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Civil Procedure

University of the Pacific; McGeorge School of Law

Civil Procedure

Civil Procedure; prejudgment attachment

Business and Professions Code §6947 (amended); Civil Code §1812 (repealed); §§2984.4, 3065a, 3152, 4380 (amended); Code of Civil Procedure Chapter 1 (commencing with §477), Chapter 4 (commencing with §537) (repealed); §684.2, Title 6.5 (commencing with §481.010), Chapter 1 (commencing with §500) (new); §§682a, 688, 690, 690.6, 690.21, 690.24, 921, 1174 (amended); Education Code §§13524, 21112 (amended); Financial Code §11208 (repealed); §§1650, 3144 (amended); Food and Agricultural Code §281 (amended); Government Code §7203 (repealed); §7203 (new); Harbors and Navigation Code §495.2 (repealed); §§495.1, 495.5 (amended); Health and Safety Code §11501 (amended); Labor Code §§300, 404, 5600, 5601 (amended); Penal Code §1208 (amended); Revenue and Taxation Code §§6713, 7864, 8972, 11472, 12680, 18833, 26251, 30302, 32352 (amended); Water Code §71689.5 (amended); Welfare and Institutions Code §§1834, 17409 (amended).

AB 2948 (McAlister); STATS 1974, Ch 1516

(Effective January 1, 1976)

Support: California Law Revision Commission; State Bar of California

Opposition: Credit Managers Association

Enacts permanent prejudgment attachment procedure; defines those instances in which attachment is authorized; requires notice and a hearing in order to obtain a writ of attachment; provides for ex parte procurement of a writ of attachment; allows plaintiff to apply for a temporary protective order pending the hearing under certain circumstances; specifies the kinds of property subject to attachment; prescribes the method of levy for particular types of property; delineates requirements for a lien of attachment, management, and disposition of attached property; establishes procedures for filing and appealing an undertaking; creates liability for wrongful attachment; provides for examination of witnesses; establishes a separate procedure for nonresident attachment; provides that act will not become operative until January 1, 1976.

Chapter 1516, to be known as the "Attachment Law," has been enacted for the purpose of providing a permanent prejudgment attachment law in California, and will replace interim legislation enacted

in 1972 [CAL. CODE CIV. PROC. ch. 4 (commencing with §537)]. The Attachment Law will go into effect on January 1, 1976, with the expiration of the interim legislation.

Writ of Attachment—Exemptions

Under the new law a writ of attachment may be issued only in an action against a defendant engaged in a business, trade, or profession, where the claim is for a fixed amount exceeding $500 and is based on a contract, expressed or implied. The attachment will not be issued if the claim is secured by an interest in real or personal property arising from agreement or by law, unless it falls under one of two narrow exceptions specified (§483.010). The attachment also will not be issued where the claim is based on the sale or lease of property, a license to use property, or the furnishing of services or the loan of money, where the property, services or money were used primarily for personal, family, or household purposes [CAL. CODE CIV. PROC. §483.010. (hereinafter all section number references will be to the Code of Civil Procedure, unless otherwise specified)]. Generally, the only property subject to attachment is corporate or partnership property or, in the case of an individual, all his real property and property used or held for use in his business or profession. Section 487.010 also exempts the following property from attachment: (1) all property exempt from execution; (2) property necessary for the support of defendant and his family; and (3) all earnings paid by an employer to defendant (§487.020). The attachment of *any* property of a nonresident is authorized unless he files a general appearance, in which case the attachment must be released if it could not be issued against a resident defendant (§492.050).

A writ of attachment may be obtained only after 20 days notice and a hearing at which the plaintiff is required to establish the probable validity of his claim and to provide a sufficient undertaking (§§481.190, 484.010, 484.040, 484.090). The defendant is required to prove claims of exemption at the hearing, and if he does not do so, he may not claim them at a later time unless he can show that circumstances have changed. The defendant is allowed to claim that property which is *not* described in the plaintiff's application is exempt from attachment. Although the writ itself is limited to the property described in the plaintiff's application, a specific description is required only where the defendant is an individual. All claims of exemption and opposition thereto must be filed and served on the adverse party

prior to the hearing, and if the plaintiff does not file and serve such a notice of opposition to a claim of exemption, no writ of attachment will be issued as to that property. If *all* of the property listed in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition, then no hearing will be held and no writ of attachment will be issued. The court must base its decision on these specified documents unless there is good cause for permitting additional evidence (§§484.020, 484.070, 484.090, 484.360).

Where plaintiff seeks an ex parte issuance of a writ of attachment he must not only show the probable validity of his claim, but also that delay would cause him great or irreparable injury (§485.010), or that the defendant is a nonresident individual, a foreign corporation not qualified to do business in this state, or a foreign partnership which has not designated an agent for service of process (§492.010 *et seq.*). The requirement of great or irreparable injury may be satisfied by: (1) sufficient evidence of a danger that the property would be concealed, substantially impaired in value, or otherwise made unavailable to levy if issuance of the order were delayed; (2) a showing that a bulk sales notice has been recorded and published, with respect to a bulk transfer by the defendant pursuant to division 6 (commencing with §6101) of the Commercial Code; (3) proof that an escrow has been opened pursuant to the provisions of section 24074 of the Business and Professions Code with respect to the sale by defendant of a liquor license; and (4) any other circumstance showing that great or irreparable injury would result if there were a delay in issuing the order (§485.010). In addition, plaintiff must show that the property sought to be attached is not exempt from attachment. After the writ is issued, the defendant may challenge the validity of plaintiff's claim by filing and serving a notice of motion prior to a hearing, and may claim any exemptions by following the procedure set out in section 690.50 (§§485.220-485.240, 492.050).

Under prior law additional writs were issued merely on the basis of the plaintiff's original affidavit and undertaking. The new legislation has established additional specific procedures for obtaining additional writs. Section 482.090 provides for the issuance of additional writs in the *same form* as the original writ, either at the same time as the original writ or later, without the requirement of a new undertaking. This may be necessary where property is located in different counties. After the right to attach order has been issued, additional writs may be issued in a *new* form either after a hearing or ex parte (§§484.310-484.530, 485.510). Sections 492.060 through 492.090 provide for

issuance of additional writs prior to a hearing. In the case of an ex parte proceeding, the defendant may make a post-levy claim of exemption unless such claim has been denied earlier in the action, in which case he must prove that there has been a change of circumstances.

Temporary Protective Order

Under the 1972 law, when the court issued a notice of hearing it was also required to issue a temporary restraining order, which prohibited any transfer by the defendant of any of his property which was subject to attachment except in the ordinary course of business. The ex parte issuance of such a decree was arguably a violation of the constitutional requirement of notice and hearing set forth in *Randone v. Appellate Department* [5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)]; however ex parte issuance of a TRO was recently upheld in *Chrysler Credit Corp. v. Waegele* [29 Cal. App. 3d 681, 105 Cal. Rptr. 914 (1972)]. The new Attachment Law attempts to satisfy due process requirements by replacing the temporary restraining order with a temporary protective order, which may be issued only under certain circumstances. When the plaintiff applies for a right to attach order, he may also apply for a temporary protective order by filing an application with the court, showing that great or irreparable injury would result if such order were not issued. The probable validity of the claim must be established, and an undertaking must be provided (§486.101). The plaintiff may apply directly for a temporary protective order when he applies for the right to attach order and writ of attachment, and the court in its discretion may grant such an order in lieu of a right to attach order (§486.030). The new legislation gives the court the authority to fashion the terms of the order in the manner it considers most just under the circumstances. A temporary protective order prohibits transfers of property by the defendant, but certain specified transfers and payments in the course of defendant's business are allowed (§§486.050, 486.060). This order is only temporary and expires 40 days after it is issued, or when a levy of attachment is made by plaintiff upon specific property described in the order, whichever is earliest (§486.090). Service of the order upon defendant creates a lien on the property described in the order, so long as the property is owned by the defendant at the time and is subject to the levy of a writ of attachment. The lien is invalid against a bona fide purchaser or encumbrancer, or a transferee in the ordinary course of business, and terminates on the date the temporary protective order expires unless a writ of attachment has been levied during that

period. Such a levy would perfect the lien initially created by the service of the temporary protective order (§486.110).

Levy Procedures

The notice of attachment must inform the person who is served of his rights and duties under the attachment and should be served on the defendant and certain third persons where real property is involved, as provided in sections 488.310 to 488.430 (§§488.010, 488.020). As a prerequisite to any seizure of property the plaintiff must deposit a sum with the levying officer sufficient to pay the expenses of taking and storing the property (§488.050). Interests in real property may be attached by recording a copy of the writ and notice of attachment with the county recorder. The levying officer is required to serve the occupant of the property with a copy of the writ and notice no more than 15 days after the date of recording, and copies are to be sent to the defendant and any third person in whose name the property stands. Failure to serve the occupant or to send notices to the defendant or other owners of the property, however, will not affect the lien created by recording of the notice of attachment with the county recorder. To attach equipment of a going business, the levying officer must file a notice with the Secretary of State, as prescribed in section 488.340. Motor vehicles or vessels which are equipment of a going business may be attached by filing a notice with the Department of Motor Vehicles (§488.350). Farm products or inventory of a going business may be attached by placing a keeper on the premises, but only if the defendant consents and only for a maximum of 10 days. At plaintiff's option, the levying officer may attach the property by filing a notice with the Secretary of State, or recording the notice with the county recorder in the case of crops or timber. If the land on which such crops or timber are growing stands in the name of a third party, the recorder must index the attachment (when recorded) in the names of both the defendant and the third party. If the defendant does not consent to the placing of a keeper, or after 10 days in any case, the levying officer shall seize the property unless the parties make some other disposition. Section 488.360 permits the defendant to apply for the release of his property where it is essential for the support of himself and his family. In order to attach accounts receivable, choses in action, and deposit accounts not represented by a negotiable instrument, the levying officer must serve the debtor, obligor, or financial institution with a copy of the writ and the notice of attachment (§§488.370, 488.390). Chattel paper, negotiable instruments, and

negotiable documents in the defendant's possession should be attached by service of the writ and notice of attachment and seizure of the items. If the property is not in defendant's possession, the levying officer may attach by serving both the person in possession and the defendant with a copy of the writ and notice of attachment. However, until the debtor or obligor is notified of the attachment, any payments made in good faith to the previous holder of the instrument will be applied to the discharge of the obligation (§§488.380, 488.400). Securities in the possession of the defendant are to be attached in the same manner as chattel paper. Where the securities are not held in defendant's possession, the procedure to be followed will vary depending on who has possession (§488.410). To attach a judgment owing to defendant, the levying officer must file a copy of the writ and notice of attachment in the action in which the judgment was entered, and in addition must serve notice on the judgment debtor in the action (§488.420). The defendant's interest in personal property belonging to the estate of a decedent may be attached by filing a copy of the writ and notice of attachment with the clerk of the court which is handling the probate proceedings, and serving notice on the personal representative of the decedent (§488.430). Subject to the provisions discussed thus far, personal property in the defendant's possession may be attached by seizure, and property not in defendant's possession may be attached by garnishing the person in possession (§§488.320, 488.330). In either case, the defendant must be served with a copy of the writ and notice of attachment. If the third party wishes, he may deliver the property into the possession of the levying officer. Any person who wishes to claim an interest in personal property which has been attached may do so in the manner provided for third party claims after levy under execution (§488.090). In order to levy upon any property or debt owed to the judgment debtor which is subject to execution, but for which no method of levy of attachment has been provided, the levying officer must serve a copy of the writ of execution and a notice of levy upon the person in possession of such property (or owing such a debt) or his agent (§688).

