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Civil Procedure

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Civil Procedure

Civil Procedure; enforcement of judgments

Code of Civil Procedure §§488.465, 693.010, 693.020, 693.030, 693.040, 693.050, 693.060, 697.590, 700.160, 700.165, 700.167 (repealed); §§488.465, 491.415, 491.470, 697.590, 700.160, 701.070, 704.995, 706.108, 996.475 (new); §§86, 485.610, 486.110, 488.455, 488.460, 488.480, 488.600, 489.210, 491.140, 491.410, 491.430, 515.010, 515.020, 515.030, 681.030, 695.010, 697.340, 697.390, 700.140, 700.150, 700.190, 704.740, 704.780, 706.101, 708.110, 708.150, 708.450, 708.530, 729.060, 995.930 (amended); Commercial Code §9301 (amended); Government Code §26735 (repealed); §26830 (amended).

AB 2295 (McAllister); 1984 STAT. CH 538

In 1982, the California Legislature enacted a new Enforcement of Judgments Law¹ with conforming changes in the Attachment Law,² which became effective on July 1, 1983.³ Chapter 538 was enacted, and became effective on January 1, 1985,⁴ to further facilitate and coordinate the implementation of the new Enforcement of Judgments Law.⁵

Priorities of Security Interests and Judgment Liens

Under existing law, a judgment lien on personal property is created by filing a notice in the office of the Secretary of State.⁶ Prior law

1. CAL. CIV. PROC. CODE §§680.010-724.260; California Law Revision Commission, *Recommendation Relating to Creditors' Remedies*, 16 CAL. L. REVISION COMMISSION REPORTS 2175, 2179 (1982) [hereinafter cited as *Recommendation*]. See also *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 397 (1983) (analysis of new Enforcement of Judgments Law); *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 509 (1984) (changes pursuant to new Enforcement of Judgments Law).

2. CAL. CIV. PROC. CODE §§481.010-493.060; *Recommendation*, *supra* note 1, at 2179. See also *Review of Selected 1982 California Legislation*, 14 PAC. L.J. 441 (1983); *Review of Selected 1983 California Legislation*, 15 PAC. L.J. 509 (1983) (analysis of conforming changes to the Attachment Law).

3. 1982 Cal. Stat. c. 1364, §3, at 5236; *id.* c. 1198, §70, at 4327.

4. 1984 Cal. Stat. c. 538, §35, at ____.

5. *Id.* c. 538, §1, at ____.

6. CAL. CIV. PROC. CODE §697.510.

provided that as against a security interest,⁷ a judgment lien on personal property had priority.⁸ Chapter 538 revises the provisions governing priorities between judgment liens and security interests on the same personal property⁹ by declaring that conflicting interests rank according to priority in time of filing¹⁰ or perfection.¹¹ Chapter 538 also provides that a purchase money security interest¹² has priority over a conflicting judgment lien on the same personal property or its proceeds if the purchase money security interest is perfected at the time the judgment debtor as a debtor under the security agreement receives possession of the personal property or within ten days thereafter.¹³

Furthermore, Chapter 538 provides that a judgment lien that has attached to personal property and that is also subordinate to a security interest in the same personal property is subordinate to the security interest only to the extent that the security interest secures advances made (1) before the judgment lien attached, (2) within forty-five days of the attachment, (3) without knowledge¹⁴ of the judgment lien, or (4) pursuant to a commitment entered into without knowledge of the judgment lien.¹⁵ In addition, the secured party is deemed not to have knowledge of the judgment lien until served by the judgment creditor

7. CAL. COM. CODE §1201 (definition of security interest).

8. 1982 Cal. Stat. c. 1364, §2, at 5070 (enacting CAL. CIV. PROC. CODE §697.590).

9. See CAL. CIV. PROC. CODE §697.590(a)(3)(A) (with respect to a judgment lien, personal property is the property to which a judgment lien has attached pursuant to CAL. CIV. PROC. CODE §§697.510-697.670); *id.* §697.590(a)(3)(B) (with respect to a security interest, personal property is the collateral subject to a security interest pursuant to section 9105(c) of the California Commercial Code).

10. See CAL. CIV. PROC. CODE §697.590(a)(1)(A) (with respect to a judgment lien on personal property, filing is the filing of a notice of judgment lien in the office of the Secretary of State to create a judgment lien on personal property pursuant to sections 697.510-697.670 of the California Civil Procedure Code); *id.* §697.590(a)(1)(B) (with respect to a security interest, filing is the filing of a financing statement pursuant to sections 9401-9408 of the California Commercial Code).

11. CAL. CIV. PROC. CODE §697.590(b). In the case of judgment lien, priority dates from the time a filing is first made covering the personal property or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection. *Id.* See *id.* §697.590(a)(2) (perfection is perfection of a security interest pursuant to sections 9302-9306 of the California Commercial Code). See also *Official Comments to AB 2295*, California Law Review Commission, at 8 [hereinafter referred to as *Official Comments*].

12. CAL. COM. CODE §9107 (definition of purchase money security interest).

13. CAL. CIV. PROC. CODE §697.590(d). See *Official Comments*, *supra* note 11, at 3.1. If a purchase money security interest in inventory has priority over a judgment lien and a conflicting security interest has priority over the purchase money security interest in the same inventory, the conflicting security interest also has priority over the judgment lien on the inventory subject to the purchase money security interest notwithstanding that the conflicting security interest would not otherwise have priority over the judgment lien. CAL. CIV. PROC. CODE §697.590(e).

14. See CAL. CIV. PROC. CODE §697.590(f) (meaning of knowledge governed by section 1201(25) of the California Commercial Code).

15. CAL. CIV. PROC. CODE §697.590(f).

with a copy of the notice of judgment lien personally or by mail.¹⁶

Right to Attach Orders

Existing law provides that if a plaintiff has obtained a right to attach order,¹⁷ and the defendant is a party to another pending action or special proceeding,¹⁸ the plaintiff may obtain a lien to the extent required to secure the amount to be secured by the attachment.¹⁹ The lien may be on both the defendant's cause of action for money or property²⁰ and the defendant's rights to money or property under any judgment subsequently procured.²¹ Chapter 538 provides that a lien may be obtained only if the money or property that is the subject of the pending action would be subject to attachment should the defendant prevail.²² In addition, Chapter 538 provides that at the time the plaintiff applies for a right to attach order, the plaintiff may apply for an order permitting creation of a lien.²³ If the plaintiff already has obtained a right to attach order, an application for an order permitting creation of a lien may be applied for in the same manner as a writ of attachment.²⁴ The plaintiff is required to file an undertaking²⁵ as a prerequisite to obtaining an order in either circumstance.²⁶

Finally, Chapter 538 permits a defendant to claim an exemption in a lien proceeding initiated by the plaintiff if the money or property sought by the defendant in the other action or proceeding would be exempt from attachment should the defendant prevail in the other action or proceeding.²⁷ Chapter 538 also establishes the procedure by which a defendant may claim such an exemption.²⁸

16. *Id.* If service on the secured party is by mail, it will be sent to the secured party at the address shown in the financing statement or security agreement. *Id.*

17. *See generally id.* §§484.010-484.110 (procedure for obtaining a right to attach order).

18. *Id.* §595.1 (definition of proceeding in a court).

19. *Id.* §491.410(a).

20. *Id.* §491.410(a)(1).

21. *Id.* §491.410(a)(2). For the purpose of applying for a right to attach order the defendant's cause of action that is the subject of the pending action or proceeding and the defendant's right to money or property under a judgment procured in the action or proceeding will be treated as property subject to attachment. *Id.* §491.415(a).

22. *Id.* §491.410(a)(1), (2). *See Official Comments, supra* note 11, at 4.

23. *Id.* §491.415(b); *see id.* §491.410(b) (procedure in obtaining a lien on causes of action or rights to money or property in a subsequent proceeding).

24. *Id.* §491.415(b); *see id.* §485.520 (application for a writ of attachment).

25. *See id.* §995.190 (definition of undertaking); *see also id.* §§489.210, 489.220 (procedure for filing an undertaking).

26. *Id.* §491.415(b).

27. *Id.* §491.415(c).

28. *See id.* §491.470. *See Official Comments, supra* note 11, at 5 (procedure drawn from section 708.450 of the Civil Procedure Code).

Transfer of Attached Property

Existing law provides that with certain exceptions,²⁹ all property of a judgment debtor is subject to enforcement of a money judgment.³⁰ Chapter 538 provides that if property were attached in the action but was transferred before entry of the money judgment in favor of the judgment creditor, the property is subject to enforcement of the money judgment as long as the attachment lien remains effective.³¹

Writs of Possession

Existing law provides that the court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed an undertaking with the court.³² Chapter 538 declares that the amount of the undertaking must be at least twice the value of the defendant's interest in the property.³³

Under existing law, the defendant may prevent the plaintiff from taking or regaining possession of property pursuant to a writ of possession by filing an undertaking in an amount equal to the amount of the plaintiff's undertaking.³⁴ Prior law required that if the plaintiff recovered judgment on the action, the defendant was required to pay all costs awarded to the plaintiff and all damages sustained by the plaintiff by reason of the loss of possession of the property not exceeding the amount of the undertaking.³⁵ Chapter 538 removes the limitation of the amount recoverable by the plaintiff³⁶ and permits the plaintiff to recover actual damages proximately caused by the failure of the plaintiff to gain or retain possession.³⁷

29. See *id.* §§703.010-703.130 (exemptions to procedures for enforcement of a money judgment).

30. *Id.* §695.010(a).

31. *Id.* §695.010(b). For provisions governing liens on property that are transferred, see sections 697.390 (judgment lien on real property), 697.610 (judgment lien on personal property), 697.720-697.750 (execution liens) of the California Civil Procedure Code. See *Official Comments*, *supra* note 11, at 7.

32. *Id.* §515.010. The undertaking will provide that the sureties are bound to the defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against the plaintiff. *Id.*

33. *Id.* The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and such other factors as may be necessary to determine the defendant's interest in the property. *Id.*

34. *Id.* §515.020(a); see also *id.* §515.010 (determination of amount of plaintiff's undertaking).

35. 1982 Cal. Stat. c. 517, §121, at 2339 (amending CAL. CIV. PROC. CODE §515.020).

36. If the plaintiff recovers judgment on the action, the defendant must pay all costs to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property. CAL. CIV. PROC. CODE §515.020(a).

37. *Id.*

Objections to Bonds or Undertakings

Prior law permitted an objection to a bond or undertaking after expiration of the time to make an objection *only* upon a showing of changed circumstances.³⁸ Chapter 538 allows an objection to be made after expiration of the statutory period upon a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances.³⁹

Payment After Service of a Final Money Judgment

Chapter 538 specifies that if a final money judgment has been levied upon, and the levying officer has served the judgment debtor under the final money judgment that was levied upon, the judgment debtor must make any payments due under the judgment to the levying officer.⁴⁰ In addition, payments made to a person other than the levying officer do not discharge the obligation of the judgment debtor under the final money judgment levied upon if the payments are made after the judgment debtor has received notice of the levy.⁴¹

Time for Filing of Exemption for Real Property

Existing law provides that a defendant may claim an exemption as to real or personal property levied upon pursuant to a writ of attachment issued after an ex parte hearing⁴² except that the defendant must claim the exemption as to personal property no later than thirty days after the levying officer serves the defendant with the notice of attachment describing the property to be attached.⁴³ Chapter 538 clarifies the law by providing that the time for filing for an exemption for real property is the same as that for personal property if the property is exempt from enforcement of a money judgment.⁴⁴ If the defendant claims the property is necessary for the support of a defendant who is a natural person or the family of such defendant supported in whole or in part by the defendant,⁴⁵ Chapter 538 provides

38. 1982 Cal. Stat. c. 998, §1, at 3659 (enacting CAL. CIV. PROC. CODE §995.930).

