

Memorandum 78-34

Subject: Study D-39.200 - Enforcement of Judgments (Comprehensive Statute--Third-Party Claims)

This memorandum discusses the more important revisions made in the draft of Chapter 6 (Third-Party Claims) of the Enforcement of Judgments Law at the May meeting. These revisions need to be approved before we prepare a complete revised draft.

§ 706.110. Application of chapter

This section has been revised to read as follows:

706.110. A third-party claim of an interest in personal property sought to be applied toward the satisfaction of a judgment may be asserted and determined pursuant to this chapter where enforcement of the judgment is sought by levy under or service of any of the following:

- (a) A writ of attachment.
- (b) A writ of execution.
- (c) A prejudgment or postjudgment writ of possession.
- (d) A writ of sale.
- (e) Process issued by the state or a local public entity to enforce a tax liability.

Comment. Section 706.110 is new. Under former law, the third-party claims procedure was specifically made applicable to attachment (see Section 488.090), claim and delivery (see Section 514.050), execution (see former Sections 689, 689b), and the enforcement of certain state tax liabilities by means of a notice of levy or warrant (see former Section 689d). The procedure was also used to determine third-party claims to property seized to satisfy a judgment foreclosing a chattel mortgage. See Lawler v. Solus, 101 Cal. App.2d 816, 818, 226 P.2d 348, ___ (1951). Subdivision (c) of this section extends this remedy to claims regarding property levied upon to enforce a judgment for possession of personal property. Subdivision (e) extends this remedy to all cases of enforcement of a tax liability.

§ 706.130. Third-party claims to property seized to satisfy tax liability

The staff was asked to investigate whether there is any policy reason for conducting third-party claim proceedings only in the superior court in cases involving enforcement of a tax liability. We have discovered no particular reason for this provision in existing Section 689d.

Code of Civil Procedure Section 86(a)(1) confers jurisdiction on municipal and justice courts in civil cases where the amount in controversy does not exceed \$5,000 "except cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, except such courts shall have jurisdiction in actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant." In several other respects, the tax collectors may employ the services of officers of the municipal or justice courts. For example, the warrant issued pursuant to Revenue and Taxation Code Section 26191 (bank and corporation tax) may be levied by a sheriff, marshal, or constable. Moreover, Revenue and Taxation Code Section 26251 permits the Franchise Tax Board to bring suit "in the courts of this state" to collect a delinquent tax. Clearly, there is no consistent policy of hearing tax-related matters solely in superior court. In any event, the determination of third-party claims is not essentially a matter involving the tax laws with which municipal and justice courts would probably be unfamiliar. There may be some issues arising under the tax laws, such as whether the tax lien has priority over the third person's interest or whether the appropriate administrative procedure for handling the third-party claim was followed.

The staff discussed this matter with three attorneys involved in collecting taxes. The consensus is that there is no identifiable policy reason for hearing third-party claims in superior court although it is more convenient because they have to deal with only one court. This is not really an important issue, however, because very few third-party claims are made in these cases.

Seeing no obstacles to permitting other courts to determine third-party claims in such cases, we have revised Section 706.130(b) in accordance with the suggestion made at the May meeting by deleting the reference to the superior court. Subdivision (c) has also been revised to make the place of filing the claim more specific. As revised, Section 706.130 reads as follows:

706.130. (a) Except as otherwise provided by statute, the provisions of this chapter apply to third-party claims regarding personal property sought to be applied to the satisfaction of a tax

liability pursuant to the Revenue and Taxation Code or the Unemployment Insurance Code. For the purpose of this section, "judgment creditor" means the public entity which seeks to collect the tax, and "judgment debtor" means the tax debtor.

(b) Third-party claims under this section shall be heard and determined in the county where the property claimed is located.

(c) If a levy is not made by a levying officer, the third-party claim shall be filed with the department or agency of the public entity in charge of enforcement of the tax liability.

(d) The public entity shall file a notice with the levying officer where an undertaking would otherwise be required pursuant to Article 2 (commencing with Section 706.210). The notice shall state that the public entity opposes the claim of the third person.