A lien on the property is created by the writ of attachment and becomes effective either on the date of recording, the date on which the levying officer takes custody of the property, the date of filing, or the date of service of the writ, depending on the type of property involved. Where a temporary protective order has been issued, the lien of attachment becomes effective from the date of service of such order (§488.500). Section 488.510 specifies the duration of the lien created

pursuant to a writ of attachment, and the procedure for extending it. The levying officer is authorized to endorse checks payable to the defendant and to sell property which is perishable or is likely to deteriorate (§§488.520, 488.530). Procedures for collection of obligations and examination of third persons and additional witnesses are set forth in sections 488.540, 488.550, and 491.010 through 491.040. Attached property may be released by returning property to the person from whom it was taken, by issuing a written release to the garnishee, or by recording such release in the case of real property (§488.560).

Undertakings

Undertakings required by the Attachment Law must be executed by at least two sureties, and must be presented to the proper court for approval prior to filing (§1056 authorizes execution by a single corporate surety in lieu of two or more personal sureties). They may be objected to on the grounds that the sureties are insufficient, or the amount of the undertaking is insufficient, and any objection should be made by a noticed motion. The beneficiary may waive the requirement of an undertaking in writing (§§489.030-489.040, 489.060-489.080). The beneficiary may directly enforce a judgment of liability on an undertaking against the sureties, but such liability is limited to the amount of the undertaking, and the motion may not be filed until such time as the judgment or appeal is final (§§489.110-489.120). The amount of the undertaking is initially set at $2,500 for municipal court and $7,500 for superior court actions, but the amount may be increased by order of the court when defendant so requests and must include an amount which the defendant could recover for any wrongful attachment by the plaintiff (§§489.210-489.220, 489.410). The notice of levy of a writ of attachment must include a statement informing the defendant that the undertaking has been filed and informing him of his right to object to it (§489.230). A defendant may apply for an order permitting him to file an undertaking in order to release an attachment or terminate a protective order, but such undertaking may not exceed the amount of any judgment which could be recovered by the plaintiff in an action against the defendant, and should be equal to the amount of the plaintiff's claim (§§489.310-489.320).

Liability for Wrongful Attachment

In addition to any common law remedies, damages may be obtained for wrongful attachment in any of the following circumstances: (1)

the levy of a writ of attachment or service of a protective order in an action in which attachment is not authorized or where the plaintiff does not recover judgment; (2) the levy of an ex parte writ of attachment on property exempt from attachment except where the party who applied for the writ shows that he reasonably believed there was no allowable exemption; and (3) the levy of a writ of attachment on property of a person other than the person against whom the writ was issued unless it was made in good faith and reliance on the registered or recorded ownership. The levy of a writ of attachment or the service of a protective order in an action where attachment is not authorized will not be considered wrongful if *both* of the following are true: first, the levy was not authorized solely because of the prohibition of section 483.010 against attaching property sold or leased (or money loaned) for family or personal purposes; and second, the person who provided the property or loaned the money reasonably believed that it would *not* be used primarily for personal or family purposes (§490.010). Liability for such wrongful attachment includes all damage proximately caused to defendant or any other person and all costs and expenses reasonably incurred in defeating the attachment, but is limited by the amount of the undertaking where the writ of attachment was issued pursuant to a noticed hearing procedure (§490.020). The defendant does not have to initiate a new action to recover such damages, but may simply make a motion in the trial court, subject only to the condition that he wait until the judgment or appeal is final. The defendant may join the sureties in this motion and they will become jointly and severally liable with the plaintiff up to the amount of the undertaking. The procedure for recovery of such damages is provided in section 1058a. A third party whose property is attached is permitted to intervene in the action and to recover damages for wrongful attachment to the same extent and in the same manner as the defendant (§§490.030, 490.050).

Miscellaneous

Chapter 12 of the newly enacted Attachment Law (commencing with §492.010) establishes a comprehensive procedure for the attachment of property of nonresidents, the most significant aspects of which have been discussed *supra*. Section 482.030 provides that the Judicial Council is to prescribe the form of applications, notices, orders, and other required documents, and to create rules of procedure for the proceedings under the new law. Any affidavit required by this law must show affirmatively that any affiant sworn as a witness can testify

competently to the facts stated, unless such matters are expressly permitted to be shown by information and belief (§482.040). Various other code sections relating to attachment have been modified or deleted in order to remain consistent with the new legislation.

COMMENT

The newly enacted Attachment Law is the latest in a series of attempts to bring California law into line with the constitutional requirements set forth in the *Randone* decision [Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)]. When the *Randone* court declared section 537 of the California Code of Civil Procedure unconstitutional, the legislature enacted temporary legislation which expires on December 31, 1975. At the same time the California Law Revision Commission was designated to study the law regarding attachment, and the new Attachment Law embodies its recommendations. One of the problems with the temporary legislation was that it failed to sufficiently restrict attachment to those obligations which arose from a commercial transaction. The interim legislation allowed prejudgment attachment against corporations, partnerships, or individuals engaged in a trade or a business—that is, based upon the defendant's *status*. For example, under the 1972 law a defendant who was a small businessman could have his property attached for a doctor bill, while the ordinary working person could not. The new law has clarified this provision by allowing attachment only when the claim is based on an unsecured contract that arises out of the *conduct* of a trade or business by the defendant, instead of merely permitting attachment only against persons or organizations engaged in commercial activities.

Another shortcoming of the 1972 law was that temporary restraining orders could be issued in all cases, but the new Attachment Law requires a showing of great or irreparable harm before such an order will be issued. This satisfies the *Randone* requirement of a showing of special circumstances before a person may be deprived of property without notice and hearing. In addition, the new Attachment Law grants far greater discretion to the judge in fashioning an appropriate remedy, a desirable change in that both creditors and debtors may now be more fairly and adequately protected.

The interim law did not specify the contents of the notice of attachment, nor did it specify any methods of levy for different types of property. The new law does that and has also eliminated the distinction between property capable or incapable of manual delivery, and has re-

fined the various methods of levy. The provisions relating to undertakings have been simplified, and a detailed procedure for obtaining additional writs more protective of defendant's rights has been enacted. In addition, the Attachment Law has introduced direct liability for wrongful attachment.

See Generally:

1) 2 WITKIN, CALIFORNIA PROCEDURE, *Provisional Remedies* §§118-217 (2d ed. 1970).
2) *Recommendation Relating to Prejudgment Attachment*, 11 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES 701-903 (1973).
3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §9.1 *et seq.* (1968).
4) Comment, *Attachment in California: Senate Bill 1048, The Interim Response to Randone*, 4 PAC. L.J. 147 (1973).
5) Comment, *Attachment in California: Another Round of Creditors' Rights and Debtor Protection*, 20 U.C.L.A.L. REV. 1015 (1973).

Civil Procedure; foreign support orders

Code of Civil Procedure §§1697, 1698, 1698.1, 1698.2, 1698.3, 1699 (new); §§1695, 1696, 1697 (amended).
SB 811 (Robbins); STATS 1974, Ch 80
Support: Attorney General

Provides additional remedies for enforcement of foreign support orders in California by setting up registration procedure; requires court clerks to maintain a registry of foreign support orders; provides for representation of obligee by prosecuting attorney or Attorney General; specifies that a support order registered in the manner provided is to be treated in the same manner as a California support order.

Chapter 80 has amended the Uniform Reciprocal Enforcement of Support Act [CAL. CODE CIV. PROC. §1650 *et seq.*] by introducing a registration procedure which provides for more efficient enforcement of foreign support orders. (For changes made in the Uniform Enforcement of Foreign Judgments Act, see concluding comment *infra.*) The new enactment (§1697) provides that if the duty of support is based on foreign support orders, the obligee has, in addition to the remedies already provided by the Act, the remedies set forth in the newly added sections 1698 and 1699. Section 1698 provides that the obligee may register the foreign support order in a California court according to procedures outlined in sections 1698.1 to 1698.3, and section 1698.1 requires the clerk of the court to maintain a registry of foreign support orders. Section 1698.2, like section 1680 under the older procedure, provides that the prosecuting attorney shall represent the obligee in the proceeding, and should the prosecuting attorney fail or re-

fuse to represent the obligee, the Attorney General may order him to do so or may undertake the representation himself. The procedure by which an obligee may register a foreign support order is outlined in section 1698.3. Basically, he or she must provide the court with (1) three certified copies of the order, (2) one copy of the reciprocal enforcement of support act of the state issuing the order, and (3) a statement verified and signed by the obligee, showing the address of the obligor, the amount of support owed, a description and the location of any property available for execution, and a list of the states in which the order is registered. The clerk of the court will file these documents in the registry of foreign support orders, at which time registration is complete. The clerk will then send to the obligor a notice of the registration along with a copy of the support order and the address of the obligee. They shall be sent by a form of mail requiring a return receipt from the addressee, and the court must be satisfied that the obligor personally received the notice of registration. Upon notification by the clerk, the prosecuting attorney is required to enforce the order just as though it had been issued by a California court.

Section 1699 expressly provides that upon registration the foreign support order is to be treated in the same manner as a support order issued in a California court. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of this state. The obligor has 20 days after the mailing of notice in which to petition the court to vacate the registration or for other relief, and if he does not, the registered support order is confirmed. At the hearing to enforce the order the obligor may present only matters that would be available to him as defenses in an action to enforce a support judgment. If an appeal from the order is pending or will be taken, the court must stay enforcement on the order. If a stay of execution has been granted by the issuing court, or if the obligor establishes grounds on which an order of this state would be stayed, the court must stay enforcement also. In all cases in which enforcement is stayed, the obligor must post appropriate security for payment of the support order.

In addition to the substantive changes already discussed, chapter 80 has also amended sections 1695, 1696, and 1697 of the Code of Civil Procedure by renumbering them to read 1694, 1695, and 1696, respectively. These sections deal with rules of evidence, defenses, interference with rights of custody and visitation, effect of a hearing on the issue of paternity, and the authority of the Attorney General to make appeals in the public interest.

