unless it determines that sale of dwelling would not likely produce a bid sufficient to satisfy any part of amount due on judgment.

Authority:

CCP § 704.780(b)

Discussion:
See *17.36[4]*

☐ Court clerk will transmit certified copy of order for sale to levying officer.

○ If court making order is not court in which judgment was entered, clerk must send certified copy to clerk of court in which it was entered.

Authority:
CCP § 704.780(c)

Discussion:
See *17.36[4]*

Timing:
If judgment debtor fails to appear at hearing, judgment creditor must serve order no later than 10 days after date of order.

☐ File proof of service with court.

Authority:
CCP § 704.790

Discussion:
See *17.36[6][a]*

☐ Within 10 days of receiving notice of order, judgment debtor or spouse may file declaration with levying officer stating that:

○ Failure to appear was due to mistake, inadvertence, surprise, or excusable neglect; and

○ Judgment debtor wishes to assert homestead exemption.

Authority:
CCP § 704.790

Discussion:
17.36[6]

☐ On receipt of declaration, court sets time and place for hearing to determine whether court's order should be modified.

Timing:
Time set for hearing must be no later than 20 days after receipt of declaration.

○ Court clerk is responsible for providing prompt notice of hearing to parties.

Authority:
CCP § 704.790

Discussion:
See *17.36[6]*

☐ Appeal in manner provided for appeal in court in which proceeding took place.

Authority:
CCP § 704.830; *see CCP § 703.600*

Discussion:
See *17.38*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt PersonnelReal Property LawHomestead ExemptionsReal Property LawOwnership & TransferPublic Entities

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17.30 Court Order Is Required for Sale of Dwelling.

Generally, a natural person's interest in a real property dwelling may not be sold under a writ of execution to enforce a money judgment unless the judgment creditor obtains a court order for sale pursuant to *CCP §§ 704.710-704.850*, which provide for a hearing to determine the existence and amount of any homestead exemption in the dwelling [*see CCP § 704.740(a)*].

Cross References:

Judgment creditor applies for writ of execution, see *17.16*.

Identifying homestead exemption, see *17.42*.

Form for application for issuance of order for sale of dwelling, see *17.55*.

Detailed discussion and forms for conducting execution sales, see Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawHomestead Exemptions

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17.31 Court Order Not Required for Sale of Personal Property Dwellings.

A court order for sale is not required if the dwelling is personal property, such as an unattached mobile home, house trailer, or house boat, or the dwelling is a leasehold estate in real property with an unexpired term of less than two years at the time of levy [*see* CCP §§ 704.910(c), *700.080*]. An exemption claim as to such property must be made and determined as provided in *CCP § 703.510 et seq*. [*CCP § 704.740(b)*].

Cross References:

Levying on personal property used as dwelling, see *16.59*.

Detailed discussion and forms for conducting execution sale on personal property, see Ch. 18, Execution Sales.

Discussion and form for removing occupants from personal property used as dwelling, see *California Forms of Pleading and Practice § 254.694* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawTypes of ContractsPersonal PropertyReal Property LawHomestead Exemptions

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17.32 Only Judgment Debtor's Interest May Be Sold.

If the judgment debtor's interest in a dwelling is that of a joint tenant or tenant in common, a leasehold, or another interest that is less than a fee interest, only the judgment debtor's interest in the dwelling, and not the dwelling itself, may be sold at an execution sale [*CCP § 704.820*]. If there is more than one judgment debtor of the judgment creditor, the interests of each of the debtors are to be sold together, and each of the debtors entitled to a homestead exemption may apply his or her exemption to his or her own interest [*CCP § 704.820*].

Strategic Point:

If the judgment debtor's interest is an interest in community property, the whole community interest is subject to enforcement of the judgment [*CCP § 695.020*].

Cross References:

Judgment lien attaches to certain property interests, see *17.09*.

Discussion of homestead exemption, see *17.41* et seq.

Detailed discussion and forms for conducting an execution sale, see Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionEstate, Gift & Trust LawCommunity PropertyGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint Tenancies

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17.33 Judgment Creditor Must Apply for Order of Sale Within 20 Days After Notice of Levy Is Served.

Promptly after the judgment creditor has caused a real property dwelling to be levied on, the levying officer must serve notice on the creditor that the levy has been made and that the execution levy will be released unless the creditor applies to the court for an order for sale and files a copy of the application with the levying officer within 20 days of the levying officer's notice to the judgment creditor [*CCP § 704.750(a)*].

Judicial Council Form EJ-150 may be used for giving notice of levy. Use of this form is optional, but recommended.

Strategic Point:

Counsel should obtain an appraisal before applying for the sale because, in most instances, it will be the levying creditor's responsibility to provide proof of the fair market value. Not only is this information necessary for the hearing, but it is also useful for evaluating whether or not to make the motion at that time [*see 17.36[4]*].

Cross References:

Court may appoint an appraiser, see *17.36[5]*.

Form for application for issuance of order of sale of dwelling, see *17.55*.

Judicial Council Form EJ-150 for Notice of Levy, see *Ch. 16, Executing and Levying Against Personal Property, 16.74*.

Detailed discussion and forms for conducting an execution sale, see Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
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17.34 Application Must State Whether Dwelling Is Homestead and Amount of Any Liens or Encumbrances.

The application must state all of the following:

- Whether or not the county tax assessor's records indicate that there is a current homeowner's exemption under R&T Code § 218 or a disabled veteran's exemption under R&T Code § 205.5 for the person or persons who claimed the exemption [*CCP § 704.760(a)*].

- Whether or not the dwelling is a homestead, and if so, the amount of the homestead exemption, and whether or not the county records indicate that a homestead declaration was recorded by the judgment debtor and/or his or her spouse relating to the dwelling that is the subject of the application. These statements may be based on information and belief[*CCP § 704.760(b)*].

- The amount of any liens or encumbrances on the dwelling, the name of each person with a lien or encumbrance on the dwelling, and the address of the person used by the county recorder for the return of the instrument creating his or her lien or encumbrance after recording [*CCP § 704.760(c)*].

Warning:

Applying for an order of sale is not easy. The applicant needs to be able to show the value of the property, liens against the property, and the amounts owing on liens. Local rules may also apply. For example, Los Angeles County Superior Court Rule 3.6 requires an appraisal and a litigation guarantee or preliminary title report (PTR), which takes time to get and is expensive. Since this information must be supplied in the application for order of sale that must be filed within 20 days of levying the writ against real property, the appraisal and PTR should be ordered and obtained by the time the writ is levied or shortly thereafter. In addition, the requirement the judgment creditor must show the amount owing on the liens may require the judgment creditor to request payoff demands from existing lienholders under *CC § 2943(c)*, which can be obtained if an abstract of judgment has been recorded.

Strategic Point:

Judgment creditor's counsel should conduct a lien search prior to applying for an order of sale. The information is required for the application, and will also help the judgment creditor evaluate whether there is sufficient equity to justify the application. Judgment creditor's counsel should also send a letter

of inquiry to lienholders of record and include their responses as exhibits in the application for sale. The court may require proof of vesting and liens.

Consider:

A declared homestead may not meet the qualifications of an automatic homestead. For execution sales purposes, the debtor must qualify for the automatic exemption to gain the benefits of exemption [*see Kelley v. Locke (In re Kelley) (BAP 9th Cir 2003) 300 BR 11]* . Discovery is available postjudgment to see if the debtor qualifies for the automatic homestead exemption.

Timing:

Oppose the exemption after the application, but prior to the hearing on the sale.

Cross References:

Identifying declared or automatic homestead exemption, see *17.42*.

Form for application for issuance of order of sale of dwelling, see *17.55*.

Detailed discussion and forms for conducting execution sales, see Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawPriorities & RecordingGeneral OverviewReal Property LawProperty Valuation

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17.35 Judgment Creditor Must Apply to Superior Court of County Where Dwelling Is Located If Dwelling Is Located in Another County.

If the dwelling is located in a county other than the county in which the judgment was rendered, the judgment creditor must apply to the superior court of the county where the dwelling is located and file with the application an abstract of judgment in the form prescribed by *[CCP § 674*], or, in the case of a judgment for spousal or child support, or against a health care provider for periodic payments, a certified copy of the judgment [*CCP § 704.750(b)*]. The judgment creditor must pay the filing fee for a motion provided in *Gov Code § 70617(a)* [*CCP § 704.750(b)*] (currently $40). A judgment lien on real property also may be created under *[CCP § 697.320(a)*] by recording an abstract of judgment.

Judicial Council Form EJ-001 is the official form for an abstract of judgment. Use of this form is mandatory.

Cross References:

Judicial Council Form EJ-001 for abstract of judgment, see *17.51*.

Discussion of judgment lien for support or against health care provider, see *17.07*.

Discussion and forms for enforcing judgment for spousal or child support, see California Forms of Pleading and Practice, Ch. 258, Family Law Enforcement: General Enforcement, Principles, and Remedies (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewHealthcare LawInsuranceReimbursementGeneral Overview

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17.36 Court Determines Whether Dwelling Is Exempt Before Ordering Sale.

17.36[1] Court Sets Hearing Date. After the judgment creditor has filed an application for an order for sale, the court sets a time and place for hearing and must order the judgment debtor to show cause why an order for sale should not be made in accordance with the application. The hearing must be set no later than 45 days after the application is filed, or such later time as the court orders on a showing of good cause [*CCP § 704.770(a)*].

Cross References:

Form for application for issuance of order of sale, see *17.55*.

17.36[2] Creditor Must Serve Notice of Hearing. The judgment creditor, no later than 30 days before the time set for hearing, must serve on the judgment debtor a copy of the order to show cause, a copy of the judgment creditor's application, and a copy of the notice of the hearing in the form prescribed by the Judicial Council [*CCP § 704.770(b)(1)*].

Judicial Council Form EJ-180 is the official form for a notice of hearing. Use of this form is optional, but recommended.

Service of the papers must be made either personally or by mail [*CCP § 704.770(b)(1)*]. In addition, the judgment creditor must personally serve a copy of each of the required documents on an occupant of the dwelling in question. If there is no occupant present at the time service is attempted, a copy of each document must be posted in a conspicuous place at the dwelling [*CCP § 704.770(b)(2)*].

If service is by mail, the notice period is extended five days if the place of address is in California, 10 days if the place of address is outside California but within the United States, or 20 days if the place of address is outside the United States [*see CCP § 684.120(a), (b)*].

Cross References:

Form for order to show cause why order of sale of dwelling should not be made, see *17.56*.

Judicial Council Form EJ-180 for notice of hearing on right to homestead exemption, see *17.57*.

17.36[3] Burden of Proof. If the records of the county tax assessor indicate that there is a current homeowner's [*see* R&T Code § 218] or disabled veteran's [*see* R&T Code § 205.5] exemption for the dwelling claimed by the judgment debtor or his or her spouse, the judgment creditor has the burden of proving that the dwelling is not a homestead [*CCP § 704.780(a)(1)*]. If the records indicate that there is no current claim of a homeowner's exemption or disabled veteran's exemption by the judgment debtor or his or her spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead [*CCP § 704.780(a)*]. If the application states the amount of the homestead exemption, the person claiming the exemption has the burden of proof that the claimed amount is other than the amount stated in the application [*CCP § 704.780(a)(2)*].

Strategic Point:

Proof of the liens and homeowners and disabled veterans exemptions should be shown through a preliminary title report or a litigation guarantee from a title company.

Cross References:

Homestead exemption may be declared or automatic, see *17.42*.

Amount of homestead exemption, see *17.50*.

17.36[4] Court Will Order Sale of Dwelling. Before the court may order a sale of a dwelling, it must determine whether the dwelling is exempt. If the court determines that the dwelling is not exempt, the court must order sale of the property [*see CCP § 701.510 et seq*.].

Consider:

A determination that the dwelling is not exempt is of significant benefit to the judgment creditor. There will be no requirement that the minimum bid be equal to 90 percent of the appraised value [*see CCP § 704.800*], and no requirement that senior liens are paid off per [*see CCP § 704.850(a)(1)*; *compare CCP § 701.810*].

If the court determines the dwelling is exempt, the court must order the sale of the dwelling subject to the homestead exemption, unless it determines that the sale of the dwelling would not be likely to produce a bid sufficient to satisfy any part of the amount due on the judgment pursuant to *CCP § 704.800* [*CCP § 704.780(b)*]. Notwithstanding the fact that *CCP § 704.800* refers to a bid that will satisfy "all" liens, in fact only senior liens must be satisfied [*Bratcher v. Buckner (2001) 90 CA4th 1177,1188-1189, 109 CR2d 534* ; *Rourke v. Troy (1993) 17 CA4th 880, 885-886, 21 CR2d 660*].The court must determine the amount of the homestead exemption and the fair market value of the dwelling. The order for sale of the dwelling subject to the homestead exemption must specify the amount of the proceeds of the sale that is to be distributed to each person with a lien or encumbrance on the dwelling and the name and address of each person with a lien or encumbrance [*CCP § 704.780(b)*]. After the court grants the order for sale, the dwelling may be sold [*CCP § 704.780(b)*; *see CCP § 701.510 et seq*. (statutes governing sale)].

When the court grants the application for order for sale, the court clerk must transmit a certified copy of the order to the levying officer. If the court making the order is not the court in which the judgment was entered, the clerk must send the certified copy to the clerk of the court in which it was entered [*CCP § 704.780(c)*].

Cross References:

Amount of homestead exemption, see *17.50*.

Form for application for issuance of order of sale of dwelling, see *17.55*.

Form for order granting application for order of sale of dwelling, see *17.58*.

Detailed discussion of procedure for conducting an execution sale, see Ch. 18, Execution Sales.

17.36[5] Court May Appoint Appraiser. The court may appoint a qualified appraiser to assist in determining the dwelling's fair market value [*CCP § 704.780(d)*]. If the court appoints an appraiser, it must fix the appraiser's compensation in a reasonable amount, not to exceed similar fees for similar services in the community in which the dwelling is located [*CCP § 704.780(d)*].

Strategic Point--Judgment Creditor:

While a court may appoint an appraiser, it probably will not be necessary if a competent appraisal is submitted with the application for order of sale. Counsel should submit an appraisal from a qualified appraiser for the court's review. This may avoid delays associated with the court appointing an appraiser independently.

17.36[6] Procedure When Judgment Debtor Fails to Appear at Hearing.

17.36[6][a] Judgment Creditor Must Serve Order. If neither the judgment debtor, the debtor's spouse, nor the judgment debtor's attorney appeared at the hearing, the judgment creditor must serve a copy of the order and a notice of the order, personally or by mail, on the judgment debtor and his or her spouse [*CCP § 704.790*]. The judgment creditor must also serve a copy and notice of the order personally on an occupant of the dwelling, or if there is no occupant present at the time service is attempted, the judgment creditor must post a copy of the order and notice in a conspicuous place at the dwelling [*CCP § 704.790*]. Proof of service and of any posting of the order must be filed with the court and with the levying officer [*CCP § 704.790(c)*].

Warning:

Failure to comply with these provisions vitiates the order and the dwelling may not be sold [*CCP § 704.790(c)*].

Timing:

The service of notice must be made no later than 10 days after the date of the order in the form prescribed by the Judicial Council [*CCP § 704.790(a), (b)*].

17.36[6][b] Court May Hold Second Hearing. If, within 10 days after service of notice of the order, the judgment debtor or his or her spouse files a declaration with the levying officer stating that the absence of the judgment debtor or his or her spouse or attorney was due to mistake, inadvertence, surprise, or excusable neglect and that he or she wishes to assert the homestead exemption, the levying officer must transmit the declaration immediately to the court that ordered the sale [*CCP § 704.790(d)*]. On receipt of the declaration, the court must set a time and place for hearing to determine whether the court's order should be modified. The time set for the hearing must be no later than 20 days after receipt of the declaration. The court clerk is responsible for providing prompt notice of the hearing to the parties [*CCP § 704.790*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsLocal GovernmentsFinanceReal Property LawHomestead Exemptions

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17.37 Court May Grant Extension of Time.

The court may allow an extension of time for an execution sale. However, written notice of the extension must be filed with the levying officer, and unless waived, promptly on the opposing party [*CCP § 704.830*; *see CCP § 703.590*].

Cross Reference:

Detailed discussion and forms for conducting execution sales, see Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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17.38 Parties Have Right to Appeal.

An appeal may be taken from any order made under *[CCP §§ 704.780-704.790*]. The appeal must be taken in the manner provided for appeal in the court in which the proceeding took place [*CCP § 704.830*; *see CCP § 703.600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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17.39 Judgment Creditor Should Request Bond Pending Appeal.

A judgment debtor may obtain a stay of the order of sale pending appeal. Because the judgment lien will terminate upon issuance of a bond under *[CCP § 917.4*], it is important to obtain a bond in an amount sufficient to cover the entire judgment. The general requirement of a bond of two times the amount [*See CCP § 917.1*] does not apply, but it can used as a guideline. In asking for a sufficient judgment bond, the creditor should include all principal, interest, and costs, and take into account the time it takes to resolve an appeal, during which interest will accrue [*see Vangel v. Vangel (1963) 116 CA2d 615, 633, 254 P2d 919* (do not assume worst case scenario on destruction of property in calculating bond amount)].

Cross Reference:

Discussion of undertakings pending appeal, see California Forms of Pleading and Practice, Ch. 43, Appeal: Stay of Proceedings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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17.40 CHECKLIST: Claiming Homestead Exemption.

☐ Determine if judgment debtor:

- ○ Has recorded declaration of homestead; or
- ○ Meets residence requirements for automatic homestead.

Authority:
CCP § 704.920

Discussion:
See *17.42*, *17.43*

☐ If representing judgment debtor, claim homestead exemption if judgment creditor seeks order to sell dwelling.

Discussion:
See *17.49*

☐ If representing judgment creditor:

- ○ Challenge homestead exemption if debtor does not meet continuous residence requirement.

Authority:
CCP § 704.920

Discussion:
See *17.43*

- ○ If appropriate, argue that declared homestead has been abandoned.

☐ Declared homestead may be abandoned by declaration.

☐ Declared homestead may be abandoned by operation of law.

Authority:
CCP § 704.990

Discussion:
See *17.48*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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17.41 Property Must Qualify As Homestead.

"Homestead" means the principal dwelling in which [*CCP § 704.710(c)*]:

- The judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling; and

- In which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead.

If exempt proceeds from the sale or damage or destruction of a homestead are used toward the acquisition of a dwelling within the six-month period provided by *[CCP § 704.720]*, "homestead" also means the dwelling so acquired if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resided continuously from the date of acquisition until the date of the court determination that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired [*CCP § 704.710(c)*].

Cross Reference:

Amount of homestead exemption, see *17.50*.

Exemption not available when abstract was recorded before property was acquired, see *17.49[2][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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17.42 Homestead Exemption May Be Declared or Automatic.

A homestead exemption may arise from a declared homestead or an automatic homestead:

- An "Article 5" homestead exemption applies to declared homesteads [*see CCP §§ 704.910-704.995*].

- An "Article 4" homestead exemption applies automatically when a debtor has continuously resided in a dwelling from the time that a creditor's lien attaches until a court's determination that the exemption applies [*CCP § 704.710(c)*]. The judgment debtor need not continuously own the property during that period; the property need only be the principal dwelling in which the judgment debtor resides [*Tarlesson v. Broadway Foreclosure Investments, LLC (2010) 184 CA4th 931, 109 CR3d 319]* .

Strategic Point:

A declared homestead may not meet the requirements for an automatic homestead. The Article 4 homestead exemption and the Article 5 declared homestead contain different provisions, have different requirements, and their applications and are often confused. The Article 4 exemption applies when there is a levy and the Article 5 declared homestead applies when there is a voluntary sale [*see In re Anderson (9th Cir. 1987) 824 F.2d 754]* .

Cross Reference:

Amount of homestead exemption, see *17.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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17.43 Declared Homestead Must Meet Statutory Requirements.

17.43[1] Owner Must Record Declaration. An owner of a dwelling in which the owner or his or her spouse resides may declare a homestead on the dwelling by recording a homestead declaration in the county recorder's office in the county in which the dwelling is located [*CCP § 704.920*]. From that time on, the dwelling is a declared homestead unless the facts claimed in the declaration were not true at the time the declaration was made and recorded [*see Rich v. Ervin (1948) 86 CA2d 386, 392, 194 P2d 809*].

Cross Reference:

Discussion of benefits of declared homestead, see *17.46*.

Declared homestead may be abandoned by declaration or operation of law, see *17.48*.

17.43[2] Declaration Must Contain Specified Information. The contents of the homestead declaration must include all of the following [*CCP § 704.930(a)*]:

- The name of the declared homestead owner.
- A description of the declared homestead.
- A statement that the declared homestead is the principal dwelling of the declared homestead owner or spouse, and that the declared homestead owner or spouse resides in the declared homestead on the date the declaration is recorded.

Strategic Point:

A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling [*CCP § 704.930(a)*].

Cross Reference:

Form for declaration of homestead, see *17.59*.

Homestead declarations upheld despite minor defects, see *17.45*.

17.43[3] Declaration Must Be Executed and Acknowledged. The homestead owner or spouse must execute and acknowledge the homestead declaration in the same manner as an acknowledgment of a conveyance of real property [*CCP § 704.930(b)*]. A guardian or conservator, or other person authorized to act on behalf of the declared homestead owner or his or her spouse, also may execute and acknowledge the homestead declaration [*CCP § 704.930(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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17.44 Only Real Property Is Subject to Declared Homestead.

A dwelling must be real property for purposes of a declared homestead [*CCP § 704.910(c)*]. Thus, a boat, a mobilehome not attached to land, or an unexpired leasehold of less than two years, which may qualify as a dwelling for the purposes of a homestead exemption under *[CCP § 704.710 et seq.]*, cannot be a declared homestead. A dwelling cannot qualify as a homestead unless the judgment debtor or the debtor's spouse resides in the dwelling [*CCP § 704.920*].

Cross Reference:

Form for declaration of homestead, see *17.59*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawMobilehomes & Mobilehome ParksExemptions

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17.45 Homestead Declarations Are Liberally Construed.

Courts liberally construe declarations of homestead [*see Johnson v. Brauner (1955) 131 CA2d 713, 722, 281 P2d 50*]. Declarations that contain minor defects or discrepancies but that also contain the facts or the essence of the statutory requirements have been upheld [*Michelman v. Frye (1965) 238 CA2d 698, 706, 48 CR 142*].

Distinguish:

Declarations that omit vital information required by the homestead declaration statute, such as failing to describe the homestead property, may be declared invalid [*Jackson v. Menick (9th Cir 1958) 260 F2d 563, 564*].

Strategic Point:

Although the husband and wife may both declare the homestead, they are only entitled to one homestead amount. They cannot multiply the exemption and are only entitled to one for the head of household [*See CCP § 704.730(b)*].

Cross Reference:

Amount of homestead exemption, see *17.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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17.46 Declared Homestead Provides a Variety of Advantages.

17.46[1] Recordation Provides Protections. A declared homestead limits the extent to which a subsequently recorded judgment lien, other than a judgment lien based on a judgment for child or spousal support, will attach to the declared homestead. Additionally, a judgment lien attaches only to the surplus value of the property over the amount of the homestead exemption plus the amount of all liens and encumbrances on the declared homestead at the time the abstract of judgment is recorded to create the judgment lien [*CCP § 704.950*; *see also CCP § 487.025(b)*]. Recording a declared homestead also provides an advantage for a judgment debtor at any future hearing in which a judgment creditor seeks to challenge the existence or amount of a homestead exemption in that the judgment creditor has the burden of proof at the hearing [*CCP § 704.780(a)(1)*].

Strategic Point:

Recording a homestead declaration is not a prerequisite to claiming the homestead exemption, and does not affect the amount of the exemption, or the right of levy pursuant to a writ of execution [*CCP § 704.970*].

Cross References:

Discussion on obtaining judgment lien on real property, see *17.04*.

Amount of homestead exemption, see *17.50*.

Detailed discussion and forms for obtaining and removing judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

17.46[2] Proceeds From Sale of Declared Homestead Are Exempt. Proceeds from the voluntary sale of a declared homestead are exempt in the amount of the homestead exemption for six months after the date of the sale [*CCP § 704.960(a)*]. In addition, if the proceeds from a sale of the homestead are invested in a new dwelling within six months after the date of the voluntary sale, the new dwelling may be selected as a declared homestead by recording a homestead declaration within the applicable six-month period, and the declaration will have the same effect as if it had been recorded at the time the prior homestead declaration was recorded [*CCP § 704.960(b)*].

Timing:

If proceeds of an execution sale or of insurance or other indemnification for damage or destruction of the homestead are invested in a new dwelling and if a new homestead declaration is recorded within six months, the new dwelling is deemed a declared homestead as of the date of the prior homestead declaration [*CCP § 704.960(b)*].

Cross Reference:

Amount of homestead exemption, see *17.50*.

17.46[3] Homestead May Be Conveyed or Encumbered. The homestead declaration does not restrict or limit any right to convey or encumber the declared homestead [*CCP § 704.940*]. The homestead statutes are designed to protect the value of the homestead from judgment liens, but they do not impair the right of a declared homestead owner to encumber the homestead with consensual liens, such as a deed of trust securing a promissory note executed by the declared homestead owner [*Amin v. Khazindar (2003) 112 CA4th 582, 589, 5 CR3d 224*].

17.46[4] Protection From Liens Continues After Death of Declared Homestead Owner. The protection of the declared homestead from any creditor with an attachment lien, execution lien, or judgment lien on the dwelling continues after the declared homestead owner's death if, at the time of his or her death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the decedent's interest passes [*CCP § 704.995(a)*]:

- The surviving spouse of the decedent; and/or
- A member of the decedent's family.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview

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17.47 Declared Homestead Does Not Protect Against Some Judgment Liens.

17.47[1] Declared Homestead Does Not Protect Against Support Orders. A declared homestead is not protected from a judgment lien created under *CCP § 697.320* for child, family, or spousal support [*CCP § 704.950(b)*].

Cross Reference:

Detailed discussion and forms for enforcing family law, see California Forms of Pleading and Practice, Ch. 258 (Matthew Bender).

17.47[2] Declared Homestead Does Not Protect Surplus Equity. A judgment lien attaches to a declared homestead in the amount of any surplus equity. Surplus equity is any amount over the total of [*CCP § 704.950(c)*]:

- All liens and encumbrances recorded prior to the judgment lien; and
- The homestead exemption.

Consider:

If there is no "surplus equity" when the judgment lien is recorded, the judgment lien may not be enforced to any extent.

Case law suggests a judgment lien does not attach to a declared homestead under *[CCP § 704.950(c)]* unless and until surplus equity exists [*see Teaman v. Wilkinson (1997) 59 CA4th 1259, 69 CR2d 705*].

Examples:

- In *In re Jones (9th Cir 1997) 106 F3d 923, 927* , the Ninth Circuit Court of Appeals held that under *[CCP § 704.950(c)]*, the equity in a homesteaded property is measured at the time a judgment lien is recorded. If, at that time, no equity exists, then no judgment lien attaches.

- However, in *Teaman v. Wilkinson (1997) 59 CA4th 1259, 1263-1267, 69 CR2d 705* , the court disagreed and held that a judgment creditor may reach surplus equity that accrues after the date the abstract of judgment is recorded. Nonetheless, the court suggested that until surplus equity develops, the

judgment lien does not attach to the declared homestead.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementFamily LawChild SupportObligationsEnforcementLiensFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewReal Property LawHomestead Exemptions

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Chapter 17 Executing and Levying Against Real Property
V. CLAIMING HOMESTEAD EXEMPTION

2-17 MB Practice Guide: CA Debt Collection 17.48

17.48 Declared Homestead May Be Abandoned.

17.48[1] Declared Homestead May Be Abandoned by Declaration.

17.48[1][a] Declaration of Abandonment Must Be Executed and Acknowledged. A declared homestead may be abandoned by a declaration of abandonment [*CCP § 704.980(a)*]. The declaration of abandonment must be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by either a declared homestead owner or by a person authorized to act on his or her behalf [*CCP § 704.980(b)*]. In the latter event, the authorized person must state that he or she has the authority to act on behalf of the declared homestead owner and state the source of the authority [*CCP § 704.980(b)*].

Cross Reference:

Form for declaration of abandonment of homestead, see *17.60*.

17.48[1][b] Abandonment Is Limited to Declarant's Interest. The declaration of abandonment will not affect the declared homestead of any person other than the declared homestead owner named in the declaration of abandonment [*CCP § 704.980(c)*].

17.48[2] Declared Homestead May Be Abandoned by Operation of Law. A declared homestead is abandoned by operation of law if the declared homestead owner, or a person authorized to act on his or her behalf, executes, acknowledges, and records a new homestead declaration on different property [*CCP § 704.990(a)*]. The abandonment affects only the declarant named in the new homestead declaration [*CCP § 704.990(a)*]. However, if a new homestead declaration includes property described in a previously recorded homestead declaration, the new homestead declaration will not be considered an abandonment of the prior declared homestead to the extent that the declaration is still valid [*CCP § 704.990(b)*].

Consider:

There is authority stating that implied abandonment occurs when a homestead declarant establishes another residence as his or her principal dwelling, even when there is no declaration of homestead on the second property. Abandonment is implied in such a case because the automatic residential exemption applies and provides the same monetary protection against creditor's liens for the new residence.

Example:

In *Webb v. Trippet (1991) 235 CA3d 647, 286 CR 742* , the judgment debtor declared a homestead exemption and disappeared. Balancing the interests of the judgment debtor and judgment creditor, the court held that the judgment debtor could be presumed dead five years after his disappearance, at which time the homestead exemption could be lifted and the property ordered for sale.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawHomestead Exemptions

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17.49 Homestead Exemption Applies to Both Automatic and Declared Homesteads.

17.49[1] Homestead Need Not Be Declared Homestead. A judgment debtor or his or her spouse may claim a homestead exemption in an execution context, even when the dwelling is not a declared homestead [*see CCP §§ 704.710(c), 704.720(a)*]. An Article 4 homestead exemption applies automatically [*see CCP §§ 704.710-704.850*]. An Article 5 homestead exemption applies to declared homesteads [*see CCP §§ 704.910-704.995*].

Strategic Point:

A declared homestead may not meet the requirements of an automatic homestead [*see 17.41*]. In order to meet the requirements for an Article 4 automatic homestead exemption (which must be met in the involuntary sale context of a levy or a bankruptcy--a declared homestead is inapplicable in such circumstances), the requirement of continuous residency must be met [*Kelley v. Locke (In re Kelley) (2003 BAP 9th Cir) 300 BR 11]* .

Cross Reference:

Amount of homestead exemption, see *17.50*.

17.49[2] Scope of Homestead Exemption.

17.49[2][a] Exemption Applies to Money Judgment. The homestead exemption applies to any interest of the judgment debtor in a homestead [*CCP § 704.720(a)*] and to all procedures for enforcement of a money judgment [*CCP § 703.010(a)*].

17.49[2][b] Exemption Is Inapplicable to Judgment for Foreclosure of Mortgage or Other Encumbrance. The exemption does not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than enforcement or attachment liens [*CCP § 703.010(b)*].

17.49[2][c] Exemption Not Available When Abstract Was Recorded Before Property Was Acquired. A judgment debtor is not entitled to a homestead exemption on real property purchased subsequent to the recording of an abstract of judgment (in the county in which the real property is located), unless and to the extent that the property was purchased with exempt proceeds [*SBAM Partners v. Wang (2008) 164 CA4th 903, 79 CR3d 752* ; *see also CCP §§*

704.710(c)].

17.49[3] Proceeds From Sale of Dwelling Are Exempt. Proceeds from a dwelling sold at an execution sale, or from insurance or other indemnification for damaged or destroyed property, or from the sale of the property for public use, are exempt in the amount prescribed by *CCP § 704.730* for a period of six months from the time the proceeds are actually received by the judgment debtor.

Strategic Point:

If the proceeds in the amount of the homestead exemption are used to acquire a new dwelling within the six-month period, the new dwelling also constitutes a homestead if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resides continuously from the date of acquisition until the date the court determines that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired [*CCP § 704.710(c)*].

Exception:

If a judgment debtor receives exempt proceeds but, rather than reinvesting in a replacement dwelling within the six-month period, applies a homestead exemption to other property owned by the judgment debtor or the judgment debtor's spouse, the proceeds cease to be exempt [*CCP § 704.720(b)*].

Compare:

Compare this provision to the right of a declared homestead owner to apply the proceeds from either a voluntary or execution sale, or the proceeds from insurance or other indemnification for damaged or destroyed property, to a new declared homestead within the six-month period [*see CCP §§ 704,960*].

Cross Reference:

Detailed discussion and forms for conducting an execution sale, see Ch. 18, Execution Sales.

17.49[4] If Spouses Reside in Separate Homesteads Only One Homestead Is Exempt. If the judgment debtor and his or her spouse reside in separate homesteads, only one of the homesteads is exempt, and only the proceeds of the exempt homestead are exempt [*CCP § 704.720(c)*]. The spouses may select which of the homesteads is exempt.

Warning:

If the spouses are unable to agree, the court will determine which homestead is exempt [*see CCP §§ 703.110*, *704.930*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawHomestead Exemptions

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17.50 Homestead Exemption May Amount to $75,000, $100,000 or $175,000.

17.50[1] Judgment Debtor Generally May Claim Homestead Exemption of $75,000 or $100,000. A judgment debtor may claim a $75,000 homestead exemption [*CCP § 704.730(a)(1)*].

If the judgment debtor or his or her spouse who resides in the homestead is a member of a family unit at the time of the attempted sale of the homestead, he or she is entitled to a $100,000 exemption [*CCP § 704.730(a)(2)*]. However, there must be 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)*].

Cross Reference:

Exemption applies to both declared and automatic homesteads, see *17.49*.

17.50[2] Judgment Debtor's Age, Disability, or Income May Increase Homestead Exemption to $175,000. The homestead exemption is increased to $175,000 if the judgment debtor or his or her spouse who resides in the homestead is any of the following, at the time of the attempted sale of the homestead, [*CCP § 704.730(a)(3)*]:

- 65 years of age or older;

- Physically or mentally disabled and, as a result of that disability, unable to engage in substantial gainful employment; or

- 55 years of age or older with a gross annual income of not more than $15,000, or, if married, a gross annual income, including the gross annual income of his or her spouse, of not more than $20,000 and the sale is an involuntary sale.

Strategic Point:

There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of physical or mental disability as to his or her inability to engage in substantial gainful employment [*CCP § 704.730(a)(2)*].

Strategic Point:

If the judgment debtor or debtor's spouse both qualify for an exemption in the homestead, the homestead exemption cannot exceed the amount specified in *[CCP § 704.730(a)(2)*] or *(3)*, whether or not the spouses are jointly obligated on the judgment and whether or not the homestead consists of community or separate property or both. If both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead are to be apportioned between the spouses on the basis of their proportionate interests in the homestead [*CCP § 704.730(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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17.51 Abstract of Judgment--Judicial Council Form EJ-001.

Abstract of Judgment--Judicial Council Form EJ-001.

Click here to view image.

NOTES.

Authority:

CCP § 374(a) (contents of abstract of judgment), 697.310(a) (recordation of abstract of judgment creates judgment lien. California Judicial council Form EJ-170, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*] Recordation of abstract of judgment, see *17.04*. Judgment liens, see Ch. 11 Obtaining and Removing Judgment Liens.

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17.52 Affidavit of Identity.

Affidavit of Identity.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	AFFIDAVIT OF
_____ [*name*],	)	IDENTITY
Defendant.	)	
	)	
	)	

_____

John Smith, being [first] duly sworn [on (his *or* her) oath deposes and] says:

1. I am the judgment creditor in the above-entitled and numbered action, which was brought in _____ [*name of court, e.g.,* the Superior Court of the County of Marin], and in which judgment was entered on _____ [*date*].

2. The name of the judgment debtor in this action is Mary Jones. Mary Jones is also known by the following name[s]: _____ [*Set forth additional name or names by which judgment debtor is known*].

3. _____ [*Set forth the facts on which judgment creditor relied in obtaining judgment debtor's additional name or names*].

_____ _____ [*signature of judgment debtor*]
Subscribed and sworn to before me on
_____ _____ [*date*]
_____ _____ [*signature of officer*]
_____ _____ [*typed name of officer*]

_____ _____ [*officer, e.g.*, Notary Public]
[*Seal*]

NOTES.

Authority:
CCP § 680.135

Discussion:
See *17.16[2]*

Related Form for Application:
See *Ch. 16, Executing and Levying Against Personal Property, 16.73*

Related Memoranda:
See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender); California Points and Authorities, Ch. 131, Judgment (Matthew Bender)

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17.53 Declaration of Community Property Presumption.

Declaration of Community Property Presumption.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____		
_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION RE COMMUNITY
_____ [*name*],	)	PROPERTY
Defendant.	)	
	)	
	)	

I, _____ [*name of attorney declarant*], declare and say:

1. I am one of the attorneys for Judgment Creditor _____ [*name of judgment creditor*] in the above-entitled and numbered action, which was brought in _____ [*name of court, e.g.,* the Superior Court of the County of Marin], and in which judgment was entered on _____ [*date*]. I am a member of the law firm of _____ [*name of law firm*]. If called upon to testify, I could and would competently do so as I have personal knowledge of the following information.

2. Judgment Debtor _____ [*name of judgment debtor*] is married to [*name and aliases of judgment debtor's spouse*].

3. Judgment Creditor seeks to recover monies due and owing pursuant to a Judgment entered by the above-entitled Court against Judgment Debtor, _____ [*name of judgment debtor*] in the sum of $_____, plus all accrued interest and costs.

4. *California Family Code Section 910(a)* provides:

"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 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."

5. The spouse of Judgment Debtor _____ [*name of judgment debtor*] maintains community property assets in his/her name only, in an effort to avoid payment of the community obligation to the Judgment Creditor.

6. Judgment Creditor _____ [*name of judgment creditor*] seeks to execute upon assets standing in the name of the spouse of Judgment Debtor, _____ [*name and aliases of judgment debtor's spouse*]

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*judgment creditor*]

NOTES.

Authority:
Fam Code § 910(a)

Discussion:
See *17.16[1]*

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17.54 Instructions to Levying Officer.

Instructions to Levying Officer.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	INSTRUCTIONS TO
_____ [*name*],	)	LEVYING OFFICER
Defendant.	)	
	)	
	)	

_____

To _____ [*name and title of levying officer*]:

You are hereby instructed by virtue of the accompanying writ of _____ [*specify, e.g.*, execution] in the above-entitled action to levy on [and sell] all the right, title, and interest of _____ [*name*], the judgment debtor, in and to the following-described real property, located in _____ County, California, and recorded in the Recorder's Office of _____ County, California.

Legal Description of Property: _____ [*give legal description, i.e., metes and bounds description*]

Street Address of Property: _____

Name(s) and Address(es) of Record Owner(s) other than Judgment Debtor:

_____ [*name*]

[_____ (*name*)]

The property _____ [is *or* is not] a dwelling [*if dwelling add*, and is real property].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*judgment creditor*]

NOTES.

Authority:
CCP § 687.010

Timing:
See *17.24*

Discussion:
See *17.19*

Related Memoranda:
See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments; California Points and Authorities, Ch. 131, Judgment

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17.55 Application for Issuance of Order of Sale of Dwelling.

Application for Issuance of Order of Sale of Dwelling.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____		
_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	APPLICATION FOR ISSUANCE
_____ [*name*],	)	OF ORDER OF SALE OF
Defendant.	)	DWELLING
	)	
	)	

_____

1. _____ [*specify party, e.g.*, Plaintiff John Smith] hereby applies for an order of the court for sale of the interest of _____ [*opposing party, e.g.*, Defendant Mary Jones, a natural person], in a dwelling, pursuant to *Code of Civil Procedure Sections 704.740-704.850*. The application is made by _____ [*specify party, e.g.*, Plaintiff John Smith] to enforce a judgment entered against _____ [*opposing party, e.g.*, Defendant Mary Jones] on _____ [*date*], in the sum of $ _____. [A copy of the abstract of judgment is attached as Exhibit A and incorporated by reference.]

2. The dwelling is _____ [*describe property, including location, e.g.*, the house and lot, including a detached garage, located on Lot 9, per map entitled "Ocean View, City of Berkeley, Alameda County, California," commonly known as 23 Baker Street, Berkeley, Alameda County, California].

3. On _____ [*date*] pursuant to instructions of _____ [*specify party, e.g.*, Plaintiff John Smith], the judgment creditor, the _____ [*specify levying officer, e.g.*, Sheriff of _____ County] levied on the interest of _____ [*opposing party, e.g.*, Defendant Mary Jones] in the above-described real property and dwelling under a writ of execution which was issued on _____ [*date*] by the clerk of the court in the above-entitled action. Notice of that levy was given to _____ [*e.g.*, Defendant Mary Jones] by the sheriff on or about _____ [*date*].

4. The dwelling is subject to a court order for sale and execution because it is the property of defendant in the above-entitled action and has been duly levied on pursuant to a writ of execution issued by the clerk of the court in the above-entitled action.

5. A reasonable search of the records of the Assessor of _____ County indicates that a current _____ [homeowner's *or* disabled veteran's] exemption does [not] exist [in the name(s) of _____ (*names(s) of any person who claimed either exemption*)].

6. The records of the Recorder of _____ County indicate that a homestead declaration on the above-described dwelling has [not] been recorded.

[*EITHER*]

7. On information and belief, the above-described dwelling is a homestead and the amount of the homestead exemption is _____ [*specify applicable amount of exemption pursuant to CCP § 704.730, e.g.*, $100,000].

[*OR*]

7. On information and belief, the above-described dwelling is not a homestead because _____ [*state reasons, e.g.*, the dwelling is not the principal residence of the judgment debtor and/or his or her spouse].

[*CONTINUE*]

[8. The liens and encumbrances on the above-described dwelling are as follows: _____ (*specify amount of each lien or encumbrance and address of each person used by county recorder for return of instrument creating each person's lien or encumbrance after recording*).]

VERIFICATION

I, _____ [*specify party, e.g.*, John Smith], am the plaintiff in the above-entitled proceeding. I have read the foregoing application and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ _____ [*signature*]

NOTES.

Authority:
CCP § 704.740

Timing:
See *17.32*; *CCP § 704.750(a)*

Grounds:
See *17.30*-38

Related Form for Order:

See *17.58*

Related Memoranda:

See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments; California Points and Authorities, Ch. 131, Judgment

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17.56 Order to Show Cause Why Order of Sale of Dwelling Should Not Be Made.

Order to Show Cause Why Order of Sale of Dwelling Should Not Be Made.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER TO SHOW CAUSE
_____ [*name*],	)	WHY ORDER OF SALE
Defendant.	)	OF DWELLING SHOULD
	)	NOT BE MADE
	)	

_____

To Mary Jones, the above-named defendant:

The ex parte application of John Smith, the plaintiff in the above-entitled action, for an order for sale of a dwelling, pursuant to *Code of Civil Procedure Sections 704.740-704.760*, being before this court, and pursuant to *Code of Civil Procedure Section 704.770*,

IT IS HEREBY ORDERED that you appear before the above-entitled court on _____, 20_____, at _____ _____.M. in [_____ (Department *or* Division) _____ of] this court located at _____ [*address and room number, if any*], _____ [*city*], then and there to show cause, if you have any, why an order for sale of your interest in the real property and dwelling at _____ [*street address*], more particularly described as follows: _____ [*legal description*] should not be issued as requested in the application of _____ [*specify party, e.g.*, Plaintiff John Smith], plaintiff in the above-entitled action, a copy of which is served with this order.

[This order, together with the attached copy of the above-mentioned application and a copy of the notice of the hearing, shall be served on you personally or by mail at least 30 days prior to _____, 20_____ (*date of*

hearing).]

Dated: _____

_____ [*signature*]
Judge of the Superior Court

NOTES.

Authority:
CCP § 704.770(b)(1)

Timing:
See *17.36*

Grounds:
See *17.29 -17.38*

Related Form for Application:
See *17.55*

Related Form for Order:
See *17.58*

Related Memoranda:
See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender); California Points and Authorities (Matthew Bender), Ch. 131, Judgments

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17.57 Notice of Hearing on Right to Homestead Exemption--Judicial Council Form EJ-180.

Notice of Hearing on Right to Homestead Exemption--Judicial Council Form EJ-180.

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 704.770 (b)(1); California Judicial Council Form EJ-180, pictured above, has been approved for optional use [*Cal Rules of Court, Rule 1.35*].

Timing:

Notice of Hearing must be served on the judgment debtor no later than 30 days before the time set for hearing.

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17.58 Order Granting Application for Order of Sale of Dwelling.

Order Granting Application for Order of Sale of Dwelling.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING
_____ [*name*],	)	APPLICATION FOR
Defendant.	)	ORDER OF SALE OF
	)	DWELLING
	)	

_____

The application of _____ [*specify party, e.g.*, Plaintiff John Smith] for an order for sale of a certain dwelling, namely: _____ [*describe property as in application*], came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name, e.g.*, Tom Doe]; _____ [*opposing party, e.g.*, Defendant Mary Jones] _____ [appeared by counsel _____ (*name, e.g.*, Tom Doe) *or* did not appear].

On proof made to the satisfaction of the court that the property is _____ [not subject to any homestead exemption *or* subject to a homestead exemption in the amount of $_____ (*specify applicable amount pursuant to CCP § 704.730, e.g.*, $100,000), that the fair market value of the dwelling is $_____,] and that the application ought to be granted,

IT IS ORDERED that the application be, and it hereby is, granted. The clerk shall forthwith transmit a copy of the order in accordance with *Code of Civil Procedure Section 704.780*.

[*EITHER, if property is not subject to homestead exemption*]

IT IS FURTHER ORDERED that the property be sold in the manner provided in *Code of Civil Procedure Sections*

701.510-701.680.

[*OR, if property is subject to homestead exemption*]

IT IS FURTHER ORDERED that the dwelling be sold under the order of sale, provided that at the sale, no bid shall be received unless it exceeds $_____ [*amount of homestead exemption plus aggregate amount of all liens and encumbrances on property*] and is not less than 90 percent of the appraised fair market value of the property. If a sale is made, the proceeds from that sale shall be applied in the following order of priority:

First: To the discharge of the following liens and encumbrances on the dwelling:

To _____ [*name and address of person having lien or encumbrance*] in the amount of $_____ [*amount of lien or encumbrance*]; [*repeat for any additional persons having lien or encumbrance*].

Second: To _____ [*name of judgment debtor/homestead claimant*] in the amount of $_____ [*specify applicable amount pursuant to CCP § 704.730, e.g.*, $100,000].

Third: To the levying officer for the reimbursement of his/her costs for which advancement has not been made.

Fourth: To the _____ [*name of moving party, e.g.*, plaintiff] in the above-entitled action to satisfy the following:

First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted;

Second, the amount due on the judgment in the above-entitled _____ action with costs and interest as entered on the writ.

[*EITHER*]

Fifth: The balance, if any, to _____ [*name of judgment debtor/homestead claimant*].

[*OR*]

Fifth: _____ percent of the balance, if any, to _____ [*name of first spouse/homestead claimant*] and _____ percent of the balance, if any, to _____ [*name of second spouse/homestead claimant*] on the basis of each spouse's proportionate interest in the homestead.

[*CONTINUE*]

Dated: _____

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:

CCP § 704.740

Timing:

CCP § 704.750

Discussion:

See *17.30 -17.38*

Related Form for Application:

See *17.55*

Related Memoranda:

See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender); California Points and Authorities, Ch. 131, Judgments (Matthew Bender)

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17.59 Declaration of Homestead by Owner or Representative.

Declaration of Homestead by Owner or Representative.

DECLARATION OF HOMESTEAD

1. I, Mary Smith or _____ [*name of first spouse*] and I, _____ [*name of second spouse*], hereby declare:

[2. We are married to each other.]

[*EITHER*]

3. I/We am/are the _____ [*owner(s) or husband/wife of the owner*] of the land and premises located in _____ [*city*], _____ County, California, more particularly described as: _____ [*describe property, e.g.*, Lot 9, per map entitled "Ocean View, City of Berkeley, Alameda County, California," filed December 16, 1970 in Map Book 90, page 87, Alameda County Records. The property is more commonly known as 23 Baker Street, Berkeley, California]. I/We hereby claim these premises and the dwelling house and other improvements thereon as a homestead.

[*OR*]

3. I am the _____ [conservator *or* guardian *or other person authorized to act on behalf of homestead owner(s) or his/her spouse*] of the owner of the land and premises located in _____ [*city*], _____ County, California, more particularly described as: _____ [*describe property, e.g.*, Lot 9, per map entitled "Ocean View, City of Berkeley, Alameda County, California," filed December 16, 1970 in Map Book 90, page 87, Alameda County Records. The property is more commonly known as 23 Baker Street, Berkeley, California]. I hereby claim these premises and the dwelling house and other improvements thereon as a homestead.

4. I/We/He/She/They own(s) the following interest(s) in the above-declared homestead: _____ [*specify, e.g.*, fee title as owner(s) in joint tenancy].

5. The above described property is _____ [my *or* our *or* my spouse's *or name of homestead owner or of his/her spouse*] principal dwelling, and I/we/she/he/they currently reside(s) in the above-described property.

[*ADD if declarant is making declaration if capacity as guardian, conservator, attorney in fact, or other representative capacity*]

6. I make this declaration pursuant to my authority as _____ [_____ (guardian *or* conservator) of the _____ (person *and/or* estate) *or* attorney in fact on behalf *or specify other status*)] of _____ [*name of declared homestead owner or his/her spouse*] under the _____ [*specify document on which authority is based, e.g.,* power of attorney recited and described in an instrument executed on _____ (*date power of attorney signed rather than date of acknowledgment*) and recorded (as Instrument No. _____) in Book 16, Page 09, Official Records of Alameda County, California].

[*CONTINUE*]

7. I have read the declaration and know the contents thereof; the facts stated therein are known to be true as of my own personal knowledge.

[I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.]

_____ [*date*]

_____ _____ [*signature*]

ACKNOWLEDGMENT

State of California,)
County of _____)
)

_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____ [*signature*] [*Notarial Seal*]

_____ [*typed name*]

_____ [*name of public office*]

NOTES.

Authority:

CCP § 704.930

Discussion:

See *17.40 -17.50*

Related Memoranda:

See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender); Ch. 294, Homesteads; California Points and Authorities, Ch. 131, Judgments (Matthew Bender)

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Chapter 17 Executing and Levying Against Real Property
VI. FORMS

2-17 MB Practice Guide: CA Debt Collection 17.60

17.60 Declaration of Abandonment of Homestead.

Declaration of Abandonment of Homestead.

DECLARATION OF ABANDONMENT OF HOMESTEAD

I/We, _____ [*name or names of spouses*], hereby declare:

I/We hereby abandon the homestead previously declared by _____ [me/us *or state name of original declarant*] on _____ [*date*], on the dwelling and premises located in _____ [*city*], _____ County, State of California, and more particularly described as follows: _____ [*describe property, e.g.*, Lot 48 of Tract 1960, filed for record on November 22, 1963, in Book 35 of maps at page 43. The property is more commonly known as 118 Avalon Street, San Francisco, California]. The declaration of homestead was recorded on _____ [*date*], in Book _____, Page _____, of the _____ records of _____ County, California.

[*ADD if declarant is making declaration if capacity as guardian, conservator, attorney in fact, or other representative capacity*]

I make this declaration pursuant to my authority as _____ [_____ (guardian *or* conservator) of the _____ (person *and/or* estate) *or* attorney in fact on behalf *or specify other status*)] of _____ [*name of declared homestead owner or his/her spouse*] under the _____ [*specify document on which authority is based, e.g.,* power of attorney recited and described in an instrument executed on _____ (*date power of attorney signed rather than date of acknowledgment*) and recorded (as Instrument No. _____) in Book 16, Page 09, Official Records of Alameda County, California].

ACKNOWLEDGMENT

State of California,)
County of _____)
)

_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____ [*signature*] [*Notarial Seal*]

_____ [*typed name*]

_____ [*name of office*]

NOTES.

Authority:
CCP § 704.980

Discussion:
See *17.48*

Related Memoranda:
See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender); Ch. 294, Homesteads; California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

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Chapter 18 Execution Sales

2-18 MB Practice Guide: CA Debt Collection 18.syn

§ 18.syn Synopsis to Chapter 18: Execution Sales

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Chapter 18 Execution Sales
I. STRATEGY

2-18 MB Practice Guide: CA Debt Collection 18.01

18.01 Scope.

This chapter covers:

- Objectives and strategy for carrying out an execution sale against personal property (including property to be collected), and real property [*see 18.02*].
- Serving, publishing, and posting notice of the execution sale [*see 18.03 -18.15*].
- Staying the execution sale [*see 18.16 -18.21*].
- Conducting the execution sale [*see 18.22 -18.30*].
- Obtaining sale proceeds in satisfaction of the judgment [*see 18.31 -18.36*].
- Resolving conflicting claims to proceeds of the sale [*see 18.37 -18.42*].
- Setting aside the sale [*see 18.43 -18.46*].

Core Statutes:
CCP §§ 701.510-701.680

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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Chapter 18 Execution Sales
I. STRATEGY

2-18 MB Practice Guide: CA Debt Collection 18.02

18.02 Objective and Strategy.

An execution sale is the final step in enforcing a money judgment against a judgment debtor's assets. After a judgment creditor obtains a writ of execution against the debtor's property and after a levying officer has levied on the writ, either by taking custody of personal property or by recording the writ, which creates an execution lien on real property [*see CCP §§ 697.710*, *700.015(a)*], the levying officer is required to sell the property at public auction and turn the cash proceeds over to the judgment creditor in satisfaction of the judgment. The levying officer is responsible for preparing, serving, publishing, and posting notice of the execution sale.

It is important to determine how to get the best response. Some things *must* go through the sheriff, but sometimes it is better to use a private process server to get things done faster. For sales of dwellings, counsel should coordinate with the sheriff, letting the sheriff decide what the sheriff's office can do and what is recommend for a private process server to do. Many sheriff's offices have standard instructions available on a form or their website.

Strategic Point:

Whenever there is the option to use a private process server versus the sheriff, counsel should use the private process server. Although it may cost more money, it certainly pays off in getting the property levied, sold, and the proceeds delivered in an efficient manner. Often the sheriff is too overwhelmed with other work and may not even get to counsel's writ of execution for days or weeks. Moreover, levying civil writs of execution generally does not have a high priority with the sheriff's office.

In determining what to sell for levy, counsel should decide first if the value of the asset to be sold, less any liens, is sufficient to merit the investment of time and energy for an execution sale, or if it would be better to wait with the judgment for the asset to be sold. For real property, this can be the best strategy if counsel can afford to wait for a sale or refinance. In addition, the threat of the initiation of a sale can provoke settlement negotiations when all else has failed.

Cross Reference:

Discussion of whether to use sheriff or registered process server as levying officer, see Ch. 16, Executing and Levying Against Personal Property.

Strategic Point--Judgment Creditor:

A judgment creditor who levies a writ of execution has considerable leverage at this stage, because the debtor's property or home is under threat or, if the debtor's business inventory may be removed, the debtor may be put out of business. This can be a good time to propose a settlement, if practical, such as a refinancing package or installment payment plan. This also may present an opportunity for the judgment creditor to obtain a consensual lien, such as deed of trust on real property, in exchange for a release of the judgment lien. The advantage to obtaining a deed of trust, as opposed to a judgment lien, is that the deed of trust will have priority over any applicable homestead exemption.

Cross Reference:

Discussion of installment plans, see Ch. 24, Discharge and Satisfaction of Judgments.

In deciding to go forward with an execution sale, the judgment creditor should evaluate whether the value of the property can cover the judgment as well as the costs of sale. The creditor should also take into account that a good portion of the costs of sale must be paid in advance and can be significant. For example, the San Francisco Sheriff's Department requires an advance of at least $700 to conduct an execution sale.

Strategic Point--Personal Property:

In handling personal property, the creditor may want to take into account whether obtaining custody of the debtor's personal property will be difficult, as the levying officer will not enter a debtor's home, for example, to seize property that is subject to levy under writ of execution. In addition, advance costs for sale of personal property will include the expense of transporting and storing the property until the date of the sale. Counsel should make sure to call the sheriff in advance and inquire as to the cost and procedure of taking and selling personal property. Sometimes these costs will far outweigh what the sale will bring. Counsel should also consider whether it is more efficient to have a post-judgment receiver perform the sale when the property is unique or valuable, or sale will be difficult or specialized.

Strategic Point--Real Property:

An execution sale of the judgment debtor's dwelling is subject to very stringent requirements: The creditor must obtain a court order for sale after a hearing on the homestead exemption, and there are strict minimum bidding requirements based on the court's determination of the property's fair market value [*CCP § 704.740*; *see 18.26*]. In addition, notice of the sale may not be given until at least 120 days after the notice of levy was served on the judgment debtor [*CCP § 701.545*; *see 18.08[3]*]., and notice must be given at least 20 days before the sale [*CCP § 701.540*]. Although it is an expensive and time-consuming process, sometimes initiation of the process will result in the judgment debtor selling or refinancing to pay the judgment.

Strategic Point:

Counsel should keep a periodic watch on the status of title on property on which counsel holds an abstract. It is not uncommon for a title company to miss the abstract and not pay it off on a sale or refinance. In those instances, recourse can be had through the new purchaser/lender on their title insurance policy.

Some intangible property, like accounts receivable or money judgments owed to the debtor, cannot be sold without a court order. If the judgment debtor applies to the court to do so, the levying officer is obligated to collect the cash on this type of property as it comes due unless the court orders a sale. In this instance, the levying officer must collect the property after the levy, rather than selling at auction [*CCP § 701.520(a)*]:

Strategic Point--Judgment Debtor:

An execution sale is not a satisfactory way for a judgment debtor to clear a money judgment because auction sales often result in bargain prices for the bidders, who are required to pay cash and receive no warranties of title. Moreover, the judgment debtor will still be liable for any shortfall if the sale proceeds are not sufficient to satisfy the judgment.

Proceedings for an execution sale can be automatically stayed by filing a voluntary petition for bankruptcy. This may provide the debtor with breathing space to reorganize the debtor's finances without losing business assets or a home [*see 18.17*]. A bankruptcy petition, if filed before judgment liens have had time to "season" (90 days from the date that the lien attached), may also permit a debtor to discharge an unsecured judgment.

Cross Reference:

Discussion of bankruptcy, see Ch. 3, Effect of Bankruptcy.

Strategic Point--Judgment Debtor:

The judgment debtor should consider claims of exemption, challenging methods and manners of sale, and having third parties file claims. The best thing is to cooperate with the creditor in a private sale so that the best values can be brought in, something that execution sales seldom achieve. If at all possible, the creditor should give the debtor time to obtain financing so as to avoid losing the property.

Cross Reference:

Discussion of impact of bankruptcy stay, see Ch. 3, Effect of Bankruptcy.

Discussion of procedure for obtaining a writ of execution against personal property, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of procedure for obtaining a writ of execution or sale against real property, Ch. 17, Executing and Levying Against Real Property.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender).

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewGovernmentsLocal GovernmentsFinanceReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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Chapter 18 Execution Sales
II. SERVING NOTICE OF SALE

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18.03 CHECKLIST: Serving Notice of Sale.

☐ If property subject to sale is personal property or real property that is not debtor's dwelling, ensure that sheriff or levying officer served notice of levy with accompanying writ of execution on debtor.

Authority:
CCP § 699.520

Discussion:
See *18.05*, *18.06*

☐ If property subject to sale is debtor's dwelling, ensure that sheriff or levying officer served a notice of levy with accompanying order for sale on debtor.

Authority:
CCP §§ 701.780(c), *704.740(a)*

Discussion:
See *18.05*, *18.06*

☐ Prepare notice of sale.

○ Notice must include date, time and place of sale, description of property, and legal description and address for real property.

○ Notice may state that property will be sold unless judgment debtor applies for order for property that will be collected rather than sold.

Authority:
CCP §§ 701.520(b), *701.530*

Discussion:
See *18.07*

Forms:
See *18.47*, *18.48*

☐ Determine timing.

○ Judgment creditor must wait at least 10 days after debtor was served with notice of levy under writ of execution or sale before notice of the personal property sale can be issued.

○ Judgment creditor must wait at least 120 days after debtor was served with notice of levy under writ of execution or sale before notice of the real property sale can be issued.

○ Execution sale must be completed within two years after issuance of writ of execution or sale.

Authority:
CCP §§ 703.530, *701.545*

Discussion:
See *18.08[1]*, *[2]*

☐ Notify all interested third parties of sale.

○ Levying officer must mail notice of sale to lienholders whose names and addresses have been furnished by judgment creditor at least 20 days before sale.

Authority:
CCP § 701.540(h)

Discussion:
See *18.09*

☐ Confirm that levying officer has served notice of sale.

○ Notice must be served on judgment debtor not less than 10 days before sale of personal property.

○ Notice must be served on judgment debtor at least 20 days before sale of real property.

○ Occupant of real property also must be served at least 20 days before sale of real property.

Authority:
CCP §§ 701.530, *701.540*

Discussion:
See *18.10*

☐ Confirm that levying officer published notice of sale; file proof of service.

Authority:
CCP § 701.540(d)-(g)

Discussion:
See *18.13[1], [2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawTypes of ContractsPersonal Property

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Chapter 18 Execution Sales
II. SERVING NOTICE OF SALE

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18.04 Options and Strategy.

Before an execution sale can take place, the notice of levy on the judgment debtor must be served [*CCP § 703.520(a)* (personal property); *CCP § 701.545* (real property)]. Once that notice is received, the creditor will prepare notice of sale if the property is collectible [*CCP § 701.530*]. All interested parties should be notified of the execution sale, and the levying officer is responsible for serving the notice of the sale [*CCP § 701.530*]. The levying office must ensure that the notice of the sale is published and posted [*CCP § 701.540*].

A title search will be necessary for sale purposes--it is the most logical place to start to determine if there is enough equity in the property to make the sale worthwhile. Most title companies will run a report for free for attorneys, hoping that the attorney will place an order for the litigation guarantee report that will be required by the court with them.

Counsel should be sure to follow up with the sheriff to ensure deadlines are met. Usually a sheriff's department will have one person who does these, and if that person is out of the office arrangements can quickly fall apart. Even though technically the sheriff or levying officer is supposed to take care of all the details regarding notice, it is better practice to monitor, assist, or even handle the details to ensure the sale is not delayed or cancelled for failing to follow procedural safeguards.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 18 Execution Sales
II. SERVING NOTICE OF SALE

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18.05 Creditor Must Give Levying Officer Information for Notice.

Service of the notice of levy on the judgment debtor is a prerequisite to an execution sale, and starts the time running before the sale can take place [*CCP § 701.530(b)* (personal property); *CCP § 701.545* (real property)]. To ensure that service was properly made, the judgment creditor should obtain a proof of service of the notice of levy from the levying officer, though typically the levying officer will send a copy to the judgment creditor's counsel.

Strategic Point:

To ensure the job is done properly, counsel should have a private process server serve the notice of levy. If this is not timely done, it must be done again.

It is the judgment creditor's responsibility to provide the sheriff's office or other levying officer with the information needed to prepare the notice of sale. The writ of execution or order for sale will contain a description of the real property interest being levied on, typically the property's metes and bounds, which is normally sufficient for preparation of the notice of sale. Once the court issues an order for sale, the court clerk must transmit a certified copy of the order to the levying officer.

For execution purposes, "real property" means any right in real property, including leasehold of interests [*CCP § 680.320*]. A mortgage or trust deed is only a lien on real property, not an interest or estate in the mortgaged property itself. Debts secured by mortgages can be reached by garnishment, but not by execution on the real property.

The creditor's instructions to the levying officer must contain an adequate description of the property (legal description and street address, if applicable), a statement whether the real property is a dwelling, and the names and addresses of all persons whom the levying officer is required to serve [*CCP §§ 687.010(a)*, *684.130*].

Consider:

A levying officer will require a fee and cost deposit for performing a real property levy. The deposit is likely to be substantial--i.e., several hundred dollars.

Strategic Point--Judgment Creditor:

Real property consisting of one parcel or two or more contiguous parcels situated in two or more

counties may be sold in one county as instructed by the judgment creditor [*CCP § 701.570(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsFinance

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18.06 Levying Officer Serves Judgment Debtor With Writ and Notice of Levy.

Once the judgment debtor obtains a writ of execution, the sheriff or other levying officer must serve the debtor with the writ, together with a notice of levy that describes the property levied on [*CCP § 700.010*]. The levying officer must record the writ and notice of levy with the recorder of the county where the real property is located [*CCP § 700.015*].

Cross Reference:

Discussion of levying on personal property, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of levying on real property, see Ch. 17, Executing and Levying Against Real Property.

Warning:

Notice of sale of real property cannot be given until 120 days after the notice of levy was served on the judgment debtor [*see 18.08[3]*]. To prevent any further delay, the judgment creditor should obtain a proof of service of the notice of levy from the sheriff or other levying officer.

Cross Reference:

Forms for notice of sale, see *18.47*, *18.48*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsFinance

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18.07 Creditor Prepares Notice of Sale for Property.

18.07[1] Contents and Form of Notice of Sale. The levying officer prepares the notice of sale. For personal property, the notice of sale must be in writing, and must include the date, time, and place of sale, and describe the property to be sold [*CCP § 701.530(a)*].

For real property, the notice of sale must be in writing, and must include the date, time, and place of sale, and describe the interest to be sold, and give a legal description of the real property and its street address or common designation, if any [*CCP § 701.540(a)*].

The validity of the notice of sale is not affected by the fact that the real property's street address or other common designation is erroneous or omitted. However, the legal description must be accurate [*CCP § 701.540(a)*].

Cross References:

Forms for notice of sale, see *18.47*, *18.48*.

18.07[2] Process for Notice of Intended Sale Regarding Property Typically Collected. For intangible property that is typically to be collected, rather than sold, such as accounts receivable [*see CCP § 701.520(a)*], the judgment creditor may give notice of intended sale to the judgment debtor. The notice must state that the property will be sold at 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 will be collected rather than sold [*CCP § 701.520(b)*].

Strategic Point:

For the judgment creditor, sale may be a good option in many cases because the judgment creditor often will have to employ another method to force the account debtor to pay, and can bid at the sale. For the judgment debtor, collection generally is preferable so that the full value of the property is applied to the satisfaction of the judgment.

Cross Reference:

Discussion of serving notice of sale regarding property to be collected, see *18.12*.

18.07[3] Time to Serve Notice of Sale. The notice of a sale of personal property must be served not less than 10 days before the sale, so the date designated in the notice must be at least 10 days after the notice has been served [*CCP § 701.530(b)*]. There are special timing provisions for property to be collected [*see CCP § 701.520(c)*].

Cross Reference:

Discussion of serving notice of sale regarding property to be collected, see *18.12*.

In addition, the sale of personal property may not occur until the expiration of the time during which a judgment debtor may make a claim of exemption [*CCP § 701.530(d)*; *see CCP § 703.520(a)*].

The date of sale of the real property designated in the notice must be at least 20 days after the notice of sale has been served, mailed and posted by the levying officer [*CCP § 701.540(b)*, *(c)*].

Cross Reference:

Forms for notice of sale, see *18.47*, *18.48*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewContracts LawTypes of ContractsPersonal Property

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18.08 Time for Notice Starts When Debtor Is Served With Notice of Levy Under Writ of Execution.

18.08[1] Notice of Sale of Personal Property Must Be Served After 10 Days. Sale of a judgment debtor's personal property cannot take place until the expiration of the time during which the debtor may file a claim of exemption, or 10 days after service of the notice of levy [*CCP § 703.530(b)*].

Cross Reference:

Discussion of obtaining a writ of execution or sale, and service of notice of levy, see Ch. 16, Executing and Levying Against Personal Property.

18.08[2] Notice of Sale of Real Property Must Be Served After 20 Days. Sale of a judgment debtor's real property (other than a dwelling or certain leasehold interests) must be preceded by notice served and posted at least 20 days before the date of sale [*CCP § 701.540(b)*].

Cross Reference:

Discussion of notice regarding property used as a dwelling, see *18.08[3]*.

18.08[3] Notice of Sale of Real Property Used As Dwelling Must Be Served After 120 Days. A court order of sale is required before any execution sale can be initiated if the real property is a dwelling owned and resided in by a natural person judgment debtor. The dwelling may be an individual debtor's house, condominium, planned development, or mobilehome affixed to land [CCP § 700.740(a)]. A real property leasehold estate with an unexpired term of less than two years is not treated as a dwelling [*see* CCP § 700.740(a)].

A judgment creditor can obtain an order for sale of the judgment debtor's dwelling only after a noticed hearing in which the court may determine the property's fair market value and decide whether the debtor is entitled to the homestead exemption [*CCP § 704.780(b)*]. If the judgment creditor obtained a court order for sale of the property after a noticed hearing, a copy of the order of sale is automatically transmitted by the court clerk to the levying officer [*CCP § 704.780(c)*]

Notice of sale of an interest in real property, other than a leasehold estate with an unexpired term of less than two years, may not be given until the expiration of 120 days after the date notice of levy on the interest in real property was served on the judgment debtor [*CCP § 701.545*]. The notice of levy is served on the debtor in tandem with the writ of

execution or sale [*CCP § 699.540*].

Warning:

Applying for an order of sale is not easy. The applicant needs to be able to show the value of the property, liens against the property, and the amounts owing on liens. Local rules may also apply. For example, Los Angeles County Superior Court Rule 3.6 requires an appraisal and a preliminary title report (PTR), which takes time to get and is expensive. For example, an appraisal of commercial real property could cost thousands of dollars, and the minimum fee for a PTR generally is $1,000. Because this information must be supplied in the application for order of sale that must be filed within 20 days of levying the writ against real property, the appraisal and PTR should be ordered and obtained by the time the writ is levied or shortly thereafter. In addition, the requirement the judgment creditor must show the amount owing on the liens may require the judgment creditor to request payoff demands from existing lienholders under *CC § 2943(c)*, which can be obtained if an abstract of judgment has been recorded.

Cross Reference:

Discussion of proceedings for writs of execution and writ of sale, see Ch. 17, Executing and Levying Against Real Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.09 Interested Third Parties Must Be Notified of Sale.

18.09[1] Lienholders Must Be Identified and Given Notice of Sale. At least 20 days before the sale, the levying officer must mail the notice of sale to lienholders whose names and addresses have been furnished by the judgment creditor [*CCP § 701.540(h)*].

Warning:

It is the judgment creditor's responsibility to determine the names and addresses of all person having recorded liens on the real property on the date of levy [*CCP § 701.540(h)*]. The relevant lienholders are those of record at least 30 days after the date of levy, and the proper address is the one used by the county recorder for the return of the instrument creating the person's lien after recording. This information can be obtained from the recorder's office or a title company, and should be conveyed to the levying officer either using one of their departmental forms or in a registered letter.

Strategic Point:

When personal property is levied on under a writ of execution, any third person claiming a superior lien may file a claim with the levying officer under *CCP §§ 720.210-720.290* before the property is sold. This obligates the judgment creditor to deposit the amount of the lien claimed (or to make an undertaking) so that the sale can go forward [*CCP § 720.260(a)*]. After the sale is completed, the levying officer will refund the amount of the deposit to the creditor from the proceeds of sale [*CCP § 701.810(c)*].

Cross Reference:

Discussion of third party claims, see Ch. 23, Third Party Claims.

18.09[2] Notice of Sale Must Be Given to Persons Who Requested Notice in Writ Proceeding. When the notice of sale is posted, the levying officer must mail notice of the sale to any person who either filed a request for notice before the writ was issued, or who filed a request with the levying officer after the property was levied on [*CCP § 701.550*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.10 Levying Officer Will Serve Notice of Sale of Personal or Real Property.

18.10[1] Levying Officer Must Serve Notice of Sale. Not less than 10 days before the sale of personal property, notice of sale must be served personally or by mail on the judgment debtor by the levying officer [*CCP § 701.530*].

The levying officer must serve notice of sale of real property on the judgment debtor, personally or by mail, at least 20 days before the date of sale [*CCP § 701.540(b), (c)*]. If more than one lot is being sold, the levying officer must make only one service for each continuous, unbroken tract of land containing the lots [*CCP § 701.540(f)*].

18.10[2] Levying Officer Must Serve Occupant of Real Property. At least 20 days before the date of sale, at the time the notice is posted on the property, the levying officer must also try to serve the notice of sale on one occupant of the property [*CCP § 701.540(e)*]. Service can be made by delivering the notice to the occupant personally. In the person's absence, service can be made by leaving the notice with an employee or agent of the occupant, or member of the occupant's household who is of suitable age and discretion. If no such person can be found when the notice is posted, no further attempts at service are required [*CCP § 701.540(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.11 Levying Officer Must Post Notice of Sale of Personal Property.

Not less than 10 days before the sale of personal property, the levying officer must post the notice of sale [*CCP § 701.530(b)*]. The levying officer must post the notice of sale in three public places in the city (or, if not in a city, in the county) in which the property is to be sold [*CCP § 701.530(c)*].

Strategic Point:

These postings are typically made on a bulletin board located in each courthouse.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.12 Creditor May Serve Notice of Sale of Property to Be Collected.

At the time of a levy on property generally collected [*see CCP § 701.520(a)*], the judgment creditor may serve a notice of intended sale of that property on the judgment debtor. Service must be made personally or by mail. A copy of the notice of intended sale and proof of service on the judgment debtor shall be filed with the court and with 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)*].

Cross Reference:

List of intangible property to be collected, see *18.02*.

Discussion of judgment debtor's motion that property be collected rather than sold, see *18.21*.

Forms, see *18.49 -18.51*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.13 Levying Officer Must Publish and Post Notice of Sale of Real Property.

18.13[1] Levying Officer Must Publish Notice of Sale. For the sale of real property, the levying officer must have the notice of sale published in a newspaper of general circulation in the city (if not in a city, in the judicial district) where the property or any part of it is located [*CCP § 701.540(g)*]. The publication of notice must begin at least 20 days before the sale, and the notice must be published at least once a week for three successive weeks, with at least five days intervening between the respective publication dates [*CCP § 701.540(g)*; *Gov Code § 6063*].

18.13[2] Levying Officer Must Post Notice of Sale. The levying officer must post notice of sale at least 20 days before the sale in (1) a public place in the city (if not in a city, in the judicial district) where the property is located, and (2) a conspicuous place on the property [*CCP § 701.540(d)*]. If more than one lot is being sold, the levying officer needs to make only one posting for each continuous, unbroken tract of land containing the lots [*CCP § 701.540(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawTypes of ContractsPersonal PropertyReal Property LawNonmortgage LiensGeneral Overview

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18.14 Judgment Creditor May Advertise Sale.

The judgment creditor may advertise the real property sale in the classified or other advertising section of a newspaper of general circulation, or other publication. The creditor is entitled to recover the reasonable costs of advertising [*CCP § 701.555*].

The judgment debtor can also advertise the sale at his or her own expense [*CCP § 701.555*], though this is not common.

Consider:

The creditor's attorney should consider spending money on advertising. The sheriff usually will not advertise extensively, and will not advertise in specialized publications for specialized property. Coordinate the advertising with the sheriff to make certain the details are correct, and consider advertising online with an appropriate website. Counsel should do what is possible to generate more interest in the sale, to obtain the greatest return. Failure to do so will result in attendance by just the scavengers who haunt sheriff's sales. Buyers willing to pay anything close to fair value rarely show up at execution sales.

Strategic Point--Judgment Creditor:

In the alternative, rather than advertising the execution sale, it may make more sense in some cases for the judgment creditor to credit bid its judgment at the sale up to point that the judgment creditor would be satisfied with the proceeds and, if no one bids that much, to simply acquire the property through credit-bidding the judgment and then sell the property in an orderly fashion, such as through a broker to sell real property.

Cross Reference:

Discussion of credit bidding, see *18.25[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawTypes of ContractsPersonal PropertyReal Property LawNonmortgage LiensGeneral Overview

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18.15 Failure to Give Notice of Sales Does Not Invalidate Sale.

Failure to give notice of the sale does not invalidate the sale [*CCP § 701.560(a)*]. However, a levying officer who sells the property without giving the required notice is liable to the judgment creditor and the judgment debtor for actual damages caused by the failure to give notice [*CCP § 701.560(b)*].

Strategic Point:

Realistically, it is costly and difficult to make a connection between improper notice and poor sales, because there are many variables, and it requires expert testimony. Proof of actual damage due to failure to give notice would be very problematic. Also, this action would be subject to government claims filing statutes, so counsel would have to do that before filing suit, in a timely manner. Improper notice leading to a poor sale can arise as a negotiating point to settle, compromise, or otherwise obtain an advantage later down the line.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.16 CHECKLIST: Postponing or Staying Execution Sale.

☐ Are debtor and creditors negotiating, and want to postpone sale?

○ Execution sale may be postponed if judgment debtor and judgment creditor request it together in writing.

Authority:
CCP § 701.580

Discussion:
See *18.18*

☐ Has judgment debtor filed a bankruptcy petition?

○ Filing bankruptcy creates automatic stay of enforcement of underlying judgment against judgment debtor or debtor's property.

○ Stay of execution sale is automatic and requires no court order.

○ Judgment debtor notifies levying officer and judgment creditor that bankruptcy petition has been filed.

Authority:
11 USC § 362(a)(2)

Discussion:
See *18.19*

☐ Has judgment debtor made a late claim of exemption?

○ Has debtor brought a motion under *CCP § 473(b)*?

○ Has debtor proven excusable neglect?

Authority:
CCP §§ 703.020, 703.030(c)

Discussion:
See *18.20*

☐ Has judgment debtor filed a motion to have applicable intangible property collected, rather than sold?

○ Motion must be made within 10 days after notice of intended sale of property is served on judgment debtor.

○ Judgment debtor must serve motion on judgment creditor.

Authority:
CCP § 701.520

Discussion:
See *18.21*

Forms:
See *18.49 -18.51*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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18.17 Options and Strategy.

The judgment debtor and judgment creditors may agree to postpone an execution sale if they are involved in negotiations to resolve the dispute [*CCP § 701.580*]. They must deliver the request, in writing, to the levying officer [*CCP § 701.580*].An execution sale will be automatically stayed if the judgment debtor notifies the judgment creditor and the levying officer that the debtor has filed a bankruptcy petition [*11 USC § 362(a)*]. A judgment debtor may also make a late claim of exemption by filing a *CCP § 473(b)* motion and showing excusable neglect in the delay of filing the exemption [*CCP §§ 703.020*, *703.030*]. Finally, a judgment debtor may file a motion to have applicable intangible property collected rather than sold under the writ of execution [*CCP § 701.520*].

Cross Reference:

Discussion of stays pending pretrial motion or on appeal, and stays during period of military service, *see* Ch. 15, Staying Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.18 Parties May Agree to Postpone Sale for Negotiations.

An execution sale may be postponed if the judgment debtor and judgment creditor together request it in writing. The request must be delivered to the levying officer conducting the sale and must include a fixed, agreed day and time for the new sale. The postponed sale must be held at the place originally fixed for sale [*CCP § 701.580*].

If the sale is so postponed, the levying officer must give notice of the postponement by public declaration at the time and place of the original sale. No other notice must be given [*CCP § 701.580*].

Strategic Point--Judgment Creditor:

If a payment plan is established, counsel should be sure to include the costs of sale already incurred by the sheriff or other levying officer, because otherwise these charges will not be reimbursed.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.19 Debtor May Give Notice That Bankruptcy Petition Has Been Filed.

18.19[1] Filing Bankruptcy Petition Causes Automatic Stay of Sale. The judgment debtor's filing of a federal petition in bankruptcy causes an automatic stay of enforcement in most cases of the underlying judgment against the debtor or the debtor's property [*11 USC § 362(a)(2)*].

Warning:

2005 amendments to the bankruptcy statutes changed the automatic stay provisions in the event of serial filings or fraudulent filings to preclude a sale, and it is not always automatically imposed.

Cross Reference:

Discussion of when stay is not automatic, see *Ch. 3, Effect of Bankruptcy, 3.08*.

Postponement of the sale to a specified new date does not necessarily violate the automatic stay if it gives the judgment creditor an opportunity to file a motion for relief from the stay in the bankruptcy court. Rather, it preserves the status quo between the creditor and the debtor until the bankruptcy process is completed or the creditor obtains relief from the stay [*Taylor v. Slick (3d Cir 1999) 178 F3d 698, 702]* .

Strategic Point:

If counsel is continuing the sale to allow for a request for stay hearing, calendar it far enough in advance to get the matter filed and heard, usually about 45 to 60 days.

Finding Bankruptcy Filings Using Online Resources:

Many resources are available online for locating bankruptcy filings. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Filings > CA Bankruptcy Filings
  - Sample Search: To find California bankruptcy filings, use a NAME segment search:

name(first name /3 last name).

Cross Reference:

Discussion of postponement of sale, see *18.18*.

18.19[2] No Notice Is Required to Initiate Bankruptcy Stay. The stay of the execution sale is automatic in most cases and requires no court order [*see 11 USC § 362(a)*]. It should be sufficient that the judgment debtor notify the levying officer and the judgment creditor that a bankruptcy petition has been filed, but it is better practice to provide the levying officer with a file-stamped copy of the bankruptcy petition.

Warning:

The 2005 bankruptcy changes do not always impose an automatic stay, particularly in the case of a serial filer. If someone previously received an order for request for stay in a prior bankruptcy, there is no stay unless the debtor applies to the court for a reimposition.

Cross Reference:

Discussion of when stay is not automatic, see *Ch. 3, Effect of Bankruptcy, 3.08*.

Strategic Point:

Counsel should have the debtor or the debtor's attorney provide the bankruptcy petition number and date of filing to verify. If the debtor refuses, it may be that the petition is not actually filed yet. Counsel can check on PACER online to verify.

Cross Reference:

Discussion of PACER, see *Ch. 3, Effect of Bankruptcy, 3.04[2]*.

The judgment debtor normally will file a notice of stay or proceedings on mandatory Judicial Council Form CM-180.

Cross Reference:

Discussion of notification of stay, see *Ch. 3, Effect of Bankruptcy, 3.04[2]*.

Judicial Council Form CM-180, see *Ch. 3, Effect of Bankruptcy, 3.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.20 Debtor Can Make Late Claim of Exemption.

18.20[1] Debtor Can Bring CCP § 473(b) Motion. Generally, a claim for exemption must be made within 10 days after the notice of levy was served on the judgment debtor and is resolved by a court order after motion and hearing [*CCP §§ 703.520*, *703.570*]. However, the exemption statute does not limit the authority of the court pursuant to *CCP § 473(b)* to relieve a person, on terms that are just, from failure to claim an exemption within the time and in the manner prescribed in the applicable enforcement procedure [*CCP § 703.030(c)*].

