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Civil Procedure

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Civil Procedure

Civil Procedure; enforcement of judgments

Business and Professions Code §§24071, 24075 (amended); Civil Code §§3057, 3058, 1237, 1238, 1239, 1240, 1241, 1242, 1243, 1244, 1245, 1246, 1247, 1248, 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1265a, 1266, 1267, 1268, 1269, 1300, 1301, 1302, 1303, 1304 (repealed), 954.5, 1861.25, 4383, 4384, 4385 (new), 765, 859, 955, 955.1, 986, 1861, 1861a, 3152, 3193, 4701, 4800, 4801.6, 4810, 5102, 5121, 5125 (amended); Code of Civil Procedure §§674.5, 674.7, 675, 675b, 675c, 729, 1007, 1032.6, 1033.7 (repealed), 681, 681a, 682, 682a, 682b, 682.1, 682.2, 683, 684, 684.1 684.2, 685, 686.010, 686.020, 687, 688, 688.1, 689, 689a, 689b, 689c, 689d, 689.5, 690, 690.1, 690.2, 690.3, 690.4, 690.5, 690.7, 690.8, 690.8a 690.9, 690.10, 690.11, 690.12, 690.125, 690.13, 690.14, 690.15, 690.16, 690.17, 690.175, 690.18, 690.19, 690.20, 690.21, 690.22, 690.24, 690.25, 690.26, 690.27, 690.28, 690.29, 690.30, 690.31, 690.50, 690.51, 690.52, 690.60, 691, 692, 692a, 693, 694, 695, 696, 697, 698, 699, 700, 700a, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 710a, 710b, 710c, 711, 711½, 712, 712½, 713, 713½, 714, 714.5, 715, 716, 717, 717.1, 718, 719, 720, 721, 722, 722.5, 723, 723.010, 723.011, 723.020, 723.021, 723.022, 723.023, 723.025, 723.026, 723.027, 723.028, 723.029, 723.030, 723.031, 723.050, 723.051, 723.052, 723.070, 723.071, 723.072, 723.073, 723.074, 723.075, 723.076, 723.077, 723.078, 723.080, 723.081, 723.082, 723.083, 723.084, 723.100, 723.101, 723.102, 723.103, 723.104, 723.105, 723.106, 723.107, 723.120, 723.121, 723.122, 723.123, 723.124, 723.125, 723.126, 723.127, 723.128, 723.129, 723.151, 723.152, 723.153, 723.154, 724a, 724b, 724c, 724d, 724e (repealed), 673, 680.010, 680.110, 680.120, 680.130, 680.140, 680.150, 680.160, 680.170, 680.180, 680.190, 680.200, 680.210, 680.220, 680.230, 680.240, 680.250, 680.260, 680.270, 680.280, 680.290, 680.300, 680.310, 680.230, 680.330, 680.340, 680.345, 680.350, 680.360, 680.365, 680.370, 680.380, 681.010, 681.020, 681.030, 681.040, 681.050, 683.010, 683.020, 683.030, 683.040, 683.050, 683.110, 683.120, 683.130, 683.140, 683.150, 683.160, 683.170, 683.180, 683.190, 683.200, 683.210, 683.220, 683.310, 683.320, 684.010, 684.020, 684.030, 684.040, 684.050, 684.110, 684.120, 684.130,

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954, 3002, 3012, 3023, 3054, 3055, 3056, 3071, 3073, 3088 (amended as added by Chapter 9 of the Statutes of 1981, 3100, 3101, 3121, 3122, 3144); Public Utilities Code §§12337, 25337, 28896, 50146, 95836, 98196 (amended); Revenue and Taxation Code §32373 (amended); Streets and Highways Code §§6617 (repealed), 5422, 8832, 9356 (amended); Unemployment Insurance Code §§12788 (repealed), 988 (amended); Water Code §§8537, 22142 (repealed); Welfare and Institutions Code §§908, 929, 11002, 11477, 14115.5, 17409 (amended).

AB 707 (McAlister); STATS. 1982, Ch 1364

(Effective July 1, 1983)*

Support: California Law Revision Commission; Department of Finance

AB 798 (McAlister); STATS. 1982, Ch 497

(Effective July 1, 1983)

Support: California Bankers Association; California Law Revision Commission; State Bar of California

Provides a procedure for the renewal of judgments; expands the class of real property reachable by a judgment lien; allows the creation of a judgment lien on personal property; enlarges the scope of registered process servers' designates a method of levy under a writ of execution; replaces the statutory right of redemption with a 120-day grace period; allows credit transactions at execution sales; expands the exemptions and increases their amounts; revises the procedures for examination; expands the availability of creditor's suits; expands the remedies available to a creditor to enforce a lien in a pending action or proceeding; changes the time limitations involved in third-party claims; revises the category of persons allowed to use third-party claims; provides a procedure for the acknowledgment of a partial satisfaction of judgment.

The California law governing the enforcement of judgments began with the 1872 enactment of the Code of Civil Procedure.¹ Since that time the statutes have been amended in a piecemeal fashion that resulted in duplication, inconsistency and with important areas not being covered at all.² Chapter 1364 represents an extensive revision of the law governing money judgments, judgments for the possession or sale of real or personal property, and judgments enforceable only by con-

* Transitional provisions effective January 1, 1983 to June 1, 1983 are outside the scope of this write-up.

1. TENTATIVE RECOMMENDATION PROPOSING THE ENFORCEMENT OF JUDGMENTS LAW, 15 Cal. L. Revision Comm'n Reports 2001, 2001, 2027 (1980) [hereinafter cited as RECOMMENDATION].