§ 706.210. Claim of title, right to possession, or an interest other than a security interest

The restriction of this procedure to claims of interests superior to liens of judgment creditors has been moved to this section from Section 706.110 in the prior draft.

706.210. (a) A third person may claim title, the right to possession, or any other interest in personal property that is not a security interest, if the interest claimed is superior to the judgment creditor's lien on the property, by filing with the levying officer a verified written third-party claim, together with a copy thereof.

(b) The claim shall contain all of the following:

(1) A description of the interest claimed, including a statement of the facts upon which the claim is based.

(2) A statement of the reasonable value of the interest claimed.

(3) The address in this state to which notice may be mailed to the third person.

Comment. Section 706.210 supersedes a portion of the first paragraph of former Section 689. Under former Section 689, the claimant was required to show "title and right to possession." See *Palmquist v. Palmquist*, 228 Cal. App.2d 789, ___, 39 Cal. Rptr. 871, ___ (1964) (attaching creditor could not use third-party claims procedure). Section 706.210(a) also makes clear that the procedure of this article is not available unless the interest of the third person is superior to the lien of the judgment creditor.

§ 706.310. Claim of security interest

This section has been revised in the same manner as Section 706.210. The word "detailed" has been added to subdivision (b)(1), consistent

with Section 689b(2). The provision requiring a statement of the interest rate has been added.

706.310. (a) A secured party may claim a security interest in personal property, if the security interest claimed is superior to the judgment creditor's lien on the property, by filing with the levying officer a verified written third-party claim, together with a copy thereof.

(b) The claim shall contain all of the following:

(1) A detailed description of the security interest claimed, including a statement of the facts upon which the security interest is based.

(2) A statement of the total amount of sums due or to accrue under the security agreement, above setoffs, with interest to date of tender, and the applicable rate of interest.

(3) The address in this state to which notice may be mailed to the secured party.

Comment. Section 706.310 supersedes the first sentence of subdivision (2) of former Section 689b. This article applies to claims by all secured parties, whereas former Section 689b governed only claims by conditional sellers and chattel mortgagees. See Division 9 (commencing with Section 9101) of the Commercial Code (secured transactions).

§ 706.370. Verified statement concerning security interest

This section has been revised to permit the verified statement to allege that the amount demanded is excessive.

706.370. At the time the undertaking is filed with the levying officer in response to a third party claim by a secured party, the judgment creditor shall file with the levying officer a verified statement that the security interest is invalid, that the security interest is not entitled to priority over the judgment creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled under the security agreement, for the reasons specified therein, and shall mail a copy of the verified statement to the secured party.

Comment. Section 706.370 supersedes a portion of the first paragraph of subdivision (9) of former Section 689b. This section permits the judgment creditor to resist the claim of the secured party on the grounds that the security interest is not entitled to priority, whereas former law required a statement that the chattel mortgage on conditional sale was void or invalid. See Section 706.110 (third-party claim of superior interest); Com. Code § 9301 (priority of lien creditor over unperfected security interest).

§ 706.460. Burden of proof

The Commission requested the staff to consider whether it would be appropriate to place the burden of proof in a hearing on a third-party claim on the judgment creditor if the property has been levied upon in the possession of some person other than the judgment debtor. This would be a departure from existing law which places the burden on the third person in all cases. The Commission has previously decided to place the burden on the judgment creditor where the third person is claiming a security interest in the property.

The staff believes that it is unnecessary to shift the burden in cases where the property is in the third person's possession. A garnishee may refuse to turn property over to the levying officer if the garnishee claims the right to possession and may refuse to pay a debt if the debt is denied. The judgment creditor may then proceed by way of a creditor's suit in which the burden is on the creditor.

A nongarnishee third person is not in a position to resist the levy, but we do not see this as a significant set of cases. Most nongarnishee third persons will be secured parties, and the Commission has already decided to shift the burden to the judgment creditor in such cases. Another typical situation involving nongarnishee third persons occurs when a joint bank account is levied upon. In this case, the judgment creditor is required to furnish a bond in twice the amount of the judgment or the amount sought to be applied to the judgment in order to indemnify the joint account holder. We think it is probably a rare case in which a levying officer levies on tangible personal property in the hands of one third person which is claimed by another third person. In sum, the magnitude of the problem does not appear to justify further tinkering with the existing allocation of the burden of proof.