COMMENT

California enacted the Uniform Reciprocal Enforcement of Support Act in 1953 (substantially amended in 1970), which dictates the manner in which support orders emanating from sister states as well as foreign countries are to be treated in California. Basically the Act provides for full enforcement, even though a modifiable sister state decree would not otherwise be entitled to full faith and credit. Prior to the enactment of the new provisions of chapter 80, the obligee had to file a petition in the initiating state, which examined it and determined whether a duty of support was owed, and whether the responding state could obtain jurisdiction over the obligor or his property. If the court answered these two questions in the affirmative, it sent copies of the petition or "complaint" to the responding court, which then took steps to obtain jurisdiction over the obligor or his property. The responding court held a hearing, and when it was finally satisfied of the obligee's claim, it entered its *own* order against the obligor, which was then forwarded to the initiating court and delivered to the obligee (§§1676, 1680, 1682). One of the problems encountered by the courts under this procedure was whether the responding state was entitled to modify the support orders issued by a foreign court. The Supreme Court of California answered this question in the affirmative in a 1955 decision [Worthley v. Worthley, 44 Cal. 2d 465, 283 P.2d 19 (1955)], and the new legislation explicitly provides that any registered support order is subject to the same procedures for modification and enforcement as a California support order.

The bill does not make any changes with regard to treatment of support orders emanating from foreign nations. Section 1693 of the Code of Civil Procedure states that a foreign country will be recognized as a reciprocating state for purposes of the Act "[w]hen the Attorney General is satisfied that reciprocal provisions will be made by any foreign jurisdiction for the enforcement therein of support orders made within this state . . . ." (As of this writing only four regions have received such status: British Columbia, Alberta, Ontario, and the Republic of South Africa. Negotiations are currently pending with Nova Scotia. Information relating to this provision is available from the California Judicial Council.) Thus when a foreign country is found to be a reciprocating state under this provision, such jurisdiction will be entitled to full faith and credit and will be treated in the same manner as a sister state.

Basically, this chapter permits the registration of a foreign support

order in a California court and full enforcement according to the laws of this state. Rather than holding a hearing prior to issuing its *own* order, the California court is now permitted to register the support decree based on the foreign order, at the same time protecting the obligor by permitting him to present any valid defenses he may have.

The Uniform Foreign Money-Judgments Recognition Act [CAL. CODE CIV. PROC. §1713 *et seq.*], which in some respect has provisions parallel to the Uniform Reciprocal Enforcement of Support Act, has also been amended by chapter 211 to provide for an optional registration procedure for the enforcement of sister state money judgments, excluding support orders. The procedure set up under that act is somewhat different from the system enacted by this chapter, particularly with regard to the requirements for application as well as various procedural rules relating to notice and time limitations [See REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION, this volume at 207 (Civil Procedure; enforcement of sister state money judgments)].

See Generally:

1) 2 CONTINUING EDUCATION OF THE BAR, THE CALIFORNIA FAMILY LAWYER §31.42 (1963), (Supp. 1969).
2) CONTINUING EDUCATION OF THE BAR, FAMILY LAW FOR CALIFORNIA LAWYERS 563-83 (1956).
3) W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 919-23 (6th ed. 1971) (discussion of procedure under the Uniform Reciprocal Enforcement of Support Act).
4) Ehrenzweig, *Interstate Recognition of Support Duties—The Reciprocal Enforcement Act in California,* 42 CAL. L. REV. 382 (1954) (case law upholding constitutionality of the Act).
5) Note, *The Uniform Reciprocal Enforcement of Support Act,* 13 STAN. L. REV. 901 (1961).

Civil Procedure; enforcement of sister state money judgments

Code of Civil Procedure §1915 (repealed); Chapter 1 (commencing with §1710.10) (new); §§674, 1713.1, 1713.3 (amended).
AB 2829 (McAlister); STATS 1974, Ch 211
Support: State Bar of California; California Law Revision Commission

Provides optional system for registration of sister state money judgments, in addition to the already existing procedure of obtaining a California judgment; establishes requirements for application for the entry of a judgment based on a sister state judgment; specifies procedural requirements regarding notice of entry of judgment; provides for issuance of a writ of execution after entry of judgment; provides for stays of enforcement under certain circumstances; places limitations on the entry of judgment.

Chapter 211 expands the scope of the Foreign Money-Judgments Recognition Act [CAL. CODE CIV. PROC. §1713 *et seq.*] by enacting the Sister State Money-Judgments Act, thus providing a streamlined process whereby enforcement of sister state money judgments can be obtained simply by registering a new cause of action and judgment based on the sister state judgment. This new scheme effectuates the recommendations of the California Law Revision Commission [*Recommendation Relating to Enforcement of Sister State Money Judgments,* 11 CAL. LAW REVISION COMM'N REPORTS, RECOMMENDATIONS, AND STUDIES 453-73 (1973)], and is an alternative to the procedures authorized under section 1713 *et seq.* of the Code of Civil Procedure. The new provisions apply exclusively to money judgments of other state courts, and specifically exclude foreign support orders. [See REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION, this volume at 204 (Civil Procedure; foreign support orders)].

Section 1710.15 states the requirements for an application for entry of judgment and requires that it be executed under oath and include all of the following: (1) a statement that an action in California on the sister state judgment is not barred by the applicable statute of limitations; (2) 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; (3) a statement of the amount remaining unpaid; (4) a statement that no action based on the sister state judgment is currently pending in this state and that no judgment based on the sister state judgment has previously been entered in California; (5) a statement of the name and last known address of an individual judgment debtor; in the case of a corporation, a statement of the corporation's name, place of incorporation, and whether it is qualified to do business in this state; and in the case of a partnership, its name, whether it is a foreign partnership, and if so whether it has designated an agent for service of process pursuant to section 15700 of the Corporations Code; and (6) a statement setting forth the name and address of the judgment creditor. An authenticated copy of the sister state judgment must be attached to the application.

Section 1710.20 states that the application should be filed in the office of the clerk of the *superior* court for the county in which the judgment debtor resides or, if the judgment debtor is no longer a resident, in any county of the state. Change of venue is allowed pursuant to existing law (§392 *et seq.*). Section 1710.25 provides that, upon filing, the clerk shall enter a judgment based on the application for the

amount shown to be unpaid on the sister state judgment. Section 1710.30 requires the *judgment creditor* to promptly serve notice of entry of the judgment on the judgment debtor in the manner provided by section 415.10 *et seq.* of the Code of Civil Procedure, and in addition requires that he must inform the debtor that he has only 30 days within which to make a motion to vacate the judgment. In proceedings to enforce judgments under this chapter, the clerk of the court will *not* send notice of the entry of judgment as provided in section 664.5 of the Code of Civil Procedure, which requires the clerk of a municipal or superior court to mail notices of entry of judgment to all parties to the action who have appeared.

Section 1710.40 provides that the judgment may be vacated on any ground which would be a defense to an action in California on the sister state judgment. Such defenses to enforcement may include the following: (1) the judgment is not final and unconditional; (2) the judgment was rendered in excess of jurisdiction; (3) the judgment was obtained by extrinsic fraud; (4) the judgment is not enforceable in the state of rendition; (5) the judgment has already been paid; (6) the plaintiff is guilty of misconduct; or (7) suit on the judgment is barred by the statute of limitations in the state where enforcement is sought. Equitable relief from the judgment may be obtained when the basis of the defense is fraud or mistake, even after the time for making a motion to vacate has expired [See 5 WITKIN, CALIFORNIA PROCEDURE, *Attack on Judgment at Trial Court* §175, *Enforcement of Judgment* §194 (2d ed. 1971)]. Section 1710.35 provides that a judgment entered pursuant to this chapter is to be treated as a money judgment of a superior court of this state and may be enforced or satisfied in like manner.

Section 1710.45 states the general rule that the judgment creditor may not obtain a writ of execution until 30 days after he serves the judgment debtor with notice of entry of judgment, proof of which has been made in the manner provided by section 417.10 *et seq.* of the Code of Civil Procedure. However, the judgment creditor may obtain a writ of execution and have it levied prior to notice of entry of judgment where the court finds upon an ex parte showing that great or irreparable injury would otherwise result, or where the judgment debtor is a nonresident, a foreign corporation not qualified to do business in this state, or a foreign partnership which has not filed a statement pursuant to section 15700 of the Corporations Code designating an agent for service. In such cases the property levied upon may not be sold (except where it is perishable), and neither the property nor the proceeds

of sale may be distributed to the creditor, until at least 30 days after the creditor serves notice of entry of the judgment on the debtor.

The court is granted broad discretion to stay enforcement under section 1710.50. The court may grant a stay of enforcement on its own motion, on ex parte motion, or on noticed motion where: (1) an appeal from the sister state judgment is pending or may be taken in the state which originally rendered the judgment; (2) a stay of enforcement of the sister state judgment has been granted in the sister state; or (3) the judgment debtor has made a motion to vacate pursuant to section 1710.40. Subdivision (c) of section 1710.50 confers upon the court considerable latitude in fashioning the terms of the stay in order to adequately protect the interests of both parties. This provision authorizes the court to require an undertaking, but does not limit the court to this particular remedy.

Section 1710.55 expressly *prohibits* the entry of a judgment based on a sister state judgment in the following cases: (1) where a stay of enforcement is currently in effect in the sister state; (2) where an action based on the sister state judgment is pending in a California court; or (3) where a judgment based on the sister state judgment has previously been entered in a California proceeding.

Section 1710.60 makes it clear that the enactment of these new provisions is not intended to supersede the traditional method of enforcing a sister state money judgment based on the judgment creditor bringing an independent action in this state. However, this section does provide that the judgment creditor must choose between the methods of enforcement offered. He will obviously not be able to obtain double recovery by using two different procedures. Section 1710.65 states that entry of a judgment pursuant to the newly enacted provisions does not limit the right of the creditor to bring an action based on that part of a sister state judgment which does not require the payment of money, and further provides that the use of the two separate procedures is not to be regarded as limiting the creditor's rights under the new chapter.

Foreign nation money judgments are specifically excluded from the provisions of this newly enacted chapter, and must be enforced according to traditional methods provided by the Foreign Money-Judgment Recognition Act [See 164 East 72nd Street Corp. v. Ismay, 65 Cal. App. 2d 574, 151 P.2d 29 (1944)]. Chapter 211 also repeals section 1915 of the Code of Civil Procedure, which gave a final and valid judgment of a foreign nation the same effect as a final judgment ren-

dered in this state. Section 1915 was enacted in 1907, but failed to achieve its purpose when other nations did not reciprocate, and it has since been only a source of confusion. The effect of section 1915 was greatly diminished with the enactment of the Uniform Foreign Money-Judgments Recognition Act in 1967, which removed foreign nation money judgments entitled to recognition under the Act from the effects of section 1915, and its repeal should thus eliminate much of the confusion regarding the enforcement of foreign nation judgments.