2. See *id.*

tempt.³ In addition to these revisions, Chapter 1364 introduces new law to allow for the creation of a judgment lien on personal property⁴ and for the acknowledgment of a partial satisfaction of the judgment.⁵ Furthermore, Chapter 1364 creates a system of enforcement of judgments that will hopefully be streamlined and practical, providing better remedies to the creditor and needed protections for the debtor.⁶

Renewal of Judgments

Under existing law, a writ or order for the enforcement of a judgment may be obtained as a matter of right within 10 years after the entry of the judgment.⁷ The 10 year period may be extended by bringing an action on the judgment to revive the judgment within the statute of limitations period.⁸ Prior law allowed the court in its discretion, upon a noticed motion, to enforce a judgment against the judgment debtor beyond the 10 year statutory limit if the judgment creditor had used due diligence in trying to enforce the judgment.⁹ In addition, if the court stayed or enjoined the enforcement of the judgment, that period was not included in the computation of the 10 year limit.¹⁰

Chapter 1364 provides a procedure for the unlimited renewal of judgments¹¹ similar to the existing procedure used for the enforcement of sister state judgments.¹² The statute of limitations is not tolled if there is a stay of the enforcement of the judgment.¹³ The judgment is readily renewable during this time since renewal has no effect on the stay and will prevent the expiration of the 10 year period of enforceability.¹⁴ Chapter 1364 provides that the renewal procedure requires no showing of due diligence by the judgment creditor and is available by simply filing an application for renewal with the court where the judgment was entered.¹⁵ The clerk will then enter the renewal on the

3. *See id.* at 2009.

4. *See* CAL. CIV. PROC. CODE §697.510.

5. *See id.* §§724.110, 724.120.

6. *See* RECOMMENDATION, *supra*, note 1, at 2027.

7. *See* CAL. CIV. PROC. CODE §§683.010-683.050 (incorporating CAL. STATS. 1955, c. 754, §1 at 1248 (increased the time period from five years to 10 years and amending CAL. CIV. PROC. CODE §681)).

8. *Id.* §§337.5(3), 683.050.

9. CAL. STATS. 1957, c. 910, §1, at 2120 (amending CAL. CIV. PROC. CODE §685). *See* Butcher v. Brouwer, 21 Cal. 2d 354, 357, 132 P.2d 205, 206 (1942).

10. CAL. STATS. 1955, c. 754, §1, at 1248 (amending CAL. CIV. PROC. CODE §681).

11. *See* RECOMMENDATION, *supra* note 1, at 2009.

12. RECOMMENDATION, *supra* note 1, at 2030. *See generally* CAL. CIV. PROC. CODE §§1710.10-1710.65.

13. RECOMMENDATION, *supra* note 1, at 2009.

14. CAL. CIV. PROC. CODE §683.210.

15. *Id.*

date of filing.¹⁶ Subsequent to the entry of renewal there must be proof of service of process upon the judgment debtor filed with the court clerk.¹⁷ The judgment debtor has 30 days from service to move to vacate or modify the renewed judgment.¹⁸ This procedure extends the enforceability of the judgment and any judgment liens¹⁹ for an additional 10 year period.²⁰

Case law has provided that the time for enforcement of an installment judgment begins to run on the date that each installment is due.²¹ Chapter 1364 codifies this case law and provides that the procedure for the enforcement and renewal of an installment judgment as to past due installments is the same as for a lump sum judgment.²²

Interests and Costs

Existing law provides that interest begins to accrue on a money judgment at the time it is entered²³ and continues to accrue until the judgment is satisfied.²⁴ Prior law required that interest accrue at the rate of 7 percent²⁵ until the date of levy if the judgment was satisfied in full pursuant to a writ of execution.²⁶ Chapter 1364 now provides that if a money judgment is satisfied in full under a writ of execution the interest accrues until the proceeds are actually received by the levying officer at an interest rate of 10 percent.²⁷

According to existing law, interest accrues on costs if there has been a partial satisfaction of the judgment.²⁸ Although allowed costs were included on writs for the enforcement of the judgment, it was unclear under prior law whether costs were part of the judgment for the accrual

16. CAL. CIV. PROC. CODE §683.150(a).

17. *Id.* §683.160(a).

18. *Id.* §§683.160(a), 683.170(b).

19. *Fulkerson v. Stiles*, 156 Cal. 703, 705, 105 P. 966, 967 (1909) (a judgment lien is a mere general lien on the property of the judgment defendant).

20. CAL. CIV. PROC. CODE §683.190. *See id.* §683.180(a) (a certified copy of application for renewal must be recorded with the county recorder where the real property is located).

21. *See Wolfe v. Wolfe*, 30 Cal. 2d 1, 4, 180 P.2d 345, 347 (1947).

22. *See* CAL. CIV. PROC. CODE §683.120(c). *See also* CAL. CIV. PROC. CODE §683.030.

23. *Id.* §685.020 (incorporating CAL. STATS. 1959, c. 534, §2, at 2503 (amending CAL. CIV. PROC. CODE §682.2)).

24. *Id.* §685.030 (incorporating CAL. STATS. 1959, c. 534, §2 at 2503).

25. The rate of interest on judgments was fixed at 7% but the legislature was given authority to set the rate at not more than 10% and to provide for a variable rate. CAL. CONST. art. XV, §1.

26. CAL. STATS. 1959, c. 534, §2, at 2503.

27. CAL. CIV. PROC. CODE §§685.010, 685.030(a)(2). *See* RECOMMENDATION, *supra* note 1, at 2033. This appears to allow the accrual of interest from the time of levy until the funds are actually received by the levying officer reducing the loss of income to the judgment creditor to a practical minimum. *Compare* CAL. CIV. PROC. CODE §685.030(a)(2) with CAL. STATS. 1959, c. 534, §2, at 2503.