39. CAL. CIV. PROC. CODE §995.930(c). *See Official Comments, supra* note 11, at 16 (no maximum time limit for making a late objection).

40. *Id.* §701.070.

41. *Id.*

42. *See id.* §§703.510-703.610 (procedure for claiming exemptions after levy); *see also id.* §§485.010-485.540 (ex parte hearing procedure for obtaining writ of attachment).

43. *Id.* §485.610(a).

44. *Id.* *See id.* §487.020(a) (all property exempt from enforcement of a money judgment is exempt from attachment). A claim of exemption under the procedure for claiming exemptions after levy shall be denied if the claim has been denied earlier in the action. *Id.* §487.030(a).

45. *See id.* §487.020(b) (property exempt from attachment).

that the defendant may claim an exemption with respect to real property either by following the procedure for claiming exemptions after levy⁴⁶ or by filing for a hearing during which the defendant has the burden of showing that the property is exempt.⁴⁷

Assignment of Rights to Future Rents

Existing law specifies the types of payments that a court may order a judgment debtor to assign to a judgment creditor⁴⁸ and the effect and priority of the assignment.⁴⁹ Chapter 538 clarifies this provision by specifying that a debtor's assignment of the right to future rent is recordable as an instrument affecting real property.⁵⁰

Redemption Price

Existing law recognizes a limited statutory right of redemption⁵¹ that permits a judgment debtor or a judgment debtor's successor in interest⁵² to redeem property sold pursuant to a judicial decree of a mortgage foreclosure or deed of trust on real property.⁵³ Existing law specifies four items that when totaled together constitute the redemption price.⁵⁴ Chapter 538 imposes as an additional item the amount of any liens, plus interest, held by the purchaser at the foreclosure sale that are subordinate to the lien under which the property was sold.⁵⁵

46. *Id.* §§703.510-703.610.

47. *Id.* §485.610(b); *see id.* §482.100(c) (procedure for filing for an exemption if the property is necessary for the support of individual and household). *But see id.* §485.610(b) (the requirement of showing changed circumstances under section 482.100 of the Civil Procedure Code does not apply).

48. *Id.* §708.510(a).

49. *Id.* §708.530(a). For the purpose of priority, an assignee of a right to payment will be deemed a bona fide assignee for value. *Id.* *See* CAL. CIV. CODE §955.1(b) (as between bona fide assignees of the same right for value without notice, the assignee first giving notice thereof to the obligor in writing has priority).

50. CAL. CIV. PROC. CODE §708.530(b). *See Official Comments, supra* note 11, at 15; *see also* CAL. CIV. CODE §1214 (priority of recorded conveyances of real property).

51. *See* CAL. CIV. PROC. CODE §§729.010-729.090 (actions for the foreclosure of mortgages).

52. *See id.* §729.020 (parties who may redeem).

53. *Id.* §729.010.

54. *Id.* §729.060(b). The items are: (1) the purchase price; (2) the amount of any assessments or taxes and reasonable amounts for fire insurance, maintenance, upkeep, and repair of improvements on the property; (3) any amount paid by the purchaser on a prior obligation secured by the property to the extent that the payment was necessary for the protection of the purchaser's interest; and (4) interest at the rate of interest on money judgments from the time such amount was paid until the date the deposit is made. *Id.* §729.060(b)(1)-(4).

55. *Id.* §729.060(b)(5). This change provides additional protection to lienholders bidding at a foreclosure sale who may be encouraged to bid with the assurance that they may recover the amount of a junior lien they may hold if the property is redeemed. *Official Comments, supra* note 11, at 15. A judgment debtor who successfully bids at a foreclosure sale will take the property free of any liens that are junior to the lien under which the sale is made. *Id.*

*Deposit Accounts and Safe Deposit Boxes Held in the Name of
a Third Person*

Under prior law, a creditor seeking to levy⁵⁶ on a deposit account⁵⁷ or a safe deposit box standing in the names of both a debtor and a third person, or in the name of a third person only, was required to furnish an undertaking to the financial institution⁵⁸ at the time of levy.⁵⁹ Prior law also imposed specific obligations and notice requirements upon financial institutions receiving undertakings.⁶⁰

Chapter 538 provides that a deposit account or safe deposit box standing in the name of a person other than the defendant, either alone or together with other third persons, is not subject to levy unless authorized by court order,⁶¹ except as specified,⁶² and subject to specified notice requirements.⁶³ Chapter 538 repeals the requirement of furnishing an undertaking as a prerequisite to levying on a deposit account or safe deposit box standing in the name of a third person other than the debtor⁶⁴ and revises existing law to permit financial institutions to hold an attached deposit account pending a settlement or judgment in the action.⁶⁵ Furthermore, Chapter 538 provides that in any case where a deposit account in the name of a person other than the defendant or judgment debtor, whether alone or together with the judgment debtor, is levied upon, the financial institution will not pay the levying officer⁶⁶ the amount levied upon until notified to do so by the levying officer.⁶⁷

56. See CAL. CIV. PROC. CODE §488.600(b)(5), (c)(1) (levy refers to levy of attachment).

57. *Id.* §481.080 (definition of deposit account).

58. *Id.* §481.113 (definition of financial institution).

59. See 1983 Cal. Stat. c. 155, §8.2, at ____ (amending CAL. CIV. PROC. CODE §488.465).

60. *Id.*

61. CAL. CIV. PROC. CODE §§488.465(a); 700.160(a).

62. *Id.* §§488.465(b); 700.160(b). A court order is not required as a prerequisite to levy on a deposit account or a safe deposit box standing in the name of the defendant or the defendant's spouse, whether alone or together with third persons; or under a fictitious business name if a current business name statement lists the defendant, the defendant's spouse, or both defendant and spouse as the persons doing business. *Id.*

63. See *id.* §488.465(a). The levying officer must serve a copy of the court order on the third person at the time the copy of the writ of attachment and the notice of attachment are served on the third person. *Id.*

64. Compare *id.* §488.465(a) with 1982 Cal. Stat. c. 1198, §50, at 6077 (enacting CAL. CIV. PROC. CODE §488.465).

65. CAL. CIV. PROC. CODE §488.455(g). See also *id.* §488.455(g)(2)(A) (providing that if defendant consents, the financial institution may hold in the deposit account an amount larger than the attached amount as necessary to avoid a penalty or a reduction in the rate of interest).

66. *Id.* §680.260 (definition of levying officer).

67. *Id.* §488.465(c). Payment may not be required by the levying officer until the expiration of 15 days after service of notice of attachment or levy on the third person. *Id.*

Survivability of Homestead

Prior case law provided that a declared homestead⁶⁸ did not survive the death of one of the spouses.⁶⁹ In addition, prior law did not specifically continue the protection of a declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on a homestead, after the death of the declared homestead owner.⁷⁰ With the enactment of Chapter 538, a declared homestead continues to be protected from a creditor having an attachment, execution, or judgment lien if, at the time of death of the declared homestead owner, the dwelling was the principal dwelling of a surviving spouse⁷¹ of the decedent,⁷² or a member of the family of the decedent,⁷³ to whom all or a part of the interest of a deceased homestead owner passes.⁷⁴ Under Chapter 538, the protection continues regardless of whether (1) the decedent was the sole owner of the declared homestead, or owned the declared homestead with the surviving spouse or a member of the decedent's family,⁷⁵ and (2) the surviving spouse or the member of the decedent's family was a declared homestead owner at the time of the decedent's death.⁷⁶

Enforcement of Condominium Liens

Existing law provides that each municipal and justice court has original jurisdiction of civil cases and proceedings in all actions to enforce liens of mechanics, materialmen, artisans, laborers, and all other persons to whom liens are given under provisions relating to mechanics' liens⁷⁷ when the amount of the lien is \$15,000 or less.⁷⁸ Chapter 538 extends the jurisdiction of municipal and justice courts

68. *Id.* §§704.710(c) (definition of homestead), 704.910(a) (definition of declared homestead).

69. *Estate of Grigsby*, 134 Cal. App. 3d 611, 615, 184 Cal. Rptr. 886, 888 (1982). *See* 1980 Cal. Stat. c. 119, §22(a), at 288 (amending CAL. CIV. PROC. CODE §1265 to abolish the rights of a surviving spouse in the homestead after the death of a spouse). *See Official Comments, supra* note 11, at 13.

70. CAL. CIV. PROC. CODE §704.910(b) (definition of declared homestead owner). *See generally id.* §704.950 (attachment of judgment lien to declared homestead).

71. *Id.* §704.710(d) (definition of spouse).

72. *Id.* §704.995(a)(1).

73. *Id.* §704.995(a)(2).

74. *Id.* §704.995(a). *Cf. Estate of Grigsby*, 134 Cal. App. 3d 611, 615, 184 Cal. Rptr. 886, 888 (1982) (in the absence of a statutory provision, the declared homestead does not survive the death of one of the spouses).

75. CAL. CIV. PROC. CODE §704.995(b).

76. *Id.* The amount of homestead exemption depends on the circumstances of the case at the time the amount is required to be determined. *Id.* §704.995(c). *See also id.* §704.730 (procedure in determining amount of the homestead exemption).

77. *See generally* CAL. CIV. PROC. CODE §§3109-3154 (mechanics' liens).

78. CAL. CIV. PROC. CODE §86(a)(6).

to include enforcement and foreclosure of an assessment lien on a condominium⁷⁹ where the amount of the lien is \$15,000 or less.⁸⁰

Appearance at an Examination

Existing law provides that a corporation, partnership, trust, or other organization served with an order to appear for an examination must designate one or more officers, directors, managing agents, or other persons familiar with the debts and property of the organization to appear.⁸¹ Chapter 538 provides that an organizational entity may appear at an examination through any authorized officer, director, or employee, whether or not the person is an attorney.⁸²

Method of Service

Prior law required that a levying officer *personally* serve a copy of the writ of attachment and a notice of attachment on the judgment debtor obligated to pay the final money judgment.⁸³ Chapter 538 eliminates the requirement of personal service on a judgment debtor of a notice of attachment or a notice of levy on a final money judgment.⁸⁴

Issuance of Earnings Withholding Orders

Under the Wage Garnishment Law,⁸⁵ a registered process server⁸⁶ is authorized to serve an earnings withholding order.⁸⁷ Chapter 538

79. CAL. CIV. CODE §783 (definition of condominium); *see also id.* §1356 (procedure for enforcement of a condominium lien).

80. CAL. CIV. PROC. CODE §86(a)(6).

81. *Id.* §491.140(a). *Compare id.* with *id.* §491.140(b) (providing that if the order to appear requires the appearance of a specified individual, the specified individual must appear for the examination and may be accompanied by one or more representatives of the organizational entity).

82. *Id.* §491.140(d). *Cf. Merco Construction Engineers, Inc. v. Municipal Court*, 21 Cal. 3d 724, 581 P.2d 636, 147 Cal. Rptr. 631 (1978). In *Merco*, the California Supreme Court struck down a statutory provision which purported to authorize a nonattorney to appear on behalf of a corporation in a municipal court. The court declared that the California Legislature cannot constitutionally vest in a person not licensed to practice law the right to appear in a court of record on behalf of another person, including a corporate entity. *Id.* at 727, 581 P.2d at 637, 147 Cal. Rptr. at 632. The court concluded that the statute offended the separation of powers clause of the California constitution and was of no force and effect. *Id.* at 733, 581 P.2d at 641, 147 Cal. Rptr. at 636.