18.20[2] Moving Party Must Show Exemption Plus Excusable Neglect. A court can relieve a party, on terms that are just, from a judgment, order or other proceeding taken against the party through mistake, inadvertence, surprise or excusable neglect [*CCP § 473(b)*]. Application for relief must be made within six months after the judgment, order or proceeding was taken [*CCP § 473(b)*]. Exemptions from enforcement of judgment, such as the exemption for property of debtors in active military service, may be claimed only by debtors who are natural persons and, in the case of community property, by their spouses [*CCP § 703.020*].

Cross Reference:

Discussion of claims of exemption from levy against personal property, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of claims of exemption from levy against real property, see Ch. 17, Executing and Levying Against Real Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionEstate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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Chapter 18 Execution Sales
III. POSTPONING OR STAYING EXECUTION SALE

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18.21 Debtor Can File Motion to Have Applicable Property Collected Rather Than Sold.

18.21[1] Collection Procedure Applies to Specified Intangible Property. For applicable property levied on, the property will be collected rather than sold, unless the creditor gives notice of intended sale [18.21(c)]. However, a judgment debtor can file a motion to have levied property collected rather than sold under the writ of execution [*CCP § 701.520(c)*]. This procedure applies to the following types of property [*CCP § 701.520(a)*]:

- Accounts receivable.
- Chattel paper.
- General intangibles.
- Final money judgments.
- Instruments that are not customarily transferred in an established markets.
- Certain consumer contracts, including instruments that represent an obligation arising out of the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased or licensed for use, the services furnished, or the money loaned was used by an individual primarily for personal, family, or household purposes.

Consider:
In most cases, use of this process compared to the expected return is going to be prohibitively costly, and so is rarely used.

18.21[2] Creditor Must Have Served Notice of Intended Sale. For this type of intangible property to be sold rather than collected, the judgment creditor must have served a notice of intended sale of the property on the judgment debtor at the time of levy on the property. Service must have been made personally or by mail. The creditor must file a copy of the notice of intended sale and proof of service on the judgment debtor with the court and the levying officer [*CCP § 701.520(b)*].

Cross Reference:

Discussion of creditor's duties to for this type of sale, see *18.12*.

18.21[3] Debtor Must Serve Motion on Judgment Creditor. If the creditor files a notice of intended sale, the judgment debtor can move to have the property collected rather than sold. The debtor must make the motion within 10 days after the notice of intended sale of the property is served on the judgment debtor [*CCP § 701.520(c)*]. The judgment debtor must 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, within the 10-day period. If the copy is not filed with the levying officer within the applicable time period, the officer must proceed to sell the property. If the copy is filed on time, the officer must continue to collect the property until otherwise ordered by the court [*see CCP § 701.520(c)*].

18.21[4] Court Has Discretion to Structure Collection or Sale. At the hearing on the motion for collection rather than sale, the court may order that the property be sold or be collected depending on the circumstance of each case [*CCP § 701.520(d)*]. If the court orders that the property be sold, the order may specify the terms and conditions of the sale. If the court orders that the property by collected, the court may condition its order on an assignment of the property by the judgment debtor to the judgment creditor [*CCP § 701.520(d)*].

Cross Reference:

Forms, see *18.49 -18.51*.

Strategic Point:

Counsel should take the opportunity to suggest conditions of sale to the court. For example, in collecting accounts receivable, there are usually a significant number of claims of offset or prior payment. Who decides the validity of these claims? Who has the ability to negotiate settlement of these disputes rather than engaging in enforcement litigation? Where does the money go and who controls it? Consider these issues and have your proposal ready for the court before the hearing on sale.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 18 Execution Sales
IV. CONDUCTING EXECUTION SALE

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18.22 CHECKLIST: Conducting Execution Sale.

☐ Levying officer conducts sale at auction.

○ Sale is held at date, time and place specified in notice of sale, in the county where property or part of property is situated.

○ Personal property must be within view if capable of manual delivery.

○ Property will be sold separately or in groups or lots that are likely to bring highest price.

○ Sale is made to highest bidder.

○ Sale ends when it has yielded an amount necessary to satisfy the money judgment.

Authority:
CCP § 701.570(a)-(e)

Discussion:
See *18.24[1] -[4]*

☐ Payments at sale are generally by cash, certified check, or cashier's check.

○ Credit bidding is allowed for interests in real property that exceed $5,000.

Authority:
CCP § 701.590

Discussion:
See *18.25[1], [2]*

☐ Minimum bid may be before property will be sold.

○ If minimum bid is not received, levying officer must promptly release property.

○ If bid on real property that is debtor's dwelling, homestead exemption if any must be satisfied.

○ Judgment creditor may bid on property by giving levying officer receipt crediting all or part of amount required to satisfy judgment

Authority:
CCP §§ 701.590, 701.620, 704.800

Discussion:
See *18.26[1] -[5], 18.27[1], [2]*

☐ If bidder defaults, bidder may be liable for damages to judgment creditor and/or judgment debtor.

○ On default, levying officer must sell to the next highest bidder or conduct a new sale.

○ Defaulting bidder's deposit is forfeited to satisfy money judgment.

Authority:
CCP § 701.600

Discussion:
See *18.28[1] -[3]*

☐ When purchaser pays the amount due, levying officer executes and delivers deed of sale to the purchaser and records a duplicate of deed of sale in office of county recorder.

○ For personal property, levying officer delivers the property to the purchaser.

Authority:
CCP §§ 701.650, 701.660, 701.670

Discussion:
See *18.29[1], [2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsLocal

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18.23 Options and Strategy.

The levying officer conducts sales at auction and the sale is made to the highest bidder [*CCP §§ 701.570(b)-(e)*]. Bidders must provide cash, certified check, or cashier's check, or for real property in excess of $5,000 may purchase by credit bidding [*CCP § 701.590*].

Strategic Point--Judgment Creditor:

A creditor who plans to bid for property should bring to the sale a written receipt crediting all or part of the amount required to satisfy the judgment. The creditor should also bring cash (or a cashier's check or certified check) to cover any claims that must be paid out of the sale proceeds. These include costs charged by the sheriff or other levying officer that were not covered by the advance payment, as well as preferred labor claims, exempt proceeds, and any other claim that is required by statute to be satisfied.

Strategic Point--Debtor:

The judgment debtor need not attend the execution sale, but may want to encourage others to bid on the property so that the sale price is as high as possible. The debtor may also give the levying officer a written request that multiple items be sold in a preferred order, or together or in lots, to maximize the sale price so as to release other property not needed to be sold after the amount of the money judgment is satisfied.

Strategic Point--Bidders:

Bidders must pay cash in full or make 10 percent deposit with the cash balance due shortly. Bidders should be aware that if they default they forfeit their deposit and may be liable for attorney's fees and costs in any action brought by the judgment for the difference between the actual sale price and defaulting bid [*see CCP §§ 701.590(d)* 701.600(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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18.24 Levying Officer Conducts Sale at Auction.

18.24[1] Sale Is Conducted As Specified in Notice of Sale. The execution sale is held at date, time (between 9 a.m. and 5 p.m.), and place specified in notice of sale, in the county where the property or part of the property is situated. Real property situated in two or more counties may be sold in one county as instructed by the judgment creditor [*CCP § 701.570(a)*].

Strategic Point:

Counsel should either attend the sale or have the client do so. There may be issues pertaining to credit bids, and potential buyers may have questions regarding the property that, if answered, will increase interest or set aside buyers' fears. Counsel or the client's presence will also be helpful if there is a later claim of irregularity in the sale.

18.24[2] Sale Is Made to Highest Bidder. The sale is made at auction to the highest bidder [*CCP § 701.570(b)*]. The sale typically takes place in a hearing room in a courthouse, designated in the notice, and is conducted by a levying officer such as a senior deputy sheriff. The levying officer may not be a purchaser or have an interest in any purchase at a sale [*CCP § 701.610*].

After sufficient property has been sold to yield the amount required to satisfy the money judgment, no more may be sold [*CCP § 701.570(e)*].

18.24[3] Personal Property Must Be Available for Inspection. If personal property capable of manual delivery is to be sold, it must be within the view of those who attend the sale unless, on application of the judgment creditor or debtor, the court orders otherwise [*CCP § 701.570(c)*].

Exception:
There is no corresponding statutory requirement that real property be available for inspection.

18.24[4] Debtor May Request Specific Sale Order or Grouping of Items. Property must be sold separately or in groups or lots that are likely to bring the highest price. The judgment debtor may request that the property be sold separately or together, and may request that the property be sold in a particular order. If the debtor is not present at the sale, the request may be made in writing and delivered to the levying officer before the sale [*CCP § 701.570(d)*].

The levying officer must honor the request if, in the officer's opinion, the requested manner of sale is likely to yield an amount at least equal to any other manner of sale or the amount required to satisfy the money judgment. The levying officer is not liable for a decision made in good faith as to the grouping or order of property [*CCP § 701.570(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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18.25 Bidders Must Provide Cash or Make 10 Percent Deposit.

18.25[1] Payment Ordinarily Is by Cash or Certified Check or Cashier's Check. The purchaser at a sale must pay in cash or by certified check or cashier's check [*CCP § 701.590(a)*].

In lieu of cash, a judgment creditor may give the levying officer a written receipt crediting all or part of the judgment [*CCP § 701.590(b)*]. Other costs, such as sheriff's fees or statutory claims that must be paid out of the sale proceeds, must still be paid in cash or certified check or cashier's check [*CCP § 701.590(b)*].

18.25[2] Bidder May Elect Credit Bidding.

18.25[2][a] Credit Bidding for Real Property Sale Over $5,000. If the highest bid for an interest in real property sold exceeds $5,000, the highest bidder may elect to treat the sale as a credit transaction [*CCP § 701.590(c)*]. A person who makes the election must deposit at least $5,000 or 10 percent of the amount bid, whichever is greater, and within 10 days after the date of the sale must pay the balance due plus costs accruing with regard to the property sold and interest accruing (at the rate on money judgments) on the balance of the amount bid from the date of sale until the date of payment [*CCP § 701.590(c)*].

A person who elects to treat the sale of property as a credit transaction is not entitled to possession of the property sold until the amount bid, plus accruing costs and interest, is paid [*CCP § 701.590(e)*].

18.25[2][b] Credit Bidding for Personal Property Sale Over $2,500. If the highest bid for an item, group, or lot of personal property sold exceeds $2,500, the highest bidder may elect to treat the sale as a credit transaction [*CCP § 701.590(d)*]. A person who makes the election must deposit at least $2,500 or 10 percent of the amount bid, whichever is greater, and within 10 days after the date of the sale must pay the balance due plus costs accruing with regard to the property sold and interest accruing (at the rate on money judgments) on the balance of the amount bid from the date of sale until the date of payment [*CCP § 701.590(d)*].

A person who elects to treat the sale of property as a credit transaction is not entitled to possession of the property sold until the amount bid, plus accruing costs and interest, is paid [*CCP § 701.590(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawTypes of ContractsPersonal Property

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18.26 Minimum Bid Is Required Before Sale of Property.

18.26[1] Property Cannot Be Sold Unless Minimum Bid Requirements Are Met. If a minimum bid required for the sale of property is not received, the levying officer must promptly release the property [*CCP § 701.620(c)*].

18.26[2] Requirements for Bids on Personal Property. Personal property may not be sold unless the amount bid exceeds the total of the following amounts [*CCP § 701.620(a)*]:

- The amount of all preferred labor claims that are required by *CCP § 1206* to be satisfied from the proceeds. Preferred labor claims up to $900 that are undisputed are generally paid out by the levying officer if they were filed under *CCP § 1206(a)* by a person who performed work for the judgment debtor within 90 days before the levy.

- The amount of any state tax lien [*see Gov Code § 7162*] that is superior to the judgment creditor's lien.

- If the purchaser is not the judgment creditor, the amount of any deposit made under *CCP § 720.260* with interest (at the rate on money judgments) from the date of the deposit to the date of the sale.

A deposit under *CCP § 720.260* is required whenever a third person claiming a superior lien files a claim with the levying officer under *CCP §§ 720.210-720.290* before personal property is sold [*CCP § 720.260(a)*]. After the sale is completed, the levying officer refunds the amount of the deposit to the creditor from the proceeds of sale [*CCP § 701.810(c)*].

The amount of any applicable proceeds exemption that is provided by CCP § 704.101 (motor vehicles), *CCP § 704.020* (household furnishings and other personal effects) or *CCP § 704.060* (tools of trade) [*CCP § 701.620(b)*].

18.26[3] Requirements for Bids on Real Property. Real property may not be sold unless the amount bid exceeds the total of the following amounts [*CCP § 701.620(a)(1), (2)*]:

- The amount of all preferred labor claims that are required by *CCP § 1206* to be satisfied from the proceeds. Preferred labor claims up to $900 that are undisputed are generally paid out by the levying officer if they were filed under *CCP § 1206(a)* by a person who performed work for the judgment debtor

within 90 days before the levy.

- The amount of any state tax lien [*see Gov Code § 7162*] that is superior to the judgment creditor's lien.

18.26[4] Bid Requirements on Real Property Subject to Homestead Exemption.

18.26[4][a] Bid Must Exceed Debtor's Homestead Exemption and Senior Liens and Encumbrances. On the sale of a judgment debtor's homestead, the highest bid can be accepted by the levying officer only if it exceeds the amount of the homestead exemption plus the amount needed to satisfy senior liens and encumbrances on the property senior to that of the judgment creditor [*CCP § 704.800(a)*; *Bratcher v. Buckner (2001) 90 CA4th 1177, 1188-1189, 109 CR2d 534* ; *Rourke v. Troy (1993) 17 CA4th 880, 885-886, 21 CR2d 660*].

The amount of the homestead exemption is determined by the court in the hearing on application for order of sale and stated in the order for sale of the property [*CCP § 704.800(b)*; *see CCP § 704.780* (determination of fair market value)].

18.26[4][b] Bid Must Be at Least 90 Percent of Fair Market Value. On the sale of a judgment debtor's homestead property, if the highest bid is not at least 90 percent of the property's fair market value, the property may not be sold unless, on the judgment creditor's motion, the court grants permission to accept the highest bid that exceeds the minimum bid, or issues a new order of sale [*CCP § 704.800(b)*].

Cross Reference:

Discussion of homestead exemption, see Ch. 17, Executing and Levying Against Real Property.

18.26[5] Homestead Property Is Released to Debtor If Minimum Bid Is Not Met. If a sufficient bid is not received, the homestead property may not be sold and must be released from the execution lien [*CCP § 704.800(a)*]. If property is so released, it may not be subjected to a court order of sale on a subsequent application by the same judgment creditor for a period of one year [*CCP § 704.800(a)* Rourke v. Troy (1993) 17, CA 4th 880, 885 1/N 886, *21 CR 2d 660]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsContracts LawTypes of ContractsPersonal PropertyReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment LiensTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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18.27 Judgment Creditor May Bid on Property.

18.27[1] Written Credit Receipt Against Judgment Is Sufficient for Bid. A judgment creditor may bid by giving the levying officer a written receipt crediting all or part of the amount required to satisfy the judgment [*CCP § 701.590(b)*].

Strategic Point:

The creditor (or the creditor's attorney or agent) can, and should attend the sale and bid on the property. This ensures that the property will be sold for its fair market value. Under a worst-case scenario, the debtor can also bid a low amount, obtain the levied property, and still have the majority of the judgment unsatisfied. Finally, the creditor can actually bid part of the judgment itself at the sale. For example, creditor has a $15,000 judgment. Debtor owns an antique pool table with a fair market value of $18,000. At the sale, one bidder appears, who bids $500. The creditor or agent can attend and bid an amount over $500 (for example $700) and, if the successful bidder, merely give the debtor "credit" on the $15,000 judgment (reducing it to $14,300), and obtain the pool table as well, leaving the creditor still with the $14,300 judgment.

Consider:

A party considering a credit bid should decide in advance how high to bid in order to get the most out of the sale. Bidders should bid in increments; it is not necessary to bid in the entire amount of the judgment. It is permissible to bid half the judgment, for example, and still retain the balance in a judgment for other execution purposes on other property. Note that credit bids may serve to increase the amounts bid at the sale by others.

Strategic Point:

Bidders should check with the sheriff in advance to find out what procedures they follow regarding credit bids. The Los Angeles County Sheriff, for example, does not require a receipt to be submitted except for the winning bidder, and then only after the sale.

18.27[2] Costs and Prior Claims Must Be Paid in Cash. Although a judgment creditor may bid using a receipt for the judgment, cash or a certified check or cashier's check still is required to pay certain costs, including the levying officer's costs remaining unsatisfied, the amount of preferred labor claims, exempt proceeds, and any other claim that is required by statute to be satisfied [*CCP § 701.590(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsContracts LawTypes of ContractsPersonal PropertyReal Property LawNonmortgage LiensJudgment LiensTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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18.28 Defaulting Bidder May Be Liable to Judgment Creditor or Debtor.

18.28[1] Defaulting Bidder May Be Liable for Damages. If the highest bidder defaults and does not pay the amount bid at the execution sale, the levying officer must sell the property to the next highest bidder or conduct a new sale. If the default occurs at the sale, the levying officer must sell the property to the next highest bidder at the amount of the next highest bid, if that bidder agrees, or to the highest bidder at a new sale held immediately [*CCP § 701.600(a)(1)*].

The levying officer may, in his or her discretion, reject any subsequent bid of a defaulting bidder [*CCP § 701.600(d)*].

If the sale was a credit transaction, and the highest bidder does not pay the balance of the amount bid within the 10-day time limit, the levying officer must sell the property to the highest bidder at a new sale [*CCP § 701.600(a)(2)*].

18.28[2] Defaulting Bidder's Deposit Is Forfeited to Satisfy Money Judgment. The levying officer must apply the amount of the deposit of a defaulting highest bidder in the following order [*CCP § 701.600(b)*]:

> (1) First, to the satisfaction of costs accruing with regard to the property sold from the date of the sale until the date the property is resold, including costs of resale.
>
> (2) Second, to the satisfaction of interest (at the rate on money judgments) on the amount bid from the date of the sale until the date the property is resold.
>
> (3) Third, to the amount required to satisfy the money judgment in the order of distribution prescribed by *CCP § 701.810* or *CCP § 704.850*, whichever is applicable.

Cross Reference:

Discussion of distribution of proceeds, see *18.34*.

18.28[3] Judgment Creditor or Judgment Debtor Can Sue Defaulting Bidder for Damages. On a default, if there is a sale to the next highest bidder or to the highest bidder at a new sale, the defaulting bidder is liable for the following amounts in an action by the judgment creditor or judgment debtor [*CCP § 701.600(c)*]:

- The amount bid, less the amount obtained from the resale of the property and the amount of any deposit applied to costs, interest or the money judgment. The amount recovered must be distributed in the manner set out in CPP § 701.810 or *CCP § 704.850*, whichever is applicable.

Cross Reference:

Discussion of distribution of proceeds, see *18.34*.

- Any costs accruing with regard to the property sold from the date of sale until the date the property is resold, including costs of resale.

- Interest (at the rate on money judgments) on the amount bid from the date of the sale until the date the property is resold.

- Costs and attorney's fees incurred in the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawTypes of ContractsPersonal PropertyReal Property LawNonmortgage LiensJudgment Liens

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IV. CONDUCTING EXECUTION SALE

2-18 MB Practice Guide: CA Debt Collection 18.29

18.29 Levying Officer Delivers Property to Buyer.

18.29[1] Levying Officer Executes and Records Deed for Real Property. When the purchaser of an interest in real property pays the amount due, the levying officer conducting the sale must execute and deliver a deed of sale to the purchaser and record a duplicate of the deed of sale in the office of the county recorder [*CCP § 701.660*]. The certificate of sale or deed of sale must contain all of the following [*CCP § 701.670*]:

- The title of the court where the judgment was entered under which the sale was made and the cause and number of the action.
- The date of entry of the judgment and of any subsequent renewals and where entered in the records of the court.
- The name and address of the judgment creditor and the name and last known address of the judgment debtor.
- A description of the property sold.
- The date of sale.

18.29[2] Levying Officer Delivers Personal Property. When the purchaser of personal property pays the amount due [*CCP § 701.650(a)*]:

- If the property is capable of manual delivery, the levying officer must deliver the property to the purchaser and, if the purchaser requests it, must execute and deliver a certificate of sale to the purchaser.
- If the property is not tangible personal property, or if it is otherwise not capable of manual delivery, the levying officer must execute and deliver a certificate of sale to the purchaser.

If the property or a certificate is subject to manual delivery, the levying officer must sign or endorse any document or instrument in the levying officer's possession relating to the title to or the right to possession of the property and deliver it to the purchaser [*CCP § 701.650(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawNegotiable InstrumentsNegotiationDeliveryContracts LawTypes of ContractsPersonal PropertyReal Property LawDeedsGeneral Overview

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18.30 Buyer Acquires Debtor's Interest in Property With Liens Extinguished.

18.30[1] Buyer's Interest Is Subject to Prior Unsatisfied Liens. On the sale of property at an execution sale, the lien under which the property is sold, liens subordinate to that lien, and any state tax lien on the property sold are extinguished [*CCP § 701.630*; *see Gov Code § 7162*].

Cross Reference:

Discussion of lien priority and relation back, see Ch. 12, Determining Priority and Sources of Liens.

18.30[2] Buyer Assumes Debtor's Interest in Wholly or Jointly Owned Property. The purchaser of property at an execution sale acquires any interest of the judgment debtor in the property sold that is held on the effective date of the lien under which the property was sold, or that is acquired between the effective date of the lien and the date of sale [*CCP § 701.640*].

If a judgment debtor owns a dwelling as a joint tenant or cotenant, or owns less than a fee simple absolute, only the judgment debtor's interest in the real property, not the property itself, can be sold at an execution sale [*CCP § 704.820*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawNonmortgage LiensGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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Chapter 18 Execution Sales
V. OBTAINING SALE PROCEEDS IN SATISFACTION OF JUDGMENT

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18.31 CHECKLIST: Obtaining Sale Proceeds in Satisfaction of Judgment.

☐ Proceeds from execution sales must be paid to person entitled to them within 30 days after receipt by levying officer.

Authority:
CCP § 701.820(b)

Discussion:
See *18.33[1]*

☐ If payments are delayed, levying officer may be liable for damages if:

○ Levying officer failed to pay or deposit proceeds with court within required time frames.

○ Person entitled to proceeds has filed written demand for payment of proceeds with levying officer.

○ Levying officer failed within 10 days of demand to pay person filing demand the proceeds to which person is entitled.

Authority:
CCP § 701.820(d)

Discussion:
See *18.33[2]*

☐ Determine if proceeds have been distributed according to statutory priority.

Authority:
CCP §§ 701.810(a)-(h), 704.800(a)

Discussion:
See *18.34*, *18.35*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawEstatesConcurrent OwnershipJoint TenanciesTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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18.32 Options and Strategy.

Promptly after an execution sale, the levying officer must distribute the proceeds to the person entitled to them, unless there are conflicting claims to all or part of the proceeds [*CCP § 701.820(a)*]. The proceeds must be paid to the person entitled to them within 30 days after they are received by the levying officer [*CCP § 701.820(b)*]. If the levying officer fail to pay the proceeds in a timely manner, the officer may be liable for penalties and interest [*CCP § 701.820(d)*; *Gov Code § 26680*]. The levying officer must also distribute the proceeds of a sale or collection in accordance with statutory priority [*CCP §§ 701.810*, *704.800(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawEstatesConcurrent OwnershipJoint TenanciesTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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18.33 Levying Officer Must Distribute Proceeds Within 30 Days.

18.33[1] Creditor Can File Written Demand for Payment. Promptly after an execution sale, the levying officer must distribute the proceeds to the persons entitled to them, unless there are conflicting claims to all or a portion of the proceeds of sale or collection known to the levying officer, in which case the levying officer must deposit the proceeds with the court [*CCP § 701.820(a)*]. The proceeds must be paid to the person entitled to them within 30 days after they are received by the levying officer [*CCP § 701.820(b)*].

A buyer who, under a credit transaction, made a 10 percent deposit on a high-value personal or real property must pay the balance in cash within 10 days after the sale so the proceeds of a credit transaction generally must be paid out 40 days after the sale [*CCP § 701.590*]. If the proceeds are not to be received by the levying officer in one payment, the levying officer may accumulate proceeds received during a 30-day period and the accumulated proceeds must be paid to the person entitled to them not later than 20 days after the expiration of the 30-day period [*CCP § 701.820(c)*].

If the proceeds are received by the levying officer in the form of a check or other noncash payment that is to be honored on presentation by the levying officer for payment, the proceeds are not considered "received" until the check or other form of noncash payment has actually been honored on presentation for payment [*CCP § 701.820(d)*].

Cross Reference:

Discussion of credit transaction, see *18.25[2]*

18.33[2] Levying Officer Is Liable for Penalties and Interest for Delay. If, on demand, the sheriff neglects or refuses to pay over to the person entitled to it, after deducting all legal fees, the person may recover the amount and 25 percent damages and interest at the rate of 10 percent a month from the time of demand [*Gov Code § 26680*].

The levying officer is liable only if all the following conditions are satisfied [*CCP § 701.820(d)*]:

- The levying officer failed to pay the proceeds or deposit them with the court within the time required.

- On that failure, a person entitled to any of the proceeds filed with the levying officer a written demand for payment of the proceeds to the persons entitled to them.

- The levying officer failed within 10 days after the demand was filed to pay to the person filing the demand the proceeds to which that person is entitled.

Strategic Point:

When any action is brought against the sheriff, all deputies and employees of the sheriff on whose negligence, willful or wrongful act, or other default the action is based are necessary parties defendant [*Gov Code § 26685*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.34 Priority of Creditors on Distribution of Proceeds of Execution Sale.

18.34[1] Levying Officer Must Distribute Proceeds According to Statutory Priority. The levying officer must distribute the proceeds of sale or collection according to the priority set out by statute [*CCP § 701.810*].

Cross Reference:

Discussion of priority, see *18.34[2] -[8]*

18.34[2] Labor, Tax, and Other Special Lienholders Have First and Second Priority. The first priority is to persons having preferred labor claims that are required by *CCP § 1206* to be satisfied, in the amounts required [*CCP § 701.810(a)*]. Preferred labor claims up to $900 that are undisputed are generally paid out by the levying officer if they were filed under *CCP § 1206(a)* by a person who performed work for the judgment debtor within 90 days before the levy.

The second priority is to a state department or agency having a state tax lien (defined in *Gov Code § 7162*) that is superior to the judgment creditor's lien, for amount of the lien [*CCP § 701.810(b)*].

18.34[3] Judgment Creditor's Deposit Has Third Priority. If a deposit has been made pursuant to *CCP § 720.260* and the purchaser at the sale is not the judgment creditor, the third priority is to the judgment creditor in the amount required to repay the deposit with interest (at the rate on money judgments) from the date of the deposit [*CCP § 701.810(c)*].

When personal property is levied on under a writ of execution, any third person claiming a superior lien may file a claim with the levying officer under *CCP §§ 720.210-720.290* before the property is sold. This obligates the judgment creditor to deposit the amount of the lien claimed (or to make an undertaking) so that the sale can go forward [*CCP § 720.260(a)*]. After the sale is completed, the levying officer will refund the amount of the deposit to the creditor from the proceeds of sale [*CCP § 701.810(c)*].

18.34[4] Judgment Debtor's Exemptions Have Fourth Priority. The fourth priority is to the judgment debtor in the amount of any applicable exemption of proceeds pursuant to *CCP § 704.010* (motor vehicle), *CCP § 704.020* (household furnishings and other personal effects) or *CCP § 704.060* (tools of trade), except that the proceeds must be used to satisfy all of the following in the order of their respective priorities [*CCP § 701.810(d)*]:

- Any consensual liens and encumbrances, and any liens for labor or materials, that are subordinate to the judgment creditor's lien.

- Subject to *CCP § 688.030*, any state tax lien [*see* in *Gov Code § 7162* (definition)] on the property sold if the notice of state tax lien on the property has been recorded or filed pursuant to *Gov Code § 7171* before the time the levying officer received the proceeds of the sale or collection.

18.34[5] Levying Officer's Costs Have Fifth Priority. The fifth priority is to the levying officer for the reimbursement of the levying officer's costs for which an advance has not been made [*CCP § 701.810(e)*].

18.34[6] Judgment Creditor Has Sixth Priority. The sixth priority is to the judgment creditor to satisfy the following [*CCP § 701.810(f)*]:

- Costs and interest accruing after issuance of the writ pursuant to which the sale or collection is conducted.

- The amount due on the judgment with costs and interest, as entered on the writ.

18.34[7] Other Creditors Have Seventh Priority. The seventh priority is to any other judgment creditors who have delivered writs to the levying officer, accompanied by instructions to levy on the judgment debtor's property or the proceeds of its sale or collection [*CCP § 701.810(g)*].

This priority also applies to any other persons actually known by the levying officer to have a claim, lien, or other interest subordinate to the judgment creditor's lien that is extinguished by the sale and that is not otherwise satisfied under the execution sale statutes, in the amounts to which they are entitled in order of their respective priorities [*CCP § 701.810(g)*]. The lien under which the property is sold at execution sale, and liens subordinate to that lien, and any state tax lien (defined in *Gov Code § 7162*) on the property sold are extinguished [*CCP § 701.630*].

18.34[8] Judgment Debtor Has Last Priority. The eighth and last priority is to the judgment debtor in the amount remaining [*CCP § 701.810(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.35 Priority of Creditors After Sale of Homestead Property.

For homestead property, the levying officer may accept the highest bid, and sell the homestead, only if the bid exceeds the amount of the homestead exemption plus the amount needed to satisfy all senior liens and encumbrances on the property, including any attachment and judgment lien [*CCP § 704.800(a)*; *Bratcher v. Buckner (2001) 90 CA4th 1177, 1188-1189, 109 CR2d 534* ; *Rourke v. Troy (1993) 17 CA4th 880, 885-886, 21 CR2d 660]* .

The levying officer must distribute proceeds of sale of a homestead in the following order [*CCP § 704.850*]:

(1) To discharge all senior liens and encumbrances, if any, on the property.

(2) To the judgment debtor in the amount of any applicable exemption of proceeds under *CCP § 704.720*.

(3) To the levying officer for the reimbursement of the levying officer's costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(a) Costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(b) The amount due on the judgment, with costs and interest, as entered on the writ.

(5) To the judgment debtor in the amount remaining.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.36 Judgment Creditor Should Prepare Memorandum of Costs.

18.36[1] Judgment Creditor Is Entitled to Costs of Sale. After an execution sale, if an adequate bid was received, the judgment creditor is entitled to recover reasonable costs incurred in connection with selling homestead property [*CCP § 704.840(a)*]. This includes all costs and interest accruing after issuance of the writ pursuant to which the sale or collection is conducted [*CCP § 701.810(f)(1)*].

18.36[2] File and Serve Memorandum of Costs Immediately After Sale. The judgment creditor has up to two years to file a memorandum of costs from the time the costs were incurred [*CCP § 685.070(b)*]. By filing a memorandum of costs immediately, the creditor is assured that the levying officer will pay out the costs from the proceeds of the sale when the distribution is made within 30 days [*see CCP § 701.820(b)*].

The memorandum should be filed and served on the judgment debtor and the levying officer, either personally or by mail [*CCP § 685.070(b)*; *see CCP § 685.090(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. RESOLVING CONFLICTING CLAIMS TO PROCEEDS OF EXECUTION SALE

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18.37 CHECKLIST: Resolving Conflicting Claims to Proceeds of Execution Sale.

☐ Determine if there are conflicting claims to proceeds from sale or collection of property.

○ Levying officer must be notified before proceeds distributed so that proceeds can be deposited with court.

Authority:
CCP § 701.830(a)

Discussion:
See *18.39*, *18.40[2]*

☐ Considering filing motion for distribution of sale proceeds.

○ Any interested person may file motion.

○ There is no time limit to file motion once proceeds have been deposited with court.

○ Motion must be served on all parties as determined by court.

Authority:
CCP § 701.830(a)

Discussion:
See *18.40[1] -[3]*

Forms:
See *18.52*, *18.53*

☐ Determine whether to file response to motion for distribution of proceeds.

○ Response is for:

☐ Order for distribution of proceeds.

☐ Discovery proceedings in connection with motion.

☐ Preparation for hearing on motion.

○ Serve opposition in same manner and on same parties as claimant's motion.

Authority:
CCP § 701.830(a)

Discussion:
See *18.41*

☐ Determine whether court should abate hearing for issues to be determined in civil action if:

○ Court is not proper court under any other provision of law for the trial of a civil action, and any interested person at or before hearing objects to determination of issues presented by motion by court.

○ A civil action is pending and jurisdiction has been obtained in court in which civil action is pending.

○ Court determines the matters should be determined in civil action.

Authority:
CCP § 701.830(c)

Discussion:
See *18.20[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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VI. RESOLVING CONFLICTING CLAIMS TO PROCEEDS OF EXECUTION SALE

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18.38 Options and Strategy.

If there are conflicting claims to all or part of the proceeds of sale or collection known to the levying officer before distribution of those proceeds, the levying officer must deposit with the court the proceeds that are the subject of the conflicting claims [*CCP § 701.830(a)*]. Any interested party may apply on noticed motion for an order for the distribution of the proceeds deposited with the court [*CCP § 701.830(a)*]. The court must determine the issues presented by the motion and make an order for distribution unless the court abates the motion until the issues presented can be determined in a civil action [*CCP § 701.830(b), (c)*].

Strategic Point:

Conflicting claims to personal property usually are resolved before the execution sale takes place. When personal property is levied on under a writ of execution, any third person claiming a superior lien may file a claim with the levying officer under *CCP §§ 720.210-720.290* before the property is sold. This obligates the judgment creditor to deposit with the court the amount of the lien claimed (or to make an undertaking) so that the sale can go forward [*CCP § 720.260(a)*]. After the sale is completed, the levying officer will refund the amount of the deposit to the creditor from the proceeds of sale [*CCP § 701.810(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.39 Levying Officer May Deposit With Court Proceeds Subject to Conflicting Claims.

If there are conflicting claims to all or part of the proceeds of sale or collection known to the levying officer before the proceeds are distributed, the levying officer *may* deposit with the court the proceeds that are the subject of the conflicting claims instead of distributing those proceeds pursuant to *CCP § 701.810* [*CCP § 701.830(a)*].

Consider:

Note that this procedure is not commonly used. Disputes about conflicting claims are typically negotiated.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.40 Interested Party May Apply for Motion for the Distribution of Sale Proceeds.

18.40[1] Interested Party's Motion for Distribution of Sale Proceeds. If the levying officer does deposit the proceeds of sale with the court, any interested person may apply on noticed motion for an order for the distribution of the proceeds deposited with the court [*CCP § 701.830(a)*].

Cross Reference:

Forms, see *18.52*, *18.53*.

18.40[2] Time Limit for Order for Distribution of Proceeds. The interested party must notify the levying officer of a conflicting claim before the proceeds are distributed to have the proceeds deposited with the court. The levying officer has 30 days from receipt of the sale proceeds, which is generally 30 days from the date of sale (or 40 days in the case of a credit transaction), within which to make the distribution [*CCP § 701.820(b)*]. Once the proceeds have been deposited with the court, the statute provides no time limit for when the interested party must file a motion for distribution of the proceeds, though careful practice suggests filing the motion as soon as possible after the interested party has notice of the proceeds, but definitely within 30 days.

Consider:

The court will look to see what the interested party did on finding out about the sale, proceeds, and the like. The longer that party waits, the more explaining the party will have to do to the court.

18.40[3] Service of Notice of Motion Is According to Court Order. A copy of the notice of motion is served on persons that the court by order determines, in a manner as the court prescribes [*CCP § 701.830(a)*], typically done by personal service as for any other third-party motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.41 Responding to Motion for Distribution of Sale Proceeds.

18.41[1] Any Interested Party May Request Additional Time. Any interested person may request time for (1) filing a response to the motion for an order for the distribution of the proceeds, (2) discovery proceedings in connection with the motion, or (3) other preparation for the hearing on the motion, and the court must grant a continuance for a reasonable time for any of these purposes [*CCP § 701.830(a)*]

18.41[2] Filing Opposition to Motion. The opposition to the motion should be served in the same manner and on the same persons as the court required for the claimant's motion [*see CCP § 701.830(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.42 Hearing and Order on Motion.

18.42[1] Court Must Abate Hearing If Issues Should Be Determined in Civil Action. In the following instances, the court must not determine the issues presented by the motion, but instead must abate the hearing until the issues presented by the motion can be determined in a civil action [*CCP § 701.830(c)*]:

- The court is not the proper court under any other provision of law for the trial of a civil action with respect to the subject matter of the motion, and any interested person at or before the hearing objects to the determination of the issues presented by the motion by the court.

- A civil action is pending with respect to the subject matter of the motion and jurisdiction has been obtained in the court in which the civil action is pending.

- The court determines that the matter should be determined in a civil action.

18.42[2] Order for Distribution of Proceeds. Unless the court abates the motion, at the hearing on the motion the court must determine the issues presented by the motion and make an order for the distribution of the proceeds deposited with the court [*CCP § 701.830(b)*].

Cross Reference:

Form, see *18.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.43 CHECKLIST: Setting Aside Execution Sale.

☐ Determine if judgment creditor was purchaser.

○ If judgment creditor was purchaser, and there were irregularities in execution sale, sale may be set aside.

○ If judgment creditor was not purchaser, and sale was improper, judgment debtor's only remedy is to sue for damages caused by the impropriety.

Authority:
CCP § 701.680(a), (c)

Discussion:
See *18.45[1], [4]*

☐ If judgment creditor is purchaser, determine if there were irregularities in execution sale proceedings.

○ Was sale at a grossly inadequate price?

○ Was purchaser guilty of unfairness or in taking undue advantage?

○ Was action to set aside commenced within 90 days after date of sale?

Authority:
Gonzalez v. Toews (2003) 111 CA4th 977, 981-922, 4 CR3d 434, 439

Discussion:
See *18.45[5], 18.46[1] -[4]*

☐ Determine if proper notice of sale was given.

○ Failure to give proper notice does not invalidate sale, but levying officer may be liable to judgment creditor and judgment debtor for damages.

Authority:
CCP § 701.560(a), (b)

Discussion:
See *18.45[2]*

☐ Determine if underlying judgment on which sale was based was reversed, vacated, or otherwise set aside.

○ Judgment debtor may be able to recover from judgment creditor the proceeds of sale, with interest.

Authority:
CCP § 701.680(b)

Discussion:
See *18.45[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.44 Options and Strategy.

With limited exceptions, execution sales are absolute and cannot be set aside [*CCP § 701.680(a)*]. If an execution sale was improper, the judgment debtor typically has the right to sue for damages caused by the impropriety [*CCP § 701.680(c)*]. An exception to this is when the purchaser is the judgment creditor and there have been irregularities in the proceedings. In this instance the judgment debtor may bring an action to set aside the execution sale [*Gonzalez v. Toews (2003) 111 CA4th 977, 981-922, 4 CR3d 434*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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18.45 Execution Sale Normally Cannot Be Set Aside.

18.45[1] Execution Sale Normally Is Absolute and Binding. With limited exceptions, execution sales are absolute and may not be set aside for any reason unless the judgment creditor was the purchaser at the sale [*CCP § 701.680(a)*; *Gonzalez v. Toews (2003) 111 CA4th 977, 981, 4 CR3d 434*].

Exception:

If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason, the judgment debtor can commence an action to set aside the sale if the purchaser at the sale was the judgment creditor [*CCP § 701.680(c)(1)*].

Cross Reference:

Discussion of setting aside sale, see *18.46*.

18.45[2] Remedy for Failure to Give Notice of Sale Is Damage Action Against Levying Officer. Failure to give proper notice of an execution sale does not invalidate the sale [*CCP § 701.560(a)*]. However, a levying officer who sold property without giving the required notice is liable to the judgment creditor and the judgment debtor for actual damages caused by the failure to give notice [*CCP § 701.560(b)*].

Timing:

The period of limitations against a sheriff or marshal for a wrongful execution sale is two years [*CCP § 339(2)*].

18.45[3] Remedy for Reversal of Underlying Judgment Is Action Against Judgment Creditor. If the underlying judgment is reversed, vacated, or otherwise set aside, the judgment debtor's remedy is to recover from the judgment creditor the proceeds of the execution sale, with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment [*CCP § 701.680(b)*].

18.45[4] Remedy for Irregularities in Sale Can Be Damages. If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason, the judgment debtor or the judgment debtor's successor in interest may recover damages caused by the impropriety [*CCP § 701.680(c)(2)*].

If the damages are recovered against the judgment creditor, they are offset against the judgment to the extent the judgment is not satisfied. If the damages are recovered against the levying officer, they are applied to the judgment to the extent it is not satisfied [*CCP § 701.680(c)(2)*].

18.45[5] Unfairness or Fraud Probably Is Not Grounds for Action for Equitable Redemption. Before the 1982 enactment of the enforcement of judgment statutes in the Code of Civil Procedure, the principle of equitable redemption allowed a judgment debtor to redeem property that sold at an execution sale for a grossly inadequate price when the purchaser was guilty of unfairness or took undue advantage. The current statutes have no stated exception for equitable doctrines, instead specifically protecting the judgment debtor from an improper sale by allowing damages against the judgment creditor or levying officer, but not against a third party purchaser. One purpose of the enforcement statutes was to do away with the right to redeem property sold at execution sales [*Gonzalez v. Toews (2003) 111 CA4th 977, 981-982, 4 CR3d 434*].

Although no case has decided the issue, the current statutory scheme appears to treat unfairness or fraud in the sale as an "irregularity," governed by the overall statutory remedy scheme that permits a damages action against the judgment creditor or sheriff but forbids setting aside a sale to third party purchasers [*see Gonzalez v. Toews (2003) 111 CA4th 977, 981-922, 4 CR3d 434*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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VII. SETTING ASIDE EXECUTION SALE

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18.46 Bringing Action to Set Aside Sale That Suffered Irregularities.

18.46[1] Judgment Debtor May Bring Action to Set Aside Improper Sale to Judgment Creditor. If an execution sale was improper because of irregularities in the proceedings, whether because the property sold was not subject to execution, or for any other reason, and if the purchaser was the judgment creditor, the judgment debtor may sue to set aside the sale [*CCP § 701.680(c)(1)*].

18.46[2] Judgment Debtor Must Bring Action Within 90 Days After Sale. The judgment debtor, or the judgment debtor's successor in interest, may commence an action within 90 days after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor [*CCP § 701.680(c)(1)*]. "Successor in interest" does not include the purchaser of the property at the sale [*CCP § 701.680(d)*].

18.46[3] Improper Sale to Creditor Is Broadly Defined. The statute authorizing a set-aside of an execution sale covers "irregularities in the proceedings" that occur for any reason [*CCP § 701.680(c)*]. An irregularity gives rise to the remedy of setting aside a sale to the judgment creditor when there is another specified consequence for it in the enforcement statutes [*Gonzalez v. Toews (2003) 111 CA4th 977, 981-982, 4 CR3d 434*].

18.46[4] If Sale Is Set Aside, Judgment and Liens Are Revived. If the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the creditor is entitled to interest on the amount of the judgment so revived as if the sale had not been made. In addition, 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)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsRevival of JudgmentsCivil ProcedureRemediesJudgment LiensRenewalsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.47

18.47 Notice of Intended Sale of Personal or Real Property.

Notice of Intended Sale of Personal or Real Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF SALE
Defendant.	)	
	)	
	)	

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on_____ [*date*], at _____ [*time*], at _____ [*location of sale*], the undersigned will sell to the highest bidder at public auction the following property: _____ [*describe property; if real property, include description of interest to be sold, legal description of real property, and street address or other common designation, if any*].
[*If real property being sold has no street address or other common designation, include EITHER*]

Directions to the location of the real property being sold may be obtained from the undersigned on oral or written request.
[*OR*]

The real property being sold is located _____ [*specify, e.g.,* on the east side of State Highway 1, 12 miles northeast of the crossroads of State Highway 1 and Paradise City Lane, Paradise City, California].

Prospective bidders should refer to *Code of Civil Procedure Sections 701.510-701.680* for provisions governing the terms, conditions, and effect of the sale and the liability of defaulting bidders.

Dated: _____.

_____, Sheriff

By _____, Deputy Sheriff

NOTES:

Authority:
CCP § 701.530(a)

Discussion:
See *18.07*

Cross References:

California Forms of Pleading and Practice, § 254.702 (Matthew Bender)

California Points and Authorities, Ch. 131 Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.48

18.48 Notice of Intended Sale of Property to Be Collected.

Notice of Intended Sale of Property to Be Collected.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF INTENDED
_____ [*name*],	)	SALE
Defendant.	)	
	)	
	)	

_____

To _____ [*specify judgment debtor, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that the property described below will be sold at execution sale unless within 10 days after service of this 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. The motion must be made within 10 days after service of this notice of intended sale.

The property which is to be sold consists of the following: _____ [*describe property*].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*judgment creditor*]

NOTES:

Authority:
CCP § 701.520(b)

Discussion:
See *18.07*

Cross References:

California Forms of Pleading and Practice, § 254.697 (Matthew Bender)

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.49

18.49 Notice of Motion and Motion for Order to Collect Property.

Notice of Motion and Motion for Order to Collect Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER TO COLLECT PROPERTY Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify judgment creditor, e.g.,* plaintiff] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify judgment debtor, e.g.,* defendant] will, and hereby does, move for an order that the property described in the notice of intended sale filed in the above-entitled action be collected rather than sold. The motion will be made on the grounds that the property is defined as property to be collected under *Code of Civil Procedure Section 701.520(a)* and thus may be collected rather than sold under a writ of execution.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the

memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES:

Authority:
CCP § 701.520(c)

Discussion:
See *18.21[3]*

Cross References:

California Forms of Pleading and Practice, § 254.698 (Matthew Bender)

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.50

18.50 Declaration in Support of Motion for Collection of Property.

Declaration in Support of Motion for Collection of Property.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ DECLARATION OF _____ IN SUPPORT OF MOTION FOR COLLECTION OF PROPERTY Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party)*].

2. The property that has been levied on under the writ of execution in the above-entitled action consists entirely of _____ [*describe property, e.g.*, chattel paper], which is defined as property to be collected under *Code of Civil Procedure Section 701.520(a)*, and as such may be collected rather than sold under the writ.

3. The property should continue to be collected rather than sold because _____ [*state why collection would be more equitable than sale under circumstances of case*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

NOTES:

Authority:
CCP § 701.520(c)

Discussion:
See *18.21[3]*

Cross References:

California Forms of Pleading and Practice, § 254.699 (Matthew Bender)

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.51

18.51 Order Granting or Denying Motion for Collection of Property.

Order Granting or Denying Motion for Collection of Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING MOTION
_____ [*name*],	)	TO COLLECT PROPERTY
Defendant.	)	
	)	
	)	

_____

The motion of _____ [*specify judgment debtor, e.g.,* defendant] for an order directing the collection of property came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],
[*EITHER*]

IT IS ORDERED that the motion be, and it hereby is granted and the levying officer is directed to collect the property described below [on the condition that defendant assign said property to plaintiff pursuant to *Code of Civil Procedure Sections 708.510-708.560*]. The property to be collected consists of the following, to wit: _____ [*describe property*].
[*OR*]

IT IS ORDERED that the motion be and it hereby is denied. [*Set forth any terms and conditions of sale, e.g.,* The sale shall be subject to a minimum bid of $_____.]

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES:

Authority:
CCP § 701.520(d)

Discussion:
See *18.21[4]*

Cross References:

California Forms of Pleading and Practice, § 254.700 (Matthew Bender)

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.52

18.52 Notice of Motion to Resolve Conflicting Claims to Proceeds of Sale.

Notice of Motion to Resolve Conflicting Claims to Proceeds of Sale.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER FOR DISTRIBUTION OF PROCEEDS [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

To _____ [*identify party, e.g.*, defendant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on_____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, plaintiff] _____ [*name*] will, and hereby does, move for an order for the distribution of the proceeds of a sale on a writ of execution that have been deposited with this court. The motion will be made on the grounds that conflicting claims exist as to the rights to such proceeds.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES:

Authority:
CCP § 701.830(a)

Discussion:
See *18.40*

Cross References:

California Forms of Pleading and Practice, § 254.704 (Matthew Bender)

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.53

18.53 Declaration in Support of Motion to Resolve Conflicting Claims to Proceeds of Sale.

Declaration in Support of Motion to Resolve Conflicting Claims to Proceeds of Sale.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ DECLARATION OF _____ IN SUPPORT OF MOTION FOR ORDER FOR DISTRIBUTION OF PROCEEDS Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts establishing claim to proceeds e.g.,* On _____ (*date*), _____ (*name moving party*) sold _____ (*describe property*) to _____ (*name of judgment debtor*), and on _____ (*date*), _____ (*name moving party*) perfected a purchase money security interest in that property. The aforesaid property was sold on _____ (*date*), under the writ of execution issued in the above-entitled action on

_____ (*date*). Under *Commercial Code Section 9306(2)*, the purchase money security interest continues in the proceeds that are now deposited with this court].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

NOTES:

Authority:
CCP § 701.830(a)

Discussion:
See *18.40*

Cross References:

California Forms of Pleading and Practice, § 254.705 (Matthew Bender)

California Points and Authorities, Ch. 131, Execution and Enforcement of Judgments, § 131.140 et seq. (Matthew Bender)

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Chapter 18 Execution Sales
VIII. FORMS

2-18 MB Practice Guide: CA Debt Collection 18.54

18.54 Order in Proceeding to Resolve Conflicting Claims to Proceeds of Sale.

Order in Proceeding to Resolve Conflicting Claims to Proceeds of Sale.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER FOR
_____ [*name*],	)	DISTRIBUTION OF
Defendant.	)	PROCEEDS
	)	
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order for the distribution of proceeds of an execution sale came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]; [*list appearances of any other interested parties*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the proceeds that are deposited with the above-entitled court are to be distributed as follows: _____ [*specify manner of distribution, e.g.,* $ _____ to _____ (*name of judgment creditor*); $ _____ to (*name of secured creditor*); and $ _____ to _____ (*name of judgment debtor*)].

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES:

Authority:
CCP § 701.830(c)

Discussion:
See *18.42*

Cross References:

California Forms of Pleading and Practice, § 254.706 (Matthew Bender)

California Points and Authorities, Ch. 131, pt. VII, Execution and Enforcement of Judgments (Matthew Bender)

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Chapter 19 Redemptions

2-19 MB Practice Guide: CA Debt Collection 19.syn

§ 19.syn Synopsis to Chapter 19: Redemptions

19.01 Scope.

19.02 Objective and Strategy.

19.03 CHECKLIST: Determining If Right to Redeem Property Exists.

19.04 Options and Strategy for Determining If a Right to Redeem Property Exists.

19.05 Property Must Be of a Type Subject to Right of Redemption.
19.05[1] Property Must Be Real Property.
19.05[2] Property Must Be Subject to a Deficiency Judgment.

19.06 Only Judgment Debtor or Judgment Debtor's Successor in Interest May Redeem Property.

19.07 Property Must Be Redeemed During Applicable Redemption Period.
19.07[1] Redemption Period Is Three Months If Proceeds From Sale Were Sufficient.
19.07[2] Redemption Period Is One Year If Proceeds From Sale Were Insufficient.
19.07[3] Redemption Period Is 90 Days for Sale of Separate Interest in Common Interest Development.

19.08 CHECKLIST: Redeeming Property Subject to a Right of Redemption.

19.09 Options and Strategies for Redeeming Property Subject to a Right of Redemption.

19.10 Levying Officer Must Serve Notice of Right of Redemption on Judgment Debtor.

19.11 Levying Officer Must File Certificate of Sale With County Recorder.

19.12 Purchaser Has Rights Prior to Redemption.
19.12[1] Purchaser Is Entitled to Rent and Profits.
19.12[2] Purchaser Has Right to Enter Property.
19.12[3] Purchaser Has Right to Restrain Waste.

19.13 Redemption Price Must Be Deposited Prior to Expiration of Redemption Period.
19.13[1] Redemption Price Must Be Deposited With Levying Officer.

19.13[2] Deposit Must Be for Total Redemption Price.
19.13[3] Rents and Profits May Be Offset Against Redemption Price.
19.13[4] Property Is Redeemed Upon Tender of Redemption Price.
19.13[5] Levying Officer Records Certificate of Sale.

19.14 Redemption Terminates Effect of Sale.

19.15 CHECKLIST: Resolving Redemption Disputes.

19.16 Options and Strategies for Resolving Redemption Disputes.

19.17 Party May File Petition to Resolve Dispute.
19.17[1] Dispute Over Redemption Price.
19.17[2] Dispute Over Petitioner's Entitlement to Redeem Property.
19.17[3] Petition Must Be Written and Contain Specified Information.
19.17[4] Verified Petition May Be Given Evidentiary Weight As Affidavit.

19.18 Petition Must Be Filed Prior to Expiration of Redemption Period.

19.19 Petitioner Must Deposit Undisputed Redemption Amount.

19.20 Evidence of Successor's Right Must Be Filed.

19.21 Levying Officer and Purchaser Must Be Given Notice.

19.22 Court Will Hold Hearing on Petition.
19.22[1] Hearing Must Be Held Within 20 Days After Petition Is Filed.
19.22[2] Petitioner Has Burden of Proof.

19.23 Court Will Determine Amount Required to Redeem Property.
19.23[1] Court Will Make Determination at Conclusion of Hearing.
19.23[2] Additional Amount Required Must Be Deposited Within 10 Days of Order.

19.24 Notice of Right of Redemption.

19.25 Declaration Verifying Copy of Assignment of Interest.

19.26 Petition for Order Determining Redemption Dispute.

19.27 Notice of Filing for Order Determining Redemption Dispute.

19.28 Notice of Hearing for Order Determining Redemption Dispute.

19.29 Order Determining Redemption Dispute.

19.30 Certificate of Redemption.

19.31 Petition for Order Authorizing Entry on Premises.

19.32 Order Authorizing Entry on Property.

19.33 Petition for Order Restraining Waste on Foreclosed Property.

19.34 Order Restraining Waste on Foreclosed Property.

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Chapter 19 Redemptions
I. STRATEGY

2-19 MB Practice Guide: CA Debt Collection 19.01

19.01 Scope.

This chapter covers:

- Determining whether a right to redeem property exists [*see 19.03 -19.07*; Forms, *see 19.24 -19.25*].
- Redeeming property subject to a right of redemption [*see 19.08 -19.14*; Forms, *see 19.24 -19.25*].
- Resolving redemption disputes [*see 19.15 -19.23*; Forms, *see 19.26 -19.34*].

Core Statutes:
CCP §§ 729.010-729.090

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionMortgagor's Right

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Chapter 19 Redemptions
I. STRATEGY

2-19 MB Practice Guide: CA Debt Collection 19.02

19.02 Objective and Strategy.

Statutory redemption refers to a right of redemption after a judicial sale that exists only if a deficiency judgment is allowed under the foreclosure decree [*see CCP §§ 726(e), 729.010(a)*]. The term is used to distinguish this right from the broader equity of redemption existing before foreclosure [*see Duff v. Randall (1897) 116 C 226, 229-230, 48 P 66*]. A right of redemption is only applicable to real property, other than a leasehold estate with an unexpired term of less than two years at the time of the levy, sold pursuant to a writ of sale [*CCP § 729.010*]. The property must be subject to a deficiency judgment and must be redeemed by the judgment debtor or the judgment debtor's successor in interest during the applicable redemption period [*CCP §§ 729.010, 729.020, 729.030, 729.035*].

Consider:

Redemption is only applicable in the case of a judicial foreclosure. Judicial foreclosures are uncommon. A nonjudicial foreclosure is typical in California, and there is usually no reason to worry about a deficiency judgment. As reflected in discussion in this chapter, title to property obtained at a judicial foreclosure is not very marketable, due to the redemption rights. It would be difficult if not impossible to obtain title insurance to insure the purchaser's title.

Exception:

A nonjudicial foreclosure by an association of a common interest development to collect on a debt for delinquent assessments is subject to a right of redemption [*CCP § 729.035*].

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, and Ch. 555, Trust Deeds and Real Property Mortgages (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionMortgagor's Right

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Chapter 19 Redemptions
II. DETERMINING IF RIGHT TO REDEEM PROPERTY EXISTS

2-19 MB Practice Guide: CA Debt Collection 19.03

19.03 CHECKLIST: Determining If Right to Redeem Property Exists.

☐ Determine if property is of a type that would be subject to right of redemption.

○ Is the property real property, other than a leasehold estate with an unexpired term of less than two years at the time of the levy?

○ Was property sold under a writ of sale?

Authority:
CCP § 729.010

Discussion:
See *19.05[1]*

☐ Determine if property was sold subject to a deficiency judgment.

○ Is there any legislation prohibiting a deficiency judgment?

○ Is deficiency judgment allowed under foreclosure decree?

Authority:
CCP §§ 580a-580d, 726(e), 729.010(a)

Discussion:
See *19.05[2]*

☐ Determine who is exercising right of redemption.

- Judgment debtor may exercise right of redemption.
- Judgment debtor's successor in interest may exercise right of redemption.
- Purchaser of property at foreclosure is not successor in interest.

Authority:
CCP § 729.020

Discussion:
See *19.06*

- Determine applicable redemption period.
  - Three months if proceeds from sale were sufficient.
  - One year if proceeds from sale were insufficient.
  - Ninety days for sale of separate interest in common property.

Authority:
CCP §§ 729.030, *729.035*

Discussion:
See *19.07[1] -[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency Judgments

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Chapter 19 Redemptions
II. DETERMINING IF RIGHT TO REDEEM PROPERTY EXISTS

2-19 MB Practice Guide: CA Debt Collection 19.04

19.04 Options and Strategy for Determining If a Right to Redeem Property Exists.

The only property subject to redemption is real property, other than a leasehold estate with an unexpired term of less than two years at the time of the levy, sold pursuant to a writ of sale [*CCP § 729.010*]. Property sold subject to the right of redemption must be subject to a deficiency judgment [*CCP § 729.010*] and may only be redeemed by the judgment debtor or the judgment debtor's successor in interest during the applicable redemption period [*CCP §§ 729.020*, *729.030*, *729.035*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency Judgments

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Chapter 19 Redemptions
II. DETERMINING IF RIGHT TO REDEEM PROPERTY EXISTS

2-19 MB Practice Guide: CA Debt Collection 19.05

19.05 Property Must Be of a Type Subject to Right of Redemption.

19.05[1] Property Must Be Real Property. The only property subject to redemption is real property sold pursuant to a writ of sale [*CCP § 729.010*].

Exception:
A leasehold estate with an unexpired term of less than two years at the time of the levy is not subject to a right of redemption [*CCP § 729.010*].

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, and Ch. 555, Trust Deeds and Real Property Mortgages (Matthew Bender).

19.05[2] Property Must Be Subject to a Deficiency Judgment. Property sold subject to redemption must be subject to a deficiency judgment [*CCP § 729.010*]. Property is subject to a deficiency judgment when both [*see CCP §§ 580a-580d, 726(e), 729.010(a)*]:

- There is no legislation prohibiting a deficiency judgment; and
- A deficiency judgment is allowed under the foreclosure decree.

The decree of foreclosure on a mortgage or deed of trust on the real property pursuant to *CCP § 726* must determine the personal liability of any defendant for the payments of the debt secured by the mortgage or deed of trust and name the defendants against whom the deficiency judgment may be ordered [*CCP §§ 726, 729.010(a)*]. A deficiency judgment does not automatically issue. To obtain a deficiency judgment, the plaintiff in an action to recover the debt must file an application for deficiency judgment, and the court must determine that there is, in fact, a deficiency and its amount [*CCP § 726*].

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments; Ch. 500, Sales and Secured Transactions; and Ch. 555, Trust Deeds and Real Property Mortgages (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral Overview

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Chapter 19 Redemptions
II. DETERMINING IF RIGHT TO REDEEM PROPERTY EXISTS

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19.06 Only Judgment Debtor or Judgment Debtor's Successor in Interest May Redeem Property.

Property sold subject to the right of redemption may be redeemed only by a judgment debtor or the judgment debtor's successor in interest [*CCP § 729.020*]. The purchaser of the property at the foreclosure sale is not a successor in interest [*CCP § 729.020*].

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments; and Ch. 555, Trust Deeds and Real Property Mortgages (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral Overview

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Chapter 19 Redemptions
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19.07 Property Must Be Redeemed During Applicable Redemption Period.

19.07[1] Redemption Period Is Three Months If Proceeds From Sale Were Sufficient. If the proceeds of a foreclosure sale are sufficient to satisfy the secured indebtedness with interest, and costs of action and of sale, the property may be redeemed within three months after the date of sale [*CCP § 729.030(a)*].

Strategic Point:

If a bankruptcy is filed, counsel for the judgment debtor may argue that under 11 USC § 198(b), the time is extended for 60 days.

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

19.07[2] Redemption Period Is One Year If Proceeds From Sale Were Insufficient. If the proceeds of the foreclosure sale are not sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, the property may be redeemed anytime within one year after the date of sale [*CCP § 729.030(b)*].

Strategic Point:

If a bankruptcy is filed, counsel for the judgment debtor may argue that under *11 USC § 108(b)*, the time is extended for 60 days.

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

19.07[3] Redemption Period Is 90 Days for Sale of Separate Interest in Common Interest Development. The sale of a separate interest in a common interest is subject to the right of redemption within 90 days after the sale if the sale arises from a foreclosure by the association of a common interest development pursuant to *CC § 1367.1(g)* [*CCP §*

729.035; *see also CC § 1367.4* (other applicable rules governing collection of debts for assessments)].

Strategic Point:

If a bankruptcy is filed, counsel for the judgment debtor may argue that under 11 USC § 198(b), the time is extended for 60 days.

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawEstate PropertyRedemptionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionReal Property LawCommon Interest CommunitiesGeneral Overview

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Chapter 19 Redemptions
III. REDEEMING PROPERTY SUBJECT TO A RIGHT OF REDEMPTION

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19.08 CHECKLIST: Redeeming Property Subject to a Right of Redemption.

☐ Determine whether levying officer or trustee served notice of right of redemption on judgment debtor after sale.

○ Determine applicable redemption period as specified in notice.

Authority:
CCP § 729.050

Discussion:
See *19.10*

Form:
See *19.26*

☐ Determine if a certificate of sale was delivered to purchaser of property and recorded in county recorder's office.

○ Determine if certificate specifies all of following:

☐ Price paid for each distinct lot or parcel.

☐ Total price paid.

☐ Statement that property is subject to right of redemption.

☐ Applicable redemption period.

Authority:

CCP § 729.040

Discussion:
See *19.11*

☐ Purchaser may exercise specified rights prior to redemption.

○ Purchaser is entitled to any rents and profits from property or value of use and occupation of property.

○ Purchaser may enter property to repair and maintain premises.

○ Purchaser may restrain waste on property.

Authority:
CCP § 729.090

Discussion:
See *19.12[1] -[2]*

Form:
See *19.31 -19.34*

☐ Deposit redemption price with levying officer prior to expiration of redemption period.

○ Deposit must be for total redemption price.

○ Offset any rents or profits against redemption price.

○ Property is deemed redeemed when purchaser accepts deposit.

Authority:
CCP § 729.060

Discussion:
See *19.13[1] -[5]*

Form:
See *19.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 19 Redemptions
III. REDEEMING PROPERTY SUBJECT TO A RIGHT OF REDEMPTION

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19.09 Options and Strategies for Redeeming Property Subject to a Right of Redemption.

Property sold with a right of redemption requires that a notice of the right of redemption must be served on the judgment debtor promptly after the sale [*CCP § 729.050*]. A certificate of sale must be served on the purchaser and recorded in the office of the county recorder [*CCP § 729.040*]. When redeeming the property, the judgment debtor must deposit the total redemption price prior to the expiration of the redemption period [*CCP § 729.060*]. Upon acceptance of the deposit, a certificate of redemption is delivered to the judgment debtor and recorded in the office of the county recorder [*CCP § 729.080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.10 Levying Officer Must Serve Notice of Right of Redemption on Judgment Debtor.

When property is sold subject to the right of redemption, the levying officer or trustee who conducts the sale must serve notice of the right of redemption on the judgment debtor promptly after the sale [*CCP § 729.050*]. The notice must indicate the applicable redemption period [*CCP § 729.050*]. Notice must be given promptly. Service of the notice may be made personally or by mail [*CCP § 729.050*].

Strategic Point:

The statute does not specify what happens if notice of the right of redemption is not served [*see CCP § 729.050*]. If this occurs, counsel for the judgment debtor should argue that because notice of the right to redemption is so important in and material in this context, at the very least the redemption period should be tolled.

Cross References:

Discussion, see *19.07*; Form, see *19.24*.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.11 Levying Officer Must File Certificate of Sale With County Recorder.

When a purchaser pays the amount due for an interest in real property sold subject to the right of redemption, the levying officer conducting the sale must execute and deliver a certificate of sale to the purchaser and record a duplicate of the certificate in the office of the county recorder. This is done in lieu of executing, delivering, and recording a deed of sale pursuant to *CCP § 701.670* when the property sold is not subject to the right of redemption [*CCP § 729.040(a)*].

The certificate must contain all of the following [*CCP §§ 701.670, 729.040(b)(1)*]:

- The title of the court where the underlying judgment was entered, and the cause and number of the action.
- The date of entry of the judgment and of any subsequent renewals, and where entered in the records of the court.
- The name and address of the judgment creditor and the name and last known address of the judgment debtor.
- A description of the property sold.
- The date of sale.

In the case of a nonjudicial foreclosure by an association of a common interest, the certificate must contain the following [*CCP §§ 701.670, 729.040(b)(2)*]:

- The name and address of the judgment creditor and the name and last known address of the judgment debtor.
- A description of the property sold.
- The date of sale.

The certificate also must specify the price paid for each distinct lot or parcel of real property sold subject to the right of redemption, the total price paid, and a statement that the property is subject to the right of redemption, indicating the

applicable redemption period [*CCP § 729.040(c)*].

Cross References:

Discussion, see *19.07*.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.12 Purchaser Has Rights Prior to Redemption.

19.12[1] Purchaser Is Entitled to Rent and Profits. From the time of the sale until a redemption, the purchaser is entitled to receive from the person in possession of the property the rents and profits from the property or the value of the use and occupation of the property [*CCP § 729.090(a)*]. The purchaser is liable to the person who redeems the property for any rents or profits that have been received by the purchaser [*CCP § 729.090(b)*].

Strategic Points:

- Transfer of any security deposits received must also occur, since they belong to the tenants of the property until/unless they are applied to repairs under the Civil Code. Failure to do so would potentially expose the holder to liability to the tenant.

- Practically speaking, it would be difficult to enforce a requirement to collect rents from the person in possession if that person is also the one from whom the property was foreclosed.

19.12[2] Purchaser Has Right to Enter Property. The purchaser, from the time of sale until redemption, is entitled to petition the court for an order to enter the property during reasonable hours to repair and maintain the premises [*CCP § 729.090(c)*].

Cross Reference:

Forms, see *19.31* (petition), 19.32 (order).

19.12[3] Purchaser Has Right to Restrain Waste. The purchaser also is entitled to petition the court and request an order from the court restraining waste on the property [*CCP § 729.090(c)*]. Such a court order may be granted with or without notice in the discretion of the court [*CCP § 729.090(c)*].

Cross References:

Forms, see *19.33* (petition), 19.34 (order).

Discussion/Forms on restraint of waste, see California Forms of Pleading and Practice, Ch. 344, Life Estates and Remainders (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionReal Property LawEstatesFuture InterestsRemaindersReal Property LawEstatesPresent EstatesLife Estates

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19.13 Redemption Price Must Be Deposited Prior to Expiration of Redemption Period.

19.13[1] Redemption Price Must Be Deposited With Levying Officer. A person who seeks to redeem property must deposit the redemption price with the levying officer who conducted the sale prior to the expiration of the applicable redemption period [*CCP § 729.060(a)*]. If the person seeking to redeem the property is a successor in interest to the judgment debtor, he or she, at the time the redemption price is deposited, must file with the levying officer either [*CCP § 729.060(a)*]:

- A certified copy of a recorded conveyance; or
- A copy of an assignment or any other evidence of the interest verified by an affidavit of the successor in interest or of a subscribing witness to such an affidavit.

Cross References:

Form, see *19.25*.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

19.13[2] Deposit Must Be for Total Redemption Price. The redemption price is the total of all the following [*CCP § 729.060(b)*]:

- The purchase price at the sale.
- The amount of any assessments or taxes and reasonable amounts for fire insurance, maintenance, upkeep, and repair of improvements on the property.
- Any amount paid by the purchaser on a prior obligation secured by the property, to the extent that the payment was necessary for the protection of the purchaser's interest.
- Interest on the amounts listed above, at the rate of interest on money judgments from the time the amount was paid until the date the deposit is made.

- The amount of the purchaser's lien, if the purchaser at the sale has any liens subordinate to the lien under which the property was sold, plus interest at the rate of interest on money judgments from the date of the sale until the date the deposit is made.

Strategic Points:

- Counsel should call the sheriff and see if updated figures are available. Most, such as taxes, should be a matter of public record.

- Counsel should also check with the sheriff to determine the form in which the funds must be deposited. Usually a cashier's check is required. Most sheriffs will not accept private or personal checks.

19.13[3] Rents and Profits May Be Offset Against Redemption Price. Rents and profits from the property paid to the purchaser or the value of the use and occupation of the property to the purchaser may be offset against the redemption price [*CCP § 729.060(c)*].

Cross Reference:

Discussion, see *19.12*.

19.13[4] Property Is Redeemed Upon Tender of Redemption Price. If the person seeking to redeem the property deposits the redemption price pursuant to *CCP § 729.060* or *CCP § 729.070* during the redemption period, the levying officer or trustee will tender the deposit to the purchaser [*CCP § 729.080(b)*]. Tender of the redemption price as determined by court order or agreed on by the purchaser and the person seeking to redeem the property is equivalent to payment [*CCP § 729.080(c)*].

Warning:

By statute, redemption occurs on *tender* by the levying officer, not *acceptance* by the purchaser. Thus, the purchaser's refusal to accept the amount tendered will not defeat redemption, as long as amount tendered is the redemption price as determined by court order. If the tender is refused, the levying officer must deposit the amount tendered with the county treasurer of the county where the property is located, payable to the order of the purchaser. If the purchaser does not claim the amount deposited within five years after the deposit is made, it will be paid into the county general fund [*CCP § 729.080(c)*]. If the redemption price is not deposited before expiration of the redemption period, the levying officer who conducted the sale must promptly execute and deliver to the purchaser a deed of sale [*CCP § 729.080(a)*]. In the case of a nonjudicial foreclosure by an association of a common interest pursuant to *CCP § 729.035*, the trustee must deliver an executed trustee's deed [*CCP § 729.080(a)*].

Cross Reference:

Discussion on resolving redemption disputes, see *19.15 -19.23*; Form, see *19.30*

19.13[5] Levying Officer Records Certificate of Sale. When the redemption price determined by court order is tendered, or if the purchaser accepts the tender, the levying officer or trustee must execute and deliver a certificate of redemption promptly to the person seeking to redeem, and must immediately record a duplicate of the certificate in the office of the county recorder where the property is located [*CCP § 729.080(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.14 Redemption Terminates Effect of Sale.

On redemption, the effect of the sale is terminated, and the person who redeemed the property is restored to the estate sold at the sale [*CCP § 729.080(d)*].

Exception:

Liens, including the lien under which the sale was made and subordinate liens, are extinguished by the sale and do not reattach to the property after redemption. The property that was subject to the extinguished lien may not be applied to the satisfaction of the claim or judgment under which the lien was created [*CCP § 729.080(d), (e)*].

Cross Reference:

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 555, Trust Deeds and Real Property Mortgages (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 19 Redemptions
IV. RESOLVING REDEMPTION DISPUTES

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19.15 CHECKLIST: Resolving Redemption Disputes.

☐ Determine basis for dispute:

- ○ Party's entitlement to redeem property.
- ○ Redemption price.

Authority:
CCP §§ 729.060, 729.070

Discussion:
See *19.17[1], [2]*

☐ Prepare written petition including:

- ○ Amounts demanded to which person seeking to redeem objects, and reasons for objection.
- ○ Amounts offset to which purchaser objects, and justification for offset.
- ○ Statement of status of petitioner that qualifies petitioner to redeem property.

Authority:
CCP § 729.070(b)

Discussion:
See *19.17[3]*

Form:
See *19.26*

☐ File petition with court prior to expiration of redemption period.

Authority:
CCP §§ 729.060, 729.070

Discussion:
See *19.18*

☐ Deposit undisputed amount of redemption price at time of filing petition.

Authority:
CCP § 729.070(a)

Discussion:
See *19.19*

☐ If petitioner is successor in interest, file one of following as proof of petitioner's status that qualifies petitioner to redeem property:

- ○ Certified copy of a recorded conveyance.
- ○ Copy of an assignment.
- ○ Other evidence of interest.

Authority:
CCP § 729.070(b)(3)

Discussion:
See *19.20*

Form:
See *19.25*

☐ Give levying officer written notice of petition at time petition is filed.

Authority:
CCP § 729.070(a)

Discussion:
See *19.21*

Form:
See *19.27*

☐ Ensure that following are personally served on purchaser not less than 10 days before hearing:

○ Copy of petition.

○ Notice of time and place of hearing.

Authority:
CCP § 729.070(d)

Discussion:
See *19.21*

Form:
See *19.28*

☐ Hearing must be held within 20 days of filing petition.

Authority:
CCP § 729.070(c)

Discussion:
See *19.22[1]*

☐ Following hearing, court will issue order specifying amount required to redeem property.

Authority:
CCP § 729.070(f)

Discussion:
See *19.23[1]*

☐ Person seeking to redeem property must pay any additional amounts required to redeem property to levying officer within 10 days of court order.

Authority:
CCP § 729.070(g)

Discussion:
See *19.23[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral Overview

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19.16 Options and Strategies for Resolving Redemption Disputes.

Redemption disputes regarding the amount of the redemption price or the right of a party to redeem that cannot be resolved by the parties may be resolved by filing a petition with the court [*see CCP § 729.070*]. In handling redemption disputes, the petitioner's attorney should ensure that a petition stating the cause of the dispute is filed with the court during the applicable redemption period [*CCP § 729.070(a)*]. A certified copy of a recorded conveyance, a copy of an assignment, or other evidence of the interest that qualifies the petitioner to redeem the property also must be filed [*CCP § 729.070(b)(3)*]. The petitioner has the burden of proof at the hearing [*CCP § 729.070(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.17 Party May File Petition to Resolve Dispute.

19.17[1] Dispute Over Redemption Price. If the purchaser and the person seeking to redeem property disagree on the redemption price for any reason, the person seeking to redeem may petition the court for an order determining the redemption price [*CCP § 729.070(a)*].

Consider:

A disagreement over the redemption price might arise as to the reasonableness of a sum demanded by the purchaser for fire insurance, maintenance, upkeep, or repair of improvements on the property, or as to the necessity of the purchaser's payment of a prior secured obligation, or as to the amount by which the redemption price can be offset by rents and profits received by the purchaser, or the value of the use and occupation of the property to the purchaser [*see CCP §§ 729.060, 729.070*].

Cross References:

Form, see *19.26*.

Discussion of rents/profits (rights of purchaser), see *19.12[1], [2]*.

19.17[2] Dispute Over Petitioner's Entitlement to Redeem Property. If the purchaser and the person seeking to redeem property disagree as to whether the person is entitled to redeem the property, the person seeking redemption may petition the court for an order determining whether or not the person is entitled to redeem the property.[*CCP § 729.070(a)*].

Consider:

A disagreement over petitioner's entitlement to redeem the property might arise as to the validity of an assignment of the judgment debtor's interest in the property or sufficiency of the records of conveyance, of the copy of assignment, or the affidavit or other evidence of the successor's interest in the property [*see CCP §§ 729.060(a), 729.070(a)*].

19.17[3] Petition Must Be Written and Contain Specified Information. The petition must be in writing and must include the following statements [*CCP § 729.070(b)*]:

- The amounts demanded as to which the person seeking to redeem objects, and the reasons for the

objection.

- Any amounts offset to which the purchaser objects, and the justification for the offset.
- The status of the petitioner that qualifies the petitioner to redeem the property.

Cross References:

Form, see *19.26*.

Documentation required to prove right of successor in interest to redeem property, see *19.13[1]*, *19.20*.

19.17[4] Verified Petition May Be Given Evidentiary Weight As Affidavit. If the petition is verified, it may be given evidentiary weight as would an affidavit (or declaration [*CCP § 2015.5*]) and may be used in support of petitioner's case [*CCP § 729.070(f)*; *see In re O'Brien Mach., Inc. (1964) 224 CA2d 563, 569, 36 CR 782*]. If the verification is to be used as evidence of facts, *CCP § 446* does not apply and the allegations cannot be based on information and belief because an affidavit which is to be used as evidence must be positive, direct, and not based on hearsay. Matters alleged on information and belief do not serve to establish facts but are hearsay [*Star Motor Imports, Inc. v. Superior Court (1979) 88 CA3d 201, 204, 151 CR 721*].

Cross Reference:

Form, see *19.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.18 Petition Must Be Filed Prior to Expiration of Redemption Period.

The petition must be filed before the expiration of the redemption period [*CCP § 729.070(a)*].

Cross Reference:

Discussion of redemption period, see *19.07[1] -[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.19 Petitioner Must Deposit Undisputed Redemption Amount.

At the time the petition is filed, the petitioner must deposit the undisputed amount of the redemption price with the levying officer, if deposit previously has not been made [*CCP § 729.070(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.20 Evidence of Successor's Right Must Be Filed.

If the petitioner is a successor in interest, the petitioner also must file either a certified copy of a recorded conveyance or a copy of an assignment or other evidence of his or her interest. An assignment or other evidence of interest must be verified by a declaration [*CCP § 729.070(b)(3)*; *see CCP § 729.060(a)*].

Cross References:

Form, see *19.25*.

Documentation of successor's right to redeem property, see *19.13[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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19.21 Levying Officer and Purchaser Must Be Given Notice.

At the time the petition is filed, the petitioner must give written notice to the levying officer or trustee of the filing of the petition [*CCP § 729.070(a)*]. Not less than 10 days before the hearing, the person seeking to redeem the property must personally serve on the purchaser a copy of the petition and a notice of the time and place of the hearing [*CCP § 729.070(d)*].

Cross Reference:

Forms, see *19.27*, *19.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral Overview

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Chapter 19 Redemptions
IV. RESOLVING REDEMPTION DISPUTES

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19.22 Court Will Hold Hearing on Petition.

19.22[1] Hearing Must Be Held Within 20 Days After Petition Is Filed. A hearing on the petition must be held no later than 20 days after the date the petition was filed unless continued by the court for good cause [*CCP § 729.070(c)*].

19.22[2] Petitioner Has Burden of Proof. At a hearing on a petition for determination of redemption price, or as to whether a person is entitled to redeem, the person seeking redemption has the burden of proof [*CCP § 729.070(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 19 Redemptions
IV. RESOLVING REDEMPTION DISPUTES

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19.23 Court Will Determine Amount Required to Redeem Property.

19.23[1] Court Will Make Determination at Conclusion of Hearing. At the conclusion of the hearing for determination of redemption price, the court will determine by order the amount required to redeem the property [*CCP § 729.070(f)*]. The determination must be made on affidavit and evidence satisfactory to the court [*CCP § 729.070(f)*].

Cross Reference:

Form for order, see *19.29*.

19.23[2] Additional Amount Required Must Be Deposited Within 10 Days of Order. If an amount in addition to that deposited with the levying officer is required to redeem the property, the person seeking to redeem must pay the additional amount to the levying officer within 10 days after the issuance of the order [*CCP § 729.070(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 19 Redemptions
V. FORMS

2-19 MB Practice Guide: CA Debt Collection 19.24

19.24 Notice of Right of Redemption.

Notice of Right of Redemption.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF RIGHT OF
_____ [*name*],	)	REDEMPTION
Defendant.	)	
	)	
	)	

_____

To _____ [*name of judgment debtor*]:

NOTICE IS HEREBY GIVEN that _____ [*name of judgment debtor*] has the right to redeem the real property described below from the sale on execution made by _____ [*name of levying officer*] pursuant to a writ of sale issued on the judgment entered in Action No. _____ of the _____ Court of _____ County, California, in which _____ [*name*] was plaintiff and _____ [*name*] was defendant.

The real property is described as follows: _____ [*give legal description*].

The real property was sold by _____ [*name of levying officer*] to _____ [*name of purchaser*] for the sum of $_____ on _____ [*date*].

The property may be redeemed anytime within _____ [three months *or* one year] after the date of sale.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

NOTES.

Authority:
CCP § 729.050

Service:
See *19.10*

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Chapter 19 Redemptions
V. FORMS

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19.25 Declaration Verifying Copy of Assignment of Interest.

Declaration Verifying Copy of Assignment of Interest.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	DECLARATION
vs.	)	OF _____
_____ [*name*],	)	VERIFYING COPY
Respondent.	)	OF _____
	)	[ASSIGNMENT *or specify*
	)	*other evidence of interest]*
	)	

_____

I, _____ [*name*], declare:

I claim a right of redemption on the real property sold to _____ [*name of purchaser*], on the execution of a writ of sale against the interest of _____ [*name of judgment debtor*] in the real property by _____ [*name and title of levying officer*] on _____ [*date*].

That real property is described as follows: _____ [*give legal description*].

This claim of redemption is based on the accompanying assignment of _____ [*describe, e.g.,* the judgment debtor's 99-year lease of the described real property].

That assignment was made to declarant on _____ [*date*], for the consideration of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____ [*date and place*]
_____ _____ [*signature*]

NOTES.

Authority:
CCP §§ 729.060(a), 2015.5

Deposit of Redemption Price:
See *19.13[1]*

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Chapter 19 Redemptions
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19.26 Petition for Order Determining Redemption Dispute.

Petition for Order Determining Redemption Dispute.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR ORDER
_____ [*name*],	)	DETERMINING REDEMPTION
Respondent.	)	DISPUTE
	)	
	)	

_____

Petitioner alleges:

1. On _____ [*date*], a judgment was rendered in Action No. _____ in favor of _____ [*name*], plaintiff, and against _____ [*name*], defendant, in the _____ Court of _____ County, California, directing sale of the _____ [real property *or specify encumbered interest in property, e.g.,* lease] subject to the _____ [mortgage *or* deed of trust *or specify other means of securing interest*].

2. The judgment declared that a deficiency judgment could be ordered against the defendant.

3. _____ [*Name and title of levying officer*] levied on the defendant's interest in the real property described below on _____ [*date*]. That property is described as follows: _____ [*give legal description*].