To shift the burden of proof would also present some procedural difficulties because the manner of levy would have to be stipulated to or determined at the hearing before the burden of proof could be placed. It would be possible to require the levying officer to file some sort of statement with the court which indicated the manner of levy on the property which is the subject of the third-party claim, but that too involves additional administrative costs.

Switching the burden to the judgment creditor where the third person claims a security interest is in part justifiable by the fact that the terms of the security interest are a matter of prior written contract and are filed with the levying officer and served on the judgment creditor along with the third-party claim. However, it is not nearly as likely that other types of interests in personal property for which a third-party claim may be made will have been reduced to a reliable writing.

§ 706.520. Application of released property to satisfaction of judgment

This section has been revised to read as follows:

706.520. If property has been released pursuant to Section 706.230 or 706.330, it may be levied upon or otherwise sought to be applied toward the satisfaction of the judgment only if it is determined in the hearing on the third-party claim that the judgment debtor has an interest in the property that may be applied toward the satisfaction of the judgment.

Comment. Section 706.520 supersedes the sixteenth sentence of the eighth paragraph of former Section 689 and the second paragraph of subdivision (10) of former Section 689b. Former law referred only to relevy upon property that had been released, but this section recognizes that other enforcement procedures may also be employed. See, e.g., Chapter 5 (commencing with Section 705.110) (special procedures for enforcement of money judgments).

We have not continued the provision concerning levy of the writ if it is still in the officer's hands or issuance of another writ if it is not because these matters are governed by the general provisions concerning the issuance and duration of writs.

§§ 706.730-706.760. Undertaking to release property

The following sections have been revised to avoid the release of property in response to the third person's undertaking before the time for objecting to the undertaking has expired. This problem also exists under current law.

§ 706.730. Filing and service of undertaking

706.730. The third person shall:

(a) File the undertaking to release property in the action with the court.

(b) Serve on the judgment creditor a notice of the filing of the undertaking with the court pursuant to subdivision (a) and a copy of the undertaking.

(c) File with the levying officer a notice of the filing of the undertaking with the court, a copy of the undertaking, and proof of service on the judgment creditor pursuant to subdivision (b).

Comment. Subdivision (a) of Section 706.730 continues the substance of a portion of former Section 711. Subdivision (b) supersedes the remainder of former Section 711. Subdivision (c) is new. This provision has been added to prevent release of the property before the time for making an objection to the undertaking has expired. See Section 706.760.

§ 706.740. Effective date of undertaking

706.740. The third person's undertaking becomes effective when the property described therein is released pursuant to this article.

Comment. Section 706.740 supersedes former Section 713-1/2 which provided that the undertaking was effective 10 days after service on the judgment creditor or, if an objection to the undertaking was made, when a new undertaking was given. Under Section 706.740, the undertaking is effective when it achieves its purpose--the release of the property it describes--by which time the period for making an objection will have expired. See Section 706.750.

§ 706.750. Release of property pursuant to undertaking

706.750. Promptly after the expiration of 10 days from the date the notice of filing with the court and the copy of the undertaking were served on the judgment creditor pursuant to subdivision (b) of Section 706.730, the levying officer shall release the property described in the third person's undertaking in the manner provided by Section 706.230 except in the following cases:

(a) Where the property described in the undertaking is to be held under another lien.

(b) Where the court orders a different disposition of the property.

(c) Where the judgment creditor makes an objection to the undertaking.

Comment. Section 706.750 supersedes a portion of the seventh paragraph of former Section 689 and a portion of former Section 713-1/2.

§ 706.760. Objection to undertaking

706.760. The judgment creditor may make an objection to the third person's undertaking not later than 10 days after the notice of the filing of the undertaking with the court and a copy of the undertaking are served on the judgment creditor pursuant to subdivision (b) of Section 706.730.

Comment. Section 706.760 continues the substance of the first sentence of former Section 711-1/2. See also Section 706.160 (general provisions regarding undertaking).

Respectfully submitted,

Stan G. Ulrich
Staff Counsel