83. 1982 Cal. Stat. c. 1198, §50, at 4289 (enacting CAL. CIV. PROC. CODE §488.480). *See also* CAL. CIV. PROC. CODE §488.480(a) (definition of final money judgment).

84. *Id.* §488.460(c); *see also id.* §482.070(a) (except as otherwise provided, a writ, notice, order, or other paper required or permitted to be served may be served personally or by mail).

85. *Id.* §§706.010-706.154.

86. *Id.* §680.330 (definition of registered process server); *see also* CAL. BUS. & PROF. CODE §§22350-22360 (procedure in becoming a registered process server).

87. CAL. CIV. PROC. CODE §706.108(c).

provides that a registered process server also may *issue* an earnings withholding order⁸⁸ and further prescribes the duties and responsibilities of the registered process server regarding issuance and service of earning withholding orders.⁸⁹

88. *Id.* §706.108(a).

89. *See id.* §706.108(b),(d) (documents to be deposited with levying officer); §706.108(c) (documents to be served on employer of judgment debtor).

Civil Procedure; settlements and sister state judgments

Code of Civil Procedure §§887.6, 1710.15, 1710.20, 1710.25, 1710.35 (amended).

SB 232 (Stirling); 1984 STAT. Ch 311

Settlements

Under existing law, a good faith settlement in a case involving multiple tortfeasors relieves the settling tortfeasor from liability for contribution or indemnity to other tortfeasors,¹ and reduces the total recovery by the settlement amount.² Existing law entitles any party in the action to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors.³ Prior to the enactment of Chapter 311, a determination of good faith or lack of good faith could be reviewed only upon appeal of the final judgment.⁴ Chapter 311 provides that an aggrieved party may seek immediate review of a good faith determination by

1. CAL. CIV. PROC. CODE §877(b) (release, dismissal without prejudice, or covenant not to sue discharges tortfeasor's liability for contribution). The legislative policy of California Civil Procedure Code section 877(b) dictates that a good faith settlement releases tortfeasor from indemnity claims. *American Motorcycle Association v. Superior Court of Los Angeles County*, 20 Cal. 3d 578, 604, 578 P.2d 899, 915, 146 Cal. Rptr. 182, 198 (1978).

2. CAL. CIV. PROC. CODE §877(a).

3. *Id.* §877.6(a). Notice must be given at least 20 days before the hearing in accordance with California Civil Procedure Code sections 1010, 1011. *Id.* The issue of good faith is determined by the court on the basis of affidavits and counteraffidavits filed before the hearing, or, at the discretion of the court, upon evidence received at the hearing. *Id.* §877.6(b). The party asserting lack of good faith has the burden of proof on that issue. *Id.* §877.6(d). Following a determination of good faith, claims by other joint tortfeasors for contribution or indemnity against the settling tortfeasor are barred. *Id.* §877.6(c).

4. *See id.* §904.1 (appealable judgments and orders).

filing a petition for writ of mandate⁵ within twenty days after receiving notice of the determination, or within up to twenty additional days which may be allowed by the trial court.⁶ Chapter 311 requires the reviewing court to notify the parties of the decision whether to hear the writ⁷ within thirty days of receipt of all materials to be filed by the parties.⁸ If granted, the hearing on the writ is given special precedence over all other civil matters on the court calendar except those matters given equal or greater precedence by law.⁹ The time period for dismissal of an action for failure to prosecute¹⁰ is tolled while the determination is being reviewed.¹¹

Sister State Judgments

Under existing law, a judgment creditor may file an application for the entry of a California judgment based on a sister state judgment.¹² Prior law required those applications to be filed in a superior court.¹³ With the enactment of Chapter 311, if a sister state judgment is \$15,000 or less, the application must be filed in a municipal or justice court.¹⁴ In all other cases, the application for a judgment based on a sister state judgment is to be filed in a superior court.¹⁵

5. See generally *id.* §§1084-1097 (provisions relating to writ of mandate). The basis of a writ of mandate is that the lower court has taken action in excess of jurisdiction, or has failed or refused to perform an act within jurisdiction. *American Mutual Liability Ins. Co. v. Superior Court for Sacramento County*, 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561, 569 (1974).

6. CAL. CIV. PROC. CODE §877.6(e).

7. A review of the decision as to whether to grant or deny the writ may be obtained only by petition for an extraordinary writ. *Id.* §904.1(a).

8. *Id.* §877.6(e)(1).

9. *Id.* §877.6(e)(2). Other proceedings given statutory precedence on the court calendar include, but are not limited to, contested election cases, probate proceedings, libel and slander actions by candidates for public office, forcible entry and unlawful detainer actions, labor claims, and eminent domain proceedings. *Id.* §§44, 1179a, 1206, 1260.01.

10. See *id.* §583 (dismissal of action for want of prosecution if not brought to trial within two years after the action was filed).

11. *Id.* §877.6(e)(2).

12. *Id.* §1710.15(a).

13. 1974 Cal. Stat. c. 211, §3, at 406 (enacting CAL. CIV. PROC. CODE §1710.20), 1982 Cal. Stat. c. 150, §4, at 745 (amending CAL. CIV. PROC. CODE §1710.15); 1982 Cal. Stat. c. 150, §5, at 746 (amending CAL. CIV. PROC. CODE §1710.25).

14. CAL. CIV. PROC. CODE §1710.20(a).

15. *Id.* See also *id.* §1710.25(b) (entry of a sister state judgment is made in the same manner as entry of an original judgment of the court), 1710.35 (except as otherwise provided, a sister state judgment has the same effect as an original money judgment of the court and may be enforced or satisfied in like manner).

Civil Procedure; mechanics' liens

Civil Code §3262 (amended).

AB 844 (Lancaster); 1984 STAT. Ch 185

Existing law prohibits a property owner or original contractor from waiving, affecting, or impairing the mechanics' lien¹ claims of subcontractors,² materialmen,³ or other persons by any contract term whether with or without notice.⁴ Any term that attempts to waive the mechanics' lien claim is null and void.⁵ Chapter 185 allows a property owner or original contractor⁶ to waive, affect, or impair another person's mechanics' lien if the lienholder consents in writing and executes and delivers a waiver and release.⁷ The waiver and release is binding and effective to release the owner, construction lender, and surety⁸ on a payment bond from claims and liens only if one of the following waiver and release forms set forth by Chapter 185 is used or substantially followed:⁹ (1) conditional waiver and release upon progress payment;¹⁰ (2) unconditional waiver and release upon progress payment;¹¹ (3) conditional waiver and release upon final payment;¹² or (4) unconditional waiver and release upon final payment.¹³

Chapter 185 also specifies that no oral or written statement purporting to waive, release, impair, or otherwise adversely affect a claim is enforceable or creates any estoppel or impairment of a claim unless (1) the statement is pursuant to one of the prescribed waiver and release forms or (2) the claimant actually received payment in

1. See generally CAL. CIV. CODE §§3109-3154 (mechanics' liens).

2. *Id.* §3104 (definition of subcontractor).

3. *Id.* §3090 (definition of materialman).

4. *Id.* §3262(a).

5. *Id.* See also *Bentz Plumbing & Heating v. Favarola*, 128 Cal. App. 3d 145, 150, 180 Cal. Rptr. 223, 226 (1982) (requiring a subcontractor to consent to a lien waiver to secure payments due a prime contractor "affected" and "impaired" the lien by the threat of resulting non-payment to the subcontractor).

6. An original contractor is any contractor who has a direct contractual relationship with the owner. CAL. CIV. CODE §3095.

7. *Id.* §3262(a). See also *Bentz Plumbing & Heating v. Favarola*, 128 Cal. App. 3d 145, 150, 180 Cal. Rptr. 223, 226 (1982). The object of the 1972 amendment of Civil Code §3262 which deleted the words *except by their written consent*, was to prevent subcontractors from being forced to consent in writing to impairment of their lien rights in order to get the job or get paid. *Id.* at n.3.

8. CAL. CIV. CODE §2787 (definition of surety).

9. *Id.* §3262(a); see *id.* §3262(d) (forms).

10. *Id.* §3262(d)(1).

11. *Id.* §3262(d)(2).

12. *Id.* §3262(d)(3).

13. *Id.* §3262(d)(4). The unconditional waiver and release forms include a warning that the signer surrender lien rights whether or not payment has been received. *Id.* §3262(d)(2),(4).

full for the claim.¹⁴ Chapter 185 further specifies that an accord¹⁵ and satisfaction¹⁶ regarding a bona fide dispute or an agreement made in settlement of an action pending in any court continues to be enforceable provided those agreements make specific reference to the mechanics' lien, stop notice,¹⁷ or bond claims.¹⁸

14. *Id.* §3262(b).

15. *Id.* §1521 (definition of accord).

16. *Id.* §1523 (definition of satisfaction). *See generally id.* §§1521-1525 (accord and satisfaction).

17. *Id.* §3103 (definition of stop notice).

18. *Id.* §3262(c).

Civil procedure; mechanics' liens—condominium units

Civil Code §3131 (amended).

AB 2526 (Lancaster); 1984 STAT. Ch 148

Under existing law, if a work of improvement¹ consists of two or more separate residential units,² each unit is considered a separate work of improvement for purposes of mechanics' liens.³ The time limit for filing a claim of lien begins to run on the date each residential unit is completed.⁴ Case law holds that a single structure containing several individual units in a condominium project is not a separate residential unit.⁵ Thus, the time for filing a mechanics' lien begins with completion of the entire condominium project.⁶ Chapter 148 provides that each residential structure of the work of improvement containing multiple condominium units, together with any common area,⁷ garage, or other improvements appurtenant thereto, is considered a separate residential unit.⁸

Under existing law, a mechanics' lien must be claimed and recorded within sixty days after a notice of completion⁹ has been recorded,

1. Work of improvement is defined as the entire structure or scheme of improvement of construction, alteration, repair or addition, in whole or in part, to any building or other structure. CAL. CIV. CODE §3106.

2. *See* E.D. McGillicuddy Constr. Co. v. Knoll Recreation Assn., Inc., 31 Cal. App. 3d 891, 897, 107 Cal. Rptr. 899, 903 (1973) (separate residential units include tract or row houses).

3. CAL. CIV. CODE §3131.

4. *Id.* §3131. *Id.* §3086 (definition of completion).

5. E.D. McGillicuddy Constr. Co. v. Knoll Recreation Assn., Inc., 31 Cal. App. 3d 891, 896-98, 107 Cal. Rptr. 899, 903-04 (1973).

6. *Id.*

7. CAL. CIV. CODE §1350 (definition of common area).

8. *Id.* §3131.

9. *Id.* §3093 (definition of notice of completion).

or within ninety days of completion if no notice has been recorded.¹⁰ Chapter 148 extends the time limit to 120 days for an express trust fund, established pursuant to a collective bargaining agreement and to which fringe benefit payments are made, to claim and record a mechanics' lien against a residential structure containing multiple condominium units.¹¹

10. *Id.* §3115.

11. *Id.* §3131.