4. The above-described real property was sold at public auction to _____ [*name of purchaser*] on _____ [*date*], for the sum of $_____.

5. On _____ [*date*], within [three *or* 12] months of the sale of the property to _____ [*name of purchaser*], petitioner sought to exercise his/her right of redemption of the property and deposited with _____ [*name and title of levying officer*] the sum of $_____, which included the amount of the purchase price at the sale, taxes and assessments paid by the purchaser, [a reasonable amount for fire insurance, maintenance, upkeep, *and/ or* repair costs incurred by the purchaser,] [payment(s) made by the purchaser on a prior obligation secured by the property,] and interest, offset by the amount of $_____, which represents the _____ [rents and profits from the property paid to the purchaser *or* value of the use and occupation of the property to the purchaser].

[*EITHER*]

6. A disagreement between petitioner and _____ [*name of purchaser*] exists over the redemption price of the property. _____ [*Describe dispute, e.g.,* Petitioner disputes the reasonableness of the amount purchaser claims to have paid for maintenance].

[*AND/OR*]

7. A disagreement between petitioner and _____ [*name of purchaser*] exists as to the entitlement of petitioner to redeem the property because the purchaser claims _____ [*describe purchaser's contention, e.g.,* that the assignment of the judgment debtor's interest in real property to petitioner does not include the property described above].

[*CONTINUE*]

8. Petitioner is the _____ [judgment debtor *or* assignee of plaintiff's interest in the property] and is entitled to redeem the property.

9. _____ [A certified copy of the conveyance of the judgment debtor's interest in the property under which petitioner claims the right to redeem is served herewith *or* A copy of the assignment of the judgment debtor's interest in the property under which petitioner claims the right to redeem is served herewith, together with petitioner's declaration and the declaration of John Lee, a subscribing witness, verifying that assignment.]

10. Petitioner has paid to _____ [*name and title of levying officer*], the levying officer, the amount necessary for redemption less the sum that is in dispute.

WHEREFORE petitioner prays:

1. That the clerk set this petition for hearing;

2. That _____ [the redemption price be determined *and/or* petitioner's entitlement to redeem the property be determined] by order of the court;

4. That a certificate of redemption be ordered issued after deposit of any additional amount determined to be due with the levying officer; and

5. For such other and further relief as the court may deem proper.

Dated: _____

Respectfully submitted,

_____[*firm name, if any*]

By: _____[*signature*]

_____[*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____ [*signature*]

NOTES:

Authority:
CCP § 729.070

Timing of Petition:
See *19.17*

Timing of Hearing:
See *19.22*

Notice of Filing of Petition:
See *19.27*

Notice of Hearing on Petition:
See *19.28*

Order:
See *19.29*

Cross Reference:

California Forms of Pleading and Practice, § 254.752 (Matthew Bender)

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Chapter 19 Redemptions
V. FORMS

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19.27 Notice of Filing for Order Determining Redemption Dispute.

Notice of Filing for Order Determining Redemption Dispute.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	NOTICE OF FILING OF
_____ [*name*],	)	PETITION FOR ORDER
Respondent.	)	DETERMINING REDEMPTION
	)	DISPUTE
	)	

_____

To _____ [*name and title of levying officer*]:

NOTICE IS HEREBY GIVEN that the undersigned has filed a petition for court order determining the _____ [redemption price of *or* entitlement of petitioner to redeem] the real property described below, which you sold pursuant to a judgment of sale entered in Action No. _____ of the _____ Court of _____ County, California, in which _____ [*name*] was plaintiff and _____ [*name*] was defendant.

The real property is described as follows: _____ [*give legal description*].

_____ [*Name of purchaser*] purchased the property at the sale for the sum of $_____ on _____ [*date*].

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

NOTES.

Authority:
CCP § 729.070(a)

Timing of Petition:
See *19.17*

Timing of Hearing:
See *19.22*

Petition to Determine Redemption Dispute:
See *19.26*

Notice of Hearing on Petition:
See *19.28*

Order:
See *19.29*

Cross Reference:

California Forms of Pleading and Practice, § 254.753 (Matthew Bender)

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Chapter 19 Redemptions
V. FORMS

2-19 MB Practice Guide: CA Debt Collection 19.28

19.28 Notice of Hearing for Order Determining Redemption Dispute.

Notice of Hearing for Order Determining Redemption Dispute.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	NOTICE OF HEARING OF
_____ [*name*],	)	PETITION FOR ORDER
Respondent.	)	DETERMINING REDEMPTION
	)	DISPUTE
	)	

_____

To _____ [*name of purchaser*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], _____ [*name of person seeking redemption*] filed a petition in the above-entitled court for an order determining _____ [the amount required *or* petitioner's entitlement] to redeem the real property that you purchased at a sale on execution of a writ of sale on _____ [*date*].

The clerk of the above-entitled court has set the petition for hearing at _____.M., or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California.

A copy of the petition is attached to this notice and served herewith.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

NOTES.

Authority:
CCP § 729.070(d)

Timing of Petition:
See *19.17*

Timing of Hearing:
See *19.22*

Petition to Determine Redemption Dispute:
See *19.26*

Notice of Filing of Petition:
See *19.27*

Order:
See *19.29*

Cross Reference:

California Forms of Pleading and Practice, § 254.754 (Matthew Bender)

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Chapter 19 Redemptions
V. FORMS

2-19 MB Practice Guide: CA Debt Collection 19.29

19.29 Order Determining Redemption Dispute.

Order Determining Redemption Dispute.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____		
_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER DETERMINING
_____ [*name*],	)	REDEMPTION DISPUTE
Respondent.	)	
	)	
	)	

_____

The petition of _____ [*name of person seeking redemption*] for an order determining _____ [the redemption price of *or* his/her entitlement to redeem] the real property described in the petition came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*]; purchaser appeared by counsel _____ [*name*].

The court, finding that notice of hearing has been duly and regularly given according to law, and having considered the evidence presented,

IT IS ORDERED that _____ [*specify terms, e.g.,* petitioner is entitled to redeem the property *and/or* $8,000.00 is a reasonable sum for the purchaser to have paid for fire insurance, maintenance, upkeep, and/or repair, *and/or* it was necessary for purchaser to pay $10,000.00 for payment of a prior secured obligation, *and/or* the redemption price may be offset by the sum of $15,000.00 for rents and profits from the property paid to the purchaser *or* the value of the use and occupation of the property to the purchaser].

Dated: _____

_____[*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 729.070(f)

Petition to Determine Redemption Dispute:
See *19.26*

Notice of Filing of Petition:
See *19.27*

Notice of Hearing on Petition:
See *19.28*

Cross Reference:

California Forms of Pleading and Practice, § 254.755 (Matthew Bender)

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Chapter 19 Redemptions
V. FORMS

2-19 MB Practice Guide: CA Debt Collection 19.30

19.30 Certificate of Redemption.

Certificate of Redemption.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	CERTIFICATE OF
_____ [*name*],	)	REDEMPTION
Respondent.	)	
	)	
	)	

_____

I, _____ [*name and title of levying officer*], do hereby certify that on _____[*date*], _____ [*name of redemptioner*] deposited with me the sum of $_____ for redemption of real property that _____ [*name of purchaser*] purchased on the execution of a writ of sale on _____[*date*].

The sale was made pursuant to a writ of sale issued on the judgment of the above-entitled court in Action No. _____, _____ [*name*], plaintiff, vs. _____ [*name*], defendant, entered on _____ [*date*], in the Judgment Book of the Clerk's records of _____ County at Vol. _____ at page _____.

The property is described as follows: _____ [*give legal description of property*].

The payment made to me in the sum of $_____ by _____ [*name of redemptioner*] _____ [is the redemption price determined by court order *or* was accepted by the purchaser].

[The Recorder of _____ County is authorized to record this certificate of redemption pursuant to *CCP § 729.080(b)*.]

_____[*signature*]

ACKNOWLEDGMENT

State of _____) ss.
County of _____)

_____

On _____ [*date*], before me _____ [*name and quality of officer*], personally appeared _____ [*name and title of levying officer*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to this instrument, and acknowledged that he/she executed it.

Dated: _____.

_____[*signature*]

_____ [*name of office*]

_____ [*seal of office*]

NOTES.

Authority:
CCP § 729.080(b)

Effect of Redemption:
See *19.13[4]*

Determination of Amount:
See *19.23*

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Chapter 19 Redemptions
V. FORMS

2-19 MB Practice Guide: CA Debt Collection 19.31

19.31 Petition for Order Authorizing Entry on Premises.

Petition for Order Authorizing Entry on Premises.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____		
_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR ORDER
_____ [*name*],	)	AUTHORIZING ENTRY ON
Respondent.	)	PREMISES
	)	
	)	

Petitioner alleges:

1. On _____ [*date*], a judgment for the sale of the real property described below was rendered in favor of _____ [*name*], plaintiff, and against _____ [*name*], defendant, in the _____ Court of _____ County, California.

2. The judgment was entered on _____ [*date*], in the Judgment Book of the Clerk's records of _____ County at Vol. _____ at page _____ in the sum of $_____.

3. A writ of sale was issued by the Clerk of the _____ Court of _____ County, California, on _____ [*date*].

4. _____ [*Name and title of levying officer*] levied on the real property owned by the above-named defendant on _____ [*date*]. That property is described as follows: _____ [*give legal description*].

5. The above-described real property was sold at public auction to _____ [*name of petitioner*] on

_____ [*date*], for the sum $_____.

6. _____ [*Name of person in possession of property*] remains in possession of the above-described property, and no redemption has been made from the execution. The period of redemption has not passed and will not expire until _____ [*date*].

7. _____ [*Name of judgment debtor or tenant in possession*] refuses the right of entry at all times to petitioner or to his/her agent or contractor in order to make repairs and maintain the property.

WHEREFORE petitioner prays:

1. For an order authorizing petitioner or his/her agent or contractor to enter the property during reasonable hours to repair and maintain the property; and

2. For such other and further relief as the court may deem proper.

Dated: _____

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

NOTES.

Authority:
CCP § 729.090(c)

Order:
See *19.32*

Cross Reference:
California Forms of Pleading and Practice, § 254.757 (Matthew Bender)

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Chapter 19 Redemptions
V. FORMS

2-19 MB Practice Guide: CA Debt Collection 19.32

19.32 Order Authorizing Entry on Property.

Order Authorizing Entry on Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER AUTHORIZING
_____ [*name*],	)	ENTRY ONTO PROPERTY
Respondent.	)	
	)	
	)	

_____

The petition of _____ [*name of purchaser*], purchaser of real property at a sale on a writ of sale on _____ [*date*], described in the petition, for an order authorizing _____ [him/her *or* _____ (*name*), his/her agent,] to enter the property to make repairs and to maintain the property came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*]; _____ [judgment debtor *or* tenant in possession] appeared by counsel _____ [*name*].

The court, finding that notice of hearing has been duly and regularly given according to law, having considered the evidence presented,

IT IS ORDERED that _____ [*name of purchaser or his/her agent*] hereby is authorized to enter the real property described in the petition at all reasonable hours for the purpose of making repairs and maintaining the premises.

Dated: _____.

_____[*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 729.090(c)

Petition for Order to Enter Property:
See *19.31*

Cross Reference:

California Forms of Pleading and Practice, § 254.758 (Matthew Bender)

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Chapter 19 Redemptions
V. FORMS

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19.33 Petition for Order Restraining Waste on Foreclosed Property.

Petition for Order Restraining Waste on Foreclosed Property.

SUPERIOR COURT OF CALIFORNIA,		
COUNTY OF _____		
_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR ORDER
_____ [*name*],	)	RESTRAINING WASTE ON
Respondent.	)	FORECLOSED PROPERTY
	)	
	)	

Petitioner alleges:

1. On _____ [*date*], a judgment for the sale of the real property described below was rendered in favor of _____ [*name*], plaintiff, and against _____ [*name*], defendant, in the _____ Court of _____ County, California.

2. The judgment was entered on _____ [*date*], in the Judgment Book of the Clerk's records of _____ County at Vol. _____, page _____, in the sum of $_____.

3. A writ of sale was issued by the Clerk of the _____ Court of _____ County, California on _____ [*date*].

4. _____ [*Name and title of levying officer*] levied on the real property owned by the above-named defendant on _____ [*date*]. That property is described as follows: _____ [*give legal description*].

5. The above-described real property was sold at public auction to _____ [*name of petitioner*] on

_____ [*date*], for the sum $_____.

6. _____ [*Name of person in possession of property*] remains in possession of the above-described property, and no redemption has been made from the execution. The period of redemption has not passed and will not expire until _____ [*date*].

7. _____ [*Name of person in possession of property*] is committing waste on the property by _____ [*state facts demonstrating waste, e.g.,* removing top soil from the property].

8. Petitioner has demanded that _____ [*name of person in possession of property*] desist from committing such waste, but he/she refuses and, unless restrained by this court, he/she will continue to commit such waste.

WHEREFORE, petitioner prays:

1. For an order restraining _____ [*name of person in possession of property*] from committing waste on the real property described above; and

2. For such other and further relief as may be proper.

Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

NOTES.

Authority:
CCP § 729.090(c)

Order:
See *19.34*

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19.34 Order Restraining Waste on Foreclosed Property.

Order Restraining Waste on Foreclosed Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER RESTRAINING
_____ [*name*],	)	WASTE ON PROPERTY
Respondent.	)	
	)	
	)	

_____

The petition of _____ [*name of purchaser at execution sale or judgment creditor*] for an order restraining the commission of waste on the real property described below during the period of redemption came on for hearing by the court this date. The applicant appeared by counsel _____ [*name*]. [*If notice of hearing was given by applicant and an appearance made, add:* Linda Jones, person in possession, appeared by counsel, Mike Edwards.]

The court, having considered the evidence presented,

IT IS ORDERED that the petition be and hereby is granted and that _____ [*name of person in possession of property*] be and hereby is restrained from _____ [*specify, e.g.,* removing top soil from the property] which is described as follows: _____ [*give legal description of property*].

Dated: _____.

_____[*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 729.090(c)

Petition for Restraining Waste:
See *19.33*

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Chapter 20 Miscellaneous Creditor's Remedies

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§ 20.syn Synopsis to Chapter 20: Miscellaneous Creditor's Remedies

20.01 Scope.

20.02 Objective and Strategy.

20.03 CHECKLIST: Enforcing Judgment Against Beneficiary's Interest in Trust.

20.04 Options and Strategies.

20.05 Judgment Debtor's Interest As Beneficiary of Trust May Be Subject to Enforcement of Money Judgment.

20.06 Obtain Order by Petitioning Court With Jurisdiction Over Trust.
20.06[1] Judgment Creditor Must Petition Court Having Jurisdiction Over Administration of Trust.
20.06[2] Petition Should Contain Specified Information.
20.06[3] Petition Need Not Be Verified.
20.06[4] File Petition in Appropriate Probate Court.

20.07 CHECKLIST: Enforcing Judgment Against Guardianship or Conservatorship Property.

20.08 Options and Strategies.

20.09 Judgment Creditor Can Apply to Court Overseeing Guardianship or Conservatorship Proceeding for Order Requiring Payment of Judgment.

20.10 Petition Should Contain Specified Information.

20.11 CHECKLIST: Obtaining Charging Order Against Judgment Debtor's Interest in Partnership or LLC.

20.12 Options and Strategies.

20.13 Judgment Creditor Can Apply for Order Charging Judgment Debtor's Interest With Payment of Unsatisfied Judgment.
20.13[1] Move for Charging Order in Court That Entered Judgment or Any Other Court of Competent Jurisdiction.
20.13[2] Judgment Creditor Can Combine Motion for Charging Order With Motion to Appoint Receiver.
20.13[3] Judgment Creditor Should Personally Serve Partnership or LLC and File Proof of Service With Court.

20.14 Judgment Creditor Can Apply for Foreclosure on Lien Created by Charging Order.

20.15 CHECKLIST: Obtaining Order Applying Public Franchise to Satisfaction of Money Judgment.

20.16 Options and Strategies.

20.17 Judgment Creditor Can Seek to Have Court Order Public Franchise Applied to Satisfaction of Money Judgment.

20.18 Judgment Creditor Must Serve Notice of Motion on Judgment Debtor and Public Entity That Granted Franchise.

20.19 Court May Apply Franchise to Satisfaction of Money Judgment and Specify Process for Applying Franchise.

20.20 CHECKLIST: Obtaining Order Assigning Judgment Creditor Right to Payment Owed to Judgment Debtor.

20.21 Options and Strategies.

20.22 Any Assignable Payment or Payment Stream Is Suitable for Assignment Order.

20.23 Judgment Creditor Must File and Serve Motion Seeking Assignment.

20.24 Court Will Consider Relevant Factors in Determining Whether to Issue Assignment Order.

20.25 Scope of Assignment Order Is Limited.

20.26 Judgment Creditor Can Restrain Judgment Debtor From Assignment or Other Disposition of Right to Payment.

20.27 Assignee Is Deemed Bona Fide Assignee for Value.

20.28 Assignment Order Does Not Affect Obligor Until Notice of Order Is Received.

20.29 Judgment Debtor Can Seek to Exempt All or Part of Right to Payment.

20.30 Either Party Can Apply for Order to Modify or Set Aside Assignment Order.

20.31 CHECKLIST: Seeking Order Applying Unvested Interest in Judgment Debtor's Property to Satisfaction of Money Judgment.

20.32 Options and Strategies.

20.33 Judgment Creditor Can Apply to Court for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment.

20.34 CHECKLIST: Seeking Appointment of Receiver to Enforce Judgment.

20.35 Options and Strategies.

20.36 Judgment Creditor Can Apply to Court for Receiver to Obtain Satisfaction of Judgment.

20.37 Judgment Creditor Must Show Appointment of Receiver Is Reasonable Method to Satisfy Judgment.

20.38 Receiver Can Be Appointed to Transfer Judgment Debtor's Interest in Alcoholic Beverage License.

20.39 CHECKLIST: Making Assignment for Benefit of Creditors.

20.40 Options and Strategies.

20.41 Defendant Can Make General Assignment for Benefit of Creditors.

20.42 Assignment Must Include All Non-Exempt Assets and Must Be For Benefit of All Creditors.

20.43 Individual Assignor May Elect to Retain Specified Property as Exempt Assets.

20.44 Assignor Must Provide Assignee With List of Creditors.

20.45 Assignee Must Accept Assignment in Writing.

20.46 Assignee Must Give Notice of Assignment and Establish a Date by Which Creditors Must File Claims.

20.47 Assignee May Recover Transfers of Property by Assignor.

20.48 Petition to Direct Guardian or Conservator to Pay Debt, Expense, or Charge.

20.49 Notice of Motion and Motion for Order Charging Judgment Debtor's Partnership Interest.

20.50 Notice of Motion and Motion for Order for Sale of Judgment Debtor's Partnership Interest.

20.51 Notice of Motion and Motion for Order Applying Franchise Granted by Public Entity to Satisfy Money Judgment.

20.52 Declaration in Support of Motion for Application of Franchise to Satisfy Money Judgment.

20.53 Order Applying Franchise Granted by Public Entity to Satisfy Money Judgment.

20.54 Notice of Motion and Motion for Order Assigning Right to Payment, Supporting Declaration, and Memorandum.

20.55 Order Assigning Right to Receive Payment.

20.56 Notice of Motion and Motion for Order Applying Nonvested Property Interest to Satisfy Money Judgment.

20.57 Declaration in Support of Motion for Order Applying Nonvested Property Interest to Satisfy Money Judgment.

20.58 Order Applying Nonvested Property Interest to Satisfy Money Judgment.

20.59 Notice of Motion and Motion to Appoint Receiver.

20.60 Declaration in Support of Motion to Appoint Receiver.

20.61 Order Appointing Receiver.

20.62 Receiver's Motion for Approval of Sale of Assets and Order.

20.63 Receiver's Motion for Order Terminating Receivership, Discharging Receiver, and Approving Final Accounting and Report.

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Chapter 20 Miscellaneous Creditor's Remedies
I. STRATEGY

2-20 MB Practice Guide: CA Debt Collection 20.01

20.01 Scope.

This chapter covers:

- Enforcing a judgment against a beneficiary's interest in trust [*see 20.03 -20.06*].
- Enforcing a judgment against guardianship or conservatorship property [*see 20.07 -20.10*].
- Obtaining a charging order against a judgment debtor's interest in a partnership or limited liability company [*see 20.11 -20.14*].
- Obtaining an order applying a publicly granted franchise to satisfy a money judgment [*see 20.15 -20.19*].
- Obtaining an order assigning to a judgment creditor a right to payment due to the judgment debtor [*see 20.20 -20.30*].
- Seeking an order applying unvested interest in a judgment debtor's property to satisfy a money judgment [*see 20.31 -20.33*].
- Seeking appointment of a receiver to enforce a judgment [*see 20.34 -20.38*].
- Making a general assignment for the benefit of creditors [*see 20.39 -20.47*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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Chapter 20 Miscellaneous Creditor's Remedies
I. STRATEGY

2-20 MB Practice Guide: CA Debt Collection 20.02

20.02 Objective and Strategy.

Judgment creditors should review the miscellaneous remedies in this chapter to determine which are available under the particular circumstances, and which would bring about the most expeditious enforcement of the relevant judgment.

Other chapters cover the most common assets debtors may have, and how to execute against them, but there may be occasions when counsel finds the debtor has an asset (or assets) that are outside the norm. After determining that the debtor does in fact has an interest in this type of property, the creditor's attorney must follow special rules and procedures to obtain this property to satisfy the judgment.

Generally speaking, the remedies discussed in this chapter are crafted for assets that:

- Are not tangible or liquid in nature;
- Are not held directly in the name of the judgment debtor; and/or
- Require specific statutory enforcement procedures, such as the sale of a liquor license.

The options and strategies with respect to each of the individual procedures noted above is discussed at the beginning of the part that covers that particular procedure.

For tips on updating your case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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Chapter 20 Miscellaneous Creditor's Remedies
II. ENFORCING JUDGMENT AGAINST BENEFICIARY'S INTEREST IN TRUST

2-20 MB Practice Guide: CA Debt Collection 20.03

20.03 CHECKLIST: Enforcing Judgment Against Beneficiary's Interest in Trust.

☐ Determine if judgment debtor's interest as beneficiary of trust is subject to enforcement of money judgment.

Authority:
CCP § 709.010

Discussion:
See *20.05*

☐ Judgment creditor should petition court having jurisdiction over administration of trust.

Authority:
CCP § 709.010(b)

Discussion:
See *20.06[1]*

○ Include required information in petition.

Authority:
CCP § 709.010

Discussion:
See *20.06[2]*

○ Verification of petition is not required.

Discussion:

See *20.06[3]*

- ○ File petition in appropriate probate court.

Authority:
CCP § 709.010

Discussion:
See *20.06[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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Chapter 20 Miscellaneous Creditor's Remedies
II. ENFORCING JUDGMENT AGAINST BENEFICIARY'S INTEREST IN TRUST

2-20 MB Practice Guide: CA Debt Collection 20.04

20.04 Options and Strategies.

The remedy of enforcing a money judgment against a judgment debtor's interest as the beneficiary of a trust applies only to written, voluntary, express trusts (testamentary or inter vivos), and not to trusts such as Totten trusts, investment trusts, and deeds of trust. This remedy does not affect the validity of a spendthrift provision in a trust instrument, but permits the surplus income from a spendthrift trust to be reached under *CCP § 709.010* to the extent that the income is liable for payment of a judgment under the law otherwise applicable. The remedy provided by *CCP § 709.010* replaces the former remedy of a creditor's suit.

Strategic Point:

It could be difficult to get a copy of a trust instrument. To find out if there is such an instrument (if counsel doesn't have it already), counsel should take a judgment debtor examination and subpoena all trust instruments.

Cross Reference:

Discussion of examination of debtor, see *9.23[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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Chapter 20 Miscellaneous Creditor's Remedies
II. ENFORCING JUDGMENT AGAINST BENEFICIARY'S INTEREST IN TRUST

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20.05 Judgment Debtor's Interest As Beneficiary of Trust May Be Subject to Enforcement of Money Judgment.

A judgment debtor's interest in a trust is not subject to execution [*CCP § 699.720(a)(8)*]. However, a beneficiary's interest in a trust is subject to enforcement by petitioning the court which has jurisdiction over the trust. [*CCP §§ 695.030(a), 709.010*].

With exceptions, a trust in which the transfer of a beneficiary's interest is restrained is only subject to enforcement of a judgment against the beneficiary once it is paid out from the trust [*see Prob C § 15300 et seq.*]. However, a judgment creditor cannot require a trustee to make distributions to the beneficiary when the trustee has discretion, even when the judgment provides for restitution for commission of a crime [*Prob C §§ 15305.5, 15306*; *Young v. McCoy (2007) 147 CA4th 1078 , 54 CR3d 847*].

Exception:

A notable exception enabling a judgment creditor to enforce the judgment against a beneficiary's interest in a trust is in a self-settled trust in which the settlor is a beneficiary or has the effective right to have property distributed to the settlor [*Prob C § 15304*; *see also Vujic v. Cutter (In re Cutter) (Bankr. C.D. Cal. Mar. 1, 2007) 2007 Bankr. LEXIS 1199]* .

Distinguish:

The prohibition against executing on an interest of a judgment debtor in a trust [*CCP § 699.720(a)(8)*] and instead requiring enforcement only via *CCP § 709.010* does not prevent the execution against assets of a revocable trust when the judgment debtor is the settlor [*Prob C § 18200*; *Keitel v. Heubel (2002) 103 CA4th 324, 328* ; *126 CR2d 763*].

Strategic Point:

The nature of the trust res will usually determine what remedy is ordered.

A court may apply a judgment debtor's interest in the trust to the satisfaction of a money judgment by such means as it, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust property by the trustee [*CCP § 709.010(b)*].

Warning:

This remedy applies only to written, voluntary, express trusts (testamentary or inter vivos) and not to Totten trusts, investment trusts, and deeds of trust [1982 California Law Revision Commission Comment to *CCP § 709.010*, 15 Cal L Rev Comm'n Reports 2001, 2538 (1980)].

Strategic Point:

The remedy provided by *CCP § 709.010* replaces the former remedy of a creditor's suit [*see Canfield v. Security-First Nat'l Bank, 13 C2d 1, 34, 87 P2d 830 (1939)* ; 1982 California Law Revision Commission Comment to *CCP § 709.010*, 15 Cal L Rev Comm'n Reports 2001, 2539 (1980)].

Investigating Enforcement of Money Judgment On Debtor's Interest As Beneficiary of Trust Using Online Resources:

Many online resources are available for researching enforcement of a money judgment on an interest in a trust. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined

Sample Search: To find California cases that discuss enforcement of a money judgment on a beneficiary's interest in a trust, use a HEADNOTES segment search: *headnotes (enforc! or unenforc! /5 judgment /15 beneficiary /5 trust)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsDistributions by Partnerships (IRC secs. 731-737)Partner Retirement & Death

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Chapter 20 Miscellaneous Creditor's Remedies
II. ENFORCING JUDGMENT AGAINST BENEFICIARY'S INTEREST IN TRUST

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20.06 Obtain Order by Petitioning Court With Jurisdiction Over Trust.

20.06[1] Judgment Creditor Must Petition Court Having Jurisdiction Over Administration of Trust. A judgment creditor may enforce a money judgment against a judgment debtor's interest as a beneficiary of a trust by petitioning the court having jurisdiction over administration of the trust [*CCP § 709.010(b)*]. By so doing, the judgment creditor requests that the court order the trustee to pay to the creditor an amount from the trust property otherwise payable to the beneficiary, to the extent allowable by applicable law.

20.06[2] Petition Should Contain Specified Information. The petition asking the court to order a trust to pay under a judgment should include the following information [*see CCP § 709.010*]:

- The petitioner's status as a judgment creditor.
- The identity of the judgment debtor respondent(s) and a description of the trust.
- A description of the underlying judgment and the amount due on it.
- The terms of the trust agreement controlling the amount of income to which the beneficiary is entitled

The petition also must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or principal. However, when a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke not need be stated. The petition does not need to state the name and last known address of any beneficiary who, under *Prob Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal Rules Ct, Rule 7.902*].

Cross Reference:

Form for petition, see *California Forms of Pleading and Practice, § 560.630* (Matthew Bender).

20.06[3] Petition Need Not Be Verified. Relevant law does not require that the petition be verified [*see CCP § 709.010*].

20.06[4] File Petition in Appropriate Probate Court. The judgment creditor must file the petition in the probate court having jurisdiction over administration of the trust, because the court with jurisdiction over the trust has exclusive jurisdiction of proceedings concerning the internal affairs of the trust [*Prob Code § 17000(a)*].

Cross Reference:

Form for court's order, see *California Forms of Pleading and Practice, § 560.631* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & Termination

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Chapter 20 Miscellaneous Creditor's Remedies
III. ENFORCING JUDGMENT AGAINST GUARDIANSHIP OR CONSERVATORSHIP PROPERTY

2-20 MB Practice Guide: CA Debt Collection 20.07

20.07 CHECKLIST: Enforcing Judgment Against Guardianship or Conservatorship Property.

☐ Judgment creditor applies to court overseeing guardianship or conservatorship proceeding for order requiring payment of judgment.

Authority:
CCP § 709.030

Discussion:
See *20.09*

○ Include specified information in petition.

Authority:
Prob Code §§ 2404(b), 2404(a), 1260(a), 2700, 2701

Discussion:
See *20.10*

○ Verify petition.

Authority:
Prob Code § 1021

Discussion:
See *20.10*

Form:
See *20.48*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & Termination

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Chapter 20 Miscellaneous Creditor's Remedies
III. ENFORCING JUDGMENT AGAINST GUARDIANSHIP OR CONSERVATORSHIP PROPERTY

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20.08 Options and Strategies.

If a guardian or conservator fails, neglects, or refuses to pay a judgment against the estate, a judgment creditor can apply to enforce the judgment in the court having jurisdiction of the guardianship or conservatorship proceeding pursuant to *Prob Code § 2404*.

Consider:

This is not a commonly used remedy, although with the general aging of the population, it is likely to become more of an issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & Termination

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III. ENFORCING JUDGMENT AGAINST GUARDIANSHIP OR CONSERVATORSHIP PROPERTY

2-20 MB Practice Guide: CA Debt Collection 20.09

20.09 Judgment Creditor Can Apply to Court Overseeing Guardianship or Conservatorship Proceeding for Order Requiring Payment of Judgment.

Although property in a guardianship or conservatorship estate is not subject to enforcement of a money judgment under the standard procedure in *CCP § 695.010 et seq*., a judgment creditor may apply to the court in which the guardianship or conservatorship proceeding is pending for an order requiring payment of the judgment [*CCP § 709.030*].

Consider:

The general exemption of guardianship and conservatorship property from enforcement is applicable even when the judgment creditor is already in the process of enforcing its judgment when the conservatorship of the judgment debtor's property arises. Even if the transfer of property has not been completed at the time the conservatorship arises, the creditor must apply for payment under the Probate Code in accordance with *CCP § 709.030* [*Neiman Marcus v. Tait (1995) 33 CA4th 271, 274, 39 CR2d 143]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawProbateGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
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2-20 MB Practice Guide: CA Debt Collection 20.10

20.10 Petition Should Contain Specified Information.

Although not expressly required by statute, a petition to compel a guardian or conservator to pay debts, expenses, or charges should specify the following to assist the court in its determination:

- The petitioner's standing to file the petition and the name of the guardian or conservator of the estate [*see Prob Code § 2404(b)*].

- The nature of the debt, expense, or charge and the guardian's or conservator's failure to pay the debt [*see Prob Code § 2404(a)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived [*see Prob Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*Prob Code § 1021*].

Cross References:

Form for petition, see *20.48*.

Discussion of preparing and filing petition, see *California Forms of Pleading and Practice, § 290.58* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawProbateGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
IV. OBTAINING CHARGING ORDER AGAINST JUDGMENT DEBTOR'S INTEREST IN PARTNERSHIP OR LLC

2-20 MB Practice Guide: CA Debt Collection 20.11

20.11 CHECKLIST: Obtaining Charging Order Against Judgment Debtor's Interest in Partnership or LLC.

☐ Judgment creditor may move for charging order in court that entered judgment or any other court of competent jurisdiction

Authority:
CCP § 708.310

Discussion:
See *20.13[1]*

Forms:
See *20.49*, *20.50*

☐ Judgment creditor may combine motion for charging order with motion to appoint receiver.

Authority:
Corp Code § 16504

Discussion:
See *20.13[2]*

☐ Personally serve partnership or limited liability company and file proof of service with court.

Authority:
CCP § 708.320

Discussion:
See *20.13[3]*

☐ Apply for foreclosure on lien created by charging order.

Authority:
Corp Code § 16504

Discussion:
See *20.14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 20 Miscellaneous Creditor's Remedies
IV. OBTAINING CHARGING ORDER AGAINST JUDGMENT DEBTOR'S INTEREST IN PARTNERSHIP OR LLC

2-20 MB Practice Guide: CA Debt Collection 20.12

20.12 Options and Strategies.

A charging order is the usual manner for applying the interest of a partner in a partnership (or a member in an LLC) to the satisfaction of a judgment against a judgment debtor who is a partner or member. Use of this enforcement tool is subject to the general rules concerning the time within which judgments may be enforced.

A charging order is a good tool for enforcement, because most partners are unaware that you can levy against their assets, and the other partners are likely to force a payoff rather than have an uninvited partner come into their midst.

Investigating Charging Orders Using Online Resources:

Many online resources are available for researching the use of charging orders to reach a judgment debtor's interest in a partnership or limited liability company. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined

Sample Search: To find California cases that discuss charging orders and partnerships or LLCs, use an ATLEAST command search: *atleast2 (charging order) /15 partner! or limited liability or llc or l.l.c*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
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2-20 MB Practice Guide: CA Debt Collection 20.13

20.13 Judgment Creditor Can Apply for Order Charging Judgment Debtor's Interest With Payment of Unsatisfied Judgment.

20.13[1] Move for Charging Order in Court That Entered Judgment or Any Other Court of Competent Jurisdiction. If a money judgment is rendered against a partner or limited liability company (LLC) member but not against the partnership or LLC, the judgment debtor's interest in the partnership or LLC may be applied toward the satisfaction of the judgment by an order charging the judgment debtor's interest [*CCP § 708.310*].

Distinguish:

No similar remedy exists for corporations. The creditor's attorney need only instruct the sheriff to levy against the actual shares the debtor has in the corporation [*see CCP § 700.130*; *Com Code § 8112*]. Those shares then are sold in a public auction. Whoever obtains those shares stands in the same place as the judgment debtor vis a vis the corporation, with all of the debtor's rights, liabilities, and remedies available to them. After doing so, if desired, the creditor can hold a meeting to take charge, and then force a sale. This is a cumbersome and difficult process unless there are significant assets held by the corporation such as trademarks or patents.

Strategic Point:

A motion for a charging order is not necessary when the charging order is stipulated to by the parties and entered by the court [*Raiton v. G&R Properties (1992) 139 BR 931, 935]* .

To obtain a charging order, a judgment creditor must apply to the court that entered the judgment or to any other court of competent jurisdiction by filing and serving a notice of motion and motion for order charging the judgment debtor's partnership or LLC interest, accompanied by a memorandum of points and authorities [*Corp Code § 16504*].

A lien on a judgment debtor's interest in a partnership or LLC is created by service of a notice of motion for a charging order on the judgment debtor [*CCP § 708.320(a)*] and on other of the following:

- All partners, or the partnership [*CCP § 708.320(a)(1)*]; or

- All members, or the LLC [*CCP § 708.320(a)(2)*].

There is no time limit in the statute for serving the order [*see CCP § 708.320*].

Cross References:

Form for notice of motion and motion for order charging judgment debtor's partnership interest, see *20.49*.

For discussion of charging orders, see *California Forms of Pleading and Practice, § 402.20* (Matthew Bender).

20.13[2] Judgment Creditor Can Combine Motion for Charging Order With Motion to Appoint Receiver. At the time of making the order, or later, the court may appoint a receiver of the judgment debtor's share of partnership or LLC profits or any other money due or to fall due to the judgment debtor in respect to the partnership or LLC. The court also may make all other orders, directions, accounts, and inquiries that the debtor partner or member might have made or that the circumstances of the case may require [*Corp Code § 16504*].

20.13[3] Judgment Creditor Should Personally Serve Partnership or LLC and File Proof of Service With Court. The judgment creditor stet serve a copy of the charging order and any related papers on the judgment debtor, the partnership or LLC, and the members of the partnership or LLC.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsBusiness & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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2-20 MB Practice Guide: CA Debt Collection 20.14

20.14 Judgment Creditor Can Apply for Foreclosure on Lien Created by Charging Order.

A judgment creditor may seek foreclosure of a judgment debtor partner's transferable interest in a partnership based on the lien created by a charging order at any time by a court having jurisdiction [*Corp Code § 16504(b)*]. To do so, the judgment creditor must file and serve a notice of motion and motion for order for sale of the judgment debtor's partnership interest, accompanied by a memorandum of points and authorities [*Corp Code § 16504(c)*].

Consider:

Because foreclosure is permissive, not mandatory, the following criteria can help determine if foreclosure is appropriate [*Crocker Nat'l Bank v. Perroton (1989) 208 CA3d 1, 9, 255 CR 794* ; *Hellman v. Anderson (1991) 233 CA3d 840, 850, 284 CR 830]* :

- Whether the creditor has previously obtained a charging order;
- Whether the judgment nevertheless remains unsatisfied; and
- Whether all partners other than the debtor consented to the sale of the interest.

Warning:

Courts have rejected debtor partners' claims that *CCP § 699.720(a)(2)* protects their interests from foreclosure, drawing a distinction between the issuance of a writ of execution and ordering a sale to foreclose a lien created by a charging order on a partnership interest [*Hellman v. Anderson (1991) 233 CA3d 840, 848-850, 284 CR 830* ; *see also Crocker Nat'l Bank v. Perroton (1989) 208 CA3d 1, 5-6, 255 CR 794]* .

Cross References:

Form for notice of motion and motion for order for sale of judgment debtor's partnership interest, see *20.50*.

Discussion of foreclosing a partnership interest, see *California Forms of Pleading and Practice, § 402.21* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 20 Miscellaneous Creditor's Remedies
V. OBTAINING ORDER APPLYING PUBLIC FRANCHISE TO SATISFACTION OF MONEY JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.15

20.15 CHECKLIST: Obtaining Order Applying Public Franchise to Satisfaction of Money Judgment.

☐ File noticed motion for order applying public franchise to satisfaction of money judgment.

Authority:
CCP § 708.920

Discussion:
See *20.17*

☐ Serve notice of motion on judgment debtor and public entity that granted franchise.

Authority:
CCP § 708.920

Discussion:
See *20.18*

Forms:
See *20.51*, *20.52*

☐ Court will determine whether to allow application of the franchise to the satisfaction of the judgment.

Authority:
CCP § 708.920

Discussion:
See *20.19*

Form:
See *20.53*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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20.16 Options and Strategies.

A public franchise is not subject to levy and sale under execution, but may be applied to the satisfaction of a judgment pursuant to a court order made in the court's discretion. However, this is not a commonly employed remedy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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20.17 Judgment Creditor Can Seek to Have Court Order Public Franchise Applied to Satisfaction of Money Judgment.

A judgment creditor may ask the court to order a judgment debtor's public entity-granted franchise applied to the satisfaction of a money judgment by filing a noticed motion [*CCP § 708.920(a)*].

A "franchise" is a franchise granted by a public entity and all the rights and privileges of that franchise, other than being a corporation [*CCP § 708.910*].

Example:

Public franchises include food concessions at public parks or stadiums, golf shops at public courses, and the like. This is clearly distinct from, and this statutory process *does not* apply to, private contractual franchises such as franchised restaurants, gas stations, or car dealerships. The latter usually are specifically made nontransferable in the franchise agreement.

A memorandum must be served and filed with the notice of motion [*Cal Rules Ct, Rule 3.1113(a)*].

Warning:

An order for application of a franchise to the satisfaction of a money judgment is subject to all applicable laws governing sale, transfer, or other actions concerning the franchise, including but not limited to any necessary approvals by the PUC or local public entities and compliance with statutory or administrative regulations [*CCP § 708.930*].

Cross Reference:

Form for notice of motion and motion for order to apply a franchise to the satisfaction of a money judgment, see *20.51*.

Form for declaration in support of motion for order to apply a franchise to the satisfaction of a money judgment, see *20.52*.

Form for order granting motion to apply a franchise to the satisfaction of a money judgment, see *20.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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20.18 Judgment Creditor Must Serve Notice of Motion on Judgment Debtor and Public Entity That Granted Franchise.

The judgment debtor must serve the notice of motion personally or by mail on the judgment debtor and the public entity that granted the franchise [*CCP § 708.920(a)*]. The statute does not specify a time for service of the motion [*see CCP § 708.920*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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2-20 MB Practice Guide: CA Debt Collection 20.19

20.19 Court May Apply Franchise to Satisfaction of Money Judgment and Specify Process for Applying Franchise.

In exercising its discretion, the court must determine whether application of the franchise to the satisfaction of the judgment is proper, taking into account all the circumstances of the case, including but not limited to [*CCP § 708.920(a)*]:

- The nature of the franchise;
- Whether the franchise is by its terms transferable; and
- The likelihood that application of the franchise to the satisfaction of the judgment will yield a substantial amount.

If the court orders application of the franchise to the satisfaction of the judgment, it will be by means that appear proper to the court, including but not limited to sale of the franchise, assignment of the franchise or proceeds of the franchise, or appointment of a receiver. The court may include in its order, or make additional orders containing, provisions to effectuate the application of the franchise to the satisfaction of the judgment, including but not limited to provisions relating to the place of sale of the franchise, possession of the property of the judgment debtor necessary for the exercise of the franchise, receipt of proceeds of the franchise, recovery of penalties imposed by law and recoverable for injury to the franchise or for damages or other cause, and the judgment debtor's powers, duties, and liability for penalties and forfeitures [*CCP § 708.920(b)*].

Strategic Point:

Although a judgment creditor may not be able to obtain a lien on certain public franchise licenses, such as an FCC broadcast license, it can obtain a lien on the proceeds of the sale of such a license [*see MLQ Investors, L.P. v. Pacific Quadracasting (9th Cir 1998) 146 F3d 746, 749]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewCivil ProcedureJudgmentsEntry of

JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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2-20 MB Practice Guide: CA Debt Collection 20.20

20.20 CHECKLIST: Obtaining Order Assigning Judgment Creditor Right to Payment Owed to Judgment Debtor.

☐ Determine if payment is of a type suitable for assignment order.

Authority:
CCP § 708.510(a)

Discussion:
See *20.22*

☐ File and serve motion seeking assignment order.

Authority:
CCP § 708.510(b)

Discussion:
See *20.23*

Form:
See *20.54*

☐ Court considers relevant factors in determining whether to issue assignment order.

Authority:
CCP § 708.510(c)

Discussion:
See *20.24*

Form:

See *20.55*

☐ Scope of assignment order will be limited.

Authority:
CCP § 708.510(d)

Discussion:
See *20.25*

☐ Judgment creditor may seek to restrain judgment debtor from assigning or otherwise disposing of right to payment.

Authority:
CCP § 708.520

Discussion:
See *20.26*

Form:
See *20.54*

☐ Determine if assignee of right to payment is deemed to be a bona fide assignment for value.

Authority:
CCP § 708.530(a)

Discussion:
See *20.27*

☐ Obligor must receive notice of order before obligor is affected by it.

Authority:
CCP § 708.540

Discussion:
See *20.28*

☐ Judgment debtor may seek to exempt all or part of right to payment.

Authority:
CCP § 708.550

Discussion:
See *20.29*

☐ Either party may apply for order to modify or set aside assignment order.

Authority:

CCP § 708.560

Discussion:
See *20.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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20.21 Options and Strategies.

CCP § 708.510 provides an affirmative procedure for reaching assignable forms of rights to monies that are otherwise subject to levy, such as accounts receivable, general intangibles, judgments, and instruments. The remedy can be used alone or in conjunction with other remedies for reaching rights to payment, such as execution, orders in examination proceedings, creditors' suits, and receivership. This process does not make property assignable that is not already assignable [*CCP § 708.510*].

Strategic Point:

An assignment order can be a more economical alternative to the appointment of a receiver, since the assignment order may require payments to be made until the judgment is satisfied. An assignment order also may have the effect of removing the assigned right to payments from the debtor's bankruptcy estate, avoiding claims against the asset by the bankruptcy trustee and other creditors.

This procedure is useful, and is commonly used when the debtor is "employed" but is not a traditional employee subject to having his or her wages garnished. People who are employed as commission salespeople, real estate brokers, stock brokers, car salespeople, yacht salespeople, and almost all individuals who work strictly on commission are not technically employees for this purpose, whose wages can be garnished via a writ of execution. Rather, the creditor's attorney must obtain an assignment order from the court by motion. The motion advises the court that the debtor is not an employee with regular wages, taxes, and insurance, taken out by an employer. Rather, the debtor's compensation varies based on success. Thus, there is no set amount to be levied on; however, counsel may obtain an assignment order providing that if the debtor is entitled to any monies in the future from a third party, the third party (typically the "employer") is obligated to deduct what the creditor client is owed before payment. Once granted and properly served on the third party, this assignment obligates the "employer" to honor the judgment and pay all monies the creditor is entitled to before paying that debtor. If the third party disregards the court order, sanctions--including being subject to an order to show cause for contempt--can be pursued.

Counsel normally must have all the details pertaining to the right to payment clear and available before insurance or annuity company will pay over. Under these circumstances, it may be best to schedule a judgment debtor examination and have the court order turnover of the policy to ascertain this information.

This remedy is subject to limitations on the time for enforcement of judgments [1982 California Law Revision

Commission Comment to *CCP § 708.510*, 15 Cal L Rev Comm'n Reports 2001, 2521 (1980)].

Cross Reference:

Discussion of examination of debtor, see *9.23[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationProfessional ServicesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureSanctionsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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20.22 Any Assignable Payment or Payment Stream Is Suitable for Assignment Order.

An assignment order is a suitable remedy for any type of payment or payment stream that is assignable. The following list of certain types of payments suitable for an assignment order (listed below and in the statute) is merely illustrative and not limiting [*see CCP § 708.510(a)* ("... including, but not limited to the following types of payments"]:

- Wages due from the federal government that are not subject to withholding under an earnings withholding order.

Strategic Point:

A federal employee's wages are subject to garnishment under current federal law [*see 5 USC § 5520a*], so an assignment under *CCP § 708.510* is unnecessary for such a debtor.

- Rents.
- Commissions.
- Royalties.
- Payments due from a patent or copyright.
- Insurance policy loan value.

Warning:

Federal case law interpreting what types of payments may be suitable for an assignment order incorrectly interprets California law by restricting payments to those in conjunction with some physical or at least specific asset located in the United States [*see Quaestor Invs., Inc. v. State of Chiapas (C.D. Cal. 1997) 1997 U.S. Dist. Lexis 24271]* .

Consider:

The fact that choses in action are ordered assigned under *CCP § 708.510* does not

preclude a challenge to whether the claims were assignable ab initio; the Legislature specifically noted that *CCP § 708.510* does not make any property assignable that is not already assignable [*Kracht v. Perrin, Gartland & Doyle (1990) 219 CA3d 1019, 1021-1022, 268 CR 637*].

Cross Reference:

Discussion of examination of debtor, see *Ch. 9, Planning Enforcement of Judgment, 9.23[4].*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionGovernmentsFederal GovernmentEmployees & OfficialsLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsPatent LawOwnershipConveyancesRoyalties

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20.23 Judgment Creditor Must File and Serve Motion Seeking Assignment.

The judgment creditor must file and serve a motion for an order assigning a payment due (or to be become due) to the judgment debtor for the judgment creditor's benefit. The creditor must serve the notice of the motion on the judgment debtor personally or by mail [*CCP § 708.510(b)*].

Cross Reference:

Form for motion to have court order judgment debtor to assign right to payment, see *20.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionGovernmentsFederal GovernmentEmployees & OfficialsPatent LawOwnershipConveyancesRoyalties

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20.24 Court Will Consider Relevant Factors in Determining Whether to Issue Assignment Order.

In determining whether to order an assignment or the amount of an assignment, the court may take into consideration all relevant factors, including the following [*CCP § 708.510(c)*]:

- The reasonable requirements of a judgment debtor who is a natural person and of persons supported in whole or in part by the judgment debtor.

- Payments the judgment debtor must make or that are deducted in satisfaction of other judgments and wage assignments, including earnings assignment orders for support.

- The amount remaining due on the money judgment.

- The amount being or to be received in satisfaction of the right to payment that may be assigned.

Warning:

Federal case law requires that the judgment creditor make a showing in the motion for an assignment order regarding the items specified in *CCP § 708.510(c)*, namely (1) amounts required for support; (2) payments required to be made on other orders; (3) the amount remaining due on the money judgment; and (4) the amounts to be received with respect to the assigned (per the assignment order) [Garden City Boxing Club, Inc. v. Briano (E.D. Cal. 2007) U.S. Dist. LEXIS 95086]. With respect to items (1), (2) and (4), it is arguably an inappropriate interpretation of the statute to require the judgment creditor to provide such information, because these issues are within the knowledge of the judgment debtor, who may make a substantive opposition if he or she wishes to do so. In analogous sections regarding claims of exemption for levies and wage garnishments, the burden is on the judgment debtor to provide such information [*see CCP §§ 703.520 et seq.*; *706.105(b)*].

Cross Reference:

Form for order to assign right to payment, see *20.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionGovernmentsFederal GovernmentEmployees & OfficialsPatent LawOwnershipConveyancesRoyalties

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20.25 Scope of Assignment Order Is Limited.

A court's ability to order an assignment is limited by several factors:

- First, the right to payment may be assigned only to the extent necessary to satisfy the money judgment [*CCP § 708.510(d)*].

- Second, when the court assigns earnings or periodic payments pursuant to a pension or retirement plan, the amount of the earnings or the periodic payments assigned must not exceed the amount that may be withheld from a like amount of earnings under the Wage Garnishment Law [*CCP § 708.510(e)*; *see CCP § 706.010*].

- Finally, when a specific amount of the payment or payments to be assigned is exempt by another statutory provision, the amount of the payment or payments to be assigned must not exceed the amount by which the payment or payments exceed the exempt amount [*CCP § 708.510(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionGovernmentsFederal GovernmentEmployees & OfficialsPatent LawOwnershipConveyancesRoyalties

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2-20 MB Practice Guide: CA Debt Collection 20.26

20.26 Judgment Creditor Can Restrain Judgment Debtor From Assignment or Other Disposition of Right to Payment.

When applying for an order assigning a judgment debtor's right to payment, the judgment creditor may 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 to the judgment creditor [*CCP § 708.520(a)*]. The application must be made on noticed motion if the court directs or if a court rule requires; otherwise, the application may be made ex parte [*CCP § 708.520(a)*].

The court may issue an order restraining the judgment debtor from assigning or otherwise disposing of the debtor's right to payment on a showing of need for the order. The court, in its discretion, may require the judgment creditor to provide an undertaking [*CCP § 708.520(b)*]. The court may modify or vacate the order at any time with or without a hearing on terms that are just [*CCP § 708.520(c)*].

An order restraining the judgment debtor from assigning or otherwise disposing of a right to payment must be personally served on the judgment debtor, and must contain a notice to the judgment debtor that failure to comply with the order may subject the judgment debtor to contempt [*CCP § 708.520(d)*].

Cross Reference:

Form for motion requesting restraining order, see *20.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewContracts LawTypes of ContractsChoses in ActionGovernmentsFederal GovernmentEmployees & OfficialsPatent LawOwnershipConveyancesRoyalties

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20.27 Assignee Is Deemed Bona Fide Assignee for Value.

Generally, an assignee of a right to payment pursuant under *CCP § 708.510 et seq*. is deemed to be a bona fide assignee for value under *CC § 955.1* [*CCP § 708.530(a)*]. An assignment of the right to future rent is recordable as an instrument affecting real property and the priority of the assignment is governed by *CC § 1214* [*CCP § 708.530(b)*].

Strategic Point:

The benefit of being a bona fide assignee for value gives the potential defenses available to a holder in due course. That is, defenses that might be enforceable against the assignor may not be available to enforcement by a bona fide assignee. This immunizes the assignment from attack as a fraudulent transfer, and will also give the assignee priority with respect to any subsequent assignees or lienholders.

Warning:

Counsel should be on the lookout for fraudulent transfers to assignees (family members, "strawmen," and the like). If counsel suspects this is happening, it may be necessary to bring a separate action against the debtor and the assignee for fraudulent conveyance.

Cross Reference:

Discussion of fraudulent transfers, see Ch. 4, Fraudulent Conveyances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral OverviewReal Property LawDeedsDeliveryReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleFraudulent Transfers

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2-20 MB Practice Guide: CA Debt Collection 20.28

20.28 Assignment Order Does Not Affect Obligor Until Notice of Order Is Received.

The rights of an obligor (the person obligated to make payments to the judgment debtor, or who may become obligated to make payments to the judgment debtor) are not affected by an order assigning the right to payment until the obligor receives notice of the order [*CCP § 708.540*].

Cross Reference:

Form for order directing obligor to make payment to creditor, see *20.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral OverviewReal Property LawDeedsDeliveryReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleFraudulent Transfers

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2-20 MB Practice Guide: CA Debt Collection 20.29

20.29 Judgment Debtor Can Seek to Exempt All or Part of Right to Payment.

The judgment debtor can claim that all or part of the right to payment is exempt from enforcement of a money judgment by filing a noticed motion with the court not later than three days before the date set for the hearing on the judgment creditor's application for an assignment order [*CCP § 708.550(a)*].

The judgment debtor must execute an affidavit in support of the application that includes all of the following matters [*CCP § 708.550(a)*; *see CCP § 703.520(b)*]:

- The name of the claimant and the mailing address where service of a notice of opposition to the claim can be made on the claimant.
- The name and last known address of the judgment debtor if the claimant is not the judgment debtor.
- A description of the property claimed to be exempt.
- A financial statement, if required by *CCP § 703.530*.
- A citation of the provision of the Code of Civil Procedure chapter or other statute on which the claim is based.
- A statement of the facts necessary to support the claim.

The court will determine any claim of exemption at the hearing on issuance of the assignment order [*CCP § 708.550(c)*].

Warning:

A judgment debtor's failure to make a claim of exemption is a waiver of the exemption [*CCP § 708.550(a)*].

Timing:

The notice of the motion must be personally served on the judgment creditor not later than three days

before the date set for the hearing [*CCP § 708.550(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral OverviewReal Property LawPriorities & RecordingGeneral Overview

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2-20 MB Practice Guide: CA Debt Collection 20.30

20.30 Either Party Can Apply for Order to Modify or Set Aside Assignment Order.

The court has broad discretion to modify or set aside an assignment order depending upon the circumstances of the case. Either the judgment creditor or the judgment debtor may apply to the court on noticed motion for an order to modify or set aside the assignment order. The notice of motion must be served on the other party, either personally or by mail [*CCP § 708.560(a)*].

The court will make an order modifying or setting aside the assignment order on a showing that there has been a material change in circumstances since the time of the previous hearing on the assignment order. The court may order a reassignment of the right to payments as necessary, stating whether and to what extent it applies to payments already made [*CCP § 708.560(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral Overview

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2-20 MB Practice Guide: CA Debt Collection 20.31

20.31 CHECKLIST: Seeking Order Applying Unvested Interest in Judgment Debtor's Property to Satisfaction of Money Judgment.

☐ Apply to court for order applying nonvested property interest to satisfy money judgment.

Authority:
CCP § 709.020

Discussion:
See *20.33*

Forms:
See *20.56 -20.58*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesJudgment InterestGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral Overview

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20.32 Options and Strategies.

Contingent interests are subject to satisfaction of a money judgment and can be reached to satisfy a money judgment [*CCP § 709.020*; *but see CCP § 699.720(a)(9)* (contingent interests are not subject to direct execution)]. The court, can fashion a suitable remedy through its equitable powers to prevent a sacrificial sale of the judgment debtor's interest while preserving the rights of the judgment creditor [*CCP § 709.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureRemediesJudgment InterestGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
VII. SEEKING ORDER APPLYING UNVESTED INTEREST IN JUDGMENT DEBTOR'S PROPERTY TO SATISFACTION OF MONEY JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.33

20.33 Judgment Creditor Can Apply to Court for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment.

A judgment creditor can apply to the court, on noticed motion, for an order applying to the satisfaction of a money judgment a contingent remainder, executory interest, or other interest of the judgment debtor in property that is not vested in the judgment debtor [*CCP § 709.020*]. The interest of the judgment debtor can be applied to the satisfaction of the money judgment by means that the court, in its discretion, determines are proper to protect the interests of 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.

The judgment creditor must serve and file a supporting memorandum with the notice of motion [*Cal Rules Ct, Rule 3.1113(a)*]. Although not specifically required by the statute, a judgment creditor also should file and serve a declaration in support of his or her motion for an order for application of a nonvested property interest to satisfaction of a money judgment

Cross References:

Form for notice of motion and motion for an order applying a nonvested property interest to satisfy a money judgment, see *20.56*.

Form for declaration in support of a motion for an order applying a nonvested property interest to satisfy a money judgment, see *20.57*.

Form for an order applying a nonvested property interest to satisfy a money judgment, see *20.58*.

Further discussion, see *California Forms of Pleading and Practice, § 254.290 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureRemediesJudgment InterestGeneral OverviewReal Property LawEstatesFuture InterestsExecutory Interests

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Chapter 20 Miscellaneous Creditor's Remedies
VIII. SEEKING APPOINTMENT OF RECEIVER TO ENFORCE JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.34

20.34 CHECKLIST: Seeking Appointment of Receiver to Enforce Judgment.

☐ Apply to court for court appointment of receiver.

Authority:
Cal Rules Ct, Rule 3.1177

Discussion:
See *20.36*

☐ Make showing that appointment of receiver is reasonable method to obtain fair and orderly satisfaction of judgment, considering interests of both judgment creditor and judgment debtor.

Authority:
CCP § 708.620

Discussion:
See *20.37*

Forms:
See *20.59*, *20.60*

☐ If appropriate, seek to have judgment debtor's interest in alcoholic beverage license applied to satisfaction of money judgment.

Authority:
CCP § 708.630

Discussion:
See *20.38*

☐ Court will fashion order appointing receiver.

Authority:
CCP § 708.630

Discussion:
See *20.36*

Form:
See *20.61*

☐ Receiver moves court for order approving sale of assets.

Authority:
CCP § 568.5

Discussion:
20.36

Form:
20.62

☐ Receiver moves for order terminating receivership.

Authority:
CCP § 568

Discussion:
20.36

Form:
20.63

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversPowers

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Chapter 20 Miscellaneous Creditor's Remedies
VIII. SEEKING APPOINTMENT OF RECEIVER TO ENFORCE JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.35

20.35 Options and Strategies.

The general receiver provisions apply to receivers for enforcement of judgments [*CCP § 708.610*; *see CCP § 564*]. The appointment of a receiver is subject to the general rules concerning the time within which judgments may be enforced.

Strategic Point:

Appointment of a receiver may be useful in the following postjudgment situations:

- When collection of the judgment involves the sale of specialized property, like large machinery, for which the sheriff will be unable to get the highest value.
- When there are potential toxic issues or code violations with the property, as an "insulating factor" for the seller, because the receiver is the agent of the court. As long as the issues are disclosed, there should be immunity from most claims.
- When there are potential title issues or conflicting claims on the property, as a way of resolving them without having a sale that diminishes in returns because of these unresolved issues.
- When there may be ongoing theft or fraud before the sale can be held.
- When there is a judgment to sell an apartment building or other building where rents are being paid, appointment of a receiver can be advantageous to ensure that while the sale is taking place, rents are being collected and distributed properly.
- When a debtor is collecting rents and not paying a first mortgage.
- When there will be a transfer of a debtor's interest in a liquor license.

Cross Reference:

Discussion of receivership to transfer liquor license, see *20.38*.

A receiver is more costly than having the sheriff sell, but under specific circumstances it is often the best way to get the highest return on sale. The receiver is not bound by the restraints of most sheriff's departments, can coordinate with an appropriate selling agent or auctioneer, and is more flexible with dates.

Warning--Be Aware of Potential Cost of Receivership:

Receivership is a drastic yet sometimes necessary remedy. It can be very expensive for the creditor, because the creditor is responsible not only for attorney's fees, but also the initial receiver's fees, bonds, and sheriff's fees. There may be assets in the debtor's property they will go towards paying all these fees, but the creditor should be prepared to advance the initial fees at the outset. *Counsel should have a game plan and a budget at the outset, and find a receiver who will honor them.*

After the receiver has fully liquidated or fulfilled his or her duties, the receiver must move to be discharged before proceeds are distributed, unless an interim court order allowing that has been sought and obtained.

Cross Reference:

Appointment of a receiver to preserve assets before entry of judgment, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDuties

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Chapter 20 Miscellaneous Creditor's Remedies
VIII. SEEKING APPOINTMENT OF RECEIVER TO ENFORCE JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.36

20.36 Judgment Creditor Can Apply to Court for Receiver to Obtain Satisfaction of Judgment.

A judgment creditor can apply to the court for the appointment of a receiver to enforce a judgment [*CCP §§ 708.610*, *708.620*].

There are general provisions regarding appointment and powers of receivers [*see CCP § 564*]. The normal procedure for appointing a receiver is by noticed motion [*see Cal Rules Ct, Rule 3.1177*], supported by an affidavit [*see CCP § 2009*] or declaration [*CCP § 2015.5*], and a memorandum [*Cal Rules Ct, Rules 3.1100*, *3.1103(a)*, *3.1113(a)*]. This is followed by a hearing on the motion [*see Cal Rules Ct, Rules 3.1304*, *3.1306*].

The noticed motion procedure eliminates the requirement that the plaintiff file an indemnity bond in favor of the defendant, which is required when a receiver is appointed on an ex parte application [*see CCP § 566(b)*] and must be used unless the delay occasioned by notice will result in irreparable injury [*see Cal Rules Ct, Rule 3.1175*].

The costs of a receiver can be added to the judgment if the costs were reasonably and necessarily incurred [*CCP § 685.070(a)(5)*].

Strategic Point:

Counsel should be certain that any powers or actions counsel wants the receiver to be able to take are included in the motion as well as in the proposed order. For example, if the receiver needs to sell property, counsel should be specific if possible about the nature of the property and whether the receiver may go into a private place to take and remove it. In addition, the receiver should seek further court approval if the sale of the property will or may affect the rights of others, such as other lienholders of record.

The receiver may move the court for an order approving the sale of real or personal property in the receiver's possession on notice, and in the manner specified, by *CCP § 701.510 et seq*. Sale by the receiver is not final until confirmed by the court [*CCP § 568.5*].

Cross Reference:

Discussion of sale of property, see Ch. 18, Execution Sales.

After the sale of assets is completed, the receiver should move the court to terminate the receivership, discharge the receiver, approve the final accounting and other reports, and remit funds accordingly [*Cal Rules Ct, Rule 3.1184*; *see CCP § 568* (judicially supervised powers of receiver)].

Cross Reference:

Form for notice of motion for appointment of receiver, see *20.59*.

Form for declaration in support of motion for appointment of receiver, see *20.60*.

Form for order appointing receiver, see *20.61*.

Form for motion for approval of sale of assets and order, see *20.62*.

Form for motion to terminate receivership and discharge receiver, see *20.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversPowersCivil ProcedureRemediesReceivershipsTerminations

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Chapter 20 Miscellaneous Creditor's Remedies
VIII. SEEKING APPOINTMENT OF RECEIVER TO ENFORCE JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.37

20.37 Judgment Creditor Must Show Appointment of Receiver Is Reasonable Method to Satisfy Judgment.

A receiver can be appointed when a writ of execution would not be able to reach the property, and other remedies appear inadequate. A receiver may also be appointed in examination proceedings when the required showing is made [*see, e.g., Tucker v. Fontes (1945) 70 CA2d 768, 771-772, 161 P2d 697]* .

The court may appoint a receiver to enforce a money judgment when the judgment creditor shows 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*].

Strategic Point:

Because a receivership is a drastic and expensive remedy, the court will require a strong showing that a receiver is necessary to preserve property and to collect the judgment. Otherwise, a less drastic remedy, such as an assignment order, is appropriate. Counsel should prepare carefully and make the strongest showing possible to assure that the desired result will be obtained.

Cross Reference:

Discussion and forms relating to receivers, see *California Forms of Pleading and Practice, § 486.01 et seq*. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 20 Miscellaneous Creditor's Remedies
VIII. SEEKING APPOINTMENT OF RECEIVER TO ENFORCE JUDGMENT

2-20 MB Practice Guide: CA Debt Collection 20.38

20.38 Receiver Can Be Appointed to Transfer Judgment Debtor's Interest in Alcoholic Beverage License.

The court can appoint a receiver for the purpose of transferring the judgment debtor's interest in a transferable alcoholic beverage license, unless the judgment debtor shows in the proceeding to appoint a receiver that the amount of delinquent taxes and claims of creditors with priority over the judgment creditor exceeds the probable sale price of the license [*CCP § 708.630(b)*].

Strategic Point:

This is the exclusive procedure available to a judgment creditor to sell an alcoholic beverage license.

The receiver can exercise the powers of the licensee/debtor as necessary and doing so, must comply with all applicable law. An application must be filed to transfer the license to the receiver and a temporary retail permit must be obtained during the pendency of the transfer [*CCP § 708.630(c)*].

Consider:

A liquor license will not be sold or allowed to be transferred by the Alcoholic Beverages Commission unless all outstanding taxes have been paid [*B&P Code § 24049*; *4 CCR § 68.2*].

Cross Reference:

Detailed discussion of procedure for transferring alcoholic beverage license, see California Legal Forms, Ch. 18, Buying and Selling a Retail Alcoholic Beverage License and Business (Matthew Bender).

Forms for motion for approval of sale of assets including liquor license, and motion to terminate receivership after sale, see *20.62*, *20.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureRemediesReceiverships ReceiversGeneral OverviewCivil ProcedureRemediesReceiverships ReceiversAppointmentsGovernmentsState & Territorial GovernmentsLicenses

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.39

20.39 CHECKLIST: Making Assignment for Benefit of Creditors.

☐ Review current status of law regarding preemption of California statutes by federal Bankruptcy Code.

Authority:
See *Sherwood Partners, Inc. v. Lycos, Inc. (9th Cir 2005) 394 F3d 1198* ; *but see Haberbush v. Charles & Dorothy Cummins Family Ltd. P'ship (2006) 139 CA4th 1630, 43 CR3d 814*

Discussion:
See *20.40*

☐ Determine whether assignment for benefit of creditors is an acceptable and available alternative to bankruptcy.

Discussion:
See *20.41*

☐ Prepare written assignment meeting following conditions:

○ Must be of all defendant's assets that are transferable and not exempt from enforcement of a money judgment.

○ Must be for benefit of all of defendant's creditors.

○ Must not create preference of one creditor or class of creditors over any other creditor or class of creditors.

Authority:

CCP § 493.010; see *CCP § 1802(a)*

Discussion:
See *20.42*

☐ Determine whether to retain any qualifying property as exempt.

Authority:
CCP § 1801

Discussion:
See *20.43*

☐ Provide assignee with list of creditors at time assignment is made.

Authority:
CCP § 1802(c)

Discussion:
See *20.44*

☐ Obtain assignee's written acceptance of assignment.

Authority:
CCP § 1802(a)

Discussion:
See *20.45*

☐ Assignee must notify creditors and establish a date by which creditors must file claims.

Timing:
Notice must be given within 30 days after written acceptance of assignment.

Timing:
Date for filing claims must be not less than 150 days nor more than 180 days after date on which notice was first given to creditors and parties in interest

Authority:
CCP § 1802(a), (b)

Discussion:
See *20.46*

☐ Assignee may take steps to recover transfers of property by assignor.

Authority:
CCP § 1802(b)

Discussion:

See *20.47*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsBenefit of CreditorBankruptcy LawCase AdministrationNotice

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.40

20.40 Options and Strategies.

There is a nonstatutory common law procedure for making assignments for the benefit of creditors. By an assignment for the benefit of creditors, the debtor assigns its property to an assignee, who sells the property and distributes the proceeds among the assignor's creditors [*see Bumb v. Bennett (1958) 51 C2d 294, 298-299, 333 P2d 23]* . Such an assignment for the benefit of creditors is not binding on the creditors, who can still sue or force an involuntary bankruptcy.

This procedure is no longer in common use. Many consumer credit counselors in effect use this procedure by default in trying to assist creditors. If creditors will not accept the terms of the payoff, a petition in bankruptcy usually follows.

California statutes also provide a process whereby a debtor can make a general assignment for the benefit of creditors [*see CCP §§ 493.010, 493.020, 1800-1802*]. Its use is prevalent in the commercial credit community, handled predominantly by creditors' associations. This latter procedure is the one discussed in this chapter.

Warning:

California law regarding assignments for the benefit of creditors is in flux as a result of two cases pertaining to the powers of an assignee to avoid preferential transfers [*see Sherwood Partners, Inc. v. Lycos, Inc. (9th Cir 2005) 394 F3d 1198* (*CCP § 1800*, creating statutory scheme for assignment for benefit of creditors, is preempted by *Bankruptcy Code); Haberbush v. Charles & Dorothy Cummins Family Ltd. P'ship (2006) 139 CA4th 1630, 43 CR3d 814* (in case decided after *Sherwood Partners*, stating that *CCP § 1800* is not preempted by Bankruptcy Code)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementInvoluntary CasesPrerequisitesBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsBenefit of CreditorBankruptcy LawCase AdministrationNotice

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.41

20.41 Defendant Can Make General Assignment for Benefit of Creditors.

A defendant can make a general assignment for the benefit of creditors [*CCP § 493.020*]. An assignment for the benefit of creditors is a business liquidation device available as an alternative to bankruptcy. By an assignment for the benefit of creditors, the debtor assigns his, her, or its property to an assignee who sells the property and distributes the proceeds among the assignor's creditors [*see Mechanics Bank v. Rosenberg (1962) 201 CA2d 419, 421-424, 20 CR 202]* .

Investigating Assignments for Benefit of Creditors Using Online Resources:

Many online resources are available for researching assignments for benefit of creditors. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined

Sample Search: To find California cases that discuss assignments for benefit of creditors, use a HEADNOTES segment search: *headnotes (assignment /3 benefit /2 creditor)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementInvoluntary CasesPrerequisitesBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsBenefit of CreditorBankruptcy LawCase AdministrationNotice

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.42

20.42 Assignment Must Include All Non-Exempt Assets and Must Be For Benefit of All Creditors.

An assignment for the benefit of creditors must meet the following conditions [*see CCP §§ 493.010, 493.020*]:

- It must be of all the defendant's assets that are transferable and not exempt from enforcement of a money judgment.
- It must be for the benefit of all of the defendant's creditors.
- It must not itself create a preference of one creditor or class of creditors over any other creditor or class of creditors.

Although the statutes do not expressly require that the assignment be made in writing, as a practical matter a written assignment is the only way to effectively satisfy the statutory requirements relating to the list of creditors and statutory notice requirements [*see CCP § 1802(a)*].

Cross References:

Discussion, see *20.44- 20.46*.

Discussion relating to assignments for the benefit of creditors, see *California Forms of Pleading and Practice, § 307.11 et seq*. (Matthew Bender).

Form for complaint by common law assignee, see *California Forms of Pleading and Practice, § 307.50* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementInvoluntary CasesPrerequisitesBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsBenefit of CreditorBankruptcy LawCase AdministrationNotice

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.43

20.43 Individual Assignor May Elect to Retain Specified Property as Exempt Assets.

In any general assignment for the benefit of creditors, the assignor, if an individual, may choose to retain as exempt property either the property that otherwise would be exempt under *CCP § 703.010* or property specifically authorized to be exempt from a general assignment for the benefit of creditors under *CCP § 1801*. The following is a summary of the exemptions specified in *CCP § 1801*:

Cross Reference:

Discussion of CCP § 703.010, see Ch. 16, Executing and Levying Against Personal Property.

- Up to $7500 in property that the assignor or a dependent uses as a residence or that is a burial plot [*CCP § 1801(a)*].
- The assignor's interest in one motor vehicle, up to $1200 [*CCP § 1801(b)*].
- Up to $200 in household goods, furniture, clothing, pets, and other personal items [*CCP § 1801(c)*].
- Up to $500 in jewelry [*CCP § 1801(d)*].
- Up to $400 in other property [*CCP § 1801(e)*].
- Up to $750 in tools of the trade [*CCP § 1801(f)*].
- Any unmatured life insurance contract owned by the assignor, other than a credit life insurance contract [*CCP § 1801(g)*], and up to $4,000 in accrued dividents or loan value of any unmatured life insurance contract [*CCP § 1801(h)*].
- Professionally prescribed health aids for the assignor or a dependent of the assignor [*CCP § 1801(i)*].
- Social security, veterans', and disability benefits, unemployment compensation, spousal and child support payments, and pension and retirement benefits (with some exceptions) [*CCP § 1801(j)*].
- Crime victims' reparations, wrongful death payments and life insurance proceeds from an individual

of whom the assignor was a dependent, up to $7500 in bodily injury or pain and suffering tort damages awarded to the assignor or a dependent, and compensation for loss of future earnings of the assignor or an individual of whom the assignor is or was a dependent, to the extent reasonably necessary for the support of the assignor and any dependent of the assignor [*CCP § 1801(k)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsFamily LawChild SupportObligationsComputationImputed IncomeUnemploymentFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.44

20.44 Assignor Must Provide Assignee With List of Creditors.

At the time the assignment is made, the assignor must provide the assignee with a list of creditors, equityholders, and other parties in interest. This list must be signed under penalty of perjury and must include the names, addresses, cities, states, and ZIP codes for each person, together with the amount of that person's anticipated claim in the assignment proceedings [*CCP § 1802(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsInsurance LawLife InsuranceGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.45

20.45 Assignee Must Accept Assignment in Writing.

The statutes do not expressly require the assignee's written acceptance of the writing, but since such consent is a statutory prerequisite to the mandatory notice requirements [*see CCP § 1802(a)*], the assignee's written acceptance is in effect mandated by statute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsInsurance LawLife InsuranceGeneral Overview

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.46

20.46 Assignee Must Give Notice of Assignment and Establish a Date by Which Creditors Must File Claims.

Within 30 days after accepting the assignment in writing, the assignee must give written notice of the assignment to the assignor's creditors, equity holders, and other parties in interest as set forth on the list provided by the assignor [*CCP § 1802(a)*].

The notice must specify a date by which creditors must file their claims to be able to share in the distribution of proceeds of the liquidation of the assignor's assets. That date must be not less than 150 days nor more than 180 days after the date on which notice was first given to creditors and parties in interest [*CCP § 1802(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 20 Miscellaneous Creditor's Remedies
IX. MAKING ASSIGNMENT FOR BENEFIT OF CREDITORS

2-20 MB Practice Guide: CA Debt Collection 20.47

20.47 Assignee May Recover Transfers of Property by Assignor.

The assignee of any general assignment for the benefit of creditors may recover any transfer of property of the assignor [*CCP § 1802(b)*]:

- To or for the benefit of a creditor;
- For or on account of an antecedent debt owed by the assignor before the transfer was made;
- Made while the assignor was insolvent [see *CCP § 1800(a)(1)* (definition), *CCP § 1800(f)* (presumption of insolvency during 90 days immediately preceding assignment)];
- Made on or within 90 days before the date of the making of the assignment or made between 90 days and one year before the date of making the assignment if the creditor, at the time of the transfer, was an insider and had reasonable cause to believe the debtor was insolvent at the time of the transfer; and
- That enables the creditor to receive more than another creditor of the same class.

Exception:
The rule stated above is subject to complex limitations [*see CCP § 1800(c)*]. Counsel should review these exceptions in appropriate cases.

Timing:
An action by an assignee under this section must be commenced within one year after the making of the assignment [*CCP § 1802(g)*].

Cross Reference:
Discussion of actions relating to fraudulent conveyances, see Ch. 4, Fraudulent Conveyances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsContracts LawDebtor & Creditor RelationsContracts LawSales of GoodsForm,

Formation & ReadjustmentFormationAssignment of RightsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 20 Miscellaneous Creditor's Remedies
X. FORMS

2-20 MB Practice Guide: CA Debt Collection 20.48

20.48 Petition to Direct Guardian or Conservator to Pay Debt, Expense, or Charge.

Petition to Direct Guardian or Conservator to Pay Debt, Expense, or Charge.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee]	NO. _____ PETITION TO DIRECT _____ [GUARDIAN *or* CONSERVATOR] TO PAY DEBT, EXPENSE, OR CHARGE Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Hearing Date: _____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner is _____ [the ward *or* the conservatee *or* a creditor of the estate *or* a person interested] in the above-entitled proceeding [in that _____ (*specify nature of interest if appropriate*)].

2. _____ [*Name*] is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate of _____ [ward *or* conservatee].

3. _____ [*Describe debt, expense, or charge incurred, e.g.,* On _____ (*date*), a judgment was entered in the case of _____ (*describe case including name, court, and number*), adjudging that _____ (*name of ward or conservatee*) was liable to _____ (*name*) in

the amount of $_____ with interest thereon from _____ (*date*), at the legal rate].

4. The _____ [guardian *or* conservator] has failed, neglected, and refused to pay any part of this _____ [*specify, e.g.,* judgment], and it is now due, owing, and unpaid.

5. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed herein and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order directing _____ [*name*], as _____ [guardian *or* conservator] of the estate of _____ [*name*], _____ [ward *or* conservatee], to pay to _____ [*name*] the sum of $_____ with interest thereon at the legal rate from _____ [*date*], and for such other and further orders as the court may deem proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein represented on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

NOTES.

Authority:
CCP § 709.030; *Prob Code § 2404*

Grounds:
See *20.08*, *20.09*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 290.58 (Matthew Bender)*

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Chapter 20 Miscellaneous Creditor's Remedies
X. FORMS

2-20 MB Practice Guide: CA Debt Collection 20.49

20.49 Notice of Motion and Motion for Order Charging Judgment Debtor's Partnership Interest.

Notice of Motion and Motion for Order Charging Judgment Debtor's Partnership Interest.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER CHARGING JUDGMENT DEBTOR'S PARTNERSHIP INTEREST Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name*], _____ [*identify party, e.g.,* plaintiff] as judgment creditor of _____ [*identify party, e.g.*, defendant] _____ [*name of judgment debtor*] will, and hereby does, move for an order:

1. Charging _____ [*name of judgment debtor*]'s interest in _____ [*name of partnership*], a partnership, with its principal place of business located at _____ [*street address*],

_____ [*city*], _____ County, California, and having as its members _____ [*names*], with payment of the unsatisfied portion of the judgment entered on _____ [*date*], in the above-entitled action, that portion being the sum of $_____.

2. Charging that partnership interest with payment of interest on the unsatisfied portion of that judgment, at the legal rate from _____ [*date*].

[3. Appointing a receiver of _____ (*name of judgment debtor*)'s share of profits and any other money due or to fall due to him/her in respect of that partnership.]

4. _____ [*Specify any other orders, directions, accounts, or inquiries that judgment debtor might have made or that circumstances require, e.g.*, That the partnership pay _____ (*identify party, e.g., defendant)* _____ (*name of judgment debtor*) all partnership profits past due and unpaid to him/her]. The motion will be made on the grounds that _____ [*name of judgment debtor*], _____ [*plaintiff or defendant*] herein, is a judgment debtor of _____ [*name*], _____ [*plaintiff or defendant*] herein, pursuant to a judgment entered in the above-entitled action on _____ [*date*]. A certified copy of the judgment is attached as Exhibit _____ to the declaration accompanying this motion. That judgment remains [wholly] unsatisfied in the amount of $_____.

The motion will be based on this notice of motion, on the declaration of _____ [*name*], who is the attorney for the _____ [*identify party, e.g.*, plaintiff], judgment creditor, on the memorandum of points and authorities served and filed herewith, on the papers and records on file in this action, and on any oral and documentary evidence that may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:
CCP § 708.310

Grounds:
See *20.13[1]*

Related Form for Motion for Order for Sale:
See *20.50*

Related Memorandum:
See *California Points and Authorities, § 200.323* (Matthew Bender)

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, §§ 402.20*, *402.45* (Matthew Bender)

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2-20 MB Practice Guide: CA Debt Collection 20.50

20.50 Notice of Motion and Motion for Order for Sale of Judgment Debtor's Partnership Interest.

Notice of Motion and Motion for Order for Sale of Judgment Debtor's Partnership Interest.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER FOR SALE OF JUDGMENT DEBTOR'S PARTNERSHIP INTEREST Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, plaintiff] will move for an order that:

1. _____ [*Name of judgment debtor*]'s interest in _____ [*name of partnership*], a California partnership, doing business as _____ [*fictitious business name*], be sold pursuant to the

charging order imposed on that interest by order of this Court dated _____ and the judgment rendered on _____ [*date*], which remains unsatisfied.

2. _____ [*Name*], _____ [*describe status, e.g.*, qualified and acting receiver under the charging order or the creditor or _____ (*name of county*) County Sheriff], be authorized to sell the aforementioned interest pursuant to Code of Civil Procedure Sections [*if receiver is involved add:* 568.5,] 701.530 and 701.545 through 701.830.

The motion will be made on the grounds that _____ [*name of judgment creditor*], _____ [*plaintiff or defendant*] herein, obtained an order charging _____ [*name of judgment debtor*]'s interest in the above-described partnership with payment of an unsatisfied judgment in the sum of $_____, together with interest. The judgment remains unsatisfied and _____ [consent of the nondebtor partners is not necessary because _____ (*specify, e.g.*, debtor no longer takes an active part in the management of the partnership and foreclosure of debtor's interest will not unduly interfere with the partnership business) *or* all (general) partners, other than the debtor, in the foregoing named partnership have consented to the sale].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], who is the attorney for the _____ [*identify party, e.g.*, plaintiff], judgment creditor, on the memorandum of points and authorities served and filed herewith, on the records and file herein, and on any evidence that may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:
Corp Code § 16504(b)

Grounds:
See *20.14*

Related Forms of Motion for Charging Order:
See *20.49*

Related Memorandum:
See *California Points and Authorities, § 200.323* (Matthew Bender)

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, §§ 402.20*, *402.45* (Matthew Bender)

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2-20 MB Practice Guide: CA Debt Collection 20.51

20.51 Notice of Motion and Motion for Order Applying Franchise Granted by Public Entity to Satisfy Money Judgment.

Notice of Motion and Motion for Order Applying Franchise Granted by Public Entity to Satisfy Money Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	NOTICE OF MOTION AND MOTION FOR ORDER TO APPLY FRANCHISE SATISFACTION OF MONEY JUDGMENT
vs.	Date: _____
_____ [*name*],	Time: _____
Defendant.	Location: _____
	Judge: _____
	Date Action Filed: _____
	Trial Date: _____

_____

To: _____ [*judgment debtor*] and _____, _____ [his/her] attorney, and _____ [*name of public entity that granted franchise*].