28. *See* CAL. CIV. PROC. CODE §§685.030, 685.050, 685.090. *See generally* Writ of Execution (Form approved by the Judicial Council of California effective January 1, 1979).

of interest.²⁹ Chapter 1364 permits past judgment costs of enforcement advanced by the judgment creditor to draw interest from the date these costs are added³⁰ to the judgment.³¹ Furthermore, Chapter 1364 provides that the judgment creditor may have the costs collected by the levying officer under a writ of execution taxed by the court.³² The cost memorandum³³ must be filed by the judgment creditor within two years of the costs being incurred and before the satisfaction of the judgment.³⁴ A copy of the cost memorandum must be served on the judgment debtor, who then has 10 days to make a noticed motion for the taxing of costs.³⁵

Enforcement of Money Judgments

Under existing law, except as otherwise provided, all property of the judgment debtor is subject to enforcement of a money judgment.³⁶ In addition, certain property that is not exclusively the judgment debtor's is also subject to the enforcement of a money judgment.³⁷ Generally property that is not assignable or transferable, however, is not subject to the enforcement of a money judgment.³⁸ Existing law has created exceptions to this generalization by holding that the surplus income in excess of a beneficiary's needs under a spendthrift trust is not immune from enforcement procedures.³⁹ In addition, a cause of action for money or property that is the subject of a pending action or special proceeding⁴⁰ and a lessee's interest in real property may be applied to the satisfaction of a money judgment.⁴¹ Furthermore, Chapter 1364

29. CAL. STATS. 1979, c. 373, §50.5, at 1266 (amending CAL. CIV. PROC. CODE §682.1); CAL. STATS. 1959, c. 534, §2, at 2503 (amending CAL. CIV. PROC. CODE §682.2); *see* RECOMMENDATIONS, *supra* note 1, at 2034.

30. CAL. CIV. PROC. CODE §685.090 (addition of costs to the judgment).

31. *See id.* §§685.010(a), 685.090(b); RECOMMENDATION, *supra* note 1, at 2035 (interest is intended to compensate the judgment creditor for the loss of the use of the money).

32. CAL. CIV. PROC. CODE §685.070(c).

33. *See generally id.* §1033 (memorandum of costs).

34. *See id.* §§685.070(b), 685.080(a).

35. *Id.* §685.070(c).

36. *Id.* §695.010 [incorporating CAL. STATS. 1977, c. 155, §1, at 618 (amending CAL. CIV. PROC. CODE §688)].

37. *Id.* §695.020 (e.g., community property).

38. *See generally*, 1 A. FREEMAN, LAW OF EXECUTIONS §119 (3d ed. 1900).

39. *See* CAL. CIV. PROC. CODE §695.030(b)(1); 5 B. WITKIN, CALIFORNIA PROCEDURE *Enforcement of Judgment* §14 (2d ed. 1971). *See generally* Canfield v. Security-First Nat'l Bank, 13 Cal. 2d 1, 87 P.2d 830 (1939) (spendthrift trust not immune from enforcement procedures).

40. CAL. CIV. PROC. CODE §695.030(b)(2) (incorporating CAL. STATS. 1970, c. 1523, §7.5, at 3069 (amending CAL. CIV. PROC. CODE §688.1)).

41. *See generally* Farnum v. Hefner, 79 Cal. 575, 21 P. 955 (1889); CAL. CIV. PROC. CODE §695.035 (a lessee's interest in real property may be applied to the satisfaction of a money judgment if the lessee has the right to sublet or assign with or without consent of the lessor and whether or not there are conditions to be complied with by the assignee or sublettee); CAL. CIV. PROC. CODE §765 (presents a restriction on the scope of a lessee's interest for its application to the enforcement of a money judgment).

specifically provides for the sale of an alcoholic beverage license by use of a receiver but not by levy and sale pursuant to a writ of execution.⁴²

Under case law, a creditor's priority relates back to the time when the first of a series of overlapping liens is created on a particular item of tangible property or a debt.⁴³ Chapter 1364 codifies this case law but does not affect the priorities or rights of third persons established while the earlier lien was in effect under the law governing the earlier lien.⁴⁴

Judgment Liens

A. Real Property

Under existing law, the abstract of a money judgment or a certified copy of certain installment money judgments, may be recorded with the county recorder to create a judgment lien on the real property then owned or subsequently acquired by the judgment debtor in the county where recorded.⁴⁵ This lien will continue from its recording until 10 years from the entry of the judgment.⁴⁶ When enforcement of the judgment is stayed on appeal, courts have determined that this does not extinguish or prevent the creation of a lien.⁴⁷ Chapter 1364 codifies this case law and provides that the 10 year period is not extended when the enforcement of the judgment is stayed, and the lien does not continue after the expiration of the period of enforceability of the judgment.⁴⁸

Existing law provides that a judgment lien attaches to all property owned by the judgment debtor.⁴⁹ Prior law required that the judgment debtor have a vested legal interest, and, therefore, the lien could not attach to real property when the judgment debtor's only interest was an

42. See CAL. CIV. PROC. CODE §§695.060, 708.630; CAL. STATS. 1977, c. 155, §1, at 618 (amending CAL. CIV. PROC. CODE §688). Prior law prohibited the application by execution of a public agency issued license to the satisfaction of a money judgment and it only impliedly provided for receiverships in the sale of the alcoholic beverage license. *Id.*

43. See *Nordstrom v. Corona City Water Co.* 155 Cal. 206, 212-13, 100 P. 242, 245 (1909); *Riley v. Nance*, 97 Cal. 203, 205, 31 P. 1126, 1126 (1893); *Bagley v. Ward*, 37 Cal. 121, 131 (1869). See also *Durkin v. Durkin*, 133 Cal. App. 2d 283, 294, 284 P.2d 185, 193 (1955); *Balzano v. Traeger*, 93 Cal. App. 640, 643-44, 270 P. 249, 250 (1928).