Civil Procedure; homestead exemptions

Code of Civil Procedure §704.965 (new); §704.730 (amended).
AB 2612 (Killea); 1984 STAT. Ch 454

Under existing law, a judgment debtor's homestead¹ is exempted from enforcement of a money judgement.² The maximum homestead exemption allowed in most cases is \$30,000.³ Prior law allowed an exemption of up to \$45,000 if the judgment debtor or spouse resided in the homestead and was a member of a family unit⁴ or sixty-five years of age or older.⁵ Chapter 454 continues the \$45,000 homestead exemption to judgment debtors or spouses of judgment debtors who reside in the homestead at the time of the attempted sale and are members of a family unit.⁶ Chapter 454 increases the amount of a homestead exemption to \$55,000 if (1) the judgment debtor or spouse of the judgment debtor resides in the homestead at the time of the attempted sale, and (2) is either sixty-five years of age or older, or as a result of physical or mental disablement, is unable to engage in substantial gainful employment.⁷ In addition, Chapter 454 creates a rebuttable presumption affecting the burden of proof that a person

1. CAL. CIV. PROC. CODE §704.710(c) (definition of homestead).

2. *Id.* §704.720.

3. *Id.* §704.730(a)(1).

4. *Id.* §704.710(b) (definition of family unit). There must be at least one member of the family unit who owns no interest in the homestead or whose only interest is a community property interest with the judgment debtor. *Id.* §704.730.

5. 1982 Cal. Stat. c. 1364, §2, at 5165 (amending CAL. CIV. PROC. CODE §704.730).

6. CAL. CIV. PROC. CODE §704.730(2).

7. *Id.* §704.730(a)(3). Chapter 454 provides that for purposes of a judgment lien attachment on a homestead and an exemption of voluntary sale proceeds, if a homestead declaration is recorded before an amendment increasing the homestead exemption, the exemption is the increased amount. *Id.* §704.965. If, however, the judgment creditor obtained a lien on the declared

receiving federal disability insurance benefits⁸ or supplemental security income payments⁹ satisfies the disability requirement.¹⁰ The combined spousal exemption cannot exceed the applicable amount of either \$45,000 or \$55,000, regardless of whether the spouses are jointly obligated on the judgment or whether the homestead is separate or community property.¹¹

homestead prior to the operative date of an amendment, the amount of the homestead exemption is determined under prior law. *Id.* See also *id.* §704.950(c) (judgment lien attachment).

8. 42 U.S.C. §§401-431 (Federal Old-Age, Survivors, and Disability Insurance Benefits).

9. *Id.* §§1381-1383(c) (Supplemental Security Income for the Aged, Blind, or Disabled).

10. CAL. CIV. PROC. CODE §704.730(a)(3).

11. *Id.* §704.730(b).

Civil Procedure; powers of attorney

Civil Code §§2432.5, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508 (new); §§2410, 2416, 2421, 2433, 2434, 2437 (amended).
SB 1365 (Keene); 1984 STAT. CH 312

Powers of Attorney

Existing law provides that a principal¹ may appoint another as attorney in fact² to act on the principal's behalf under a power of attorney.³ Under existing law, various persons are authorized to petition the court⁴ to contest the validity of the power or review the decision of the attorney in fact.⁵ Chapter 312 provides that a principal may limit the authority of these persons to petition the court if a statement by the principal's attorney is included in the instrument creating the power stating that (1) the attorney is licensed in the state, (2) the principal was a client at the time the power was executed, and (3) the client has been advised regarding the consequences of executing the power.⁶

Under existing law, a court may dismiss a petition for review when the proceeding appears unnecessary to protect the interests of the

1. CAL. CIV. CODE §2410(d) (definition of principal).

2. *Id.* §2410(a) (definition of attorney in fact).

3. *Id.* §§2400-2407; compare *id.* §2410(c) with 1983 Cal. Stat. c. 1204, §3(c) at ____ (amending CAL. CIV. CODE §2410) (definition of power of attorney). Chapter 312 eliminates the requirement that a person appointed as attorney in fact be a resident of the state. *Id.*

4. CAL. CIV. CODE §2411 (persons who may petition the court).

5. *Id.* §2412 (purposes of petition).

6. Compare *id.* §2421 with 1983 Cal. Stat. c. 1204, §9, at ____ (amending CAL. CIV. CODE

principal or the principal's estate.⁷ Chapter 312 additionally requires a court to stay or dismiss the proceeding in whole or part when, in the interests of substantial justice, the matter should be heard in a forum outside the state.⁸

Durable Power of Attorney

Existing law permits a principal to designate an attorney in fact to make health care⁹ decisions¹⁰ under a durable power of attorney for health care.¹¹ A principal cannot designate, however, the treating health-care provider or an employee of the provider¹² as an attorney in fact to make health-care decisions.¹³ Chapter 312 establishes a special exception by stating that if the employee is related to the principal by blood, marriage, or adoption, that person may be designated as attorney in fact.¹⁴

An attorney in fact is authorized under existing law to make a disposition after the principal's death under the Uniform Anatomical Gift Act.¹⁵ This authority is expanded under Chapter 312 to specifically include the power to authorize an autopsy¹⁶ and to direct the disposition of remains.¹⁷

Existing law provides that at any time while a principal has the capacity to give a durable power of attorney for health care, the principal may revoke the appointment or authority of an attorney in fact.¹⁸ Chapter 312 further provides that persons acting in good faith reliance upon the durable power, and without actual knowledge of a revocation of that power are not subject to criminal prosecution

§2421); *see also* California Law Review Commission, *Recommendation Relating to Statutory Forms for Durable Powers of Attorney*, 17 CAL. L. REVISION COMM'N 701, 751 (1984) (Sections 2421 and 2433 are amended so that the lawyer's certificate provided for in those sections and the lawyer's certificate in section 2501 are phrased the same, thereby avoiding the need to include more than one certificate of the lawyer when a certificate of the lawyer is required under more than one of those sections).

7. CAL. CIV. CODE §2416.

8. *Id.*; *see also* CAL. CIV. PROC. CODE §410.30 (when dismissal is required).

9. CAL. CIV. CODE §2430(b) (definition of health care).

10. *Id.* §2430(c) (definition of health care decision).

11. *Id.* §§2430-2443; *see Review of Selected 1983 California Legislation*, 15 PAC. L.J. 526 (durable power of attorney for health care); *see also* CAL. CIV. CODE §2430(a) (definition of durable power of attorney for health care).

12. CAL. CIV. CODE §2430(d) (definition of health care provider).

13. *Id.* §2432(b).

14. *Id.* §2432.5.

15. *Id.* §2434(b); *see also* CAL. HEALTH & SAFETY CODE §§7150-7157 (Uniform Anatomical Gift Act).

16. CAL. CIV. CODE §2434(b); *see also* CAL. HEALTH & SAFETY CODE §7113 (authorization for autopsy).

17. CAL. CIV. CODE §2434(b); *see also* CAL. HEALTH & SAFETY CODE §7100 (directing disposition of remains).

18. CAL. CIV. CODE §2437.

or civil liability for their reliance.¹⁹

Statutory Form

Chapter 312 authorizes the use of a statutory form for the creation of a durable power for health care which is consistent with and subject to the durable power of attorney for health care law.²⁰ In order to be valid, the form must contain a warning to the principal²¹ or a certificate signed by the principal's lawyer.²²

The statutory form provides for the designation of alternate agents in the event that an agent nominated as the attorney in fact is unable or ineligible to act in that position.²³ A conservator may be nominated in the event a court should decide to appoint one.²⁴ The statutory form has the effect of revoking any prior durable power for health care purposes and requires the signature of two witnesses, one of whom must be a patient advocate or ombudsman if the principal is a patient in a skilled nursing facility.²⁵

A printed statutory form durable power of attorney for health care that is distributed in this state for use by a person without legal counsel must contain the exact language of the form set out in Chapter 312 including the warnings and instructions.²⁶ Additional material that explains the form and its use is not prohibited by Chapter 312.²⁷ Chapter 312, however, does not limit the use of any other forms creating a durable power of attorney for health care.²⁸

19. *Id.* §2437(f).

20. *Id.* §§2500-2506; *see id.* §§2430-2443 (durable power of attorney for health care).

21. *Id.* §§2400, 2501(a) (required warning).

22. *Id.* §2501(b); *see also supra* note 6 and accompanying text.

23. CAL. CIV. CODE §2500(9).

24. *Id.* §2500(10).

25. *Id.* §2500(11).

26. *Id.* §2503.

27. *Id.* §2503(c)(1).

28. *Id.* §2507; *see id.* §§2430-2443 (form for durable power of attorney for health care).

Civil Procedure; statutory forms for durable powers of attorney

Civil Code §§2450, 2451, 2452, 2453, 2454, 2455, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473 (new).

SB 1367 (Keene); 1984 STAT. Ch 602

Existing law permits a person to create a durable power of attorney that confers upon another the authority to perform certain acts on the principal's behalf even after the principal's capacity to contract ends.¹ The Uniform Durable Power of Attorney Act sets forth the requirements for the establishment, use, and termination of a durable power of attorney.² Chapter 602 establishes a statutory form for creating a durable power of attorney that may cover many aspects of property matters.³

Statutory Form

Under Chapter 602, the statutory form must contain a prescribed warning⁴ to persons executing the document that (1) broad powers are being conferred, (2) the power is a durable power unless otherwise limited, (3) the principal has the right to limit or revoke the power, and (4) the principal is advised to consult an attorney if anything in the form is not clearly understood.⁵ This warning, however, is not required if a certificate by the principal's attorney is included in the statutory short form stating that (1) the attorney is licensed to practice in the state where the power is executed, (2) the principal was a client at the time of execution, and (3) the attorney has advised the client regarding the consequences of executing the power.⁶

Chapter 602 also provides that if more than one agent is designated in the statutory form, they are to act jointly in exercising the powers of attorney unless otherwise specifically stated.⁷ The statutory form further provides for the nomination of a conservator by the principal in the event a court decides one should be appointed.⁸ To be valid, the statutory form must be (1) signed by the principal, (2) acknowledged before a notary public, and (3) contain a declaration by two adult witnesses that the principal appears to be of sound mind and under no duress, fraud, or undue influence.⁹

1. CAL. CIV. CODE §§2400-2407.

2. *Id.*; see also *id.* §§2410-2423 (court enforcement of duties of attorney in fact).

3. *Id.* §§2450-2473; see also *id.* §2456 (Chapter 602 does not affect or limit the use of any other form for a power of attorney).

4. *Id.* §2451(a).

5. *Id.* §2450; see also California Law Review Commission, *Recommendation Relating to Statutory Forms for Durable Powers of Attorney*, 17 CAL. L. REVISION COMM'N REPORTS, 701, 708 n.9 (1984). Chapter 602 closely follows a New York statutory form that can be used without the necessity of having the document prepared by a lawyer and which has been in effect in that state since 1948. *Id.*

6. CAL. CIV. CODE §2451(b).

7. *Id.* §2453.

8. *Id.* §2450.

9. *Id.* §2452.

Chapter 602 lists thirteen categories of specified matters in which the attorney in fact would have authority to act unless otherwise limited.¹⁰ These include authority to act with regard to: (1) real estate transactions;¹¹ (2) tangible personal property transactions;¹² (3) bond, share, and commodity transactions;¹³ (4) financial institution transactions;¹⁴ (5) business operating transactions;¹⁵ (6) insurance transactions;¹⁶ (7) retirement plan transactions;¹⁷ (8) estate transactions;¹⁸ (9) claims and litigation;¹⁹ (10) tax matters;²⁰ (11) personal relationships and affairs;²¹ (12) benefits from military service;²² (13) records, reports, and statements.²³ Chapter 602 also provides the attorney in fact with full authority to delegate any of these powers.²⁴ Unless limited, the attorney in fact is also authorized to act in “all other matters” on behalf of the principal, however, elimination of authority to act in any of the thirteen specific areas automatically eliminates authority to act in “all other matters.”²⁵ The principal also may set forth “special provisions and limitations” either limiting the authority of the principal to act in any of the specified areas or adding authority to act in additional matters.²⁶

10. *Id.* §2450.