You are hereby notified that on _____ [*day*], _____ [*date*], at _____ [*time*], or as soon thereafter as counsel can be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*name of judgment creditor*] will, and does hereby, apply to the court for an order to apply the franchise granted by _____ [*name of public entity*] to _____ [*name of judgment debtor*] to the satisfaction of the judgment rendered on _____ [*date*], by this court in favor of _____ [*name of judgment creditor*] and against _____ [*name of judgment debtor*].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:
CCP § 708.920(a)

Grounds:
See *20.17*

Related Forms of Declaration and Order:
See *20.52*, *20.53*

Detailed Discussion of Form/Requirements:
See *California Points and Authorities, § 200.323* (Matthew Bender)

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2-20 MB Practice Guide: CA Debt Collection 20.52

20.52 Declaration in Support of Motion for Application of Franchise to Satisfy Money Judgment.

Declaration in Support of Motion for Application of Franchise to Satisfy Money Judgment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ DECLARATION OF _____ IN SUPPORT OF MOTION FOR APPLICATION OF FRANCHISE SATISFACTION OF MONEY JUDGMENT Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) or other statement as appropriate].

2. _____ [*Specify judgment creditor, e.g.*, Plaintiff] _____ [*name*] obtained a judgment against _____ [*specify judgment debtor, e.g.*, defendant] _____ [*name*] in the above-entitled action in the amount of $_____ on _____ [*date*].

3. _____ [*Specify facts pertaining to judgment debtor's franchise rights, e.g.*, _____ (*name of judgment debtor*) holds the exclusive right to furnish cable television service within the boundaries of the City

of _____, under a franchise granted by the City of _____].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

NOTES.

Authority:
CCP § 708.920(a)

Grounds:
See *20.17*

Related Forms for Motion and Order:
See *20.51*, *20.53*

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2-20 MB Practice Guide: CA Debt Collection 20.53

20.53 Order Applying Franchise Granted by Public Entity to Satisfy Money Judgment.

Order Applying Franchise Granted by Public Entity to Satisfy Money Judgment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING MOTION
_____ [*name*],	)	TO APPLY FRANCHISE
Defendant.	)	SATISFACTION OF MONEY JUDGMENT
	)	
	)	

_____

The motion of _____ [*identify party, e.g.*, Plaintiff] for an order applying a franchise to the satisfaction of a money judgment came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that:

1. The _____ [*specify franchise*] be applied to the satisfaction of the _____ [*specify judgment creditor, e.g.*, plaintiff's] money judgment against _____ [*specify judgment debtor, e.g.*, defendant] by _____ [selling the franchise and applying the proceeds of the sale to the judgment or assigning the franchise to _____ (*specify judgment creditor, e.g.*, plaintiff) *or* appointing a receiver to take over the management and control of the franchise and to turn over the rents, issues, and profits therefrom to the plaintiff for application to the judgment].

[2. _____ (*Specify any additional provisions to effectuate application of franchise to satisfaction of judgment as provided by CCP § 708.920(b), e.g., place or terms of sale; collection of penalties recoverable by*

franchise, etc.)]

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 708.920(a)

Grounds:
See *20.17*

Related Forms for Motion and Declaration:
See *20.51*, *20.52*

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2-20 MB Practice Guide: CA Debt Collection 20.54

20.54 Notice of Motion and Motion for Order Assigning Right to Payment, Supporting Declaration, and Memorandum.

Notice of Motion and Motion for Order Assigning Right to Payment, Supporting Declaration, and Memorandum.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	NOTICE OF MOTION FOR ASSIGNMENT ORDER; DECLARATION; MEMORANDUM
vs.	Date: _____
_____ [*name*],	Time: _____
Defendant.	Location: _____
	Judge: _____
	Date Action Filed: _____
	Trial Date: _____

_____

To: _____ [*name of judgment debtor*] and to his/her attorney of record].

You are hereby notified that on _____ [*date*], at _____ [*time*], or as soon thereafter as counsel can be heard, _____ in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*party*] will, and does hereby, move the court for an order instructing the judgment debtor _____ [*name of judgment debtor*] to assign the judgment debtor's interest in _____ [*describe source of payment*] and all rights to payment thereunder, to the judgment creditor _____ [*name of judgment creditor*] to the extent necessary to pay the judgment creditor's judgment in full, including accrued interest through the date of payment.

[*Add if applicable:* The judgment creditor will also move the court for an order restraining the judgment debtor and any

servant, agent, employee, or attorney for the judgment debtor and any person in active concert and participating with the judgment debtor from encumbering, assigning, disposing or spending _____ (*describe source of payment*) and all rights to payment thereunder.]

This motion is made on the grounds that the judgment creditor has a judgment against the judgment debtor, the balance due on which, including accrued interest to the date of this notice, is $_____, and that the judgment debtor has an assignable right to the payments described herein.

This motion will be based on this notice, the attached declaration of _____ [*name of declarant*], the memorandum set forth herein, and the complete files and records.

Date: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Specify judgment creditor, e.g.*, Plaintiff] _____ [*name*] obtained a judgment against _____ [*specify judgment debtor, e.g.*, Defendant] _____ [*name*] in the above-entitled action in the amount of $_____ on _____ [*date*].

3. _____ [*Specify facts pertaining to judgment debtor's franchise rights, e.g.*, _____ (*name of judgment debtor*) is entitled to _____ (*describe source of payment*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ [*signature*]

MEMORANDUM

I.
THE COURT MAY ORDER THE JUDGMENT DEBTOR TO ASSIGN
A RIGHT TO PAYMENT TO THE JUDGMENT CREDITOR

Code of Civil Procedure Section 708.510 authorizes a court to issue an order directing the judgment debtor to assign to a judgment creditor (or to a receiver) 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 earning 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 take into consideration 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, where 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 [*Code of Civil Procedure Section 708.510(d)-(f)*].

II.
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 $_____. This balance accrues interest at the rate of 10 percent per annum [*Code of Civil Procedure Section 685.010(a)*]. Therefore, the court may order assignment of the right to payment in an amount necessary to pay off the judgment in full, including accrued interest.

III.
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 for the judgment creditor.

[*Add if applicable:*]

IV.
THE COURT CAN RESTRAIN THE JUDGMENT DEBTOR

Code of Civil Procedure Section 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. This showing of need is set forth in the declaration that accompanies this memorandum. Consequently, the judgment 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.

NOTES.

Authority:
CCP § 708.510(b)

Grounds:
See *20.23*, *20.26*

Related Form for Order:
See *20.55*

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2-20 MB Practice Guide: CA Debt Collection 20.55

20.55 Order Assigning Right to Receive Payment.

Order Assigning Right to Receive Payment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ASSIGNMENT ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] _____ [*name*] for an assignment order in the above-entitled action came on regularly for hearing before the court, the Honorable _____ [*name*] presiding, on _____ [*date*], at _____ [*time*]. Plaintiff appeared by counsel _____ [*name*]. _____ [Defendant appeared by counsel _____ (*name*) *or* No appearance was made by defendant or by anyone on his/her behalf].

On proof made to the satisfaction of the Court that the motion ought to be granted,

IT IS ORDERED that:

1. The motion be and is granted.

2. The following rights to payment of judgment debtor _____ [*name of judgment debtor*] be, and hereby are, assigned to the judgment creditor _____ [*name of judgment debtor*], until such time as the

judgment herein is fully satisfied or this order is amended: _____ [*describe property, e.g.,* 25 percent of the judgment debtor's disposable future earnings *or for employee paid on commission* any and all salaries, commission, bonuses, fees, or royalties paid to debtor, subject to *Code of Civil Procedure Section 708.510(e)* whereby only 25 percent of the judgment debtor's paid disposable wages as defined are hereby assigned].

3. That _____ [*name of third party obligor*] pay _____ [*describe property, e.g.,* 25 percent of the judgment debtor's disposable future earnings *or for employee paid on commission* any and all salaries, commission, bonuses, fees, or royalties paid to debtor, subject to *Code of Civil Procedure Section 708.510(e)* whereby only 25 percent of the judgment debtor's paid disposable wages as defined are hereby assigned] to _____ [*name of judgment creditor or judgment creditor's attorney*] to be applied to the judgment herein until the judgment is fully satisfied or this order is amended.

[*Add if applicable:* IT IS FURTHER ORDERED that the judgment debtor and any servant, agent, employee, or attorney for the judgment debtor and any person in active concert and participating with the judgment debtor be restrained from encumbering, assigning, disposing or spending _____ (*describe source of payment*) and all rights to payment thereunder.]

[*Add if applicable:* IT IS FURTHER ORDERED that the judgment debtor will file a bond or undertaking in the sum of $_____.]

IT IS FURTHER ORDERED that a copy f this order will be personally served on the judgment debtor.

NOTICE IS HEREBY GIVEN THAT FAILURE BY THE JUDGMENT DEBTOR TO COMPLY WITH THIS ORDER MAY SUBJECT HIM/HER TO BEING HELD IN CONTEMPT OF COURT.

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 708.510(e)

Grounds:
See *20.24*

Related Form for Motion and Declaration:
See *20.54*

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Chapter 20 Miscellaneous Creditor's Remedies
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2-20 MB Practice Guide: CA Debt Collection 20.56

20.56 Notice of Motion and Motion for Order Applying Nonvested Property Interest to Satisfy Money Judgment.

Notice of Motion and Motion for Order Applying Nonvested Property Interest to Satisfy Money Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER APPLYING NONVESTED PROPERTY INTEREST TO SATISFACTION OF MONEY JUDGMENT Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*name of judgment debtor*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] _____ [*name of judgment creditor*] will, and hereby does, move for an order applying defendant's nonvested property interest in _____ [*describe property interest, e.g.*, the contingent remainder of the estate of _____ (*name*), which estate is held by _____ (*name of life beneficiary*) for life, the remainder to pass to defendant on the death of the life beneficiary, if defendant

survives the life beneficiary]. The motion will be made on the ground that _____ [*specify party, e.g.*, plaintiff] _____ [*name of judgment creditor*] has obtained a judgment against _____ [*specify party, e.g.*, defendant] _____ [*name of judgment debtor*], that the money judgment has not been satisfied, and that pursuant to *Code of Civil Procedure Section 709.020*, the court may order that a nonvested property interest be applied to the satisfaction of a money judgment.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:
CCP § 709.020

Grounds:
See *20.33*

Related Forms for Declaration and Order:
See *20.57*, *20.58*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 254.290 et seq*. (Matthew Bender)

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2-20 MB Practice Guide: CA Debt Collection 20.57

20.57 Declaration in Support of Motion for Order Applying Nonvested Property Interest to Satisfy Money Judgment.

Declaration in Support of Motion for Order Applying Nonvested Property Interest to Satisfy Money Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	DECLARATION IN SUPPORT OF MOTION FOR ORDER APPLYING NONVESTED PROPERTY INTEREST TO SATISFACTION OF MONEY JUDGMENT
vs.	
_____ [*name*],	
Defendant.	Date: _____
	Time: _____
	Location: _____
	Judge: _____
	Date Action Filed: _____
	Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) or other statement as appropriate].

2. _____ [*Specify existence and details of judgment*].

3. _____ [*Specify facts pertaining to judgment debtor's nonvested property rights, e.g.*, Defendant is entitled to the contingent remainder of the estate of _____ (*name*), which estate is presently held by _____ (*name*) for life, if defendant survives the life beneficiary].

4. _____ [*Specify facts to persuade court that interests of the parties will be protected by requested action*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

NOTES.

Authority:
CCP § 709.020

Grounds:
See *20.33*

Related Forms for Motion and Order:
See *20.56*, *20.58*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 254.290 et seq*. (Matthew Bender)

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2-20 MB Practice Guide: CA Debt Collection 20.58

20.58 Order Applying Nonvested Property Interest to Satisfy Money Judgment.

Order Applying Nonvested Property Interest to Satisfy Money Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ ORDER APPLYING NONVESTED PROPERTY INTEREST TO SATISFACTION OF MONEY JUDGMENT Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order applying a nonvested property interest to the satisfaction of a money judgment came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*specify judgment debtor, e.g.*, defendant's] _____ [*describe nonvested interest, e.g.*, remainder in the estate of _____ (*name*), which is contingent on defendant surviving _____ (*name*), the life beneficiary] be, and hereby is, applied to the satisfaction of the _____ [*specify judgment creditor, e.g.*, plaintiff's] money judgment against _____ [*specify judgment debtor, e.g.*, defendant] by

_____ [*specify means, e.g.*, the sale of defendant's interest in the contingent remainder, with the proceeds subject to a lien for the benefit of plaintiff].

Dated: _____

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 709.020

Grounds:
See *20.33*

Related Forms for Motion and Declaration:
See *20.56*, *20.57*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 254.290 et seq*. (Matthew Bender)

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Chapter 20 Miscellaneous Creditor's Remedies
X. FORMS

2-20 MB Practice Guide: CA Debt Collection 20.59

20.59 Notice of Motion and Motion to Appoint Receiver.

Notice of Motion and Motion to Appoint Receiver.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____		
_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	))))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR APPOINTMENT OF RECEIVER Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this Court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 708.620* appointing a receiver to take possession of _____ [*describe property*] ("the property") and, pending the determination of this action, to _____ [*specify what receiver is to do with property, e.g.*, manage, control, care for, preserve, maintain, and incur the expenses necessary for the management, control, care, preservation, and maintenance of, the property, and, specifically, to collect the rents, issues, and profits therefrom, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by owners, managers, and operators

of similar businesses]. The motion will be made on the grounds that _____ [*specify grounds, e.g.*, the property which is the subject to this action is in danger of being lost or materially injured and that the appointment of a receiver is necessary to preserve it pending determination of this lawsuit].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, [and] on the records and file herein [, and on such evidence as may be presented at the hearing of the motion].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

NOTES.

Authority:
CCP § 708.620

Grounds:
See *20.36*

Related Forms for Declaration and Order:
See *20.60*, *20.61*

Related Memorandum:
See *California Points and Authorities, § 200.10* (Matthew Bender)

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 486.01 et seq.* (Matthew Bender)

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Chapter 20 Miscellaneous Creditor's Remedies
X. FORMS

2-20 MB Practice Guide: CA Debt Collection 20.60

20.60 Declaration in Support of Motion to Appoint Receiver.

Declaration in Support of Motion to Appoint Receiver.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ DECLARATION IN SUPPORT OF MOTION FOR APPOINTMENT OF RECEIVER Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am the _____ [*identify declarant, e.g.*, plaintiff in the above-entitled action].

2. _____ [*Specify nature of action, showing that it is one in which appointment of receiver is authorized, e.g.*, As shown by the verified complaint herein, this is an action to foreclose a mortgage on a 10-unit apartment house located at _____ (*street address and city*), California, after defendant's default in making installment payments on the mortgage note and for the sale of the property].

3. _____ [*Set forth conditions justifying the appointment of a receiver pendente lite, e.g.*, The apartment building has been cited several times in the past year for building code violations, none of which has been corrected either in whole or in part. The costs of correcting these violations and bringing the building up to code are in excess of $_____. As shown by the Current Income/Expense Sheet attached to this declaration and incorporated by

this reference, only four of the units are rented, producing a total monthly income of $_____, and the current operating expenses of the building amount to $_____ per month. It is unlikely, because of the building code violations, that any or all of the remaining six units will be rented within the foreseeable future. The total amount of the balance due on the mortgage debt is $_____. As shown by the declaration of _____ (*name*), a licensed real estate appraiser, attached to this declaration and incorporated by this reference, the property's present value is $_____. This is insufficient to discharge the mortgage debt].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

NOTES.

Authority:
CCP § 708.620

Grounds:
See *20.36*

Related Forms for Motion and Order:
See *20.59*, *20.61*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 486.01 et seq*. (Matthew Bender)

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Chapter 20 Miscellaneous Creditor's Remedies
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2-20 MB Practice Guide: CA Debt Collection 20.61

20.61 Order Appointing Receiver.

Order Appointing Receiver.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] _____ [*name*] for the appointment of a receiver in the above-entitled action came on regularly for hearing before the Court, the Honorable _____ [*name*] presiding, on _____ [*date*], at _____ [*time*]. Plaintiff appeared by counsel _____ [*name*]. _____ [Defendant appeared by counsel _____ (*name*) *or* No appearance was made by defendant or by anyone on his/her behalf].

On proof made to the satisfaction of the Court that the motion ought to be granted,

IT IS ORDERED that:

1. The motion be and is granted;

2. _____ [*Name*], whose address is _____ [*specify*], is appointed receiver;

3. Before entering on his/her duties as receiver, _____ [*name*] take an oath to perform the duties of receiver faithfully, that he/she execute an undertaking, or secure a bond, in the amount of $_____ to the State of California for the faithful performance of those duties subject to the orders of this Court, and that the oath and

undertaking, or bond, be filed with the Clerk of the Court;

4. On the filing of the executed oath and undertaking, or bond, _____ [*name*], as receiver, shall take possession of the following described property (hereinafter "the property"): _____ [*description*];

5. Pending further order of this Court, _____ [*name*], as receiver, is instructed to _____ [*specify receiver's duties, e.g.*, manage, control, care for, preserve, maintain, and incur the expenses necessary for the management, control, care, preservation, and maintenance of, the property, and, specifically, to collect the rents, issues, and profits therefrom, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar businesses] [; and]

[6. _____ (*Name*), as receiver, is further instructed to _____ (*specify any further instructions*).]

IT IS FURTHER ORDERED THAT _____ [*party, e.g.*, defendant] _____ [*name*] [and any of his/her agents or employees], on request and exhibition of a conformed copy of this order, immediately deliver possession of any property herein described to _____ [*name of receiver*].

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:
CCP § 708.620

Grounds:
See *20.36*

Related Forms for Motion and Declaration:
See *20.59*, *20.61*

Detailed Discussion of Form/Requirements:
See *California Forms of Pleading and Practice, § 486.01 et seq.* (Matthew Bender)

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Chapter 20 Miscellaneous Creditor's Remedies
X. FORMS

2-20 MB Practice Guide: CA Debt Collection 20.62

20.62 Receiver's Motion for Approval of Sale of Assets and Order.

Receiver's Motion for Approval of Sale of Assets and Order.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____	
_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ RECEIVER'S MOTION FOR APPROVAL OF SALE OF ASSETS AND ORDER THEREON; MEMORADUM Date: _____ Time: _____ Location: _____ Judge: _____

_____ [*Name*], as receiver, will move and, hereby moves the Court for an order approving sale of assets as follows:

Receiver was appointed by the Court on _____ [*date*], in this matter after entry of a judgment rendered in favor of plaintiff, _____ [*name*], and against defendant, _____ [name] (judgment debtor). Pursuant to the order appointing receiver, receiver was specifically authorized to market and sell _____ [*describe specific asset, e.g.,* a liquor license], as well as other assets of the judgment debtor's estate. The receiver went into possession on _____ [*date*]. However, certain assets of the judgment debtor's estate were held at premises by judgment debtors' former landlord, _____ [*name*], who claimed a landlord's lien on the assets at the rate of $_____ per month from _____ [*date*], as well as a judgment lien recorded _____ [*date*], in the amount of $_____.

After investigating the costs and benefits of a sale of the assets on the premises, a sale of the assets off the premises, and

a separate sale of the _____ [*e.g.,* liquor license], and after considering the estimated asserted amount of both the landlord's statutory possessory lien and judgment lien and other costs of sale, the receiver has determined that the sale arranged to _____ [*name of buyer*] or its designee for a total of $_____ is in the best interests of the estate and is the best method of obtaining the highest sales price.

As proposed, the sale will be for a total of $_____. There will be two escrows opened, one for the sale of the _____ [*e.g.,* liquor license] and the other for the sale of the furniture, fixtures, and equipment (FF&E). On approval of the valuation and list of assets, the buyer will deposit $_____ into each of the two escrows, with the balance to be paid on approval of the Court [and the California Department of Alcoholic Beverage Control]. Costs of transfer will be borne equally by the seller, _____ [*name*], and the buyer, _____ [*name*]. Those costs are currently estimated to be $_____.

The sale that is proposed, a true and correct copy of which Agreement is attached to the receiver's declaration, marked as Exhibit A and incorporated by reference, is believed to be in the best interest of the estate and for the highest possible net price. As is set forth in the declaration of _____ [*name of receiver*], served and filed concurrently herewith, the estimated costs of a sale off premises would be nearly $_____, with an estimated gross sales return of between $_____ and $_____ [, excluding the liquor license]. This must take into consideration the costs of opposing or paying the landlord's lien, which would be estimated in the amount of up to $_____.

The sale as proposed would be certain, would not have significant costs associated with it, and is within the range of the estimated value of $_____ on sale. [The liquor license is being sold for $_____, the same amount of other bids that the receiver has received on it.] For the above reasons, the receiver requests that this court find that the proposed sale totaling $_____ is in the best interests of the estate, and will bring the greatest certain net return, and approve the sale as proposed. The sale will exclude _____ [*describe excluded assets*]. The receiver also requests that the Court find that the subordinate lien held by _____ [*name of landlord*] not be paid out of sale proceeds, but that the goods be sold free and clear of that lien.

Dated: _____.

_____

[*signature*]

_____

[*typed name*]

MEMORANDUM

I.
THE RECEIVER MAY SELL PROPERTY PURSUANT TO AN ORDER OF THE COURT AND SUBJECT TO THE COURT'S CONFIRMATION

Pursuant to *Code of Civil Procedure Section 568.5*, the receiver may sell property of the estate on approval by the Court and after appropriate notice. Here, the Court authorized the receiver to sell the assets of the estate [, including the liquor license,] by its order appointing receiver on _____ [*date*]. The sale is specifically made subject to this Court's approval and is being done on noticed motion so that any opposition may be filed and heard. Notice is being given to all parties to the action, as well as all lienholders of record.

II.
A RECEIVER MAY SELL A JUDGMENT DEBTOR'S INTEREST IN A LIQUOR LICENSE AND APPLY THE PROCEEDS TO THE

JUDGMENT

Under *Code of Civil Procedure Section 708.630*, the receiver may sell a liquor license owned by the judgment debtor.

III.
CONCLUSION

It is clear that the receiver is authorized, subject to court approval, to sell the furniture, fixtures, and equipment of the judgment debtors[, as well as the liquor license,] and to apply the net proceeds of sale to the satisfaction of the judgment.

Dated: _____.

_____
[*signature*]

_____
[*typed name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the duly appointed post judgment receiver in the above action, having been appointed and filing my bond with the court on _____ [*date*].

2. After being appointed, I arranged with the landlord's representative, _____ [*name*], to meet at the premises where _____ [*name of judgment debtor*] conducted its business, _____ [*address*], where I conducted an inspection of the premises and attempted to itemize all goods, furniture, fixtures, and equipment located there. Attached as Exhibit B is an inventory of the goods that I observed. I took digital photos of the premises and assets, which I have made available to all parties. The assets have not been removed from the premises as the landlord currently claims ownership of some and has a landlord's lien on the whole.

3. I met with an appraiser, _____ [*name*], who is familiar with this type of asset sale and he provided me with an estimated value of the goods located on the premises, as well as estimated returns for sales both on and off the premises. A true and correct copy of that report is attached, marked Exhibit C and incorporated by reference.

4. _____ [*Name of appraiser*] valued the furniture, fixtures and equipment at $_____ replacement value, but it was his opinion that an on site auction would gross between $_____ and $_____. Selling the goods off site would gross between $_____ and $_____ with costs of moving and sale estimated to be in the range of $_____. _____ [*Name of appraiser*] would also charge an auctioneer's fee of 15 percent for items sold. The landlord's representative, _____ [*name*], was adamant that the landlord would not allow a sale on premises, so the sale proceeds were more realistically estimated based on the off site sale. In addition, _____ [*name*] has consistently advised that the landlord was claiming a landlord's lien on the goods for their remaining on the premises without rent being paid at the rate of $_____, the amount of rent paid by the judgment debtor before default. Although as receiver I did not stipulate to the validity of such a lien, I estimate that the costs of defending such a lien claim could exceed $_____ in fees and that the time required to resolve the dispute would intrude substantially on the sale, thus causing more damage to the estate if the sale were postponed.

[5. In investigating the value of the assets and the costs of sale, I looked into the sales price that I could expect on the sale of the liquor license. I received one bid of $_____ for the license, a true and correct copy of which is attached, marked Exhibit D, and incorporated by reference. I also contacted two other local liquor license brokers and the consensus was that the license was worth about $_____, and that the only person who might pay more for it was a potential new tenant operating the same type of business on the same premises. Because I could not get involved in new tenancies, this possibility, without the consent and cooperation of the landlord, was remote. Therefore I determined that the sales price of $_____ was reasonable.]

6. To ascertain what interest the judgment debtor claimed in the property, I met with _____ [*name*], the _____ [*e.g.,* principal of judgment debtor], and asked him to provide documents supporting the claim of ownership of some of the fixtures that the landlord was disputing were on the premises before _____ [*name*] going into possession. Although _____ [*name*] stated that he would provide me with such evidence, he never did. I had several telephone conversations with _____ [*name*] after the meeting in each of which I once again requested the documentation for the fixtures added to the premises as well as any sales offers, but nothing came from him or his representatives.

7. According to the Agreement between the purchaser and the seller, a true and correct copy of which is attached, marked Exhibit E, and incorporated by reference, the seller would be responsible for payment of the receiver's fees and costs. These would be paid after approval by the court of the receiver's final accounting.

8. Based on the forgoing, and all information I received during the course of my administration of this estate, it is my opinion that the sale that would generate the best net profits, without the uncertainty of a public auction, is this sale for $_____ proposed under the agreement, Exhibit F. The sale would be without representation and warranty as to title to any of the equipment, and is specifically subject to the approval by the court [and the Department of Alcoholic Beverage Control].

The sale has been negotiated with the participation and consent of the judgment creditor, and has been done with the opportunity of the judgment debtors to submit a higher offer.

I declare under penalty of perjury and under the laws of the State of California, that the foregoing is true and correct.

Dated: _____.

_____

[*signature*]

NOTES.

Authority:
See *CCP §§ 568, 568.5*

Grounds:
See *20.36*

Related Form of Order Terminating Receivership:
See *20.63*

Detailed Discussion of Form/Requirements:
See California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender)

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Chapter 20 Miscellaneous Creditor's Remedies
X. FORMS

2-20 MB Practice Guide: CA Debt Collection 20.63

20.63 Receiver's Motion for Order Terminating Receivership, Discharging Receiver, and Approving Final Accounting and Report.

Receiver's Motion for Order Terminating Receivership, Discharging Receiver, and Approving Final Accounting and Report.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER TERMINATING RECEIVERSHIP AND DISCHARGING RECEIVER, APPROVING FINAL ACCOUNTING AND FINAL REPORT, AND REMITTING ESTATE FUNDS TO PLAINTIFF Date: _____ Time: _____ Location: _____ Judge: _____

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____ [*date*], at _____ [*time*], in Department _____ of the above-entitled Court, located at _____ [*address*], receiver, _____ [*name*] (receiver), will move this Court for an order discharging the receiver,

approving the final accounting and final report, exonerating bonds and remitting the balance of the estate funds to Plaintiff as set forth in the receiver's final accounting.

This motion is made pursuant to *California Rule of Court 3.1184* and is based on this notice, the accompanying memorandum, the declarations of _____ [*name of plaintiff's attorney*] and _____ [*name of receiver*], filed and served concurrently herewith, the papers, pleadings, and documents on file in this action, and on such other matters which come before this Court on this motion.

Dated: _____

_____

[*signature*]

_____

[*typed name*]

MEMORANDUM

INTRODUCTION

By way of this motion, receiver seeks an order discharging the appointed receiver (hereinafter the receiver), of his/her duties and responsibilities as receiver and approving the final accounting and final report of the receivership estate.

STATEMENT OF FACTS

Plaintiff obtained a judgment against the defendants and, as part of their enforcement of the judgment, requested and had the Receiver appointed by this Court on _____ [*date*], most specifically because the defendants _____ [*e.g.,* owned a liquor license] that plaintiffs wanted the receiver to sell. The Receiver went into possession of the estate on _____ [*date*].

On _____ [*date*], the Court approved the sale of the [liquor license and other] tangible estate assets (primarily restaurant equipment and supplies), for the gross sales price of $_____. Escrow of both aspects of the sale (simultaneous double escrows were opened to sell the liquor license in one and the equipment in the other) closed on _____ [*date*], with net proceeds of $_____, after deduction of tax liens and costs of sale. A true and correct copy of both escrow closing statements are attached to the declaration of _____ [*name*] as Exhibit A.

The receiver has prepared and submitted a final accounting of the receivership estate, which accounts for all receipts and disbursements from _____ [*date*], through _____ [*date*]. A true and correct copy of the final accounting and final report is attached to the declaration of _____ [*name*] as Exhibit B and incorporated by reference. No payments have been received in satisfaction of the judgment, as is set forth in the Declaration of _____ [*name*].

The final accounting of the receiver shows that the receiver collected $_____ as proceeds of sale during the time that she was in possession and control of the property, and incurred receivership fees and costs in the amount of $_____, obtaining an appraisal, obtaining court approval and noticing all potential interested parties, and closing the sale, and includes an estimated _____ hours of time for appearing at the hearing on this motion and preparing notices and closing the file for coordinating the sale, thereby leaving an account balance of $_____.

The final accounting attached is a complete and accurate account of all expenditures made by the receiver. These

expenditures, all of which were noticed to and/or approved by the parties to this action, represents the sums necessary to maintain and preserve the estate and sell it in the most commercially reasonable manner for the highest available price.

THE ACTS OF THE RECEIVER HAVE BENEFITED THE ESTATE
AND THE FINAL ACCOUNTING MUST BE APPROVED

"The examination of the account of a Receiver is conducted in a spirit of equity, assuming the Receiver to be honest until the contrary appears, and from the standpoint of benefit or injury to the estate." *People vs. Riverside University (1973) 35 Cal. App. 3d 572, 586* . Thus, "where the Receiver has acted in good faith and when what he has done has been beneficial to the interested parties, his acts ... should be subsequently approved." *People vs. Riverside University (1973) 35 Cal. App. 3d 572, 582* .

The expenditures by the receiver benefited the estate or were necessary to maintain and preserve the estate assets. There were no extraordinary or unanticipated expenses, aside from payment of state taxes owed by the judgment debtors. For these reasons, the receiver requests that the Court approve the final accounting and final report and order the estate balance be paid, after deducting the receiver's costs, fees, and expenses, by the receiver to plaintiffs.

Based on the foregoing, the receiver respectfully requests this Court to grant this motion and enter an order: (1) terminating the receivership estate and discharging the receiver; (2) approving the final accounting and the receiver's final report of the estate; (3) exonerating the bonds of the receiver and plaintiff as shown in the final accounting; and (4) ordering receiver, after deducting for his/her costs, fees, and expenses in the sum of $_____, to pay the estate balance in the amount of $_____ to the plaintiffs within 10 days of the date of the order.

Dated: _____

_____

[*signature*]

_____

[*typed name*]

DECLARATION OF _____

I, _____ [*name*], declare and state as follows:

1. I am an attorney at law, duly licensed to practice law before all the Courts of the State of California, and am a member of the law firm of _____, attorneys for plaintiff in this action. The matters set forth in this declaration are known to me to be true by my own personal knowledge except for those matters which are set forth on information and belief, and as to those matters, I believe them to be true.

2. Plaintiffs obtained a judgment against defendants on _____ [*date*], in the amount of $_____, together with pre-judgment interest of $_____ per day from _____ [*date*], through date of entry of judgment, and costs of $_____, and attorney's fees of $_____. This judgment remains unsatisfied and no payments have been received on it.

3. On behalf of plaintiffs, I approved the terms and conditions of the sale of assets for a total gross sales price of $_____, less costs of sale and the payment of a lien by the State Bard of Equalization of $_____, and Employment Development Department of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____

[*signature*]

DECLARATION OF _____

I, _____ [*name*], declare and state as follows:

1. I am an attorney at law, duly licensed to practice law before all the Courts of the State of California, and am a member of the law firm of _____. The matters set forth in this declaration are known to me to be true by my own personal knowledge except for those matters which are set forth on information and belief, and as to those matters, I believe them to be true.

2. On _____ [*date*], I was appointed as the receiver by this Court for the purposes of enforcing the judgment entered in favor of plaintiffs and against the defendants instructed to take possession of the liquor license held by the defendants as well as the furniture and equipment located at their former place of business, _____ [*address*]. These premises were leased to defendants by the property owner, _____ [*name*], and the lease payments were substantially past due.

3. After being appointed, I arranged with the landlord's representative, _____ [*name*], to meet at the premises where _____ [*judgment debtor*] conducted its business, _____ [*address*], where I conducted an inspection of the premises and attempted to itemize all goods, furniture, fixtures and equipment located there. The inventory was previously filed with this Court. The assets were not removed from the premises as the landlord claimed ownership of some and a landlord's lien on the whole.

4. During the course of the receivership, I met with an appraiser, _____ [*name*], who was familiar with this type of asset sale and he/she provided me with an estimated value of the goods located on the premises, as well as estimated returns for sales both on and off the premises. I also looked into the sales price that I could expect on the sale of the liquor license. I negotiated with the landlord for a release of the landlord's lien, arrangements were made to leave the assets on premises and safeguard them, and to negotiate for the sale of the assets, including the liquor license, through the ABC. I made and received the Court's consent to conduct the sale for a gross price of $_____, and negotiated with the escrow agent and buyer for specific terms and conditions of the sale. I negotiated with the plaintiffs' attorney for the same thing. The Court approved the sale as proposed on _____ [*date*], and the escrow closed on _____ [*date*].

5. During the course of the receivership, I incurred costs of $_____ for the asset appraisal, express mail, bond premium and photocopy costs of $_____, filing fees of $_____ for the motions to approve the sale and this motion, and have spent a total of _____ [*number*] hours of my time at the rate of $_____ per hour and _____ [*number*] hours of my paralegal's time at the rate of $_____ per hour for total fees and costs of $_____. An itemization of those fees and costs is attached hereto as the "Final Accounting" and marked Exhibit C and incorporated by reference. In the fees and costs set forth in the final accounting I have included estimated fees for this hearing and closing the case of three hours, for $_____.

6. On _____ [*date*], I received two closing statements and checks from the escrow holder, _____ [*name*], for $_____ and $_____, representing the net proceeds of sale. True and correct copies of the escrow closing statements and checks are attached hereto, cumulatively marked Exhibit D and

incorporated by reference.

7. During the course of the receivership estate, the total income and proceeds received was $_____. After deducting fees and costs totaling $_____, there remains in the receivership estate the sum of $_____.

8. I request that this Court issue an order approving the receiver's final accounting, authorizing the receiver to pay himself/herself for his/her fees and costs incurred in the sum of $_____ out of the net proceeds of the sale, and remitting the balance of $_____ to the Plaintiffs within 10 days of the date of entry of the Court's order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____

[*signature*]

NOTES.

Authority:
See *CCP § 568*; *Cal Rules Ct, Rule 3.1184*

Grounds:
See *20.36*

Related Form of Motion to Approve Sale:
See *20.62*

Detailed Discussion of Form/Requirements:
See California Forms of Pleading and Practice, Ch. 486, Receivers (Matthew Bender)

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Chapter 21 Garnishment

2-21 MB Practice Guide: CA Debt Collection 21.syn

§ 21.syn Synopsis to Chapter 21: Garnishment

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21.05 Understanding Garnishment.

21.06 Exempt Property May Not Be Garnished.

21.07 Judgment Debtor in Military Service May Obtain Vacatur or Stay of Garnishment.
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21.09 CHECKLIST: Obtaining Garnishment of Wages.

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21.14 Judgment Creditor Initiates Garnishment.
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21.16[3][a] Employer Ordinarily Must Withhold Earnings During Withholding Period.
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21.16[3][c] Employer Must Comply With Priority of Withholding Orders.
21.16[4] Employer Must Pay Withheld Earnings to Levying Officer.
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21.17 Levying Officer Receives and Disburses Withheld Earnings.
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21.17[3] Judgment Creditor May Obtain Final Earnings Withholding Order to Cover Costs and Interest.

21.18 CHECKLIST: Opposing Garnishment of Wages.
21.18[1] Judgment Debtor's Checklist.
21.18[2] Judgment Creditor's Checklist.

21.19 Options and Strategies.

21.20 Part of Earnings Needed to Support Debtor and Family Is Generally Exempt.

21.21 Judgment Debtor May Claim Exemption.
21.21[1] Judgment Debtor Must File Claim of Exemption With Levying Officer.
21.21[2] Levying Officer Must Notify Judgment Creditor of Exemption Claim.

21.22 Judgment Creditor May Oppose Claim of Exemption.
21.22[1] Judgment Creditor Must File Notice of Opposition and Motion to Determine Claim of Exemption.
21.22[2] Judgment Creditor Must Provide Notice of Hearing.
21.22[3] Levying Officer Must File Exemption Claim and Notice of Opposition With Court.
21.22[4] Exemption Will Be Allowed If Not Timely Opposed.
21.22[5] Court Conducts Hearing on Claim of Exemption.
21.22[6] Court Determines Claim of Exemption.

21.22[7] Levying Officer Notifies Employer of Any Change in Earnings Withholding Order.
21.22[8] Parties May Appeal.

21.23 CHECKLIST: Obtaining Garnishment of Money (Other Than Wages) Owed to Judgment Debtor by Public Entity.
21.23[1] Judgment Creditor's Checklist.
21.23[2] Judgment Debtor's Checklist.

21.24 Options and Strategies.

21.25 Judgment Creditor Initiates Garnishment.
21.25[1] Judgment Creditor Must File Abstract of Judgment and Affidavit With Public Entity.
21.25[2] Judgment Creditor Must Notify Judgment Debtor.

21.26 Public Entity Must Deposit Garnished Amount With Court.

21.27 Judgment Debtor May Claim Exemption From Garnishment.
21.27[1] Judgment Debtor Must File Motion to Determine Exemption Claim.
21.27[2] Judgment Creditor May Oppose Claim of Exemption.
21.27[3] Court Determines Claim of Exemption.

21.28 Court Disburses Deposited Funds.

21.29 Application for Earnings Withholding Order--Judicial Council Form WG-001.

21.30 Earnings Withholding Order--Judicial Council Form WG-002.

21.31 Employee Instructions--Judicial Council Form WG-003.

21.32 Application for Order Staying Enforcement of Earnings Withholding Order Taken Against Party During Period of Military Service.

21.33 Employer's Return--Judicial Council Form WG-005.

21.34 Letter to Employer Advising of Duty to Submit Return

21.35 Claim of Exemption--Judicial Council Form WG-006.

21.36 Financial Statement--Judicial Council Form WG-007/EJ-165.

21.37 Notice of Filing of Claim of Exemption--Judicial Council Form WG-008.

21.38 Notice of Opposition to Claim of Exemption--Judicial Council Form WG-009.

21.39 Notice of Motion for Order Determining Claim of Exemption.

21.40 Notice of Hearing on Claim of Exemption--Judicial Council Form WG-010/EJ-175.

21.41 Order Determining Claim of Exemption--Judicial Council Form WG-011.

21.42 Notice of Termination or Modification of Earnings Withholding Order--Judicial Council Form WG-012.

21.43 Statement of Amount Required to Satisfy Judgment in Proceeding to Garnish Money Owed to Judgment Debtor by Public Entity.

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Chapter 21 Garnishment
I. STRATEGY

2-21 MB Practice Guide: CA Debt Collection 21.01

21.01 Scope.

This chapter covers:

- Determining whether garnishment is an available remedy [*see 21.03 -21.08*; Form: *see 21.32*].
- Obtaining garnishment of wages [*see 21.09 -21.17*; Forms: *see 21.29 -21.31*, *21.34*].
- Opposing garnishment of wages [*see 21.18 -21.22*; *see Forms: 21.35 -21.42*].
- Obtaining garnishment of money other than wages owed to the judgment debtor by a public entity [*see 21.23 -21.28*; Form: See *21.43*].

For coverage of prejudgment attachment and other provisional remedies, see Ch. 8, Preserving Assets During Litigation or Pending Enforcement of Judgment.

For coverage of execution and levy against personal property generally, see Ch. 16, Executing and Levying Against Personal Property.

For coverage of assignment orders and miscellaneous creditor's remedies, see Ch. 20, Miscellaneous Creditor's Remedies.

For coverage of garnishment to collect amounts owed under a judgment for the support of a child, spouse, or former spouse of the judgment debtor, see California Family Law Practice and Procedure, Ch. 141, Special Remedies for Enforcement of Support (Matthew Bender), and California Forms of Pleading and Practice, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

For coverage of earnings withholding orders to collect taxes, see California Forms of Pleading and Practice, Ch. 540, Taxes and Assessments (Matthew Bender).

Core Statutes:
CCP §§ 683.010, *683.020*, *683.110 et seq*., *704.010 et seq*., *706.020 et seq*., *708.010 et seq*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsFamily LawChild SupportObligationsEnforcementGarnishments

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Chapter 21 Garnishment
I. STRATEGY

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21.02 Objective and Strategy.

The objective of garnishment is to ensure that part of a judgment debtor's income is applied to satisfy the judgment. Although the amount that may be withheld from the debtor's income is limited [*see, e.g.,* 15 USC *§ 1673(a), CCP* §§ 706.050, 706.051(b)], garnishment may be an effective way to collect a small judgment (such as a consumer debt), particularly if the debtor has no significant assets that can be levied on.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishments

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Chapter 21 Garnishment
II. DETERMINING WHETHER GARNISHMENT IS AVAILABLE REMEDY

2-21 MB Practice Guide: CA Debt Collection 21.03

21.03 CHECKLIST: Determining Whether Garnishment Is Available Remedy.

☐ Determine whether third party (potential garnishee) owes money or personal property to judgment debtor.

Discussion:
See *21.05*

☐ Determine whether debt or personal property owed to judgment debtor is exempt from garnishment.

Authority:
CCP §§ 704.010 et seq., 706.051

Discussion:
See *21.06*

☐ Determine whether judgment debtor is protected against garnishment as service member.

Authority:
50 USC § 524; M&V Code § 403(c)(2)

Discussion:
See *21.07*

☐ If potential garnishee is federal government or federal agency, determine whether sovereign immunity has been waived.

Discussion:
See *21.08[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSovereign ImmunityCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsGovernmentsFederal GovernmentClaims By & AgainstLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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Chapter 21 Garnishment
II. DETERMINING WHETHER GARNISHMENT IS AVAILABLE REMEDY

2-21 MB Practice Guide: CA Debt Collection 21.04

21.04 Options and Strategies.

In determining whether garnishment is an effective method of collecting a judgment, counsel for the judgment creditor should consider whether garnishment is precluded by circumstances such as the judgment debtor's active military status or the sovereign immunity of a federal agency that is the judgment debtor's employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsGovernmentsFederal GovernmentClaims By & AgainstLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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Chapter 21 Garnishment
II. DETERMINING WHETHER GARNISHMENT IS AVAILABLE REMEDY

2-21 MB Practice Guide: CA Debt Collection 21.05

21.05 Understanding Garnishment.

As used in this chapter, "garnishment" refers to the levy by a judgment creditor on a debt owed to the judgment debtor by the garnishee (the person owing the debt to the judgment debtor) [*see Millard v. United States (Fed Cir 1990) 916 F2d 1, 3* ; *Los Angeles County Employees Union, Local 434 v. County of Los Angeles (1973) 33 CA3d 269, 272, 109 CR 46* ; *see also CCP § 706.010 et seq.*].

Examples:

Garnishment is most frequently used to reach a judgment debtor's earnings from employment. This is the only context in which the governing statutes use the term "garnishment" [*see CCP § 706.010 et seq.*; *see also 15 USC § 1672(c)* ("garnishment" for purposes of federal wage garnishment law is "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt")]. However, although not called "garnishment," similar procedures exist for withholding a portion of money (other than wages) owed by a public entity to a judgment debtor and using the withheld amounts to satisfy the judgment [*see CCP § 708.710 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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Chapter 21 Garnishment
II. DETERMINING WHETHER GARNISHMENT IS AVAILABLE REMEDY

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21.06 Exempt Property May Not Be Garnished.

Property that is exempt from execution is exempt from garnishment [*see CCP § 704.010 et seq.*].

Example:

The part of a judgment debtor's earnings that is necessary for his or her support or for the support of his or her family generally is exempt from wage garnishment [*CCP § 706.051(b)*]. However, unless the judgment debtor claims the exemption, it is presumed that the statutory maximum will be available for wage garnishment [*see 15 USC § 1673(a), (c); CCP § 706.050*].

Cross References:

Discussion of family support exemption from wage garnishment, see *21.20*.

Discussion of statutory maximum and computation of amount subject to wage garnishment, see *21.13*.

Discussion of property generally exempt from execution, see Ch. 16, Executing and Levying Against Personal Property.

A judgment debtor claiming an exemption generally must follow statutory procedures [*see CCP §§ 703.510 et seq., 706.105*], and has the burden of proving the right to the claimed exemption [*Perfection Paint Prods. v. Johnson (1958) 164 CA2d 739, 741, 330 P2d 829]* .

Cross Reference:

Discussion of procedure to claim exemption, see *21.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsFamily LawChild SupportObligationsEnforcementGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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Chapter 21 Garnishment
II. DETERMINING WHETHER GARNISHMENT IS AVAILABLE REMEDY

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21.07 Judgment Debtor in Military Service May Obtain Vacatur or Stay of Garnishment.

21.07[1] Federal Law Protects Military Service Members. A court must vacate or stay an attachment or garnishment on the application of the person in military service (or of someone on that person's behalf) if the court is of the opinion that the defendant's ability to comply with the judgment is materially affected by military service [*50 USC app § 524*; *see 50 USC app §§ 511*, *514*, *516*, *519*]. The court also has discretion to enter a stay or vacatur on its own motion [*50 USC app § 524*]. A stay may be ordered for the period of military service and 90 days afterward, or any part of that period, subject to such terms as may be just [*50 USC app § 525(a)*]. If the person in military service is a codefendant with others, the plaintiff may proceed against the others by leave of court [*50 USC app § 525(b)*].

21.07[2] California Law Protects Military Service Members.

21.07[2][a] Court May Stay Garnishment. In an action or proceeding against a military service member, before or during the period of service or within 60 days afterward, the court, on application by the service member or someone on the service member's behalf, must vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, unless in the court's opinion the defendant's ability to comply with the judgment entered or sought is not materially affected by reason of the military service [M&V Code § 403(c)(2)]. The court also has discretion to enter a stay on its own motion [M&V Code § 403(c)(2)].

Any stay may be ordered for the period of military service and three months afterward, or any part of that period, and subject to terms as may be just, including terms with respect to payment in installments of the amounts at the times the court may fix [M&V Code § 403(d)]. When the person in military service is a codefendant with others, the plaintiff, by leave of court, may proceed against the others during the pendency of the stay [M&V Code § 403(d)].

21.07[2][b] Judgment Debtor Must Qualify As Service Member. To receive the protection against garnishment, a judgment debtor or defendant must be a "service member," which is either of the following [M&V Code § 400(a)]:

- An officer or enlisted members of the National Guard called or ordered into active state service by the Governor [*see* M&V Code §§ 143, 146] or into active federal service by the President of the United States.

- A reservist of the United States Military Reserve who has been called to full-time active duty.

"Military service" in this context is full-time active state or federal service [*see* M&V Code § 400(a)(1)] or full-time active duty for a reservist [*see* M&V Code § 400(a)(2)], for a period in excess of seven days in any 14-day period. Days of service for a service member called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, are credited toward the seven-day period [M&V Code § 400(b)].

Example--Establishing Status As Service Member:

A certificate signed by an appropriately authorized officer of the military department, branch, or unit in which a service member is serving is prima facie evidence of any of the following facts as stated in the certificate [M&V Code § 409.8(a)]:

- That a person named is, has been, or has not been in the military service.
- The time when and the place where the person entered military service.
- The person's residence at that time, and the rank, branch, and unit of the service the person entered.
- The dates within which the person was in the military service.
- The monthly pay received by the person at the date of issuing the certificate.
- The time when and the place where the person died in or was discharged from the service.

The authorized officer must furnish the certificate on application. Any certificate purporting to be signed by an officer purporting on the face of the certificate to have been authorized to sign it, is prima facie evidence of its contents and of the authority of the signer to issue it [M&V Code § 409.8(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGarnishmentsMilitary & Veterans LawServicemembersActive DutyMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActMilitary & Veterans LawServicemembersU.S. National Guard

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Chapter 21 Garnishment
II. DETERMINING WHETHER GARNISHMENT IS AVAILABLE REMEDY

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21.08 Sovereign Immunity May Preclude Garnishment.

21.08[1] Federal Agency May Not Be Garnishee Unless Sovereign Immunity Is Waived. An agency of the federal government may not be liable as a garnishee unless the government has waived its sovereign immunity [*Millard v. United States (Fed Cir 1990) 916 F2d 1, 3* ; *see United States v. Sherwood (1941) 312 US 584, 586, 61 S Ct 767, 85 L Ed 1058]* . Federal sovereign immunity has been expressly waived in a case of garnishment of a federal employee's wages [*5 USC § 5520a(a), (b)*].

Consider:

Federal sovereign immunity also bars a claim by a judgment debtor against a federal agency that honored a writ of garnishment, provided that the writ was regular on its face, was issued by a court with subject matter jurisdiction, and was properly served on the agency, which then gave notice of garnishment to the judgment debtor [*see United States v. Morton (1984) 467 US 822, 836, 104 S Ct 2769, 81 L Ed2d 680* ; *Millard v. United States (Fed Cir 1990) 916 F2d 1, 6* ; *see 5 USC § 5520a(g)* (no federal liability with respect to wage garnishment accomplished pursuant to legal process regular on its face and in accordance with applicable federal law)].

Examples--Immunity Waived.

Sovereign immunity of the United States has been waived for legal proceedings for the enforcement of child support and spousal support obligations against wages or salary payable to the support obligor by any agency, subdivision, or instrumentality of the United States or District of Columbia [*42 USC § 659*]. Federal sovereign immunity has also been waived for any federal agency that is authorized to sue or be sued [*see, e.g., Franchise Tax Bd. v. USPS (1984) 467 US 512, 516-525, 104 S Ct 2549, 81 L Ed2d 446* (waiver for suit against U.S. Postal Service under *39 USC § 401(1)*].

Examples--Immunity Retained.

Specific statutes retain sovereign immunity for payments from specified government retirement and benefit plans [*see, e.g., 5 USC § 8346* (civil service retirement benefits); *10 USC § 1440* (armed forces annuities based on retired or retainer pay); *10 USC § 1450(i)* (armed forces Survivor Benefit Plan annuities); *42 USC § 407* (federal old-age, survivors, and disability insurance benefits)].

21.08[2] California Has Waived Sovereign Immunity. California has waived sovereign immunity with respect to garnishment proceedings against earnings owed to an employee [*CCP §§ 706.011(a), (c), (d), 708.720(a)*] or other

money owed to a judgment debtor [*see CCP § 708.720(a), (c)*] by a public entity. A "public entity" for this purpose includes the state and any political subdivision of the state [*CCP § 708.710(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGarnishmentsFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishmentsGovernmentsFederal GovernmentClaims By & AgainstGovernmentsFederal GovernmentEmployees & OfficialsGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstMilitary & Veterans LawServicemembersRetirementPensions & Benefits LawGovernmental EmployeesU.S. Civil Service Retirement SystemGeneral Overview

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Chapter 21 Garnishment
III. OBTAINING GARNISHMENT OF WAGES

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21.09 CHECKLIST: Obtaining Garnishment of Wages.

☐ Before initiating procedures to garnish debtor's wages, verify that creditor has obtained judgment against debtor.

Authority:
McCallop v. Carberry (1970) 1 C3d 903, 904-907, 83 CR 666, 464 P2d 122

Discussion:
See *21.12[1]*

☐ If garnishment will not be completed within 10 years after entry of creditor's judgment against debtor, consider initiating procedure to renew judgment.

Authority:
CCP §§ 683.010, 683.020, 683.110 et seq.

Discussion:
See *21.12[2]*

☐ Verify that judgment debtor is "employee" earning compensation from employer for personal services performed by judgment debtor.

Authority:
CCP § 706.011(a), (c), (d)

Discussion:
See *21.11[1]*

☐ Determine whether wage garnishment will provide creditor with satisfactory remedy, considering following:

○ Individual debtor's maximum aggregate weekly earnings subject to garnishment generally may not exceed lesser of following:

☐ 25 percent of debtor's disposable earnings (that is, earnings remaining after deduction of taxes and other normal withholdings) for the week.

☐ Amount by which debtor's disposable earnings for week exceed 30 times federal minimum hourly wage.

Authority:
CCP § 706.050; *15 USC § 1673(a)*, *(c)*

Discussion:
See *21.13*

☐ If wage garnishment is desired, obtain writ of execution.

Authority:
CCP §§ 699.010, *510(a)*, *706.102(a)*, 7067.108(a)

Discussion:
See *21.14[1]*

☐ Obtain issuance of earnings withholding order by filing application, before expiration of 180 days from date writ of execution was issued, with either:

○ Levying officer.

○ Registered process server.

Authority:
CCP §§ 706.102(a), *706.108(a)*; *see CCP § 699.530(b)*

Discussion:
21.14[2]

Form:
21.29

☐ When earnings withholding order has been issued, obtain service of order on debtor's employer.

Authority:
CCP §§ 706.021, *706.101*, *706.108(c)*

Discussion:
See *21.15*

○ Request service of order on employer by either:

☐ Levying officer.

☐ Registered process server.

Authority:
CCP §§ 706.101(a), 706.108(c)

Discussion:
See *21.15*

○ If earnings withholding order was issued by registered process server, verify that process server does both of following before serving order on employer:

Authority:
CCP § 706.108(b); see Gov Code § 26750

☐ Provides levying officer with copy of writ of execution, application for issuance of earnings withholding order, and copy of earnings withholding order.

☐ Pays statutory fee for service of earnings withholding order.

○ Verify that levying officer or process server accomplishes service by delivering order to any of following:

Authority:
CCP §§ 706.101(a), 706.103(a)(1), 706.108(c)

Discussion:
See *21.15[1]*

☐ Managing agent or person in charge, at time of service, of branch or office where judgment debtor works or office from which judgment debtor is paid.

☐ Any person to whom copy of summons and complaint may be delivered to accomplish service of process on employer.

○ Verify that levying officer or process server accomplished service prior to expiration of 180 days after issuance of writ of execution, in appropriate manner, either:

Authority:
CCP §§ 706.101(b), 706.103(c), 706.108(c); see CCP §§ 415.10, 415.20, 699.530(b)

Discussion:
See *21.15[2]*

☐ By personal delivery [*see CCP §§ 415.10*, *415.20*].

☐ By delivery by registered or certified mail, postage prepaid, with return receipt requested [*CCP §§ 706.101(b)*, *706.108(c)*].

○ Verify that levying officer or process server provided following documents to employer:

Authority:
CCP §§ 706.103(a), *(b)*, *706.108(c)*, *706.122*, *706.126*, *706.127*

Discussion:
See *21.15[3]*

☐ Original and copy of earnings withholding order (including employer's instructions).

Form:
See *21.30*

☐ Form for notice to employee of earnings withholding.

Form:
See *21.31*

☐ Form for employer's return.

Form:
See *21.33*

○ If service of earnings withholding order has been made by registered process server, verify that process server files following documents with levying officer within five court days after service of the earnings withholding order:

☐ Writ of execution, if it is not already in hands of levying officer.

☐ Proof of service on employer of earnings withholding order and accompanying papers.

☐ Judgment creditor's written instructions describing employer to be served and earnings to be garnished.

Authority:
CCP § 706.108(d)

Discussion:
See *21.15[4]*

☐ Verify that employer has notified judgment debtor of earnings withholding order within 10 days after service of order.

Exception:
Employer need not notify judgment debtor if debtor is no longer employed by employer and employer does not owe judgment debtor any earnings.

Authority:
CCP § 706.104(a)

Discussion:
See *21.16[1]*

☐ If judgment debtor files notice of claim of exemption, follow statutory procedures to contest claim.

Authority:
CCP § 706.105(d), (e)

Checklist:
See *21.18[2]*

Discussion:
See *21.22*

☐ Verify that within 15 days after service of earnings withholding order, employer submitted completed return form, by first class, postage-prepaid mail, to levying officer.

Authority:
CCP § 706.104(b)

Discussion:
See *21.16[2]*

☐ Verify that employer is withholding appropriate amounts from judgment debtor's earnings, as follows:

○ Verify that at least 10 days have elapsed since earnings withholding order was served on employer, and that withholding period has not terminated or become dormant or suspended.

Authority:
CCP §§ 706.022(a), 706.032

Discussion:
See *21.16[3]*

○ Verify that employer is withholding amounts required by earnings withholding order or other

written notice from levying officer.

Authority:
CCP §§ 706.022(b), 706.024(b)

Discussion:
See *21.16[3]*

○ If multiple withholding orders have been served on employer regarding judgment debtor, ascertain that employer is complying with order that has priority.

Authority:
CCP § 706.023

Discussion:
See *21.16[3][c]*

☐ Ascertain that employer is paying withheld amounts to levying officer monthly or more frequently.

Authority:
CCP §§ 706.025(a), 706.034

Discussion:
See *21.16[4]*

☐ If employer is not complying with earnings withholding order, consider pursuing one or more of following remedies:

Discussion:
See *21.16[5]*

○ Contacting employer in writing to obtain compliance.

○ Seeking order to show cause why employer should not be found in contempt of court.

○ Seeking examination of employer as third party owing debt to judgment debtor.

Authority:
CCP § 708.120 et seq.

○ Filing civil action against employer.

Authority:
CCP §§ 706.153(b), 706.154(a)

☐ Verify that at least once every 30 days, levying officer pays over to judgment creditor, and accounts for, amounts received from employer.

Authority:
CCP § 706.026(a)

Discussion:
See *21.17[1]*

☐ Verify that at least once every two years, levying officer accounts to court for all amounts collected under earnings withholding order.

Authority:
CCP § 706.026(b)

Discussion:
See *21.17[1]*

☐ Ascertain that levying officer makes return of writ of execution to court when earnings withholding order is satisfied.

Authority:
CCP § 706.024

Discussion:
See *21.17[2]*

☐ If necessary to collect unsatisfied costs and interest not collected under original earnings withholding order, obtain final earnings withholding order.

Authority:
CCP § 706.028

Discussion:
See *21.17[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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III. OBTAINING GARNISHMENT OF WAGES

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21.10 Options and Strategies.

Wage garnishment is a frequently used method of collecting judgments, especially for consumer debts. If the judgment is sizeable, collection of the full amount through wage garnishment may take a long time, considering the statutory limits on garnishment [*see 15 USC § 1673(a), (c)*; *CCP § 706.050*]. Still, garnishment is a simple and relatively inexpensive enforcement procedure, and the costs of garnishment are recoverable by the judgment creditor [*see CCP § 706.028*].

In some instances, initiating garnishment of the judgment debtor's wages may promote settlement discussions. Particularly in the context of nonconsumer debt, the judgment debtor may not want his or her employer to acquire information about the debtor's personal finances. In that case, initiating wage garnishment may result in a settlement for a lump sum payment or for installment payments that exceed the amounts available in garnishment [*see 15 USC § 1673(a), (c)*; *CCP § 706.050*]. Thus, because wage garnishment is simple and inexpensive, and because it puts pressure on the judgment debtor, its use should be considered.

Cross References:

Limits on earnings subject to garnishment, see *21.13*.

Recovery of costs of garnishment, see *21.17[3]*.

Before commencing garnishment proceedings, counsel should consider obtaining a credit report on the judgment debtor or checking the judgment debtor's employment status through an online locate-and-research tool such as Accurint[(R)] [*see* www.accurint.com]. That information can be useful in confirming that the debtor is employed and whether the debtor's compensation from employment is based on an hourly wage, a salary, or commissions. If the judgment debtor has income but is not an "employee" (and therefore not subject to wage garnishment) [*see CCP §§ 706.011(a), (c), (d), 706.021*], counsel instead may seek an assignment order to establish a right to receive a part of the debtor's income [*see CCP § 708.510 et seq.*].

Cross References:

Discussion of employee status as prerequisite for wage garnishment, see *21.11[1]*.

Discussion of assignment orders, see *21.11[2]*; see also Ch. 20, Miscellaneous Creditor's Remedies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishments

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21.11 Judgment Debtor Must Be Employee.

21.11[1] Only Earnings of Employee Are Subject to Garnishment. Wage garnishment is available only if the judgment debtor has earnings from employment. For this purpose, "earnings" are compensation payable by an employer for personal services performed by the debtor, whether denominated as wages, salary, commission, bonus, or otherwise [*CCP § 706.011(a)*]. The judgment debtor qualifies as an employee whose earnings may be garnished if he or she is a public officer or any individual who performs services subject to the right of the employer to control both what will be done and how it will be done [*CCP § 706.011(c)*; *see CCP § 706.011(d)*]. The employer need not actually exercise control of the employee's performance; it is sufficient that the employer have the *right* of control [*In re Carter (9th Cir 1999) 182 F3d 1027, 1031]* .

A self-employed person does not qualify as an "employee" whose earnings can be garnished. Rather, a self-employed person is essentially an independent contractor whose clients do not have the right to control the contractor's performance [*Moses v. DeVersecy (1984) 157 CA3d 1071, 1074, 203 CR 906]* .

Distinguish:

A person who forms his or her own corporation (such as a professional corporation) and is employed by the corporation is not considered self-employed; the wages paid by the corporation to the person *are* subject to garnishment [*In re Carter (9th Cir 1999) 182 F3d 1027, 1031]* .

Warning:

If the judgment debtor is not an employee, his or her income is not subject to wage garnishment [*see CCP §§ 706.011(a), (c), (d), 706.021*; *Moses v. DeVersecy (1984) 157 CA3d 1071, 1074, 203 CR 906]* . Often, a judgment creditor will initiate wage garnishment proceedings on the assumption that the judgment debtor is an employee in an occupation, only to learn that garnishment cannot be had because the debtor is not an employee. In fact, many workers who appear to be employees are in fact independent contractors, such as real estate salespersons, stockbrokers, commissioned sales agents, and entertainment and sports agents. Therefore, before initiating garnishment proceedings, judgment creditor's counsel should investigate (for example, through an online locate-and-research tool such as Accurint[(R)] [*see* www.accurint.com]) to verify that the judgment debtor is an employee. If the debtor is not an employee, counsel should consider pursuing an alternative enforcement mechanism, such as an assignment order [*see CCP § 708.510 et seq*.].

Cross Reference:

Discussion of assignment orders, see *21.11[2]* and Ch. 20, Miscellaneous Creditor's Remedies.

21.11[2] Judgment Creditor May Seek Assignment Order If Judgment Debtor Is Not Employee. If a judgment debtor is not an employee and therefore not subject to wage garnishment [*see CCP §§ 706.011(a), (c), (d), 706.021*; *Moses v. DeVersecy (1984) 157 CA3d 1071, 1074, 203 CR 906]* , the judgment creditor may seek an assignment order to establish a right to receive a part of the debtor's future income [*see CCP § 708.510 et seq.*].

Generally, on a noticed motion by the judgment creditor, the court may order the judgment debtor to assign to the judgment creditor all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments [*CCP § 708.510(a)*]. Thus, an assignment order may be used to reach the earnings of a judgment debtor who is self-employed or who otherwise does not qualify as an "employee" for purposes of wage garnishment.

Examples:

Commissions earned by a judgment debtor who works as an independent sales agent may be the subject of an assignment order [*see CCP § 708.510(a)*]. Other examples of payments that may be subject to an assignment order are rents, royalties, and payments due from patents or copyrights [*CCP § 708.510(a)*].

Cross Reference:

Discussion of employee status as prerequisite for wage garnishment, see *21.11[1].*

Discussion of requirements and procedures for obtaining, implementing, and enforcing assignment orders, see Ch. 20, Miscellaneous Creditor's Remedies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsLabor & Employment LawEmployment RelationshipsIndependent Contractors

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21.12 Garnishment Must Be Timely.

21.12[1] Wages May Not Be Garnished Before Judgment. A creditor may not garnish a debtor's wages until after the entry of a judgment in favor of the creditor on the underlying debt. Prejudgment garnishment violates due process [*McCallop v. Carberry (1970) 1 C3d 903, 904-907, 83 CR 666, 464 P2d 122* ; *Sniadach v. Family Fin. Corp. (1969) 395 US 337, 339-342, 89 S Ct 1820, 23 L Ed2d 349* ; *see CCP § 683.010*]. Therefore, garnishment is not a remedy available under the Attachment Law [*see CCP §§ 487.010, 487.020(c)*].

Strategic Point--Judgment Creditor:

Generally, if an employer is served with two or more earnings withholding orders with respect to earnings of the same employee, the employer must comply with the first order served [*CCP § 706.023(a)*]. Therefore, counsel for the judgment creditor should initiate garnishment proceedings as soon as possible after entry of the judgment.

Cross Reference:

Discussion of priority among withholding orders, see *21.16[3][c]*.

21.12[2] Judgment Creditor Must Obtain Garnishment Within 10 Years After Entry or Renewal of Underlying Judgment. A money judgment is subject to enforcement, including by garnishment proceedings, on entry of the judgment [*CCP § 683.010*]. No garnishment or other enforcement proceeding may occur or continue after the expiration of 10 years after the judgment was entered or renewed [*CCP § 683.020*; *see CCP § 683.110 et seq.*].

Exception:

If a money judgment is payable in installments, the 10-year period of enforceability runs as to each installment from the date the installment becomes due and runs as to costs from the date the costs are added to the judgment [*CCP § 683.030*; *see CCP § 685.090*].

Distinguish:

A judgment, order, or decree for spousal, family, or child support generally is enforceable until paid in full and is exempt from any requirement that judgments be renewed [*Fam Code § 291*].

Cross References:

Discussion of timing of enforcement and procedures for renewal of judgments, see Ch. 13, Expiration and Renewal of Judgments.

Discussion of procedures for enforcement of support obligations, see California Family Law Practice and Procedure, Ch. 141, Special Remedies for Enforcement of Support (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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21.13 Amount of Wages Garnished Is Limited by Statute.

21.13[1] Federal Law Imposes Upper Limit. An individual debtor's maximum aggregate weekly earnings subject to garnishment generally may not exceed the lesser of the following [*15 USC § 1673(a)*, *(c)*; *CCP § 706.050*]:

- 25 percent of the debtor's disposable earnings for the week; or
- The amount by which the debtor's disposable earnings for the week exceeds 30 times the federal minimum hourly wage [*see 29 USC § 206(a)(1)*].

"Earnings," for this purpose, means compensation payable by an employer to the judgment debtor for personal services performed by the debtor, whether denominated as wages, salary, commission, bonus, or otherwise, and the term includes periodic payments pursuant to a pension or retirement program [*CCP § 706.011(a)*; *see 15 USC § 1672(a)*]. "Disposable earnings" means earnings remaining after deduction of taxe s and other normal withholdings [*see 15 USC § 1672(b)*].

Distinguish:

The federal limits do not annul, alter, or affect, and do not exempt any person from complying with, the laws of any state that prohibits garnishment or provides for more limited garnishments than are allowed under the federal law or that prohibits the discharge of any employee by reason of the fact that his or her earnings have been subjected to garnishments for more than one indebtedness [*15 USC § 1677*]. Thus, in California, the actual amount garnished in a particular case may be less than the federal maximum, because California provides an exemption for the part of the judgment debtor's earnings necessary for his or her support or for the support of his or her family [*CCP § 706.051(b)*].

Cross Reference:

Discussion of exemption for earnings needed to support judgment debtor and family, see *21.13[2]*, *21.20*.

Exceptions--In General:

These federal limits do not apply to (1) court support orders, (2) bankruptcy court orders, and (3) debts due for federal or state taxes [*15 USC § 1673(b)*]. The United States Secretary of Labor also may exempt

from statutory limits garnishments issued under any state law that, as determined by the Secretary, provides restrictions on garnishment that are substantially similar to those provided under federal statutes [*15 USC § 1675*].

Exception--Withholding Order for Taxes:

Garnishment for taxes under an earnings withholding order issued by the state may not exceed the foregoing federal limits [*CCP § 706.074(a)*]. A court-issued withholding order for taxes may, however, require garnishment of a larger amount [*CCP § 706.076(a)*; *see 15 USC § 1673(b)(1)(C)*]. In that case, the court after hearing will issue a withholding order for taxes requiring the employer to withhold and pay over all of the taxpayer's earnings other than the amount the taxpayer proves is exempt as necessary for support of employee or employee's family [*see CCP § 706.051*], but in no event less than the maximum amount otherwise permitted [*CCP § 706.076(e)*].

Exception--Garnishment for Support:

The maximum of the debtor's aggregate disposable earnings subject to garnishment to enforce a support order depends on whether the employee is currently supporting a spouse or dependent child other than ones covered by the support order, and on whether the support order is for current or past support [*15 USC § 1673(b)(2)*]. If the employee is supporting a spouse or child not covered by the support order, the maximum is 50 percent for current support and 55 percent for past support [*15 USC § 1673(b)(2)*]. If the employee is not supporting any other spouse or child, the maximum is 60 percent for current support and 65 percent for past support [*15 USC § 1673(b)(2)*].

Cross Reference:

For detailed coverage of the enforcement of support obligations, see California Family Law Practice and Procedure, Ch. 141, Special Remedies for Enforcement of Support (Matthew Bender).

21.13[2] California Exemption May Reduce Amount Subject to Garnishment. Aside from the upper limit on garnishment imposed by federal law [*15 USC § 1673(a), (c)*; *see CCP § 706.050*], California law provides an exemption from garnishment for the portion of the judgment debtor's earnings that is necessary for his or her support or for the support of his or her family [*CCP § 706.051(b)*]. The family support exemption, if applicable, may be claimed by the judgment debtor after garnishment proceedings are commenced [*CCP § 706.105(b)*]. The application of this exemption may result in garnishment of a smaller amount than the federal maximum, depending on the circumstances of the case [*see 15 USC § 1677* (federal limit does not preempt state law providing for more limited garnishment)].

Cross Reference:

Discussion of federal maximum, see *21.13[1]*.

Discussion of judgment debtor's claim of exemption, see *21.21*.

Warning:

The California statute adopting the federal maximum refers to the portion of the judgment debtor's earnings that exceeds the maximum as "exempt" from garnishment [*CCP § 706.050* (adopting federal limits imposed by *15 USC § 1673(a), (c)*)]. Thus, a judgment debtor's attorney may argue that the federal limits define an "automatic exemption" from garnishment. Under that view, the "automatic exemption" (which typically is 75 percent of the debtor's disposable earnings [*see 15 USC § 1673(a)*]) would be added to the California family support exemption [*see CCP § 706.051(b)*]. The result under that view would be that in any case in which the debtor spends 25 percent of his or her earnings on family support, *all of the debtor's earnings* would be shielded from garnishment. That approach, even though it has been used by some judges, is incorrect. The correct approach, as described below, recognizes that the statute

that actually establishes the federal limits expresses them not as an exemption, but as a "maximum" allowable garnishment [*15 USC § 1673(a)*].

Thus, the amount of earnings subject to garnishment is determined as follows:

- Step 1. The part of the debtor's earnings that is exempt under California law as necessary for family support [*CCP § 706.051(b)*] is subtracted from the debtor's total disposable earnings (that is, earnings remaining after deduction of taxes and other normal withholdings [*see 15 USC § 1672(b)*]).

- Step 2. The maximum amount subject to garnishment under federal law is calculated in accordance with the federal statute [*15 USC § 1673(a), (c)*].

Cross Reference:

Discussion of federal maximum, see *21.13[1]*.

- Step 3. The figure derived in Step 1 is compared with the figure derived in Step 2. The smaller of these two figures is what will be withheld from the judgment debtor's earnings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsFailure to Pay Tax

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21.14 Judgment Creditor Initiates Garnishment.

21.14[1] Judgment Creditor Must Obtain Writ of Execution. A writ of execution is a prerequisite to the issuance of an earnings withholding order for the garnishment of a judgment debtor's earnings [*see CCP §§ 699.010*, *706.102(a)*, *706.108(a)*]. The writ is issued by the court clerk on application of the judgment creditor and is directed to the levying officer in the county where the levy is to be made and to any registered process server [*CCP § 699.510(a)*]. The writ requires the levying officer to whom it is directed to enforce the money judgment [*CCP § 699.520*].

Strategic Point:

To garnish wages of the spouse of a judgment debtor, the judgment creditor must obtain a court order [*CCP § 706.109*]. The sole purpose of this requirement is to be certain that the spouse was married to the judgment debtor at the time the debt resulting in the judgment was incurred. This is necessary because of the specific exception to the general rule that community property is liable for the debt of either spouse, namely that earnings of the non-debtor spouse are not liable if the debt was incurred before marriage [*Fam C § 911*].

Cross Reference:

Discussion of issuance and contents of writ of execution, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of issuance of earnings withholding order, see *21.14[2]*.

21.14[2] Judgment Creditor Must Obtain Issuance of Earnings Withholding Order. A wage garnishment is initiated by filing an application by a judgment creditor with a levying officer or a registered process server for the issuance of an earnings withholding order [*CCP §§ 706.102(a)*, *706.108(a)*].

Judicial Council Form WG-001 is the official application form for an earnings withholding order, and its use is mandatory [*CCP §§ 681.030(b)*, *706.120*].

Judicial Council Form WG-002 is the official form for an earnings withholding order, and its use is mandatory [*CCP § 706.120*].

Cross Reference:

Form for application for earnings withholding order (Judicial Council Form WG-001), see *21.29*.

Form for earnings withholding order (Judicial Council Form WG-002), see *21.30*.

Decision Point:

In deciding whether to use the levying officer (e.g., sheriff or marshal) or a private, registered process server, counsel should consider that a registered process server will typically be more expensive than a sheriff, although the process server's fees can be added to the postjudgment cost bill [*CCP § 706.108(f)*; *see CCP § 1033.5*]. Counsel should also consider that service of the earnings withholding order by a uniformed peace officer can have more of an impact on a potentially recalcitrant employer. However, it may be desirable to use a registered process server if it is necessary to serve the earnings withholding on the employer more quickly or at an unusual time or place.

Cross Reference:

Discussion of postjudgment cost bill, see *21.17[3]*.

Timing:

The application for an earnings withholding order must be made before expiration of 180 days from the date the writ of execution was issued [*CCP §§ 706.102(a)*, *706.108(a)*; *see CCP § 699.530(b)*].

Distinguish:

An earnings withholding order may not be issued against the earnings of the judgment debtor's spouse except by court order on noticed motion [*CCP § 706.109*].

Strategic Point--Judgment Creditor:

If an earnings withholding order is terminated by the court, unless the court otherwise orders or unless there is a material change of circumstances, a creditor may not apply for another order directed to the same employer with respect to the same judgment debtor for a period of 100 days following service of the earnings withholding order or 60 days after the date of termination of the order, whichever is later [*CCP § 706.105(h)*]. This limitation does not apply to an application for an earnings withholding order for support or for taxes [*CCP § 706.105(k)*].

Exception:

A local child support agency may issue a withholding order for support [*see CCP § 706.030(b)(1)*].

Cross References:

For detailed coverage of the issuance of withholding orders for support, see California Family Law Practice and Procedure, Ch. 140, General Enforcement Principles and Remedies (Matthew Bender);

California Forms of Pleading and Practice, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil

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21.15 Levying Officer or Process Server Must Serve Earnings Withholding Order on Employer.

21.15[1] Service Must Be Made on Appropriate Person. A levy of execution on a judgment debtor's earnings from employment is made by service of the earnings withholding order on the employer [*CCP § 706.021*].

Cross Reference:

Discussion of issuance of earnings withholding order, see *21.14[2]*.

Prerequisite:

If a registered process server has issued the earnings withholding order, he or she must deposit with the levying officer, before serving the earnings withholding order, a copy of the writ of execution, the application for issuance of the earnings withholding order, and a copy of the earnings withholding order. The process server must also pay the statutory fee for service of an earnings withholding order [*CCP § 706.108(b)*; *see Gov Code § 26750*]. Failure to comply with these requirements renders the service of the earnings withholding order ineffective, and the levying officer will not be required to perform any duties under the order. The levying officer may also terminate the order and release any withheld earnings to the judgment debtor [*CCP § 706.108(e)*].

To accomplish service on the employer, the levying officer or registered process server must deliver the original and one copy of the earnings withholding order to any of the following persons [*CCP §§ 706.101(a)*, *706.103(a)(1)*, *706.108(c)*]:

- The managing agent or person in charge, at the time of service, of the branch or office where the employee works or the office from which the employee is paid.

Distinguish:

If the judgment debtor is a state employee, the office from which the employee is paid does not include the controller's office unless the employee works directly for the controller's office [*CCP § 706.101(a)(1)*].

- Any person to whom a copy of a summons and complaint may be delivered to accomplish service of process on the employer [*see CCP § 416.10 et seq*.].

Strategic Points--Judgment Creditor:

Before service of the withholding order, counsel for the judgment creditor should ascertain whom to serve, and when and where that person will be available for service. In large institutions this is not difficult to determine, but it can become more problematic in small companies. Also, if the judgment debtor works in the employer's human resources or payroll department, counsel for the judgment creditor should advise a person higher up of the levy, to minimize the chances that the earnings withholding order might be misplaced. If the judgment debtor is self-employed by his or her corporate or other type entity, counsel for the judgment creditor should be prepared to deal directly with the judgment debtor regarding service and other enforcement issues.

The fee for services of a registered process server will be allowed as a recoverable cost [*CCP § 706.108(f)*; *see CCP § 1033.5*].

21.15[2] Service Must Be Made in Appropriate Manner. Service of the earnings withholding order must be accomplished either by personal delivery [*see CCP §§ 415.10*, *415.20*] or by delivery by registered or certified mail, postage prepaid, with return receipt requested [*CCP §§ 706.101(b)*, *706.108(c)*]. Service by mail is complete when the return receipt is executed by or on behalf of the recipient [*CCP § 706.101(b)*].

Timing:

Service of an earnings withholding order must be made before expiration of 180 days from the date the writ of execution was issued [*CCP §§ 706.103(c)*, *706.108(c)*; *see CCP § 699.530(b)*].

Timing--Failure of Service by Mail:

If the levying officer attempts service by mail and does not receive a return receipt within 15 days from the date of mailing, the levying officer must make service in the manner provided by law for the service of a summons and complaint [*CCP § 706.101(b)*; *see CCP § 415.10*].

21.15[3] Earnings Withholding Order Must Be Accompanied by Appropriate Documents. At the same time the original and copy of the earnings withholding order (including employer's instructions) are served, the levying officer or process server must also serve a notice to the employee of earnings withholding and a form for the employer's return [*see CCP §§ 706.103(a)*, *(b)*, *706.108(c)*, *706.122*, *706.126*, *706.127*]. Judicial Council Form WG-002 is the official earnings withholding order, and Form WG-004 is the official instructions to the employee, use of which are mandatory [see *CCP §§ 706.103(a)(3)*, *706.104(a)*, *706.122*].

Cross References:

Form for earnings withholding order (Judicial Council Form WG-002), see *21.30*.

Form for notice to employee of earnings withholding (Judicial Council Form WG-003), see *21.31*.

Form for employer's return (Judicial Council Form WG-005, see *21.33*.

21.15[4] Process Server Must File Documents With Levying Officer. If service of the earnings withholding order is performed by a process server, the process server must file all of the following with the levying officer [*CCP § 706.108(d)*]:

Timing:

The following items must be filed with the levying officer within five court days after service of the

earnings withholding order [*CCP § 706.108(d)*]:

- The writ of execution, if it is not already in the hands of the levying officer.

- Proof of service on the employer of the earnings withholding order and accompanying papers [*see CCP § 706.108(c)*].

- The judgment creditor's written instructions describing the employer to be served and the earnings to be garnished [*see CCP § 687.010*].

If the fee for service of an earnings withholding order [*see Gov Code § 26750*] has been paid, the levying officer must perform all other duties required by the wage garnishment statutes as if the levying officer had served the earnings withholding order [*CCP § 706.108(e)*].

Caution:

If the registered process server has not filed the necessary documentation with the levying officer, or did not provide the levying officer with the necessary documentation before serving the earnings withholding order [*see CCP § 706.108(b)*], the service of the earnings withholding order is ineffective, and the levying officer is not required to perform any duties under the order. The levying officer may also terminate the order and release any withheld earnings to the judgment debtor [*CCP § 706.108(e)*].

21.15[5] Service of Earnings Withholding Order Creates Lien. Service of an earnings withholding order creates a lien on the earnings of the judgment debtor in the amount required to be withheld pursuant to the order. The lien continues for one year from the date the earnings of the judgment debtor become payable, unless the amount required to be withheld pursuant to the order is paid as required by law [*CCP § 706.029*].

Strategic Point--Judgment Creditor:

This statutory lien may become important if there are deferred wages and the judgment debtor files a bankruptcy petition. In that event, the judgment creditor will be able to argue that the debt is secured to the extent of the amount to be withheld from the wages that are subject to the lien [*see 11 USC § 522(c)(2)*].

Exception--Withholding Order for Support:

Additional requirements apply to withholding orders for support. When a local child support agency serves on the employer a withholding order for support, the agency must also serve a notice informing the support obligor of the effect of the order and of the right to hearings and remedies in the garnishment statutes and the Family Code [*CCP § 706.030(b)(3)*].

Cross References:

For detailed coverage of wage garnishment for support, see California Family Law Practice and Procedure, Ch. 141, Special Remedies for Enforcement of Support (Matthew Bender);

California Forms of Pleading and Practice, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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21.16 Employer Must Comply With Garnishment Procedure.

21.16[1] Employer Must Notify Judgment Debtor of Earnings Withholding Order. Within 10 days after the service of an earnings withholding order, the employer ordinarily must deliver to the employee (the judgment debtor) a copy of the withholding order and the accompanying notice to employee of earnings withholding [*CCP § 706.104(a)*].

Exception:

The employer need not notify the judgment debtor if the debtor is no longer employed by the employer and the employer does not owe the judgment debtor any earnings [*CCP § 706.104(a)*].

Consider:

The employer is not subject to civil liability for failure to provide the required notice to the employee, but the court may hold the employer in contempt of court for failure to comply with the notice requirement [*CCP § 706.104(a)*].

Warning:

An employer may not discharge an employee because his or her earnings have been subjected to garnishment for any one indebtedness [*15 USC § 1674(a)*]. A willful violation of this provision is punishable by a fine of up to $1,000, imprisonment for up to one year, or both [*15 USC § 1674(b)*]. However, an employee discharged in violation of this provision does not have a private right of action against the employer [*LeVick v. Skaggs Cos. (9th Cir 1983) 701 F2d 777, 779-780]* .