44. See CAL. CIV. PROC. CODE §697.020.

45. *Id.* §§697.310, 697.320, 697.340, 674 (incorporating CAL. STATS. 1978, c. 203, §1, at 441 (amending CAL. CIV. PROC. CODE § 674)). CAL. STATS. 1976, c. 612, §1.5, at 1463 (amending CAL. CIV. PROC. CODE §674.7).

46. CAL. CIV. PROC. CODE §697.310(b) (incorporating CAL. STATS. 1978, c. 203, §1, at 441).

47. See generally *Industrial Indem. Co. v. Levine*, 49 Cal. App. 3d 698, 122 Cal. Rptr. 712 (1975) (granting of a stay by trial court under CAL. STATS. 1977, c. 1257, §32, at 4768 (amending CAL. CIV. PROC. CODE §681a) and pursuant to stipulation did not prevent the recording of an abstract of judgment to create a judgment lien on real property).

48. See CAL. CIV. PROC. CODE §§697.310, 697.030, 697.040(b); RECOMMENDATION, *supra* note 1, at 2261.

49. See CAL. CIV. PROC. CODE §697.340(a); CONTINUING EDUCATION OF THE BAR, 2 OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW §19.17 at 982 (1975).

equitable interest or bare legal title.⁵⁰ Chapter 1364 expands the class of interests reachable under a judgment lien.⁵¹ Chapter 1364 allows a judgment lien to attach to any interest whether present or future, vested or contingent, or legal or equitable.⁵² In addition to the above interests that are now subject to a judgment lien, Chapter 1364 also includes leasehold estates with an unexpired term of not less than two years, but specifically excludes the right to rental payments from leased property.⁵³ Case law held that two or more judgments attach simultaneously to after-acquired property no matter when the date of entry or recordation of the respective abstract.⁵⁴ The creditor that first levied execution on the land first obtained the superior lien.⁵⁵ Chapter 1364 instead specifically provides that the first created judgment lien has priority over all amounts that are due and payable on the judgment at the time the property is acquired.⁵⁶

Chapter 1364 codifies the judicial decision holding that an interest transferred or encumbered after attachment of a judgment lien is created remains subject to the judgment lien for the same amount as if the interest had not been transferred or encumbered.⁵⁷

Existing law requires that the judgment creditor, assignee of record, or the attorney of record for the judgment creditor execute and acknowledge a satisfaction of judgment by the judgment debtor.⁵⁸ Chapter 1364, in addition, permits the judgment creditor, judgment debtor, or owner of real property subject to a judgment lien on real property to record in the office of the county recorder an acknowledgement of satisfaction of judgment as executed or a court clerk's certificate of satisfaction of judgment.⁵⁹

B. Personal Property

Chapter 1364 introduces a provision analogous to the procedure in

50. See generally *Belieu v. Power*, 54 Cal. App. 244, 201 P. 620 (1921); CAL. STATS. 1978, c. 203, §1, at 441. RECOMMENDATION, *supra* note 1, at 2265.

51. Compare CAL. CIV. PROC. CODE §697.340 with CAL. STATS. 1978, c. 203, §1 at 441.

52. CAL. CIV. PROC. CODE §697.340. See generally Halbach, Jr., *Creditors' Rights in Future Interests*, 43 MINN. L. R. 217 (1958).

53. See CAL. CIV. PROC. CODE §697.340(a); RECOMMENDATION, *supra* note 1, at 2265.

54. See generally *Hertweck v. Fearon* 180 Cal. 71, 179 P. 190 (1919).

55. See generally *id.*

56. See CAL. CIV. PROC. CODE §697.380(g). But cf. *Hulbert v. Hulbert*, 111 N.E. 70; *Zink v. James River Nat'l Bank* 224 N.W. 901 (repudiated the prior American rule).

57. CAL. CIV. PROC. CODE §697.390; see *Kinney v. Vallentyne*, 15 Cal. 3d 475, 479, 541 P.2d 537, 539, 124 Cal. Rptr. 897, 899 (1975).

58. CAL. CIV. PROC. CODE §724.060(c) [incorporating CAL. STATS. 1980, c. 600, §1 at 1622 (amending CAL. CIV. PROC. CODE §675)].

59. See CAL. CIV. PROC. CODE §§697.400, 724.060, 724.100 (certificate of satisfaction of judgment may be issued by the court clerk if the satisfaction of the judgment has been entered in the register of actions upon application and payment of a \$3 fee).