COMMENT

Prior to the enactment of this bill, the only way to enforce a sister state money judgment was to bring an action on the judgment (§1913). Only when a California judgment had been obtained was the creditor allowed to execute on the debtor's assets in this state. This procedure involved all the requirements of an original action, including a complaint, personal or quasi in rem jurisdiction, a writ of attachment if available, and a trial (however summary), at which time the judgment debtor could raise defenses to the validity of the sister state judgment. This whole process has been highly criticized, and the new registration procedure offers a much simpler and more efficient method of enforcement. Congress has enacted a similar system for the enforcement of the judgment of one federal district court in another district [28 U.S.C. §1963 (1959)]; and California also has enacted a similar procedure for the enforcement of support orders (§1650 *et seq.*). The revised Uniform Enforcement of Foreign Judgments Act of 1964, thus far adopted by nine states (New York, Pennsylvania, Arizona, Colorado, Kansas, North Dakota, Oklahoma, Wisconsin, and Wyoming), is substantially the same as the new California legislation and served as the basis for the recommendations made by the California Law Revision Commission. An earlier act, the Uniform Enforcement of Foreign Judgments Act of 1948, prescribed a summary judgment procedure rather than a registration procedure, and has been adopted by Arkansas, Illinois, Minnesota, Nebraska, Oregon, and Washington.

One of the more significant features of the California law is the requirement that the application for entry of a California judgment based on a sister state judgment be filed in a California *superior court.* Although as a general rule, claims of not more than $1,000 are heard in justice court (§112), and claims of not more than $5,000 are heard in municipal court (§89), all actions under the new system to enforce sister state judgments will take place in superior court regardless of the amount in dispute. It is hoped that consolidation in this manner will

promote a more uniform application of the law, and that the increased number of cases will not impose an unmanageable burden on the court.

See Generally:
1) 28 U.S.C. §1963 (1959).
2) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§193-198 (2d ed. 1971).
3) R. LEFLAR, AMERICAN CONFLICTS OF LAW 171-84 (1968) (discussion of uniform laws relating to foreign money judgments).

Civil Procedure; payment of judgments

Code of Civil Procedure §85 (new).
SB 1853 (Beilenson); STATS 1974, Ch 1415
Support: California Trial Lawyers' Association; California Rural Legal Assistance; Department of Consumer Affairs

Section 85 has been added to the Code of Civil Procedure to expressly authorize a municipal or justice court to provide for payment of a money judgment upon such terms and conditions as the court may see fit to prescribe. These terms, which may include deferred payment or installment payments, may be permitted only in actions or proceedings in which the defendant has appeared. Section 85 sets forth, as guidelines for the judge to consider when determining the appropriate conditions of payment, the sections of the Code of Civil Procedure pertaining to claims of property exempted from execution of judgment [CAL. CODE CIV. PROC. §§681-713.5] or the examination of a debtor in proceedings supplemental to execution [CAL. CODE CIV. PROC. §§714-723].

COMMENT

Although prior to the enactment of section 85 it appeared that superior courts, because of their equity powers, and small claims courts, pursuant to section 117i, had the authority to provide for payment of money judgments on such terms or conditions as the court saw fit to prescribe, it was questionable whether such power was vested in the municipal courts. This confusion led to the dichotomy of some municipal and justice courts providing for late payment or payment by installments, while other such courts were requiring immediate payment because of doubt as to the existence of their authority to do otherwise [Interview with Jerry Scribner, Aide to Senator Beilenson, Sacramento, Cal., Oct. 2, 1974]. The addition of section 85 to the Code of Civil Procedure will serve to clear up any doubts as to the authority to provide for the payment of money judgments on terms established by the municipal or justice courts. It should be noted that no express statu-

tory grant of such authority has yet been made to superior courts.

Civil Procedure; small claims courts—default judgments

Code of Civil Procedure §117g (amended).
AB 2413 (Alatorre); STATS 1974, Ch 120
Support: Department of Consumer Affairs; California Trial Lawyers' Association

Section 117g of the Code of Civil Procedure has been amended to prohibit a default judgment from being entered in a small claims court unless the plaintiff presents evidence to prove his claim, thus requiring that where the claim is based on a written contract, the evidence must, at the very least, consist of a presentation of the contract and proof of its validity. Under prior law, the general rule was that when a defendant failed to appear a default judgment was granted without requiring the plaintiff to present evidence of his claim. Although some small claims court judges did require presentation of a prima facie case before granting a default judgment, the practice was not universal. A study was conducted in 1968 [Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657, 1660 (1969)] which indicated that nearly 74 percent of the judgments entered against individual defendants were occasioned by defaults. There are many reasons, unrelated to the merits of the case, which may prevent a defendant from appearing in court. Very often a person cannot afford to be absent from work, or there may be language barriers, or he may be legally unsophisticated and fail to understand the summons or the way the court system works. This amendment will prevent default judgments from being granted without legal substantiation, thereby protecting defaulting defendants from violation of due process. One problem which may arise as a result of the amendment is that many plaintiffs may be encouraged to bring their *contract* actions in the municipal court instead of small claims court, since there is currently no such evidence requirement in the municipal courts [CAL. CODE CIV. PROC. §585].

See Generally:
1) 1 WITKIN, CALIFORNIA PROCEDURE, *Courts* §194 (2d ed. 1970).

Civil Procedure; execution exemption

Code of Civil Procedure §§682b, 690.235 (new); §§683, 690.50, 690.52 (amended).
SB 2129 (Beilenson); STATS 1974, Ch 1251

Chapter 1251 creates a new exemption from execution or attachment for a dwelling house which has not been formally declared as a homestead, but in which the debtor or his family actually resides and which could be selected as a homestead pursuant to section 1237 *et seq.* of the Civil Code. Both the California Constitution and the Civil Code [CAL. CONST. art. XVII, §1; CAL. CIV. CODE §1240] protect homesteads from execution or forced sale. However, as a prerequisite to such protection, a formal declaration of homestead must be filed. The purpose of the homestead exemption is to prevent insolvent debtors from going homeless, but many people are not taking advantage of the procedure (less than five percent of the homes in California are homesteaded). Apparently this new exemption, created by the addition of section 690.235 to the Code of Civil Procedure, was established because people are generally not aware of the technical requirements for declaring a homestead, and this ignorance of the law could result in the loss of their dwelling (since under prior law if a judgment was obtained before they recorded the declaration, the exemption could not be claimed).

Section 690.235 has been added to the Code of Civil Procedure to permit a debtor who does not have an existing declared homestead on *any* property in California to exempt his home from attachment or execution if (1) he or his family actually resides in the home, and (2) he would otherwise be entitled to declare it as a homestead pursuant to title 5 (commencing with §1237) of the Civil Code. This exemption may be claimed by following the procedure outlined in section 690.50 of the Code of Civil Procedure. The exemption, however, will not apply to any judgment *recorded* prior to the acquisition of the property by the debtor or his spouse. Further, this exemption cannot be claimed if the property is subject to execution and forced sale in satisfaction of a judgment obtained: (1) on debts secured by mechanics', contractors', or various other specified artisans' and laborers' liens on the premises; or (2) on debts secured by encumbrances on the premises executed and acknowledged by the claimant.

Subsection (d) of the new section 690.235 also provides that if there is an execution sale, the proceeds shall be distributed in the following order of priority: (1) to the discharge of all liens and encumbrances; (2) to the debtor in the amount of the exemption; (3) to the satisfaction of the execution; and (4) to the debtor. Also, the proceeds from any sale of exempt property shall be exempt for a period of six months from the date the proceeds are received by the debtor.

In addition, section 682b has been added to the Code of Civil Procedure to require that each application for a writ of execution against real property containing a dwelling house shall be accompanied by the following notice:

IMPORTANT NOTICE TO THE HOMEOWNER

1. You may be able to protect the real property described in the Notice of Levy from execution and forced sale if you or your spouse are now residing on the property.
2. If you or your spouse wish to prevent the forced sale of this property, a claim of exemption must be filed as required by Section 690.50 of the Code of Civil Procedure within twenty (20) days from the date of service of this notice.
3. For your own protection you should seek the advice of an attorney in this matter, and you should do so promptly so that your claim of exemption may be filed within twenty (20) days of the service of this notice.

Section 682b further provides that no writ of execution will be issued unless the above notice is included in the application for the writ, and that the writ of execution served upon the judgment debtor must include this notice.

Additionally, section 690.50 has been amended to extend the time for declaring or objecting to exemption. The debtor now has 20 days instead of 10 to deliver to the levying officer an affidavit of exemption for *real* property although the 10-day time limit remains unchanged for all other types of property. The creditor is also given an extension in the case of real property, from 5 to 10 days, for filing a counter-affidavit with the levying officer, although for all other types of property the period remains 5 days. This bill should help insure that debtors will not be deprived of their homes in satisfaction of a judgment simply because they failed to comply with the formal requirements for a homestead exemption.

See Generally:
1) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§29-49 (2d ed. 1971) (homestead exemptions).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §9.154 *et seq.* (1968).

Civil Procedure; unlawful detainer

Code of Civil Procedure §1167.3 (amended).
SB 1704 (Holmdahl); STATS 1974, Ch 430

Section 1167.3 of the Code of Civil Procedure has been amended to

specify that a defendant has 5 days to answer an amended complaint in an unlawful detainer proceeding, unless otherwise ordered by the court for cause shown. Since the prior law did not specify the time limitation for answering amended complaints in unlawful detainer proceedings, there was some question as to whether the more general 30-day time limit for answering amended complaints in other types of actions should apply (§586(1)). The amendment is clearly technical in nature since a 30-day time period would be unreasonable in light of the summary nature of an unlawful detainer action.

See Generally:
1) 2 WITKIN, CALIFORNIA PROCEDURE, *Actions* §596 (2d ed. 1970).