11. *Id.*; *see also id.* §2460 (constructional section setting forth precise powers granted regarding real estate transactions).

12. *Id.* §2450; *see also id.* §2461 (constructional section setting forth precise powers granted regarding tangible personal property transactions).

13. *Id.* §2450; *see also id.* §2462 (constructional section setting forth precise powers granted regarding bond, share, and commodity transactions).

14. *Id.* §2450; *see also id.* §2463 (constructional section setting forth precise powers granted regarding financial institution transactions).

15. *Id.* §2450; *see also id.* §2464 (constructional section setting forth precise powers granted regarding business operating transactions).

16. *Id.* §2450; *see also id.* §2465 (constructional section setting forth precise powers granted regarding insurance transactions).

17. *Id.* §2450; *see also id.* §2466 (constructional section setting forth precise powers granted regarding retirement plans).

18. *Id.* §2450; *see also id.* §2467 (constructional section setting forth precise powers granted regarding estate transactions).

19. *Id.* §2450; *see also id.* §2468 (constructional section setting forth precise powers granted regarding claims and litigation).

20. *Id.* §2450; *see also id.* §2469 (constructional section setting forth precise powers granted regarding tax matters).

21. *Id.* §2450; *see also id.* §2470 (constructional section setting forth precise powers granted regarding personal relationships and affairs).

22. *Id.* §2450; *see also id.* §2471 (constructional section setting forth precise powers granted regarding benefits from military service).

23. *Id.* §2450; *see also id.* §2472 (constructional section setting forth precise powers granted regarding records, reports, and statements).

24. *Id.* §2450.

25. *Id.*; *see also id.* §2473 (constructional section setting forth precise powers granted regarding all other matters).

26. *Id.* §2450.

Civil Procedure; contempt of minors

Code of Civil Procedure §1219.5 (new).
AB 3842 (Mojonnier); 1984 STAT. Ch 1643

Existing law provides that refusing to be sworn or refusing to answer as a witness is a contempt¹ of the authority of the court,² and when committed in the immediate presence of the court, may be summarily punished.³ In the special case of a minor under the age of sixteen years who has refused to take the oath or to testify, Chapter 1643 provides that the court first must refer the matter to a probation officer⁴ before imposing any sanction.⁵ The probation officer must prepare a report based on specific factors,⁶ and submit to the court a recommendation on the appropriateness of imposing a sanction for the minor's contempt.⁷ Under the provisions of Chapter 1643, the court is to consider the probation officer's report and recommendation in imposing any sanction.⁸ Chapter 1643, however, permits the court to impose a sanction for contempt prior to receipt of the probation officer's report if the court finds a probability that the minor will flee if released prior to receipt of the report.⁹

In a case of contempt of court where the court orders placement outside the minor's home, Chapter 1643 requires that the minor be placed in the least restrictive setting available.¹⁰ The court may not place the minor in a secure facility unless the minor has previously fled other placements or has persistently refused to obey the directions¹¹ of the person under whose control the minor has been placed.¹² If the court finds, however, a probability that the minor will flee if placed in a nonrestrictive setting, the court may require the minor to be placed in a secure facility without first attempting a nonsecure placement.¹³

1. CAL. CIV. PROC. CODE §1209 (acts and omissions that constitute contempt).

2. *Id.* §1209(a)(9).

3. *Id.* §1211.

4. See CAL. WELF. & INST. CODE §270.

5. CAL. CIV. PROC. CODE §1219.5(a).

6. Chapter 1643 provides a list of factors the probation officer must address in preparing the report for the court: (1) The maturity of the minor; (2) the reasons for the minor's refusal to take the oath or to testify; (3) the probability that available sanctions will affect the decision of the minor not to take the oath or not to testify; (4) the potential impact on the minor of testifying; (5) the potential impact on the pending litigation of the minor's unavailability as a witness; and (6) the appropriateness of the various available sanctions in the minor's case. *Id.*

7. CAL. CIV. PROC. CODE §1219.5(a).

8. *Id.*

9. *Id.* §1219.5(c).

10. *Id.* §1219.5(b).

11. *Id.* (directions or orders must have been reasonable and proper).

12. *Id.*

13. *Id.* §1219.5(d).

Civil Procedure; contempt of sexual assault victims

Code of Civil Procedure §§128, 1219 (amended).
SB 1678 (McCorquodale); 1984 STAT. Ch 1644

Existing law provides that any person held in contempt for refusing to perform an act within the person's power to perform¹ may be imprisoned until that person has complied with the order of the court requiring performance of the act.² With the enactment of Chapter 1644, a court may not use its contempt powers to confine the victim of a sexual assault³ who has refused to testify concerning that sexual assault.⁴ Although existing law permits a court to hold a victim of a sexual assault who refuses to testify⁵ in contempt, Chapter 1644 limits the exercise of judicial discretion by providing that the execution of any sentence must be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the order.⁶

1. *Noorthoek v. Superior Ct. of San Luis Obispo County*, 269 Cal. App. 2d 600, 609, 75 Cal. Rptr. 61, 67 (1969). In order to support an indefinite commitment under section 1219, there must be a finding, based upon evidence, that the contemner has the present ability to perform. *Id.*

2. CAL. CIV. PROC. CODE §1219(a).

3. *Id.* §§128(d), 1219(b). Under Chapter 1644, sexual assault means any act made punishable by Penal Code sections 261, 262, 264.1, 285, 286, 288, 288a, and 289. *Id.*

4. CAL. CIV. PROC. CODE §1219(b).

5. *Id.* §1209(a)(9).

6. *Id.* §128(d).

Civil Procedure; dismissal for lack of prosecution

Code of Civil Procedure §§581a, 583 (repealed); §§583.110, 583.120, 583.130, 583.140, 583.150, 583.160, 583.210, 583.220, 583.230, 583.240, 583.250, 583.310, 583.320, 583.330, 583.340, 583.350, 583.360, 583.410, 583.420, 583.430 (new); §§411.30, 581, 1141.17 (amended); Revenue and Taxation Code §3638 (amended).
SB 1366 (Keene); 1984 STAT. Ch 1705*

* In order to alleviate any confusion regarding retroactive or prospective application of the new dismissal provisions, Chapter 1705 specifically applies to a motion for dismissal in an action commenced before, on, or after the effective date of Chapter 1705. Any order of dismissal made before the effective date of Chapter 1705 will not be affected by Chapter 1705. In an action which was commenced before the effective date of Chapter 1705, however, a

Existing law provides for dismissal of civil actions for lack of diligent prosecution by a plaintiff.¹ Existing law also provides certain statutory guidelines for a trial court to determine whether or not to dismiss a case for lack of diligent prosecution.² Chapter 1705 specifies certain circumstances under which the court in which an action is pending may dismiss a civil action, and mandates other circumstances under which a court must dismiss an action for lack of diligent prosecution.³ In addition, Chapter 1705 makes other technical and substantive changes that clarify and consolidate the law governing the dismissal of civil actions for want of prosecution.⁴

Competing Policies

With the enactment of Chapter 1705, the declared policy of California is that a plaintiff must proceed with reasonable diligence in the prosecution of an action,⁵ and that all parties to an action must cooperate in bringing the action to trial or other disposition.⁶

motion for dismissal that is noticed before, on, or within one year after the effective date of Chapter 1705 is governed by the applicable law in effect immediately prior to the enactment of Chapter 1705. CAL. CIV. PROC. CODE §583.160.

1. CAL. CIV. PROC. CODE §§583.110-583.430 (incorporating 1982 Cal. Stat. c. 600, §1, at 2574-75) (amending CAL. CIV. PROC. CODE §581(a) and 1982 Cal. Stat. c. 1402, §3, at 5355 (amending CAL. CIV. PROC. CODE §583)); Slomanson, *Dismissal for Failure to Serve and Return Summons in State and Federal Courts in California*, 19 CAL. W.L. REV. 1, 3 (1982). See also Dupuy v. Shear, 29 Cal. 238, 242-43 (1865)(nonstatutory power to strike complaint where plaintiff failed to serve process for nine years); Reynolds v. Page, 35 Cal. 296, 298-99 (1868)(complaint dismissed where no summons issued for nearly four years); Kornahrens v. His Creditors, 64 Cal. 492, 492-93, 3 P. 126, 127 (1884)(no abuse of discretion in dismissing insolvency proceeding for order not served within eight months). Plaintiff includes a cross-complainant or other person by whom an action is commenced. CAL. CIV. PROC. CODE §583.110(e).

2. CAL. CIV. PROC. CODE §§583.110-583.430; see also CAL. RULES OF COURT, Rule 373 (formerly Rules 203.5 and 503.5 which were repealed effective January 1, 1984) (procedure for motion to dismiss for failure to prosecute).

3. CAL. CIV. PROC. CODE §§583.110-583.430.

4. Compare *id.* with 1982 Cal. Stat. c. 600, §1, at 2574-75 (amending CAL. CIV. PROC. CODE §581a) and 1982 Cal. Stat. c. 1402, §3, at 5355 (amending CAL. CIV. PROC. CODE §583). The adversary nature of litigation has spawned problems of statutory construction for nearly every word in section 581a of the Code of Civil Procedure. Slomanson, *supra* note 1, at 5.

5. Action includes an action commenced by cross-complaint or other pleading that asserts a cause of action or claim for relief. CAL. CIV. PROC. CODE §583.110(a).

6. CAL. CIV. PROC. CODE §583.130. See also Gonsalves v. Bank of America, 16 Cal. 2d 169, 172, 105 P.2d 188, 120 (1940) (encouraging promptness in the prosecution of actions); Schultz v. Schultz, 70 Cal. App. 2d 293, 297, 161 P.2d 36, 38 (1945) (encouraging expeditious and prompt disposition of litigation); Wyoming Pacific Oil Company v. Preston, 50 Cal. 2d 736, 740-41, 329 P.2d 489, 491-92 (1958) (rule designed to encourage promptness in the prosecution of actions). The object is to compel reasonable diligence in the prosecution of an action after it has been commenced, to share the analogous purposes of promoting the trial of cases before the evidence is lost, destroyed, or the memory of witnesses become dimmed, and to protect defendants from being subjected to the annoyance of an unmeritorious action

In addition, Chapter 1705 specifies that the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are to be preferred over the policy that requires dismissal for lack of diligent prosecution.⁷ Chapter 1705 also provides specific statutory time requirements for serving a summons and complaint⁸ and for bringing an action to trial.⁹ Finally, Chapter 1705 specifies the circumstances under which trial courts may exercise discretion to dismiss an action for lack of diligent prosecution.¹⁰

Mandatory Time for Service of Summons

Under prior law, service of summons and complaint and return of summons was required within three years from the date the action was commenced.¹¹ With the enactment of Chapter 1705, the summons and complaint¹² in a civil action also must be served upon the defendant¹³ within three years from the date the action is commenced.¹⁴ In addition, Chapter 1705 requires that summons or other proof of service be returned to the court within sixty days after the time in which the summons and complaint are required to be served upon

remaining undecided for an indefinite period of time. *Flamer v. Superior Court*, 266 Cal. App. 2d 907, 915, 72 Cal. Rptr. 561, 567 (1968). The purpose is to expedite litigation and require an action to be brought to a conclusion within a reasonable time limit. *Moore v. Superior Court*, 8 Cal. App. 3d 804, 810, 87 Cal. Rptr. 620, 624 (1970). The purpose of the existing statutory scheme is to compel reasonable diligence in the prosecution of an action, to expedite litigation, and to require an action to be brought to a conclusion within reasonable time limits. *Ostrus v. Price*, 82 Cal. App. 3d 518, 521, 146 Cal. Rptr. 922, 924 (1978).