the Commercial Code for perfecting a security interest.⁶⁰ Chapter 1364 allows the creation of a judgment lien on personal property by filing notice of the judgment lien with the Secretary of State.⁶¹ A judgment creditor may use the procedure provided for in Chapter 1364 to avoid delay in obtaining an execution lien by levy of a writ of execution.⁶² Furthermore, the use of this procedure allows the judgment creditor to avoid a possible third-party claim by a secured party having priority, and at the same time permits the judgment creditor to become a secured creditor.⁶³ The filing of notice with the Secretary of State is constructive notice to certain transferees,⁶⁴ and in those cases the judgment creditor by use of the judgment lien on personal property may be able to preclude the transfer of the property to bona fide purchasers.⁶⁵ The duration of the lien is five years,⁶⁶ and a subsequent filing with the Secretary of State creating another judgment lien on the personal property does not relate back to the time of the first filing.⁶⁷ The subsequent filing, however, may relate back to the earlier creation of an *attachment* lien.⁶⁸ The judgment lien may be created on the same personal property in which a security interest can be created by filing a financing statement with the Secretary of State under the Commercial Code.⁶⁹ If possession is required to perfect the security interest or if the filing must be in a place other than the office of the Secretary of State, a judgment lien cannot be created.⁷⁰ Chapter 1364 lists the personal property upon which a judgment lien may be created as accounts receivable, chattel paper, equipment, farm products, inventory and negotiable documents of title.⁷¹ The priorities of a judgment lien in respect to other interests is governed by the Commercial Code.⁷² A judgment lien has priority if

60. See OFFICIAL COMMENTS TO AB 707 (1982) at 40 (copy on file at *Pacific Law Journal*). Compare CAL. COM. CODE §§9101-9507 with CAL. CIV. PROC. CODE §§697.510-697.670 [hereinafter cited as OFFICIAL COMMENTS].

61. CAL. CIV. PROC. CODE §697.510.

62. See RECOMMENDATION, *supra* note 1, at 40.

63. See *id.*

64. CAL. CIV. PROC. CODE §697.610. The transferees include a buyer in the ordinary course of business who would take free of a security interest created by the seller; a holder to whom a negotiable document of title has been duly negotiated; and a purchaser of chattel paper who gives new value and takes possession of the paper in the ordinary course of business. *Id.*

65. See *id.* §§697.610, 697.920; RECOMMENDATION, *supra* note 1, at 40; see also CAL. CIV. PROC. CODE §§697.590, 697.600.

66. See CAL. CIV. PROC. CODE §697.510(b).

67. See *id.* §697.510(c).

68. See OFFICIAL COMMENTS to AB 707 (1982), at 41 (copy on file at the *Pacific Law Journal*).

69. See CAL. CIV. PROC. CODE §697.530; OFFICIAL COMMENTS, *supra* note 60, at 42.

70. See CAL. CIV. PROC. CODE §697.530(d); see OFFICIAL COMMENTS, *supra* note 60, at 42.

71. CAL. CIV. PROC. CODE §697.530(a).

72. *Id.* §697.590. See generally CAL. COM. CODE §9301 (persons who take priority over unperfected security interests, and rights of "lien creditors").

the notice of the lien is filed before the security interest is perfected.⁷³ A purchase money security interest, however, may have priority over an earlier filed notice of judgment lien.⁷⁴

Execution

Under existing law, a writ of possession may be obtained to levy on property in a private place.⁷⁵ Chapter 1364 specifically extends this procedure to execution⁷⁶ by allowing for a levy under a writ of execution on property in a private place upon an ex parte order with probable cause or a hearing on a noticed motion.⁷⁷

Existing law provides that both under attachment procedures and claim and delivery turnover orders are permitted to direct the defendant to transfer possession of the property to the plaintiff.⁷⁸ Chapter 1364 incorporates this procedure into the execution levy procedure,⁷⁹ by allowing for a turnover order on an ex parte order or on a noticed motion in aid of execution.⁸⁰

Under existing law, a registered process server may serve a writ of execution on personal property of a judgment debtor in the possession of another when the levy of execution does not require the person serving the writ to sell, deliver, or take custody of the property.⁸¹ Chapter 1364 expands the authority of registered process servers and permits them to levy on real property, growing crops, timber to be cut, minerals to be extracted and other types of property levied upon by recording a writ and notice of levy with the county recorder.⁸² In addition, a registered process server may levy on personal property used as a dwelling when the levy is accomplished by service or posting rather than actually taking custody.⁸³

Prior law required that the writ of execution be returned no sooner than 10 days and no later than 60 days after its receipt by the officer to

73. CAL. CIV. PROC. CODE §697.590(b).

74. *Id.* §697.590(c); RECOMMENDATION, *supra* note 1, at 2047.

75. CAL. CIV. PROC. CODE §§512.010(b)(4), 512.020 (writs of possession under claim and delivery). *See generally* CONTINUING EDUCATION OF THE BAR, 1 CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §17 (1977).

76. 1 A. FREEMAN, LAW OF EXECUTIONS §1, 2 n.1 (1900). Execution is in a practical sense the formal method prescribed by law whereby the party entitled to the benefit of a judgment or of an obligation equivalent to judgment may obtain that benefit. *Id.*

77. CAL. CIV. PROC. CODE §699.030(b).

78. *Id.* §§482.080, 512.070.

79. *Compare id.* §482.080 with *id.* §699.040; *id.* §512.070 with *id.* §699.040.

80. CAL. CIV. PROC. CODE §699.040.

81. *See id.* §699.080 (incorporating CAL. STATS. 1978, c. 1419, §4 at 4683 (amending CAL. CIV. PROC. CODE §687)); *see* RECOMMENDATION, *supra* note 1, at 2303-304.

82. *Compare* CAL. CIV. PROC. CODE §699.080 with CAL. STATS. 1978, c. 1419 §4 at 4683.