Civil Procedure; pleading

Code of Civil Procedure §425.11 (new); §425.10 (amended).
AB 4467 (Waxman); STATS 1974, Ch 1481
Support: California Medical Association; State Bar of California; California Trial Lawyers' Association
Opposition: Judicial Council

This chapter has been enacted to prevent a claimant from stating the specific amount demanded as recovery in a personal injury or wrongful death action brought in a superior court. The bill also provides a procedure whereby the defendant may request a statement setting forth the nature and amount of damages being sought by serving the request upon the plaintiff or cross-complainant, who is required to answer within 15 days. If no response is forthcoming, the party making the request may, on notice to the plaintiff or cross-complainant, obtain a court order requiring the plaintiff or cross-complainant to serve a response. If no such request is made, the plaintiff must give notice to the defendant of the amount of special and general damages being sought before a default judgment may be entered; or, where an answer is filed, at least 60 days prior to the date set for trial. This bill will have no real effect on jurisdiction over subject matter, since it applies only when the action is brought in superior court, where the jurisdictional amount must be greater than $5,000 (even if no mention is made in the complaint of the amount demanded). If the amount claimed by the plaintiff is $5,000 or less, he must bring the action in municipal court and must state in the complaint the amount of damages claimed. Since the bill applies exclusively to actions for personal injury or wrongful death, any other type of action brought in the superior court must also state the amount demanded.

Apparently this bill is designed to protect defendants charged in personal injury or wrongful death actions from the adverse publicity generated by the filing of lawsuits in which the amount claimed is greatly inflated. This is particularly true of medical malpractice suits where the amounts claimed very often bear little relationship to the amounts actually recovered (a study indicates that of 2,784 claims against members of the California Hospital Association from 1969 to 1972, the damages prayed for were 53 times greater than the amounts recovered). Since these lawsuits often attract sensational coverage by the media, they constitute a source of unnecessary ill feeling between physicians and attorneys. In order to alleviate these problems, the legislature has responded by enacting this bill, which it is hoped will avoid much of the harmful publicity in malpractice suits, and will also insure that defendants will be made aware of the amounts claimed against them, whether or not they actively seek to discover such information.

Opponents of this measure raise serious questions as to its efficacy as well as to its constitutionality. It is contended that since the defendant will be initially unable to determine the magnitude of the claim against him, he will not be able to determine whether the claim is in excess of any insurance he might have and thus will be in a poor position to decide what kind of representation he will need. Procedurally, the bill does not make any provision for informing the *court* of the amount of damages being sought, and in addition raises questions such as whether a defendant's petition to the court to force disclosure will constitute a general or special appearance, or what procedures are to be used to amend responses. Since many state and local public entities are required to present a verified claim for a specific amount as a *prerequisite* to filing suit, it makes no sense from their point of view to omit this requirement when suit is actually filed. In view of the fact that the press may still discover the amount of damages being sought by simply asking the plaintiff's attorney (who is not prohibited from so informing them), it is questionable whether this bill will truly serve its intended purpose. A direct prohibition against public disclosure of amounts claimed in certain legal suits would clearly be an unconstitutional prior restraint on speech, and it may be argued that this bill in fact attempts to accomplish the same thing indirectly.

See Generally:

1) 1 WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* §§11, 19, 38 (2d ed. 1970).
2) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§374-375 (2d ed. 1971).
3) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 241, 247 (1972) (general provisions of Code of Civil Procedure as originally enacted).
4) UNITED STATES DEP'T OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 37-38 (1973).

Civil Procedure; summons—notice in Spanish

Code of Civil Procedure §412.20 (amended).
SB 1091 (Beilenson); STATS 1974, Ch 363
Support: California Rural Legal Assistance; State Bar of California

Within the last several years protection of the rights of those Americans who do not speak English has generated a certain amount of concern [*See* STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 1-7]. Chapter 363 has been enacted in an effort to further ensure such rights by amending section 412.20 of the Code of Civil Procedure to require the printing of a warning regarding default on civil summons forms in both English *and* Spanish. It is presumably the legislative intent that this revision will reduce the number of default judgments in civil actions.

Previously, section 412.20 (which prescribes the basic format for civil summonses) authorized the use of any summons approved by the Judicial Council, such as those set forth in rule 982 of the California Rules of Court. The amendment to section 412.20 requires that the following introductory legend be printed at the top of each summons in English and *Spanish*:

> Notice! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read information below.

In addition each county may, by ordinance, require each summons issued by a court in that county to contain the same introductory legend in any other foreign language. This makes it imperative that the attorney check the summons form required by the county in which the suit is instituted. These provisions become inoperative after June 30, 1989. The summons must still contain an additional notice to the effect that unless the defendant responds within 30 days of service a default judgment will be entered against him. This provision of section 412.20 has been modified by chapter 363, however, to require that the notice state that the default judgment may result "in a garnishment of wages, taking of money or property, or other relief."

See Generally:
1) Comment, *Breaking the Language Barrier: New Rights for California's Linguistic Minorities*, 5 PAC. L.J. 648 (1974).

Civil Procedure; service of notice or papers by mail

Code of Civil Procedure §§1013, 1013a (amended).
SB 1680 (Grunsky); STATS 1974, Ch 281

SB 1694 (Grunsky); STATS 1974, Ch 282
(Effective May 28, 1974)
Support: State Bar of California

Chapters 281 and 282 amend section 1013 of the Code of Civil Procedure relating to the requirements for service by mail of all notices and other papers subsequent to service of the complaint. Under prior law, when an act was to be done, or a right was to be exercised within a given number of days after a person was given notice, the law granted the recipient an automatic two-day extension plus one additional day for every 100 miles the letter had to travel, not to exceed 30 days in all. Chapters 281 and 282 revise the automatic time extension to 5 days if the place of address is within the State of California, 10 days if it is elsewhere within the country, and 20 days if it is outside of the United States. The purpose of this amendment is to make allowance for the uncertainties of mail delivery by giving recipients of mailed notices or papers longer time to act or exercise their rights. The 100-mile unit, as a measure of whether or not an extension is granted, has no relevance to present day mail delays in the United States since it often takes less time for mail to go between large cities at considerable distance than it does for mail between closer and smaller cities.

Chapter 282 has further amended sections 1013 and 1013a by deleting subsection (b) of section 1013a, and then adding essentially the same paragraph to section 1013. Thus the new section 1013(b) contains the requirement that papers served by mail be accompanied by a notation of the place and date of mailing, or an unsigned affidavit or certificate of mailing. The reason for this rearrangement of the code sections was the apparent confusion as to the applicability of the notice requirements of section 1013a(b) to probate proceedings. As amended, section 1013 now applies only to civil proceedings.

The requirement that all notices or other papers served by mail be dated or accompanied by an affidavit or certificate of mailing, is now *directory* only, in order to avoid any confusion with respect to whether noncompliance with this provision invalidates the notice. With the enactment of this chapter, the party upon whom any notice or subsequent pleading is served now has additional time to respond in those instances where he must do some act or exercise some right. This would include those situations in which a party must respond to an interrogatory or request for admission, demur to an action, or any other situation in which a party must do something within a specified time.

See Generally:
1) 4 WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §§19-21 (2d ed. 1971).
2) 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 289 (1974) (importance of noting date and place of mailing).
3) STATE BAR OF CALIFORNIA, 1971 CONFERENCE RESOLUTION 12-13.

Civil Procedure; discovery procedure

Code of Civil Procedure §§2031, 2034 (amended).
AB 3770 (McAlister); STATS 1974, Ch 592
Support: California Trial Lawyers' Association; State Bar of California

Chapter 592 amends section 2031 of the Code of Civil Procedure by replacing the procedure of noticed motion and court order with a *request procedure* for the inspection and copying of documents and other tangible items, and the entry upon land for the purpose of inspecting, sampling, or making a photographic record. This brings California law substantially into line with the 1970 revision of the rules of federal procedure [See FED. R. CIV. P. 34].

The new legislation provides an extrajudicial method for making discovery by simply serving a request on the other party, rather than making a formal motion in court and showing good cause to compel such discovery. In general, this is merely a codification of the actual practice under the prior law, since many attorneys proceeded by way of informal agreement rather than by court proceedings [See W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 54-55, 220-21 (1968)]. The request under the revised law must describe each item or category of items to be inspected with reasonable particularity and must specify the time, place, and manner of making the inspection or any other related acts. The request may be served upon the *plaintiff* without leave of court at any time after the commencement of the action, or upon any other party either with or after service of summons and complaint on that party. However, if the request is made by the plaintiff within 10 days after service of summons or appearance of such other party in the action, the plaintiff must first obtain leave of court. Any party who is served with such a request to make discovery must serve a written response within 20 days, although the court may shorten or lengthen this period on a showing of good cause. The response must state, with respect to each item or category, that permission will be granted for inspection or any related activities; or, any objections must be stated with particularity.

Section 2034 of the Code of Civil Procedure has been amended to provide that *failure*, as well as refusal, to answer questions during the taking of a deposition or posed by interrogatory, to produce documents at deposition pursuant to a subpoena duces tecum, or to permit inspection or entry pursuant to a request under section 2031, entitles the other party to seek compliance with the request by a court order. This amendment is technical in nature, since the courts have apparently made no distinction in the past and have imposed sanctions for failure as well as refusal to make discovery [See Stein v. Hassen, 34 Cal. App. 3d 294, 109 Cal. Rptr. 321 (1973)]. The new law still contains the provision that the party who is served with a request may be required to pay the examining party his reasonable expenses in obtaining the order if the court determines that the failure or refusal was without justification. On the other hand, the failing or refusing party may be reimbursed by the examining party to the extent of reasonable expenses incurred in opposing a motion to make delivery, if the motion is denied and the court finds it was made without substantial justification.

See Generally:
1) WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§990-996, 1031 (2d ed. 1966), (Supp. 1972).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 219 (1972) (materials are subject to discovery).

Civil Procedure; access to medical records

Evidence Code §1158 (amended).
AB 2908 (Z'berg); STATS 1974, Ch 250
AB 4474 (Waxman); STATS 1974, Ch 667

Chapter 667 has amended section 1158 of the Evidence Code to provide that an attorney may gain access to his client's medical records prior to the appearance of the defendant in an action, rather than only *before* filing suit. Ordinarily the medical records of a patient are privileged information, and the records will not be made available for inspection or copying absent a court order or the permission of the hospital or medical practitioner. Most hospitals have developed rules for the disclosure of medical records to patients as well as to third parties, and generally find it undesirable to allow the patient to view his own charts, since they often contain notes made by nurses and doctors which may be offensive or unflattering to the patient. When a patient wishes to see his own records, he is usually referred to his attending physician, who will answer any questions he may have regarding his record. Under common practice, if the patient needed the records for treatment

by his physician or for use in litigation by his attorney, an abstract of the record (omitting reference to any unnecessary remarks) was sent directly to the physician or attorney when the patient so requested in writing.

Apparently, one of the primary concerns of the legislature in enacting this amendment was the impact of section 1158 of the Evidence Code on malpractice cases. In many cases the patient-client waited until the statute of limitations had almost run before consulting the attorney regarding medical malpractice, and as a result the attorney had to file suit immediately and was unable to take advantage of the simple discovery technique afforded under section 1158. Chapter 667 helps to alleviate this problem by expanding the time period in which section 1158 discovery is available to include any time prior to the appearance of the medical practitioner or hospital as a defendant in a malpractice suit, rather than restricting such discovery to only before the time that the action is filed.