7. CAL. CIV. PROC. CODE §583.130; *see also* *Los Angeles v. Gleneagle Development Co.* 62 Cal. App. 3d. 543, 563, 133 Cal. Rptr. 212, 224 (1976) (stating a preference for favoring trial on the merits of a case). Nothing in Chapter 1705 affects the authority of a court to dismiss an action or to impose sanctions under a rule adopted by the court or the Judicial Council, or under the inherent authority of the court. CAL. CIV. PROC. CODE §583.150. Chapter 1705 also does not affect existing principles of waiver or estoppel. *Id.* §583.140. *Kunzler v. Karde*, 109 Cal. App. 3d 683, 688, 167 Cal. Rptr. 425, 427 (1980) (discussing competing policies).

8. CAL. CIV. PROC. CODE §§583.210-583.250.

9. *Id.* §§583.310-583.360.

10. *Id.* §§583.410-583.430.

11. 1982 Cal. Stat. c. 600, §1, at 2574-75 (amending CAL. CIV. PROC. CODE §581).

12. Complaint includes a cross-complaint or other initial pleading. CAL. CIV. PROC. CODE §583.110(b).

13. Defendant includes a cross-defendant or other person against whom an action is commenced. *Id.* §583.110(d).

14. *Id.* §583.210(a). An action is commenced at the time the complaint is filed. *Id.*

the defendant.¹⁵ With certain exceptions,¹⁶ if service¹⁷ is not made within the specified time limitations, Chapter 1705 specifies that the action cannot be prosecuted further and that no other proceedings may be held in the action.¹⁸ Moreover, if service is not made, the action must be dismissed by the court after a properly noticed motion is made by any person interested in the action, or upon motion made by the court.¹⁹

Prior to the enactment of Chapter 1705, certain specified circumstances existed which allowed for extension of the three year rule.²⁰ In addition, a number of implied exceptions to the three year service rule were established through judicial interpretation of the statutes.²¹ Under Chapter 1705, the three year service requirements are mandatory requirements, not subject to extension, excuse, or exception unless expressly provided by statute.²² With the enactment of Chapter 1705, extensions of the three year service rule, by stipulations between the parties or by oral agreements made in open court, are expressly authorized by statute.²³

In addition, Chapter 1705 specifies that in computing the time in which service must be made, the time during which any of the following conditions exist is excluded from the computation:²⁴ (1) the

15. *Id.* §583.210(b). Under prior law, return of summons was required to be made within three years after commencement of the action, except when the parties filed stipulations in writing that the time limitations would be extended or the party against whom the action was prosecuted had made a general appearance. 1982 Cal. Stat. c. 600, §1, at 2574-75 (amending CAL. CIV. PROC. CODE §581a).

16. The time within which service must be made pursuant to Code of Civil Procedure section 583.210 does not apply if the defendant enters into a stipulation in writing or does another act constituting a general appearance. CAL. CIV. PROC. CODE §583.220. Thus, if a defendant makes a general appearance in the action, return of summons or other proof of service is not required. *Id.* Under Chapter 1705, none of the following constitutes a general appearance: (a) a stipulation extending the time within which service must be made; (b) a motion to dismiss pursuant to Chapter 1705; or (c) an extension of time to plead after a motion to dismiss. *Id.* §§583.220(a),(b),(c).

17. Service includes return of summons. *Id.* §583.110(f).

18. *Id.* §583.250(a)(1).

19. *Id.* §583.250(a)(2).

20. The time during which the defendant was not amenable to the process of the court was excluded from the computation of the three year service requirement. 1982 Cal. Stat. c. 600, §1, at 2574-75 (amending CAL. CIV. PROC. CODE §581a). Compliance with the three year service rule also was excused when the defendant or cross-defendant was estopped to complain, and when service was impossible, impracticable, or futile. *Id.*

21. See *Hocharian v. Superior Court of Los Angeles County*, 28 Cal. 3d 714, 722, 621 P.2d 829, 832-33, 170 Cal. Rptr. 790, 793 (1981); *Tresway Aero, Inc. v. Superior Court of Los Angeles County*, 5 Cal. 3d 431, 439, 487 P.2d 1211, 1217, 96 Cal. Rptr. 571, 577 (1971); *Wyoming Pacific Oil Company v. Preston*, 50 Cal. 2d 736, 740-41, 329 P.2d 489, 491-92 (1958); *Flamer v. Superior Court*, 266 Cal. App. 2d 907, 918, 72 Cal. Rptr. 561, 568 (1968). See also *Slomanson, supra* note 1, at 41-53 (discussing implied exceptions to CAL. CIV. PROC. CODE §581a).

22. CAL. CIV. PROC. CODE §582.250(b).

23. *Id.* §§583.230(a), (b).

24. *Id.* §583.240.

defendant was not amenable to the process of the court;²⁵ (2) the prosecution of the action or proceedings was stayed and the stay affected service;²⁶ (3) the validity of service was the subject of litigation;²⁷ and (4) service for any other reason was impossible, impracticable, or futile due to causes beyond the plaintiff's control.²⁸ Under Chapter 1705, no other exceptions are allowed.²⁹

*Mandatory Time for Bringing Action
to Trial or New Trial*

Prior to the enactment of Chapter 1705, a civil action which was not brought to trial within five years after the date of commencement was required to be dismissed by the trial court.³⁰ In addition, a three year time limitation was imposed for bringing a case back to trial when a new trial was granted or a judgment was not entered because of a mistrial or jury disagreement.³¹ Implied exceptions to these requirements were created, however, in several California cases.³²

Chapter 1705 mandates that an action be brought to trial within five years after the action is commenced.³³ Chapter 1705 also specifies a mandatory three year time limitation for bringing an action back to trial.³⁴ If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision the new trial must be brought within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered.³⁵

25. *Id.* §583.240(a).

26. *Id.* §583.240(b).

27. *Id.* §583.240(c).

28. *Id.* §583.240(d). *Cf. Wyoming Pacific Oil Company*, 50 Cal. 2d at 740-41, 329 P.2d at 491-92 (discussion of the implied exceptions of impossibility and impracticability). Failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control and will not excuse compliance. CAL. CIV. PROC. CODE §583.240(d).

29. CAL. CIV. PROC. CODE §583.250(b).

30. 1982 Cal. Stat. c. 1402, §3, at 5355 (amending CAL. CIV. PROC. CODE §583). The trial court also had discretion to dismiss a civil action if it were not brought to trial within two years after the action was filed. *Id.*

31. *Id.*

32. See *Hocharian v. Superior Court of Los Angeles County*, 28 Cal. 3d 714, 722, 621 P.2d 829, 832-33, 170 Cal. Rptr. 790, 793 (1981) (rebuttable presumption); *Wyoming Pacific Oil Company v. Preston*, 50 Cal. 2d 736, 740-41, 329 P.2d 489, 491-92 (1958) (discretion permitted must be exercised in accordance with the spirit of the law and with a view of subserving, rather than defeating, the ends of substantial justice); *Rose v. Knapp*, 38 Cal. 2d 114, 117, 237 P. 2d 981, 983 (1951); *Dillashaw v. Ayerst Laboratories, Inc.*, 141 Cal. App. 3d 35, 40-41, 190 Cal. Rptr. 68, 71 (1983) (failure to discover facts is no excuse); *Herring v. Peterson*, 116 Cal. App. 3d 608, 615-16, 172 Cal. Rptr. 240, 244 (1981) (discussing competing policies).

33. CAL. CIV. PROC. CODE §583.310; see also *id.* §583.360(b) (specifying that the requirements under sections 583.310 to 583.360 of the Code of Civil Procedure are mandatory and not subject to extension, excuse, or exception except as expressly provided by statute).

34. *Id.* §§583.320(a)(1)-(3).

35. *Id.* §583.320(a)(1).

If after judgment a new trial is granted and no appeal is taken the new trial must be brought within three years after the order granting the new trial is entered.³⁶ If on appeal, an order granting a new trial is affirmed or judgment is reversed and the action is remanded for a new trial the new trial must be brought within three years after the remittitur is filed by the clerk of the court.³⁷ With the enactment of Chapter 1705, these time requirements are mandatory and, except as expressly provided by statute, not subject to extension, excuse, or exception.³⁸ Under Chapter 1705, an extension of time by written stipulation between the parties, or, by oral agreement made in open court is expressly authorized by statute.³⁹

With the enactment of Chapter 1705, in computing the time within which an action must be brought to trial, the time during which the following conditions exist are excluded: (1) when the jurisdiction of the court to try the action was suspended; (2) the prosecution or trial of the action was stayed or enjoined; and (3) bringing the action to trial for any other reason was impossible, impracticable, or futile.⁴⁰ An action which does not meet the specified time requirements of Chapter 1705 must be dismissed by the trial court.⁴¹

Discretionary Dismissal for Delay

In addition to the mandatory dismissal requirement, Chapter 1705 provides the trial court discretion to dismiss an action for delay in prosecution if the dismissal would be appropriate under the circumstances of the case.⁴² Before an action may be dismissed,

36. *Id.* §583.320(a)(2).

37. *Id.* §583.320(a)(3). Nothing in section 583.320 of the Code of Civil Procedure requires a new trial to be brought before the expiration of the original five year limitation. *Id.* §583.320(b).

38. *Id.* §583.360(b).

39. *Id.* §583.330. The written stipulation need not be filed with the court but must be brought to the attention of the court if relevant to a motion to dismiss. *Id.* §583.330(a). Any oral agreement to extend the time requirements must be entered into the minutes of the court or contained within a transcript of a court proceeding. *Id.* §583.330(b).

40. *Id.* §583.340(a)-(c). If the time within which an action must be brought to trial pursuant to sections 583.310 to 583.360 of the Code of Civil Procedure is tolled or otherwise extended with the result that at the end of the period of tolling or extension less than six months remains within which the action must be brought to trial, the action must not be dismissed pursuant to sections 583.310 to 583.360 of the Code of Civil Procedure if the action is brought to trial within six months after the end of the tolling or extension period. *Id.* §583.350.

41. *Id.* §583.360(a).

42. *Id.* §583.410(a). Chapter 1705 specifies that dismissal must be pursuant to the procedure and in accordance with the rules adopted by the Judicial Council. *Id.* §583.410(b); *see also* CAL. RULES OF COURT, Rule 373 (providing the procedure for a motion to dismiss pursuant to former Code of Civil Procedure sections 581a and 583). As of the date of this writing no Rule has been adopted by the Judicial Council to provide the procedure for a motion to dismiss pursuant to sections 583.110 to 583.430 of the Code of Civil Procedure.

however, one of the following conditions must have occurred:⁴³ (1) service was not made within two years after the action was commenced;⁴⁴ (2) the action was not brought to trial within three years after it had been commenced, or within two years after the action was commenced if the Judicial Council so prescribes because of the condition of the court calendar or for other reasons affecting the conduct of litigation or the administration of justice;⁴⁵ or (3) a new trial was granted and the action was not again brought to trial within two years.⁴⁶ Chapter 1705 provides that the time limitations for a discretionary dismissal must be computed in the manner provided for computation of the comparable times for service of summons and for bringing an action to trial or new trial.⁴⁷

Finally, Chapter 1705 permits the trial court to require, as a condition of granting or denying a dismissal, that the parties comply with such terms as appear to the court proper in order to effectuate substantial justice.⁴⁸ The court may make provisional, conditional, or any other order necessary to carry out the authority provided for discretionary dismissal.⁴⁹

43. CAL. CIV. PROC. CODE §583.420.

44. *Id.* §583.420(a)(1).