83. *See id.* §§699.080, 700.080(a). *See generally* RECOMMENDATION, *supra* note 1, at 2303-304.

whom it was directed.⁸⁴ Additionally, another writ could not be issued in the same county within the 60 day period unless the previous writ was returned.⁸⁵ Chapter 1364 instead provides that the writ of execution is to be returned within the earliest of the following times: (1) two years from the date of issuance of the writ;⁸⁶ (2) promptly after all of the duties under the writ are performed;⁸⁷ (3) if no levy takes place under the writ within 180 days after its issuance then promptly after the expiration of the 180 day period;⁸⁸ (4) when return is requested by the judgment creditor;⁸⁹ or (5) upon the expiration of the time for the enforcement of the money judgment.⁹⁰ These modifications by Chapter 1364 provide more time for locating and levying on property and avoid levying under a writ that no longer accurately reflects the amount due on the judgment.⁹¹ The writ of execution is leviable at any time during the first 180 days after it is issued.⁹² If property is levied on during that time, the writ is retained by the levying officer for the purpose of selling or collecting for the remaining life of the writ.⁹³ This revision avoids the need for redelivery of the writ and an alias return.⁹⁴

Under existing law all goods, chattels, moneys or other property both real and personal, or any interests, not exempt by law are liable to execution.⁹⁵ Prior law has created exceptions to this general rule.⁹⁶ Chapter 1364 codifies these exceptions⁹⁷ and retains some previously

84. CAL. STATS. 1978, c. 1133, §3, at 3461 (amending CAL. CIV. PROC. CODE §683).

85. *Id.*

86. *Id.* §699.560(a)(1).

87. *Id.* §699.560(a)(2).

88. *Id.* §699.560(a)(4).

89. *Id.* §699.560(a)(3).

90. *Id.* §699.560(a)(5).

91. Compare CAL. CIV. PROC. CODE §§699.510, 699.530, 699.560 with CAL. STATS. 1978, c. 1133, §3, at 3461 (amending CAL. CIV. PROC. CODE §683).

92. See CAL. CIV. PROC. CODE §§699.510, 699.530, 699.560.

93. See RECOMMENDATION, *supra* note 1, at 2053.

94. See *id.*; CAL. CIV. PROC. CODE §699.560.

95. See CAL. CIV. PROC. CODE §695.010 (incorporating CAL. STATS. 1977, c. 155, §1 at 618 (amending CAL. CIV. PROC. CODE §688)).

96. See *Equico Lessors, Inc. v. Metropolitan Life Ins. Co.*, 88 Cal. App. 3d 6, 7-10, 151 Cal. Rptr. 618, 619-21 (1978) (life insurance loan values); *Anglo Calif. Nat'l Bank v. Kidd*, 58 Cal. App. 2d 651, 655, 137 P.2d 460, 462 (1943) (contingent remainders).

97. See CAL. CIV. PROC. CODE §§724a (the subjection of franchises to levy and sale under execution is not continued but there are other provisions under miscellaneous creditors' remedies), §708.910-708.930, 699.720 (property not subject to execution; an alcoholic beverage license; interest of a partner in a partnership when the partnership is not the judgment debtor; a cause of action that is the subject of a pending action or special proceeding; judgment in favor of the judgment debtor prior to the expiration of the time for appeal from such judgment or prior to the final determination of the appeal; a debt owing and unpaid by a public entity other than earnings; the loan value of an unmaturing life insurance, endowment, or annuity policy; a franchise granted by a public entity and all the rights and privileges thereof; interests of a trust beneficiary; contingent remainders; executory interests; or other interests in property that are not vested; property in a guardianship or conservatorship estate).

codified exceptions.⁹⁸ Chapter 1364 also recognizes that these enumerated exceptions are not reachable by levy and sale by execution but they may be reached under any applicable procedure other than execution.⁹⁹

Methods of Levy

Existing law requires that the levying officer serve a copy of the writ of execution and notice of levy upon the judgment debtor.¹⁰⁰ Under prior law this procedure only applied to execution by incorporation of the attachment procedure.¹⁰¹ Under Chapter 1364, although this procedure is continued, it is worded to apply specifically to a levy under a writ of execution.¹⁰² Furthermore, Chapter 1364 requires that if the judgment debtor is a natural person, a copy of a form listing exemptions, prepared by the judicial council, must be served personally or by mail upon the judgment debtor.¹⁰³

Under existing law real property of the judgment debtor is to be levied upon according to the procedure provided for when levying under a writ of attachment.¹⁰⁴ Levy under attachment on real property requires that the levying officer record with the county recorder's office a copy of the writ and a notice of attachment.¹⁰⁵ Furthermore, if the property to be attached stands in the name of another the levying officer is to have a copy of the writ and notice of attachment sent to that person.¹⁰⁶ Additionally, there is the requirement of service on an occupant of the property.¹⁰⁷ Prior law, by incorporation of attachment procedure, provided for service on a third person and the occupant within a 15 day time limitation.¹⁰⁸ This time limitation for service is not continued in the execution provisions of Chapter 1364.¹⁰⁹ The main body of the procedure for attachment of real property of the judgment debtor is, however, continued.¹¹⁰

98. See CAL. STATS. 1977, c. 155, §1 at 618 (amending CAL. CIV. PROC. CODE §688).

99. See CAL. CIV. PROC. CODE §699.720; RECOMMENDATION, *supra* note 1, at 2313 (list of other possible methods to reach the property excluded from execution).

100. CAL. CIV. PROC. CODE §700.010 (incorporating CAL. STATS. 1977, c. 155, §1 at 618).

101. *Id.* §§488.310(c), 488.320(b); CAL. STATS. 1977, c. 155, §1 at 618.

102. CAL. CIV. PROC. CODE §700.010 (service of writ and notice of levy judgment debtor).

103. CAL. CIV. PROC. CODE §§681.030, 700.010(a)(3).

104. See CAL. CIV. PROC. CODE §700.015 (incorporating CAL. STATS. 1977, c. 155, §1, at 618 (amending CAL. CIV. PROC. CODE §688); CAL. STATS. 1976, c. 437, §29 at 1129 (amending CAL. CIV. PROC. CODE §488.310)).