Cross Reference:

Discussion of employer's liability for failure to comply with wage garnishment law, see *21.16[5]*.

21.16[2] Employer Must Submit Return to Levying Officer. Within 15 days after service of the earnings withholding order, the employer must complete the employer's return and send it by first class, postage-prepaid mail to the levying officer [*CCP § 706.104(b)*]. If the order is ineffective, the employer must state in the return that the order will not be complied with for that reason and return the order to the levying officer with the employer's return [*CCP § 706.104(b)*].

Judicial Council Form WG-005 is the official employer's return for this purpose, the use of which is mandatory [*CCP §*

706.120].

Cross References:

Form for employer's return (Judicial Council Form WG-005, see *21.33*.

Discussion of ineffectiveness of earnings withholding order, see *21.15[4]*.

Discussion of sanctions for failure to comply with earnings withholding order, see *21.16[5]*.

Form for letter to employer, see *21.34*.

Record Keeping--Judgment Creditor:

Counsel for the judgment creditor should calendar the date for the employer's return to verify that the return was timely submitted. If it has not been timely submitted, counsel should contact the employer in writing, advising the employer of its legal responsibility to submit the return and the legal sanctions available for a failure to submit the return or to comply with the earnings withholding order.

21.16[3] Employer Must Withhold Earnings.

21.16[3][a] Employer Ordinarily Must Withhold Earnings During Withholding Period. Except as otherwise provided by statute, the judgment debtor's employer must withhold the amounts required by the earnings withholding order from all earnings payable for any pay period that ends within the withholding period [*CCP § 706.022(b)*]. The "withholding" period begins on the 10th day after service on the employer of the earnings withholding order and continues until the earliest of the following dates [*CCP § 706.022(a)*]:

- The date the employer has withheld the full amount required to satisfy the order.
- The date specified in a court order served on the employer.
- The date specified in a notice of termination served on the employer by the levying officer.
- The date a dormant or suspended earnings withholding order terminates [*see CCP § 706.032*].

Exception:

A withholding order for support is governed by these time limitations, except that it automatically ends one year after the termination of the judgment debtor's employment with the employer [*CCP § 706.030(c)(1)*].

Cross References:

Discussion of dormant or suspended earnings withholding order, see *21.16[3][b]*.

Coverage of withholding orders for support, see California Family Law Practice and Procedure, Ch. 140, General Enforcement Principles and Remedies (Matthew Bender); California Forms of Pleading and Practice, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

Exception--Calculation of Withholding Amount:

The levying officer has discretion to give written notice from time to time to the employer of the amount required to satisfy the earnings withholding order. The employer must determine the total amount to be withheld based on the notice, regardless of whether the order originally served states a different amount [

CCP § 706.024(b)].

21.16[3][b] Earnings Withholding Order May Become Dormant or Suspended and May Terminate. The earnings withholding order becomes dormant or suspended if the withholding ceases because the judgment debtor's employment is terminated or because his or her earnings become subject to an order or assignment of higher priority [*see CCP § 706.032(a)*]. If employment is terminated, the withholding order will terminate at the end of a continuous 180-day period during which no amounts are withheld under the order [*CCP § 706.032(a)(1)*]. If an order or assignment of higher priority takes effect, the withholding order will terminate at the end of a continuous two-year period during which no amounts are withheld under the order [*CCP § 706.032(a)(2)*].

If a dormant or suspended earnings withholding order terminates, the employer must return the order to the levying officer, along with a statement of the reasons for the return [*CCP § 706.032(b)*].

Exception--Termination of Writ of Execution:

A writ of execution is a prerequisite to the issuance of an earnings withholding order for the garnishment of a judgment debtor's earnings [*see CCP §§ 706.102(a)*, *706.108(a)*]. However, the duration of a writ of execution is limited [*see CCP § 699.560(a)*] and may expire and be returned to the court before the earnings withholding order has terminated [*see CCP § 699.560(d)*]. Nevertheless, the earnings withholding order continues in effect [*see CCP §§ 699.560(d)*, *706.033*]. At the time the withholding order terminates, the levying officer must make a supplemental return on the writ [*CCP §§ 699.560(d)*, *706.033*].

Cross Reference:

Discussion of writ of execution, see *21.14[1]*.

Discussion of execution generally, see Ch. 16, Executing and Levying Against Personal Property.

Strategic Point--Judgment Creditor:

If an earnings withholding order is terminated by the court, unless the court otherwise orders or unless there is a material change of circumstances, a creditor may not apply for another order directed to the same employer with respect to the same judgment debtor for a period of 100 days following service of the earnings withholding order or 60 days after the date of termination of the order, whichever is later [*CCP § 706.105(h)*]. This limitation does not apply to an application for an earnings withholding order for support or for taxes [*CCP § 706.105(k)*].

21.16[3][c] Employer Must Comply With Priority of Withholding Orders. Except as otherwise provided in the garnishment statutes, if an employer is served with two or more earnings withholding orders with respect to earnings of the same employee, the employer must comply with the first order served [*CCP § 706.023(a)*]. However, if the employer is served with two or more orders on the same day, the employer must comply with the order issued pursuant to the judgment first entered. If orders served on the employer on the same day are based on judgments entered on the same day, the employer must comply with whichever one of the orders the employer selects [*CCP § 706.023(b)*]. If an order is served during the period that an employer is required to comply with another order with respect to the earnings of the same employee, the subsequent order is ineffective and the employer is not permitted to withhold earnings pursuant to the subsequent order [*CCP § 706.023(c)*].

Strategic Point--Judgment Creditor:

The statutory priority given to the first order served provides a strong incentive for initiating garnishment

proceedings as soon as possible.

Exceptions:

A withholding order for support has priority over any other earnings withholding order, and the employer *must* comply with it, notwithstanding the requirements of another earnings withholding order [*CCP § 706.030(c)(2)*]. An earnings assignment order for support also has priority over any earnings withholding order [*CCP § 706.031(b)*]. However, the employer must continue to withhold earnings pursuant to a non-support earnings withholding order as long as the sum of the amounts withheld does not exceed the maximum amount subject to garnishment specified by statute [*CCP §§ 706.030(c)(3)*, *706.031(d)*; *see 15 USC § 1673(a)*; *CCP § 706.050*]. If withholding under an earnings assignment order requires an employer to cease withholding under an earnings withholding order, the employer must notify the levying officer who served the earnings withholding order that a supervening wage assignment is in effect [*CCP § 706.031(b)*].

Cross References:

Discussion of maximum amount of earnings subject to garnishment, see *21.13*.

Discussion of wage garnishment for support, see California Family Law Practice and Procedure, Ch. 141, Special Remedies for Enforcement of Support (Matthew Bender); California Forms of Pleading and Practice, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

21.16[4] Employer Must Pay Withheld Earnings to Levying Officer. The amount withheld by the employer must be paid to the levying officer monthly. The initial monthly payment must include all the amounts required to be withheld during the preceding calendar month up to the close of the employee's pay period ending closest to the last day of that month. Each subsequent monthly payment must include amounts withheld from the employee's earnings for services rendered in the interim, up to the close of the employee's pay period ending closest to the last day of the preceding calendar month [*CCP § 706.025(a)*]. The employer may deduct $1.50 from the employee's earnings for each payment made to the levying officer [*CCP § 706.034*].

Timing:

The employer's monthly payment to the levying officer must be made not later than the 15th day of each month [*CCP § 706.025(a)*].

Exception--Employer's Election to Pay More Frequently:

The employer may elect to pay more frequently than monthly. In that case, payment of the amount withheld for each pay period must be made not later than 10 days after the close of the pay period [*CCP § 706.025(b)*].

Strategic Point--Judgment Creditor:

If the judgment creditor has prior wage information concerning the judgment debtor (such as credit applications, income statements filed in divorce actions, or tax returns), it is a good idea to cross reference those against the employer's return to verify that the full amount of wages is being reported and withheld.

Record Keeping--Judgment Creditor:

It is good practice for the judgment creditor's counsel to keep a chart of payments received, as well as interest and costs incurred independent from the levying officer, to make certain that there are no

discrepancies and to verify that all funds to which the creditor is entitled have been collected. The chart helps determine whether there is a decrease in wages being withheld or a delay in payments.

Warning:

A violation of the earnings withholding order subjects the employer to civil and criminal liability [*CCP §§ 706.152-706.154*].

Cross Reference:

Discussion of employer's liability for failure to comply with wage garnishment law, see *21.16[5]*.

21.16[5] Judgment Creditor May Enforce Employer's Compliance.

21.16[5][a] Several Remedies Are Available to Judgment Creditor. A judgment creditor has several options if the employer fails to comply with the earnings withholding order. The wage garnishment law subjects the employer to civil liability for certain violations [*CCP §§ 706.153*, *706.154(a)*]. In addition, the judgment creditor may apply other enforcement devices against a recalcitrant employer. The remedies available to the judgment creditor are nonexclusive and thus may be used in combination [*see CCP §§ 706.153(b)*, *706.154(a)*].

Aside from the provisions imposing civil liability, the wage garnishment law imposes criminal liability for certain violations. Thus, it is a misdemeanor for the employer to withhold earnings and, with the intent to defraud either the judgment creditor or the judgment debtor, fail to pay the withheld earnings over to the levying officer [*CCP § 706.152*].

An employer may not discharge an employee because his or her earnings have been subjected to garnishment for any one indebtedness [*15 USC § 1674(a)*; *Lab Code § 2929*]. A willful violation of this provision is punishable by a fine of up to $1,000, imprisonment for up to one year, or both [*15 USC § 1674(b)*]. However, an employee discharged in violation of this provision does not have a private right of action against the employer [*LeVick v. Skaggs Cos. (9th Cir 1983) 701 F2d 777, 779-780]* .

Exception:

The employer is not subject to civil or criminal penalty for complying with any written order or written notice that purports to be given or served in accordance with the garnishment statutes, unless the employer has actively participated in a fraud [*CCP § 706.154(b)*]. Thus, if the employer fails to comply with a withholding order because another apparently valid order was served first [*see CCP § 706.023(a)*], the employer is not civilly or criminally liable unless the employer is actively participating in a fraud.

Cross Reference:

Discussion of priority of earnings withholding orders, see *21.16[3][c]*.

21.16[5][b] Employer May Incur Civil Liability. If an employer fails to withhold or pay over the amount required by an earnings withholding order, the judgment creditor may bring a civil action against the employer to recover that amount [*CCP § 706.154(a)*]. This remedy is not exclusive and can be used in conjunction with other available remedies [*CCP § 706.154(a)*].

The employer may not defer or accelerate any payment of earnings to an employee with the intent to defeat or diminish the judgment creditor's rights under an earnings withholding order [*CCP § 706.153(a)*]. If the employer violates this provision, the judgment creditor may bring a civil action against the employer to recover the amount that would have been withheld and paid over if the violation had not occurred [*CCP § 706.153(b)*]. This remedy is not exclusive and can be used in conjunction with other available remedies [*CCP § 706.153(b)*].

Strategic Point--Judgment Creditor:

Bringing a separate lawsuit against an uncooperative employer to recover the amount that should have been garnished usually is cost-prohibitive, considering the statutory limits on the amount of wages subject to garnishment [*15 USC § 1673(a), (c)*; *CCP § 706.050*]. For this reason, counsel should consider other methods of obtaining cooperation from the employer. For example, a polite but firm letter to the employer, pointing out the employer's legal duties under the withholding order, may be effective. If that fails, counsel may consider seeking an order to show cause (OSC) why the employer should not be found in contempt of court for failure to obey the earnings withholding order. Another option is to obtain an examination of the employer (as a third party that is indebted to the judgment debtor [*see CCP § 708.120*]). Only if none of these less costly options is successful should counsel for the judgment debtor consider filing a separate lawsuit against the employer.

Cross References:

Discussion of limits on amount of wages subject to garnishment, see *21.13*.

Discussion of examination of employer, see *21.16[5][c]*.

Discussion of orders to show cause, see Ch. 10, Postjudgment Discovery.

21.16[5][c] Judgment Creditor May Obtain Examination of Employer. If an employer fails to comply with an earnings withholding order, the judgment creditor may ask the court to conduct an examination of the employer as a third party that is indebted to the judgment debtor [*CCP § 708.120(a)*].

The judgment creditor may apply ex parte for examination of the employer, by filing an affidavit showing that the employer is indebted (i.e., owes wages) to the judgment debtor in an amount exceeding $250. The affidavit may be based on the affiant's information and belief. If the court is satisfied with the affidavit, the court will order the employer to appear before the court or a referee appointed by the court, at a time and place specified in the order, to answer concerning the wages owed to the judgment debtor [*CCP § 708.120(a)*]. The order will be served on the employer and the judgment debtor at least 10 days before the date set for the examination [*CCP § 708.120(b), (e), (f)*], and the judgment debtor will have an opportunity to claim exemptions [*CCP § 708.120(d)*].

Generally, at the conclusion of the examination proceeding, the court may order the judgment debtor's wages owed by the employer to the judgment debtor to be applied toward the satisfaction of the money judgment, to the extent that the wages not exempt from enforcement of a money judgment [*CCP § 708.205(a)*].

Cross Reference:

Detailed discussion of examination of third parties, see Ch. 10, Postjudgment Discovery.

Strategic Point--Judgment Creditor:

Examination of the employer will be quicker and less costly than pursuing a separate lawsuit against the employer [*see* CCP (§ 706.153(b), 706.154(a)]. If, at the conclusion of the examination, the court issues an order requiring the employer to apply the debtor's wages to satisfy the withholding order [*see CCP § 708.205(a)*], a separate lawsuit will be unnecessary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionLabor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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21.17 Levying Officer Receives and Disburses Withheld Earnings.

21.17[1] Levying Officer Pays Judgment Creditor. The levying officer must receive and account for all amounts paid by the employer pursuant to the earnings withholding order, and the levying officer must pay those amounts over to the judgment creditor at least once every 30 days [*CCP § 706.026(a)*].

Timing:

Payment to the judgment creditor must be made at least once every 30 days [*CCP § 706.026(a)*].

The levying officer must also account to the court for all amounts collected under the earnings withholding order, including costs and interest added to the amount due [*CCP § 706.026(b)*].

Timing:

The accounting to the court must be made at least once every two years [*CCP § 706.026(b)*].

21.17[2] Levying Officer Makes Return to Court on Satisfaction of Earnings Withholding Order. The amount required to satisfy an earnings withholding 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 [*CCP § 706.024(a)*]:

- Addition of the statutory fee for service of the order [*see CCP § 706.108(f)*; *see CCP § 1033.5*] and any other statutory fees for performing duties under the order.
- Addition of costs [*see CCP § 685.090*].
- Subtraction of the amount of any partial satisfactions.
- Addition of daily interest accruing after issuance of the order, as adjusted for partial satisfactions.

The levying officer must compute and collect the costs and interest required to satisfy the order, including any additional interest or costs not entered on the writ of execution [*CCP § 685.050(b)*].

Prerequisite--Addition of Costs:

> If costs are added to the judgment while the earnings withholding order is outstanding [*see CCP § 685.090(a)*], the levying officer must add the costs to the amount to be collected pursuant to the order, provided that the officer receives either of the following before the order is returned: (1) a certified copy of the court order allowing the costs, or (2) a certificate from the court clerk that the costs have been added to the judgment after a memorandum of costs has been filed [*see CCP § 685.070*] and that no timely motion to tax costs was made [*CCP § 685.090(c)*].

After the full amount required to satisfy the order is withheld, interest ceases to accrue on that amount [*CCP § 706.024(c)*; *see CCP § 685.030(a)(2)*]. At that time, the levying officer must return the writ of execution or, if the writ is no longer outstanding, must make a supplemental return to the court [*CCP §§ 699.560(a)(2)*, *(d)*, *706.033*].

21.17[3] Judgment Creditor May Obtain Final Earnings Withholding Order to Cover Costs and Interest. After payment of the amount stated in the earnings withholding order, if any costs and interest remain unsatisfied, the judgment creditor may obtain a final earnings withholding order. A final order is issued after the earlier order has been returned satisfied, and it may authorize the collection only of unsatisfied costs and interest that were not collected under the prior order [*CCP § 706.028(a)*, *(b)*]. On the date the final order is issued, interest ceases to accrue, and no additional costs may be added except statutory fees for serving the order and performing duties under the order [*CCP § 706.028(d)*; *see CCP § 685.030(a)(2)*]. The final earnings withholding order is enforceable in the same manner as other earnings withholding orders [*CCP § 706.028(c)*]. Satisfaction of the amount stated as owing in the final order is equivalent to satisfaction of the money judgment [*CCP § 706.028(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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21.18 CHECKLIST: Opposing Garnishment of Wages.

21.18[1] Judgment Debtor's Checklist.

☐ Determine whether judgment debtor qualifies for relief from earnings withholding order as service member.

Authority:
50 USC app § 524; M&V Code § 403

Discussion:
See *21.07*

☐ Determine whether family support exemption from wage garnishment is unavailable, based on existence of any of following circumstances:

Authority:
CCP § 706.051(c)

Discussion:
See *21.20*

○ Debt was incurred for common necessaries of life furnished to judgment debtor or to judgment debtor's family.

○ Debt was incurred for personal services rendered by employee or former employee of judgment debtor.

○ Withholding order is for support obligation.

○ Withholding order is for taxes.

☐ If family support exemption is available, determine whether judgment debtor should claim exemption, considering following:

○ Amount of exemption is limited to part of judgment debtor's earnings that is necessary for support of debtor and his or her family, including former spouse.

Authority:
CCP § 706.051(a), (b)

Discussion:
See *21.20*

○ If applying exemption would not reduce amount of withheld earnings below statutory maximum, judgment debtor would receive no monetary benefit from claiming exemption.

Authority:
15 USC § 1673(a); *CCP §§ 706.050, 706.051(b)*

Discussion:
See *21.13*, *21.20*

○ If judgment debtor's income is sufficient to pay debtor's and family's living expenses without claiming exemption, debtor may prefer not to claim exemption, so as to accelerate satisfaction of earnings withholding order.

☐ If debtor decides to claim exemption, file following documents with levying officer:

Authority:
CCP § 706.051(a), (b)

Discussion:
See *21.21[1]*

○ Claim of exemption.

Form:
See *21.35*

○ Judgment debtor's financial statement.

Form:
See *21.36*

☐ Verify that levying officer has sent following documents to judgment creditor:

○ Copy of claim of exemption.

○ Copy of judgment debtor's financial statement.

○ Notice of filing of claim of exemption.

Form:
See *21.37*

☐ If judgment creditor opposes claim of exemption, attend court hearing on exemption.

Discussion:
See *21.22[5]*

☐ If claim of exemption is uncontested or allowed in whole or in part, verify that levying officer serves modified earnings withholding order or notice of termination of earnings withholding order, as appropriate, on employer.

Discussion:
See *21.22[6]*, *[7]*

☐ If court's ruling on claim of exemption is unsatisfactory, consider appealing from that ruling.

Discussion:
See *21.22[8]*

21.18[2] Judgment Creditor's Checklist.

☐ If judgment creditor wants to oppose judgment debtor's claim of exemption, file following documents within 10 days after date on which levying officer mailed notice of claim of exemption:

Authority:
CCP § 706.105(d), *(e)*

Discussion:
See *21.22[1]*

○ With levying officer, notice of opposition to claim of exemption.

Form:
See *21.38*

○ With court, notice of motion for order determining claim of exemption.

Form:
See *21.39*

☐ Notify judgment debtor and levying officer of hearing on claim of exemption, by doing following within time prescribed for service of moving and supporting papers for motions generally:

Authority:
CCP §§ 706.105(e), 1005(b)

Discussion:
See *21.22[2]*

○ Giving written notice of hearing to levying officer.

○ Serving notice of hearing and copy of notice of opposition to claim of exemption on judgment debtor (and, if requested in claim of exemption, on attorney for judgment debtor).

Form:
Notice of hearing, 21.40

☐ File proof of service with court.

Authority:
CCP § 706.105(e)

Discussion:
See *21.22[2]*

☐ Verify that levying officer has filed following with court before hearing on claim of exemption:

Authority:
CCP § 706.105(e)

Discussion:
See *21.22[3]*

○ Claim of exemption.

○ Notice of opposition to claim of exemption.

☐ Attend hearing on exemption.

Discussion:
See *21.22[5]*

☐ If court's ruling on claim of exemption is unsatisfactory, consider appealing from ruling.

Discussion:

See *21.22[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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21.19 Options and Strategies.

Before advising a judgment debtor to oppose garnishment by claiming an exemption for the part of earnings used to support the debtor or the debtor's family, counsel should review the particulars of the underlying debt to verify that the exemption if available [*CCP § 706.051(c)*]. Counsel should also review the debtor's actual earnings and family support expenses and calculate whether the use of the exemption would reduce the withholding amount below the statutory maximum [*see 15 USC § 1673(a)*; *CCP § 706.050*]. Finally, counsel should consult with the judgment debtor--it may be that the debtor prefers not to assert the exemption, so as to pay off the underlying debt as quickly as possible.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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21.20 Part of Earnings Needed to Support Debtor and Family Is Generally Exempt.

The part of the judgment debtor's earnings necessary for his or her support or for the support of his or her family ordinarily is exempt from garnishment [*CCP § 706.051(b)*]. "Family," for this purpose, includes the spouse or former spouse of the judgment debtor [*CCP § 706.051(a)*].

Exceptions:

The support exemption is inapplicable if any of the following conditions exists [*CCP § 706.051(c)*]:

- The judgment was for a debt incurred for the common necessaries of life furnished to the judgment debtor or to his or her family.
- The judgment was for a debt incurred for personal services rendered by an employee or former employee of the judgment debtor.
- The withholding order is for a support obligation [*see CCP § 706.030*].
- The withholding order is for state taxes [*see CCP §§ 706.070-706.084*].

Example--Automobile Not Common Necessary of Life:

In determining whether a particular debt was incurred for a "common necessar[y] of life" [*see CCP § 706.051(c)(1)*] the court must consider whether the particular item involved is ordinarily required for the sustenance of all persons [*Ratzlaff v. Portillo (1971) 14 CA3d 1013, 1015-1016, 92 CR 722]* . For example, a debt incurred to purchase an automobile is not incurred for a "common necessar[y] of life," because of the general availability of public transportation, home delivery service, and neighborhood shopping centers [*see Ratzlaff v. Portillo (1971) 14 CA3d 1013, 1015-1016, 92 CR 722* (statutory reference to "common" necessaries of life means only items that are *universally* necessary to sustain life, or substantially so, will qualify as necessaries)]. Presumably, however, if the judgment debtor resides where such services are not readily available, an automobile might be deemed a common necessary of life.

Distinguish:

"Necessaries of life" are distinguishable from necessities of lifestyle. Thus, expenses such as ballet lessons and cable television service may not be deemed necessaries of life sufficient to invoke the

exemption. On the other hand, if an automobile is owned and deemed necessary, automobile insurance is a necessity because it is required by law [*see Veh Code § 16020*].

Exception--Support Order:

In the case of a support order [*see CCP § 706.030*], ordinarily half the judgment debtor's disposable earnings, plus any amount withheld from the judgment debtor's earnings pursuant to any earnings assignment for support [*see CCP § 706.011(b)*] is exempt from garnishment [*CCP § 706.052(a)*]. On the motion of any interested party, the court may issue an order determining the amount to be withheld from the judgment debtor's earnings, after making an equitable division of the judgment debtor's earnings that takes into account the needs of all the persons the judgment debtor is obligated to support [*CCP § 706.052(b)*; *see CCP § 706.052(c)* (order may not authorize withholding of amount in excess of what may be withheld for support under *15 USC § 1673*)].

Strategic Point--Judgment Debtor:

In addition to this exemption for earnings needed to support the judgment debtor and his or her family, California law incorporates federal law specifying the "maximum" part of the judgment debtor's disposable earnings that may be garnished [*CCP § 706.050*; *see 15 USC § 1673(a)*]. The maximum garnishment levels are low, and in a given case it is possible that the maximum amount will be garnished anyway, even after application of the family support exemption. Accordingly, before initiating the procedure to claim the family support exemption, counsel for the judgment debtor should calculate the maximum garnishment as well as the amount of the family support exemption to determine whether any benefit would be gained by asserting the exemption.

Cross References:

Discussion of maximum portion of judgment debtor's disposable earnings that may be garnished, see *21.13[1]*.

Discussion of calculation of amount subject to garnishment, see *21.13[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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21.21 Judgment Debtor May Claim Exemption.

21.21[1] Judgment Debtor Must File Claim of Exemption With Levying Officer. The judgment debtor may make a claim of exemption for income needed for support [*see CCP § 706.051*] by filing with the levying officer the original and one copy both of the following [*CCP § 706.105(b)*]:

- The judgment debtor's claim of exemption.
- The judgment debtor's financial statement.

The judgment debtor's claim of exemption must be executed under oath and must indicate how much the judgment debtor believes should be withheld from his or her earnings each pay period by the employer pursuant to the earnings withholding order and state the judgment debtor's present mailing address [*CCP § 706.123*].

Judicial Council Form WG-006 is the official claim of exemption, and Form WG-007/EJ-165 is the official financial statement, the use of which is mandatory [*CCP § 706.120*].

Cross References:

Form for claim of exemption (Judicial Council Form WG-006), see *21.35*.

Form for financial statement (Judicial Council Form WG-006/EJ-165), see *21.36*.

Strategic Point--Judgment Debtor:

The judgment debtor has the burden of showing that the exemption applies and that the amount of the claimed exemption is required for necessaries of life [*see CCP § 703.580(b)*]. For this reason, it is advisable to attach supporting documentation to the claim of exemption. In the absence of documentation, the court may inherent disregard unsupported, self-serving statements made in the claim of exemption [*see Benavidez v. San Jose Police Dept. (1999) 71 CA4th 853, 860-863, 84 CR2d 157* (court has discretion to disregard self-serving statements made in connection with summary judgment motion)].

Timing:

The judgment debtor may claim the exemption if (1) no prior hearing has been held with respect to the earnings withholding order, or (2) there has been a material change in circumstances since the last previous hearing on the earnings withholding order [*CCP § 706.105(a)*].

Exceptions:

These procedures do not apply to an earnings withholding order for support or taxes [*CCP § 706.105(k)*].

21.21[2] Levying Officer Must Notify Judgment Creditor of Exemption Claim. After receiving the claim of exemption, the levying officer will send all of the following, by first-class mail with postage prepaid, to the judgment creditor [*CCP § 706.105(c)*]:

- A copy of the claim of exemption.
- A copy of the financial statement.
- A notice of the filing of the claim of exemption.

Judicial Council Form WG-008 is the official form for notice of filing a claim of exemption, the use of which is mandatory [*CCP § 706.120*].

Cross Reference:

Form for notice (Judicial Council Form WG-008), see *21.37*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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21.22 Judgment Creditor May Oppose Claim of Exemption.

21.22[1] Judgment Creditor Must File Notice of Opposition and Motion to Determine Claim of Exemption.
A judgment creditor who wants to contest a claim of exemption must file both of the following documents:

- With the levying officer, a notice of opposition to the claim of exemption [*CCP § 706.105(d)*].

Cross Reference:

Form for notice (Judicial Council Form WG-009), see *21.38*.

- With the court, a notice of motion for an order determining the claim of exemption [*CCP § 706.105(e)*].

Cross Reference:

Form for notice of motion, see *21.39*.

Judicial Council Form WG-009 is the official form for notice of opposition, the use of which is mandatory [*CCP § 706.120*].

Timing:

The notice of opposition and the notice of motion must be filed within 10 days after the date of mailing of the notice of the claim of exemption [*CCP § 706.105(d), (e)*].

Cross Reference:

Discussion of mailing of notice of claim of exemption, see *21.22[2]*.

Warning:

A failure to file a timely notice of opposition or notice of motion will result in the forfeiture of the right to contest the exemption, and the allowance of the exemption [*see CCP § 706.105(f)*].

Trap:

The relevant statutory provisions make no mention of "service" on the levying officer of the notice of opposition to the claim of exemption. Rather, the judgment creditor is required to "file" the notice of opposition with the levying officer [*CCP § 706.105(d)*]. Therefore, to preserve the judgment creditor's right to contest a claim of exemption, the notice of opposition must be actually *received* by the levying officer within 10 days after the date of mailing of the notice of the claim of exemption. Mailing before the end of a specified period is not sufficient [*see CCP § 706.105(f)*].

21.22[2] Judgment Creditor Must Provide Notice of Hearing. When the judgment creditor files a notice of motion to determine the claim of exemption, a hearing date will be set no later than 30 days from the date the notice of motion was filed, unless continued by the court for good cause [*CCP § 706.105(e)*]. The judgment creditor must then do the following [*CCP § 706.105(e)*]:

- Give written notice of the hearing to the levying officer.
- Serve a notice of the hearing and a copy of the notice of opposition to the claim of exemption on the judgment debtor and, if requested in the claim of exemption, on the judgment debtor's attorney.
- File a proof of the service with the court.

Judicial Council Form WG-010/EJ-175 is the official form for notice of hearing on claim for exemption, the use of which is mandatory [*Cal Rules Ct, Rule 1.31*].

Cross Reference:

Form for notice of hearing on claim of exemption (Judicial Council Form WG-010/EJ-175), see *21.40*.

Strategic Point--Judgment Creditor:

Counsel for the judgment creditor should consider serving the judgment debtor with a notice to produce at the hearing documents supporting the claim of exemption. The documents may prove useful in impeaching inflated claims of amounts subject to the exemption.

Timing:

Service on the judgment debtor must be done at the time prescribed for the service of moving and supporting papers for motions generally [*CCP §§ 706.105(e), 1005(a)(3), (b)*]. That time ordinarily is 16 court days before the hearing [*CCP § 1005(b)*]. However, if service is by mail, the 16-day period is increased by five calendar days if the mailing is within California, 10 calendar days if the papers are mailed to or from an address outside California but within the United States, and 20 calendar days if the papers are mailed to or from an address outside the United States [*CCP § 1005(b)*]. If the papers are served by fax, express mail, or another method of overnight delivery, the 16-day period is increased by two calendar days [*CCP § 1005(b)*]. The court has discretion to prescribe a shorter time [*CCP § 1005(b)*].

Consider:

Service is deemed made when the notice of the hearing and a copy of the notice of opposition to the claim of exemption are deposited in the mail, postage prepaid, addressed to the judgment debtor at the address stated in the claim of exemption and, if service on the attorney for the judgment debtor was requested in the claim of exemption, to the attorney at the address stated in the claim of exemption [*CCP*

§ 706.105(e)].

Trap:

The statutory provision requiring the giving of notice of the hearing to the levying officer states that notice must be given at the time generally prescribed for the service of moving and supporting papers for motions generally [*CCP § 706.105(e)*; *see CCP § 1005(b)*]. However, another provision states that the claim of exemption will be deemed allowed if the levying officer does not receive a notice of the hearing within 10 days after the filing of the notice of opposition to the claim of exemption [*CCP § 706.105(e)*]. Furthermore, the relevant statutory provisions make no mention of "service" on the levying officer of the notice of hearing. Rather, the judgment creditor is required to "give" the levying officer written notice of the hearing [*CCP § 706.105(e)*]. Therefore, to preserve that the judgment creditor's right to contest a claim of exemption, counsel for the judgment creditor must ensure that the notice of hearing is actually *received* by the levying officer within 10 days after the filing of the notice of opposition to the claim of exemption; mailing before the end of that period is not sufficient [*see CCP § 706.105(f)*].

Cross Reference:

Discussion of hearing on claim of exemption, see *21.22[5]*.

21.22[3] Levying Officer Must File Exemption Claim and Notice of Opposition With Court. If the judgment creditor contests the claim of exemption, once the levying officer receives the notice of the hearing, the levying officer must file the claim of exemption and the notice of opposition to the claim of exemption with the court [*CCP § 706.105(e)*].

Timing:

The claim of exemption and the notice of opposition to the claim must be filed before the date set for the hearing [*CCP § 706.105(e)*].

Cross Reference:

Discussion of judgment creditor's duty to give levying officer notice of hearing, see *21.22[2]*.

21.22[4] Exemption Will Be Allowed If Not Timely Opposed. If the levying officer does not receive a notice of opposition to the claim of exemption within 10 days after the date the notice of claim of exemption was mailed and a notice of hearing not later than 10 days after the notice of opposition to the claim of exemption was filed, the claim of exemption will be deemed uncontested. In that case, the levying officer must serve on the employer one of the following, as appropriate [*CCP § 706.105(f)*]:

- If all the employee's earnings were claimed to be exempt, a notice that the earnings withholding order has been terminated.

- If only a part of the earnings were claimed to be exempt, a modified earnings withholding order that reflects the amount of earnings claimed to be exempt.

Cross Reference:

Discussion of notice of opposition to claim of exemption, see *21.22[1]*.

Discussion of notice of hearing, see *21.22[2]*.

21.22[5] Court Conducts Hearing on Claim of Exemption. If the judgment creditor filed a timely motion to determine the claim of exemption, the court will conduct a hearing on the motion [*CCP § 706.105(e)*].

Timing:

The hearing ordinarily will occur no later than 30 days from the date the notice of motion was filed. However, the court may continue the hearing date for good cause [*CCP § 706.105(e)*].

Cross Reference:

Discussion of notice of motion to determine claim of exemption, see *21.22[1]*.

Consider:

The judgment creditor may indicate on the notice of hearing that he or she will not appear at the hearing and will be submitting the issue on the papers filed. If the judgment debtor also elects not to appear, the matter will be determined on the papers filed [*see* Judicial Council Form WG-010/EJ-175].

Strategic Point:

If possible, counsel for both parties should appear at the hearing. It is the best place to discuss a settlement, which can then be incorporated by the court into a withholding order.

Strategic Point--Judgment Creditor:

The judgment debtor has the burden of showing the amount that is necessary to support his or her family and thus subject to the claim of exemption [*see CCP § 703.580(b)*]. Counsel for the judgment creditor should therefore look for, and object to, things like the following: dry cleaning bills, travel expenses, cable television, more than one cell phone, dance and extracurricular expenses for children, tuition for private schools. If the judgment debtor claims that credit card payments are necessary for family support, counsel should request copies of credit card statements showing what the charges were incurred for.

21.22[6] Court Determines Claim of Exemption. After the hearing, or if the matter is submitted on the papers filed, the court may render its decision without issuing specific findings [*CCP § 706.106*]. The court may deny the claim of exemption, modify the earnings withholding order, or terminate the earnings withholding order. Termination may be ordered as of a date that precedes the date of hearing [*CCP § 706.105(g)*].

If the court determines that any amount already withheld pursuant to the earnings withholding order is to be paid to the judgment debtor, it will make an order directing the person who holds the withheld amount to pay it promptly to the judgment debtor [*CCP § 706.105(g)*].

Judicial Council Form WG-011 is the official form for an order determining claim of exemption, the use of which is mandatory [*CCP § 706.120*].

Cross Reference:

Form for court's order determining claim of exemption (Judicial Council Form WG-011), see *21.41*.

21.22[7] Levying Officer Notifies Employer of Any Change in Earnings Withholding Order. If the court orders that the earnings withholding order be modified or terminated, the clerk must promptly transmit a certified copy of the order to the levying officer [*CCP § 706.105(g)*].

The levying officer then must prepare a modified earnings withholding order or a notice that the earnings withholding order has been terminated, as appropriate, and promptly serve it on the employer [*CCP § 706.105(g)*].

Judicial Council Form WG-012 is the official form for notice of modification or termination of an earnings withholding order, the use of which is mandatory [*CCP § 706.120*].

Cross Reference:

Form for notice of modification or termination of an earnings withholding order (Judicial Council Form WG-012), see *21.42*.

If the employer withheld and paid over amounts pursuant to an order after the date of termination of the order but before receipt of the notice of termination, the judgment debtor may recover those amounts only from the levying officer, if the levying officer still holds those amounts [*CCP § 706.105(i)*; *see CCP § 706.022(c)*]. If the levying officer paid the amounts to the judgment creditor, the judgment debtor may recover them from the creditor [*CCP § 706.105(i)*]. If the employer withheld earnings after termination of the order but has not paid them over to the levying officer, the employer must pay them promptly to the judgment debtor [*CCP § 706.105(i)*].

21.22[8] Parties May Appeal. The parties may appeal from an order denying a claim of exemption or modifying or terminating an earnings withholding order [*CCP § 706.105(j)*].

An appeal by the judgment creditor from an order modifying or terminating the earnings withholding order does not stay the order from which the appeal is taken. Until that order is set aside or modified, the order allowing the claim of exemption in whole or in part is given the same effect as if the appeal had not been taken [*CCP § 706.105(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 21 Garnishment
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21.23 CHECKLIST: Obtaining Garnishment of Money (Other Than Wages) Owed to Judgment Debtor by Public Entity.

21.23[1] Judgment Creditor's Checklist.

☐ Initiate garnishment of public entity's obligation owed to judgment debtor, by filing following with public entity, along with filing fee:

Authority:
CCP §§ 708.730(a), (b), 708.740(a), 708.785(a)

Discussion:
See *21.25[1]*

○ Abstract or certified copy of money judgment.

○ Affidavit stating that judgment creditor desires relief provided by *CCP § 708.710 et seq.* and specifying exact amount required to satisfy judgment.

Form:
See *21.42*

☐ Serve notice of filing on judgment debtor.

Authority:
CCP § 708.730(b)

Discussion:
See *21.25[2]*

☐ Verify that public entity has deposited with court amount required to satisfy money judgment in full or to greatest extent.

Authority:
CCP § 708.740(c)

Discussion:
See *21.26*

☐ Verify that court clerk has notified judgment debtor of deposit of funds by public entity.

Authority:
CCP § 708.770(a)

Discussion:
See *21.26*

☐ If judgment debtor files claim of exemption, follow statutory procedures to contest claim.

Authority:
CCP § 708.770(d)

Discussion:
See *21.27[2], [3]*

☐ Verify that court pays judgment creditor portion of deposited amount to which judgment creditor is entitled.

Authority:
CCP § 708.775

Discussion:
See *21.28*

21.23[2] Judgment Debtor's Checklist.

☐ If exemption from garnishment is available, file and serve claim of exemption and notice of motion to determine claim.

Authority:
CCP §§ 703.520(b), 708.770(b)

Discussion:
See *21.27[1]*

☐ If judgment creditor opposes claim of exemption, attend court hearing on exemption.

Authority:
CCP § 708.770(c)

Discussion:
See *21.27[3]*

☐ After court determines claim of exemption, verify that court does following, unless some other disposition is required by law:

Authority:
CCP § 708.775

Discussion:
See *21.28*

○ Pays judgment creditor any portion of deposited money to which judgment creditor is entitled.

○ Pays any remaining balance of deposited money to judgment debtor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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21.24 Options and Strategies.

If a public entity owes the judgment debtor wages for employment, those wages may be garnished in accordance with the garnishment procedures applicable to employers generally [*see CCP § 706.010 et seq.*]. In other cases, debt payments owed by a public entity to the judgment debtor may be subject to withholding in favor of the judgment creditor only in accordance with special statutory procedures [*see CCP § 708.710 et seq.*].

These cases are not common, and the statutory procedures for withholding are rarely used.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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21.25 Judgment Creditor Initiates Garnishment.

21.25[1] Judgment Creditor Must File Abstract of Judgment and Affidavit With Public Entity. If a public entity owes money (other than wages) to a judgment debtor, the judgment creditor may initiate garnishment of the public entity's obligation by filing the following with the public entity [*CCP § 708.730(a)*]:

- An abstract or a certified copy of the money judgment.
- An affidavit stating (1) that the judgment creditor desires the relief provided by *CCP § 708.710 et seq.*, and (2) the exact amount then required to satisfy the judgment.

  Cross Reference:

  Form for affidavit, see *21.42*.

- A filing fee of $6 [*CCP § 708.785(a)*].

  Timing--Filing With State Agency:

  If the public entity is a state agency [*see CCP § 708.710(d)*], the abstract (or copy) and affidavit must be filed with the agency before the time the agency presents the judgment debtor's claim to the state controller [*CCP § 708.740(a)*].

  Timing--Filing With Other Public Entity:

  If the public entity is not a state agency, the judgment creditor must file the abstract (or copy) of the judgment and the affidavit with the auditor of the public entity or, if there is no auditor, with the official whose duty corresponds to that of auditor [*CCP § 708.750*]. No filing deadline is imposed by the garnishment statutes.

The filing of the abstract (or copy) of the judgment and the affidavit creates a lien on the money owing and unpaid to the judgment debtor by the public entity in an amount equal to that which may properly be applied to the satisfaction of the judgment under the garnishment statutes [*CCP § 708.780(a)*; *see CCP § 708.710 et seq.*].

Exception--Lottery Prize:

If the judgment creditor is garnishing a judgment debtor's lottery prize that is payable in annual installments, and if the judgment is not paid by the first year's garnishment, the creditor must make additional filings to continue his or her lien on the lottery prize [*CCP § 708.755(a)*]. Starting with the second installment against which the judgment creditor's lien is asserted, the creditor must file annually with the lottery agency an affidavit stating that the judgment has not been satisfied, including the amount of the unsatisfied judgment with interest and costs, if any [*CCP § 708.755(a)(1)*].

21.25[2] Judgment Creditor Must Notify Judgment Debtor. Promptly after filing the abstract (or certified copy) of the judgment and affidavit with the public entity, the judgment creditor must personally or by mail serve notice of the filing on the judgment debtor [*CCP § 708.730(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsGovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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21.26 Public Entity Must Deposit Garnished Amount With Court.

To discharge the judgment debtor's claim against the public entity, the state controller (if the claim is against a state agency) or the auditor or other official (if the claim is against another public entity) generally will do the following [*CCP § 708.740(c)*; *see CCP § 708.760(a)* (special rules if judgment debtor is contractor on public work)]:

- First, deduct from the judgment debtor's claim an amount sufficient to reimburse the state or other public entity for any amounts advanced by it to the judgment debtor or owed to it by the judgment debtor.

- Second, deposit with the court, by a warrant or check payable to the court, the amount due the judgment debtor that is required to satisfy the money judgment as shown by the affidavit (or declaration) in full or to the greatest extent.

- Finally, pay any remaining balance to the judgment debtor.

Promptly after the public entity deposits find with the court, the court clerk must have a notice of deposit served on the judgment debtor. Service must be made personally or by mail [*CCP § 708.770(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesDeposits in CourtGovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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21.27 Judgment Debtor May Claim Exemption From Garnishment.

21.27[1] Judgment Debtor Must File Motion to Determine Exemption Claim. To claim an exemption from garnishment of money other than wages owed by a public entity, the judgment debtor must do all of the following [*CCP § 708.770(b)*]:

- File a claim of exemption with the court [*see CCP § 703.520(b)*].
- File with the court a notice of motion for an order determining the claim of exemption.
- Serve on the judgment creditor, personally or by mail, the claim of exemption, a copy of the notice of motion, and a notice of hearing on the motion.

Timing:

These documents must be filed and served within 10 days after service of the notice of deposit on the judgment debtor [*CCP § 708.770(b)*]. The judgment debtor's failure to make a timely claim of exemption will result in the forfeiture of the exemption [*CCP § 708.770(f)*].

Examples:

Exemptions may be claimed, for example, for public retirement benefits [*see CCP § 704.110*], unemployment compensation and unemployment compensation disability benefits [*CCP § 704.120*], and personal injury and wrongful death settlements and awards [*CCP §§ 704.140*, *704.150*]. Although the statutes creating these exemptions make them available "without making a claim," if such property is levied on, its release may be obtained through the statutory procedure for asserting claims of exemption [*CCP § 703.510(b)*].

Cross Reference:

Discussion of service of notice of deposit, see *21.26*.

Discussion of hearing to determine claim of exemption, see *21.27[3]*.

Discussion of available exemptions, see Ch. 16, Executing and Levying Against Personal Property.

21.27[2] Judgment Creditor May Oppose Claim of Exemption. To oppose the judgment debtor's claim of exemption, the judgment creditor must file with the court a notice of opposition to the claim of exemption [*see CCP § 703.560*]; and must serve a copy of the notice on the judgment debtor [*CCP § 708.770(d)*].

Timing:

Filing and service must be accomplished within 10 days after the judgment creditor is served with the judgment debtor's claim of exemption and related documents [*CCP § 708.770(d)*].

Cross Reference:

Discussion of notice of claim of exemption and related documents, see *21.27[1]*.

21.27[3] Court Determines Claim of Exemption. The court will conduct a hearing to determine the claim of exemption [*CCP § 708.770(c)*].

Timing:

The hearing on the motion must be held not later than 30 days from the date the notice of motion to determine the claim of exemption was filed, unless the court continues the hearing date for good cause [*CCP § 708.770(c)*].

Either party may appeal the court's decision [*CCP § 708.770(e)*; *see CCP § 703.600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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21.28 Court Disburses Deposited Funds.

After determination of any claim of exemption, the court will pay the judgment creditor any part of the deposited money that is nonexempt and to which the judgment creditor is entitled. The court will pay any remaining balance of deposited money to the judgment debtor, unless some other disposition is required by law [*CCP § 708.775*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesDeposits in Court

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2-21 MB Practice Guide: CA Debt Collection 21.29

21.29 Application for Earnings Withholding Order--Judicial Council Form WG-001.

Application for Earnings Withholding Order--Judicial Council Form WG-001.

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP §§ 706.102(a), *706.108(a)*, *706.121*; California Judicial Council Form WG-001, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.14[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.30

21.30 Earnings Withholding Order--Judicial Council Form WG-002.

Earnings Withholding Order--Judicial Council Form WG-002.

Click here to view image.

NOTES.

Authority:
CCP §§ 706.102(a), *706.108(a)*, *706.125*; California Judicial Council Form WG-002, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.14[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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2-21 MB Practice Guide: CA Debt Collection 21.31

21.31 Employee Instructions--Judicial Council Form WG-003.

Employee Instructions--Judicial Council Form WG-003.

Click here to view image.

NOTES.

Authority:
CCP §§ 706.104(a), *706.122*; California Judicial Council Form WG-003, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion:
See *21.15[3]*, *21.16[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.32

21.32 Application for Order Staying Enforcement of Earnings Withholding Order Taken Against Party During Period of Military Service.

Application for Order Staying Enforcement of Earnings Withholding Order Taken Against Party During Period of Military Service.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

	)	
	)	No. _____
	)	APPLICATION FOR ORDER
John Smith,	)	STAYING EARNINGS
Plaintiff,	)	WITHHOLDING ORDER;
vs.	)	DECLARATION
Mary Jones,	)	Date: _____
Defendant.	)	Time: _____
	)	Location: 1 North Main St., Farallon City
	)	Judge: _____
	)	Date Action Filed: _____
	)	

_____

I, the undersigned Defendant Mary Jones, hereby apply pursuant to *Military and Veterans Code Section 402(d)* for an order staying enforcement of the earnings withholding order described below and, in support of this application, declare:

1. I am the Defendant named in this action.

2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on _____ [*date*], and _____ [*specify proceeding leading to earnings withholding order from which relief is sought, e.g.,* the summons was served on _____ (*date*), and Defendant's default was entered on _____ (*date*), a default judgment against the defendant was entered on

_____ (*date*), and an earnings withholding order was entered on _____ (*date*)].

[*EITHER*]

3. On _____ [*date*], I was called to active _____ [state *or* federal] military service as _____ [*e.g.,* an enlisted member of the National Guard] by _____ [*e.g.,* the President of the United States of America pursuant to Title _____ (10 *or* 12) of the United States Code].

[*OR*]

3. On _____ [*date*], I was called to full-time active duty as a reservist of the United States Military Reserve.

[*CONTINUE*]

4. As shown by the attached certificate, of which the court is requested to take judicial notice, from _____ [*date*] to _____ [*date*], I was in full-time active _____ [state *or* federal] service as defined in *Military and Veterans Code Section 400(b)*.

5. As shown by Paragraphs 2 through 4, above, the earnings withholding order from which relief is sought was entered during a period of military service governed by *Military and Veterans Code Section 402(d)*.

6. A stay of enforcement is needed because I was prejudiced by reason by military service in making my defense to this action, because _____ [*specify facts showing prejudice*]. I have a _____ [meritorious *or* legal] defense to the action, as follows: _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [*signature*]
Mary Jones
Defendant

NOTES.

Authority:
M&V Code § 402(d)

Discussion:
See *21.07[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersActive DutyMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActMilitary & Veterans LawServicemembersU.S. National Guard

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VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.33

21.33 Employer's Return--Judicial Council Form WG-005.

Employer's Return--Judicial Council Form WG-005.

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NOTES.

Authority:
CCP §§ 706.104(b), *706.126*; California Judicial Council Form WG-005, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.16[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.34

21.34 Letter to Employer Advising of Duty to Submit Return

Letter to Employer Advising of Duty to Submit Return

Tom Doe
Attorney at Law
100 North Main St., Suite 200
Farallon City, California 90000
Telephone: 555-555-5555

July 15, 2007

Payroll Supervisor
Atlas Flypaper Company
200 South Main St.
Farallon City, California 90000

Re: *Smith v. Jones, Farallon County Superior Court Case No. 13579*; your employee Mary Jones

Dear Payroll Supervisor:

I represent John Smith, the judgment creditor in the above-listed matter. Mr. Smith obtained a judgment against Mary Jones in the amount of $45,000.00. I am advised that Mary Jones is employed by you.

On June 17, 2007, an Earnings Withholding Order (wage garnishment) was served on Jane Johnson at your office by an agent of the Farallon County Sheriff's Department. The Sheriff's Department advises that they have not received an Employer's Return form from you, even though you are required by law to fill out the form (it was included with the Earnings Withholding Order) and return it to the Sheriff within 15 days after being served. Your failure to do so subjects you to various potential sanctions by the court.

I am enclosing another copy of the Employer's Return form, along with a copy of the Earnings Withholding Order. Please complete and return the Employer's Return to the Sheriff as required by law. If you have any questions, please

feel free to contact me or the Sheriff's Department (555/777-7777).

Sincerely,

_____

Tom Doe

Enclosures

NOTES.

Authority:
CCP § 706.104(b)

Discussion:
See *21.16[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.35

21.35 Claim of Exemption--Judicial Council Form WG-006.

Claim of Exemption--Judicial Council Form WG-006.

Click here to view image.

NOTES.

Authority:

CCP §§ 706.105, *706.123*; California Judicial Council Form WG-006, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:

See *21.21[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.36

21.36 Financial Statement--Judicial Council Form WG-007/EJ-165.

Financial Statement--Judicial Council Form WG-007/EJ-165.

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NOTES.

Authority:
CCP §§ 706.105(b), *706.124*; California Judicial Council Form WG-007/EJ-165, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.21[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.37

21.37 Notice of Filing of Claim of Exemption--Judicial Council Form WG-008.

Notice of Filing of Claim of Exemption--Judicial Council Form WG-008.

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NOTES.

Authority:
CCP § 706.105(c); California Judicial Council Form WG-008, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.21[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.38

21.38 Notice of Opposition to Claim of Exemption--Judicial Council Form WG-009.

Notice of Opposition to Claim of Exemption--Judicial Council Form WG-009.

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NOTES.

Authority:
CCP §§ 706.105(d), *706.128*; California Judicial Council Form WG-009, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.22[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.39

21.39 Notice of Motion for Order Determining Claim of Exemption.

Notice of Motion for Order Determining Claim of Exemption.

Tom Doe
California Bar Number 987654
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Attorney for Plaintiff John Smith

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

	)	
	)	No. _____
	)	NOTICE OF MOTION
John Smith,	)	FOR ORDER DETERMINING
Plaintiff,	)	CLAIM OF EXEMPTION
vs. Mary Jones,	)	Date: _____
Defendant.	)	Time: _____
	)	Location: 1 North Main St., Farallon City
	)	Judge: _____
	)	Date Action Filed: _____
	)	

_____

To Defendant Mary Jones and to her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in Department _____ of this court, located at 1 North Main St, Farallon City, Plaintiff John Smith will move the court for an order determining the claim of exemption filed by the Defendant with the levying officer.

The motion will be made on the ground that _____ [*specify, e.g.,* the judgment entered in this action is for common necessaries of life, as that term is used in the Wage Garnishment Law, and that therefore, the exemption claimed is not available].

The motion will be based on this notice of motion, on the memorandum served and filed with this notice, on the records and file in this action, on the claim of exemption and the notice of opposition to the claim of exemption that will be filed by the levying officer, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [*signature*]
Tom Doe
Attorney for Plaintiff John Smith

NOTES.

Authority:
CCP § 706.105(e)

Discussion:
See *21.22[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.40

21.40 Notice of Hearing on Claim of Exemption--Judicial Council Form WG-010/EJ-175.

Notice of Hearing on Claim of Exemption--Judicial Council Form WG-010/EJ-175.

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NOTES.

Authority:
CCP § 706.105(e); California Judicial Council Form WG-010/EJ-175, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.22[2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.41

21.41 Order Determining Claim of Exemption--Judicial Council Form WG-011.

Order Determining Claim of Exemption--Judicial Council Form WG-011.

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NOTES.

Authority:
CCP § 706.106; California Judicial Council Form WG-011, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.22[6]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.42

21.42 Notice of Termination or Modification of Earnings Withholding Order--Judicial Council Form WG-012.

Notice of Termination or Modification of Earnings Withholding Order--Judicial Council Form WG-012.

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NOTES.

Authority:
CCP § 706.105(g); California Judicial Council Form WG-012, pictured above, has been approved for mandatory use [*Cal Rules Ct, Rule 1.31*]

Discussion:
See *21.22[7]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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Chapter 21 Garnishment
VI. FORMS

2-21 MB Practice Guide: CA Debt Collection 21.43

21.43 Statement of Amount Required to Satisfy Judgment in Proceeding to Garnish Money Owed to Judgment Debtor by Public Entity.

Statement of Amount Required to Satisfy Judgment in Proceeding to Garnish Money Owed to Judgment Debtor by Public Entity.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	No. _____
vs.	)	STATEMENT OF AMOUNT
Mary Jones,	)	REQUIRED TO SATISFY
Defendant.	)	JUDGMENT
	)	
	)	

_____

I, the undersigned Plaintiff John Smith, am the judgment creditor in this action. As shown by the _____ [abstract *or* certified copy] of judgment filed with this declaration, a judgment was entered in this action by this court on _____ [*date*], in my favor against Defendant Mary Jones (hereinafter judgment debtor) in the sum of $_____ together with costs in the sum of $_____. The exact amount now required to satisfy this judgment is the sum of $_____, all of which is due, owing, and unpaid. [This sum consists of _____ (*specify, e.g.,* the principal amount of the judgment, accrued interest to date, accrued costs, the fee for the abstract of the judgment, and the fee for filing it and this declaration, after deducting all payments made on and credits allowed against the judgment).]

There is money now due, owing, and unpaid by _____ [*name of public entity*] to the judgment debtor in this action, for _____ [*specify reason money is owed, showing that money is not owed for wages or salary*]. To have that money used to satisfy the judgment, I desire to avail myself of the provisions of *Code of Civil Procedure Sections 708.710 through 708.795* and request that the money due, owing, and unpaid by _____ [*name of public entity*] to the judgment debtor, or enough of it as is required to satisfy the judgment in this action, be paid into the court.

[*Set forth any fact or facts tending to identify the judgment debtor as the person to whom the public entity owes money, such as his or her social security number*.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [*signature*]
John Smith
Plaintiff and Judgment Creditor

NOTES.

Authority:
CCP §§ 708.730(a), 706.740(a)

Discussion:
See *21.25[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishments

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Chapter 22 Enforcing Nonmoney Judgments

2-22 MB Practice Guide: CA Debt Collection 22.syn

§ 22.syn Synopsis to Chapter 22: Enforcing Nonmoney Judgments

22.01 Scope.

22.02 Objective and Strategy.

22.03 CHECKLIST: Enforcing Judgment for Possession or Sale of Property.
22.03[1] Checklist for Judgment Creditor.
22.03[2] Checklist for Occupant Claiming Right to Possess Real Property After Unlawful Detainer Judgment.

22.04 Options and Strategies.

22.05 Court Clerk Issues Writ of Possession or Sale.
22.05[1] Judgment Creditor Must Apply for Writ.
22.05[2] Writ Must Include Required Information.
22.05[2][a] Writ Must Contain General Information Required by Statute.
22.05[2][b] Writ of Possession of Personal Property Must Contain Additional Information.
22.05[2][c] Writ of Possession of Real Property Must Contain Additional Information.
22.05[2][d] Writ of Sale Must Contain Additional Information.
22.05[3] Separate Writ Must Issue for Each County Where Judgment Will Be Enforced.

22.06 Judgment Creditor Delivers Writ and Instructions to Levying Officer.

22.07 Levying Officer Executes Writ of Possession of Personal Property.
22.07[1] Levying Officer Searches for Property.
22.07[2] If Property Is Found, Levying Officer Will Take Possession.
22.07[2][a] Levying Officer Takes Custody in Same Manner As Under Writ of Execution.
22.07[2][b] Personal Property Located in Private Place.
22.07[2][c] Personal Property Used As Dwelling.
22.07[3] If Property Is Not Found, Levying Officer Will Make Demand on Judgment Debtor.
22.07[4] Judgment Creditor May Obtain Order to Turn Over Property.
22.07[4][a] Judgment Creditor May Apply for Turnover Order.
22.07[4][b] Court May Issue Turnover Order on Showing of Need.
22.07[4][c] Turnover Order Must Be Served on Judgment Debtor.

22.08 Levying Officer or Process Server Executes Writ of Possession of Real Property.
22.08[1] Levying Officer Generally Executes Writ of Possession of Real Property.
22.08[1][a] Writ of Possession Must Be Served on Occupant of Property.
22.08[1][b] If Service on Occupant Is Not Accomplished, Writ of Possession Must Be Posted and Served on Judgment Debtor.
22.08[2] Registered Process Server May Execute Writ of Possession.
22.08[2][a] Process Server May Execute Writ If Levying Officer Failed to Do So.
22.08[2][b] Process Server Must File Documentation of Execution With Levying Officer.
22.08[2][c] Levying Officer Must Perform Other Duties Under Writ.
22.08[2][d] Court May Allow Process Server's Fee As Recoverable Cost.
22.08[3] Levying Officer Must Evict Occupants Who Do Not Vacate Premises.
22.08[4] Judgment Creditor May Dispose of Occupants' Personal Property.
22.08[5] Occupant Not Named in Unlawful Detainer Judgment May Oppose Eviction.
22.08[5][a] Occupant Not Named in Judgment May Claim Right to Possession Unless Previously Served With Prejudgment Claim of Right Form.
22.08[5][b] Claimant Must Present Claim Form to Levying Officer and Then Pay Court Filing Fee.
22.08[5][c] Levying Officer Stops Eviction On Presentation of Claim.
22.08[5][d] Levying Officer Delivers Claim to Court, Which Sets Hearing.
22.08[5][e] Court Conducts Hearing to Determine Claim of Right to Possession.
22.08[5][f] If Claim Is Valid, Court Must Order Further Proceedings.
22.08[5][g] If Claim Is Unsuccessful, Court Must Order Levying Officer to Enforce Writ of Possession.

22.09 Levying Officer Executes Writ of Sale of Personal or Real Property.
22.09[1] Levying Officer Levies on Property to Be Sold.
22.09[2] Levying Officer Sells Property.
22.09[3] Levying Officer Applies Proceeds of Sale in Conformity With Judgment.
22.09[4] Judgment Creditor May Obtain Order to Transfer Property.
22.09[4][a] Judgment Creditor Applies for Transfer Order.
22.09[4][b] Court May Issue Transfer Order on Showing of Need.
22.09[4][c] Transfer Order Must Be Served on Judgment Debtor.

22.10 Writ of Possession or Sale May Be Enforced to Satisfy Money Judgment.

22.11 Levying Officer Returns Writ of Possession or Sale.

22.12 CHECKLIST: Enforcing Permanent Injunction or Other Nonmoney Judgment.
22.12[1] Judgment Creditor's Checklist.
22.12[2] Judgment Debtor's Checklist.

22.13 Options and Strategies.

22.14 Judgment Creditor Must Serve Judgment on Person Required to Obey It.

22.15 Court May Punish Disobedience of Injunction or Other Nonmoney Judgment As Contempt.

22.16 Judgment Creditor May Initiate Contempt Proceeding.

22.17 Court Issues Order to Show Cause.

22.18 Accused Person May Raise Defenses to Contempt Charge.

22.19 Court Conducts Hearing.

22.20 Court May Impose Fine or Imprisonment.

22.21 Court May Award Attorney's Fees Against Judgment Debtor or Agent.

22.22 Application for Writ of Possession or Sale.

22.23 Notice of Motion for Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

22.24 Declaration in Support of Motion for Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

22.25 Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

22.26 Claim of Right to Possession--Judicial Council Form CP-10.

22.27 Declaration Initiating Contempt Proceeding for Violation of Permanent Injunction.

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Chapter 22 Enforcing Nonmoney Judgments
I. STRATEGY

2-22 MB Practice Guide: CA Debt Collection 22.01

22.01 Scope.

This chapter covers:

- Enforcing a judgment for the possession or sale of personal or real property [*see 22.03 -22.11*; Forms: *see 22.22 -22.25*].

- Opposing eviction from real property that is subject to a judgment of possession in an unlawful detainer proceeding [*see 22.08[5]*; Form: *see 22.26*].

- Enforcing, and opposing enforcement of, a permanent injunction or other nonmoney judgment [*see 22.12 -22.21*; Form: *see 22.27*].

Core Statutes:
CCP §§ 681.010, 712.010 et seq., 717.010, 1209-1219

Cross Reference:

For coverage of enforcement of money judgments, see Ch. 16, Executing and Levying Against Personal Property, Ch. 17, Executing and Levying Against Real Property, and Ch. 18, Execution Sales.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesInjunctionsPermanent InjunctionsReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawPurchase & SaleRemediesSpecific PerformanceReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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Chapter 22 Enforcing Nonmoney Judgments
I. STRATEGY

2-22 MB Practice Guide: CA Debt Collection 22.02

22.02 Objective and Strategy.

A nonmoney judgment may award the judgment creditor possession of real or personal property. It may require the sale of real or personal property, with the proceeds to be distributed in accordance with the terms of the judgment, or it may incorporate an injunction, ordering the judgment debtor to perform, or refrain from performing, a specified act [*see CCP § 681.010(b)-(e)*]. If the judgment debtor does not comply with the judgment, the judgment creditor must resort to the enforcement mechanisms provided by statute.

Judgments for possession or sale of real or personal property ordinarily are enforced through the issuance and execution of a writ of possession or sale [*CCP §§ 681.010(b)-(d), 714.010 et seq.*]. Judgments that contain injunctive orders are enforced through the court's contempt power [*CCP § 1209(a)(5); see CCP §§ 681.010(e), 717.010*].

Cross References:

Discussion of enforcement of judgments for possession or sale, see *22.03 -22.11*.

Discussion of enforcement of judgments containing injunctive orders, see *22.12 -22.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesInjunctionsContemptCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 22 Enforcing Nonmoney Judgments
II. ENFORCING JUDGMENT FOR POSSESSION OR SALE OF PROPERTY

2-22 MB Practice Guide: CA Debt Collection 22.03

22.03 CHECKLIST: Enforcing Judgment for Possession or Sale of Property.

22.03[1] Checklist for Judgment Creditor.

☐ Obtain writ of possession or sale of property.

Authority:
CCP § 712.010

Discussion:
See *22.05[1]*

○ Prepare application for writ or possession or sale.

Authority:
CCP §§ 712.010, *715.010(a)*

Form:
See *22.22*

○ File application for writ with clerk of court.

Authority:
CCP § 712.010

○ Verify that clerk has issued writ to each county in which judgment will be enforced.

Authority:
CCP §§ 712.010, *712.020*, *714.010(b)*, *715.010(b)*, *716.010(b)*

Discussion:

See *22.05[2], [3]*

☐ Deliver writ of possession or sale, with accompanying written instructions, to levying officer in each county in which judgment will be enforced.

Authority:
CCP § 712.030

Discussion:
See *22.06*

☐ If judgment is for possession of personal property:

○ Verify that levying officer has taken possession of property.

Authority:
CCP § 714.020

Discussion:
See *22.07[1] -[3]*

○ If levying officer is unable to take possession of property, consider applying to court for order directing judgment debtor to turn over property.

Authority:
CCP § 714.030

Discussion:
See *22.07[4]*

Forms:
See *22.23 -22.25*

☐ If judgment is for possession of real property:

○ Verify that levying officer has executed writ of possession by serving writ on occupant or by posting writ and serving copy of writ on judgment debtor.

Authority:
CCP §§ 715.010, 715.020

Discussion:
See *22.08[1]*

○ If levying officer has not executed writ within three working days of delivery of writ, consider retaining registered process sever to execute writ.

Authority:

CCP § 715.040

Discussion:
See *22.08[2]*

○ If occupants of property do not vacate premises within five days after service of writ, request that levying officer evict occupants from premises.

Authority:
CCP § 715.020(c)

Discussion:
See *22.08[3]*

○ If evicted occupants have left behind personal property:

Authority:
CC § 1988(a); *CCP § 1174(f)-(i)*

Discussion:
See *22.08[4]*

☐ Determine and notify owner of personal property that property was left behind.

☐ Store personal property and release it to owner if owner pays costs of storage not later than date specified in writ of possession.

☐ If owner does not redeem personal property, sell it at public sale unless total resale value is less than $300, in which case judgment creditor may retain or dispose of property without offering it for public sale.

○ If occupant of property not named in unlawful detainer judgment presents claim of right of possession, attend hearing on claim.

Authority:
CCP §§ 715.020(d), *1174.3(b)-(h)*

Discussion:
See *22.08[5]*

☐ If judgment is for sale of real or personal property:

○ Verify that levying officer has executed writ of sale in same manner as under writ of execution and has applied proceeds of sale in conformity with judgment for sale.

Authority:

CCP § 716.020

Discussion:
See *22.09[1] -[3]*

○ If necessary, apply to court for order directing judgment debtor to transfer to levying officer possession of property to be sold.

Authority:
CCP § 716.030

Discussion:
See *22.09[4]*

Forms:
See *22.23 -22.25*

☐ After levying officer has returned writ of possession or sale, apply to court for award of enforcement costs.

Authority:
CCP §§ 699.560(a), 715.040(d)

Discussion:
See *22.08[2][d], 22.11*

22.03[2] Checklist for Occupant Claiming Right to Possess Real Property After Unlawful Detainer Judgment.

☐ After service of writ of possession of real property pursuant to unlawful detainer judgment, determine whether any occupant not named in judgment may assert claim of right to possess property.

Authority:
CCP §§ 715.020(d), 1174.3(b), (c)

Discussion:
See *22.08[5][a]*

☐ If occupant has valid basis for claim and is not barred from asserting it, present claim by:

Authority:
CCP § 1174.3(c)

Discussion:
See *22.08[5][a]*

○ Preparing claim on form provided by levying officer.

Authority:
CCP § 1174.3(h)

Form:
See *22.26*

○ Presenting completed claim form to levying officer.

○ Within two court days after presentation to levying officer, delivering to court filing fee or application to proceed in forma pauperis, with or without 15 days rent.

☐ Attend hearing on claim.

Authority:
CCP § 1174.3(d)

Discussion:
See *22.08[5][e]*

☐ If claim is found valid, either:

Authority:
CCP § 1174.3(e)

Discussion:
See *22.08[5][f]*

○ Take steps to correct curable breach of lease agreement to restore occupant's right to possession.

○ Litigate unlawful detainer action, if court has deemed action amended to include occupant as defendant.

☐ If claim is unsuccessful, have occupant vacate premises.

Authority:
CCP § 1174.3(f), (g)

Discussion:
See *22.08[5][g]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsSpecific ActsCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawPurchase & SaleRemediesSpecific PerformanceReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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Chapter 22 Enforcing Nonmoney Judgments
II. ENFORCING JUDGMENT FOR POSSESSION OR SALE OF PROPERTY

2-22 MB Practice Guide: CA Debt Collection 22.04

22.04 Options and Strategies.

A judgment for possession or sale of real or personal property typically is enforced by writ of possession or sale [*see CCP § 712.010 et seq.*; *see also CCP § 681.010(b)-(d)*].

Strategic Point:

A judgment for possession of personal property typically is obtained by a lender or lessor who is unable to repossess collateral or leased property by other means. A judgment for possession of real property usually is entered in an unlawful detainer action, but it may also be entered in quiet title action, forcible entry action, or forcible detainer action. A judgment for sale of real or personal property usually is entered in an action for partition or a foreclosure proceeding to enforce a security interest.

As an alternative to enforcement by writ of possession or sale, the court may appoint a receiver to enforce a judgment for possession or sale [*CCP § 712.060*; *see CCP § 708.610*].

Strategic Point:

Appointment of a receiver may be a preferable method of enforcing a judgment for possession or sale in cases such as the following:

- When the asset in question is a going business, and the judgment creditor is not capable or qualified to run the day-to-day operations of the business and wishes to preserve the business in order to maximize the ultimate return on the sale.

- When a project, such as a construction project, is ongoing, and completion of the project would yield a greater recovery than otherwise would be obtained.

- When a sale involves specialized property, like large machinery, for which the sheriff will be unable to get the highest value.

- When there are potential toxic issues or code violations with the property as an "insulating factor" for

the seller, because the receiver is the agent of the court. As long as the issues are disclosed there should be immunity from most claims.

A nonmoney judgment against a public entity is enforceable under the procedures for enforcement of nonmoney judgments generally [*CCP § 712.070*].

Distinguish:

Enforcement of a *money* judgment against a public entity (other than the Regents of the University of California) must be carried out under procedures prescribed by the Government Code [*CCP § 695.050*; *see Gov Code §§ 965.5(b)*, *965.9*, *970.1(b)*].

Exemptions from execution and levy that are provided by statute for certain kinds of property apply only when a *money* judgment is being enforced [*CCP § 703.010*]. Thus, a judgment debtor may not assert a statutory exemption from execution of a writ of possession or sale and levy issued to enforce a *nonmoney* judgment.

Cross References:

Discussion of appointment of receiver to enforce judgment, see *Ch. 20, Miscellaneous Creditor's Remedies, 20.34* et seq.

Enforcement of money judgments against public entities, see *Ch. 21, Garnishment, 21.23* et seq.

Exemptions from enforcement of money judgments, see Ch. 16, Executing and Levying Against Personal Property, and Ch. 17, Executing and Levying Against Real Property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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22.05 Court Clerk Issues Writ of Possession or Sale.

22.05[1] Judgment Creditor Must Apply for Writ. A judgment for the *sale* of real or personal property may be enforced by a writ of sale [*CCP § 716.010(a)*]. A judgment for the *possession* of real or personal property may be enforced by a writ of possession [*CCP §§ 714.010(a)*, *715.010(a)*].

To obtain a writ of possession or sale, the judgment creditor must apply to the court clerk [*CCP § 712.010*].

Prerequisites--Unlawful Detainer Action:

If the judgment was entered in an unlawful detainer proceeding, the judgment creditor's application for a writ of possession must include a declaration under penalty of perjury stating the daily rental value of the property as of the date the complaint for unlawful detainer was filed [*CCP § 712.010*]. An application for a writ of possession of real property also must include an indication that the writ will apply to all tenants, subtenants, named claimants to the property, and any other occupants of the premises [*CCP § 715.010(a)*].

Cross Reference:

Form for application for writ of possession or sale, see *22.22*.

Timing--Generally:

A writ of possession or sale will not be issued until after entry of the judgment for possession or sale of the property [*CCP §§ 715.010(a)*, *716.010(a)*].

Timing--Five-Day Stay of Enforcement in Unlawful Detainer Action:

If the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, and the landlord's underlying notice to terminate did not state an intention to declare a forfeiture of the lease, the court may order that a writ may not be issued to enforce the judgment until the expiration of five days after the entry of the judgment [*CCP § 1174(c)*]. If the lease or agreement is in writing, is for a term of more than one year, and does not contain a forfeiture clause, the court must order a five day stay [*CCP § 1174(c)*]. During the stay, the judgment debtor may restore his or her right of possession by paying the outstanding rent,

damages, and costs [*CCP § 1174(c)*].

Investigating Writ of Possession or Sale Using Online Resources:

Many resources are available online for learning about writs of possession or sale. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined
  - Sample Search: To find California cases that discuss writs of sale or possession, use a HEADNOTES segment and ATLEAST command search: *headnotes (writ of sale or writ of possession) and atleast4 (writ of sale or writ of possession)*.

22.05[2] Writ Must Include Required Information.

22.05[2][a] Writ Must Contain General Information Required by Statute. A writ of possession or sale is directed to the levying officer in the county where the judgment is to be enforced [*CCP § 712.010*]. Any writ for possession or sale must require the levying officer to enforce the judgment, and it must include the following information [*CCP § 712.020*]:

- The date of issuance of the writ.
- The title of the court in which the judgment for possession or sale was entered, and the cause and number of the action.
- The name and address of the judgment creditor, and the name and last known address of the judgment debtor.
- The date on which the judgment was entered, and the dates of any subsequent renewals, and where those entries were made in the records of the court.
- If the judgment for possession or sale includes a money judgment, the amount required to satisfy the money judgment on the date the writ is issued; in addition, at the option of the judgment creditor, the writ may include the amount of interest accruing daily on the principal amount of the judgment from the date the writ is issued.
- Whether any person has requested notice of sale under the judgment and, if so, the name and address of that person.

Cross References:

Additional information required in writ of possession of personal property, see *22.05[2][b]*.

Additional information required in writ of possession of real property, see *22.05[2][c]*.

Additional information required in writ of sale, see *22.05[2][d]*.

Form for writ, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

22.05[2][b] Writ of Possession of Personal Property Must Contain Additional Information. In addition to the information generally required for any writ of possession [*see CCP § 712.020*], a writ of possession of *personal* property also must contain the following [*CCP §§ 712.020(g), 714.010(b)*]:

- A description of the property to be delivered to the judgment creditor in satisfaction of the judgment.
- The value of the property, if specified in the judgment or in a supplemental order.

Cross References:

Information generally required in any writ for possession or sale, see *22.05[2][a]*.

Form for writ, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

22.05[2][c] Writ of Possession of Real Property Must Contain Additional Information. In addition to the information generally required for any writ of possession [*see CCP § 712.020*], a writ of possession of *real* property must also contain the following [*CCP §§ 712.020(g), 715.010(b)*]:

- A description of the real property of which possession is to be delivered to the judgment creditor in satisfaction of the judgment.
- A statement that if the real property is not vacated within five days from the date of service of a copy of the writ on the occupant or, if the copy of the writ is posted, within five days from the date a copy of the writ is served on the judgment debtor, the levying officer will remove the occupants from the real property and place the judgment creditor in possession.
- A statement that any personal property, except a mobilehome, remaining on the real property after the judgment creditor has been placed in possession will be sold or otherwise disposed of in accordance with *CCP § 1174* unless the judgment debtor or other owner 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 real property.
- The date the complaint was filed in the action that resulted in the judgment of possession.
- The date or dates on which the court will hear objections to enforcement of the judgment of possession that are filed pursuant to *CCP § 1174.3*, unless a summons, complaint, and prejudgment claim of right to possession were served on the occupants in accordance with *CCP § 415.46*.
- The daily rental value of the property as of the date the complaint for unlawful detainer was filed, unless a summons, complaint, and prejudgment claim of right of possession were served on the occupants in accordance with *CCP § 415.46*.
- If a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with *CCP § 415.46*, a statement that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises.

Cross References:

Information generally required in any writ for possession or sale, see *22.05[2][a]*.

Form for writ, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

22.05[2][d] Writ of Sale Must Contain Additional Information. In addition to the information generally required for any writ of possession or sale [*see CCP § 712.020*], a writ of sale of real or personal property must contain a description of the property to be sold in satisfaction of the judgment for sale [*CCP §§ 712.020(g), 716.010(b)*].

Cross References:

Information generally required in any writ for possession or sale, see *22.05[2][a]*.

Form for writ, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

22.05[3] Separate Writ Must Issue for Each County Where Judgment Will Be Enforced. The court clerk will issue a separate writ of possession or sale for each county in which the judgment is to be enforced [*CCP § 712.010*].

Timing:

Writs may be issued successively until the judgment is satisfied, but 180 days must expire between issuance of successive writs in the same county unless the prior writ is first returned [*CCP § 712.010*].

Cross Reference:

Form for writ, see *Ch. 16, Executing and Levying Against Personal Property, 16.73*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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22.06 Judgment Creditor Delivers Writ and Instructions to Levying Officer.

Once the court clerk has issued a writ of possession or sale, to obtain execution the judgment creditor must deliver the writ, along with the judgment creditor's written instructions, to the levying officer (i.e., the sheriff or marshal) [*CCP § 712.030(a)*; *see CCP § 680.260*]. A writ of sale delivered to the levying officer must also be accompanied by a certified copy of the judgment for sale [*CCP § 716.010(c)*]. The levying officer will then execute the writ in the manner prescribed by law [*CCP § 712.030(a)*].

The creditor's written instructions accompanying the writ must contain information needed or requested by the levying officer, including an adequate description of the property subject to the writ; whether the property is a dwelling; and if it is a dwelling, whether it is real property of personal property (such as a mobilehome) [*see CCP § 687.010(a)*].

Example--Judgment Creditor's Instructions:

If the writ covers easily movable personal property, the judgment creditor's instructions should specify locations where the property is likely to be found.

Timing:

A levying officer may not levy on or otherwise seize property under the writ of possession or sale after the expiration of 180 days from the date the writ was issued [*CCP § 712.030(b)*].

Cross References:

Discussion of issuing writ of possession or sale, see *22.05*.

Discussion of manner of execution of writ, see *22.07 -22.09*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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22.07 Levying Officer Executes Writ of Possession of Personal Property.

22.07[1] Levying Officer Searches for Property. To execute a writ of possession of personal property, the levying officer must search for the property specified in the writ [*CCP § 714.020(a)*].

Strategic Points--Judgment Creditor:

As with all actions to be taken by the sheriff, counsel should try to be as detailed and specific in the instructions as possible. Counsel should use a letter that itemizes, step by step, what is to be done:

- To facilitate the levying officer's search for the personal property specified in the writ, the judgment creditor's written instructions accompanying the writ should include any available information about the location of the property [*see CCP § 712.030(a)*].

- It is important to give as detailed a description of the property as possible. If there is an invoice that lists identification or serial numbers, or photos, they should be included so that the officer can properly identify the property and will not be put off by claims of the debtor that the property is not subject to the levy.

- If there are special or unusual circumstances, such as prior threats of violence against other process servers or specialized property that has to be taken into possession, counsel should advise the sheriff in advance and check to see what special actions or instructions they want listed.

Cross Reference:

Discussion of creditor's delivery of writ to levying officer, see *22.06*.

22.07[2] If Property Is Found, Levying Officer Will Take Possession.

22.07[2][a] Levying Officer Takes Custody in Same Manner As Under Writ of Execution. If the personal property specified in the writ is in the possession of the judgment debtor or an agent of the judgment debtor, the levying officer must take custody of the property in the same manner as a levy under a writ of execution [*CCP § 714.020(a)*].

If the levying officer obtains possession of the property specified in the writ of possession, the officer must delivered that property to the judgment creditor in satisfaction of the judgment [*CCP § 714.020(a)*].

Distinguish:

If the personal property is found in the possession of someone other than the judgment debtor or the debtor's agent--for example, a bona fide purchaser or lessee--the levying officer is not authorized to take possession of the property [*see CCP § 714.020(a)*]. In that case, the judgment creditor may have to commence a separate action against the possessor of the property.

Strategic Point:

A debtor may operate under multiple names. If it is the same person/entity, but shows the sheriff different identifying information, counsel should consider amending the judgment to include the new entity/person so that the levy is not frustrated.

Cross References:

Discussion of levy against personal property under writ of execution, including personal property used as dwelling and personal property in private place, see Ch. 16, Executing and Levying Against Personal Property.

Amending a judgment, see *Ch. 9, Planning Enforcement of Judgment, 9.37* et seq.

22.07[2][b] Personal Property Located in Private Place. If the personal property is located in a private place, the levying officer must take custody in the manner prescribed for levying on property found in private places [*CCP § 714.020(a)*; *see CCP § 699.030*]. Under that procedure, the levying officer must demand delivery of the property by the judgment debtor and must advise the judgment debtor that the judgment debtor may be liable for costs and attorney's fees incurred in any further proceedings to obtain delivery of the property [*CCP § 699.030(a)*]. If the judgment debtor does not deliver the property, the levying officer may make no further effort to obtain possession of the property and must promptly notify the judgment creditor of the failure to obtain the property [*CCP § 699.030(a)*]. The judgment creditor may then apply to the court for an order directing the levying officer to seize the property in the private place [*CCP § 699.030(b)*].

Strategic Point:

Include this information in advance and make sure it is included in the order if there is cause to believe that the property is located on private property. If counsel does not know where the property is, consider taking a judgment debtor examination to ascertain its location before sending the writ out for levy.

22.07[2][c] Personal Property Used As Dwelling. If the personal property is used as a dwelling (for example, a mobilehome), the levying officer must take possession in the manner prescribed for levying on such property [*CCP § 714.020(a)*; *see CCP § 700.080*].

22.07[3] If Property Is Not Found, Levying Officer Will Make Demand on Judgment Debtor. If the personal property specified in the writ of possession cannot be taken into custody but the judgment debtor can be located, the levying officer must make a demand on the judgment debtor for the property [*CCP § 714.020(b)*]. If the levying officer does not obtain possession after making the demand, the levying officer must so state in the return [*CCP § 714.020(b)*].

After the levying officer has made a return stating that the inability to obtain possession of the property after making a

demand on the judgment debtor, the judgment for the possession of the property may be enforced in the same manner as a money judgment for the value of the property as specified in the judgment or a supplemental order [*CCP § 714.020(b)*]. The writ of possession of personal property may then be treated as a writ of execution [*CCP § 714.020(c)*].

Cross References:

Discussion of levying officer's return of writ, see *22.11*.

Discussion of enforcement of money judgment, see Ch. 16, Executing and Levying Against Personal Property, and Ch. 17, Executing and Levying Against Real Property.

22.07[4] Judgment Creditor May Obtain Order to Turn Over Property.

22.07[4][a] Judgment Creditor May Apply for Turnover Order. After the entry of a judgment for possession of personal property, whether or not a writ of possession of personal property has been issued, the judgment creditor may apply to the court for an order directing the judgment debtor to turn over possession of the property, or documentary evidence of title to the property, or both, to the judgment creditor [*CCP § 714.030(a)*]. The application generally may be made ex parte. However, the court may direct, or a court rule may require, that the application be made by noticed motion [*CCP § 714.030(a)*].