45. *Id.* §583.420(a)(2).

46. *Id.* §583.420(a)(3). If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision the action must be brought to a new trial within two years after the order from the court declaring the mistrial or jury disagreement is entered. *Id.* §583.420(a)(3)(A). If after judgment a new trial is granted and no appeal is taken, the action must be brought to a new trial within two years after the order granting the new trial is entered. *Id.* §583.420(a)(3)(B). If on appeal, an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial, the action must be brought to a new trial within two years after the remittitur is filed by the clerk of the court. *Id.* §583.420(a)(3)(C).

47. *Id.* §583.420(b). See *supra* notes 27-31, 42-43, and accompanying text.

48. CAL. CIV. PROC. CODE §583.430(a).

49. *Id.* §583.430(b).

Civil Procedure; service of notice, pleadings

Code of Civil Procedure §§409, 472(a), 1167.3 (amended).
AB 3051 (Goggin); 1984 STAT. CH 572

Under existing law, a party causing notice to be recorded of the pendency of an action¹ concerning real property is required to serve notice immediately upon each adverse party later brought into the

1. CAL. CIV. PROC. CODE §1049 (definition of pending action).

action pursuant to (1) amendment as a matter of course² or (2) amendment by permission of the court.³ Chapter 572 adds the requirement of immediate service upon each adverse party later brought into the action by amendment upon discovery of the true name of a party designated by a fictitious name.⁴

Under existing law, in a summary proceeding for the possession of real property involving cases of forcible entry,⁵ forcible detainer,⁶ or unlawful detainer,⁷ the defendant is required to answer a complaint, answer an amended complaint, or amend the answer within five days⁸ in specified cases.⁹ Chapter 572 also imposes the five day time limit for a motion to strike an answer granted in an unlawful detainer proceeding.¹⁰

2. See *id.* §472 (amendment as a matter of course defined).

3. *Id.* §409(b). See also *id.* §473 (amendment permitted by the court). Cf. *id.* §1250.220(c). In addition to those persons known by the plaintiff to have a claim or interest in the property described in the complaint, the plaintiff in an eminent domain proceeding may name as defendants "all persons unknown claiming an interest in the property," naming them in that manner. *Id.*

4. *Id.* §409(b). See also *id.* §474 (procedure for serving a defendant designated by a fictitious name); CAL. BUS. & PROF. CODE §§17910-17930 (use of fictitious name).

5. CAL. CIV. PROC. CODE §1159 (forcible entry defined).

6. *Id.* §1160 (forcible detainer defined).

7. *Id.* §1161 (unlawful detainer defined). See generally *id.* §§1159-1179(a) (summary proceedings for obtaining possession of real property in certain cases).

8. CAL. CIV. PROC. CODE §1167.3 (may exceed five days upon showing of good cause). Cf. *id.* §1167 (the defendant must respond to the complaint within five days after the summons is served upon him).

9. See *id.* §§586(2) (demurrer to complaint overruled, motion to strike complaint is denied and defendant fails to answer, or both); 586(3) (motion to strike complaint is granted and defendant fails to answer any unstricken portion of the complaint); 586(6) (defendant fails to respond following grant or denial of a motion to transfer).

10. *Id.* §1167.3. See also *id.* §586(7). If a motion to strike is granted without leave to amend or is granted with leave to amend and the defendant fails to amend within the time allowed by the court, judgment is rendered as if defendant failed to amend. *Id.* See generally *id.* §585 (judgment upon failure to answer).

Civil Procedure; change of venue

Code of Civil Procedure §400 (amended).

SB 1545 (Boatwright); 1984 STAT. Ch 145

Under existing law, when an order is made by the superior court granting or denying a motion to change venue, the aggrieved party may petition the court of appeal for the district in which the superior court is situated for a writ of mandate¹ requiring trial of the case

1. See CAL. CIV. PROC. CODE §1084 (writ of mandamus denominated as writ of mandate).

in the proper court.² Prior to the enactment of Chapter 145, the aggrieved party was allowed to petition the court of appeal within ten days after service of written notice of the order, unless within the original ten days the court granted additional time not exceeding twenty days.³ Chapter 145 permits the aggrieved party to petition the court of appeal for a writ of mandate within thirty days after service of written notice.⁴

2. CAL. CIV. PROC. CODE §400. The petitioner is required to file a copy of the petition with the trial court immediately after petition is filed with the court of appeals. *Id.*

3. 1967 Cal. Stat. c. 17, §12, at 828 (amending CAL. CIV. PROC. CODE §400).

4. CAL. CIV. PROC. CODE §400. The court of appeal may stay all proceedings in the case, pending final judgment on the petition. *Id.*

Civil Procedure; small claims court judgments

Code of Civil Procedure §117.24 (new); §117.9 (amended); Vehicle Code §16370.5 (new).

AB 862 (Konnyu); 1984 STAT. CH 1225

Under existing law, a judgment debtor in a small claims court action is required to pay the judgment in any judicially prescribed manner without delay.¹ Upon payment of the judgment, the judgment creditor or assignee of record must file with the court an acknowledgment of satisfaction of judgment.² If after the judgment is paid in full and the judgment debtor has made a written demand to the judgment creditor, an acknowledgment is not filed with fifteen days, then the judgment creditor is liable to the judgment debtor for all damages sustained as a result of the failure to file an acknowledgment, plus \$50.³ Chapter 1225 provides that rather than paying the judgment creditor directly, a judgment debtor may pay the small claims court judgment to the sheriff, marshal, or constable of the court who will pay the judgment creditor.⁴

In addition, Chapter 1225 provides that if a judgment of \$500 or less is rendered in small claims court against the driver of a motor vehicle as a result of an accident on a California highway,⁵ and the

1. CAL. CIV. PROC. CODE §117.9.

2. *Id.*

3. *Id.*

4. *Id.* The judgment debtor must pay a handling fee set by the Board of Supervisors not to exceed the actual cost of administering the program. *Id.*

5. At the time the judgment is entered, the judge must determine whether the judgment results from a motor vehicle accident occurring on a California highway caused by the judgment

judgment remains unsatisfied for more than ninety days, the judgment creditor may file a notice with the Department of Motor Vehicles (hereinafter referred to as the Department).⁶ Chapter 1225 requires the Department to give a copy of the notice⁷ to the judgment creditor.⁸ Further, Chapter 1225 requires the Department to attempt to notify the judgment debtor⁹ that the privilege to operate a motor vehicle will be suspended¹⁰ for ninety days.¹¹ Chapter 1225 provides that the privilege will be suspended unless the Department receives satisfactory proof that the judgment debtor is complying with the judgment within ten days from the time the judgment creditor files notice.¹²

debtor's operation of a motor vehicle. *Id.* §117.24(a).

6. The notice must accompany the court judgment and state that a small claims judgment rendered against the driver of a motor vehicle as a result of an accident on a California highway has not been satisfied. *Id.* §117.24(a),(b). The judgment debtor must pay a handling fee set by the Department of Motor Vehicles not to exceed the actual cost of administering the program. *Id.* §117.24(b).

7. The notice will indicate the filing fee paid by the creditor and provide a space to be signed by the judgment creditor acknowledging payment of the judgment by the judgment debtor, to be returned to the judgment debtor once the judgment is satisfied. *Id.* §117.24(b).

8. *Id.*

9. The department must attempt to notify the judgment debtor by telephone. If this is not possible, the Department must attempt to notify the judgment debtor by certified mail. *Id.* §117.24(c).

10. *See* CAL. VEH. CODE §16370.5 (relating to vehicle suspension pursuant to CAL. CIV. PROC. CODE §117.24).

11. *See* CAL. CIV. PROC. CODE §117.24(a)-(c).

12. *Id.* The suspension terminates and may not be reinstituted if the Department receives (1) a copy of the notice signed by the judgment creditor acknowledging satisfaction of judgment, (2) a statement signed by the judgment debtor declaring that the judgment has been satisfied, (3) proof that a court-ordered payment schedule is being complied with, (4) proof that the judgment debtor had insurance covering the accident sufficient to satisfy the judgment, or (5) proof that a deposit of a sum equal to the judgment has been made with the Department by the judgment debtor in the event the judgment debtor is unable to locate the judgment creditor. Otherwise, the suspension terminates at the end of ninety days. *Id.* §117.24(d), (e).

Civil Procedure; small claims—judgments

Code of Civil Procedure §117.8 (amended)

SB 1906 (Petrus); 1984 STAT. Ch 296

Under existing law, a plaintiff may not appeal a small claims court¹ judgment.² Existing law provides, however, that a motion for relief from default is available to either party in a civil action, including

1. CAL. CIV. PROC. CODE §116.2 (jurisdiction of the small claims division).

2. *Id.* §117.8(a). A party is a "plaintiff" only as to causes of action voluntarily brought by that party in small claims court. *Skaff v. Small Claims Court for Los Angeles Judicial District*, 68 Cal. 2d 76, 81, 65 Cal. Rptr. 65, 68, 435 P.2d 825, 828 (1968). The defendant

a summary proceeding in small claims court.³ Chapter 296 establishes the procedure by which a plaintiff may vacate a judgment entered where the plaintiff fails to appear at a small claims hearing.⁴

Chapter 296 allows the plaintiff to file a motion to vacate the judgment within thirty days after notice of entry of judgment has been mailed by the clerk.⁵ The court may grant the motion upon a showing of good cause.⁶ Moreover, if all parties are present and agree, the court may hear the matter without recalendering.⁷ If the defendant is not present, Chapter 296 requires the judge to hear the motion, and if granted, to reset the matter for a future hearing.⁸

may appeal a small claims judgment to the superior court where the case will be heard de novo. CAL. CIV. PROC. CODE §§117.8(b), 117.10.

3. See B. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Attack on Judgment in Trial Court* §127.

4. See CAL. CIV. PROC. CODE §117.8(a) (procedure by which a plaintiff may vacate and default judgment). Compare *id.* with *id.* §117.8(c) (procedure by which a defendant may vacate a default judgment).

5. *Id.* §117.8(a).

6. *Id.*

7. *Id.*

8. *Id.* The judge or clerk will reset the matter and notice it in accordance with CAL. CIV. PROC. CODE §116.4. *Id.*

Civil Procedure; disposition of exhibits

Code of Civil Procedure §§1952, 1952.3 (repealed); §§1952, 1952.3 (new); §1952.2 (amended).