Chapters 250 and 667 seem to indicate the legislature's intent to liberalize the procedure for access to medical records both before and after an action is filed. This trend has been underscored by another piece of 1974 legislation. Chapter 592 has amended section 2031 of the Code of Civil Procedure to replace the old procedure of noticed motion and court order with a request procedure for the inspection and copying of documents and other tangible items [See REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION, this volume at 220 (Civil Procedure; discovery procedure)]. Thus chapter 592 should greatly simplify pretrial discovery and, together with the limited discovery available after commencement of an action under section 1158 of the Evidence Code made possible by chapter 667, will aid a patient-client's attorney in gaining access to the necessary medical records.

Chapter 250 has further amended section 1158 of the Evidence Code to add the guardian or conservator of the person or estate of an adult to that class of persons who may authorize the release of medical records for inspection or copying to an attorney. Prior to this amendment only an adult, or the parent or guardian of a minor, could give written authorization for the release of such records to an attorney by certain medical professionals or hospitals. Failure to make the records available within five days after presentation of the written authorization may subject the medical practitioner or hospital to liability for all reasonable expenses incurred as a result of enforcing the provisions of this section. With this amendment the legislature has expanded the

authority of a guardian or conservator to act on behalf of his ward in a manner consistent with his responsibilities, and has increased that class of persons to whom an attorney may turn for authorization to compel the release of medical records.

See Generally:
1) WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §991A (2d ed. 1966), (Supp. 1972).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 144-45.
3) 2 PAC. L.J., REVIEW OF SELECTED 1970 CALIFORNIA LEGISLATION 416 (1971) (penalty for failure to produce records).
4) E. HAYT & J. HAYT, LEGAL ASPECTS OF MEDICAL RECORDS 84-104 (1964) (release of medical records in general).
5) *Interprofessional Code of Conduct*, 48 CAL. S.B.J. 694, 697, 698 (1973) (written medical reports and requirements for release; subpoena of medical records).

Civil Procedure; order of examination—judgment debtor

Code of Civil Procedure §§714, 717 (amended).
SB 222 (Grunsky); STATS 1974, Ch 213
SB 223 (Grunsky); STATS 1974, Ch 214
Support: California Credit Union League
Opposition: California Rural Legal Assistance; Santa Clara County Sheriff's Department; California Peace Officers' Association; California State Sheriffs' Association

Chapter 2 of the Code of Civil Procedure commencing with section 714 establishes supplemental proceedings for the purpose of discovering assets of a judgment debtor and applying them to the judgment. This is the familiar Order of Examination (OX) procedure. Section 714 provides that when a writ of execution may properly be issued against property of a judgment debtor, the judgment creditor is entitled to a court order requiring the judgment debtor to appear and answer concerning his property before a judge or referee. Section 717 of the Code of Civil Procedure provides that after the issuance of an execution against property of the judgment debtor, and upon proof that any person or corporation has property of, or owes more than $50 to, such debtor, the judgment creditor is entitled to a court order requiring such person or corporation to appear and answer concerning the property before a judge or referee. Both sections authorize the issuance of an arrest warrant if the party ordered to appear fails to do so, but only if the order has been served by a sheriff, constable, marshal, or some person specially appointed by the court.

Chapters 213 and 214 have amended sections 714 and 717, respectively, to provide that an arrest warrant may also be issued if the judg-

ment debtor or other party fails to appear and the order has been served by a registered process server, in addition to a sheriff, constable, marshal, or other specially appointed person previously specified by statute. Prior to these amendments a registered process server or his agent could serve the court order to appear and answer regarding property, but an arrest warrant could not be issued if the party served failed to appear. Since private process servers are generally not viewed by the general public as representatives of the court, there was some concern that the court order delivered by them might be ignored or at least might be treated less seriously than it would be if a uniformed officer had served the order. Since an arrest warrant may be issued and the party may be punished for contempt of court if he fails to appear, the amendments further state that an order to appear and answer must contain a statement, in boldface type, that failure to appear may subject the party served to arrest and punishment for contempt of court. This warning is required whether the order is served by the sheriff or by a registered process server. It is hoped that this will alert the party served to the seriousness of the court order requiring him to appear.

In addition, both amendments provide that any person who willfully makes an improper service of an order which results in the arrest of the party ordered to appear is guilty of a misdemeanor. The legislative intent behind this provision is to discourage sloppy service of the orders of examination by private process servers. This provision, combined with the warning on the court order itself, should insure that the party who is served with such an order will be sufficiently warned of the necessity of his appearance in court, whether it is the judgment debtor or some third party.

See Generally:
1) 5 WITKIN, CALIFORNIA PROCEDURE, *Enforcement of Judgment* §§123-124, 126 (2d ed. 1971).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §§18.1, 18.3, 18.9, 18.10 (1968).

Civil Procedure; cross-complaints

Code of Civil Procedure §428.60 (amended).
SB 1682 (Biddle); STATS 1974, Ch 429
Support: State Bar of California

Section 428.60 of the Code of Civil Procedure has been amended to expand the requirements for service of a cross-complaint. Prior to amendment, only parties who were *affected* by the cross-complaint were entitled to be served with same. The amended statute now re-

quires that service be made upon each of the parties *in an action.* When a party has appeared in the action, whether or not he is affected by the cross-complaint, the complaint is to be served upon his attorney or upon the party if he appeared without an attorney, in the manner provided for service of a summons (§§415.10-415.50) or in the manner provided for service of papers (§§1010-1020). When the party has not appeared in the action, regardless of whether he is affected by the cross-complaint, he must be served with a summons upon the complaint in the same manner as in the original action.

Although many attorneys serve cross-complaints on all parties to an action simply as a matter of courtesy, there have been instances in which this has not been done, and only the parties required by statute were served. Basically, this bill is aimed at curbing the latter practice in order to prevent any party from being surprised at trial because he did not know about the cross-complaint.

There is a technical difficulty in the drafting of the code language in that a literal interpretation would suggest that a cross-complainant must serve (in the manner provided for service of summons) *any* party who is designated as a party to the action in the plaintiff's complaint, even though the plaintiff himself did not choose to serve such party or to bring him into the lawsuit. The amended statute will probably not be so interpreted, since to do so would produce an unreasonable result [*See* Sacramento County v. Hickman, 66 Cal. 2d 841, 428 P.2d 593, 59 Cal. Rptr. 609 (1967) (literal meaning of words may be disregarded to avoid absurd results or to give effect to manifest purpose of statute)].

See Generally:
1) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §988 (2d ed. 1971).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 241, 253 (1972) (counterclaims and cross-complaints).

Civil Procedure; venue

Code of Civil Procedure §581b (repealed); §§396, 396b, 399, 581 (amended).
AB 3439 (Z'berg); STATS 1974, Ch 1369
Support: State Bar of California

Chapter 1369 amends several sections of the Code of Civil Procedure in an effort to specify which parties to an action are entitled to an award of attorney's fees and transfer costs, where the action must be transferred from one court to another because of subject matter jurisdiction or venue considerations.

Section 396, which relates to cases which must be transferred to other courts because the complaint or cross-complaint raises issues which are not within the original court's subject matter jurisdiction, has been amended to provide that when such a transfer is ordered, the party filing the pleading in which the question outside the jurisdiction of the court appears shall pay the costs of transferring the case and filing it in the proper court. Prior to amendment the section specified that these costs would be paid by the *plaintiff*, and thus made no provision for payment by defendant in cases where issues raised in a cross-complaint necessitated the transfer.

Further, chapter 1369 amends section 396b, which pertains to motions for the transfer of an action in cases where the court has subject matter jurisdiction, but is the improper court because of improper *venue*. The amended section provides that when such a motion is made the court may, in its discretion, order costs and attorney's fees to be paid to the party who prevails on the motion to transfer. Certain factors are to be considered by the judge in determining whether to award these fees, including whether the respective parties have acted in good faith in selecting the venue or in moving for a change in venue, and whether an offer to change the venue was reasonably made but was nevertheless rejected. Thus where both parties act in good faith in making or resisting a motion for a change of venue, fees probably would not be awarded. The amended section further provides that as between the losing party and his attorney, the fees shall be the personal liability of the attorney. Thus, the practical effect of the legislation is to insure that attorneys engaged in litigation concerning a change in venue do so in good faith and not merely as a device to protract the litigation on the assumption that the opposing party will be unwilling or financially unable to litigate the issues.

Chapter 1369 also amends section 399 to provide that whenever the defendant prevails on the motion to change venue, and a case is ordered transferred, such a transfer shall not occur until any fees awarded to the defendant are paid. In cases where such fees are not paid within thirty days, the cause may be dismissed upon a motion by any party on the condition that the case may not be commenced by the plaintiff in any other court prior to the payment of such fees.

Lastly, section 581 has been amended to provide that a case may not be dismissed upon a motion by the plaintiff if the defendant has made a motion to transfer the action to another court because of venue considerations. This amendment is apparently intended to insure that

plaintiffs who in bad faith file actions in forums inconvenient to the defendant may not compel the defendant to move for a change in venue and then move to dismiss the action. The primary thrust of this legislation is to remove any practical incentive which may have existed for the plaintiff to file in a court inconvenient to the defendant for want of proper venue. Prior to this legislation, the plaintiff had little to lose by filing in an improper court, since there were no provisions which awarded to the defendant the costs which he incurred in moving for a change of venue.

See Generally:
1) 1 WITKIN, CALIFORNIA PROCEDURE, *Jurisdiction* §§271-280 (2d ed. 1970).
2) STATE BAR OF CALIFORNIA, 1972 CONFERENCE RESOLUTION 9-6.

Civil Procedure; enforcement of OSHA civil penalties

Labor Code Chapter 8 (commencing with §6650) (repealed); Chapter 8 (commencing with §6650) (new).
SB 2164 (Song); STATS 1974, Ch 1253
Support: Judicial Council

Chapter 1253 repeals those provisions of the Occupational Safety and Health Act of 1973 relating to the procedure for transforming penalties, imposed for violation of safety regulations under the Act, into civil judgments. Sections 6317 through 6320 presently delineate the procedure by which a person may be cited for violation of safety regulations, and sections 6600 through 6630 set forth the procedure for appealing the notice of civil penalty or citation. This newly enacted *enforcement* procedure provides that the Director of Industrial Relations may apply to the superior court for an order directing payment of a civil penalty *after* all review procedures have been exhausted (as provided in CAL. LABOR CODE §6600 *et seq.*), by presenting a certified copy of the notice of civil penalty and the decision of the appeals board. The system under the prior law for enforcing such penalties was virtually unworkable in actual practice. Under the prior system, the Director filed with the court the notice of civil penalty or decision of the appeals board, and the court then entered a judgment. But thereafter the appeals board of the administrative agency was authorized under section 6652 to stay the execution of that judgment on a showing of good cause, and could impose its own terms and conditions on the stay of execution. The situation was thus created wherein an administrative appeals board could be ruling on a finding already made and filed in the superior court. In order to rectify this problem, the

new legislation stipulates that the final order is not to be filed with the court until *all* administrative appeals and judicial proceedings pursuant to section 6600 *et seq.* are completed, so that the final order will issue from the court rather than the administrative agency itself. This amendment was suggested by the Judicial Council in order to maintain a separation of powers between the administrative agency and the judiciary, and to insure that the court does not enter any judgment until the administrative agency has made a *final* determination regarding the violation.