105. CAL. STATS. 1976, c. 437, §29 at 1129.

106. *Id.*

107. *Id.*

108. *Id.*

109. CAL. CIV. PROC. CODE §700.015.

110. *Id.*

Chapter 1364 codifies case law which provides that tangible personal property already in the possession of a levying officer may be levied on by delivering the writ of execution to the levying officer with instructions to levy upon the property already in the officer's custody.¹¹¹ If the levying officer having custody of the property is not the officer levying on it the levy is performed by serving the officer with custody of the property with the writ and notice of levy.¹¹² This procedure enables a second judgment creditor to establish a lien on any surplus proceeds that might remain after sale or release of the property.¹¹³

Duties and Liabilities of a Third Person after Levy

Under existing law a third person is required to deliver property or make payments to the levying officer.¹¹⁴ If the third person fails or refuses to do so the person is liable to the judgment creditor.¹¹⁵ Chapter 1364 provides that if there is good cause for failure to pay or deliver to the levying officer, the third person will not be held liable to the judgment creditor.¹¹⁶

Under existing law a third person served with a copy of the writ of execution and notice of levy must prepare a memorandum to be given to the levying officer within 10 days after service.¹¹⁷ Prior law dictated that the memorandum describe any property of the debtor in the third person's possession or any debt owed to the debtor that was levied upon and state its value or the amount owing.¹¹⁸ If the third person denied possession of the property or owing of the debt it was to be stated in the memorandum.¹¹⁹ Chapter 1364 provides a broader range of information to be included in the memorandum.¹²⁰ The memorandum now must include a statement of the amount and the terms of any obligation to the judgment debtor sought to be levied upon that is due and payable and is not paid to the levying officer, and the reason for not paying the obligation.¹²¹ Additionally, the memorandum must contain the description of claims and rights of other persons to the

111. See *O'Connor v. Blake*, 29 Cal. 313, 315 (1865), *Colver v. W. B. Scarborough Co.*, 73 Cal. App. 441, 443, 238 P. 1104, 1105 (1925).

112. RECOMMENDATION, *supra* note 1, at 2063; see CAL. CIV. PROC. CODE §700.050(a)(2).

113. RECOMMENDATION, *supra* note 1, at 2063.

114. See CAL. CIV. PROC. CODE §701.010 (incorporating Cal. Stats. 1974, c. 1516, §9, at 3362 (amending CAL. CIV. PROC. CODE §488.550)).

115. See *id.* §701.020 (incorporating CAL. STATS. 1974, c. 1516, §9 at 3362).

116. See CAL. CIV. PROC. CODE §701.020.

117. *Id.* §701.030(a); see CAL. STATS. 1976, c. 437, §28, at 1129 (amending CAL. CIV. PROC. CODE §488.080).

118. CAL. STATS. 1976, c. 437, §28 at 1129.

119. *Id.*

120. Compare CAL. CIV. PROC. CODE §701.030(b) with CAL. STATS. 1976, c. 437 §28 at 1129.

121. CAL. CIV. PROC. CODE §701.030(b)(3).

property or obligation levied upon that are known to the third person as well as the names and addresses of these other persons.¹²² Finally, all this information must be supplied on any obligation to the judgment debtor sought to be levied upon that is not due and payable at the time of levy or any obligation owed at the time of levy not sought to be levied upon.¹²³

Sale and Collection

Under existing law the general rule is that the levying officer must sell all property that has been levied upon.¹²⁴ Prior law provided for the collection or sale of things in action and the selling of other property.¹²⁵ Chapter 1364 may create an exception to the general rule by discouraging the sale of accounts receivable, chattel paper, general intangibles, final money judgments, instruments that are not customarily transferred in an established market and other similar property.¹²⁶ This exception is apparently created to encourage collection and to avoid the sale of certain types of property that are especially susceptible to sacrifice sales.¹²⁷

Existing law provides that the notice of a sale of an interest in real property is to be given to the judgment debtor not less than 20 days before the date of sale by personal service or mail, posting in numerous places, serving an occupant of the property, and publishing in a newspaper of general circulation in the city where the property is situated.¹²⁸ Chapter 1364, in addition, requires that the notice of sale of an interest in real property be given to all persons that possess, on the date of levy, a recorded lien on the property.¹²⁹ The determination of these persons is to be made not earlier than 30 days after the date of levy.¹³⁰

According to existing law, sales of interests in real property are generally absolute.¹³¹ Prior law provided for a 12 month period when those persons entitled¹³² could redeem the property after the execution

122. *Id.* §701.030(b)(6).

123. *Id.* §§701.030(b)(4), (5).

124. *Id.* §701.510 (incorporating CAL. STATS. 1933, c. 744, §136, at 1888 (amending CAL. CIV. PROC. CODE §691)).

125. CAL. STATS. 1933, c. 744, §136, at 1888.

126. *See* CAL. CIV. PROC. CODE §701.520(a)(1)-(6).

127. RECOMMENDATION, *supra* note 1, at 2106-107.

128. CAL. CIV. PROC. CODE §701.540 (incorporating CAL. STATS. 1977, c. 139, §2, at 579 (amending CAL. CIV. PROC. CODE §692)).

129. *Id.* §701.540(h).

130. *Id.*

131. *See* CAL. CIV. PROC. CODE §701.680(a) (incorporating CAL. STATS. 1971, c. 1312, §2, at 2613 (amending CAL. CIV. PROC. CODE §700a)).