Strategic Point:

Some property does not have real value without its accompanying documentation. For example, the value of an airplane is greatly diminished without its complete set of log books, and transfer is thus hindered. Counsel should obtain an order demanding that these documents be turned over as well, and make sure to include this information in the levy instructions.

Cross References:

Form for turnover application, see *22.23*.

Form for supporting declaration, see *22.24*.

22.07[4][b] Court May Issue Turnover Order on Showing of Need. On a showing that a turnover order is needed, the court may issue the order [*CCP § 714.030(b)*]. The order must include a notice to the judgment debtor that a failure to comply with the order may subject the judgment debtor to being held in contempt of court [*CCP § 714.030(c)*].

Example--Showing of Need for Order:

A turnover order might be needed if, for example, the judgment debtor has refused to surrender possession of the personal property subject to the writ or has hidden the property. Savvy debtors may hide ownership and transfer papers or other important documentation so that the relevant property cannot readily be sold. What is a "need" is subjective, not defined in *CCP § 714.030(b)* or construed by a court, but can usually be asserted when there has been passive or actual interference with the levy by the debtor.

Cross Reference:

Form for turnover order, see *22.25*.

22.07[4][c] Turnover Order Must Be Served on Judgment Debtor. The turnover order must be personally served on the judgment debtor [*CCP § 714.030(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementContracts LawSecured TransactionsDefaultForeclosure & RepossessionPrivate & Public Sales

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22.08 Levying Officer or Process Server Executes Writ of Possession of Real Property.

22.08[1] Levying Officer Generally Executes Writ of Possession of Real Property.

22.08[1][a] Writ of Possession Must Be Served on Occupant of Property. To execute a writ of possession for real property, the levying officer must serve a copy of the writ on one occupant of the property. At the time service is made, the levying officer must also serve a copy of the form for a claim of right to possession, unless a summons, complaint, and prejudgment claim of right to possession were served on the occupants in accordance with *CCP § 415.46* [*CCP § 715.010(c)*].

Service must be made either by leaving the copy with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion who is found on the property when service is attempted and who is either an employee or agent of the occupant or a member of the occupant's household [*CCP § 715.020(a)*].

22.08[1][b] If Service on Occupant Is Not Accomplished, Writ of Possession Must Be Posted and Served on Judgment Debtor. If, at the time service is attempted, the levying officer is unable to accomplish service on an occupant of the property [*see CCP § 715.020(a)*], the officer must post a copy of the writ in a conspicuous place on the property and serve a copy on the judgment debtor [*CCP § 715.020(b)*]. At the time of posting, the levying officer must also post and serve a copy of the form for a claim of right to possession, unless a summons, complaint, and prejudgment claim of right to possession were served on the occupants in accordance with *CCP § 415.46* [*CCP § 715.010(c)*].

Service on the judgment debtor may be made either personally or by mail. If the judgment debtor's address is not known, a copy of the writ may be served by mailing it to the address of the property [*CCP § 715.020(b)*].

22.08[2] Registered Process Server May Execute Writ of Possession.

22.08[2][a] Process Server May Execute Writ If Levying Officer Failed to Do So. A registered process server may execute a writ of possession of real property in the same manner as the levying officer, if a proper writ was delivered to a levying officer and that officer did not execute the writ within three working days from the day the writ was delivered [*CCP § 715.040(a)*]. For this purpose, a "working day" is any day but Saturday, Sunday, or legal holiday [*CCP § 715.040(a)*].

If the levying officer has not timely executed the writ, he or she must, on request, give the writ to the judgment creditor

or to a registered process server designated by the judgment creditor [*CCP § 715.040(a)*].

Cross References:

Discussion of manner of execution by levying officer, see *22.08[1]*.

Comparison between levying officer and process server, see *Ch. 16, Executing and Levying Against Personal Property, 16.49*.

22.08[2][b] Process Server Must File Documentation of Execution With Levying Officer. If a registered process has executed a writ of possession of real property, he or she must file all of the following with the levying officer [*CCP § 715.040(b)*]:

- The writ of possession of real property.
- An affidavit (or declaration [*see CCP § 2015.5*]) of the registered process server stating the manner in which the writ was executed.
- Proof of service of the writ.
- The creditor's written instructions.

Timing:

These documents must be filed with the levying officer within five days after the process server has executed the writ [*CCP § 715.040(b)*].

22.08[2][c] Levying Officer Must Perform Other Duties Under Writ. If the writ of possession of real property has been executed by a registered process server, the levying officer must perform all other duties under the writ and must return the writ to the court [*CCP § 715.040(c)*].

Example:

A registered process server's power to execute the writ of possession extends only to serving and posting the writ [*see CCP § 715.040(a)*; *see also CCP § 715.020(a), (b)*]. Thus, for example, the process server lacks the power to evict occupants of the premises who do not voluntarily vacate the premises [*see CCP § 715.020(c)*]. That duty must be performed by the levying officer [*see CCP § 715.040(a)*].

Consider:

Some sheriff's offices are backlogged, and counsel may decide in advance to use a private process server. Counsel should coordinate this in advance with the sheriff, and make certain that the process server knows exactly what to do.

Cross Reference:

Discussion of eviction of occupants of property, see *22.08[3]*.

Discussion of return of writ of possession, see *22.11*.

22.08[2][d] Court May Allow Process Server's Fee As Recoverable Cost. The court has discretion to allow the process server's fee for executing the writ of possession of real property as a recoverable cost on motion by the judgment creditor [*CCP § 715.040(d)*; *see CCP § 685.080*]. If allowed, the recoverable fee is limited to the amount actually incurred to execute the writ [*CCP §§ 715.040(d), 1033.5(a)(4)(B)*].

Cross Reference:

Discussion of recovery of enforcement costs, see Ch. 7, Litigation to Recover Debts--Trying and Proving the Case.

22.08[3] Levying Officer Must Evict Occupants Who Do Not Vacate Premises. If the judgment debtor, members of the debtor's household, and any other occupants holding under the judgment debtor do not vacate the property subject to a writ of possession within five days from the date of service of the writ, the levying officer must remove the occupants and place the judgment creditor in possession [*CCP § 715.020(c)*].

If the judgment was entered in an unlawful detainer action, any person who came to occupy the premises under the judgment debtor (such as a subtenant of the judgment debtor) after the commencement of the action is bound by the judgment and may be removed by the levying officer as if that person had been made a party to the action [*CCP § 1164*].

Distinguish:

Although a registered process server, under some circumstances, may perform the statutory duties of serving and, if necessary, posting the writ of possession [*see CCP § 715.040(a)*; *see also CCP § 715.020(a), (b)*], only the levying officer has the power to remove the occupants of the affected premises [*CCP § 715.020(c)*].

Exception:

The levying officer may not remove any person from the property who claims a right to possession accruing before commencement of the unlawful detainer action, or who claims to have been in possession of the property on the date the unlawful detainer action was filed, unless either [*CCP § 715.020(d)*; *see CCP § 1174.3(a)*]:

- That person is named in the writ; or
- The summons, complaint, and prejudgment claim of right to possession were served on that person [*see CCP §§ 415.46, 1174.3*].

Timing--No Extension If Service Was by Mail:

Service of the writ of possession by mail [*see CCP § 715.020(b)*] does not extend the five-day period for the occupants to vacate the premises voluntarily. The statute generally providing that time periods triggered by service are extended if service is accomplished by mail [*CCP § 684.120(b)*] does not apply to this five-day period [*CCP § 715.020(c)*].

Warning--Liability for Wrongful Eviction:

A judgment creditor who procures the eviction of an occupant under an invalid writ of execution or possession based on an unenforceable judgment ordinarily will be liable for forcible entry and detainer [*see Bedi v. McMullan (1984) 160 CA3d 272, 274-275, 206 CR 578*]. However, a judgment creditor who proceeds in accordance with orderly judicial processes and obtains an eviction in reliance on a properly issued writ will not be liable for forcible entry and detainer, even if the writ is subsequently determined to have been erroneously issued [*Glass v. Najafi (2000) 78 CA4th 45, 51, 92 CR2d 606*].

Consider--Effect of Bankruptcy of Judgment Debtor in Unlawful Detainer Action:

A writ of possession issued pursuant to a judgment in an unlawful detainer action generally must be enforced without delay, notwithstanding the filing of a bankruptcy proceeding by the judgment debtor,

unless the property subject to the writ is a mobilehome, a manufactured home, or real property in a mobilehome park or a manufactured-housing community [*CCP § 715.050*; *see CC § 798 et seq.*; *CCP § 1161a*. The filing of bankruptcy does *not* cause an automatic stay if the tenant is a residential tenant and the landlord has already obtained a judgment for possession [*11 USC § 362(b)(22)*]. Thus, in such a case, the eviction is not stayed. An exception provides that in a residential situation, if (1) the tenant files with the bankruptcy petition a certification of a defense to eviction under state law that allows curing the default before to eviction, (2) the tenant deposits rent that will come due for the next 30 days with the court, and (3) the court hears the motion within 30 days to impose the stay and prevent eviction, the tenant can get the stay imposed unless the court decides to set it aside anyway [*11 USC § 362(l)(1), (2)*].

Cross References:

Discussion of service and posting of writ of possession, see *22.08[1]*.

Discussion of registered process server's role in executing writ of possession, see *22.08[2]*.

Unnamed occupant's right to oppose eviction, see *22.08[5]*.

Discussion of bankruptcy, see Ch. 3, Effect of Bankruptcy.

22.08[4] Judgment Creditor May Dispose of Occupants' Personal Property. The occupants' personal property remaining on the real property (except a mobilehome) after the judgment creditor is placed in possession will be disposed of in accordance with the statutory procedures for a landlord's disposition of an evicted tenant's personal property after judgment in an unlawful detainer action [*CCP § 715.030*; *see CCP §§ 715.010(b)(3), 1174(e)-(m)*]. Generally, the judgment creditor must give notice to the owner of the personal property that the property was left on the premises [*CCP § 1174(f)*]. The judgment creditor must then store the personal property and release it to its owner if the owner pays the reasonable cost of storage not later than 15 days after the time the judgment creditor takes possession of the real property, as specified in the writ of possession [*CCP §§ 715.010(b)(3), 1174(g), (h)*]. Otherwise, the judgment creditor must sell the personal property at a public sale, unless the total resale value of the personal property not released to its owner is less than $300, in which case the judgment creditor may retain or dispose of the property without offering it for public sale [*CC § 1988(a)*; *CCP § 1174(i)*].

Strategic Point:

It is a good idea to clearly document what property is left on the premises. Photos are the best evidence of this, as is an inventory itemized as much as possible and witnessed by at least two people. If the remaining property has some significant value (as in a commercial tenancy), consider calling in an appraiser to give a valuation and potentially hold a sale. Counsel should prepare to defend against an action for conversion of supposedly valuable property by clearly evidencing what was left behind.

Cross Reference:

Discussion of disposal of personal property left behind by evicted tenant, see California Forms of Pleading and Practice, Ch. 333, Landlord and Tenant: Eviction Actions (Matthew Bender).

22.08[5] Occupant Not Named in Unlawful Detainer Judgment May Oppose Eviction.

22.08[5][a] Occupant Not Named in Judgment May Claim Right to Possession Unless Previously Served With Prejudgment Claim of Right Form. Unless served with a prejudgment claim of right to possession along with the summons and complaint [*see CCP § 415.46*], a person not named in the judgment for possession entered in an unlawful detainer action who occupied the premises on the date the action was filed may object to his or her eviction by

presenting a postjudgment claim of right to possession [*CCP § 1174.3(b), (c), (h)*].

Warning:

If an occupant was served with a prejudgment claim of right to possession along with the summons and complaint [*see CCP § 415.46*], that occupant may not object to the enforcement of the judgment of possession, whether or not he or she is named in the judgment for possession [*CCP § 715.020(d)*].

Distinguish:

An occupant who was named as a defendant in the complaint but not named in the judgment of possession need not file a postjudgment claim of right of possession to protect his or her right to possession [*CCP § 1174.3(a)*]. Such an occupant may object to eviction at the levying officer's office or at the premises at the time of eviction, and then present the objection to the court at the time set by the court for hearing objections [*CCP §§ 715.010(b)(5), 1174.3(b)*].

Timing:

A postjudgment claim of right to possession may be made at any time after the writ of possession is served or posted, up to and including the time at which the levying officer returns to evict those named in the judgment [*CCP § 1174.3(a)*].

22.08[5][b] Claimant Must Present Claim Form to Levying Officer and Then Pay Court Filing Fee. A postjudgment claim of right to possession may be asserted by presenting the completed claim form in person, with identification, to the levying officer. Then, within two court days after presenting the claim to the levying officer, the occupant/claimant must pay to the court the appropriate filing fee or file a form for proceeding in forma pauperis [*CCP § 1174.3(c)*]. Judicial Council Form CP-10 is a standard form for claim of right to possession, approved for optional use [*CCP § 1174.3*; *see Cal Rules Ct, Rule 1.35*].

Warning:

If a claim is made without paying the appropriate filing fee or applying to proceed in forma pauperis, the court will deny the claim immediately. On ordering denial of the claim, the court must immediately deliver an endorsed copy of the order to the levying officer, and must serve an endorsed copy of the order on the judgment creditor and claimant by first-class mail [*CCP § 1174.3(f)*].

Strategic Point:

The occupant/claimant may elect to deliver to the court, along with the filing fee or application to proceed in forma pauperis, an amount equal to 15 days' rent. If that amount is delivered to the court, the court will hold a hearing on the claim not less than five or more than 15 days after the claim is filed with the court by the levying officer [*CCP § 1174.3(c)(1)*]. If the occupant/claimant elects not to deliver 15 days' rent to the court, the court will immediately set a hearing to be held on the fifth day after filing is completed [*CCP § 1174.3(c)(2)*].

Cross References:

Judicial Council Form CP-10 for postjudgment claim of right of possession, see *22.26*.

Discussion of filing of claim by levying officer and setting of hearing date, see *22.08[5][d]*.

22.08[5][c] Levying Officer Stops Eviction On Presentation of Claim. If the claim of right to possession is completed and presented to the levying officer, and if the levying officer does not have a document specifying that a

prejudgment claim of right to possession was served, the officer must immediately stop the eviction of the occupants of the premises [*CCP § 1174.3(b)*].

22.08[5][d] Levying Officer Delivers Claim to Court, Which Sets Hearing. On receiving the claim, the levying officer must do all of the following [*CCP § 1174.3(b), (c)*]:

- Indicate on the claim form the date and time of its receipt.
- Deliver the original to the issuing court.
- Deliver a receipt or copy of the claim to the claimant.
- Notify the judgment creditor of the claim.

If the occupant/claimant has deposited with the court 15 days rent along with the filing fee or application to proceed in forma pauperis, the court will [*CCP § 1174.3(c)(1)*]:

- File the claim of right to possession that was delivered by the levying officer; and
- Serve an endorsed copy, with notice of the hearing date, on the judgment creditor and the claimant by first-class mail.

Timing:

The hearing must be held not less than five or more than 15 days after the claim is filed [*CCP § 1174.3(c)(1)*].

If the occupant/claimant has paid the filing fee or filed an application to proceed in forma pauperis without depositing 15 days rent with the court, the court must immediately set a hearing on the claim to be held on the fifth day after the filing is completed [*CCP § 1174.3(c)(2)*]. The court must notify the claimant of the hearing date at the time the claimant completes the filing and must notify the judgment creditor of the hearing date by first-class mail [*CCP § 1174.3(c)(2)*].

Cross Reference:

Discussion of occupant/claimant's deposit of rent money with the court, see *22.08[5][a]*.

22.08[5][e] Court Conducts Hearing to Determine Claim of Right to Possession. At the hearing, the court must determine whether there is a valid claim of possession by the occupant/claimant, considering all the evidence produced at the hearing, including the information stated in the claim. The court must determine the claim to be invalid if the court determines that the claimant is an invitee, licensee, guest, or trespasser [*CCP § 1174.3(d)*].

22.08[5][f] If Claim Is Valid, Court Must Order Further Proceedings. If the court determines that the occupant's claim of right to possession is valid, and if the occupant delivered to the court 15 days rent [*see CCP § 1174.3(c)(1)*], that amount must be returned immediately to the occupant [*CCP § 1174.3(d)*]. In addition, the court must order further proceedings as follows [*CCP § 1174.3(e)*].

If the unlawful detainer action was based on a curable breach and the occupant/claimant was not previously served with a proper notice, if any notice was required, then the required notice, at the judgment creditor/plaintiff's discretion, may be served on the claimant at the hearing or after the hearing. If the claimant does not cure the breach within the required time, then a supplemental complaint may be filed and served on the claimant as defendant, if the plaintiff proceeds against the claimant in the same action. For this purpose only, service of the required notice and of the supplemental complaint may be made by first-class mail addressed to the claimant at the subject premises, or service may be made on

his or her attorney of record. Further proceedings on the merits of the claimant's continued right to possession after service of the summons and supplemental complaint will be conducted as in other unlawful detainer proceedings [*CCP § 1174.3(e)(1)*].

In all other cases (if the action was not based on a curable breach), the court must deem the unlawful detainer summons and complaint to be amended on their faces to include the claimant as defendant. Service of the summons and complaint, as thus amended, may, at the plaintiff's discretion, be made at the hearing or after the hearing, and the claimant thus named and served as a defendant in the proceeding must answer or otherwise respond within five days after service [*CCP § 1174.3(e)(2)*].

22.08[5][g] If Claim Is Unsuccessful, Court Must Order Levying Officer to Enforce Writ of Possession. If the occupant's claim of right to possession is unsuccessful, the court must order the levying officer to proceed with enforcing the original writ of possession as deemed amended to include the occupant-claimant. Enforcement must be effected within a reasonable time, not to exceed five days. On receiving the court's order, the levying officer may enforce the writ of possession as against any occupant or occupants [*CCP § 1174.3(g)*].

For this purpose, an occupant's claim of right to possession is unsuccessful if [*CCP § 1174.3(g)*]:

- It is denied for failure to pay the filing fee or make a proper application for in forma pauperis status [*see CCP § 1174.3(f)*];
- The occupant/claimant fails to appear at the hearing;
- The court determines at the hearing that the claim is not valid; or
- The court initially rules the claim valid, but the claimant does not prevail at a trial on the merits of the unlawful detainer action.

In addition, if the court has found the occupant's claim of right to possession invalid, and if the occupant delivered to the court 15 days rent [*see CCP § 1174.3(c)(1)*], the court must order the return to the occupant/claimant of that amount, less a prorated amount for each day that enforcement of the judgment was delayed by reason of making the claim of right to possession. The prorated amount is paid to the judgment creditor [*CCP § 1174.3(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawNonmortgage LiensJudgment LiensReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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22.09 Levying Officer Executes Writ of Sale of Personal or Real Property.

22.09[1] Levying Officer Levies on Property to Be Sold. To execute a writ of sale, the levying officer must levy on the property described in the writ in the same manner as under a writ of execution [*CCP § 716.020(a)*; *see* CCP § 700.10 et seq.].

Cross Reference:

Discussion of procedures for levy under writ of execution, see Ch. 16, Executing and Levying Against Personal Property, and Ch. 17, Executing and Levying Against Real Property.

22.09[2] Levying Officer Sells Property. The levying officer must give notice of sale and sell the property in the same manner as under a writ of execution, unless otherwise ordered by the court [*CCP § 716.020(b)*; *see CCP § 701.510 et seq*.].

Cross Reference:

Discussion of procedures for notice of sale and sale under writ of execution, see Ch. 18, Execution Sales.

22.09[3] Levying Officer Applies Proceeds of Sale in Conformity With Judgment. The levying officer must apply the proceeds of the sale in conformity with the judgment for sale [*CCP § 716.020(c)*].

22.09[4] Judgment Creditor May Obtain Order to Transfer Property.

22.09[4][a] Judgment Creditor Applies for Transfer Order. If a writ of sale is issued, the judgment creditor may apply ex parte, or on noticed motion if required by the court or by a court rule, for an order directing the judgment debtor to transfer the following to the levying officer [*CCP § 716.030(a)*]:

- Possession of the property to be sold, if the prescribed method of levy is by taking the property into custody.

- Possession of any documentary evidence of title to the property to be sold.

Cross References:

Form for application, see *22.23*.

Form for supporting declaration, see *22.24*.

22.09[4][b] Court May Issue Transfer Order on Showing of Need. On a showing that a transfer order is needed, the court may issue the order [*CCP § 716.030(b)*]. The order must include a notice to the judgment debtor that failure to comply with the order may subject the judgment debtor to being held in contempt of court [*CCP § 716.030(c)*].

Examples--When Transfer Order May Be Needed:

- A transfer order may be needed if the judgment debtor has refused to surrender possession of the property or documents evidencing title to the property.

- A transfer order may be needed if a debtor owns a bonded warehouse and is ordered to surrender the business; the governmental authority will need proof that the creditor is the new owner. In this case, it is necessary to have the debtor turn over stock certificates showing ownership in the corporation.

Strategic Point:

Counsel should always apply for an order requiring turnover of documentary evidence of title, adjunct documents necessary for sale (such as a log books for an airplane), or inventory lists to assist in enforcing the order.

Cross References:

Form for order, see *22.25*.

Discussion of contempt, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

22.09[4][c] Transfer Order Must Be Served on Judgment Debtor. The transfer order must be personally served on the judgment debtor [*CCP § 716.030(c)*].

Timing:

An order to transfer the possession of any documentary evidence of title to the property to be sold may be served either when the property is levied on or afterward [*CCP § 716.030(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionPrivate & Public SalesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial Foreclosures

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22.10 Writ of Possession or Sale May Be Enforced to Satisfy Money Judgment.

A writ of possession or sale may be enforced as a writ of execution to satisfy any money judgment included in the judgment for possession or sale [*CCP § 712.040(a)*].

Example:

If a judgment for possession or sale includes an award of costs and attorney's fees, that award may be enforced as a money judgment under the writ of possession or sale [*see CCP § 712.040(a)*].

If amounts due under the money judgment are not satisfied pursuant to the writ of possession or sale, the judgment creditor may use a writ of execution to satisfy the money judgment after the writ of possession has been returned or 180 days after its issuance, whichever is earlier [*CCP § 712.040(a)*]. If the judgment creditor does not seek a writ of possession or sale, he or she may obtain a writ of execution to satisfy the money judgment included in the judgment for possession or sale [*CCP § 712.040(a)*].

Example:

A judgment creditor may decide not to seek a writ of possession or sale if, for example, the judgment debtor has voluntarily surrendered possession of the subject property or has voluntarily paid the debt secured by the subject property [*see CCP § 712.040(a)*].

Whether or not a writ of possession or sale has been issued, enforced, or returned, the judgment creditor may use garnishment and other remedies to satisfy any money judgment included in the judgment for possession or sale [*CCP § 712.040(b)*; *see CCP §§ 706.010 et seq.*, *708.010 et seq.*].

Consider:

In rendering a judgment for sale that includes a money judgment, the court may include express limitations on the manner of enforcing the money judgment [*CCP § 712.040(c)*]. For example, if a judgment for sale includes an award of costs and attorney's fees, the court may order that the costs and fees be paid only from the proceeds of the sale [*CCP § 712.040(c)*].

Cross References:

Discussion of executing and levying against personal property, see Ch. 16, Executing and Levying Against Personal Property.

Discussion of executing and levying against real property, see Ch. 17, Executing and Levying Against Real Property.

Discussion of miscellaneous remedies to satisfy money judgments, see Ch. 20, Miscellaneous Creditor's Remedies.

Discussion of garnishment, see Ch. 21, Garnishment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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22.11 Levying Officer Returns Writ of Possession or Sale.

The levying officer must return the writ of possession or sale in the same manner as the return of a writ of execution [*CCP § 712.050*; *see CCP § 699.560*]. Thus, the writ ordinarily must be returned to the court, together with a report of the levying officer's actions, an accounting of any costs incurred, and an accounting of any amounts collected under a monetary award included in the judgment, at the earliest of the following times [*see CCP § 699.560(a)*]:

- Promptly after all of the duties under the writ are performed;
- When the return is requested in writing by the judgment creditor;
- If no levy takes place under the writ within 180 days after its issuance [*see CCP § 712.030*], promptly after the expiration of the 180-day period; or
- On the expiration of the time for enforcement of the judgment.

Cross References:

Discussion of enforcement of monetary award included in judgment, see *22.10*.

Discussion of return of writ of execution, see Ch. 16, Executing and Levying Against Personal Property, and Ch. 17, Executing and Levying Against Real Property.

Discussion of expiration of time to enforce judgment, see Ch. 13, Time Restrictions on Enforcement of Judgments.

In seeking an award of enforcement costs, the judgment creditor may include the costs listed in the levying officer's return [*see CCP § 685.070(a)(4)*].

Cross Reference:

Recovery of enforcement costs, see Ch. 7, Litigation to Recover Debts--Trying and Proving the Case.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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22.12 CHECKLIST: Enforcing Permanent Injunction or Other Nonmoney Judgment.

22.12[1] Judgment Creditor's Checklist.

☐ If nonmoney judgment is not enforceable by writ of possession or sale and includes permanent injunction or other order to perform or refrain from performing specified act, have certified copy of judgment personally served on judgment debtor.

Authority:
CCP §§ 681.010(e), 717.010

Discussion:
See *22.14*

☐ If judgment debtor fails to comply with judgment, determine whether judgment debtor's conduct constitutes contempt of court.

Authority:
CCP §§ 717.010, 1209(a)(5)

Discussion:
See *22.15*

☐ If judgment debtor's conduct constitutes contempt of court, prepare and file affidavit or declaration, or statement of levying officer, setting forth facts constituting contempt.

Authority:
CCP §§ 1211(a), 2015.5

Discussion:
See *22.16*

Form:
See *22.27*

☐ Attend hearing on contempt charge, and present evidence to support charge and to negate any defenses asserted.

Authority:
CCP § 1217

Discussion:
See *22.18*, *22.19*

22.12[2] Judgment Debtor's Checklist.

☐ If judgment debtor is served with order to show cause regarding contempt charge, prepare, file, and serve affidavit or declaration asserting defenses to charge.

Authority:
CCP § 1209(a)(5)

Discussion:
See *22.18*

☐ Attend hearing on contempt charge, and present evidence to support defenses asserted.

Authority:
CCP § 1217

Discussion:
See *22.18*, *22.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesInjunctionsContemptCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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22.13 Options and Strategies.

A nonmoney judgment that is not enforceable by a writ of possession or sale may be enforced under the court's contempt power [*CCP § 717.010*; *see CCP § 1209(a)(5)*].

Example:

An example of a nonmoney judgment that is not enforceable by a writ of possession or sale is a judgment awarding a permanent injunction that (1) requires the performance of a specified act, other than a judgment for possession or sale of particular property; or (2) requires forbearance from performing any act [*CCP § 681.010(e)*]. Thus, if the judgment debtor disobeys an injunctive order, the judgment creditor's remedy is to seek enforcement through the court's contempt power [*see CCP § 717.010*; *see also CCP § 1209(a)(5)*].

Distinguish:

Money judgments and judgments for possession or sale are not enforceable under the court's contempt power, but rather must be enforced in accordance with the statutory procedures prescribed for each kind of judgment [*CCP § 681.010(a)-(d)*; *see CCP §§ 695.010 et seq*. (money judgments), *CCP § 714.010 et seq*. (judgments for possession of personal property), *CCP § 715.010 et seq*. (judgments for possession of real property), *CCP § 716.010 et seq*. (judgments for possession or sale of real or personal property)].

Cross Reference:

Discussion of enforcement of judgments for possession or sale, see *22.03 -22.11*.

Detailed discussion of contempt, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesInjunctionsContemptCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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22.14 Judgment Creditor Must Serve Judgment on Person Required to Obey It.

Before invoking the court's contempt power, the judgment creditor must have a certified copy of the judgment personally served on the judgment debtor or other person required to obey the judgment [*CCP § 717.010*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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2-22 MB Practice Guide: CA Debt Collection 22.15

22.15 Court May Punish Disobedience of Injunction or Other Nonmoney Judgment As Contempt.

Disobedience of an injunctive order in a nonmoney judgment is punishable as contempt of court if all of the following circumstances exist [*CCP §§ 717.010, 1209(a)(5)*; *Board of Supervisors v. Superior Court (1995) 33 CA4th 1724, 1736-1737, 39 CR2d 906*]:

- The judgment is valid [*see Davidson v. Superior Court (1999) 70 CA4th 514, 522, 82 CR2d 739*].
- The injunctive order is specific and narrowly drawn [*see Sorensen v. Superior Court (1969) 269 CA2d 73, 78, 74 CR 597*].
- The person disobeying the judgment had actual knowledge of the judgment.
- The person disobeying the judgment had the ability to comply.
- The disobedience of the judgment was willful.

Example:

It is a contempt of court for a judgment debtor or other person who has been dispossessed or ejected from real property by a judgment of a court of competent jurisdiction to reenter or take possession of the property without the right to do so [*CCP § 1210*].

Cross Reference:

Detailed coverage of contempt, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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22.16 Judgment Creditor May Initiate Contempt Proceeding.

A judgment creditor may commence a contempt proceeding by filing an affidavit (or declaration under penalty of perjury [*see CCP § 2015.5*]) setting forth the facts constituting the contempt [*CCP § 1211(a)*]. Alternatively, the judgment creditor may present a statement of a judicial officer, such as the levying officer, setting forth the facts constituting contempt [*CCP § 1211(a)*].

Exception:

A contempt committed in the presence of the court may be punished summarily, without the need for an affidavit or statement of facts presented by any party [*CCP § 1211(a)*].

If facts that establish contempt are proved at the contempt hearing, any deficiency in the initiating affidavit or statement court will not deprive the court of jurisdiction to punish the contempt [*CCP § 1211.5(a)*].

Cross References:

Discussion of elements of contempt, see *22.15*.

Form for declaration initiating contempt proceeding, see *22.27*.

Discussion of contempt hearing, see *22.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContempt

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22.17 Court Issues Order to Show Cause.

When the initiating affidavit or statement is filed, the court ordinarily will issue an order to show cause why the accused person should not be held in contempt [*CCP § 1212*].

The order to show cause, which functions as a summons to appear in court on the date specified, must be personally served on the person accused of contempt [*see Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 CA4th 1281, 1286-1287, 100 CR2d 320* ; *see also CCP § 1212*].

Cross Reference:

Discussion of conduct of contempt hearing, see *22.19*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContempt

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2-22 MB Practice Guide: CA Debt Collection 22.18

22.18 Accused Person May Raise Defenses to Contempt Charge.

In response to the judgment creditor's affidavit or declaration, the judgment debtor or other person accused of contempt may submit an affidavit (or declaration under penalty of perjury [*see CCP § 2015.5*]) raising his or her available defenses [*see Freeman v. Superior Court (1955) 44 C2d 533, 536-537, 282 P2d 857*].

Examples:

Potential defenses include the following:

- The underlying injunction or judgment is void because the court lacked jurisdiction to enter it [*see Condor Enters., Ltd. v. Valley View State Bank (1994) 25 CA4th 734, 741, 30 CR2d 613* .
- The person accused of contempt was not served with the underlying judgment and did not have actual knowledge of the judgment when the alleged contempt occurred [*CCP § 717.010*; *see Board of Supervisors v. Superior Court (1995) 33 CA4th 1724, 1736, 39 CR2d 906*].
- The terms of the underlying injunction or other nonmoney judgment are ambiguous. The party subject to an injunction must be able to determine from its terms what he or she may and may not do, and thus may not be held guilty of contempt for violating an injunction that is uncertain or ambiguous [*Sorensen v. Superior Court (1969) 269 CA2d 73, 78, 74 CR 597*]. Any ambiguity in the injunction will be resolved in favor of the person accused of the violation [*Gottlieb v. Superior Court (1959) 168 CA2d 309, 313, 335 P2d 714*].
- The person accused of contempt lacked the ability to comply with the judgment [*see Board of Supervisors v. Superior Court (1995) 33 CA4th 1724, 1736, 39 CR2d 906*].
- The alleged contempt was not committed willfully [*see Board of Supervisors v. Superior Court (1995) 33 CA4th 1724, 1736, 39 CR2d 906*].

Cross Reference:

Detailed coverage of defenses to contempt charge, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesInjunctionsContempt

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22.19 Court Conducts Hearing.

The court will conduct a hearing to determine the charge of contempt [*CCP § 1217*]. At the hearing, federal constitutional protections must be applied if the alleged contempt is criminal in nature [*Hicks v. Feiock (1988) 485 US 624, 637, 108 S Ct 1423, 99 L Ed2d 721*]. These protections include the requirement that the offense be proved beyond a reasonable doubt. However, for most contempt proceedings it does not include a right to jury trial [*Hicks v. Feiock (1988) 485 US 624, 632 n5, 485 US 624, 108 S Ct 1423, 99 L Ed2d 721*].

When a witness disobeys a subpoena duly served, a contempt has been committed. The court may punish the contemnor for criminal contempt by imposing a fine or imprisonment, or both. When the contempt consists of the omission to perform an act which is still in the person's power to perform, the court may in the alternative punish the contemnor for a civil contempt and order the contemnor imprisoned until the act has been performed. The termination of the underlying civil action generally will make it impossible for the subpoenaed party to comply with the subpoena, so punishment for civil contempt is no longer a threat. However, disobedience of a subpoena may still be punished as a criminal contempt, so long as proper safeguards are preserved, and the evidence warrants a finding of contempt [*see Morelli v. Superior Court (1969) 1 C3d 328, 332, 82 CR 375, 461 P2d 655*].

Exception:
A victim of sexual assault or domestic violence may not be imprisoned or confined when the contempt consists of a refusal to testify about that sexual assault or domestic violence crime [*CCP §§ 1219(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptCivil ProcedureSanctionsContemptCivil ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesCriminal Law & ProcedureDiscovery & InspectionSubpoenasGeneral Overview

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Chapter 22 Enforcing Nonmoney Judgments
III. ENFORCING PERMANENT INJUNCTION OR OTHER NONMONEY JUDGMENT

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22.20 Court May Impose Fine or Imprisonment.

If the court finds that the accused person committed a contempt, the court generally may impose a fine (payable to the court) not exceeding $1,000, or imprisonment for not more than five days, or both [*CCP § 1218(a)*].

If a person's contempt of court consists of the omission to perform an act that remains in the person's power to perform, the court may imprison the person until he or she has performed the act [*CCP § 1219(a)*].

Cross Reference:

Detailed coverage of contempt proceedings, see Matthew Bender[(R)] Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 23, Contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureSentencingFines

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III. ENFORCING PERMANENT INJUNCTION OR OTHER NONMONEY JUDGMENT

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22.21 Court May Award Attorney's Fees Against Judgment Debtor or Agent.

If the person committing the contempt is the judgment debtor or his or her agent, the court may award the judgment creditor costs and attorney's fees incurred in connection with the contempt proceedings [*CCP § 1218(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesInjunctionsContemptCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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Chapter 22 Enforcing Nonmoney Judgments
IV. FORMS

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22.22 Application for Writ of Possession or Sale.

Application for Writ of Possession or Sale.

Tom Doe
California Bar Number 987654
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Attorney for Plaintiff John Smith

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	No. _____
Plaintiff,	)	APPLICATION FOR WRIT
vs.	)	OF _____
Mary Jones,	)	[POSSESSION *or* SALE]
Defendant.	)	OF _____
	)	[REAL *or* PERSONAL]
	)	PROPERTY
	)	

_____

I, the undersigned John Smith, declare the following under penalty of perjury under the laws of the State of California:

1. I am the Plaintiff in this action.

2. The judgment in this action was entered on _____ [*date*] and provides as follows:

a. Judgment Creditor: John Smith, whose address is _____.

b. Judgment Debtor: Mary Jones, whose last known address is _____.

c. Description of property: _____.

[*If appropriate, add* d. Amount of judgment: $_____.]

3. This writ is to be issued to _____ County [*or specify other counties as appropriate*].

[*If judgment includes order requiring judgment debtor to pay money, add following*]

4. There is actually remaining due on the judgment the sum of $_____, plus $_____ accrued costs, plus $_____ accrued interest to the date of this application, plus $_____ interest per day accruing from the date of this application.

[*If judgment was entered in unlawful detainer proceeding, add following*]

5. This is an unlawful detainer proceeding. The daily rental value of the property when the complaint was filed was $_____. A prejudgment claim of right to possession was served on the occupants pursuant to *Code of Civil Procedure Section 415.46*. Pursuant to *Code of Civil Procedure Sections 715.010* and *1174.3*, the writ sought in this application will apply to all tenants, subtenants, named claimants to the property, and any other occupants of the premises.

[*CONTINUE*]

Accordingly, the undersigned requests the issuance of a writ of _____ [possession *or* sale] in favor of John Smith and against Mary Jones to the County of Farallon [*or specify other counties as appropriate*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
John Smith

NOTES.

Authority:
CCP § 712.010

Timing:
See *22.05[1]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 22 Enforcing Nonmoney Judgments
IV. FORMS

2-22 MB Practice Guide: CA Debt Collection 22.23

22.23 Notice of Motion for Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

Notice of Motion for Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

Tom Doe
California Bar Number 987654
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Attorney for Plaintiff John Smith
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

	)	
	)	No. _____
	)	NOTICE OF MOTION
John Smith,	)	AND MOTION FOR ORDER
Plaintiff,	)	DIRECTING TURNOVER OF
vs.	)	_____ [PROPERTY *and/or*
Mary Jones,	)	EVIDENCE OF TITLE]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: 1 North Main St., Farallon City
	)	Judge: _____
	)	

_____

To Defendant Mary Jones and to her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in Department _____ of this court, located at 1 North Main St, Farallon City, Plaintiff John Smith will move the court for an order directing the turnover of possession of _____

[the property *and/or* documentary evidence of title to] the following property, to wit: _____ [*describe property*].

[*For writ of possession:*]

The motion will be made on the ground that the property is subject to a writ of possession issued in this action and the Defendant has refused to surrender the property to the levying officer.

[*OR, for writ of sale:*]

The motion will be made on the ground that the property is subject to levy under the writ of sale issued in this action and that the Defendant has refused to turn over possession of _____ [the property *and/or* documentary evidence of title to the property].

[*CONTINUE*]

The motion will be based on this notice of motion, on the memorandum served and filed with this notice, on the records and file in this action, on the declarations of _____ [*names*], and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*signature*]
Tom Doe
Attorney for Plaintiff John Smith

NOTES.

Authority:
CCP §§ 714.030(a), 716.030(a)

Availability of Turnover Order:
See *22.07[4], 22.09[4]*

Related Form for Declaration:
See *22.24*

Related Form for Order:
See *22.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 22 Enforcing Nonmoney Judgments
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2-22 MB Practice Guide: CA Debt Collection 22.24

22.24 Declaration in Support of Motion for Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

Declaration in Support of Motion for Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

Tom Doe
California Bar Number 987654
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Attorney for Plaintiff John Smith
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith, Plaintiff, vs. Mary Jones, Defendant.	No. _____ DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER DIRECTING TURNOVER OF _____ [PROPERTY *and/or* EVIDENCE OF TITLE] Date: _____ Time: _____ Location: 1 North Main St., Farallon City Judge: _____

_____

I, _____ [*name*], declare the following under penalty of perjury under the laws of the State of California:

1. I am _____ [*identify declarant, e.g.,* a deputy sheriff in the County of Farallon, California, and I am serving as the levying officer in this action].

2. On _____ [*date*], a writ of _____ [possession *and/or* sale] of _____ [*describe property, e.g.,* one 2006 Toyota Camry automobile, Vehicle Identification Number J12PQ34RST567891], was issued in favor of Plaintiff John Smith, the judgment creditor in this action. Defendant Mary Jones, the judgment debtor in this action, has refused to surrender the property to me.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

NOTES.

Authority:
CCP §§ 714.030(a), 716.030(a)

Application for Turnover Order:
See *22.07[4][a], 22.09[4][a]*

Related Form for Notice of Motion:
See *22.23*

Related Form for Order:
See *22.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 22 Enforcing Nonmoney Judgments
IV. FORMS

2-22 MB Practice Guide: CA Debt Collection 22.25

22.25 Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.

Turnover Order for Property or Evidence of Title in Aid of Writ of Possession or Sale.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	No. _____
vs.	)	ORDER TO TURN OVER
Mary Jones,	)	_____ [PROPERTY *and/or*
Defendant.	)	EVIDENCE OF TITLE]
	)	
	)	

_____

The motion of the Plaintiff came on regularly for an order directing the turnover of _____ [property *and/or* documentary evidence of title to property] to the levying officer came on regularly for hearing by the court on _____ [*date*]. Plaintiff, John Smith, appeared by his attorney, Tom Doe. Defendant, Mary Jones, appeared by her attorney, Jane Lee.

On proof made to the satisfaction of the court that the motion should be granted,

[*For a writ of possession:*]

IT IS ORDERED that the motion be, and hereby is, granted, and Defendant Mary Jones is ordered to transfer to Plaintiff John Smith _____ [possession of *and/or* documentary evidence of title to] the following property: _____ [*describe property, e.g.,* one 2006 Toyota Camry automobile, Vehicle Identification Number J12PQ34RST567891].

[*OR, for a writ of sale:*]

IT IS ORDERED that the motion be, and hereby is, granted, and Defendant Mary Jones is ordered to turn over to the

levying officer _____ [possession of *and/or* documentary evidence of title to] the following property: _____ [*describe property, e.g.,* Lot Number 27 of the Farallon City Estates Subdivision in Farallon City, California].

[*CONTINUE*]

NOTICE: Failure to comply with this order may subject Defendant Mary Jones to being held in contempt of court.

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

NOTES.

Authority:
CCP §§ 714.030(b), (c), 716.030(b), (c)

Issuance of Turnover Order:
See *22.07[4][b], 22.09[4][b]*

Related Form for Notice of Motion:
See *22.23*

Related Form for Declaration:
See *22.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 22 Enforcing Nonmoney Judgments
IV. FORMS

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22.26 Claim of Right to Possession--Judicial Council Form CP-10.

Claim of Right to Possession--Judicial Council Form CP-10.

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:

CCP § 1174.3. California Judicial Council Form CP-10, pictured above, is an unofficial form for use by levying officers in unlawful detention cases. It is approved for optional use [Cal Rules Ct, Rule 1.35].

Claim Procedure:

See *22.08[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 22 Enforcing Nonmoney Judgments
IV. FORMS

2-22 MB Practice Guide: CA Debt Collection 22.27

22.27 Declaration Initiating Contempt Proceeding for Violation of Permanent Injunction.

Declaration Initiating Contempt Proceeding for Violation of Permanent Injunction.

Tom Doe
California Bar Number 987654
100 North Main St., Suite 200
Farallon City, California 90000
Phone: 555-555-5555
Attorney for Plaintiff John Smith

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	No. _____
vs.	)	DECLARATION TO INITIATE
Mary Jones,	)	CONTEMPT PROCEEDINGS
Defendant.	)	
	)	
	)	

_____

I, the undersigned John Smith, declare the following under penalty of perjury under the laws of the State of California:

1. I am the Plaintiff in this action.

2. Judgment was entered in this action on _____ [*date*]. The judgment _____ [*describe act required or forbidden by judgment, e.g.,* requires Defendant Mary Jones to deliver possession of 2006 Toyota Camry automobile, Vehicle Identification Number J12PQ34RST567891, to Plaintiff John Smith]. The judgment remains in full force and effect.

3. The Defendant was present in court when the court announced its judgment in this action, and the Defendant was subsequently served with a certified copy of the judgment.

4. At all relevant times, the Defendant had the ability to comply with the terms of the judgment and still has the ability to do so.

5. The Defendant has disobeyed the judgment in that _____ [*e.g.*, she has continued to refuse to turn over possession of the vehicle to Plaintiff].

6. The Defendant's disobedience has been willful and with the intent to frustrate the processes of this court and to deprive the undersigned of the benefits of the judgment entered by this court.

WHEREFORE, I, the undersigned John Smith, pray that this court issue an order requiring Defendant Mary Jones to show cause, if any she have, why she should not be judged in contempt of this court by reason of her violation of the judgment in this action, as alleged above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
John Smith

NOTES.

Authority:
CCP §§ 717.010, *1209(a)(5)*, *1211(a)*

Service of Judgment:
See *22.14*

Elements of Contempt:
See *22.15*

Requirements for Declaration:
See *22.16*

Issuance of Order to Show Cause:
See *22.17*

Defenses to Contempt Charge:
See *22.18*

Hearing on Contempt Charge:
See *22.19*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptCivil ProcedureRemediesInjunctionsPermanent Injunctions

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Chapter 23 Third Party Claims

2-23 MB Practice Guide: CA Debt Collection 23.syn

§ 23.syn Synopsis to Chapter 23: Third Party Claims

23.01 Scope.

23.02 Objective and Strategy.

23.03 CHECKLIST: Filing Third Party Claim.

23.04 Options and Strategy for Filing Third Party Claim.

23.05 Third Party May File Claim for Ownership or Possession of Real or Personal Property.
23.05[1] Third Party May Claim Ownership of Property Levied on by Creditor.
23.05[2] Interest Claimed Must Be Superior to Judgment Creditor's Lien on Property.
23.05[3] Interest Claimed May Be in Real Property Levied On Under a Writ of Attachment or Writ of Execution.
23.05[4] Interest Claimed May Be for Personal Property Under a Writ of Attachment, Writ of Execution, Prejudgment or Postjudgment Writ of Possession, or Writ of Sale.

23.06 Third Party May File Claim Based on a Security Interest or Lien in Personal Property.
23.06[1] Third Party May Claim Security Interest or Lien on Property Levied on by Creditor.
23.06[2] Interest Claimed Must Be Superior to Creditor's Lien on Property.
23.06[3] Interest Claimed Must Be in Personal Property Levied On Under a Writ of Attachment, Writ of Execution, Prejudgment or Postjudgment Writ of Possession, or Writ of Sale.
23.06[4] Interest Claimed May Be a Security Interest in Fixtures.

23.07 Judgment Creditor May Demand That Lienholder File Third Party Claim.
23.07[1] Judgment Creditor May Demand a Third Party File a Third Party Claim to Personal Property Levied on Under a Writ of Attachment or Writ of Execution.
23.07[2] Failure of Third Party to File Claim.

23.08 Process for Filing a Third Party Claim.
23.08[1] Claim Must Be Filed With Levying Officer.
23.08[2] Claim Must Be Filed After Levy, but Before Property Has Been Sold or Delivered to Creditor, or Proceeds of Collection Paid to Claimant.
23.08[3] Third Party Must Decide Whether to File Undertaking.
23.08[4] Levying Officer Must Serve Creditor and Debtor With Claim and Statement of Undertaking.

23.08[5] Notice of Release of Property If Third Party Does File Undertaking.
23.08[6] Notice of Release of Property If Third Party Does Not File Undertaking.
23.08[7] Release of Property When No Undertaking Filed by Either Third Party Claimant or Creditor.
23.08[8] Effect of Filing or Not Filing Third Party Claim.

23.09 Representing Third Party at Hearing on Third Party Claim.
23.09[1] Either Party May Petition Court for Hearing to Determine Validity of Third Party Claim.
23.09[2] Petition Must Be Filed With the Court Within 15 Days of Filing Third Party Claim.
23.09[3] Levying Officer Must File Papers With Court.
23.09[4] Pleadings Must Consist of Third Party Claim.
23.09[5] Hearing on Validity of Claim Must Be Held Within 20 Days of Filing Petition.
23.09[6] Third Party Claimant Has Burden of Proof.
23.09[7] Court Must Determine Validity of Claim and Disposition of Property.
23.09[8] Judgment May Be Appealed.
23.09[9] Party May Petition Court for Order Staying Sale of Property.

23.10 Other Remedies for Third Party Claimant.
23.10[1] Third Party Claimant May Intervene in Original Action.
23.10[2] Third Party Claimant May Bring Independent Action.

23.11 CHECKLIST: Filing Undertaking by Third Party Claimant.

23.12 Options and Strategy for Filing Undertaking by Third Party Claimant.

23.13 Third Party May File Undertaking for Release of Property.
23.13[1] Third Party May File Undertaking for Release of Property in Which the Third Party Claims an Interest.
23.13[2] Undertaking Must Be Filed With Levying Officer.
23.13[3] Requirements for Filing an Undertaking for Release of Property by Third Party Claimant.
23.13[4] The Undertaking Must Be Served on Both Creditor and Debtor.

23.14 Beneficiary of Undertaking May File Motion to Object to Undertaking.

23.15 Release of Property Pursuant to Undertaking by Third Party.

23.16 CHECKLIST: Creditor's Response to Third Party Claim.

23.17 Options and Strategies for Creditor's Response to Third Party Claim.

23.18 Undertaking in Response to Third Party Claim.
23.18[1] Judgment Creditor May File Undertaking With Levying Officer.
23.18[2] Court May Order Decrease in Amount of Undertaking.
23.18[3] Creditor May Also File an Amount Larger Than Required by Statute.
23.18[4] Public Entity Creditor Is Exempt From Undertaking.
23.18[5] Creditor's Statement in Opposition to Third Party Claim.

23.19 Deposit in Lieu of Undertaking in Response to Third Party Claim.
23.19[1] Creditor May Make Deposit in Lieu of Undertaking With Levying Officer.
23.19[2] Levying Officer Must Pay Deposit to Third Party Claimant.
23.19[3] Writ Must Be Executed If Creditor Files Undertaking, Deposit in Lieu of Undertaking, or Notice of Exemption.

23.20 Application for Hearing on Third Party Claim.

23.21 Stay or Injunction of Any Transfer or Other Disposition of Levied Property That Is Subject of Third Party Claim.

23.22 CHECKLIST: Debtor's Response to Third Party Claim.

23.23 Options and Strategies for Debtor's Response to Third Party Claim.

23.24 Right to Notification of Third Party Claim.

23.25 Right to Notification of Application for Hearing on Validity on Third Party Claim.

23.26 Right to Move the Court for Order Staying the Sale, or Enjoining the Transfer or Other Disposition of the Property Pending Determination of Claim.

23.27 Third Party Claim of Ownership or Right to Possession of Levied Property.

23.28 Third Party Claim of Security Interest in or Lien on Levied Property.

23.29 Declaration in Opposition to Third Party Claim of Security Interest in Levied Property.

23.30 Demand by Creditor That Secured Party or Lienholder File Third Party Claim.

23.31 Petition for Hearing and Attached Order.

23.32 Notice of Hearing on Third Party Claim.

23.33 Judgment Determining Validity of Third Party Claim and Order for Disposition of Property.

23.34 Notice of Motion for Order to Stay Sale or Enjoin Transfer of Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

23.35 Declaration in Support of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

23.36 Order Granting Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

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Chapter 23 Third Party Claims
I. STRATEGY

2-23 MB Practice Guide: CA Debt Collection 23.01

23.01 Scope.

This chapter covers:

- Filing a third party claim [*see 23.03 -23.08*; Forms: *see 23.27 -23.28*].
- Representing a third party at a hearing on third party claim [*see 23.09*; Forms: *see 23.31 -23.36*].
- Filing an undertaking by a third party claimant [*see 23.11 -23.15*].
- Creditor's response to a third party claim [*see 23.16 -23.21*; Forms: *see 23.29 -23.30*].
- Debtor's response to a third party claim [*see 23.22 -23.26*].

Core Statutes:
CCP §§ 720.110-720.800

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
I. STRATEGY

2-23 MB Practice Guide: CA Debt Collection 23.02

23.02 Objective and Strategy.

Third party claims are used to claim ownership or right to possession of real or personal property that has been levied on in an action by a creditor either before or after judgment [*see CCP §§ 720.110, 720.210*].

Detailed Discussion/Forms:

California Forms of Pleading and Practice. Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementReal Property LawNonmortgage LiensLien Priorities

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Chapter 23 Third Party Claims
II. FILING THIRD PARTY CLAIM

2-23 MB Practice Guide: CA Debt Collection 23.03

23.03 CHECKLIST: Filing Third Party Claim.

☐ Determine if third party interest is superior to creditor's lien on property.

Authority:
CCP §§ 720.110, 720.110(b)

Discussion:
See *23.05[1], 23.06[1]*

☐ Determine if third party claim is for ownership or possession of one of following:

○ Real property under either of following:

☐ Writ of attachment.

☐ Writ of execution.

○ Personal property under any of following:

☐ Writ of attachment.

☐ Writ of execution.

☐ Prejudgment writ of possession.

☐ Postjudgment writ of possession.

☐ Writ of sale.

Authority:
CCP §§ 481.010 et seq., 511.010 et seq., 699.510, 699.520, 714.010, 716.010, 720.110(a), (b)

Discussion:
See *23.05[1] -[4]*

☐ Determine if third party claim is for a security interest or lien in personal property, including fixtures, which has been levied on under one of following:

○ Writ of attachment.

○ Writ of execution.

○ Prejudgment writ of possession.

○ Postjudgment writ of possession.

○ Writ of sale.

Authority:
CCP §§ 481.010 et seq., 511.010 et seq., 699.510, 699.520, 714.010, 716.010, 720.210(a)

Discussion:
See *23.06[1] -[4]*

☐ Determine if judgment creditor demanded that third party file claim for personal property levied under a writ of attachment or writ of execution.

Authority:
CCP §§ 720.510-720.550

Discussion:
See *23.07[1]*

Form:
See *23.30*

☐ File third party claim with levying officer after levy, but before levying officer does any of following:

○ Sells the property.

○ Delivers possession of property to creditor.

○ Pays proceeds of collection to creditor.

Authority:
CCP § 720.120

Discussion:
See *23.08[1]*, *[2]*

Forms:
See *23.27*, *23.28*

☐ Decide if third party claimant will file an undertaking.

Authority:
CCP §§ 720.140, *720.240*

Discussion:
See *23.08[3]*

☐ Serve claim on creditor and debtor:

○ Within five days of filing third party claim.

○ With statement of whether third party claimant is filing an undertaking.

Authority:
CCP §§ 720.120, *720.220*, *720.140(a)*, *(c)*, *720.240(a)*, *(c)*

Discussion:
See *23.08[4]*

☐ Decide whether third party should apply for hearing on third party claim.

○ To determine validity of third party claim;

○ For order staying sale of property.

Authority:
CCP §§ 720.310-720.340, *720.350-720.370*, *720.380(a)*, *720.390*, *720.400-720.410*, *720.420*

Discussion:
See *23.09[1] -[9]*

Forms:
See *23.31 -23.36*

☐ If third party applies to court for hearing on third party claim, has the following occurred:

- ○ Petition filed with court within 15 days of filing third party claim?
- ○ Notice of hearing served on creditor and debtor?
- ○ Papers filed with court by levying officer?
- ○ Hearing held within 20 days of filing petition?

Authority:
CCP §§ 720.310-720.340

Discussion:
See *23.09[1] -[8]*

Forms:
See *23.31 -23.33*

☐ Should third party seek additional remedies:

- ○ Intervention in original action?
- ○ Should third party claimant bring an independent action?

Authority:
CCP § 387

Discussion:
See *23.10[1], [2]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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23.04 Options and Strategy for Filing Third Party Claim.

A third party may file a claim of ownership or the right to possession of real or personal property that has been levied on in an action by a creditor [*CCP § 720.110*], or a security interest in or lien on personal property [*CCP § 720.210*]. A third party may also file an undertaking in addition to filing the claim [*CCP § 720.620*]. A third party, once a claim is filed, may also apply to the court for a hearing on the validity of the third party claim and a proper disposition of the property [*CCP § 720.310(a)*] or an order staying the sale of property or enjoining any transfer or other disposition of the property [*CCP § 720.380*].

Consider:

The statutory definitions of "creditor" and "debtor" include the plaintiff and defendant, respectively, in the case of a levy under a writ of attachment or prejudgment writ of possession of personal property [*CCP §§ 720.020*, *720.030* (definitions)].

Strategic Point--Complexity of Statutory Scheme:

This is a convoluted statutory scheme, and it is important to review all statutes, and chart them out, before filing or opposing a third party claim noting the different time periods for filings, hearings, and responses.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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23.05 Third Party May File Claim for Ownership or Possession of Real or Personal Property.

23.05[1] Third Party May Claim Ownership of Property Levied on by Creditor. A third party claim is a claim by a third person to the ownership or right to possession of real or personal property that has been levied on in an action by a creditor either before or after judgment [*CCP § 720.110*].

Cross Reference:

Discussion/Forms, see Ch. 16, Executing and Levying Against Personal Property; and Ch. 17, Executing and Levying Against Real Property.

23.05[2] Interest Claimed Must Be Superior to Judgment Creditor's Lien on Property. A third party may make a third party claim to property levied on by a creditor only if the interest being claimed by the third party is superior to the judgment creditor's lien on the property [*CCP § 720.110*].

Cross Reference:

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

23.05[3] Interest Claimed May Be in Real Property Levied On Under a Writ of Attachment or Writ of Execution. The third person may make this claim concerning real property that has been levied on under a writ of attachment or a writ of execution [*CCP § 720.110(a)*].

Cross Reference:

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

23.05[4] Interest Claimed May Be for Personal Property Under a Writ of Attachment, Writ of Execution, Prejudgment or Postjudgment Writ of Possession, or Writ of Sale. A third party claimant may make a claim concerning personal property that has been levied on under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale [*CCP § 720.110(b)*].

Cross Reference:

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

Locating Real and Personal Property Using Online Resources:

Many resources are available online for locating ownership information for both real and personal property. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Public Records > Real Property Locator > CA Deed Transfers, Tax Assessor Records and Mortgage Records--Selected Counties
  - Sample Search: To find real property ownership information when you know the name of the owner, use a NAME segment search: *name (first name /3 last name)*.
  - Sample Search: To find real property ownership information when you know the address of the property, use an ADDRESS segment search: *address (property address)*.
- Legal tab > States Legal--U.S. > California > Public Records > Personal Property Locator > Federal Aviation Administration Aircraft Registrations
  - Sample Search: To find aircraft ownership information, use a NAME segment search: name (first name /3 last name).
- Legal tab > States Legal--U.S. > California > Public Records > Personal Property Locator > US Coast Guard Merchant and Recreational Vessel Registrations
  - Sample Search: To find boat ownership information, use a NAME segment search: *name (first name /3 last name)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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23.06 Third Party May File Claim Based on a Security Interest or Lien in Personal Property.

23.06[1] Third Party May Claim Security Interest or Lien on Property Levied on by Creditor. A third party claim is a claim by a third person to a security interest in or lien on property that has been levied on in an action by a creditor either before or after judgment [*CCP § 720.210*].

Cross Reference:

Discussion/Forms, see Ch. 16, Executing and Levying Against Personal Property.

23.06[2] Interest Claimed Must Be Superior to Creditor's Lien on Property. A third person claiming a security interest in or lien on personal property which has been levied on under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale, may make a third party claim as to the property if the security interest or lien claimed is superior to the judgment creditor's lien on the property [*CCP § 720.210(a)*].

Cross Reference:

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

23.06[3] Interest Claimed Must Be in Personal Property Levied On Under a Writ of Attachment, Writ of Execution, Prejudgment or Postjudgment Writ of Possession, or Writ of Sale. The interest claimed by a third party claiming a security interest in or lien on personal property must be levied on under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale [*CCP § 720.210(a)*].

Strategic Point:

It is a good idea for the creditor, before instructing the officer to levy, and the third party lienholder, before filing its claim, to perform a UCC lien search at the secretary of state to ascertain the existence of liens and their potential priorities. This might also reveal the existence of equipment or fixtures that can be levied upon.

Warning:

Note that liens or claims of ownership might not always be a matter of public record. For example,

certain items might appear to be held in the inventory of a judgment debtor but might, in reality, be there on consignment (such as cars or jewelry).

Cross Reference:

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

23.06[4] Interest Claimed May Be a Security Interest in Fixtures. A third party claiming a security interest in fixtures may also make a third party claim providing the claimed interest is superior to the creditor's lien on the property [*CCP § 720.210(b)*].

Strategic Point:

The creditor should, if possible, contact the landlord at or before levy to determine if there has been a valid landlord's waiver of any potential lien that the landlord could claim in fixtures and try to negotiate an agreement as to sale before it goes to sale. Moving fixtures to another location for sale involves great time and cost, and sales on site bring better prices at less expense to the levying creditor, which is another point to negotiate in advance with any landlord.

Cross Reference:

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCommercial Law (UCC)Secured Transactions (Article 9)PriorityAccessions & FixturesFixtures & CropsCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesFixtures & Crops

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23.07 Judgment Creditor May Demand That Lienholder File Third Party Claim.

23.07[1] Judgment Creditor May Demand a Third Party File a Third Party Claim to Personal Property Levied on Under a Writ of Attachment or Writ of Execution. A judgment creditor may demand that a third party file a third party claim for personal property levied on under a writ of attachment or writ of execution [*CCP §§ 720.510-720.550*]. The demand must include [*CCP § 720.530*]:

- The name and address of both the secured party or lienholder and the creditor;
- A detailed description of the personal property levied on and the date of the levy;
- A statement that the secured party or lienholder must file a third party claim within 30 days or be deemed to have waived any priority that their interest may have had over the creditors lien;
- A statement that if any priority is waived, the secured party or lienholder may have a right to share in any excess proceeds of an execution sale of the property as provided in *CCP § 701.810*.

The creditor's demand must be filed with the levying officer, who has the responsibility to serve the demand on the secured party or lienholder, after levy on the personal property, but before the levying officer sells the property or pays proceeds of collection to the creditor, and served on the secured party or lienholder [*CCP § 720.520(a), (b)*]. Except as otherwise provided by statute, the levying officer will not release, sell, or otherwise dispose of the personal property described in the creditor's demand until after the expiration of 30 days from the date of service of the demand on the secured party or lienholder [CCP § 720.5240].

Cross Reference:

Form, see *23.30*.

Discussion filing third party claims, see *23.08[1] -[8]*.

Form of third party claim, see *23.27 -23.28*.

23.07[2] Failure of Third Party to File Claim. If the secured party or lienholder does not file a third party claim

with the levying officer within 30 days after service of the creditor's demand, the third party will be deemed to have waived any priority the security interest or lien may have had over the creditor's lien in the levied property, and the property may be applied toward the satisfaction of the judgment free of the security interest or lien [*CCP § 720.550(a)*]. However, if the creditor's lien on the property is released without sale, the security interest or lien on the property is restored to its former position of priority [*CCP § 720.550(b)*].

Strategic Point:

It is generally a good strategy to demand that the third party file the claim because of the potential for waiver. If the demand is not made, and the third party does not file a claim, the claim still exists and must be paid out of proceeds pursuant to *CCP § 720.150*.

Cross Reference:

Effect of third party claim, see *23.08[8]*.

Discussion/Forms, see Ch. 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesProceedsContracts LawSecured TransactionsThird Party RightsGeneral Overview

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23.08 Process for Filing a Third Party Claim.

23.08[1] Claim Must Be Filed With Levying Officer. A person making a third party claim under *CCP. §§ 720.110-720.170* or under *CCP §§ 720.210-720.290* must file the claim with the levying officer, together with two copies of the claim [*CCP § 720.120*]. The third party claim must be executed under oath and contain [*CCP §§ 720.130(a), 720.230(a)*]:

- The name of the third party claimant;
- A description of the property in which an interest is claimed;
- A detailed description of the interest claimed, including a statement of the facts upon which the claim is based;
- An estimate of:
  - The market value of the interest claimed; or
  - The total amount of the sums due or to accrue under a security interest or lien and the applicable rate of interest on amounts due;
- A copy of the security agreement and any financing statement, if interest claimed is a security interest;
- A California address for service by mail on the third party claimant.

A copy of any writing upon which the claim is based must be attached to the third party claim. At a hearing on the third party claim, the court in its discretion may exclude from evidence any writing if a copy was not attached to the third party claim [*CCP § 720.130(b)*].

Cross References:

Forms, see *23.27 -23.28*.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

23.08[2] Claim Must Be Filed After Levy, but Before Property Has Been Sold or Delivered to Creditor, or Proceeds of Collection Paid to Claimant. The third party claim must be filed after the levy, but before the levying officer either [*CCP §§ 720.120*, *720.220*]:

- Sells the property; or
- Delivers possession of it to the creditor;
- Pays the proceeds of collection to the creditor.

Cross References:

Discussion on filing third party claim, see *23.08*; Forms, see *23.27 -23.28*.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

23.08[3] Third Party Must Decide Whether to File Undertaking. The third party claimant may also file at this time an undertaking for release of the levied property [*CCP § 720.620*]. No later than five days after the third party claim has been filed with the levying officer, he or she must serve on the creditor and debtor either personally or by mail a copy of the third party claim and a statement as to whether the third party has filed an undertaking to release the property [*CCP §§ 720.140(a)*, *(c)*, *720.240(a)*, *(c)*].

Cross References:

Discussion of filing and amount of required undertaking, see *23.13[1] -[4]*.

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

23.08[4] Levying Officer Must Serve Creditor and Debtor With Claim and Statement of Undertaking. The levying officer must serve on the creditor and debtor, either personally or by mail, no later than five days after the third party claim is filed with the levying officer [*CCP §§ 720.140(a)*, *720.240(a)*]:

- A copy of the third party claim; and
- A statement as to any third party undertaking.

The levying officer may serve the copy of the third party claim and the statement and notice pursuant to this section notwithstanding any defect, informality, or insufficiency of the claim [*CCP §§ 720.140(d)*, *720.240(d)*].

Cross Reference:

Discussion of filing and amount of required undertaking, see *23.13[1]-[4]*.

23.08[5] Notice of Release of Property If Third Party Does File Undertaking. If the third party claimant has filed an undertaking to release the property, a notice that the property will be released within 10 days after service of the notice, unless the creditor objects to the undertaking must also be served on the judgment creditor and judgment debtor [*CCP §§ 720.140(a)-(c)*, *720.240(a)-(c)*].

23.08[6] Notice of Release of Property If Third Party Does Not File Undertaking. If the third party has not filed an undertaking, a notice must be served on the judgment creditor and judgment debtor that the property will be released within 10 days after service of the notice unless the creditor files with the levying officer either an undertaking that satisfies the requirements of a creditor's undertaking as provided by *CCP § 720.160* (third party claims based on ownership or right to possession) or *CCP § 720.260* (third party claims based on secured interest or lien) [*CCP §§ 720.140(a)-(c)*, *720.240(a)-(c)*].

Cross Reference:

Discussion of amount and effect of posting required undertaking, see *23.18*.

23.08[7] Release of Property When No Undertaking Filed by Either Third Party Claimant or Creditor. When the third party claimant has not filed an undertaking, the levying officer must release the property to the person from whom it was taken within 10 days after the service of notice of the third party claim on the creditor and debtor unless the creditor has filed an undertaking or notice of exemption or made a deposit in lieu of an undertaking [*CCP §§ 720.140(b)*, *720.170(a)*, *720.240(b)*, *720.270(b)*]. If the debtor does not claim the property, the third party who claimed it under a third party claim is entitled to its possession [*CCP §§ 720.170(c)*, *720.270(c)*]. Release of the property by the levying officer pursuant to *CCP § 720.170* or *CCP § 720.270* does not preclude a hearing on the validity of the third party claim [*CCP §§ 720.170(d)*, *720.270(d)*].

Strategic Point:

Note that if the creditor does not file a bond, the property goes back to the debtor, rendering the whole exercise moot. So if counsel is representing a debtor who has a good relationship with a third party, it is feasible to ask the third party to file a claim, not post a bond, and potentially get the property back if the creditor is unable or unwilling to post its bond. Be aware, however, that the third party claim must be valid and able to withstand a hearing if requested by the creditor, which can occur even if the property is returned.

23.08[8] Effect of Filing or Not Filing Third Party Claim. Except as may otherwise be provided by statute, if a third party filed a timely third party claim, the levying officer may not do any of the following with respect to the property in which an interest is claimed [*CCP §§ 720.150(a)*, *720.250(a)*]:

- Sell the property;
- Deliver possession of the property to the creditor; or
- Pay proceeds of collection to the creditor.

The interest of the third person in the property levied upon is not affected by the third person's failure to file a third party claim [*CCP §§ 720.150(b)*, *720.250(b)*].

Cross Reference:

Discussion that judgment creditor may demand lienholder file third party claim, see *23.07*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesProceedsContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of Collateral

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23.09 Representing Third Party at Hearing on Third Party Claim.

23.09[1] Either Party May Petition Court for Hearing to Determine Validity of Third Party Claim. Either the creditor or the third party claimant may petition the court for a hearing to determine the validity of the claim and the proper disposition of the property that is the subject of the claim [*CCP § 720.310*]. The petitioner must serve notice of the hearing, personally or by mail, at least 16 court days before the hearing (plus additional time if service is by mail, overnight delivery, etc.), on the adverse party and on the debtor, and file a copy of the notice of hearing with the levying officer [*CCP §§ 720.320(a), 1005(b)*].

Strategic Point:

There is usually no reason for the third party claimant to petition the court for a hearing on the claim, since the property levied on by the creditor will be released unless the creditor takes prompt action.

Cross References:

Discussion on filing third party claim, see *23.08[1] -[8].*

Forms, see *23.31 -23.33.*

Discussion/Forms, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

23.09[2] Petition Must Be Filed With the Court Within 15 Days of Filing Third Party Claim. The petition must be filed with the court no later than 15 days after the third party claim is filed with the levying officer or 15 days after an undertaking is filed [*CCP § 720.310(a)*]. The petitioner must serve, personally or by mail,and in complaince with the time requirements of *CCP § 1015(b)*, notice of the time and place of the hearing on the adverse party and on the debtor and file a copy of the notice with the levying officer [*CCP § 720.320(a)*]. The notice must include a statement that the purpose of the hearing is to determine the validity of the third party claim and the proper disposition of the property that is the subject of the claim [*CCP § 720.320(b)*].

Strategic Points:

- Someone must request the hearing because there is no specific provision for release of the property if the third party claim issue is not legally resolved, and no way for the levying officer to determine priority rights to the proceeds of any sale. Further, there is sometimes a significant cost to the creditor for the levying officer to hold the property pending sale, and the extension of such time period will increase those costs. For these reasons, it is usually in the best interest of the creditor to request a hearing expeditiously.

- Consult local court rules to determine when and where such hearings are held. For example, in Los Angeles Superior Court these hearings are set in a post-judgment enforcement department as opposed to the trial court. In such a situation, the hearing officer is usually better versed in the process and can rule more expeditiously. Counsel should also discover whether a court reporter will be present to transcribe the hearing, and if not, make a determination whether to provide one in order to establish a clear record in the event of an appeal.

Cross Reference:

Discussion on filing third party claim, see *23.08[1] -[8]*.

Forms, see *23.31 -23.33*.

23.09[3] Levying Officer Must File Papers With Court. Promptly after receiving the notice of hearing, the levying officer must file the following papers with the court [*CCP § 720.330*]:

- The third party claim;

- Any statement filed by the creditor with the levying officer pursuant to *CCP § 720.280* in opposition to the third party claim of a secured party;

- Any undertaking of the creditor filed in response to the third party claim pursuant to *CCP § 720.160* or *CCP § 720.260*;

- Any undertaking to release the levied property filed by the third party claimant pursuant to *CCP §§ 720.610-720.660*; and

- Any notice of exemption to filing of an undertaking by a public entity pursuant to *CCP § 720.160* or *CCP § 720.260*.

If the creditor has not previously filed a statement with the levying officer pursuant to *CCP § 720.280* in opposition to a third party claim by a secured party, and the creditor petitions for a hearing on the third party claim, the creditor must file the statement with the court at the time the petition is filed and serve a copy of the statement on the secured party along with the notice of the hearing [*CCP § 720.340(a)*]. If the secured party petitions the court for the hearing, the creditor must file the statement pursuant to *CCP § 720.280* with the court no later than five days before the date set for the hearing and serve, personally or by mail, a copy of the statement on the secured party [*CCP § 720.340(b)*].

Strategic Point:

It is a good practice to include an opposition or support of the third party claim in the actual petition for hearing and satisfy all pleading requirements at once.

Cross Reference:

Discussion on filing third party claim, see *23.08[1] -[8]*.

Forms, see *23.31 -23.33*.

23.09[4] Pleadings Must Consist of Third Party Claim. The pleadings in the hearing to determine validity of third party claim must consist of the third party claim, and in the case of a third party claim by a secured party, the creditor's statement in opposition [*CCP § 720.350*]. A third party claim of ownership, right of possession, or a lien is deemed controverted by the creditor [*CCP § 720.350*]. Once the creditor or third party has applied for the hearing, he or she cannot move to dismiss the proceedings without the consent of the other *CCP § 720.370*]. There is no right to a jury trial on the issue of the validity of the third party claim [*CCP § 720.410*].

Cross References:

Discussion on filing third party claim, see *23.08[1] -[8]*.

Forms, see *23.31 -23.33*.

23.09[5] Hearing on Validity of Claim Must Be Held Within 20 Days of Filing Petition. The hearing on the validity of the third party claim must be held within 20 days after the filing of the petition, unless continued by the court for good cause shown [*CCP § 720.310(c)*]. The hearing may be held regardless of whether an undertaking has been filed, but not if a deposit has been made pursuant to *CCP 720.260* [*CCP § 720.310(b)*].

Strategic Point:

Note that there is no statutory procedure for deposing third parties, and in the event that their testimony or documents are sought, they must be subpoenaed to the hearing for presentation at that time. For example, a judgment creditor may wish to subpoena the records of another of the debtor's creditors to see if the debtor has claimed ownership of a disputed asset in its credit application as a source of rebutting the claim of a third party, such as spouse. In that case, the documents must be subpoenaed to the hearing under seal, and are opened by the court for review by the parties at that time.

Cross Reference:

Discussion on filing third party claim, see *23.08[1] -[8]*.

Forms, see *23.31 -23.33*.

23.09[6] Third Party Claimant Has Burden of Proof. Regardless of who demands the hearing, the third party claimant has the burden of proof as to the validity of the claim [*CCP § 720.360*].

Strategic Points:

- Although some courts permit the option of merely submitting the matter on all the papers filed by all parties (including the levying officer if appropriate), and several courts actually inform counsel that no

appearance is required, it is recommended that counsel always attend in person as many judges are not that familiar with this area of the law. Be prepared to not only argue particular matters, but to explain the law and procedure.

- Note that the usual "preponderance of the evidence" standard does not apply when one spouse is claiming that an asset is separate and not community. Rather, in that case it is required that the spouse claiming the separate nature of the property do so by the more difficult "clear and convincing" standard [*In re Marriage of Ashodian (1979) 96 CA3d 43, 47, 157 CR 555]* .

Cross Reference:

Discussion on filing third party claim, see *23.08[1] -[8]*.

Forms, see *23.31 -23.33*.

23.09[7] Court Must Determine Validity of Claim and Disposition of Property. At the conclusion of the hearing, the court must determine the validity of the third party claim, and may order the disposition of the property or its proceeds in accordance with the respective interests of the parties [*CCP § 720.390*]. The court, however, is not required to make findings [*CCP § 720.400*]. The judgment is conclusive between the parties to the proceeding, but is appealable [*CCP §§ 720.390*, *720.420*].

Strategic Point:

In the event that an appeal is contemplated, it is a good practice to request such findings and prepare them for the court.

Cross Reference:

Discussion on filing third party claim, see *23.08[1] -23.08[8]*.

Forms, see *23.31 -23.33*.

23.09[8] Judgment May Be Appealed. An appeal may be taken from the judgment in the manner prescribed for appeals from the court in which the hearing took place [*CCP § 720.420*].

Strategic Point:

Before deciding whether to require that the property be held for the time required for an appeal, ascertain what that will cost. If the levying officer has the property in storage, or there are arrangements with the landlord to keep the property on the premises, there is likely to be ongoing storage costs and/or costs required to safeguard the property which might far exceed the value of the property. This should be considered prior to filing an appeal.

23.09[9] Party May Petition Court for Order Staying Sale of Property. After a third party claim has been filed, the creditor, debtor, or third party claimant may apply to the court for an order staying the sale of the property under a writ or enjoining any transfer or other disposition of the property levied on under a writ until the proceedings to determine the rights of a third person can be completed [*CCP § 720.380(a)*]. The application for such an order may be made ex parte, unless it is required to be on noticed motion by the court or by local court rule [*CCP § 720.380(b)*]. Any such order may be modified or vacated by the court any time before the termination of the proceedings on such terms as are just [*CCP § 720.380(c)*].

Strategic Point:

Especially in the case of real property, this is a good idea to preclude purported attempts to transfer title, which would result in confusion and potential clouds on title, diminishing any sale returns.

Cross Reference:

Discussion on filing third party claim, see *23.08[1] -[8]*.

Discussion on creditor's right to apply for order to stay sale, see *23.21*.

Discussion on debtor's right to apply for order to stay sale, see *23.26*.

Forms, see *23.34 -23.36*.

Discussion/Forms staying enforcement of judgment, see Ch. 15, Staying Enforcement of Judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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Chapter 23 Third Party Claims
II. FILING THIRD PARTY CLAIM

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23.10 Other Remedies for Third Party Claimant.

23.10[1] Third Party Claimant May Intervene in Original Action. In addition to the third party claim proceeding provided by *CCP §§ 720.010-720.800*, a third party who claims title to or an interest in property levied on either prejudgment or postjudgment may intervene in the original action [*CCP § 387*]. By intervening in the action, the third party would establish title to the property, but would be denied the right to immediate possession [*CCP § 387*; *see Beshara v. Goldberg (1963) 221 CA2d 392, 395, 34 CR 501]* .

Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

California Forms of Pleading and Practice, Ch. 150, Conversion (Matthew Bender).

23.10[2] Third Party Claimant May Bring Independent Action. In addition to the third party claim proceeding provided by *CCP §§ 720.010-720.800*, a third party who claims title to or an interest in property levied on either prejudgment or postjudgment may elect to bring an independent action [*see Retailers' Credit Ass'n v. Superior Court (1937) 19 CA2d 457, 459, 65 P2d 937]* .

Example:

An action for damages for conversion may be brought when the third party claim is properly made, but personal property is wrongfully sold or released by the levying officer [*see McCaffey Canning Co. v. Bank of Am. (1930) 109 CA 415, 429-435, 294 P 45*].

Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil

ProcedurePartiesInterventionRight to Intervene

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Chapter 23 Third Party Claims
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23.11 CHECKLIST: Filing Undertaking by Third Party Claimant.

☐ Determine if the third party should file an undertaking for release of the property:

○ Is the claim for real property in which the third party claims ownership or the right to possession under a writ of attachment or writ of execution?

○ Is the claim for personal property in which the third party claims ownership, the right to possession, or security interest under a writ of attachment, writ of execution, or writ of sale?

Authority:
CCP § 720.610

Discussion:
See *23.13[1]*

☐ Does the undertaking:

○ Contain a description of the property and the interest of the third party claimant?

○ Provide that the third party will pay the creditor the lesser of the amount required to satisfy the judgment against the debtor, or a sum equal to the market value of the debtor's property?

○ In the same amount as the creditor's undertaking, if the creditor has also given an undertaking in response to third party claim?

Authority:
CCP § 720.630(a)-(d)

Discussion:
See *23.13[3]*

☐ Has the undertaking been filed with the levying officer and served on the creditor and debtor?

Authority:
CCP §§ 720.620, 720.640(a)-(b)

Discussion:
See *23.13[2], [4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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23.12 Options and Strategy for Filing Undertaking by Third Party Claimant.

A third party claimant may file an undertaking to release property in which the third party claims an interest [*CCP § 610*]. By filing an undertaking, the third party is substituting the undertaking as security for the original property, thereby releasing any lien on the original property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralReal Property LawNonmortgage LiensJudgment LiensReal Property LawNonmortgage LiensLien Priorities

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23.13 Third Party May File Undertaking for Release of Property.

23.13[1] Third Party May File Undertaking for Release of Property in Which the Third Party Claims an Interest. The third party claimant may file an undertaking to release property in which the third party claims an interest [*CCP § 720.610*].

Strategic Points:

- By filing an undertaking, the third party is substituting the undertaking as security for the original property, thereby releasing any lien on the original property.

- The third party claimant does not need to file an undertaking unless the creditor has filed its own undertaking. If the creditor does not file an undertaking and a timely petition for hearing on the third party claim, the property will automatically be released from the creditor's lien.

- The client should be reminded that an undertaking means that if the creditor ultimately prevails and the property has been lost or dissipated after being placed in the third party's possession, the bonding company will look to the third party for complete reimbursement of the amount required to pay the creditor.

- An alternative to the third party filing an undertaking is to challenge the sufficiency of the creditor's undertaking.

An undertaking may be given when [*CCP § 720.610*]:

- Real property in which the third party claims ownership or the right to possession is levied on under either a writ of attachment or execution; or

- Personal property in which the third party claims ownership or the right to possession, or a security interest or lien is levied on under either a writ of attachment, execution, or sale.

Cross References:

Discussion, see Ch. 20, Miscellaneous Creditor's Remedies.

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice, Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

23.13[2] Undertaking Must Be Filed With Levying Officer. The undertaking may be filed with the levying officer, together with two copies, at the time the third party filed the third party claim, or later, but in any event before the levying officer either sells the property, delivers possession of it to the creditor, or pays proceeds of collection to the creditor [*CCP § 720.620*].

23.13[3] Requirements for Filing an Undertaking for Release of Property by Third Party Claimant. The undertaking filed by a third party claimant for release of property must [*CCP § 720.630(a)-(d)*]:

- Contain a description of the property to be released and describe the interest of the third party in the property and must be made in favor of the creditor;

- Provide that, in the event that the debtor is adjudged to have an interest in the property levied on, the third party will pay to the creditor the lesser of the amount required to satisfy the judgment against the debtor of the creditor, or a sum equal to the market value of the debtor's interest in the property;

- Be an amount either twice the market value of the property sought to be released, or twice the amount of the creditor's lien on the property; and

- Be in the same amount as the creditor's undertaking, if the creditor has given an undertaking in response to a third party's claim.

The undertaking will be effective as of the date the property is released [*CCP § 720.650*].

Cross References:

Filing an undertaking larger than required by statute and strategy for doing so, see *23.18[3]*.

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

23.13[4] The Undertaking Must Be Served on Both Creditor and Debtor. The levying officer must serve a copy of the undertaking and notice of the filing on both the creditor and the debtor at the same time as the notice of the third party claim is served if the third party filed the undertaking at the same time as the claim [*CCP § 720.640(a)*; *see CCP §§ 720.140*, *720.240*]. If the undertaking is filed subsequent to the filing of the third party claim, the levying officer must, within five days after the undertaking is filed, serve a copy of the undertaking on the creditor and debtor with a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor objects to the undertaking. Service may be made personally or by mail [*CCP § 720.640(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsTermination StatementsContracts LawSecured TransactionsThird Party RightsGeneral Overview

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23.14 Beneficiary of Undertaking May File Motion to Object to Undertaking.