See Generally:
1) 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 395, 402 (1974) (California Occupational Safety and Health Act of 1973).

Civil Procedure; garagemen's liens

Civil Code §3071.5 (new); §§3052, 3068, 3071, 3072 (amended); Vehicle Code §§22705, 22851 (amended).
SB 2293 (Song); STATS 1974, Ch 1262
(*Effective November 1, 1974*)
Support: Department of Motor Vehicles; Western Center on Law and Poverty; California Tow Truck Association
Opposition: California Auto Body Association

Chapter 1262 has been enacted for the purpose of providing a constitutionally sound procedure for the sale of a vehicle in possession of a lienholder in order to satisfy the lien. Section 3068 of the Civil Code creates a service lien, dependent on lawful possession of the owner's property by the lienholder, for compensation due to labor or repairs to *any* vehicle which is subject to registration under the Vehicle Code. Prior to amendment, Civil Code Section 3071 authorized the lienholder to sell the property in his possession to satisfy the lien and costs of sale, when the amount due was not paid within ten days after it became due. Section 3052 provided that when any automobile or trailer was to be sold, notice of sale was to be given twenty days prior to sale by registered mail by the lienholder to the legal and registered owners and to the Department of Motor Vehicles. The DMV was to again notify the legal and registered owners (although failure of the Department to do so would not invalidate the sale). Chapter 1262 effects a major change to the previous law.

Section 3071 has been amended to permit a possessory lienholder to sell a vehicle to satisfy the lien only if one of the following situations is present: (1) an authorization to conduct a lien sale has been issued

by the Department of Motor Vehicles; (2) a judgment has been entered in favor of the claim which gives rise to the lien; or (3) the registered and legal owners have signed, after the lien has arisen, a release of any interest in the vehicle. The lienholder may apply to the Department for authorization to conduct a lien sale by executing, under penalty of perjury, an application which includes all of the following: (1) a description of the vehicle; (2) the names and addresses of the registered and legal owners (if ascertainable from the registration certificate), and any other persons who the lienholder knows or reasonably should know claim an interest in the vehicle; and (3) a statement that the lienholder has no information regarding any valid defense to the claim which gives rise to the lien.

Upon receipt of the application the Department must send a notice and a copy of the application by certified mail to the owners and all those persons listed in the application. The notice must include: (1) a statement informing such persons that an application for authorization to conduct a lien sale has been made with the Department, and a statement that the Department will issue the authorization unless, within twenty days from the date the notice was mailed, the person returns an enclosed declaration, under penalty of perjury, that he desires to contest the claim; (2) a statement that the person has a legal right to a hearing in court, and that if such a hearing is desired, the enclosed declaration must be signed and returned, in which case the lienholder will be allowed to sell the vehicle *only* if he obtains a judgment in court or is given a release by the registered and legal owners; (3) a statement that if the declaration is signed and returned, the lienholder must file an action in court at which time the registered and legal owners will be notified that they may appear and contest the claim of the lienholder; and (4) a statement that the person shall be liable for the costs if the lienholder prevails in such action. The notice and declaration enclosed therein must be printed in both English and Spanish.

If the Department receives a declaration within twenty days stating that the owner desires to contest the claim, it must inform the lienholder that he may not conduct a lien sale unless a judgment has been rendered in his favor or the owner has signed a release. Further, the Department is authorized to charge a fee for the filing of an application, such fee to be recoverable as a cost by the lienholder if a lien sale is conducted.

In addition, subsection (f) has been added to section 3071 to provide that any lien arising because of work or services performed on a

vehicle with the consent of the registered owner shall be *extinguished* unless: (1) the lienholder applies for authorization to conduct a lien sale within ten days after a written statement of charges is presented to the registered owner; or (2) a court action is filed within thirty days after such a statement is presented. Subsection (h) has also been added to section 3071 exempting mobilehomes (registered pursuant to section 35790 of the Vehicle Code) from the lien sale procedures of section 3072 by providing that a lien sale shall *not* be conducted unless a judgment has been entered on the claim, or the registered and legal owners have signed a release of any interest in the mobilehome after the lien has arisen.

Chapter 1262 also adds section 3071.5 to the Civil Code to provide that a registered or legal owner of a vehicle in the possession of a person holding a lien pursuant to section 3051 or sections 3067 through 3075 may release, in writing, any interest in the vehicle after the lien has arisen. The release is to be signed by the vehicle's owner, dated when signed, and is to contain such information as the amount of the lien, a description of the vehicle, and a statement that the person releasing the interest gives the lienholder permission to sell the vehicle.

Section 3052 of the Civil Code has been amended to delete any references to automobiles in order to avoid any conflict with the new provisions of section 3071. Section 3052 will therefore no longer be applicable to the enforcement of garagemen's liens when automobiles are the subject of the sale. Section 22705 of the Vehicle Code, relating to removal of a vehicle (appraised at less than $200) by a public agency, has also been amended to conform to the new provisions of section 3071 of the Civil Code, and now provides that the public agency must indicate either that an authorization to conduct a lien sale has been issued pursuant to Civil Code Section 3071, or that a judgment has been rendered in favor of the lienholder on the claim which gave rise to the lien.

COMMENT

The legislature has enacted this bill for the purpose of satisfying the constitutional objections to the garagemen's lien laws raised in *Adams v. Department of Motor Vehicles* [11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974)]. The *Adams* court held that it was violative of due process for a possessory lienholder to sell or transfer a vehicle in order to satisfy the lien, without first giving notice and affording an opportunity for a hearing. Notice and hearing are essential to due

process before there can be a seizure and sale, unless there are extraordinary circumstances. The prior lien law did not set forth any such circumstances. Although constitutional due process issues generally arise only when the taking involves significant state action, the *Adams* court decided that the involvement of the Department of Motor Vehicles in the enforcement of garagemen's liens constituted "state action" (since the DMV recorded transfer of title to the lien sale purchaser pursuant to Vehicle Code §5909), and therefore notice and opportunity for a hearing must be given before the state may aid a creditor in depriving a debtor of his property interest. The court stated that the garagemen's lien law itself, which provides for the temporary retention of a vehicle without notice of hearing [CAL. CIV. CODE §3068(a)], does *not* violate due process, but that the provisions which permitted the involuntary sale and transfer of the vehicle *did* deny due process. The new law attempts to remedy this infirmity. [*See* Comment, *California Garagemen's Liens—Impact And Aftermath Of Adams v. Department Of Motor Vehicles*, this volume at 98].

See Generally:
1) CAL. CIV. CODE §§3051-3052, 3067 *et seq.* (garagemen's liens).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA DEBT COLLECTION PRACTICE §10.17 (1968).

Civil Procedure; stay of administrative orders

Code of Civil Procedure §1094.5 (amended).
AB 4479 (Waxman); STATS 1974, Ch 668

Chapter 668 has been enacted to amend section 1094.5 of the Code of Civil Procedure, which provides for judicial review of administrative proceedings by defining the requirements for the issuance of an administrative writ of mandate. The law requires that before such a writ can be issued, the proceeding must have been one in which a hearing was required by law and evidence was required to be taken. The courts are limited in their proceedings to the questions of whether the agency proceeded without proper jurisdiction, whether there was a fair trial, or whether there was any prejudicial abuse of discretion.

This amendment now prohibits an administrative order or decision from being stayed where such proceeding for issuance of a writ of mandate to review the order is pending, *unless* the application for stay is accompanied by proof of service of a copy of the application on the respondent. Prior to amendment, a court was permitted to stay the operation of an administrative order or decision without regard to whether

both parties were notified, subject only to the condition that the stay not violate the public interest. Apparently, this amendment was sparked by legislative disapproval of the practice whereby a physician whose license had been revoked could apply for a stay of the board's decision on an ex parte basis. The amended statute now provides the opportunity for the state or administrative board to show good cause why the stay should not issue.

See Generally:

1) CAL. GOV'T CODE §11523 (procedure for judicial review of administrative proceedings).
2) 5 WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §213 *et seq.* (2d ed. 1971).
3) CONTINUING EDUCATION OF THE BAR, CALIFORNIA ADMINISTRATIVE MANDAMUS §§15.11-15.20 (1966), (Supp. 1974).
4) Clarkson, *The History of the California Administrative Procedure Act*, 15 HAST. L.J. 237 (1964).

Civil Procedure; claims against public entities

Government Code §911.8 (amended).
AB 2486 (McAlister); STATS 1974, Ch 620

Section 911.8 of the Government Code has been amended to insure that whenever an application for leave to present a late claim against a public entity is denied, the claimant will be put on notice of the proper action to take in order to pursue his claim. Under existing law, claims against public entities for death or personal injuries, or damage to personal property or crops must be brought before the appropriate governmental body within 100 days from the time the cause of action accrued (§911.2). If the claim is not presented within that time, the claimant has a year within which to file an application for leave to present a *late claim.* If this application for leave to present a late claim is denied, the claimant must petition the court within six months for relief from the filing requirement (§§911.4, 946.6). The court will relieve the petitioner fro mthe filing requirement if the court finds that the application for leave to file a late claim was made to the board within a reasonable time and the failure was due to mistake or excusable neglect, or the person sustaining the injury was a minor, was mentally or physically incapacitated, or died before the expiration of the time for presentation of late claims. If, after receiving the denial of his application for leave to present a late claim, the claimant files suit without petitioning the court in this manner, the case is subject to dismissal for failure to comply with the requirements of Government Code Section 945.4 (claim-filing requirements as a prerequisite to judicial action on denial of late claim application).

As amended, section 911.8 requires that a public entity's notice of denial of an application for leave to present a late claim must be accompanied by a warning that the claimant must petition the court within six months for an order relieving him of the requirements of filing a claim *before* he can file suit. The warning must also advise the claimant that if he wants to consult an attorney, he should do so immediately. This is substantially similar to the warning which is required under section 913 for notices of rejection of timely claims. This amendment has apparently been made in response to a recent California decision in which the court relieved a claimant of the filing requirement of section 945.4 on the ground that he had been misled by the board [McLaughlin v. Superior Court, 29 Cal. App. 3d 35, 105 Cal. Rptr. 384 (1972)]. In that case the State Board of Control mailed a letter to the claimant informing him that his application for leave to present a late claim had been denied, but at the bottom of the letter there was a notice which stated he had only six months in which to file a court action on his rejected claim. This misled him into believing that his *claim* had been rejected rather than his *application for leave to present a late claim*, and the court therefore held that the Board was estopped from asserting a failure to comply with section 945.4.