AB 669 (Frazee); 1984 STAT. CH 27

AB 2876 (Connelly); 1984 STAT. CH 250

Under existing law, upon the final determination or dismissal of an action or proceeding, a court may order, on its own motion, the destruction or other disposition of an exhibit or deposition introduced in a civil trial.¹ Prior law required the exhibit or deposition to be held in the custody of the court for six months after expiration of the time for appeal or, if an appeal were filed, six months after final determination or dismissal.²

With the enactment of Chapter 27, the destruction or disposal of exhibits or depositions is prohibited until sixty days after notice of the proposed destruction has been mailed by the clerk to all attorneys

1. CAL. CIV. PROC. CODE §1952(b). Cf. CAL. PENAL CODE §§1417, 1418 (disposition of exhibits in criminal actions).

2. See 1978 Cal. Stat. c. 423, §1, at 1323 (amending CAL. CIV. PROC. CODE §1952).

of record and to all parties not having an attorney of record.³ Alternatively, Chapter 27 provides that the clerk may give notice by indicating on the notice of entry of judgment⁴ that if no appeal is filed, the court may order, on its own motion, the destruction of the exhibit or deposition sixty days after expiration of the appeal time.⁵

Chapter 27 permits the court to order exhibits or depositions returned to the parties at any time upon oral stipulation by the parties or for good cause.⁶ Chapter 27 prohibits the destruction of an exhibit or deposition when a party to the action or proceeding files a written notice requesting preservation for a stated time not exceeding one year.⁷ Chapter 27 authorizes the court, upon judgment becoming final and at the expiration of the appeal period, to order the clerk to return to the attorneys for the parties all exhibits and depositions introduced in or filed with the court.⁸

Finally, Chapter 250 restores provisions of law that would have been repealed by Chapter 27, and provides that a court may order destruction of exhibits and depositions which have remained in custody for five years after the time for appeal has expired, or, if appeal has been taken, have remained in the custody of the court or clerk five years after final determination.⁹ In addition, the court on its own motion may order the destruction or other disposition of an exhibit or deposition that remains in the custody of the court for a period of ten years after the introduction or filing of the action or proceeding if, in the discretion of the court, the exhibit or deposition should be disposed of or destroyed.¹⁰

3. *Id.* §1952(c). Compare *id.* with 1978 Cal. Stat. c. 423, §1, at 1323 (amending CAL. CIV. PROC. CODE §1952(c) to require only 30 days notice).

4. See CAL. CIV. PROC. CODE §664.5 (describing notice of entry of judgment).

5. *Id.* §1952(c).

6. *Id.* §1952(a).

7. *Id.* §1952(d). But see *id.* §1952.3, re-enacted by 1984 Cal. Stat. c. 250, §3, at _____ (allows preservation for up to three years). The exhibit or deposition may be destroyed after that time unless another notice is filed. CAL. CIV. PROC. CODE §§1952(d), 1952.3.

8. CAL. CIV. PROC. CODE §1952.2.

9. *Id.* §1952.3.

10. *Id.*

Civil Procedure; subpoena duces tecum—consumer records

Code of Civil Procedure §1985.4 (new); §1985.3 (amended);

Evidence Code §1564 (amended).

AB 3231 (Wright); 1984 STAT. CH 437

SB 1462 (Presley); 1984 STAT. CH 603

Under existing law, when a party¹ issues a subpoena duces tecum for the production of a consumer's² personal records³, notice must be served on the consumer whose records are being sought.⁴ Proof of service or the consumer's written authorization to release the records⁵ must be furnished to the witness before the witness⁶ is required to comply with the subpoena.⁷ With the enactment of Chapter 437, these provisions are applicable to a subpoena duces tecum for personal records⁸ pertaining to a party in any civil action or proceeding that are maintained by a state or local agency⁹ and are otherwise exempt from public disclosure.¹⁰

Pursuant to existing law, a subpoena duces tecum for the production of personal records must be served in sufficient time to allow the witness a *reasonable* period to locate and produce the records or copies thereof.¹¹ Chapter 603 requires that if subpoenaed records are located in more than one place, the subpoena duces tecum must be served upon the witness no less than *ten days* before the date required for production, unless good cause is shown.¹²

Finally, existing law provides that submission of a copy of the requested records accompanied by an affidavit by the custodian of records or other qualified witness is sufficient to satisfy a subpoena

1. CAL. CIV. PROC. CODE §1985.3(a)(3) (definition of a subpoenaing party).

2. *Id.* §1985.3(a)(2) (definition of consumer).

3. *Id.* §1985.3(a)(1) (definition of personal records).

4. *Id.* §1985.3(b). The notice must indicate that: (1) records about the consumer are being sought from the witness named on the subpoena; (2) if the consumer objects to having the witness furnish the records, the consumer must file an objection with the court prior to the date specified for production on the subpoena; and (3) if the party who is seeking the records will not, upon request, agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting any affected right of privacy. *Id.* §1985.3(e).

5. Written authorization must be signed by the consumer or the consumer's attorney of record. The witness may presume that any attorney purporting to sign the authorization on behalf of the consumer acted with the consent of the consumer. *Id.* §1985.3(c)(2).

6. *Id.* §1878 (definition of witness).

7. *Id.* §1985.3(c). See generally, *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 300 (1981)(analysis of legislation authorizing subpoena duces tecum); *Review of Selected 1981 California Legislation*, 13 PAC. L.J. 629 (1982)(analysis of legislation amending procedure).

8. Nothing in Chapter 437 pertains to personal records as defined in Penal Code section 832.8. CAL. CIV. PROC. CODE §1985.4.

9. CAL. GOV'T CODE §§6252(a) (definition of state agency), 6252(b) (definition of local agency).

10. CAL. CIV. PROC. CODE §1985.4. For purposes of Code of Civil Procedure section 1985.4, "witness" means a state or local agency as defined in Government Code section 6252; "consumer" means an employee of any state or local agency. *Id.* Records contained in personnel, medical, or similar files are subject to subpoena, although otherwise exempt from disclosure which constitutes an unwarranted invasion of personal privacy. CAL. GOV'T CODE §6254(c).

11. CAL. CIV. PROC. CODE §1985.3(d).

12. *Id.* Records subpoenaed for criminal proceedings and records subpoenaed during trial are exempted from the limitation. *Id.* Upon a showing of good cause and provided that the

duces tecum.¹³ Copies of records accompanied by an affidavit are insufficient, however, if the subpoena contains a clause requesting the production of the original records and the personal attendance of the custodian or other qualified witness.¹⁴ Chapter 603 clarifies existing law by providing that the *original* records and personal attendance of the custodian or witness are not required unless, at the discretion of the requesting party, the specified clause is included in the subpoena.¹⁵

rights of witnesses and consumers are preserved, the subpoenaing party is entitled to obtain an order shortening the time for service of the subpoena duces tecum. *Id.* §1985.3(g).

13. CAL. EVID. CODE §1562.

14. *Id.* §1564.

15. Compare *id.* §1564 with 1965 Cal. Stat. c. 299, §1564, at 1354 (enacting CAL. EVID. CODE §1564).

Civil Procedure; disclosure of public records

Government Code §6259 (amended).

SB 2222 (Keene); 1984 STAT. CH 802

When an issue arises as to whether a public record¹ is being improperly withheld² from a member of the public,³ the California Public Records Act⁴ requires the superior court to decide the propriety of withholding the record after examining the record in camera.⁵ Under prior law, the decision of the court was appealable as a final order.⁶ Chapter 802 provides that the decision of the court, either directing disclosure or supporting the decision of the public official not to disclose the record, is not a final judgment⁷ from which an appeal

1. CAL. GOV'T CODE §6252(d).

2. See *id.* §§6254, 6255 (circumstances in which records may be properly withheld).

3. *Id.* §6252(f) (definition of member of the public).

4. *Id.* §6251 (short title).

5. *Id.* §6259(a).

6. See CAL. CIV. PROC. CODE §904.1; *Alto-Menlo Park Yellow Cab Co., Inc. v. Santa Clara County Transit Dist.*, 65 Cal. App. 3d 121, 129, 135 Cal. Rptr. 192, 196 (1976). The rule in determining whether a judgment is final or merely interlocutory is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties the judgment is interlocutory only; but when no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, the decree is final. *Id.* *Pahl v. Ribero*, 193 Cal. App. 2d 154, 159, 14 Cal. Rptr. 174, 178 (1961). Generally, no appeal can be taken except from a final order or judgment as defined in the statutes and developed in the case law. *Id.*

7. CAL. CIV. PROC. CODE §904.1 (court actions which constitute a final judgment).

may be taken.⁸ The decision may be immediately reviewable, however, by petition to the appellate court for issuance of an extraordinary writ of review.⁹

8. CAL. GOV'T CODE §6259(c).

9. *Id.* Compare CAL. CIV. PROC. CODE §904.1 with CAL. CIV. PROC. CODE §1068 (final judgment always appealable whereas the court may review the extraordinary writ in its discretion). See also 5 B. WITKIN, CALIFORNIA PROCEDURE, *Extraordinary Writs* §§2, 10, 24-34 (2d ed. 1971) (general information on the writ of certiorari); *Hammond Lumber Co. v. Board of Supervisors of Humboldt County*, 85 Cal. App. 2d 568, 571, 193 P.2d 503, 505 (1948). The writ of certiorari is not one of right and will not issue as a matter of course, but must rest in the sound discretion of the court. *Hammond Lumber*, 85 Cal. App. 2d at 571, 193 P.2d at 505.

Civil Procedure; self representation of wholly owned corporations

Civil Procedure Code §904.3(new).

AB 2827 (McClintock); 1984 STAT. Ch 385

Under existing law, an officer, director or employee of a corporation may represent the corporation in an action in small claims court.¹ In addition, existing law allows a nonattorney officer, director, or employee of a corporation to represent the corporation in a municipal or justice court action.² Chapter 358 specifically provides that only the owner of a wholly owned corporate entity operated as a sole proprietorship, whether or not an attorney, who is also a director, an officer, or an employee of the corporation may represent the corporation in an appeal to the superior court from a small claims action.³

1. CAL. CIV. PROC. CODE §117.4. An officer, director, or employee of the corporation who is also an attorney only can represent the corporation in small claims court if all the other directors and officers are attorneys. *Id.* See also *Prudential Insurance Co. v. Small Claims Court*, 76 Cal. App. 2d 379, 386- 87, 173 P.2d 38, 42 (1946) (an exception was created allowing the person who is the plaintiff or the defendant to take part in small claims court actions because the only way a corporation can be given access to small claims court is through a person who is a representative of the corporation and not the corporation itself).

2. CAL. CIV. PROC. CODE §87.

3. *Id.* §904.3

Civil Procedure; registered process servers

Code of Civil Procedure §§488.065, 685.095, 699.545 (new); §§488.080, 699.080 (amended).

AB 2983 (McAlister); 1984 STAT. Ch 759

Existing law provides that a registered process server¹ may levy² upon certain types of property³ under a writ of attachment.⁴ With the enactment of Chapter 759, the process server is permitted to collect, as a recoverable cost,⁵ all expenses incurred in levying the property.⁶ Thus, Chapter 759 conforms the recovery of registered process servers' fees for levying under a writ of attachment to the procedure of cost recovery for summons, subpoenas, or other process.⁷ Chapter 759 also implements case law⁸ by allowing the costs of serving a writ of execution⁹ by a sheriff or a registered process server to be added to, and to become part of, the judgment.¹⁰ Chapter 759 provides that if a copy of the original notice of attachment served upon a third party holding the property is served upon the debtor or any other party, then the copy suffices as notice of attachment to that person.¹¹

1. CAL. CIV. PROC. CODE §481.205 (definition of registered process server).

2. *Id.* §§488.010-488.140 (levy procedures).

3. *See id.* §§488.080(a) (listing types of property), 488.010 (notice of attachment, contents of writ).

4. CAL. CIV. PROC. CODE §488.080(a).

5. *See id.* §1032.8(b). Registered process server may collect recoverable costs as reasonably incurred in effecting service, including but not limited to, a stakeout or other reasonable means employed in locating the person to be served. *Id.*

6. *Id.* §488.080(f).

7. *Compare id.* §488.080 with *id.* §1032.8.

8. *See Kramer v. Ferguson & Dorney*, 230 Cal. App. 2d 237, 250, 41 Cal. Rptr. 61, 68 (1964); *see also Barnhart v. Kron*, 88 Cal. 447, 450, 26 P. 210, 210 (1891).

9. CAL. CIV. PROC. CODE §488.300 (definition of writ of execution).

10. *Id.* §685.093.

11. *Id.*