The beneficiary of an undertaking, either the third party claimant or the creditor, may file a noticed motion with levying officer, objecting to an undertaking on grounds that [*CCP §§ 720.760*, *720.660*, *995.920(a)*, *(b)*, *995.930*, *996.010(a)*, *(b)*]:

- Sureties are insufficient or;
- Amount of undertaking is insufficient.

The objecting party has 10 days after service of a copy of the bond on the beneficiary to make an objection [*CCP § 995.930(b)*].

The hearing on the objection must be held at least 10 but not more than 15 days after service of the notice of motion unless otherwise agreed by the parties [*CCP § 720.770*].

Cross Reference:

Discussion/Forms on objections to undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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23.15 Release of Property Pursuant to Undertaking by Third Party.

After the filing of the undertaking by the third party, and after the expiration of the 10 days allowed for the creditor to object to the undertaking [*CCP §§ 720.140(b)*, *720.240(b)*], the levying officer must release the property unless the creditor has made a timely objection to the undertaking and filed a copy of the notice of motion objecting to an undertaking with the levying officer pursuant to *CCP § 720.760*.

Cross References:

Discussion, see *23.08[7]*, *23.14*.

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
IV. CREDITOR'S RESPONSE TO THIRD PARTY CLAIM

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23.16 CHECKLIST: Creditor's Response to Third Party Claim.

☐ Determine if the creditor should file an undertaking.

Authority:
CCP §§ 720.160, 720.260

Discussion:
See *23.18[1]*

☐ If the creditor files an undertaking, is the amount of the undertaking:

○ $10,000;

○ Twice the amount of the execution lien as of the date of the levy or other enforcement lien as of the date it was created; or

○ Larger than that required by statute.

Authority:
CCP §§ 720.160(b), 720.260(b)

Discussion:
See *23.18[1][3]*

☐ Is the creditor a public entity and exempt from filing an undertaking?

Authority:
CCP §§ 720.160(d), 720.260(d)

Discussion:

23.18[4]

☐ If the creditor files an undertaking for security interest, did the creditor file a statement in opposition to third party claim?

○ Was the statement of opposition filed with the court and served on secured party?

☐ Does the statement of opposition state:

○ That the claimed security interest is invalid;

○ That the claimed security interest is not entitled to priority over the creditor's lien; or

○ The amount demanded in the claim excess the amount to which the secured party is entitled; and

○ Specify the reasons for the positions taken?

Authority:
CCP §§ 720.280, 720.340

Discussion:
See *23.18[5]*

☐ Determine if creditor should make a deposit in lieu of an undertaking in response to a third party claim.

○ Is the deposit in the amount of the sums due or to accrue under the security interest, plus the applicable rates of interest?

Authority:
CCP §§ 720.230(a)(4), 720.260

Discussion:
See *23.19[1]*

☐ Determine if creditor should apply for hearing on third party claim to determine validity of third party claim.

Authority:
CCP § 720.310

Discussion:
See *23.20*

Forms:
See *23.31 -23.33*

☐ Determine if creditor should apply for order staying the sale, or enjoining the transfer or other disposition of the property.

Authority:
CCP § 720.380(a)

Discussion:
See *23.21*

Forms:
See *23.34 -23.36*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
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23.17 Options and Strategies for Creditor's Response to Third Party Claim.

A creditor can respond to a third party claim by filing an undertaking, making a deposit in lieu of an undertaking, applying for a hearing to determine the validity of a third party claim, or apply for an order staying the sale or enjoining the transfer or other disposition of the property [*CCP §§ 720.160*, *720.230(a)(4)*, *720.260*, *720.310*, *720.380(a)*].

Warning:

If the creditor makes a deposit rather than filing an undertaking, there can be no hearing on the issue of the third party claim [*CCP § 720.310(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
IV. CREDITOR'S RESPONSE TO THIRD PARTY CLAIM

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23.18 Undertaking in Response to Third Party Claim.

23.18[1] Judgment Creditor May File Undertaking With Levying Officer. A judgment creditor may file an undertaking with the levying officer in response to the third party claim in order to protect his or her rights in the property of the debtor [*CCP § 720.160*]. Such undertaking must be at least equal to the lesser of [*CCP §§ 720.160(b)*, *720.260(b)*]:

- $10,000; or
- Twice the amount of the execution lien as of the date of the levy or other enforcement lien as of the date it was created.

Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

23.18[2] Court May Order Decrease in Amount of Undertaking. The court may order a decrease in the amount of the undertaking below the statutory amounts [*CCP § 720.770*]. The amount of the undertaking is also subject to the provisions of *CCP § 996.010* (objection to undertaking for insufficiency) [*CCP §§ 720.160(b)*, *720.260(b)*].

Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

23.18[3] Creditor May Also File an Amount Larger Than Required by Statute. A judgment creditor may also elect to file an undertaking in an amount larger than required by statute [*CCP §§ 720.160(b)*, *720.260(b)*]. The creditor's

undertaking must be made in favor of the third party claimant, and indemnify him or her against any loss, liability, damages, costs, and attorney's fees incurred by reason of the enforcement proceedings, and be conditioned on a final judgment that the third party claimant owns or has a right to possession of the property, or that his or her security interest or lien has priority over that of the creditor's lien [*CCP §§ 720.160(c), 720.260(c)*]. The attorney's fees recoverable pursuant to the undertaking's indemnity provisions are to be distinguished from the attorney's fees recoverable to a prevailing party. The latter are only recoverable if the undertaking also includes such a provision [*Franke v. BAM Building Co. (2009) 172 CA4th 224, 236, 91 CR3d 212* .

Strategic Point:

Determine whether to post the higher bond, as it will require the third party to post a bond of equal amount in order for the third party to obtain possession. This might prove better in the long run if counsel succeeds because the bond is a liquid asset and will not require the added expenses of storage and sale.

Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

23.18[4] Public Entity Creditor Is Exempt From Undertaking. A creditor that is a public entity is exempt from giving an undertaking. However, it must file with the levying officer a notice of opposition to the third party claim [*CCP §§ 720.160(d), 720.260(d)*].

Cross Reference:

Filing an undertaking larger than required by statute, see *23.18[3]*.

23.18[5] Creditor's Statement in Opposition to Third Party Claim. When a creditor files an undertaking pursuant to *CCP § 720.260* in response to a third party claim by a secured party, he or she must file with the levying officer a statement executed under oath that the security interest is invalid, that it is not entitled to priority over the creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled, giving specific reasons for the applicable statement [*CCP § 720.280(a)*].

The creditor must serve personally or by mail a copy of the statement on the secured party, and the debtor [*CCP § 720.280(b), (c)*]. The failure to file a creditor's undertaking together with a statement in opposition concerning the security interest (or a deposit in lieu of an undertaking or notice of exemption as a public entity) could result in release of the property by the levying officer [*CCP § 720.270(a)*].

A hearing on the validity of the third party claim may still be had whether or not the property has been released [*CCP § 720.270(d)*].

If not already filed with the levying officer, the creditor must file the statement of opposition with the court and serve it on the secured party at the time of petitioning for a hearing on the third party claim, or if the secured party has petitioned for the hearing, the statement must be filed with the court and served personally or by mail on the secured party not later than five days before the date set for the hearing [*CCP § 720.340*]. The statement in opposition must state that the claimed security interest is invalid, that it is not entitled to priority over the creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled and specify the reasons for the position taken [*CCP § 720.280(a)*].

Strategic Point:

It is a good idea to file the opposition and petition a hearing simultaneously in order to ensure compliance with all requirements at once.

Cross References:

Form, see *23.29*

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Discussion/Forms on undertaking, see California Forms of Pleading and Practice Ch. 538, Suretyship, Bonds, and Undertakings (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementContracts LawSecured TransactionsPerfection & PriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPerfectionMethodsFinancing StatementsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral OverviewContracts LawSecured TransactionsThird Party RightsGeneral Overview

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23.19 Deposit in Lieu of Undertaking in Response to Third Party Claim.

23.19[1] Creditor May Make Deposit in Lieu of Undertaking With Levying Officer. Instead of filing an undertaking in response to the third party claim by a secured person or lienholder, the creditor may make a deposit with the levying officer in the amount of the sums due or to accrue under the security interest or lien, plus the applicable rate of interest on the amount due [*CCP §§ 720.230(a)(4)*, *720.260*].

Cross Reference:

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

23.19[2] Levying Officer Must Pay Deposit to Third Party Claimant. After receiving the deposit, the levying officer, if the deposit is sufficient, must promptly tender or pay the deposit to the third party claimant [*CCP § 720.290(a)*]. If the tender is accepted, the interest of the third party claimant in the property passes to the creditor, and on distribution of any proceeds under *CCP § 701.810*, the creditor making the deposit will be entitled to the proceeds to the extent of the deposit in the priority of the secured interest or lien for which the deposit is made [*CCP § 720.290(b)*]. However, if the deposit is refused, it will be deposited with the county treasurer payable to the order of the third party claimant [*CCP § 720.290(c)*].

Warning:

If the creditor makes a deposit rather than filing an undertaking, there can be no hearing on the issue of the third party claim [*CCP § 720.310(b)*].

23.19[3] Writ Must Be Executed If Creditor Files Undertaking, Deposit in Lieu of Undertaking, or Notice of Exemption. If the creditor files with the levying officer an undertaking, a deposit in lieu of an undertaking, or a notice of exemption as a public entity, the levying officer must execute the writ unless the third party has also filed an undertaking sufficient to satisfy the statutory requirement. After sale, payment, or delivery of the levied property pursuant to the writ, the property is free of all claims of the third party for which the creditor has given the undertaking [*CCP §§ 720.160(a)*, *720.260(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesProceeds

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IV. CREDITOR'S RESPONSE TO THIRD PARTY CLAIM

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23.20 Application for Hearing on Third Party Claim.

A creditor may, within 15 days of the filing of a third party claim, or within 15 days of the filing of an undertaking, petition the court for a hearing to determine the validity of the third party claim and, the proper disposition of the property that is subject to the claim [*CCP § 720.310*]. The hearing may be held whether or not an undertaking has been filed,but not if a deposit in lieu of an undertaking has been made [*CCP § 720.310(b)*]. 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)*].

Cross Reference:

Discussion, see *23.09[1] -[8].*

Forms, see *23.31 -23.33*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesProceeds

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Chapter 23 Third Party Claims
IV. CREDITOR'S RESPONSE TO THIRD PARTY CLAIM

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23.21 Stay or Injunction of Any Transfer or Other Disposition of Levied Property That Is Subject of Third Party Claim.

After a third party claim has been filed, the creditor, debtor, or third party claimant may apply to the court for an order staying the sale of the property under a writ or enjoining any transfer or other disposition of the property levied on under a writ until the proceedings to determine the rights of a third person can be completed [*CCP § 720.380(a)*].

Strategic Point:

Especially in the case of real property, this is a good idea to preclude purported attempts to transfer title which would result in confusion and potential clouds on title, diminishing any sale returns.

Cross Reference:

Discussion, see *23.09[9]*.

Forms, see *23.34 -23.36*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
V. DEBTOR'S RESPONSE TO THIRD PARTY CLAIM

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23.22 CHECKLIST: Debtor's Response to Third Party Claim.

☐ Has the debtor received notification of the filing of the third party claim?

○ If an undertaking was filed, did the debtor receive notification of the undertaking?

Authority:
CCP §§ 720.140(c), 720.240(c), 720.640

Discussion:
See *23.24*

☐ Was the property levied on either prejudgment or postjudgment?

○ Did the debtor receive notice of any application for a hearing as to the validity of the third party claim?

Authority:
CCP § 720.320(a)

Discussion:
See *23.25*

○ Determine if the debtor should move the court for:

☐ An order staying the sale of the property levied under a writ.

☐ Enjoin the transfer or other disposition of the property pending the commencement and prosecution to termination of the hearing on the third party claim.

○ Determine if personal property is being held under another lien or otherwise ordered by the court.

☐ If personal property is not being held under another lien or other court order, determine if the creditor has timely filed an undertaking, deposit, or notice of exemption.

☐ If creditor has not filed a timely undertaking, deposit, or notice of exemption, the personal property taken into custody by the levying officer must be released to the debtor.

Authority:
CCP §§ 720.170(a), 720.270(a), 720.320(a), 720.380

Discussion:
See *23.25, 23.26*

Forms:
See *23.34 -23.36*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
V. DEBTOR'S RESPONSE TO THIRD PARTY CLAIM

2-23 MB Practice Guide: CA Debt Collection 23.23

23.23 Options and Strategies for Debtor's Response to Third Party Claim.

A debtor whose property has been levied on must be notified on any third party claim as well as any application for a hearing on a third party claim [*CCP §§ 720.140(c)*, *720.240(c)*, *720.320(a)*, *720.640*]. The debtor may also move the court for an order staying the sale, or enjoining the transfer or other disposition of the property pending a determination of the claim [*CCP § 720.380*].

Strategic Point:

Note that if the creditor does not file a bond, the property goes back to the debtor, rendering the whole exercise moot. So if counsel is representing a debtor who has a good relationship with a third party, it is feasible to ask the third party to file a claim, not post a bond, and potentially get the property back if the creditor is unable or unwilling to post its bond. Be aware, however, that the third party claim must be valid and able to withstand a hearing if requested by the creditor, which can occur even if the property is returned.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
V. DEBTOR'S RESPONSE TO THIRD PARTY CLAIM

2-23 MB Practice Guide: CA Debt Collection 23.24

23.24 Right to Notification of Third Party Claim.

A debtor whose property has been levied on either prejudgment or postjudgment must be notified of any third party claim to the property that has been filed with the levying officer, as well as of any undertaking filed by the third party claimant [*CCP §§ 720.140(c)*, *720.240(c)*, *720.640*].

Cross Reference:

Discussion, see *23.08[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
V. DEBTOR'S RESPONSE TO THIRD PARTY CLAIM

2-23 MB Practice Guide: CA Debt Collection 23.25

23.25 Right to Notification of Application for Hearing on Validity on Third Party Claim.

A debtor whose property has been levied on either prejudgment or postjudgment must also be given notice of any application for a hearing on the validity of the third party claim [*CCP § 720.320(a)*].

Cross Reference:

Discussion, see *23.09[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 23 Third Party Claims
V. DEBTOR'S RESPONSE TO THIRD PARTY CLAIM

2-23 MB Practice Guide: CA Debt Collection 23.26

23.26 Right to Move the Court for Order Staying the Sale, or Enjoining the Transfer or Other Disposition of the Property Pending Determination of Claim.

A debtor whose property has been levied on either prejudgment or postjudgment may move the court for an order staying the sale of the property levied on under a writ, or to enjoin the transfer or other disposition of the property pending the commencement and prosecution to termination of the hearing on the third party claim [*CCP § 720.380*]. Personal property of the debtor taken into custody by the levying officer must be released to the debtor if the creditor has not timely filed an undertaking, deposit, or notice of exemption unless the property is to be held under another lien or otherwise ordered by the court [*CCP §§ 720.170(a)*, *720.270(a)*].

Cross Reference:

Discussion, see *23.09[9]*, *23.21*.

Discussion, see California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of CollateralContracts LawSecured TransactionsDefaultForeclosure & RepossessionPrivate & Public Sales

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.27

23.27 Third Party Claim of Ownership or Right to Possession of Levied Property.

Third Party Claim of Ownership or Right to Possession of Levied Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	THIRD PARTY CLAIM OF
_____ [*name*],	)	[OWNERSHIP *or* RIGHT TO
Defendant.	)	POSSESSION] OF LEVIED
	)	PROPERTY
	)	

_____

TO _____ [*name and title of levying officer*]:

1. NOTICE IS HEREBY GIVEN that I, _____ [*name*], claim an interest in the following described property: _____ [*describe property*], which was levied on by you on or about _____ [*date*], under a writ of _____ [execution *or* attachment *or* sale *or* possession] issued in the above-entitled action.

2. My interest in the above-described property is that of _____ [*describe interest, e.g.,* owner with title to the property].

3. I acquired my interest in the above-described property from _____ [*name*] on or about _____ [*date*], by _____ [*specify manner in which interest was acquired, e.g.,* purchase for $100,000, which has been paid in full. The bill of sale and canceled check are attached as Exhibits 1 and 2].

4. The reasonable market value of [my interest in] the above-described property is $_____.

5. I may be served by mail at _____ [*mailing address*], California.

6. I hereby demand that you release the above-described property and the levy thereon.

Dated: _____.

_____ [*signature*]

_____ [*address*]

VERIFICATION

I, _____ [*name*], am a third party claimant in the above-entitled _____ [action *or* proceeding]. I have read the foregoing claim and know the contents thereof. The same is true of my own knowledge.

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*]

NOTES.

Authority:
CCP §§ 720.110, 720.210]

Discussion:
See *23.08[1]*

Warning:
This third party claim must be executed under oath or verified [*CCP §§ 720.230(a), 2015.5*]

Cross Reference:
See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.820 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.28

23.28 Third Party Claim of Security Interest in or Lien on Levied Property.

Third Party Claim of Security Interest in or Lien on Levied Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	THIRD PARTY CLAIM OF
vs.	)	_____ [SECURITY
_____ [*name*],	)	INTEREST IN *or* RIGHT
Defendant.	)	TO LIEN ON] LEVIED
	)	PROPERTY
	)	

_____

TO _____ [*name and title of levying officer*]:

1. NOTICE IS HEREBY GIVEN that I, _____ [*name*], claim an interest in the following described property: _____ [*describe property*], which was levied on by you on or about _____ [*date*], under a writ of _____ [execution *or* attachment *or* sale *or* possession] issued in the above-entitled action.

2. The _____ [security interest in *or* lien on] the above-described property is a _____ [*describe nature of security interest or lien, e.g.,* conditional sales contract] in the total sum of $_____, created on _____ [*date*], by _____ [*describe manner in which security interest or lien was created*].

[*EITHER*]

3. A copy of the above-described security agreement (and accompanying financial statement) is attached to the claim and marked Exhibit "A," and made a part of this claim.

[*OR*]

4. The total amount due or to accrue to me under the _____ [security interest *or* lien] is the sum of $_____, with interest at the rate of _____ percent until the date of tender of payment.

5. Payment of this claim or release of the above-described property is hereby demanded.

Dated: _____.

_____ [*signature*]

_____ [*address*]

VERIFICATION

I, _____ [*name*], am a third party claimant in the above-entitled _____[action *or* proceeding]. I have read the foregoing claim and know the contents thereof. The same is true of my own knowledge.

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*]

NOTES.

Authority:
CCP §§ 720.110, 720.210

Discussion:
See *23.08[1]*

Warning:
This form of third party claim must be executed under oath or verified [*CCP §§ 720.230(a), 2015.5*]

Cross Reference:
See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.821 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.29

23.29 Declaration in Opposition to Third Party Claim of Security Interest in Levied Property.

Declaration in Opposition to Third Party Claim of Security Interest in Levied Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION IN
vs.	)	OPPOSITION TO
_____ [*name*],	)	THIRD PARTY CLAIM OF
Defendant.	)	SECURITY INTEREST IN
	)	LEVIED PROPERTY
	)	

_____

I, _____ [*name*], declare:

1. I am the plaintiff in the above-entitled action.

2. This declaration is in opposition to the claim of _____ [*name*] that he/she is a secured party with a security interest in the below-described property levied on in this action.

3. The property levied on in this action is _____ [*describe nature of security interest*] and was levied on _____ [*date*], by virtue of the writ of _____ [execution *or* attachment *or* sale *or* possession] issued in the above-entitled action on _____ [*date*].

[*EITHER*]

4. The security interest claimed by the third party claimant is invalid because _____ [*specify reasons*].

[*OR*]

4. The security interest claimed by the secured third party claimant is not entitled to priority over the creditor's lien obtained by me because _____ [*specify reasons*].

[*OR*]

4. The amount demanded in the secured third party claim of $ _____ exceeds the amount to which the secured party is entitled because _____ [*specify reasons*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

NOTES.

Authority:
CCP §§ 720.270, 720.280, 720.340

Discussion:
See *23.18[5]*

Warning:
This form of third party claim must be executed under oath or verified [*CCP §§ 720.230(a), 2015.5*]

Cross Reference:
See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.822 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.30

23.30 Demand by Creditor That Secured Party or Lienholder File Third Party Claim.

Demand by Creditor That Secured Party or Lienholder File Third Party Claim.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMAND FOR THIRD PARTY
_____ [*name*],	)	CLAIM TO BE FILED BY
Defendant.	)	SECURED PARTY OR
	)	LIENHOLDER
	)	

_____

TO: _____ [*name and address of secured party or creditor*].

1. I, _____ [*name*], am the judgment creditor herein. My address is _____ [*address*].

2. On _____ [*date*], I obtained a writ of _____ [attachment *or* execution *or* sale *or* possession] issued by the court in the above-entitled action on certain property to wit: _____ [*describe property levied on*] which was subsequently levied on on _____ [*date*].

3. I am informed that you have a _____ [security interest in *or* lien on] the above-described property. If this is correct, you must file with _____ [*title, name, and address of levying officer*] a third party claim pursuant to *Code of Civil Procedure Sections 720.210-720.290*. If you fail to file a third party claim within 30 days after receipt of this demand, you will be deemed to have waived any priority that your _____ [security interest *or* lien] may have over my lien on the above-described property unless the property is released from my lien.

4. If your priority _____ [security interest *or* lien] is waived, you may still have a right to share in any excess proceeds of an execution sale of the above-described property as provided in *Code of Civil Procedure Section*

701.810.

Dated: _____.

_____ [*signature*]

_____ [*address*]

NOTES.

Authority:
CCP §§ 720.510-720.550

Discussion:
See *23.07[1]*

Cross Reference:

See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.283 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.31

23.31 Petition for Hearing and Attached Order.

Petition for Hearing and Attached Order.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	PETITION FOR HEARING
_____ [*name*],	)	ON THIRD PARTY CLAIM
Defendant.	)	AND ORDER
	)	
	)	

_____

To the _____ Court of _____:

1. Petitioner hereby applies as authorized by *Code of Civil Procedure Section 720.310* for a hearing to determine the validity of a third party claim filed in the above-entitled court pursuant to Section _____ [720.110 *or* 720.210] of the Code of Civil Procedure.

2. _____ [*Name*], petitioner, is the _____ [plaintiff and creditor in the above-entitled action *or* third party claimant to property levied on in the above-entitled action].

3. On _____ [*date*], _____ [*name and title of levying officer*], under a writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court on _____ [*date*], levied on the property of _____ [defendant *or* judgment debtor] and took possession of the following-described property: _____ [*describe property*].

4. On _____ [*date*], _____ [*name*] delivered to the above-described levying officer a verified claim, together with two copies, asserting _____ [ownership of *or* right to possession of *or* a security interest in *or* a lien on] the above-described property.

[5. _____ (Petitioner *or specify opposing party, e.g.,* Third party claimant) on _____ (*date*), filed with the above-described levying officer an undertaking to have the above-described property _____ (held *or* released).]

WHEREFORE, petitioner requests that a date for hearing be set by this court to determine the validity of the third party claim and the proper disposition of the above-described property that is the subject of the claim.

Dated: _____.

_____ [*signature*]

ORDER

The petition of _____ [*identify party, e.g.,* third party claimant] for a hearing to determine the validity of a third party claim and the proper disposition of the property that is the subject of the claim, being before this court, and good cause appearing therefor,

IT IS ORDERED that the petition be, and it hereby is, granted and that it be, and it is, set for hearing in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard.

IT IS FURTHER ORDERED that a copy of the petition and a copy of this order be served on _____ [*name and title of levying officer*], and on _____ [*name third party claimant or creditor, which ever applicable*], and on _____ [*name of debtor or defendant*] at least 10 days before the date set for said hearing.

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:

CCP §§ 720.110, 720.210, 720.310

Discussion:

See *23.09[1] -[8]*

Cross Reference:

See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.824 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.32

23.32 Notice of Hearing on Third Party Claim.

Notice of Hearing on Third Party Claim.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF HEARING ON
_____ [*name*],	)	THIRD PARTY CLAIM
Defendant.	)	
	)	
	)	

_____

TO _____ [*name*], _____ [third party claimant *or specify creditor by designation in underlying proceeding, e.g.,* plaintiff], and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that the petition of _____ [third party claimant *or specify creditor by designation in underlying proceeding, e.g.,* plaintiff] for a hearing on a third party claim to _____ [real *or* personal] property which was levied on herein pursuant to a writ of _____ [execution *or* attachment *or* sale *or* possession] issued by the above-entitled court on _____ [*date*], has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*]. The purpose of the hearing is to determine the validity of the third party claim and the proper disposition of the property that is the subject of the third party claim.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES.

Authority:
CCP § 720.320

Discussion:
See *23.09[1] -[8]*

Cross Reference:
See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.825 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.33

23.33 Judgment Determining Validity of Third Party Claim and Order for Disposition of Property.

Judgment Determining Validity of Third Party Claim and Order for Disposition of Property.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	JUDGMENT DETERMINING
_____ [*name*],	)	VALIDITY OF THIRD PARTY
Defendant.	)	CLAIM AND ORDER FOR
	)	DISPOSITION OF PROPERTY
	)	

_____

The petition of _____ [*identify party, e.g.,* third party claimant] for an order to determine the validity of a third party claim to property levied on in the above-entitled action under a writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court on _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; third party claimant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court and good cause appearing therefor,

IT IS ADJUDGED that _____ [the ownership of *or* the right of possession of *or* a security interest in *or* a lien on] the below-described property is [not], and at the time it was levied on under the above-mentioned writ of _____ [attachment *or* execution *or* sale *or* possession] was [not] vested in _____, the third party claimant. The property levied on and which is the subject of the third party claim is _____ [*describe property*].

IT IS ORDERED that _____ [*name and title of levying officer*] _____ [*describe action, e.g.,* release the above-described property and levy and return it to Jane Lee, debtor].

[IT IS FURTHER ORDERED that _____ (*prevailing party*) recover from _____ (*adverse party*) the costs incurred in this proceeding in the sum of $_____.]

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:

CCP §§ 720.390-720.420

Discussion:

See *23.09[1] -[8]*

Cross Reference:

See California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.286 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.34

23.34 Notice of Motion for Order to Stay Sale or Enjoin Transfer of Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

Notice of Motion for Order to Stay Sale or Enjoin Transfer of Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND
vs.	)	MOTION FOR ORDER TO
_____ [*name*],	)	_____ [STAY
Defendant.	)	SALE *or* ENJOIN TRANSFER
	)	OR OTHER DISPOSITION]
	)	OF LEVIED PROPERTY
	)	

_____

TO_____ [*identify party, e.g.,* third party claimant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* third party claimant] _____ [*name*] will, and hereby does, move for an order _____ [staying the sale *or* enjoining transfer or other disposition] of the below-described property levied on in the above-entitled action and claimed by _____ [*name*], third party claimant, until proceedings to determine the validity of the third party claim have been commenced and prosecuted to termination. The property that was levied on and is the subject of the third party claim is _____ [*describe property*]. The motion will be made on the grounds that the above-described property has been claimed by _____ [*name*], third party claimant and that a petition to determine the validity of his/her claim is now pending before this

court.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*party's status and name*]

NOTES.

Authority:
CCP § 270.380

Discussion:
See *23.09[9]*

Warning:
A supporting memorandum is required to be served and filed with this notice of motion [*Cal Rules Ct, Rule 3.1113(a)*; *see CCP §§ 1005(b), 1010*]

Cross Reference:
California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.287 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.35

23.35 Declaration in Support of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

Declaration in Support of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF
vs.	)	_____ [*name*]
_____ [*name*],	)	IN SUPPORT OF MOTION TO
Defendant.	)	_____ [STAY SALE
	)	*or* ENJOIN TRANSFER OR
	)	OTHER DISPOSITION] OF
	)	LEVIED PROPERTY
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. Plaintiff in the above-entitled action obtained a judgment against defendant _____ [*name*] in the amount of $_____.

3. In order to satisfy the judgment, plaintiff obtained a writ of execution pursuant to *Code of Civil Procedure Section 699.510* directing _____ [*name and title of levying officer*] to levy on certain property, to wit: _____ [*describe property*].

4. On _____ [*date*], _____ [*name and title of levying officer*] levied on the above-described property pursuant to the above-described writ of execution.

5. _____ [*set out facts showing title of declarant or of party through or from whom declarant seeks to obtain property, e.g.,* _____ (*name*), the third party claimant, has legal title to and is the lawful owner of the above-described property by right of purchase under a bill of sale dated _____ (*date*)].

6. On _____ [*date*], _____ [*name*], third party claimant, filed a third party claim with _____ [*name and title of levying officer*] [together with an undertaking in the amount of $_____ for the release of the above-described property] pursuant to *Code of Civil Procedure Section 720.110*.

[7. On _____ (*date*), _____ (*identify party, e.g.,* plaintiff) applied to the above-entitled court for a hearing to determine the validity of the third party claim pursuant to *Code of Civil Procedure Section 720.310*.]

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*]

NOTES.

Authority:
CCP § 270.380

Discussion:
See *23.09[9]*

Cross Reference:
See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.828 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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Chapter 23 Third Party Claims
VI. FORMS

2-23 MB Practice Guide: CA Debt Collection 23.36

23.36 Order Granting Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

Order Granting Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third Party Claim.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING MOTION
vs.	)	TO _____
_____ [*name*],	)	[STAY SALE *or* ENJOIN
Defendant.	)	TRANSFER OR OTHER
	)	DISPOSITION] OF LEVIED
	)	PROPERTY
	)	

_____

The motion of _____ [*identify party, e.g.,* third party claimant] for an order _____ [staying the sale of property *or* enjoining transfer or other disposition of property] levied on under a writ of _____ [*describe writ, e.g.,* execution] issued by this court on _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

[*EITHER*]

IT IS ORDERED that the motion be, and it hereby is granted and that _____ [*name and title of levying officer*] is stayed from selling certain property, to wit, _____ [*describe property*] under the writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court and that is the subject of a

third party claim until such time as the proceedings to determine the validity of the third party claim have commenced and have been prosecuted to termination.

[*OR*]

IT IS ORDERED that the motion be, and it hereby is granted and that _____ [*identify party, e.g.,* the judgment debtor] is enjoined from transferring or otherwise disposing of certain property, to wit, _____ [*describe property*] levied on under the writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court and that is the subject of a third party claim until such time as the proceedings to determine the validity of the third party claim have commenced and have been prosecuted to termination.

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

NOTES.

Authority:

CCP § 270.380

Discussion:

See *23.09[9]*

Cross Reference:

See *California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.829 (Matthew Bender)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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Chapter 24 Discharge and Satisfaction of Judgments

2-24 MB Practice Guide: CA Debt Collection 24.syn

§ 24.syn Synopsis to Chapter 24: Discharge and Satisfaction of Judgments

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24.23 [Reserved]

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24.29 Demand for Acknowledgment of Satisfaction of Judgment.

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24.32 Notice of Motion to Compel Compliance With Demand for Acknowledgment of Satisfaction of Judgment.

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Chapter 24 Discharge and Satisfaction of Judgments
I. STRATEGY

2-24 MB Practice Guide: CA Debt Collection 24.01

24.01 Scope.

This chapter covers satisfaction of judgments for damages, particularly:

- Whether a judgment has been satisfied [*see 24.03*].
- The judgment creditor's duty to file an acknowledgment of satisfaction [*see 24.09*].
- Demanding that the judgment creditor file an acknowledgment of satisfaction [*see 24.14*].
- The judgment creditor's compliance with such a demand [*see 24.17*].
- Recording and filing the acknowledgment of satisfaction to ensure that the judgment debtor is discharged [*see 24.24*].

References in this chapter to the judgment creditor include any person who has succeeded to the judgment creditor's interest. References to the judgment debtor include any person who has assumed the judgment debtor's liability or on whom it has been imposed by operation of law.

Core Statutes:
CCP §§ 724.010 et seq., 724.110 et seq., 724.210 et seq.

Cross References:

See Ch. 14, Assigning a Judgment.

Satisfaction of judgments in family law proceedings generally, see California Forms of Pleading and Practice, Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies; Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement; and Ch. 260, Family Law Enforcement: Foreign Judgments (Matthew Bender).

Satisfaction of judgments for child, family, or spousal support payable in installments, see *California Forms of Pleading and Practice, § 318.130* (Matthew Bender).

Satisfaction of judgments in small-claim cases, see *California Forms of Pleading and Practice, §*

526.111 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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Chapter 24 Discharge and Satisfaction of Judgments
I. STRATEGY

2-24 MB Practice Guide: CA Debt Collection 24.02

24.02 Objective and Strategy.

24.02[1] Satisfying a Judgment. A judgment for money is satisfied once the full amount that the judgment creditor is entitled to recover pursuant to the judgment has been paid, or the judgment creditor accepts a lesser sum in satisfaction of the judgment [*CCP § 724.010(a)*]. Satisfaction of a judgment automatically terminates the action in which the judgment was rendered, once the time for filing a notice of appeal has expired, unless an appeal is pending [*see CCP § 1049*].

Strategic Point--Judgment Creditor:

When preparing to levy on an asset that may have sufficient value to satisfy the judgment in full, the judgment creditor should add to the judgment all possible recoverable costs, including attorney's fees [*see* Ch. 16, Executing and Levying Against Personal Property, Ch. 17, Executing and Levying Against Real Property], by filing a Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest before commencing the levy. This will ensure that post-judgment costs will be satisfied, and will avoid having to perform a subsequent levy.

Strategic Point--Judgment Debtor:

Satisfaction of judgment is also important to a judgment debtor for purposes of compelling contribution or repayment. A judgment debtor entitled to compel contribution or repayment [*see CCP § 881 et seq.*] may move for an order determining liability for contribution or repayment. The notice of motion may be filed at any time but not later than 30 days after the judgment is satisfied in full [*CCP § 883(a)*].

Cross Reference:

For detailed discussion, see California Forms of Pleading and Practice, Ch. 300, Indemnity and Contribution (Matthew Bender).

In addition, satisfaction of judgment may be necessary to avoid suspension of the judgment debtor's driver's license under the Financial Responsibility Law [*Veh Code § 16370 et seq.*]. If the Financial Responsibility Law [*see Veh Code § 16000 et seq.*] is applicable because the judgment debtor's liability

arose from driving a motor vehicle, then the judgment debtor's driver's license could be suspended unless the judgment is satisfied, up to a specified threshold amount [*see Veh Code § 16377*; *see also Veh Code § 16379* (allowance for installment payments)], within 30 days after the judgment becomes final [*see Veh Code § 16370*].

Cross Reference:

For detailed discussion, see Ch. 20, Miscellaneous Creditor's Remedies; *see also California Forms of Pleading and Practice, § 92.93* (Matthew Bender).

Strategic Point--Judgment Debtor:

Satisfaction of judgment is important to the judgment debtor who is attempting to rehabilitate his or her credit. The judgment debtor should retain a certified copy of the satisfaction to present to potential creditors to prove payment in full, as it sometimes takes collection reporting services awhile to report such payment (if they report it at all).

Strategic Point--Judgment Debtor's Discharge:

To obtain discharge from the liability of the judgment, in lieu of paying the amount required for satisfaction, the judgment debtor may be in a position to choose as an alternative either:

- Setting off a claim that the judgment debtor has against the judgment creditor [*see 24.27[1]*]; or
- Starting a bankruptcy proceeding [*see 24.27[2]*].

Warning:

A discharge of the judgment amount in bankruptcy does not necessarily exonerate a judgment lien created beyond the preference period on real or personal property by way of an attachment, abstract, or personal property business lien filing. In order for a lien to be released in a bankruptcy, the debtor must file a motion to avoid lien.

24.02[2] Record of Satisfaction of Judgment. It is important to the judgment debtor that satisfaction of the judgment is reflected in the court's record, so that the judgment debtor is discharged from the liability that the judgment established [*cf. Brochier v. Brochier (1941) 17 C2d 822, 825-826, 112 P2d 602* (sale under writ of execution issued on satisfied judgment is void)].

The court clerk must enter satisfaction of a money judgment in the register of actions when one of the following occurs [*CCP § 724.020(a)*]:

- A writ is returned satisfied for the full amount of a lump sum judgment.
- An acknowledgment of satisfaction of judgment is filed with the court.
- The court orders entry of satisfaction of judgment.

Warning--Judgment Creditor:

The judgment creditor has a statutory duty to file an acknowledgment "immediately" once the judgment has been satisfied, except when it has been fully satisfied pursuant to a writ [*CCP § 724.030*]. Failure to file an acknowledgment once that duty has arisen can expose the judgment creditor to liability to the judgment debtor for damages and a statutory penalty [*see CCP § 724.050*], plus attorney's fees [*see CCP § 724.080*]. In addition, other potential claims for actions such as derogation of credit, unfair business practices, and infliction of emotional distress are not precluded [*see CCP § 724.090*].

Strategic Point--Judgment Creditor:

If a payment arrangement is made with the judgment debtor in advance, the judgment creditor should ensure it provides for the expiration of the 90-day bankruptcy preference period before being required to file the satisfaction. There is nothing in the Code of Civil Procedure that says the parties cannot agree to a later period, and it may help to preserve the judgment creditor's claim as a secured creditor if the debtor files a bankruptcy petition within 90 days of payment being received. This is good practice to require prior to dismissal of a case upon receipt of settlement payments.

Strategic Point--Judgment Debtor:

When the judgment creditor's statutory duty arises, and the judgment creditor does not "immediately" file an acknowledgment of satisfaction, the judgment debtor may serve on the judgment creditor a demand that an acknowledgment be filed or be delivered to the judgment debtor. The judgment creditor has a duty to comply not later than 15 days after receiving the demand. If necessary, the judgment debtor thereafter may move the court for an order either directing the judgment creditor to comply with the demand or directing the court clerk to enter satisfaction of the judgment. In the motion, or in a subsequent action, the judgment debtor may claim damages, a statutory penalty, and attorney's fees [*see CCP §§ 724.050*, *724.080*].

Strategic Point--Judgment Debtor:

The judgment debtor should accompany payment to the judgment creditor with a demand to file an acknowledgment of satisfaction and deliver an additional original to the debtor for his or her files.

Strategic Point--Judgment Debtor:

The judgment debtor may encounter a situation in which the judgment creditor has filed bankruptcy or no longer exists, or the debt has been assigned to a third party who the judgment debtor cannot find. The judgment debtor could use an interpleader action to determine who is the actual judgment creditor, and have the court issue a satisfaction of judgment once the judgment debtor proves that the debt is satisfied.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

Cross Reference:

Renewal of judgments, see Ch. 13, Expiration and Renewals of Judgments.

24.02[3] Partial Satisfaction of Judgment. Demands for acknowledgment of *partial* satisfaction of a judgment may be made under some circumstances. Whenever a judgment for money has been partially satisfied, the judgment debtor (or any owner of property on which there is a judgment lien created under the judgment) may serve a demand on the judgment creditor that an acknowledgment of partial satisfaction of the judgment be delivered to the judgment debtor (or property owner). The judgment creditor thereupon has a statutory duty to comply not later than 15 days after receiving the demand; and thereafter, if necessary, the judgment debtor (or property owner) may move for an order directing the judgment creditor to comply [*CCP §§ 724.110*, *724.220*, *724.230*].

Strategic Point--Judgment Creditor:

Under the wage garnishment statutes, the levying officer must report payments on the writ to the court. This requirement can be interpreted as exonerating or superseding the obligation, if any, of a judgment creditor to file partial satisfactions [*see CCP § 706.026*; *see also Ch. 21, Garnishment, 21.16[2]*]. However, in the event of any dispute, the better course for the judgment creditor would be to file a partial satisfaction on appropriate demand of the judgment debtor.

Consider:

The judgment debtor may want acknowledgment of partial satisfaction to "free up" equity in property on which a lien is recorded, or as part of a plan to rehabilitate his or her credit. For example, a judgment debtor may need to prove to a lender or other third party that he or she owes only $5,000 on a $25,000 judgment. The judgment is recorded for the full $25,000, and does not reflect the $20,000 the debtor has already paid to the judgment creditor. The only way to for the judgment debtor to show this is to have the judgment creditor provide an acknowledgment of partial satisfaction showing the valid amount still due.

If there are joint and several debtors obligated to the creditor, but there is an agreement between debtors apportioning the repayment, the debtors who pay their portion may want proof of that to exonerate themselves with regard to their co-debtors. An acknowledgment of partial satisfaction may provide that proof.

Cross Reference:

Demand for acknowledgment of full or partial satisfaction, see *24.15[1]*.

For Tips on updating case law and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 24 Discharge and Satisfaction of Judgments
II. DETERMINING WHETHER JUDGMENT IS SATISFIED

2-24 MB Practice Guide: CA Debt Collection 24.03

24.03 CHECKLIST: Determining Whether Judgment Is Satisfied.

☐ Determine whether judgment has been satisfied; that is, total amount of judgment as entered or renewed has been paid, with:

- ○ Addition of costs added to judgment;
- ○ Addition of interest added to judgment as it accrues;
- ○ Subtraction of amount of any partial satisfactions of judgment; and
- ○ Subtraction of amount of any portion of judgment that is no longer enforceable.

Authority:
CCP §§ 695.210, 724.010(a)

Discussion:
See *24.04*

☐ If less has been paid than is required for full satisfaction of judgment, determine extent to which judgment has been satisfied.

- ○ Judgment creditor may accept any amount paid as full satisfaction of judgment.

Authority:
CCP § 724.010(a)

Discussion:
See *24.04*

○ Installment judgment against health care provider, under which lien may be created on interest in real property under *CCP § 697.320*, is satisfied to extent of payment of matured installments, meaning sum of:

☐ All amounts and installments that have matured under installment judgment on or before date specified in demand for acknowledgment of satisfaction of matured installments under installment judgment;

☐ Interest that has accrued on installment judgment on date specified in demand; and

☐ Costs that have been added to installment judgment on or before date specified in demand pursuant to *CCP § 685.010 et seq*.

Authority:
CCP § 724.210(b)

○ In any other case, judgment is partially satisfied to extent of total amount paid to date.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestPostjudgment InterestCivil ProcedureRemediesJudgment InterestPrejudgment InterestCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 24 Discharge and Satisfaction of Judgments
II. DETERMINING WHETHER JUDGMENT IS SATISFIED

2-24 MB Practice Guide: CA Debt Collection 24.04

24.04 Satisfaction Means Payment of Judgment in Full.

24.04[1] Amount of Judgment As Entered Must Be Paid. A money judgment is satisfied by payment of the full amount required to satisfy the judgment [*CCP § 724.010(a)*]. The amount required to satisfy a money judgment is the total amount of the judgment as entered or renewed, with adjustment by [*CCP § 695.210*]:

- Addition of costs [*see 24.04[2]*].
- Addition of interest [*see 24.04[3]*].
- Subtraction of partial payments and uncollectible amounts [*see 24.04[4]*].

Exception--Postjudgment Settlement:
Alternatively, a money judgment is satisfied by acceptance by the judgment creditor of a lesser sum in full satisfaction of the judgment [*CCP § 724.010(a)*]. Therefore, the parties may negotiate a postjudgment settlement, with the same effect as if the judgment actually was paid in full [*see generally Schwartz v. California Claim Serv. (1942) 52 CA2d 47, 54-55, 125 P2d 883*].

Strategic Points--Judgment Creditor:

- It may be appropriate to negotiate a satisfaction of judgment for a lesser sum than due under the judgment when there are multiple judgment debtors, and there is the prospect of receiving a full recovery from the remaining judgment debtors. It also may be appropriate when the judgment debtor is in precarious financial condition and the alternative may be a bankruptcy filing.

- Judgments are valid for 10 years [*see CCP § 683.020*] and renewable [*see CCP § 683.110 et seq.*], so it is not unusual for a judgment written off by the judgment creditor to reappear years later. This can occur when the judgment debtor is trying to refinance, purchase a piece of property, or just clean up his or her credit. In these situations, the judgment creditor should negotiate a settlement to get as much money as quickly as possible. Although the judgment creditor can sit on the judgment if the judgment

debtor cannot or will not pay all of it, most creditors would rather collect something than nothing, and negotiated satisfactions are a strong incentive for the debtor to pay as much as possible. Under these circumstances, the judgment creditor should consider a partial satisfaction and/or a partial lien release as to specific property only. This allows the judgment creditor to retain a lien position if the judgment debtor later owns or acquires more property.

- Any settlement agreement should require the delivery of a full satisfaction of judgment in recordable form, with a specified number of days after receipt of the settlement payment.

Strategic Points--Judgment Debtor:

The judgment debtor should ensure that any discounted sum agreed upon as full satisfaction of the judgment is in writing in case of future disputes.

The judgment debtor, in any settlement agreement, should require the judgment creditor to agree to an affirmative duty to advise the judgment debtor in the event a payment is made on behalf of the judgment debtor to the judgment creditor.

Warning--Withholdings in Employment Cases:

If the judgment creditor is or was employed by the judgment debtor, the judgment might consist of damages for unpaid earnings. Depending on the circumstances, the judgment debtor might be required by tax law to withhold taxes before paying such damages. If withholding were required, then the judgment debtor should be entitled to consider the judgment as fully satisfied on payment of the withheld amounts to the tax collectors and payment of the remainder (including accrued interest and costs) to the judgment creditor [*see Lisec v. United Airlines, Inc. (1992) 10 CA4th 1500, 1507, 11 CR2d 689*].

Cross References:

Entry of judgment, see *California Forms of Pleading and Practice, § 318.54* (Matthew Bender).

Renewal of judgment, see Ch. 13, Expiration and Renewal of Judgments.

Partial or specific release of judgment liens, see *Ch.11, Obtaining and Removing Judgment Liens, 11.14*.

24.04[2] Costs Will Be Added. Costs must be added to the judgment pursuant to *CCP § 685.090* [*CCP § 695.210*].

Distinguish--Judgment in Favor of Public Agency:

If the judgment creditor is a public agency, the judgment as entered could include an amount added by the clerk for the clerk's fees that were not collected from the agency [*see Gov Code § 6103.5*].

Cross Reference:

California Forms of Pleading and Practice, Ch. 174, Costs and Attorney's Fees (Matthew Bender).

24.04[3] Interest Will Be Added. Interest must be added to the judgment as it accrues pursuant to *CCP §§ 685.010-685.030* [*CCP § 695.210*].

- Interest accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied [*CCP § 685.010*].

- Generally the interest accrues from the date of entry of the judgment [*CCP § 685.020(a)*; *see generally Ehret v. Congoleum Corp. (2001) 87 CA4th 202, 206-210, 104 CR2d 370]* or the date each installment becomes due under an installment judgment [*CCP § 685.020(b)*].

- Interest ceases to accrue on the date the judgment is satisfied in full [*CCP § 685.030(b)*] or, in the event of partial satisfaction, as to the part satisfied, on the date that part is satisfied [*CCP § 685.030(c)*].

Distinguish--Personal Injury Case:

In a personal injury case, if the judgment creditor made a settlement offer that the judgment debtor rejected, the interest could accrue from the date of the judgment creditor's settlement offer instead of from the date of entry of the judgment [*see* CCP § 3291; *see generally Steinfeld v. Foote-Goldman Proctologic Med. Group, Inc. (1997) 60 CA4th 13, 17-23, 70 CR2d 41*].

Strategic Point--Noncash Payment:

In the event the judgment debtor pays by check (or other noncash means), the accrual of interest is suspended as of the date the judgment creditor accepts the check; and if the check eventually is paid in due course, then the date of the judgment creditor's acceptance becomes the date of satisfaction of the judgment, and no interest may be added from that date forward [*Long v. Cuttle Constr. Co. (1998) 60 CA4th 834, 837-838, 70 CR2d 698* ; *see CCP § 685.030(d)*].

Recordkeeping:

The judgment creditor should track the payments received, add the interest, and apply the payments to accrued interest before applying them to the principal amount of the judgment. The judgment should already have interest accrued through judgment in the total judgment amount, and the post-judgment interest is added to that new judgment principal amount. This good habit can also assist the judgment creditor when deciding if it is necessary to periodically file partial satisfactions.

Cross Reference:

Interest on judgment, see *California Forms of Pleading and Practice, § 318.57* (Matthew Bender).

24.04[4] Partial Payments and Uncollectible Amounts Will Be Subtracted. The judgment as entered is adjusted by subtraction of the amount of any partial satisfactions of the judgment and subtraction of the amount of any portion of the judgment that is no longer enforceable [*CCP § 695.210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEffectsCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment InterestPostjudgment InterestCivil ProcedureRemediesJudgment InterestPrejudgment InterestCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 24 Discharge and Satisfaction of Judgments
II. DETERMINING WHETHER JUDGMENT IS SATISFIED

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24.05 Satisfaction of Judgment Must Be Entered in Court's Record.

24.05[1] Clerk Must Enter Judgment As Satisfied Upon Filing of Acknowledgment of Satisfaction of Judgment. The court clerk must enter satisfaction of a money judgment in the register of actions when an acknowledgment of satisfaction of the judgment is filed with the court [*CCP § 724.020(b)*].

24.05[2] Clerk May Enter Satisfaction of Lump Sum Judgment Upon Return of Writ. If a writ is returned satisfied for the full amount of a lump sum judgment, the clerk will enter satisfaction of the judgment based on the return of the writ; and in that case, the filing of an acknowledgment of satisfaction is not necessary [*see CCP §§ 724.020(a), 724.030*].

Consider:

It appears that there is a possible conflict between *CCP § 724.010(b)* and *CCP § 724.020(a)*. A judgment creditor is required to file a satisfaction when the judgment is satisfied by levy, but only when the judgment creditor has received the full amount required to satisfy the judgment from the levying officer [*CCP § 724.010(b)*]. However, the court clerk is required to enter satisfaction of a money judgment when a writ is returned satisfied for the full amount of a lumpsum judgment [*CCP § 724.020(a)*].

A levying officer may return a writ as satisfied, but the judgment may not be paid in full, for example when postjudgment fees and costs have been added to the judgment after issuance of the writ. In that situation, the judgment creditor has no obligation to file a satisfaction under *CCP § 724.010(b)*, but the clerk is required to enter a satisfaction under *CCP § 724.020(a)*.

As a practical matter, it is unlikely that a court clerk would take it upon him or herself to file a satisfaction, because this is a fairly drastic move that disposes of the entire action.

24.05[3] Court May Order Clerk to Enter Satisfaction of Judgment. If the judgment creditor has a duty to file an acknowledgment [*see 24.09*] but has not done so, the court may simply order entry of satisfaction of the judgment in lieu of ordering the judgment creditor to file an acknowledgment; and in that case, the clerk will duly enter satisfaction of the judgment [*see CCP §§ 724.020(c), 724.050(d)*].

24.05[4] Labor Commissioner May Order Clerk to Enter Satisfaction of Judgment. If the judgment was entered on the Labor Commissioner's order, decision, or award in the case of a complaint by an employee against the

employer [*see Lab Code § 98.2(e)*], then when the judgment is satisfied in fact, other than by execution, the Labor Commissioner, on the motion of either party or on its own motion, may order entry of satisfaction of the judgment. The clerk of the court must enter satisfaction of judgment on the filing of a certified copy of the order [*Lab Code § 98.2(h)*].

Cross Reference:

California Forms of Pleading and Practice, § 250.32 (Matthew Bender).

24.05[5] Workers' Compensation Appeals Board May Order Clerk to Enter Satisfaction of Judgment. If the judgment was entered on the order, decision, or award of the Workers' Compensation Appeals Board [*see Lab Code § 5806*], then when the judgment is satisfied in fact, otherwise than on an execution, the board, on motion of either party or sua sponte, may order the entry of satisfaction of the judgment. The clerk must enter satisfaction of judgment on the filing of a certified copy of the order [*Lab Code § 5809*].

Cross Reference:

California Forms of Pleading and Practice, § 577.246 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcement

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24.06 Clerk Can Provide Proof of Satisfaction of Judgment.

If satisfaction of a judgment has been entered in the register of actions, the court clerk must issue a certificate of satisfaction of judgment on application and payment of the fee as provided in *Gov Code § 70626(a)* [*CCP § 724.100(a)*]. The certificate of satisfaction of judgment must contain the following information [*CCP § 724.100(b)*]:

- The title of the court.
- The cause and number of the action.
- The names of the judgment creditor and the judgment debtor.
- The date of entry of judgment and of any renewals of the judgment, and where they are entered in the records of the court.
- The date of entry of satisfaction of judgment, and where it was entered in the register of actions.

Consider:

Anyone can apply for a certificate of satisfaction of judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionGovernmentsCourtsClerks of Court

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24.07 Judgment Creditor May Obtain Relief on Ground Such As Fraud.

When a satisfaction of judgment has been erroneously entered--for instance, because of fraud, undue influence, or mistake [*Remillard Brick Co. v. Dandini (1950) 98 CA2d 617, 622, 220 P2d 927*]--it may be canceled either on motion made in the original action or by means of an independent action in equity between the parties [*Kinnison v. Guaranty Liquidating Corp. (1941) 18 C2d 256, 265, 115 P2d 450* (dictum); *see Hrimnak v. Watkins (1995) 38 CA4th 964, 987, 45 CR2d 514* (Davis, J., concurring)].

Example:

If payment is made by check, banks typically allow an account holder a reasonable period of time, not exceeding 30 days, to challenge a check as wrongfully honored [*Com Code § 4406(d)(2)*; *see Com Code § 4406(f)* (one-year Commercial Code limitation)]. Even if the customer notifies the bank within a reasonable period, the bank can still seek to apportion fault [*see Com Code § 4406(e)*]. If a wrongfully honored check passed through the judgment creditor's account, it may subject the judgment creditor to suit for repayment of the funds. If the payee was altered, it might take the maker of the check several months to discover that fact, at which point the check will already have been paid. This is one possible reason for setting aside a prior satisfaction.

Warning:

A payment made within 90 days of the filing of a bankruptcy petition can be set aside as a preference and the funds sent back to the trustee of the bankruptcy estate [*see 11 USC § 547*]. In order to avoid this situation, the judgment creditor should get an agreement in advance that states that the judgment creditor does not have to immediately file an acknowledgment of satisfaction, but can delay filing for at least 95 days. If the judgment creditor cannot get such an agreement, the acknowledgment of satisfaction must be filed immediately [*see CCP § 724.030*]. If the judgment creditor is secured by a lien on real property that has been seasoned for more than 90 days, and there is sufficient equity value beyond the homestead exemption amount to cover the lien, then this is not as much of an issue because the judgment creditor is deemed a secured creditor.

Strategic Points--Judgment Creditor:

If fraud supported the filing of an acknowledgment of satisfaction, the judgment creditor should consider filing a separate complaint. Depending on the circumstances, the complaint potentially could allege

causes of action for fraud, conversion, emotional distress, and/or potentially unfair business practices. The new complaint may also allow the judgment creditor to bring in new defendants in addition to the judgment debtor.

The judgment creditor also can attack the satisfaction of judgment by making a motion in the underlying action to vacate the satisfaction based upon mistake, inadvertence, surprise, or excusable neglect [*see CCP § 473(b)*].

Investigating Setting Aside a Satisfaction of Judgment Using Online Resources:

Many resources are available online for investigating case law dealing with how to set aside, cancel, or vacate a satisfaction of judgment. For example, helpful resources at *lexis.com* include:

- Legal tab > States Legal--U.S. > California > Cases > CA State Cases, Combined
- Legal tab > States Legal--U.S. > California > Cases > CA Published Cases, Combined

  - Sample Search: To find decisions that involve setting aside a satisfaction of judgment, use this search: *satisfaction of judgment /5 cancel! or set! aside or vacat! /12 fraud! or mistake! or excusable neglect or undue influence or duress or inadverten! or surprise*.

Cross References:

Proceedings to vacate satisfaction of judgment, see *California Forms of Pleading and Practice, § 318.132* (Matthew Bender).

Vacating judgment for mistake, inadvertence, surprise, or excusable neglect, see *California Forms of Pleading and Practice, § 489.32* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsPreference PeriodsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentFraudReal Property LawHomestead Exemptions

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24.08 Satisfaction of Judgment Does Not Preclude Appeal.

The judgment debtor's payment of all or any part of the amount required for satisfaction of a judgment will not preclude the judgment debtor from pursuing an appeal (if a timely notice of appeal was filed) unless the parties effected a compromise or the judgment debtor agreed to forgo an appeal [*Reitano v. Yankwich (1951) 38 C2d 1, 2-4, 237 P2d 6* ; *e.g., Stone v. Regents of Univ. of Cal. (1999) 77 CA4th 736, 745, 92 CR2d 94]* .

Cross Reference:

Acknowledgment of satisfaction of judgment does not always preclude appeal, see *24.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

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III. FILING ACKNOWLEDGMENT OF SATISFACTION BY JUDGMENT CREDITOR

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24.09 CHECKLIST: Filing of Acknowledgment of Satisfaction by Judgment Creditor.

☐ Determine whether judgment creditor has duty to file acknowledgment of satisfaction.

○ Generally, judgment creditor's duty to file acknowledgment of satisfaction arises immediately when judgment is satisfied.

Authority:
CCP § 724.030

Discussion:
See *24.10[1]*

☐ When judgment is satisfied in full pursuant to a writ, judgment creditor has no duty to file an acknowledgment of satisfaction [*CCP § 724.030*]; return on writ takes place of acknowledgment by judgment creditor.

○ If judgment is satisfied by payment to judgment creditor by check or other form of noncash payment that is to be honored on presentation for payment, judgment creditor's duty to file acknowledgment of satisfaction arises only when check or other form of noncash payment has actually been honored on presentation for payment.

Authority:
CCP § 724.010(c)

Discussion:
See *24.10[2][a]*

○ If judgment is satisfied by levy, judgment creditor's duty to file acknowledgment of satisfaction arises only when judgment creditor receives full amount required to satisfy judgment from levying officer.

Authority:
CCP § 724.010(b)

Discussion:
See *24.10[2][b]*

☐ Determine whether judgment creditor has special duty to acknowledge satisfaction of judgment in particular case because:

○ Earnings withholding order was issued.

Authority:
CCP § 706.027

Discussion:
See *24.10[3][a]*

○ Judgment creditor is owner of mobilehome park and obtained judgment for unpaid rent against registered owner of manufactured home or mobilehome registered with Department of Housing and Community Development.

Authority:
H&S Code §§ 18080.9, 18100.5(a)(4)

Discussion:
See *24.10[3][b]*

☐ Judgment creditor must complete Judicial Council Form EJ-100, Acknowledgment of Satisfaction of Judgment.

Authority:
CCP § 724.060

Discussion:
See *24.11*

Form:
See *24.28*

☐ File completed Form EJ-100 "immediately" with clerk of court.

Authority:
CCP § 724.030

Discussion:
See *24.10[1]*

☐ Serve completed Form EJ-100 "immediately" on judgment debtor, by personal delivery or by mail, if abstract of judgment (or certified copy of installment judgment against health care provider) was recorded in any county.

Authority:
CCP § 724.040

Discussion:
See *24.12*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawNonmortgage LiensJudgment Liens

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24.10 Judgment Creditor Must File Acknowledgment of Satisfaction of Judgment.

24.10[1] Duty Arises Immediately on Satisfaction. When a money judgment is satisfied, the judgment creditor immediately must file with the court an acknowledgment of satisfaction of judgment [*CCP § 724.030*].

Exception:

This requirement does not apply when the judgment is satisfied in full pursuant to a writ [*CCP § 724.030*]. The return on the writ takes the place of the judgment creditor's acknowledgment.

Timing:

There is no established definition of "immediately." Some judgments often are satisfied by satisfaction, the satisfaction is usually delivered to opposing counsel within an agreed upon number of days. In all cases, it is good practice for the judgment creditor to file the acknowledgment of satisfaction as soon as practicable after good funds (e.g., cashier's or official bank check) have been received, or after a settlement check has cleared [*see CCP § 724.010(c)*]. The judgment creditor should file no later than the 15 days set forth for the demand period by the debtor [*see CCP § 724.110*].

24.10[2] Duty to File Is Conditional in Some Cases.

24.10[2][a] Duty to File Arises When Check or Similar Noncash Payment Is Honored. If a money judgment is satisfied by payment to the judgment creditor by check or other form of noncash payment that is to be honored on presentation by the judgment creditor for payment, the obligation of the judgment creditor to give or file an acknowledgment of satisfaction of judgment arises only when the check or other form of noncash payment has actually been honored on presentation for payment [*CCP § 724.010(c)*].

24.10[2][b] Duty to File Arises When Creditor Has Received Full Amount of Judgment Levy From Levying Officer. If a money judgment is satisfied by levy, the obligation of the judgment creditor to give or file an acknowledgment of satisfaction arises only when the judgment creditor has received the full amount required to satisfy the judgment from the levying officer [*CCP § 724.010(b)*].

24.10[3] Special Duty to Acknowledge Satisfaction of Judgment Exists in Some Cases.

24.10[3][a] Duty Exists When an Earnings Withholding Order Was Issued. If the judgment pursuant to which

an earnings withholding order was issued is satisfied before the order otherwise terminates [*see CCP § 706.022* (terminations)], the judgment creditor must promptly notify the levying officer, who must promptly terminate the order by serving a notice of termination on the employer [*CCP § 706.027*].

Strategic Point--Judgment Creditor:

The judgment creditor has an affirmative duty to instruct the levying officer to cease enforcement of the withholding order, which is why the judgment creditor should track payments received. The levying officer is not required to file a return of the writ as being paid in full, so the affirmative duty to file the acknowledgment of satisfaction falls back on the judgment creditor.

Cross Reference:

Earnings withholding orders, see *Ch. 21, Garnishment, 21.14* et seq.

24.10[3][b] Duty Exists When Judgment Is for Unpaid Rent Against Registered Owner of Manufactured Home or Mobilehome. When a judgment creditor is the owner of mobilehome park and obtained judgment for unpaid rent against the registered owner of a manufactured home or mobilehome registered with the Department of Housing and Community Development, the judgment lien must be released on satisfaction of the money judgment [*H&S Code § 18080.9(c)*]. The judgment creditor must indicate its release of lien by signing the certificate of title and forwarding the certificate to the department, with appropriate fees. The department will amend the permanent title record, deliver a new certificate of title reflecting the change to the permanent title record to the new legal owner, if any, by first class mail, and forward an amended registration card reflecting the change to the permanent title record to the registered owner with copies to all secured parties shown on the registration card [*H&S Code § 18100.5(a)(4)*].

Cross Reference:

Mobilehome liens, see California Forms of Pleading and Practice, Ch. 369, Mobilehomes and Mobilehome Parks (Matthew Bender).

Warning:

If the judgment has been satisfied, a judgment creditor who fails without just cause to comply with *H&S Code § 18100.5* (requiring notification to the department after satisfaction of the judgment), will be liable for damages, a penalty of $100, and attorney's fees [*H&S Code § 18080.9(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksSecurity InterestsReal Property LawNonmortgage LiensJudgment Liens

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24.11 Statute Mandates Content and Execution of Acknowledgment.

24.11[1] Judgment Creditor Should Use Judicial Council Form EJ-100. The judgment creditor should use Judicial Council Form EJ-100, Acknowledgment of Satisfaction of Judgment, which has been approved for optional use [*see Cal Rules Ct, Rule 1.35*].

Cross Reference:

Form EJ-100, see *24.28*.

24.11[2] Content Is Prescribed--Full Satisfaction. An acknowledgment of full satisfaction of judgment must contain the following information [*CCP § 724.060(a)*]:

- The title of the court.
- The cause and number of the action.
- The names and addresses of the judgment creditor, the judgment debtor, and the assignee of record if any.

Warning:

If an abstract of the judgment has been recorded in any county, the judgment debtor's name must appear on the acknowledgment of satisfaction of judgment as it appears on the abstract of judgment [*CCP § 724.060(a)(3)*].

- The date of entry of judgment and of any renewals of the judgment and where entered in the records of the court.
- A statement that either:
  - The judgment is satisfied in full; or

- The judgment creditor has accepted payment or performance other than that specified in the judgment in full satisfaction of the judgment.

- A statement whether an abstract of the judgment has been recorded in any county and, if so:
  - A statement of each county where the abstract has been recorded, and the book and page or instrument number of the county records where the abstract has been recorded; and
  - A notice that the acknowledgment of satisfaction of judgment (or a court clerk's certificate of satisfaction of judgment) will have to be recorded with the county recorder of each county where the abstract of judgment has been recorded in order to release the judgment lien on real property in that county.

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

Cross Reference:

Clerk's certificate of satisfaction of judgment, see *24.06*.

24.11[3] Content Is Prescribed--Satisfaction of Matured Installments. An acknowledgment of satisfaction of matured installments under an installment judgment against a health care provider must contain the following information [*CCP § 724.250(a)*]:

- The title of the court.
- The cause and number of the action.
- The names and addresses of the judgment creditor, the judgment debtor, and the assignee of record if any.

Warning:

The judgment debtor's name must appear on the acknowledgment of satisfaction of matured installments as it appears on the certified copy of the judgment (or an abstract of the judgment) that was recorded to create the judgment lien.

- The date of entry of the judgment and of any renewals of the judgment and where entered in the records of the court.
- A statement that the matured installments under the installment judgment had been satisfied as of a specified date.

- A statement whether a certified copy or abstract of the judgment has been recorded in any county and, if so, a statement of each county where the certified or abstract copy has been recorded and the book and page of the county records where the certified copy or abstract of the judgment has been recorded.

24.11[4] Content Is Prescribed--Partial Satisfaction in Other Cases. An acknowledgment of partial satisfaction of judgment in any other case must contain the following information [*CCP § 724.120*]:

- The title of the court.

- The cause and number of the action.

- The names and addresses of the judgment creditor, the judgment debtor, and the assignee of record if any.

Warning:

If an abstract of the judgment has been recorded in any county, the judgment debtor's name must appear on the acknowledgment of partial satisfaction of judgment as it appears on the abstract of judgment.

- The date of entry of judgment and of any renewals of the judgment and where entered in the records of the court.

- A statement of the amount received by the judgment creditor in partial satisfaction of the judgment.

- A statement whether an abstract of judgment has been recorded in any county and, if so, a statement of each county where the abstract has been recorded and the book and page of the county records where the abstract has been recorded.

- A statement whether a notice of judgment lien has been filed in the office of the Secretary of State and, if so, the file number of the notice.

Distinguish--Partial Settlement and Multiple Judgment Debtors:

Partial satisfaction can occur either with reference to a fraction of the whole amount of the judgment or with reference to the share of liability to be borne by one of two or more judgment debtors. A partial satisfaction respecting one of the judgment debtors will entail the negotiation of a postjudgment settlement. The parties should be careful to ensure that the judgment creditor's acknowledgment of partial satisfaction accurately and clearly reflects that settlement. For example, a statement such as "in full satisfaction of his/her/its pro rata share of liability under the judgment" should be appended to the released judgment debtor's name in Paragraph 4 of Form EJ-100 [*see McCall v. Four Star Music Co. (1996) 51 CA4th 1394, 1401, 59 CR2d 829]* .

24.11[5] Acknowledgment of Satisfaction of Judgment Must Be Notarized. The acknowledgment of satisfaction of judgment must be made in the manner of an acknowledgment of a conveyance of real property and must be executed and acknowledged by one of the following [*CCP §§ 724.060(b), (c), 724.120, 724.250(a)*]:

- The judgment creditor;

- The assignee of record; or

- The attorney for the judgment creditor or assignee of record, unless a revocation of the attorney's authority is filed.

Warning:

The satisfaction of judgment must be notarized and the notary acknowledgment attached to it, if an abstract was recorded and the satisfaction will be recorded. The recorder's office will not accept photocopies of signatures, or other copies that they may deem illegible. The judgment creditor should send or obtain at least one original notarized satisfaction for each county in which an abstract has been recorded.

Cross Reference:

Discussion of acknowledgment of deed, see *California Legal Forms, § 27.27* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionReal Property LawNonmortgage LiensJudgment Liens

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24.12 Acknowledgment Must Be Filed and Served When Abstract of Judgment Has Been Recorded and Judgment Is Satisfied.

If an abstract of a money judgment (or a certified copy of a money judgment against a health care provider that calls for installment payments) has been recorded with the recorder of any county, and the judgment is satisfied, the judgment creditor must immediately do both of the following [*CCP § 724.040*]:

- File an acknowledgment of satisfaction of judgment with the court.

- Serve an acknowledgment of satisfaction of judgment on the judgment debtor, by personal delivery or by mail.

- The notarized acknowledgment also should be recorded where real property judgment liens have been recorded. Originals or certified copies from the court are needed to be able to record them.

Warning--Installment Judgments:

Recording a certified copy of an installment judgment is functionally equivalent to recording an abstract of judgment, in that a judgment lien is created on the judgment debtor's nonexempt real property in either case [*see CCP § 697.310 et seq.*]. Therefore, an acknowledgment of satisfaction of matured installments under an installment judgment against a health care provider is required to disclose the specific recordation facts when either an abstract of the judgment or a certified copy of the judgment was recorded [*CCP § 724.250(a)*; *see 24.11[3]*]. While *CCP § 724.040* does not expressly extend to a case in which a certified copy of an installment judgment was recorded in lieu of an abstract of the judgment, the judgment creditor should serve an acknowledgment of satisfaction in either case.

Distinguish--Service of Original or Copy:

The statute apparently requires the judgment creditor to serve an original acknowledgment of satisfaction, not a copy of the filed acknowledgment. One purpose of requiring service on the judgment debtor is to enable the judgment debtor to have the judgment lien extinguished. An original acknowledgment may be recorded in order to extinguish a judgment lien on real property that was created by the recording of an abstract or a certified copy of the judgment [*see CCP § 697.400*; *see generally Gov Code § 27279 et seq.* (documents that may be recorded)]. However, a court-certified copy of the filed acknowledgment also is recordable [*Gov Code § 27282(a)(9)*], and service of such a copy should meet the requirement of *CCP § 724.040*.

Strategic Point--Judgment Creditor:

The judgment creditor must serve an acknowledgment of satisfaction of judgment on the judgment debtor by personal delivery or by mail [*CCP § 724.040(b)*]. The judgment creditor may want to include a cover letter advising the debtor that the satisfaction must be recorded in the counties where abstracts of judgment have been recorded, in order to remove the judgment lien. The judgment creditor also should keep an additional original acknowledgment of satisfaction for his or her records.

Strategic Point--Judgment Debtor:

The judgment creditor is not required to record the satisfaction, so it is incumbent on the judgment debtor to make certain that a satisfaction of judgment is recorded in every county where an abstract has been recorded. The judgment debtor should ask the creditor for a list of the counties where the abstracts are recorded, and request an original acknowledgment for each county as the recorder's offices will not accept copies.

Cross Reference:

Filing and recording an abstract of judgment, see Ch. 11, Obtaining and Removing Judgment Liens.

Recording an acknowledgment of satisfaction of judgment, see *24.24* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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2-24 MB Practice Guide: CA Debt Collection 24.13

24.13 Acknowledgment of Satisfaction Does Not Preclude Appeal in Some Cases.

Acknowledging satisfaction of a judgment will not preclude the judgment creditor from pursuing an appeal to assert that the amount awarded by the judgment is too little [*In re Marriage of Fonstein (1976) 17 C3d 738, 744,131 CR 873, 552 P2d 1169* ; *e.g., Furlough v. Transamerica Ins. Co. (1988) 203 CA3d 40, 44-45, 249 CR 703]* .

Cross Reference:

Satisfaction of judgment does not preclude appeal, see *24.08*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureAppealsReviewabilityGeneral Overview

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IV. MAKING DEMAND FOR ACKNOWLEDGMENT OF FULL OR PARTIAL SATISFACTION

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24.14 CHECKLIST: Making Demand for Acknowledgment of Full or Partial Satisfaction.

☐ Determine whether judgment has been satisfied or partially satisfied for purposes of enforcement of judgment creditor's duty to file acknowledgment or comply with demand for acknowledgment. [*see 24.03*].

Authority:
CCP §§ 695.210, 724.010(a)

Discussion:
See 24.03.

☐ Draft demand for appropriate acknowledgment of satisfaction, either:

○ Full satisfaction of judgment.

Authority:
CCP § 724.050(a)

Discussion:
See *24.15*

Form:
See *24.29*

○ Satisfaction of matured installments under installment judgment against health care provider.

Authority:
CCP § 724.220(a)

Discussion:

See *24.15*

Form:
See *24.30*

○ Partial satisfaction of judgment in other case.

Authority:
CCP § 724.110(a)

Discussion:
See *24.15*

Form:
See *24.31*

☐ Serve demand by personal delivery or by mail.

Authority:
CCP §§ 724.050(a), 724.110(a), 724.220(a)

Discussion:
See *24.15[3]*

☐ If judgment creditor does not comply within 15 days following actual receipt of demand, take following actions upon expiration of 15-day period:

○ If judgment creditor's noncompliance was evidently without just cause and demand was for full satisfaction or satisfaction of matured installments under installment judgment against a health care provider:

☐ Ascertain what damages were sustained by reason of judgment creditor's noncompliance.

☐ Determine whether to claim damages and statutory penalty of $100.

Authority:
CCP §§ 724.050(e), 724.240(a)

Discussion:
See *24.15[5]*

○ If judgment creditor imposed any condition on complying with demand for full satisfaction of judgment:

☐ Determine whether that condition was unlawful.

☐ Ascertain what damages were sustained by reason of judgment creditor's act.

Authority:
CCP § 724.070

Discussion:
See *24.15[5]*

○ Draft notice of motion for order requiring judgment creditor to comply with demand.

Authority:
CCP §§ 724.050(d), *724.110(b)*, *724.230*

Form:
See *24.32*

○ Serve notice of motion by personal delivery or by mail.

Authority:
CCP §§ 724.050(d), *724.110(b)*, *724.230*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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Chapter 24 Discharge and Satisfaction of Judgments
IV. MAKING DEMAND FOR ACKNOWLEDGMENT OF FULL OR PARTIAL SATISFACTION

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24.15 Judgment Creditor's Acknowledgment of Satisfaction May Be Demanded.

24.15[1] Judgment Debtor or Other Person May Demand Acknowledgment of Full or Partial Satisfaction. A demand for acknowledgment of satisfaction, or partial satisfaction, of the judgment, or satisfaction of matured installments, may be served on the judgment creditor by either [*CCP §§ 724.050(a)*, *724.110(a)*, *724.220(a)*]:

- The judgment debtor;
- The owner of real or personal property subject to a judgment lien created under the judgment; or
- If the judgment has been fully satisfied, a person having a security interest in or a lien on personal property subject to a judgment lien created under the judgment.

24.15[2] Statute Mandates Form and Content of Demand.

24.15[2][a] Demand May Require Judgment Creditor to Execute, Acknowledge, and Deliver Acknowledgment of Satisfaction. A demand that follows full satisfaction of a judgment may require the judgment creditor to do one or both of the following [*CCP § 724.050(a)*]:

- File an acknowledgment of satisfaction of the judgment with the court.
- Execute, acknowledge, and deliver to the person who made the demand, an acknowledgment of satisfaction of the judgment.

A demand that relates to matured installments under an installment judgment against a health care provider may require the judgment creditor to execute, acknowledge, and deliver to the person who made the demand, an acknowledgment of satisfaction of the matured installments [*CCP § 724.220(a)*].

A demand that relates to partial satisfaction in any other case may require the judgment creditor to execute, acknowledge, and deliver to the person who made the demand, an acknowledgment of partial satisfaction of the judgment [*CCP § 724.110(a)*].

Warning:

Failure to use the statutory language, while not fatal to the debtor's motion for filing the satisfaction, has been held to preclude the judgment debtor from receiving attorney's fees and sanctions. However, this may have been a very fact-specific decision and should not be relied upon as a rebuttal to the assertion of the defense of failure to follow the statutory format [*see Quintana v. Gibson (2003) 113 CA4th 89, 94-96, 5 CR3d 898*] .

Cross References:

Form for demand for acknowledgment of full satisfaction, see *24.28*.

Form for demand for acknowledgment of satisfaction of matured installments under installment judgment against health care provider, see *24.29*.

Form for demand for acknowledgment of partial satisfaction, see *24.30*.

Discussion of content of judgment creditor's acknowledgment in each case, see *24.11*.

24.15[2][b] Written Demand Is Required. A demand for acknowledgment of satisfaction must be in writing [*CCP §§ 724.050(a)*, *724.110(a)*, *724.220(a)*].

24.15[2][c] Warning to Judgment Creditor Is Required. A warning about the judgment creditor's duty to comply with the demand and the consequences of noncompliance must be included in a demand for acknowledgment of full satisfaction of the judgment [*see CCP § 724.050(b)*] or in a demand for acknowledgment of satisfaction of matured installments under an installment judgment against a health care provider [*CCP § 724.220(b)*]. The exact language of this warning is prescribed by statute [*see CCP § 724.220(b)*].

Exception:

A demand for acknowledgment of partial satisfaction in other cases need not include any such warning [*see CCP § 724.110 et seq*.].

Cross References:

Form for statutory warning in demand for acknowledgment of full satisfaction of judgment, see *24.29*.

Form for warning in demand for acknowledgment of satisfaction of matured installments under installment judgment against health care provider, see *24.30*.

24.15[3] Demand Must Be Served on Judgment Creditor. The demand for acknowledgment of judgment must be served on the judgment creditor. Service must be made personally or by mail [*CCP § 724.220(a)*]. The statute does not require that a copy be filed with the court.

Strategic Point--Judgment Creditor:

An assignee of the judgment creditor should file his or her assignment and serve notice of the assignment to the judgment debtor. Unless the judgment debtor is notified of the assignment, the demand is not required to be served on the assignee and may result in an adverse ruling against the creditor assignee [*see Kaplan v. Hacker (1952) 113 CA2d 571, 573-574, 248 P2d 464*].

24.15[4] Receipt of Demand Starts 15-Day Compliance Period. A demand for acknowledgment of satisfaction must be served on the judgment creditor by personal delivery or by mail [*CCP §§ 724.050(a)*, *724.110(a)*, *724.220(a)*]. If the judgment has been satisfied as the demand assumes, then the judgment creditor must comply with the demand not later than 15 days after actually receiving it [*CCP §§ 724.050(c)*, *724.110(a)*, *724.220(c)*].

Strategic Point--Judgment Debtor:

The demand period starts from date of actual receipt, and not from the mailing date, so the judgment debtor should send the demand by a form of mail or delivery that requires a signature on receipt in order to avoid a dispute over when the demand was received. A letter that is properly addressed and mailed is deemed to have been received in the ordinary course of mail [*Evid Code § 641*], but this is a rebuttable presumption and does not establish a date of receipt for the purposes of this statutory time frame.

Strategic Point--Judgment Creditor:

If the judgment creditor contends that the debt has not been repaid in full, he or she should respond to the demand by setting forth the bases upon which the refusal to file a satisfaction is asserted. A good faith dispute may be a valid defense to an award of attorney's fees, damages, and sanctions requested under a motion to enforce the demand.

Cross Reference:

Compliance requirements for judgment creditor, see *24.17* et seq.

24.15[5] Court Will Enforce Demand.

24.15[5][a] Person Making Demand May File Motion to Enforce Demand. If the judgment creditor does not comply with a legally sufficient demand within the time allowed, the person making the demand may apply to the court for an order requiring the judgment creditor to comply. The request for the order must be made on a noticed motion [*CCP § 724.050(d)*].

A copy of the notice of motion must be served on the judgment creditor either personally or by mail [*CCP § 724.050(d)*].

Prerequisite:

Adherence to the statutory procedure for making a demand [*see 24.15[2]*] is a procedural prerequisite to the right to move for an enforcement order [*Quintana v. Gibson (2003) 113 CA4th 89, 92-95, 5 CR3d 898*].

Strategic Point--Judgment Debtor:

It is good practice to serve all parties against whom an order is sought. In order to receive an award of sanctions, the parties against whom sanctions are sought must be noticed of the request for sanctions against them and given an opportunity to defend.

24.15[5][b] Court Will Issue Order on Proper Determination. If the court determines that the judgment has been fully satisfied and that the judgment creditor has not complied with the demand, the court must either [*CCP § 724.050(d)*]:

- Order the judgment creditor to comply with the demand; or
- Order the court clerk to enter satisfaction of the judgment.

Cross References:

Discussion of court's enforcement order after judgment creditor's noncompliance with demand, see *24.20*.

Discussion of judgment creditor's liability for noncompliance without just cause, see *24.21*.

Discussion of judgment creditor's liability for unlawful imposition of condition on compliance, see *24.22*.

24.15[5][c] Damages and Attorney's Fees Are Recoverable. If the judgment creditor's noncompliance was without just cause, or the judgment creditor unlawfully imposed a condition on compliance after full satisfaction, the person that made the demand could recover damages and attorney's fees [*CCP §§ 724.080*, *724.090*, *724.240(b)*, *724.260*].

Strategic Point--Judgment Debtor:

The court is required by statute to award fees to the prevailing party in this type of action [*CCP § 724.080*]. Accordingly, the motion should indicate that the judgment debtor seeks recovery of fees.

Strategic Point--Judgment Creditor:

If the judgment creditor has requested an extension to file the satisfaction, but has not received express consent of the judgment debtor to delay filing, the judgment creditor should file the satisfaction immediately to avoid sanctions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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24.16 Special Demand Rules Apply to Judgments for Overpaid Employment Compensation or Disability Benefits.

If the judgment was entered in favor of the Director of Employment Development for the recovery of overpaid unemployment compensation benefits [*see UI Code § 1379(a), (b)*] or disability benefits [*see UI Code § 2739(a), (b)*], and an abstract of judgment was recorded [*see UI Code §§ 1379.5, 2739.1*], then when the judgment is satisfied in full, the judgment debtor or the owner of real property subject to the judgment lien may demand an acknowledgment of satisfaction pursuant to *CCP § 724.050* [*see 24.15*]. In that event, the Department of Employment Development must do *all* of the following [*UI Code §§ 1379.6(a), 2739.2(a)*]:

- File an acknowledgment of satisfaction of judgment with the court.
- Serve an acknowledgment of satisfaction of judgment on the judgment debtor, by personal delivery or by mail.
- Record an acknowledgment of satisfaction of judgment in the office of the county recorder where the abstract of judgment is recorded.

Prerequisite:

If the judgment was satisfied through payment by check, then the department's duty to acknowledge satisfaction does not arise until the check has been paid by the financial institution on which it was drawn [*UI Code §§ 1379.6(c), 2739.2(c)*].

Warning:

The cost of recording is an obligation of the judgment debtor and may be collected from the judgment debtor in any manner provided by law for the collection of benefit overpayments from claimants [*UI Code §§ 1379.6(b), 2739.2(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment LiensWorkers' Compensation & SSDIAdministrative ProceedingsAwardsEnforcementWorkers' Compensation & SSDISocial Security Disability

InsuranceOverpayments

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24.17 CHECKLIST: Complying with Demand for Acknowledgment of Satisfaction.

☐ Determine whether judgment creditor has received legally sufficient demand for acknowledgment of full satisfaction.