This bill therefore protects claimants by requiring public entities to put them on notice of the procedure to be followed after an application for leave to present a late claim has been denied, and also protects public entities, because once a proper warning is given they cannot be charged with misleading claimants.

See Generally:

1) 2 WITKIN, CALIFORNIA PROCEDURE, *Revised Law: Relief from Late Filing* §§164-171 (2d ed. 1970).
2) CONTINUING EDUCATION OF THE BAR, CALIFORNIA GOVERNMENT TORT LIABILITY §§8.28-8.39 (1964), (Supp. 1969) (late claim proceedings).
3) Comment, *The Constitutionality Of California's Public Entity Claim Statutes*, this volume at 30.

Civil Procedure; attorney's fees—interpleader

Code of Civil Procedure §386.6 (amended).
AB 2909 (Z'berg); STATS 1974, Ch 273

Section 386.6 of the Code of Civil Procedure has been amended to provide that a party shall not be denied attorney's fees in an *interpleader* action simply because he is himself an attorney, appeared in *pro se*, and performed his own legal services. Under the existing pro-

visions of section 386.6, a party who interpleads in an action by following the procedure set forth in section 386 or 386.5 (procedure for substitution of defendant and deposit of disputed amount with court, and procedure for discharge of defendant who is stakeholder), may request costs and attorney's fees, and the court in its discretion may grant the request if the party is discharged, and may make payment from the disputed amount which has been deposited in court. Prior to this amendment, case law held that a lawyer representing himself in such an action was entitled to costs, but was *not* entitled to an attorney's fee because he did not *incur* any liability to pay a fee [O'Connell v. Zimmerman, 157 Cal. App. 2d 330, 321 P.2d 161 (1958)]. This bill effectively reverses that decision, and permits an attorney who represents himself in an interpleader action to recover both costs and attorney's fees incurred in the action. The bill also provides that this amendment will only apply to actions or proceedings filed on or after January 1, 1975.

See Generally:
1) 3 WITKIN, CALIFORNIA PROCEDURE, *Pleading* §229 (2d ed. 1971).
2) 1 CAL PRACTICE §§7:1, 7:7, 7:10.

Civil Procedure; court records

Code of Civil Procedure §§2030, 2033, 2034 (amended).
SB 1392 (Song); STATS 1974, Ch 732
Support: State Bar of California

This bill makes procedural changes relating to written interrogatories, requests for admission, and replies. It is no longer necessary to *file* the following documents in addition to serving them on another party: (1) written interrogatories to be answered by the party served, or by any officer or agent if such party is a public or private corporation or a partnership or association; (2) answers to the written interrogatories, to be served on the party submitting the interrogatories; (3) written requests for admission of the genuineness of any relevant documents, or of the truth of any relevant facts; (4) a sworn statement by the party served with a request denying specifically those matters of which an admission is requested, or setting forth in detail his reasons for not admitting or denying those facts; and (5) written objections made by the party served with a request, on the ground that some or all of the requested admissions are privileged, irrelevant, or otherwise improper, together with a notice of hearing.

Prior to the enactment of chapter 732, interrogatories and their responses had to be filed and served on the other party. Section 2030

no longer requires that *complete* copies of interrogatories or their responses be filed, but instead requires the propounding or replying party to file a copy of the first page and such other pages as are necessary to show the identity of the author, the set number, and the identity of each party directed to answer. In addition, he must file the original of an affidavit of service. The originals of all these documents are now required to be delivered to the clerk, or judge if there is no clerk, to be kept by him in the same manner as exhibits or depositions introduced in the trial of a civil action or proceeding. This section has also been amended to require that the party originating an interrogatory or reply must provide copies at any time prior to final judgment and on written request, to any party not previously served, and must do so within thirty days of such request.

Additionally, section 2030(a) expands the time for answering interrogatories or moving for an order requiring further response from twenty to thirty days from the date of service. The time limit for denying or objecting to requested admissions has *not* been amended, and remains twenty days. The court may still extend the time on motion and notice, or on a showing of good cause. It is important to remember that when service of the interrogatory was made by mail, an extension of time is granted [CAL. CODE CIV. PROC. §1013].

This chapter similarly amends the filing requirements of requests for admission by requiring that only the first page, and such other pages as necessary to identify the propounding and responding parties and the set number, be filed as opposed to the entire document (§2033). However, as with interrogatories, the originals of such documents must be delivered to the clerk, or the judge if there is no clerk, to be kept by him in the same manner as exhibits or depositions introduced in a civil trial. In addition, copies of all requests for admission and of all responses must be served upon all the other parties to the action who have appeared, unless the court waives the requirement after determining that it would be too expensive or burdensome to enforce. At any time prior to judgment and on written request, the party originating requests or responses must provide copies within thirty days to any other party not previously served.

Section 2033(a) continues to provide that each matter of which an admission is requested shall be deemed admitted unless, within twenty days of service, the responding party serves upon the other party either: (1) a denial of the requested admissions or an explanation of the reasons for not admitting or denying them; or (2) a written objection that the admissions are privileged, irrelevant or improper, in which case

the reply must be accompanied with a notice of hearing of such objections. As amended, subdivision (a) of section 2033 further provides that if the propounding party finds it necessary to have additional replies, he must move the court for an order requiring further response within thirty days from the date of service of response, unless the court extends the time on a showing of good cause. Otherwise he will be deemed to have waived his right to compel further responses. This is the same procedure which is used for requesting further responses to interrogatories, and places the primary burden of seeking judicial intervention on the propounding party.

Since these amendments delete the filing requirement for interrogatories, requests for admission, and their responses, there is no longer a penalty for failing to file answers to interrogatories, although the penalty for failing to serve them has not been changed (§2034(d), sanctions for failure to respond). This bill has apparently been enacted to relieve the court clerk of much of the burden involved in filing such documents and eliminate expensive microfilming, since many of the interrogatories, in particular, are voluminous. By permitting them to keep only the first page in the file as a record of what transpired, and to retain the bulk of the documents in a separate place reserved for exhibits, it should enable the clerks to more easily handle the clerical work entailed in preserving such records.

See Generally:
1) WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§978-982 (2d ed. 1966).
2) D. LOUISELL & B. WALLY, MODERN CALIFORNIA DISCOVERY §§5.01-5.37, 8.01-8.12 (2d ed. 1972).

Civil Procedure; payment of firemen as witnesses

Government Code §§68097, 68097.1, 68097.2, 68097.5, 68097.6, 68097.7, 68097.9, 68097.10 (amended).
AB 1157 (Murphy); STATS 1974, Ch 986
Support: California State Firemen's Association; California Trial Lawyers' Association

Chapter 986 provides that city and county firemen be included within those sections of the Government Code relating to (1) attendance as witnesses or deponents in civil actions, (2) payment of their salaries and expenses while attending such proceedings, and (3) *reimbursement* to their employers. Prior to the enactment of this bill, persons other than peace officers who were called as witnesses in civil cases could demand advance payment for one day's mileage and fees as provided under section 68095 of the Government Code, and could not

be compelled to appear until such payment was made pursuant to section 68097. Peace officers (including members of the California Highway Patrol, sheriffs, deputy sheriffs, marshals, deputy marshals, and city policemen) who were required to attend as witnesses were entitled to their regular salary in addition to reasonable traveling expenses and were to be paid directly by the public agency employing them. The party who requested the subpoena was required to reimburse the public entity at the rate of $45 per day, and had to deposit $45 before the subpoena would be issued. Any excess would be refunded [CAL. GOV'T CODE §68097.2].

Chapter 986 amends sections 68097 through 68097.10 of the Government Code, which formerly dealt with the use of various types of peace officers as witnesses, by adding firemen to that special category. For example, the amended section 68097.2 now entitles a *fireman* to receive from his employer his regular salary for the period of time spent traveling to and from the place where the court is located, and in addition be reimbursed for his actual traveling expenses incurred in complying with the subpoena. This section has also been amended to require the party at whose request the subpoena is issued to reimburse the public entity an amount equal to the *actual* cost incurred as a result of the fireman's or peace officer's attendance, rather than at the flat rate of $45 per day. Section 68097.5 provides that no fireman or peace officer may be ordered to return on another day for further proceedings unless the party requesting such a subpoena first deposits with the clerk or with the tribunal the sum of $45. Those provisions which are applicable to subpoenas issued for the taking of depositions of peace officers are now also made applicable to firemen (§68097.6).

Section 68097.7 makes it a misdemeanor for anyone to pay or offer to pay any consideration for the services of a fireman or other officer as a witness pursuant to this section, or for any fireman or officer to ask for or receive any such payment except as provided by this section. Section 68097.9 permits the fireman or officer to agree with the party requesting the subpoena to appear at some time other than that specified in the subpoena, in lieu of the specified date.

Similar bills were passed in previous sessions of the legislature but were vetoed since they lacked the provision permitting reimbursement for actual cost rather than a set rate, and hence would have placed a significant financial burden on local government.

See Generally:
1) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 328 (1973).

Civil Procedure; domestic water suppliers

Health and Safety Code §4028 (amended).
SB 1448 (Holmdahl); STATS 1974, Ch 289

Chapter 289 has amended section 4028 of the Health and Safety Code by reducing from 90 to 60 days the period which the State Department of Health must wait before bringing an action against a domestic water supplier who fails to comply with the Department's quality standards. The bill *requires* rather than permits the Department to bring a court action after such notification if the supplier fails to either bring the system into compliance with quality standards or to have a reasonable plan for compliance. If the supplier fails to make such a showing, a cease and desist order is issued to prevent any new service connections until standards or requirements are met. The bill also specifies that such an action will have priority over all other civil matters on the court calendar except those which are granted equal precedence by law. Section 4032 of the Health and Safety Code, which establishes a misdemeanor penalty for noncompliance with the code sections on water distribution (§4010 *et seq.*), remains unchanged.

In 1970 a program was set up for testing the quality of domestic water, whereby the Department of Health must notify suppliers when they are in violation of these standards. After 90 days, the Department was permitted to seek a court order to prevent the violator from making any new service connections, but such an action was not mandatory. There have been several reported instances in which a supplier had persistently provided substandard water to its customers, and no action was taken against it. The legislature has enacted this bill in order to tighten up enforcement procedures and prevent such situations from occurring in the future by requiring that action be taken to protect the public from these violations.