Authority:
CCP § 724.050

Discussion:
See *24.15*, 24.18[2]

☐ Determine whether judgment creditor has received legally sufficient demand for acknowledgment of partial satisfaction before judgment has been fully satisfied.

○ If judgment is installment judgment against health care provider under which lien could be created on interest in real property under *CCP § 697.320*, then judgment creditor must comply with sufficient demand from judgment debtor, or from owner of real property subject to judgment lien, to deliver acknowledgment of satisfaction of matured installments.

Authority:
CCP § 724.220

Discussion:
See *24.15*, 24.18[5]

○ In any other case, if judgment is partially satisfied, judgment creditor must comply with sufficient demand from judgment debtor, or from owner of real or personal property subject to judgment lien, to deliver acknowledgment of partial satisfaction.

Authority:

CCP § 724.110

Discussion:
See *24.15*, 24.18[5]

☐ Determine last day of 15-day period for complying with demand for acknowledgment of satisfaction, if any.

Authority:
CCP §§ 724.050(c), *724.110(a)*, *724.220(c)*

Discussion:
See *24.19*.

Timing:
If the judgment creditor has received a sufficient demand for an acknowledgment of satisfaction, the judgment creditor must comply with the demand not later than 15 days after actually receiving it [*CCP §§ 724.050(c)*, *724.110(a)*, *724.220(c)*]. Normal rules apply for determining the last day of that 15-day period [*see generally CCP §§ 10*, *12-13b*].

☐ Complete Judicial Council Form EJ-100, Acknowledgment of Satisfaction of Judgment, as appropriate for either:

○ Full satisfaction of judgment.

Authority:
CCP § 724.060

Discussion:
See *24.11[2]*

Form:
See *24.28*

○ Satisfaction of matured installments under installment judgment against health-care provider.

Authority:
CCP § 724.250

Discussion:
See *24.11[3]*

Form:
See *24.29*

○ Other partial satisfaction of judgment.

Authority:
CCP § 724.120

Discussion:

See *24.11[4]*

Form:
See *24.30*

☐ File and/or deliver completed Form EJ-100 as necessary to comply with demand that acknowledgment of satisfaction be filed and/or delivered to judgment debtor (or other eligible person) or both, not later than 15 days after actually receiving demand.

Authority:
CCP §§ 724.050, 724.110(a), 724.220(a)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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24.18 Judgment Creditor Ordinarily Must Comply With Demand for Acknowledgment.

24.18[1] Judgment Creditor Must Comply With Valid Demand. If the judgment creditor receives a valid demand for acknowledgment of satisfaction, the judgment creditor must comply [*see CCP § 724.050(c)*]. A failure to comply could expose the judgment creditor to liability for damages, a statutory penalty, and attorney's fees [*CCP § 724.050(c)*, *724.080*, *724.090*; *see 24.21*].

Warning:

Notwithstanding the judgment creditor's duty to file an acknowledgment of full satisfaction, the judgment debtor (or another person having a qualifying interest in property that is subject to a judgment lien under the judgment) may serve on the judgment creditor a demand that an acknowledgment of satisfaction be filed or delivered or both [*CCP § 724.050(a)*; *see 24.18[4]*]. The judgment creditor must comply with a sufficient demand not later than 15 days after actually receiving the demand [*CCP § 724.050(c)*], whether or not it was properly served.

Warning:

A judgment creditor who does not respond to the demand does so at his or her peril. A judgment creditor who fails to acknowledge a demand for acknowledgment risks liability for actual damages, attorneys' fees in any compliance proceeding, and a $100 penalty for failure to comply with the demand if the court ultimately determines that the judgment creditor did not have "just cause" for failing to respond [*CCP §§ 724.050(e)*, *724.080*, *724.090*]. Since compliance with the demand is not difficult and can be made simply by supplying the required acknowledgment, the judgment creditor may find it easier and safer to simply comply, rather then raising technical objections to the form of the demand [*see 24.18[2]*], as long as no genuine issue exists as to whether or not the judgment has actually been satisfied [*see 24.18[3]*].

Strategic Points--Judgment Creditor:

The statute does not provide any procedure under which the judgment creditor can object to a request for acknowledgment--such as filing an objection with the court or moving to quash the request. Thus, it appears that the only avenue available to a judgment creditor who wishes to contest the request, either on technical grounds [*see 24.18*] or on the substantive ground that the judgment was not in fact satisfied [*see*

24.18[3]], is not to respond to the request and wait for the requesting party to seek a court order [*see CCP § 724.050(e)*].

The judgment creditor may want to send a "meet and confer" letter to the debtor's counsel informing him or her of the factual and/or legal support for the judgment creditor's belief that the judgment has not been satisfied. The letter can be used to show a good faith dispute, and should be attached to a declaration filed in support of any opposition to the judgment debtor's motion. If the judgment creditor is wrong, the letter may help provide a valid defense to an award of attorney's fees, damages, and sanctions requested under a motion to enforce the demand.

Cross Reference:

Discussion of the required contents of an acknowledgment of satisfaction of judgment, see *24.11*.

24.18[2] Demand for Acknowledgment Must Be Legally Sufficient. *CCP § 724.050* requires that the demand for acknowledgment meet specified criteria [*see 24.15[2]*]. Although the statute does not expressly so state, it implies that if the demand does not meet these criteria, it is not legally sufficient and the judgment creditor therefore is not required to comply. The statute specifies that the demand must meet the following requirements [*see CCP § 724.050(a), (b)*]:

- Must be made by a party entitled to do so [*see 24.15[1]*].
- Must be written.
- Must have been served on judgment creditor personally or by mail.
- Must contain statutory the required statutory warning.

Warning:

In all cases, a demand for acknowledgment of satisfaction is required to be served on the judgment creditor by personal delivery or by mail. However, the judgment creditor's duty to comply with a sufficient demand arises on actual receipt of the demand [*CCP §§ 724.110(a), 724.220(a), (c)*], whether or not it was properly served.

24.18[3] Judgment Must Actually Have Been Satisfied. If the judgment has not been satisfied, the judgment creditor obviously is not required to acknowledge its satisfaction [*see CCP § 724.050(a)* (satisfaction of judgment is prerequisite to right to demand), *CCP § 724.050(d)* (satisfaction of judgment is prerequisite to judgment creditor's duty to comply), *CCP § 724.050(e)* (satisfaction of judgment is prerequisite to judgment creditor's liability for noncompliance)].

24.18[4] Judgment Creditor May Have Duty to Respond to Multiple Requests. A judgment creditor may have a duty to comply with a request for satisfaction of judgment even if such an acknowledgment has already been filed. The statute does not limit the duty to a single request [*see CCP § 724.050(a)*].

Warning--Duty Unclear:

However, the extent of the judgment creditor's duty with respect to multiple requests is unclear. Unsettled questions include:

- It is not clear whether the judgment creditor, after filing an acknowledgment and serving it on the

judgment debtor, would have any duty to comply with a demand for delivery of an acknowledgment to another person who has a qualifying interest in property subject to a judgment lien.

- It is not clear whether the judgment creditor would have a duty to comply with more than one demand from the judgment debtor (or another person) for delivery of an acknowledgment.

- It is not clear whether the judgment creditor is obliged to deliver an executed original acknowledgment (as *CCP § 724.050(a)* apparently requires) or may instead deliver a certified copy of the filed acknowledgment.

Exception--Filing:

If the judgment creditor has already filed an acknowledgment of satisfaction, there would be no point in filing it again simply because filing has been duly demanded. The governing statute does not require an idle act [*CC § 3532*].

Exception--Delivery to Judgment Debtor:

If the judgment creditor has already served an acknowledgment on the judgment debtor because an abstract of the judgment (or a certified copy of the judgment) was recorded [*see 24.12*], there would be no point in delivering another acknowledgment to the judgment debtor simply because delivery has been duly demanded.

Decision Point:

The judgment creditor may want to comply with an additional demand for acknowledgment of satisfaction, even though the judgment creditor has already provided an acknowledgment. Re-recording may be easier and cheaper than fighting a claim from a third party with an interest in the property. Alternatively, the judgment creditor could respond to additional demands by informing the judgment debtor or interested third parties that the satisfaction was filed, and that they can obtain a certificate of satisfaction of judgment from the court [*see CCP § 724.100*].

24.18[5] Judgment Creditor Has Duty to Provide Acknowledgment of Partial Satisfaction Upon Demand In Some Cases.

24.18[5][a] Duty Applies to Installment Judgments Against Health Care Provider. If the judgment is an installment judgment against a health care provider under which a lien may be created on an interest in real property under *CCP § 697.320*, then the judgment debtor or the owner of real property subject to the judgment lien may serve on the judgment creditor a demand in writing that the judgment creditor execute, acknowledge, and deliver to the person who made the demand an acknowledgment of satisfaction of matured installments under the installment judgment [*see CCP §§ 724.210(a)*, *724.220(a)*]. These statutes apply also to judgments for child, family, or spousal support payable in installments [*see CCP §§ 697.320*, *724.210(a)*], which are beyond the scope of this chapter.

Cross Reference:

Discussion of demand for acknowledgment of satisfaction of matured installments under installment judgment against health care provider, see *24.15*.

24.18[5][b] Duty Applies to Other Cases Involving Partial Satisfaction of Money Judgments. In any other case of partial satisfaction, the judgment debtor or the owner of real or personal property subject to a judgment lien created under a money judgment may serve on the judgment creditor a demand in writing that the judgment creditor execute, acknowledge, and deliver an acknowledgment of partial satisfaction of judgment to the person who made the demand [*CCP § 724.110(a)*].

Cross Reference:

Discussion of demand for acknowledgment of partial satisfaction of judgment, see *24.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsReal Property LawNonmortgage LiensJudgment Liens

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24.19 Receipt of Demand Starts 15-Day Compliance Period.

If the judgment has been satisfied to the extent assumed in the demand, and the judgment creditor receives a sufficient demand for an acknowledgment of satisfaction, the judgment creditor must comply with the demand not later than 15 days after actual receipt of the demand [*CCP §§ 724.050(c)*, *724.110(a)*, *724.220(c)*].

Cross Reference:

Legally sufficient demand for acknowledgment of satisfaction, see *24.15*. Detailed discussion of 15-day compliance period, see *24.15[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcement

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24.20 Court May Order Noncomplying Judgment Creditor to Comply.

If the judgment creditor does not comply with the demand before expiration of the time allowed, 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. If the court determines that the judgment creditor has not complied with the demand, then:

- On determining that the judgment has been satisfied, 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)*].

- In the case of an installment judgment against a health care provider, on determining that the matured installments have been satisfied as of the date specified in the demand, the court must either (1) order the judgment creditor to comply with the demand or (2) make an order determining that the matured installments as of the date specified in the demand have been satisfied [*CCP § 724.230*].

- In any other case, on determining that the judgment has been partially satisfied, the court must make an order determining the amount of the partial satisfaction and may make an order requiring the judgment creditor to comply with the demand [*CCP § 724.110(b)*].

Warning:

The court is obliged to find as a matter of fact that the judgment has been satisfied to the extent the judgment debtor asserts. It is reversible error for the court simply to infer or assume that fact [*Schumacher v. Ayerve (1992) 9 CA4th 1860, 1863-1865, 12 CR2d 417]* .

Strategic Point:

When a proper demand was not made, but the court issued the order anyway, there will be no error if the judgment creditor is not prejudiced [*Quintana v. Gibson (2003) 113 CA4th 89, 96, 5 CR3d 898*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment

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24.21 Judgment Creditor May Be Liable for Noncompliance Without Just Cause.

If the judgment creditor fails without just cause to comply with the demand before expiration of the time allowed, then in either of the following cases, the judgment creditor is liable to the person who made the demand for all damages sustained by reason of that failure and must also forfeit $100 to that person:

- If the judgment has been satisfied [*CCP § 724.050(e)*]; or
- In the case of an installment judgment against a health-care provider, if the matured installments under the judgment have been satisfied as of the date specified in the demand [*CCP § 724.240(a)*].

Strategic Point--Attorney's Fees:

Liability may be determined in the proceedings on the motion to compel compliance [*see 24.20*] or in an action [*CCP §§ 724.050(e), 724.240(a)*]. In any event, the court must award reasonable attorney's fees to the prevailing party [*CCP §§ 724.080, 724.260*].

Strategic Point--Additional Potential Liability:

The damages recoverable as stated above are not in derogation of any other damages or penalties to which an aggrieved person may be entitled by law [*CCP §§ 724.090, 724.240(b)*].

Warning:

Failure to provide a satisfaction may expose the judgment creditor to damages for derogation of credit, among other issues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesJudgment LiensEnforcement

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24.22 Judgment Creditor Generally May Not Impose Conditions on Compliance After Full Satisfaction.

If the judgment creditor intentionally conditions delivery of an acknowledgment of satisfaction of judgment on the performance of any act or the payment of an amount in excess of that to which the judgment creditor is entitled under the judgment, the judgment creditor is liable to the judgment debtor for all damages sustained by reason of that action or $250, whichever is the greater amount [*CCP § 724.070(a)*].

Exception:

The judgment creditor will have no liability, however, if the judgment creditor has agreed to deliver an acknowledgment of satisfaction of judgment to the judgment debtor prior to full satisfaction of the 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)*].

Strategic Point--Attorney's Fees:

In an action or proceeding to determine the judgment creditor's liability, the court must award reasonable attorney's fees to the prevailing party [*CCP § 724.080*].

Strategic Point--Additional Potential Liability:

The damages recoverable as stated above are not in derogation of any other damages or penalties to which an aggrieved person may be entitled by law [*CCP § 724.090*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

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[Reserved]

24.23[Reserved]

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Chapter 24 Discharge and Satisfaction of Judgments
VI. RECORDING AND FILING ACKNOWLEDGMENT OF SATISFACTION TO ENSURE DISCHARGE

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24.24 CHECKLIST: Recording and Filing Acknowledgment of Satisfaction to Ensure Discharge.

☐ On receiving acknowledgment of full satisfaction from judgment creditor:

○ File it with clerk of court unless:

☐ It was previously filed by judgment creditor or some other party; or

☐ Court clerk previously entered satisfaction in register of actions.

Authority:
CCP § 724.020

Discussion:
See *24.05[1]*

○ Record it in order to extinguish judgment lien (if any) on real property.

Authority:
CCP § 697.400

Discussion:
See *24.25[1]*

○ File it with Secretary of State in order to extinguish judgment lien (if any) on personal property.

Authority:
CCP § 697.640

Discussion:
See *24.25[2]*

○ After clerk enters satisfaction of judgment in register of actions, obtain clerk's certificate, and have certificate recorded or filed if necessary or convenient.

Authority:
CCP §§ 724.020, 724.100

Discussion:
See *24.26*

☐ On receiving acknowledgment of satisfaction of matured installments under an installment judgment against a health care provider [*CCP § 697.400(a), (b)*] from judgment creditor, record it in order to extinguish judgment lien (if any) on real property.

Authority:
CCP § 697.400

Discussion:
See *24.25[1]*

☐ Do not file or record partial satisfaction of judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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Chapter 24 Discharge and Satisfaction of Judgments
VI. RECORDING AND FILING ACKNOWLEDGMENT OF SATISFACTION TO ENSURE DISCHARGE

2-24 MB Practice Guide: CA Debt Collection 24.25

24.25 Acknowledgment of Satisfaction Can Be Recorded or Filed to Extinguish Judgment Lien.

24.25[1] Recording Extinguishes Lien on Real Property. If a judgment lien on real property was created under the judgment [*see CCP § 697.310 et seq.*], the judgment debtor, or any owner of real property subject to the judgment lien, may have the judgment creditor's acknowledgment of satisfaction of the judgment recorded in order to extinguish the judgment lien.

- If the judgment creditor acknowledges full satisfaction of the judgment, the judgment lien is extinguished as a matter of record [*CCP § 697.400(a)*].

- If the judgment creditor acknowledges satisfaction of matured installments under an installment judgment against a health-care provider, the judgment lien is extinguished as a matter of record to the extent of the satisfied installments described in the acknowledgment of satisfaction [*CCP § 697.400(b)*].

Distinguish:

The judgment creditor also is entitled to have the judgment creditor's acknowledgment of satisfaction recorded, with the same effect [*CCP § 697.400(a), (b)*].

Cross Reference:

Obtaining and removing judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

24.25[2] Acknowledgment May Be Filed With Secretary of State If Judgment Lien on Personal Property Was Created Under Judgment.

24.25[2][a] Filing With Secretary of State Extinguishes Lien on Personal Property. If a judgment lien on personal property was created under the judgment [*see CCP § 697.510 et seq.*], the judgment debtor, or any owner of property subject to the judgment lien, or a person having a security interest in or a lien on the property subject to the judgment lien, may file an acknowledgment of satisfaction of the judgment in the office of the Secretary of State, together with a statement containing the name of the judgment creditor, the name and address of the judgment debtor, and the file number, all as shown on the notice of judgment lien. As of the date of filing, the judgment lien created under the judgment is extinguished as a matter of record [*CCP § 697.640(a)*].

These documents should be filed with the Secretary of State. They may be filed in person or mailed to P.O. Box

942835, Sacramento, CA 94235-0001.

Distinguish:

The judgment creditor also is entitled to file the judgment creditor's acknowledgment of satisfaction with the Secretary of State, with the same effect [*CCP § 697.640(a)*].

Warning:

Although the Secretary of State allows electronic filing for many corporate and UCC forms, that office does not accept electronic filing for releases of judgment or tax liens. These forms must be filed with the appropriate fee with the Secretary of State in Sacramento, and must have the original signature of the judgment creditor or his or her attorney.

Cross Reference:

Obtaining and removing judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

24.25[2][b] Filing Fee Must Be Included. The statement must be accompanied by the correct filing fee. The fee for filing the acknowledgment or certificate is the same as the fee for filing a termination statement under *Com Code § 9404* [*CCP § 697.640(a)*]. A current list of the applicable filing fees for commercial filings is available on the Secretary of State's website at http://www.ss.ca.gov/business/ucc/ra_9_ucc_formsfees.htm.

24.25[3] Judgment Debtor May Demand Release. If the personal property lien is extinguished (by satisfaction, release, termination), the judgment creditor must file a statement of release within 20 days after the judgment creditor receives an authenticated demand from the judgment debtor [*CCP § 697.510(g)(2)*]. "Authenticated demand" means either a signed written demand or an executed or otherwise encrypted demand delivered electronically that identifies the judgment debtor and the demand for a statement of release [*CCP § 697.510(g)(2)*].

If a judgment creditor does not timely file a statement of release, the person who made the demand may apply to the court on noticed motion for an order releasing the judgment lien [*CCP § 697.510(h)*]. Service of the motion may be made personally or by mail [*CCP § 697.510(h)*].

Upon presentation of evidence to the satisfaction of the court that the judgment lien has been extinguished, the court must order the judgment creditor to prepare and file the statement of release, or itself order the release of the judgment lien [*CCP § 697.510(h)*]. The court must award reasonable attorney's fees to the prevailing party in such an action [*CCP § 697.510(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsTermination StatementsReal Property LawNonmortgage LiensJudgment Liens

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Chapter 24 Discharge and Satisfaction of Judgments
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24.26 Clerk's Certificate May Be Recorded or Filed to Extinguish Judgment Lien.

24.26[1] Recording Extinguishes Lien on Real Property. If a judgment lien on real property was created under the judgment [*see CCP § 697.310 et seq.*], the judgment debtor, or any owner of real property subject to the judgment lien, may have a clerk's certificate of satisfaction of the judgment [*see CCP § 724.100*; *see 24.06*] recorded in order to extinguish the judgment lien.

- If the certificate shows full satisfaction of the judgment, the judgment lien is extinguished as a matter of record [*CCP § 697.400(a)*].

- If the certificate shows satisfaction of matured installments under an installment judgment against a health care provider [*see 24.18[5][a]*], the judgment lien is extinguished as a matter of record to the extent of the satisfied installments described in the certificate [*CCP § 697.400(b)*].

Distinguish:

The judgment creditor also is entitled to have a clerk's certificate of satisfaction recorded, with the same effect [*CCP § 697.400(a), (b)*].

Cross Reference:

Obtaining clerk's certificate, see *24.06*.

Obtaining and removing judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Recording process, see *Ch. 11, Obtaining and Removing Judgment Liens, 11.06*.

24.26[2] Filing With Secretary of State Extinguishes Lien on Personal Property. If a judgment lien on personal property was created under the judgment [*see CCP § 697.510 et seq.*], the judgment debtor, or any owner of property subject to the judgment lien, or a person having a security interest in or a lien on the property subject to the judgment lien, may file in the office of the Secretary of State a clerk's certificate of satisfaction of the judgment [*see CCP § 724.100*], together with a statement containing the name of the judgment creditor, the name and address of the judgment debtor, and the file number, all as shown on the notice of judgment lien. As of the date of filing, the judgment lien created under the judgment is extinguished as a matter of record [*CCP § 697.640(a)*].

Distinguish:

The judgment creditor also is entitled to file a clerk's certificate of satisfaction with the Secretary of State, with the same effect [*CCP § 697.640(a)*].

Cross Reference:

Obtaining and removing judgment liens, see Ch. 11, Obtaining and Removing Judgment Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsTermination StatementsReal Property LawNonmortgage LiensJudgment Liens

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Chapter 24 Discharge and Satisfaction of Judgments
VI. RECORDING AND FILING ACKNOWLEDGMENT OF SATISFACTION TO ENSURE DISCHARGE

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24.27 Judgment Debtor Also May Obtain Discharge From Judgment by Equitable Proceedings.

24.27[1] Claim Against Judgment Creditor May Be Set Off. A court of equity will compel a setoff when reciprocal demands are such that one of them should be applied against the other, so that only the difference can be recovered. On this principle, when the judgment debtor under a judgment has a matured claim against the judgment creditor, the judgment debtor may go to the court in which the judgment was rendered and have that claim set off against the judgment [*Harrison v. Adams (1942) 20 C2d 646, 648-649, 128 P2d 9* ; *cf. CCP § 431.70*].

Cross Reference:

Discussion of equitable setoff of reciprocal claims as means of discharging judgment debtor from liability under judgment, see *California Forms of Pleading and Practice, Ch. 318, Judgments, § 318.122* (Matthew Bender).

24.27[2] Bankruptcy May Effect Discharge. In some cases, the judgment debtor's liability under a judgment will be discharged in bankruptcy. For discussion of the effects of bankruptcy on a judgment or debt, see Ch. 3, Effects of Bankruptcy.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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Chapter 24 Discharge and Satisfaction of Judgments
VII. FORMS

2-24 MB Practice Guide: CA Debt Collection 24.28

24.28 Acknowledgment of Satisfaction of Judgment--Judicial Council Form EJ-100.

Acknowledgment of Satisfaction of Judgment--Judicial Council Form EJ-100.

Click here to view image.

Go to Interactive Fillable Form.
Download HotDocs(R) Player at www.hotdocs.com/downloads/player/latest

NOTES.

Authority:
CCP §§ 724.060, *724.120*, *724.250*; California Judicial Council Form EJ-100, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Exception:
A victim of sexual assault or domestic violence may not be imprisoned or confined when the contempt consists of a refusal to testify about that sexual assault or domestic violence crime [*CCP §§ 1219(b)*, *(c)*].

Drafting Form:
See *24.11*

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Chapter 24 Discharge and Satisfaction of Judgments
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24.29 Demand for Acknowledgment of Satisfaction of Judgment.

Demand for Acknowledgment of Satisfaction of Judgment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	
vs.	)	NO. _____
Mary Jones,	)	DEMAND FOR ACKNOWLEDGMENT OF SAT-
Defendant.	)	ISFACTION OF JUDGMENT
	)	
	)	

_____

To Plaintiff, John Smith:

Pursuant to *Code of Civil Procedure Section 724.050*, defendant demands that you _____ [file with the court *and/or* execute, acknowledge, and deliver to him/her at _____ (*address*) or to defendant's attorney] an acknowledgment of satisfaction of the judgment in this action, not later than 15 days after you receive this demand.

Important warning. If this judgment has been satisfied, the law requires that you comply with this demand not 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 defendant's reasonable attorney's 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 defendant sustains by reason of such failure and will also forfeit one hundred dollars to defendant.

Dated: _____

_____ [*signature*]

Jane Lee (Bar Number 123456)
50 South Main St., Suite 100
Farallon City, California 90000
Phone: 555-999-9999
Attorney for Defendant

NOTES.

Authority:
CCP § 724.050

Drafting Form:
See *24.15[2]*

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Chapter 24 Discharge and Satisfaction of Judgments
VII. FORMS

2-24 MB Practice Guide: CA Debt Collection 24.30

24.30 Demand for Acknowledgment of Satisfaction of Matured Installments.

Demand for Acknowledgment of Satisfaction of Matured Installments.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	
vs.	)	NO. _____
Mary Jones,	)	DEMAND FOR ACKNOWLEDGMENT OF SAT-
Defendant.	)	ISFACTION OF MATURED INSTALLMENTS
	)	
	)	

_____

To Plaintiff, John Smith:

Pursuant to *Code of Civil Procedure Section 724.220*, defendant demands that you execute, acknowledge, and deliver to him/her at _____ [*address*] or to defendant's attorney an acknowledgment of satisfaction of matured installments, as of _____ [*date*], under the judgment in this action, not later than 15 days after you receive this demand.

Important warning. If the matured installments on this judgment have been satisfied as of the date specified in this demand, the law requires that you comply with this demand not later than 15 days after you receive it. (The "matured installments" are all amounts and installments that are due and payable on or before the date specified in this demand together with the accrued interest to that date and costs added to the judgment on or before that date.) If a court proceeding is necessary to compel you to comply with this demand, you will be required to pay defendant's reasonable attorney's fees in the proceeding if the court determines that the matured installments have 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 defendant sustains by reason of that failure and will also forfeit $100 to defendant.

Dated: _____

_____ [*signature*]

Jane Lee (Bar Number 123456)
50 South Main St., Suite 100
Farallon City, California 90000
Phone: 555-999-9999
Attorney for Defendant

NOTES.

Authority:
CCP § 724.220

Drafting Form:
See *24.15[2]*

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Chapter 24 Discharge and Satisfaction of Judgments
VII. FORMS

2-24 MB Practice Guide: CA Debt Collection 24.31

24.31 Demand for Acknowledgment of Partial Satisfaction of Judgment.

Demand for Acknowledgment of Partial Satisfaction of Judgment.
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	
vs.	)	NO. _____
Mary Jones,	)	DEMAND FOR ACKNOWLEDGMENT OF PAR-
Defendant.	)	TIAL SATISFACTION OF JUDGMENT
	)	
	)	

_____

To Plaintiff, John Smith:

Pursuant to *Code of Civil Procedure Section 724.110*, defendant demands that you execute, acknowledge, and deliver to him/her at _____ [*address*] or to defendant's attorney an acknowledgment of partial satisfaction of the judgment in this action, in the amount of $_____, not later than 15 days after you receive this demand.

Dated: _____

_____ [*signature*]
Jane Lee (Bar Number 123456)
50 South Main St., Suite 100
Farallon City, California 90000
Phone: 555-999-9999
Attorney for Defendant

NOTES.

Authority:
CCP § 724.110

Drafting Form:
See *24.15[2]*

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Chapter 24 Discharge and Satisfaction of Judgments
VII. FORMS

2-24 MB Practice Guide: CA Debt Collection 24.32

24.32 Notice of Motion to Compel Compliance With Demand for Acknowledgment of Satisfaction of Judgment.

Notice of Motion to Compel Compliance With Demand for Acknowledgment of Satisfaction of Judgment.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF FARALLON

John Smith,	)	
Plaintiff,	)	
vs.	)	NO. _____
Mary Jones,	)	NOTICE OF MOTION TO COMPEL COMPLI-
Defendant.	)	ANCE WITH DEMAND FOR ACKNOWLEDG-
	)	MENT OF SATISFACTION OF JUDGMENT
	)	

_____

To Plaintiff, John Smith, and to Tom Doe, his attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [(Department *or* Division) _____ of] this court, located at 1 North Main Street, Farallon City, California, Defendant will, and hereby does, move for an order compelling Plaintiff, John Smith, to comply with Defendant's demand to acknowledge [partial] satisfaction of the [matured installments on the] judgment herein.

[*If judgment was fully satisfied or matured installments under installment judgment were satisfied, and judgment creditor failed without just cause to comply with demand for acknowledgment, add:*]

Defendant will also move the court to hold Plaintiff, John Smith, liable to Defendant for damages in the sum of $_____ sustained by reason of plaintiff's failure without just cause to comply with the demand for acknowledgment of satisfaction, plus $100 and reasonable attorney's fees, on the ground that the _____ [judgment *or* matured installments under the installment judgment] rendered in the above-entitled cause _____ [has *or* have] been satisfied and that Plaintiff, John Smith, failed without just cause to comply with the demand for acknowledgment of satisfaction.

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____

_____ [*signature*]

Jane Lee (Bar Number 123456)
50 South Main St., Suite 100
Farallon City, California 90000
Phone: 555-999-9999
Attorney for Defendant

NOTES.

Authority:
CCP §§ 724.050, 724.110, 724.230

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementProof of Signature

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Chapter 25 Enforcing Out of State Judgments in California

2-25 MB Practice Guide: CA Debt Collection 25.syn

§ 25.syn Synopsis to Chapter 25: Enforcing Out of State Judgments in California

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25.02 Objective and Strategy.

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25.06 Sister State Money Judgments May Be Enforced Under Sister State Money Judgments Act.
25.06[1] Judgment Creditors Can Enforce Sister State Money Judgments.
25.06[2] Status As Judgment Creditor Must Be Established.
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25.06[10] Judgment Has Same Effect As Original Money Judgment of California Court.
25.06[11] Judgment Entered Pursuant to Act May Be Vacated.
25.06[11][a] Grounds Must Exist for Vacating Judgment.
25.06[11][b] Judgment Debtor Must Move to Vacate Within 30 Days of Notice of Entry.
25.06[11][c] Court May Vacate Judgment and Enter New Judgment.

25.06[12] Timing of Issuance of Writ of Execution.
25.06[12][a] Judgment Creditor Generally Must Wait 30 Days After Service of Notice of Entry Before Writ of Execution Will Issue.
25.06[12][b] Writ May Be Issued Earlier Under Specified Circumstances.
25.06[13] Court May Grant Stay of Enforcement.
25.06[14] Judgment Based on Sister State Judgment May Not Be Entered If Action Was Stayed in Sister State or Another Action Is Pending or Was Decided In California.
25.06[15] Act Does Not Affect Right of Judgment Creditor to Bring Action to Enforce Sister State Judgment.

25.07 Sister State Nonmoney Judgments May Be Enforced in California.

25.08 CHECKLIST: Enforcing Out of State Federal Court Judgments in California.

25.09 Options and Strategies.

25.10 Filing Certified Copy Registers Federal Judgment in California Federal District Court.

25.11 Enforcing Federal Out of State Judgments After Entry or Registration.
25.11[1] Registered Judgment May Be Enforced As Any Judgment of District in Which Judgment Is Registered.
25.11[2] California Law Provides for Entry of Judgment Lien on Real and Personal Property to Enforce Federal Money Judgments.

25.12 CHECKLIST: Enforcing Foreign Judgments.

25.13 Options and Strategies.

25.14 Foreign Money Judgment Qualifying for Recognition Under Uniform Foreign-Country Money Judgments Recognition Act May Be Enforced.
25.14[1] Only Qualifying Foreign Money Judgments Are Eligible for Recognition.
25.14[2] Foreign Money Judgment Must Be Entitled to Recognition to Be Enforceable.
25.14[2][a] Foreign Judgment Must Be Final, Conclusive, and Enforceable Where Rendered.
25.14[2][b] Foreign Judgment Rendered by System Lacking Impartial Tribunals or Due Process Is Not Conclusive.
25.14[2][c] Foreign Judgment Rendered by Court Lacking Personal or Subject Matter Jurisdiction Is Not Conclusive.
25.14[3] Otherwise Qualifying Foreign Judgment May Be Denied Recognition on Specified Grounds.

25.15 Obtaining Enforcement of Foreign Judgment.
25.15[1] Party Seeking Enforcement Must Comply With Procedures Applicable to California Civil Actions.
25.15[2] Party Seeking Enforcement Must Serve Summons on Other Party.
25.15[3] Court May Stay Enforcement of Foreign Judgment Subject to Appeal.
25.15[4] Party Seeking Recognition Must Commence Action Within Specified Time Limit.

25.16 Outside of Uniform Foreign-Country Money Judgments Recognition Act, Foreign Judgments May Be Enforced Only by Action to Establish Judgment.

25.17 Application for Entry of Judgment on Sister State Judgment--Judicial Council Form EJ-105.

25.18 Notice of Entry of Judgment on Sister State Judgment--Judicial Council Form EJ-110.

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Chapter 25 Enforcing Out of State Judgments in California
I. STRATEGY

2-25 MB Practice Guide: CA Debt Collection 25.01

25.01 Scope.

This chapter covers:

- Enforcing sister state judgments in California [*see 25.03 -25.07*].
- Enforcing out-of-state federal court judgments in California [*see 25.08 -25.11*].
- Enforcing foreign judgments in California [*see 25.12 -25.16*].

Core Statutes:
CCP § 1710.10 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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Chapter 25 Enforcing Out of State Judgments in California
I. STRATEGY

2-25 MB Practice Guide: CA Debt Collection 25.02

25.02 Objective and Strategy.

Various options are available to judgment creditors seeking to enforce out-of-state and foreign judgments in California. For example, judgment creditors may choose to pursue the traditional method of enforcing a sister state money judgment discussed in *25.06[15]*, which requires the judgment creditor to bring an independent action in California. However, the Sister State Money Judgments Act [*CCP § 1710.10 et seq*., *see 25.06*] provides an alternative method for enforcement that may prove to be simpler and quicker, while still affording the judgment debtor the opportunity to vacate the judgment if warranted.

To enforce out-of-state federal court judgments in California, judgment creditors may choose to use a judgment lien, one of the simplest and most effective means by which a judgment creditor may seek to secure payment of the judgment and establish a priority over other judgment creditors. It is among the least disruptive of creditors' remedies because it results in a lien that usually does not interfere with use of the property. If the judgment is not satisfied voluntarily, the judgment lien generally is enforced by levy on and sale of the real property under a writ of execution [16 Cal. Law Rev. Com. Reports, p. 104]. Judgment liens on real and personal property are available to enforce federal money judgments [*see 28 USC § 1962*].

The Uniform Foreign-Country Money Judgments Recognition Act [*CCP § 1713 et seq*.] provides a uniform mechanism for creditors seeking to enforce a foreign-country money judgment. However, it does not exempt judgment creditors from compliance with requirements applicable in civil actions generally. Further, nonmonetary portions of a foreign judgment are not covered by the Act, and thus present more of a challenge for creditors seeking their enforcement.

Detailed Discussion/Forms:

California Forms of Pleading and Practice, Ch. 318, Judgments (Matthew Bender).

California Points and Authorities, Ch. 131, Judgments (Matthew Bender).

Cross Reference:

For Tips on updating caselaw and expanding your research with additional resources, see **How to Use Lexis.com With This Publication** at the front of this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 25 Enforcing Out of State Judgments in California
II. ENFORCING SISTER STATE JUDGMENTS

2-25 MB Practice Guide: CA Debt Collection 25.03

25.03 CHECKLIST: Enforcing Sister State Judgments.

☐ Determine if judgment is enforceable in California.

Discussion:
See *25.05*

○ Determine if action involves pending or conditional judgment.

Discussion:
See *25.05[2][a]*

○ Determine if judgment is void for lack of jurisdiction.

Discussion:
See *25.05[2][b]*

○ Determine if action is enforceable in state of rendition.

Discussion:
See *25.05[2][c]*

○ Determine if action was subsequently superseded.

Discussion:
See *25.05[2][d]*

○ Determine if action conflicts with prior judgment by California court.

Discussion:
See *25.05[2][e]*

☐ Use Sister State Money Judgments Act to enforce sister state money judgments.

Discussion:
See *25.06*

○ Establish status as judgment creditor.

Authority:
CCP § 1710.10(a)

Discussion:
See *25.06[2]*

○ Draft application for entry of judgment, including all required information.

Authority:
CCP § 1710.15(a)

Discussion:
See *25.06[6]*

Form:
See *25.17*

○ Attach copy of sister state judgment to application.

Authority:
CCP § 1710.15(c)

Discussion:
See *25.06[7]*

○ File application for entry of judgment against judgment debtor in proper California court.

Authority:
CCP §§ 1710.10(b), 1710.20(a)

Discussion:
See *25.06[3], [5]*

○ Clerk will enter judgment.

Authority:
CCP § 1710.25

Discussion:
See *25.06[8]*

○ Promptly serve notice of entry of judgment.

Authority:
CCP § 1710.30(a)

Discussion:
See *25.06[9]*

Form:
See *25.18*

○ Judgment debtor may move to vacate judgment.

Authority:
CCP § 1710.40

Discussion:
See *25.06[11][a]*, *[b]*

☐ Court will rule on motion to vacate judgment.

Authority:
CCP § 1710.40(c)

Discussion:
See *25.06[11][c]*

○ Obtain issuance of writ of execution.

Authority:
CCP § 1710.45

Discussion:
See *25.06[12]*

○ Court may grant stay of enforcement.

Authority:
CCP § 1710.50

Discussion:
See *25.06[13]*

☐ Judgment creditor may bring action to enforce sister state nonmoney judgment.

Authority:
CCP § 1710.65

Discussion:
See *25.07*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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Chapter 25 Enforcing Out of State Judgments in California
II. ENFORCING SISTER STATE JUDGMENTS

2-25 MB Practice Guide: CA Debt Collection 25.04

25.04 Options and Strategies.

Unless there is some compelling reason to the contrary, the best practice is to enforce a sister state judgment by using the Sister State Money Judgments Act [*CCP § 1710.10 et seq.*], discussed in *25.06* et seq. Using it is far more simple, straightforward, cost-effective, and time-effective than bringing a separate action on the out of state judgment.

Consider:

The Act is not unconstitutional on the ground that it does not provide for notice and hearing prior to entry of the judgment by the clerk [*Magalnick v. Magalnick (1979) 98 CA3d 753, 758, 159 CR 889]* . That characteristic is key to the timesaving advantage of the Act over the traditional method of enforcement by independent action.

Using the Act requires filing an application, after which the process proceeds as follows [*see CCP § 1710.10 et seq.*]:

- The judgment is entered in the California court.
- The judgment creditor gives notice of that entry to the judgment debtor.
- The judgment debtor pursues any grounds for vacating the entry of judgment.
- The judgment creditor obtains a writ of execution for levying on the judgment debtor's property.

Strategic Point:

If counsel believes a sale of real property may be imminent, or merely for strategic advantage, counsel may want to obtain an abstract of judgment and record the abstract upon filing the application and before service under the Act. It is arguable that nothing in the Act mandates a 30-day waiting period after service before a court can issue an abstract of judgment (as opposed to actually obtaining a writ of execution after entry of judgment under the Act), and that merely recording an abstract of judgment is not a step in execution, but rather is merely advising the public that a judgment exists [*see Industrial Indemnity v. Levine (1975) 49 CA3d 698, 699, 122 CR 712* ("a stipulated stay of execution does not preclude recordation of an abstract of judgment, because such recordation is not a step in the process of execution upon the judgment"; decided under former *CCP § 681a*,

repealed 1983); *but see CCP § 1710.45(a)* (judgment may not be "enforced by any other means" during 30-day period)].

The alternative to using the Act to enforce an out of state judgment is for the judgment creditor to pursue the traditional method of enforcing a sister state money judgment. This method, discussed briefly in 25.06[15], requires the judgment creditor to bring an independent action in California. That method also remains the sole method in California for enforcing sister state *nonmoney* judgments and other sister state judgments not covered by the Act [*see* 26.07].

Cross Reference:

Discussion of support orders not subject to enforcement under the Sister State Money Judgments Act, see *25.06[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcement

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Chapter 25 Enforcing Out of State Judgments in California
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2-25 MB Practice Guide: CA Debt Collection 25.05

25.05 Judgment Must Be Enforceable.

25.05[1] Most Types of Sister State Judgments Are Enforceable in California. The types of sister state judgments that have been enforced in California are numerous, and include the following:

- Money judgments [*see, e.g., Sanpietro v. Collins (1967) 250 CA2d 203, 207, 58 CR 219]* .
- Equity decrees [*see, e.g., Rozan v. Rozan (1957) 49 C2d 322, 331, 317 P2d 11]* .
- Deficiency judgments [*see, e.g., Gill v. Wolf (1948) 85 CA2d Supp 817, 820, 190 P2d 52]* .
- Specific performance for the conveyance of real property located in California [*see, e.g., Redwood Inv. Co. v. Exley (1923) 64 CA 455, 459, 221 P 973]* .
- Child support orders [*see, e.g., Farmers & Merchs. Trust Co. v. Madeira (1968) 261 CA2d 503, 508, 68 CR 184]* .
- Child custody decrees [*see, e.g., In re Walker (1964) 228 CA2d 217, 221-222, 39 CR 243]* .
- Divorce decrees [*see, e.g., Worthley v. Worthley (1955) 44 C2d 465, 474, 283 P2d 19]* .

Penal judgments of sister states are not enforceable [*Farmers & Merchs. Trust Co. v. Madeira (1968) 261 CA2d 503, 508, 68 CR 184]* .

25.05[2] Courts May Deny Enforcement of Sister State Judgments Under Some Circumstances.

25.05[2][a] Action Must Not Involve Pending or Conditional Judgments. Generally, a sister state judgment must be final and unconditional in order to be the subject of a California action [Law Revision Commission Comment to *CCP § 1710.40*; 11 Cal Law Rev Com Reports 466 (1973); *see Traci & Marx Co. v. Legal Options, Inc. (2005) 126 CA4th 155, 158, 23 CR3d 685]* .

Exceptions:

A sister state judgment that is not stayed but is under appeal in that state is final for purposes of affording

it full faith and credit [*Little v. Stevens (1972) 23 CA3d 112, 113-114, 99 CR 885]* .

A support order of a sister state is enforceable in California as a matter of comity, although subject to modification under the law of that state [*Farmers & Merchs. Trust Co. v. Madeira (1968) 261 CA2d 503, 506-508, 68 CR 184]* .

25.05[2][b] Judgment Is Not Enforceable If Void for Lack of Jurisdiction. A judgment of a sister state having no jurisdiction to render the judgment is not entitled to full faith and credit and enforcement by California [*Sanpietro v. Collins (1967) 250 CA2d 203, 208, 58 CR 219]* .

Timing:

A motion challenging entry of a sister state judgment on jurisdictional grounds is not subject to the 30 day limitation of CCP § 1714.10 [*Airlines Reporting Corporation v. Renda (2009) 177 CA4th 14, 99 CR3d 66]* .

Distinguish:

Whether the court of the sister state had jurisdiction to make the judgment is of course to be determined under the laws of the sister state. Therefore, if the court had jurisdiction under the laws of its jurisdiction, the judgment is enforceable in California even if the court would not have had jurisdiction were California jurisdictional laws applied to determine the jurisdiction of the court of the sister state [*Sanpietro v. Collins (1967) 250 CA2d 203, 208, 58 CR 219]* .

25.05[2][c] Judgment Must Be Enforceable in State Where It Was Rendered. The judgment of a sister state must receive only as much recognition in California as it would in the state rendering the judgment [*see Farley v. Farley (1964) 227 CA2d 1, 6, 38 CR 357]* .

25.05[2][d] Judgment Must Not Have Been Subsequently Superseded. A judgment rendered in one state will not be recognized or enforced in another state if both [*see In re Marriage of Hanley (1988) 199 CA3d 1109, 1117-1118, 245 CR 441]* :

- An inconsistent, but valid, judgment is subsequently rendered in another action between the parties; and
- The earlier judgment is superseded by the later judgment under the law of the state in which the later judgment was rendered.

25.05[2][e] Judgment Must Not Conflict With Prior Judgment by California Court. When courts of different jurisdictions have reached different results on the same issue, and the first of the conflicting decisions was rendered by a California court, that decision takes precedence over the decision of a sister state's court [*Stuart v. Lilves (1989) 210 CA3d 1215, 1221, 258 CR 780]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsFamily LawChild CustodyAwardsGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Reciprocal Enforcement of Support ActReal Property LawDeedsRemediesSpecific Performance

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25.06 Sister State Money Judgments May Be Enforced Under Sister State Money Judgments Act.

25.06[1] Judgment Creditors Can Enforce Sister State Money Judgments. The Sister State Money Judgments Act [*CCP § 1710.10 et seq.*] provides a judgment creditor with the right to enforce a sister state monetary judgment as if it were a California judgment against a judgment debtor [*Aspen Int'l Capital Corp. v. Marsch (1991) 235 CA3d 1199, 286 CR 921]* .

25.06[2] Status As Judgment Creditor Must Be Established. The party seeking to enforce a sister state judgment must qualify as a "judgment creditor" for purposes of the Act [*see CCP § 1710.10(a)*]. "Judgment creditor" as used in the Act means the person or persons who can bring an action to enforce a sister state judgment [*CCP § 1710.10(a)*].

Consider:

The circularity of the definition of "judgment creditor" in the Act probably means simply that if the applicant is not a named judgment creditor in the sister state judgment, then the applicant must prove that he or she holds the enforceable money interest in the sister state judgment [*see CCP § 1710.10(a)*].

25.06[3] Action Must Be Brought Against Judgment Debtor. For purposes of the Act, the "judgment debtor" is the person or persons against whom an action to enforce a sister state judgment can be brought [*CCP § 1710.10(b)*].

25.06[4] Only Requirement for Payment of Money May Be Enforced. A judgment must be for the payment of money in order to be enforced in California under the Act. It must be any part of a judgment, decree, or order of a court of a state of the United States, other than California, that requires the payment of money [*CCP § 1710.10(c)*].

Exception:

A support order as defined in *Fam Code § 155* is not a "sister state judgment" for purposes of the Act [*CCP § 1710.10(c)*]. Support orders by courts of sister states are enforceable under the Uniform Interstate Family Support Act [CCP § 4900 et seq.], as well as by the traditional method filing an independent action [*see Farmers & Merchs. Trust Co. v. Madeira (1968) 261 CA2d 503, 506-508, 68 CR 184* (support order of sister state is enforceable in California as a matter of comity, although subject to modification under the law of that state)].

Cross Reference:

For enforcement of support orders issued by a court of a jurisdiction not in California, see California Forms of Pleading and Practice, Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement (Matthew Bender).

Distinguish:

In the case of a judgment of a sister state court that requires both the payment of money and the performance of some other act, such as the conveyance of land, only the part requiring the payment of money is considered a "sister state judgment" enforceable under the Act. The part requiring the performance of some other act may be enforced, if at all, only by a separate action [Law Revision Commission Comment to *CCP § 1710.10*, 11 Cal L Rev Com'n Reports, 451, 462 (1973)].

Cross Reference:

For discussion of enforcement of portion of judgment awarding nonmonetary relief, see *25.07*.

25.06[5] Judgment Creditor Must File Application in Proper California Court. A judgment creditor files an application for entry of a judgment based on a sister state money judgment in superior court [*CCP § 1710.20(a)*]. The proper county for the filing of an application is any of the following:

- The county in which any judgment debtor resides [*CCP § 1710.20(b)(1)*].
- If no judgment debtor is a resident, any county in California [*CCP § 1710.20(b)(2)*].

A case in which the sister state judgment amounts to $25,000 or less is a limited civil case [*CCP § 1710.20(b)(3)*]. Limited civil cases have abridged pleading, discovery, and evidentiary procedures relative to unlimited civil cases [*see CCP §§ 90-100*].

If a judgment creditor does not select the proper venue for his or her application, the judgment debtor may request a transfer of the proceedings under the general provisions relating to transfer of venue. A transfer will not, however, affect the validity of actions already taken [Law Revision Commission Comment to *CCP § 1710.20*, 11 Cal L Rev Com'n Reports, 451, 464 (1973)].

Cross Reference:

For jurisdictional, venue, and limited civil case rules, see Matthew Bender Practice Guide: California Pretrial Civil Procedure, Chs. 6, 9, 10, 15.

25.06[6] Application for Entry of Judgment Must Contain Specified Information. In order to seek enforcement of a sister state money judgment, a judgment creditor must apply for the entry of a judgment based on that judgment by filing an application for entry of judgment [*CCP § 1710.15(a)*]. The application is executed under oath and includes all of the following:

- A statement that an action in California on the sister state judgment is not barred by the applicable statute of limitations [*CCP § 1710.15(b)(1)*].
- A statement, based on the applicant's information and belief, that no stay of enforcement of the sister state judgment is currently in effect in the sister state [*CCP § 1710.15(b)(2)*].
- A statement of the amount remaining unpaid under the sister state judgment and, if accrued interest on the sister state judgment is to be included in the California judgment, a statement of the amount of interest accrued on the sister state judgment (computed at the rate of interest applicable to the judgment under the law of the sister state), a statement of the rate of interest applicable to the judgment under the

law of the sister state, and a citation to the law of the sister state establishing the rate of interest [*CCP § 1710.15(b)(3)*].

Distinguish:

It is very important for counsel to provide what the correct rate of interest is in the sister state, along with a citation to the sister state's law to that effect. California's judicial council form includes an area requiring this information to be noted, so counsel can save time and obtain it before attempting to file any paperwork [*see 25.17*].

- A statement that no action based on the sister state judgment is currently pending in any California court and that no judgment based on the sister state judgment has previously been entered in any proceeding in California [*CCP § 1710.15(b)(4)*].

- If the judgment debtor is an individual, a statement setting forth the name and last known residence address of the judgment debtor [*CCP § 1710.15(b)(5)*].

- If the judgment debtor is a corporation, a statement of the corporation's name, place of incorporation, and whether the corporation, if foreign, has qualified to do business in California under the provisions of *Corp Code § 2100 et seq* [*CCP § 1710.15(b)(5)*].

- If the judgment debtor is a partnership, a statement of the name of the partnership, whether it is a foreign partnership, and, if it is a foreign partnership, whether it has filed a statement pursuant to *Corp Code § 15800* designating an agent for service of process [*CCP § 1710.15(b)(5)*].

Consider:

Except for facts that are matters of public record in California, these statements may be made on the basis of the judgment creditor's information and belief [*CCP § 1710.15(b)(5)*].

Strategic Point:

Counsel should make certain that the names of the parties against whom enforcement is being sought are clearly set forth in your application. Counsel should review it when it comes back from the court, because clerks have been known to inadvertently pick up the names off the case caption, even if one or more of the named parties have been dismissed from the action.

- A statement setting forth the name and address of the judgment creditor [*CCP § 1710.15(b)(6)*].

California Judicial Council Form EJ-105 is an optional form that may be used for the application for entry of judgment on a sister state judgment. Although this form is designated as optional, in practice its use is standard, since it contains all the required information and is readily accepted by court clerks.

Cross Reference:

For Judicial Council form EJ-105, application for entry of judgment on sister state judgment, see *25.17*.

25.06[7] Copy of the Sister State Judgment Must Be Attached to Application. A properly authenticated copy of the sister state judgment must be attached to the application [*CCP § 1710.15(c)*].

Trap:

Counsel must make sure to provide an "authenticated copy" of the sister state judgment, as the Act defines it. Discerning what version of a copy of a judgment produced under the laws of the sister state qualifies as an authenticated copy under California law may take some investigation. Some states have loosely called authentication as required by the Act a "three way" certification (because there are three areas where the clerk needs to affix their signature and stamp). Furthermore, too many practitioners unknowingly provide only a "certified" copy of the judgment, or an abstract of judgment from the sister state. Neither of these meets the requirements of the Act, and clerks will reject the filing and not enter the judgment until they are provided with a properly authenticated copy.

Cross References:

For California provisions relating to authentication of judgments, see, e.g., *Evid Code §§ 1452*, *1453*, *1530(a)*; see also *California Trial Guide, § 30.01 et seq*. (Matthew Bender).

25.06[8] Clerk Will Enter Judgment. Once the judgment creditor has filed the application in conformity with the Act, the clerk will enter judgment based on the application. Entry of judgment is mandatory, constituting a ministerial act of the clerk and not a judicial act of the court [*Aspen Int'l Capital Corp. v. Marsch (1991) 235 CA3d 1199, 1202, 286 CR 921]* . The judgment will be entered for the total of the following amounts as shown in the application:

- The amount remaining unpaid under the sister state judgment [*CCP § 1710.25(a)(1)*].
- The amount of interest accrued on the sister state judgment (computed at the rate of interest applicable to the judgment under the law of the sister state) [*CCP § 1710.25(a)(2)*].
- The amount of the fee for filing the application for entry of the sister state judgment [*CCP § 1710.25(a)(3)*].

Entry is made in the same manner as entry of an original judgment of the court [*CCP § 1710.25(b)*]. After entry of the California judgment, interest runs at the legal rate of 10 percent per annum [*see* CCP § 685.10(a)] applicable to money judgments initially rendered in California [*CCP § 1710.25(b)*].

Cross Reference:

For procedure for entry of judgment, see *California Forms of Pleading and Practice, § 318.54* (Matthew Bender).

25.06[9] Judgment Creditor Must Promptly Serve Notice of Entry of Judgment. The judgment creditor must promptly serve the notice of entry of judgment on the judgment debtor in the manner provided for service of summons by *CCP § 415.10 et seq*. Notice must be in the form prescribed by the Judicial Council and inform the judgment debtor that the judgment debtor has 30 days within which to make a motion to vacate the judgment [*CCP § 1710.30(a)*]. Judicial Council Form EJ-110 is the standard form for notice of entry of judgment on a sister state judgment. Although use of this form has been designated optional (notwithstanding the statutory requirement), its use is standard in practice.

An out-of-state defendant may be served via certified mail, return receipt requested [*CCP § 415.40*].

Warning:

The judgment creditor must serve notice of entry of judgment promptly. In proceedings under the Sister State Money Judgment Act, the court clerk does not send notice of entry of judgment as provided in *CCP § 664.5* [Law Revision Commission Comment to *[CCP § 1710.30]*, 11 Cal L Rev Com'n Reports 451,

465 (1973)].

Strategic Point:

There is nothing hard and fast as to what constitutes service of the notice of entry of judgment "promptly." However, the judgment creditor has an incentive to serve the debtor as quickly as possible because the judgment creditor generally must wait at least 30 days after the date of service of the notice before the writ of execution may issue [*CCP § 1710.45*], and the execution is necessary for levy on any available assets.

In any case, it appears that delay in serving the notice of judgment, or failure to give notice at all, is not grounds for vacating the judgment unless it rises to the level of *undue* delay [*see Epps v. Russell (1976) 62 CA3d 201, 205, 133 CR 30* ; *Magalnick v. Magalnick (1979) 98 CA3d 753, 758, 159 CR 889* ; *see also CCP § 1710.40(a)* (delay in service not stated as ground for vacating judgment)]. A finding of undue delay appears to require [*see Magalnick v. Magalnick (1979) 98 CA3d 753, 759, 159 CR 889* ; *Epps v. Russell (1976) 62 CA3d 201, 205, 133 CR 30]* :

- Prejudice to the defendant, and
- Lack of culpability on the defendant's part for the delay.

Examples:

- Failure to serve notice does not constitute undue delay if the defendant has suffered no prejudice [*Magalnick v. Magalnick (1979) 98 CA3d 753, 759, 159 CR 889]* .
- Delay of more than two months was not undue delay, when uncontroverted evidence showed that the defendant was either unavailable for service or deliberately avoided it, and defendant did not allege prejudice from the delay [*Epps v. Russell (1976) 62 CA3d 201, 205, 133 CR 30]* .

Strategic Point--Judgment Creditor:

The fee paid for service of the notice of entry of judgment is an item of recoverable costs, but it may not exceed the amount allowed to a public officer or employee in California for such service [*CCP § 1710.30(b)*].

Cross References:

For Judicial Council Form EJ-110 for notice of entry of judgment, see *25.18*.

For discussion of timing of issuance of writ of execution, see *25.06[12]*.

For discussion of service of summons, see Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, Ch. 8, Service of Summons.

25.06[10] Judgment Has Same Effect As Original Money Judgment of California Court. Except as otherwise provided in the Sister State Money Judgments Act, a judgment entered pursuant to the Act has the same effect as an original money judgment of the court and may be enforced or satisfied in like manner [*CCP § 1710.35*].

Cross References:

For discussion of special restrictions on obtaining writ of execution in enforcement of entered sister state judgment, see *25.06[12]*.

For discussion of methods of enforcing judgments generally, see Ch. 9, Planning Enforcement of Judgments.

25.06[11] Judgment Entered Pursuant to Act May Be Vacated.

25.06[11][a] Grounds Must Exist for Vacating Judgment. A judgment entered pursuant to the Sister State Money Judgments Act may be vacated on any ground that would be a defense to an action in California on the sister state judgment, including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to the Act is incorrect [*CCP § 1710.40(a)*].

Examples:

Common defenses to enforcement of a sister state judgment include the following [Law Revision Commission Comments to *CCP § 1710.40*; 11 Cal L Rev Com'n Reports 451, 466 (1973); Restatement (Second) of Conflict of Laws §§ 103-121 (1971)]:

- The judgment is not final and unconditional (if finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated).
- The judgment was obtained by extrinsic fraud.
- The judgment was rendered in excess of jurisdiction.
- The judgment is not enforceable in the state of rendition;
- The plaintiff is guilty of misconduct.
- The judgment has already been paid.
- Suit on the judgment is barred by the statute of limitations in the state where enforcement is sought.

On the other hand, neither the judgment creditor's delay in providing notice of the entry of the sister judgment in California [*Epps v. Russell (1976) 62 CA3d 201, 205, 133 CR 30]* nor failure to provide such notice [*Magalnick v. Magalnick (1979) 98 CA3d 753, 759, 159 CR 889]* , is grounds for a motion to vacate under *CCP § 1710.40(a)*, with the possible exception of situations in which "undue" delay is found [*see Magalnick v. Magalnick (1979) 98 CA3d 753, 759, 159 CR 889* ; *Epps v. Russell (1976) 62 CA3d 201, 205, 133 CR 30]* .

Grounds for vacating judgment may be waived by voluntary appearance and participation in the sister state action [*see Magalnick v. Magalnick (1979) 98 CA3d 753, 760, 159 CR 889]* . However, participation in post-judgment proceedings does not constitute waiver [*Airlines Reporting Corp. v. Renda (2009) 177 CA4th 14, 21, 99 CR3d 66]* .

25.06[11][b] Judgment Debtor Must Move to Vacate Within 30 Days of Notice of Entry. Not later than 30 days after service of notice of entry of judgment, the judgment debtor, on written notice to the judgment creditor, may file a motion to vacate the judgment [*CCP § 1710.40(b)*; *Epps v. Russell (1976) 62 CA3d 201, 205, 133 CR 30* (filing period begins on date of service of notice, not on date of entry of judgment)].

Distinguish:

This 30-day limit does not apply when the motion to vacate is based on the fact that the underlying judgment was void for lack of personal or subject matter jurisdiction [*Airlines Reporting Corp. v. Renda (2009) 177 CA4th 14, 19-20, 99 CR3d 66]* .

A party moving to set aside a sister state judgment under [*CCP § 1710.40*] has the burden of showing by a preponderance of the evidence why he or she is entitled to relief [*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 CA4th 74, 88, 15 CR2d 585]* .

Cross References:

For a form for notice of a motion to vacate a money judgment entered pursuant to the Sister State Money Judgments Act, see *California Forms of Pleading and Practice, § 318.465* (Matthew Bender).

For the manner of showing proof of service on person in California, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 8.36*.

25.06[11][c] Court May Vacate Judgment and Enter New Judgment. Following the hearing of the motion to vacate the judgment, the court may vacate the judgment on any ground provided in 25.06[11][a] and enter another and different judgment, including, but not limited to, another and different judgment for the judgment creditor if the decision of the court is that the judgment creditor is entitled to the different judgment. The court's decision on the motion to vacate the judgment is given and filed with the clerk of court, except that the court is not required to make any written findings and conclusions if the amount of the judgment as entered under *CCP § 1710.25* does not exceed $1,000 [*CCP § 1710.40(c)*].

25.06[12] Timing of Issuance of Writ of Execution.

25.06[12][a] Judgment Creditor Generally Must Wait 30 Days After Service of Notice of Entry Before Writ of Execution Will Issue. A writ of execution on a judgment entered pursuant to the Act will not be issued, and the judgment may not be enforced by other means, until at least 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor [*CCP § 1710.45(a)*].

Exception:

A writ may be issued earlier under the circumstances noted in 25.06[12][b] [*see CCP § 1710.45(b)*].

Cross Reference:

For the rules governing proof of service on a person in California, see *CCP § 417.10 et seq*.

25.06[12][b] Writ May Be Issued Earlier Under Specified Circumstances. A writ of execution may be issued, or other enforcement sought, before service of the notice of entry of judgment if the judgment debtor is any of the following:

- An individual who does not reside in California [*CCP § 1710.45(b)(1)*].
- A foreign corporation not qualified to do business in California under the provisions of *Corp Code § 2100 et seq*. [*CCP § 1710.45(b)(2)*].
- A foreign partnership which has not filed a statement pursuant to *Corp Code § 15700* designating an agent for service of process [*CCP § 1710.45(b)(1)*].

Likewise, the court may order that a writ of execution be issued, or may permit enforcement by other means, before service of the notice of entry of judgment if the court finds upon an ex parte showing that great or irreparable injury would result to the judgment creditor if issuance of the writ or enforcement were delayed as provided in *CCP § 1710.45(a)* [*CCP § 1710.45(c)*].

Strategic Point:

Property levied upon pursuant to a writ issued under *CCP § 1710.45(b)* or *(c)* or otherwise sought to be applied to the satisfaction of the judgment generally may not be sold or distributed before 30 days after the judgment creditor serves notice of entry of the judgment upon the judgment debtor [*CCP § 1710.45(d)*].

Exception:

If property levied upon is perishable, it may be sold in order to prevent its destruction or loss of value, but the proceeds of the sale may not be distributed to the judgment creditor before the date on which sale of nonperishable property is permissible [*CCP § 1710.45(d)*].

Cross Reference:

For the manner showing proof of service on person in California, see *CCP § 417.10 et seq*.

25.06[13] Court May Grant Stay of Enforcement. The court has authority to grant a stay of enforcement under any of the following circumstances:

- An appeal from the sister state judgment is pending or may be taken in the state that originally rendered the judgment. In this case, enforcement will be stayed until the proceedings on appeal have been concluded or the time for appeal has expired [*CCP § 1710.50(a)(1)*].

- A stay of enforcement of the sister state judgment has been granted in the sister state. In this case, enforcement will be stayed until the sister state stay of enforcement expires or is vacated [*CCP § 1710.50(a)(2)*].

- The judgment debtor has made a motion to vacate. In this case, enforcement will be stayed until the judgment debtor's motion to vacate is determined [*CCP § 1710.50(a)(3)*].

- Any other circumstance exists in which the interests of justice require a stay of enforcement [*CCP § 1710.50(a)(4)*].

Cross Reference:

For form for a notice of motion to stay enforcement of judgment, see *California Forms of Pleading and Practice, § 318.466* (Matthew Bender).

The court may grant a stay of enforcement on its own motion, on ex parte motion, or on noticed motion [*CCP § 1710.50(b)*].

When the court has adequate information, it may grant the stay on its own motion. Otherwise, the burden is on the judgment debtor to show a need for the stay on ex parte or noticed motion. The court has broad discretion to fashion the terms of the stay in order to adequately protect the interests of both the judgment creditor and the judgment debtor. Whether an undertaking is to be required, and the amount of the undertaking if one is required, is left to the discretion of the court which may consider factors such as whether (1) a successful defense is probable, (2) it is likely that the debtor

will conceal or transfer assets, (3) the debtor has already given a bond on appeal in the sister state, and (4) the debtor prefers having the property held subject to levy rather than giving an undertaking [Law Revision Commission Comment to *CCP § 1710.50*].

The court must grant a stay of enforcement on such terms and conditions as are just, including but not limited to the following:

- The court may require an undertaking in an amount it determines to be just, but the amount of the undertaking may not exceed double the amount of the judgment creditor's claim [*CCP § 1710.50(c)(1)*].

- If a writ of execution has been issued, the court may order that it remain in effect [*CCP § 1710.50(c)(2)*].

- If property of the judgment debtor has been levied upon under a writ of execution, the court may order the levying officer to retain possession of the property capable of physical possession and to maintain the levy on other property [*CCP § 1710.50(c)(3)*].

25.06[14] Judgment Based on Sister State Judgment May Not Be Entered If Action Was Stayed in Sister State or Another Action Is Pending or Was Decided In California. No judgment based on a sister state judgment may be entered under the Act in any of the following situations:

- A stay of enforcement of the sister state judgment is currently in effect in the sister state [*CCP § 1710.55(a)*].

- An action based on the sister state judgment is currently pending in any court in California [*CCP § 1710.55(b)*].

- A judgment based on the sister state judgment has previously been entered in any proceeding in California [*CCP § 1710.55(c)*].

If a judgment creditor obtains entry of judgment in California before the stay of enforcement of the sister state judgment is granted in the sister state, the judgment debtor may seek to stay enforcement of the California judgment under *[CCP § 1710.50(a)(2)]* [Law Revision Commission Comment to *CCP § 1710.55*].

25.06[15] Act Does Not Affect Right of Judgment Creditor to Bring Action to Enforce Sister State Judgment. Nothing in the Act affects any right a judgment creditor has to bring an action to enforce a sister state judgment. However, no action to enforce a sister state judgment may be brought if a judgment based on that sister state judgment has previously been entered pursuant to the Act [*CCP § 1710.60*].

Consider:

There is no reason to bring a new action to enforce a judgment in lieu of proceeding under the Act, since the Act's procedure is simpler, more efficient, and more expeditious. A separate action should be considered only if the Act cannot be used in a particular case.

Cross Reference:

For a form for a complaint on a sister state money judgment, see *California Forms of Pleading and Practice, § 318.462* (Matthew Bender).

The Act is not intended to restrict the traditional method of enforcing a sister state money judgment, which requires the judgment creditor to bring an independent action in California. However, the judgment creditor must choose between

the methods of enforcement offered. He or she may not obtain two money judgments in California based on one sister state judgment by using the two different procedures [Law Revision Commission Comment to *CCP § 1710.60*, 11 Cal L Rev Com'n Reports 451, 470-471 (1973)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsForeign ServiceCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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II. ENFORCING SISTER STATE JUDGMENTS

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25.07 Sister State Nonmoney Judgments May Be Enforced in California.

The entry of a judgment based on a sister state judgment pursuant to the Act does not limit a judgment creditor's right to bring an action based on the part of a judgment of a sister state that does not require the payment of money, nor does the bringing of such an action limit the judgment creditor's right to obtain entry of judgment based on the sister state judgment pursuant to the Act [*CCP § 1710.65*].

Strategic Point:

Enforcement of the part of a judgment of a sister state ordering the payment of money pursuant to the Act is independent of any action brought to enforce a part of the judgment awarding some other type of relief, and the use of the two separate procedures is not to be regarded as splitting a single cause of action [Law Revision Commission Comment to *CCP § 1710.65*, 11 Cal L Rev Com'n Reports 451, 471 (1973)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of Judgments

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Chapter 25 Enforcing Out of State Judgments in California
III. ENFORCING OUT OF STATE FEDERAL COURT JUDGMENTS IN CALIFORNIA

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25.08 CHECKLIST: Enforcing Out of State Federal Court Judgments in California.

☐ Judgment creditor enters or registers federal judgment in federal district court in California.

Authority:
28 USC § 1963

Discussion:
See *25.10*

☐ Judgment creditor records abstract or certified copy of money judgment to create judgment lien.

Authority:
CCP § 697.060

Discussion:
See *25.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of Judgments

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25.09 Options and Strategies.

Out of state federal judgments can be enforced by registering them in any California federal district court [*28 USC § 1963*; *see 25.10*]. Thereafter, they may be enforced in that district in the same manner as a judgment of that district court [*28 USC § 1963*; *see 25.11*]. Judgment liens on real and personal property may be obtained to enforce federal money judgments in state court [*CCP § 697.060*; *see 25.11[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsCivil ProcedureRemediesJudgment LiensEnforcement

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25.10 Filing Certified Copy Registers Federal Judgment in California Federal District Court.

In an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade, a judgment creditor may register the judgment by filing a certified copy of the judgment in any other district or, with respect to the Court of International Trade, in any judicial district [*28 USC § 1963*].

Warning:

Notwithstanding the statutory language quoted above, in practice a federal judgment may not be registered by simply filing a standard "certified copy"of the judgment in another district. Rather, the person seeking to register the judgment must file a "Certification of Judgment for Registration in Another District" [Form AO 451] issued by the clerk of the court in the district where the judgment was originally issued. This certification is different from a standard certified copy of the judgment. Most if not all federal district courts have district-specific versions of Form AO 451 available online at their individual websites.

Timing:

The judgment creditor may register the judgment when it has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. However, a judgment entered in favor of the United States may be registered any time after judgment is entered [*28 USC § 1963*].

Cross Reference:

For more information on the registration process, see Moore's Federal Practice, Civil, at § 58-08. For registration form, see Bender's Federal Practice Forms, Form 8(V):1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit Statute

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25.11 Enforcing Federal Out of State Judgments After Entry or Registration.

25.11[1] Registered Judgment May Be Enforced As Any Judgment of District in Which Judgment Is Registered. A judgment of an out of state federal court that has been registered with a California federal district court has the same effect as a judgment of the district court of the district in which it is registered and may be enforced in the same manner as a judgment of that district court [*28 USC § 1963*].

Cross Reference:

For discussion of methods of enforcing judgments generally, see Ch. 9, Planning Enforcement of Judgments.

25.11[2] California Law Provides for Entry of Judgment Lien on Real and Personal Property to Enforce Federal Money Judgments. Judgment liens on real and personal property are available to enforce federal money judgment [*CCP § 697.060*]:

- In order to create a judgment lien on real property, a party must record, with the county recorder, an abstract or certified copy of a money judgment of a court of the United States that is enforceable in California [*CCP § 697.060(a)*].

- In order to create a judgment lien on personal property, a party must file, in the Office of the Secretary of State, a notice of judgment lien based on a money judgment of a court of the United States that is enforceable in California [*CCP § 697.060(b)*].

Cross References:

For discussion of creating a judgment lien on real property, see *Ch. 11, Obtaining and Removing Judgment Liens, § 11.03* et seq.; see also *California Forms of Pleading and Practice, § 318.94* (Matthew Bender).

For discussion of creating a judgment lien on personal property, see *Ch. 11, Obtaining and Removing Judgment Liens, § 11.18* et seq.; see also *California Forms of Pleading and Practice, § 318.96* (Matthew Bender).

For discussion of determining priority and sources of liens, see Ch. 12, Determining Priority and Sources of Liens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsCivil ProcedureRemediesJudgment LiensEnforcementCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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Chapter 25 Enforcing Out of State Judgments in California
IV. ENFORCING FOREIGN JUDGMENTS

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25.12 CHECKLIST: Enforcing Foreign Judgments.

☐ Determine if foreign judgment is eligible for recognition under Uniform Foreign-Country Money Judgments Recognition Act.

Authority:
CCP § 1714

Discussion:
See *25.14[1]*

☐ Determine if foreign judgment is entitled to recognition under Act.

Authority:
CCP § 1716(b)

Discussion:
See *25.14[2]*

☐ Determine if circumstances exist warranting nonrecognition of foreign judgment.

Authority:
CCP §§ 1716(c)

Discussion:
See *25.14[3]*

☐ File action for recognition and enforcement relief.

Authority:
CCP § 1718

Discussion:

See *25.16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of Judgments

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Chapter 25 Enforcing Out of State Judgments in California
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25.13 Options and Strategies.

Although the Uniform Foreign-Country Money Judgments Recognition Act [*CCP § 1713 et seq.*] provides a uniform mechanism for creditors seeking to enforce foreign-country money judgments, the Act does not exempt judgment creditors from compliance with requirements applicable in civil actions generally.

Nonmonetary portions of a foreign judgment are not covered by the Act, and thus present more of a challenge for creditors seeking their enforcement. Enforcing those judgments and orders are not within the scope of this Part.

Warning:

The discussion and references in this chapter are based on the Uniform Foreign-Country Money Judgments Recognition Act [*CCP § 1713 et seq.*], which applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*CCP § 1724(a)*]. Counsel dealing with a pre-2007 action should consult the former Uniform Foreign Money-Judgments Recognition Act [former *CCP § 1713 et seq.*]. Although the former Act was repealed in 2007 [Stats. 2007 Ch. 212 § 1], it continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*CCP § 1724*].

Cross Reference:

Enforcing foreign nonmoney judgments, see California Forms of Pleading and Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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Chapter 25 Enforcing Out of State Judgments in California
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25.14 Foreign Money Judgment Qualifying for Recognition Under Uniform Foreign-Country Money Judgments Recognition Act May Be Enforced.

25.14[1] Only Qualifying Foreign Money Judgments Are Eligible for Recognition. To be eligible for recognition under the Uniform Foreign-Country Money Judgments Recognition Act, a judgment of a foreign state must grant or deny recovery of a sum of money, other than a judgment for the following [*CCP § 1715(b)*]:

- Taxes.
- Fines or other penalties.
- Support in matrimonial or family matters. "Support" has been broadly defined to include an award of attorney fees [*Marriage of Lyustiger (2009) 177 CA4th 1367, 99 CR3d 922]* .

Distinguish:

A "foreign country" under the Uniform Foreign-Country Money Judgments Recognition Act includes any governmental unit other than the United States, or any state, district, commonwealth, territory, or insular possession, of the United States [*CCP § 1714(a)*].

25.14[2] Foreign Money Judgment Must Be Entitled to Recognition to Be Enforceable.

25.14[2][a] Foreign Judgment Must Be Final, Conclusive, and Enforceable Where Rendered. A foreign money judgment must be entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act in order to be enforceable [*Renoir v. Redstar Corp. (2004) 123 CA4th 1145, 1150, & n1, 20 CR3d 603]* . The Act applies to foreign judgments that are final and conclusive and enforceable where rendered [*CCP § 1715(a)(2)*]. These standards are to be determined generally in accordance with the law of the jurisdiction in which the foreign court made its decision [*Korea Water Res. Corp. v. Lee (2004) 115 CA4th 389, 398, 8 CR3d 853]* .

Strategic Point--Burden of Proof:

The party seeing recognition of a foreign-country judgment bears the burden of establishing that the foreign-country judgment is entitled to recognition under the Act [*CCP § 1715(c)*].

A foreign judgment that is otherwise conclusive is only conclusive to the extent that it grants or denies recovery of a sum of money [*CCP § 1715(a)(1)*].

Examples:

Foreign appellate ruling rejecting legal theory underlying relief in foreign judgment sought to be enforced precluded finding of conclusiveness of the foreign judgment and, thus, recognition of the judgment for enforcement in California [*Korea Water Res. Corp. v. Lee (2004) 115 CA4th 389, 402, 8 CR3d 853]* .

Exception:

The Act applies to foreign judgments even though an appeal is pending or when the judgment is subject to appeal [*CCP §§ 1715(a)(2), 1720*]. This allows the enforcer of the judgment to pursue creditor's remedies during the pendency of the appeal [*Korea Water Res. Corp. v. Lee (2004) 115 CA4th 389, 399-403, 8 CR3d 853* (foreign law to contrary not followed)].

Strategic Point:

If a defendant satisfies the court either that an appeal is pending or that he or she is entitled to and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable to enable the defendant to prosecute the appeal [*CCP § 1720*].

25.14[2][b] Foreign Judgment Rendered by System Lacking Impartial Tribunals or Due Process Is Not Conclusive. A foreign judgment is not conclusive under the Uniform Foreign-Country Money Judgments Recognition Act if it was rendered under a system that does not provide [*CCP § 1716(b)(1)*]:

- Impartial tribunals, or
- Procedures compatible with the requirements of due process of law.

25.14[2][c] Foreign Judgment Rendered by Court Lacking Personal or Subject Matter Jurisdiction Is Not Conclusive. A foreign judgment is not conclusive under the Uniform Foreign-Country Money Judgments Recognition Act if [*CCP § 1716(b)(2)*]:

- The foreign court did not have jurisdiction over the subject matter [*CCP § 1716(b)(3)*]; or
- The foreign court did not have personal jurisdiction over the defendant [*CCP § 1716(b)(2)*].

Exceptions:

A foreign judgment will not be refused recognition for lack of personal jurisdiction in any of the following circumstances:

- The defendant was served personally in the foreign state [*CCP § 1717(a)(1)*].
- The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over the defendant [*CCP § 1717(a)(2)*].

- Prior to the commencement of the proceedings, the defendant had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved [*CCP § 1717(a)(3)*].

- The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate, had its principal place of business, was incorporated, or had otherwise acquired corporate status in the foreign state [*CCP § 1717(a)(4)*].

- The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state [*CCP § 1717(a)(5)*].

- The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of that operation [*CCP § 1717(a)(6)*].

- Any other basis for jurisdiction that a California court may recognize [*CCP § 1717(b)*].

25.14[3] Otherwise Qualifying Foreign Judgment May Be Denied Recognition on Specified Grounds. A foreign judgment need not be recognized under the Uniform Foreign-Country Money Judgments Recognition Act the following circumstances:

- The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend [*CCP § 1716(c)(1)*].

- The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case [*CCP § 1716(c)(2)*].

- The cause of action or defense on which the judgment is based is repugnant to the public policy of California [*CCP § 1716(c)(3)*].

Example:
When a Mexican court entered a judgment purporting to enforce California divorce decree, the judgment was against public policy and unenforceable to the extent that it enforced payment for alimony continuing after the remarriage of the divorced wife [*Pentz v. Kuppinger (1973) 31 CA3d 590, 597, 107 CR 540]* .

- The judgment conflicts with another final and conclusive judgment [*CCP § 1716(c)(4)*].

- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceeding in that court [*CCP § 1716(c)(5)*].

- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action [*CCP § 1716(c)(6)*].

Cross Reference:
Discussion of when a forum is seriously inconvenient, see *Matthew Bender[(R)] Practice Guide: California Pretrial Civil Procedure, 9.25[1].*

- The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment [*CCP § 1716(c)(7)*].

- The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law [*CCP § 1716(c)(8)*].

- The judgment includes recovery for a claim of defamation, unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions [*CCP § 1716(c)(9)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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Chapter 25 Enforcing Out of State Judgments in California
IV. ENFORCING FOREIGN JUDGMENTS

2-25 MB Practice Guide: CA Debt Collection 25.15

25.15 Obtaining Enforcement of Foreign Judgment.

25.15[1] Party Seeking Enforcement Must Comply With Procedures Applicable to California Civil Actions. Whether the party is seeking to enforce a foreign judgment as recognizable under the Uniform Foreign-Country Money Judgments Recognition Act or another foreign judgment, the party seeking enforcement must comply with the procedures applicable to civil actions decided by a California court [*Renoir v. Redstar Corp. (2004) 123 CA4th 1145, 1152, 20 CR3d 603*].

Example:

A party seeking to enforce a foreign judgment might file an action requesting recognition of the foreign judgment under the Uniform Foreign-Country Money Judgments Recognition Act and praying for relief in the form of judgment for the payment of money and attachment of the other party's assets [*see Korea Water Res. Corp. v. Lee (2004) 115 CA4th 389, 389, 8 CR3d 853]* .

25.15[2] Party Seeking Enforcement Must Serve Summons on Other Party. Whether the party is seeking to enforce a foreign judgment as recognizable under the Uniform Foreign-Country Money Judgments Recognition Act or another foreign judgment, the party seeking enforcement must comply with service of a summons under *CCP § 412.10 et seq.* to establish personal jurisdiction. An enforcement proceeding under the Act is not a special proceeding in which process is something other than a summons, such as a notice or order to show cause or citation or writ [*Renoir v. Redstar Corp. (2004) 123 CA4th 1145, 1151-1152, 20 CR3d 603 (California judgment on foreign judgment was void for lack of service of summons)]* .

Strategic Point:

The right to summons in an action to enforce a foreign judgment may be waived by a general appearance [*see Renoir v. Redstar Corp. (2004) 123 CA4th 1145, 1153, 20 CR3d 603* (general appearance not established by minor references to substantive issues in papers filed with court)].

Cross References:

For discussion of service of summons generally, see California Forms of Pleading and Practice, Ch. 518, Service of Summons and Papers (Matthew Bender).

For planning enforcement of judgments in civil actions decided by a California court, see Ch. 9, Planning Enforcement of Judgment.

25.15[3] Court May Stay Enforcement of Foreign Judgment Subject to Appeal. If a defendant satisfies the court either that an appeal is pending or that he or she is entitled to and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable to enable the defendant to prosecute the appeal [*CCP § 1720*].

25.15[4] Party Seeking Recognition Must Commence Action Within Specified Time Limit. An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which it is effective in the foreign country or 10 years from the date it first became effective in the foreign country [*CCP § 1721*]. If the issue of recognition is sought as an original matter, the issue should be raised by filing an action; however, the issue of recognition may also be raised in a pending action by a counterclaim, cross claim, or affirmative defense [*CCP § 1718*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsMoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsNonmoney Judgments

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25.16 Outside of Uniform Foreign-Country Money Judgments Recognition Act, Foreign Judgments May Be Enforced Only by Action to Establish Judgment.

Outside of the Uniform Foreign-Country Money Judgments Recognition Act, a foreign judgment can be enforced in California only by an action to establish it as a foreign judgment with full force and effect [*Hamilton v. Superior Court (1974) 37 CA3d 418, 422, 112 CR 450]* . Upon establishing this, the courts are required to give a final judgment of a foreign country the same effect as a final judgment rendered in this state. The finality of a foreign judgment is to be presumed until the contrary appears. The presumptions are in favor of the judgment. The burden of proof is upon the party attacking a foreign judgment [*164 East 72nd Corp. v. Ismay (1944) 65 CA2d 574, 576, 151 P2d 29]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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25.17 Application for Entry of Judgment on Sister State Judgment--Judicial Council Form EJ-105.

Application for Entry of Judgment on Sister State Judgment--Judicial Council Form EJ-105

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NOTES:

Authority:
California Judicial Council Form EJ-105, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Discussion:
See *25.06[6]*

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Chapter 25 Enforcing Out of State Judgments in California
V. FORMS

2-25 MB Practice Guide: CA Debt Collection 25.18

25.18 Notice of Entry of Judgment on Sister State Judgment--Judicial Council Form EJ-110.

Notice of Entry of Judgment on Sister State Judgment--Judicial Council Form EJ-110

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NOTES:

Authority:

California Judicial Council Form EJ-110, pictured above, has been approved for optional use [*Cal Rules Ct, Rule 1.35*]

Timing:

See *25.06[9]*