132. *See* WITKIN, *supra* note 39, at §98(b) (persons entitled to redeem include the judgment

sale.¹³³ Chapter 1364 replaces the statutory right of redemption with a 120 day grace period between the service of the notice of levy on the judgment debtor and the notice of the execution sale.¹³⁴ This delay is apparently provided to give the judgment debtor an opportunity to redeem the property from the judgment creditor's lien before the sale or to seek potential purchasers.¹³⁵ Chapter 1364 does, however, provide an exception to the rule that all sales are absolute¹³⁶ by stating that when a sale is improper because of irregularities in the proceedings an action may be brought within six months after the date of sale to set aside the sale if the purchaser was the judgment creditor.¹³⁷ The elimination of the right to redeem arguably does not affect the equitable right of a judgment debtor to redeem the property when the purchaser is guilty of unfairness or has taken undue advantage.¹³⁸

Existing law allows a judgment debtor or the judgment debtor's successor in interest the right of redemption when the judgment creditor is seeking a deficiency judgment from the sale of real property under a decree of foreclosure.¹³⁹ In addition, existing law specifies that if the proceeds from the sale were sufficient to satisfy the judgment the judgment debtor or the judgment debtor's successor in interest may still redeem the property within three months of the foreclosure sale.¹⁴⁰ Furthermore, if the proceeds are insufficient and a deficiency judgment is sought the period of redemption is extended to one year after the foreclosure sale.¹⁴¹ The redemption price under prior law could be paid directly to the purchaser or earlier redemptioner.¹⁴² Chapter 497 modifies this practice by requiring the redemption price to be deposited with the levying officer.¹⁴³ Under prior law interest on the redemption price was computed at the rate of two-thirds of one per cent per month up to the time of redemption.¹⁴⁴ The rate of interest applicable to money judgments is applied by Chapter 497 to that accruing in cases of

debtor or his successor in interest or a creditor having a lien on the property subsequent to that on which the property was sold).

133. See CAL. STATS. 1963, c. 204, §1, at 941 (amending CAL. CIV. PROC. CODE §702); see *id.* §2 at 942 (amending CAL. CIV. PROC. CODE §703).

134. CAL. CIV. PROC. CODE §701.545.

135. RECOMMENDATION, *supra* note 1, at 2353.

136. CAL. CIV. PROC. CODE §701.680(c)(1).

137. *Id.*

138. See *Smith v. Kessler*, 43 Cal. App. 3d 26, 32, 117 Cal. Rptr. 470, 473-74 (1974).

139. CAL. CIV. PROC. CODE §§729.010(a), 729.020 (incorporating CAL. STATS. 1872; CAL. STATS. 1941, c. 446, §1, at 1738 (amending CAL. CIV. PROC. CODE §725a)).

140. CAL. CIV. PROC. CODE §729.030(a) (incorporating CAL. STATS. 1941, c. 446, §1 at 1738).

141. *Id.* §729.030(b) (incorporating CAL. STATS. 1941, c. 446, §1, at 1738).

142. See CODE CIV. PROC. of 1872, §704 (repealed by CAL. STATS. 1872, c. 1364, §1).

143. CAL. CIV. PROC. CODE §729.060(a).

144. CAL. STATS. 1963, c. 204, §1, at 941 (amending CAL. CIV. PROC. CODE §702).

redemption.¹⁴⁵

In the case of a disagreement between the purchaser at the foreclosure sale and the redemptioner on the sum required to be paid for redemption, prior law set forth a procedure requiring the redemptioner to pay to the court clerk the amount necessary for redemption minus the disputed sum.¹⁴⁶ The undisputed redemption price under Chapter 497 is required to be deposited with the levying officer at the time of filing of the petition for a court determination of the dispute.¹⁴⁷ Under prior law the court determination was to be held not less than five days nor more than ten days after the filing of the petition by the redemptioner.¹⁴⁸ Moreover, two days prior to the hearing the redemptioner was required to notify the purchaser of the hearing date.¹⁴⁹ If at the hearing the court determined an additional amount was owing by the redemptioner this amount was to be promptly paid to the court clerk.¹⁵⁰ Chapter 497 restructures the procedure and extends the time period for the hearing to 20 days after the filing of the petition.¹⁵¹ Furthermore, the purchaser under Chapter 497 must be given notice 10 days before the date set for the hearing.¹⁵² In addition, if at the hearing the court determines that the redemptioner must pay a sum in addition to that deposited with the levying officer, the redemptioner is allowed 10 days to pay this new amount to the officer.¹⁵³

When property was redeemed by the judgment debtor or the judgment debtor's successor in interest, case law provided that liens subordinate to the lien under which the property was sold reattached to the property upon redemption.¹⁵⁴ In addition, a judgment lien under which the property was sold would reattach if the amount received from the sale left a deficiency.¹⁵⁵ These case law rules are not continued in Chapter 497.¹⁵⁶ Chapter 497 provides that only unsatisfied liens that are superior to the lien on which the property is sold survive the sale, whether or not there is a redemption.¹⁵⁷ This procedure encour-

145. CAL. CIV. PROC. CODE §§729.060(b)(4), 685.010 (interest accrues at the rate of 10% per annum on the principle amount of a money judgment).

146. CAL. STATS. 1963, c. 204, §1 at 941.

147. CAL. CIV. PROC. CODE §729.070(a).

148. CAL. STATS. 1963, c. 204, §1 at 941.

149. *Id.*

150. *Id.*

151. CAL. CIV. PROC. CODE §729.070(c).

152. *Id.* §729.070(d).

153. *Id.* §729.070(g).

154. *See* *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 548, 375 P.2d 169, 172, 25 Cal. Rptr. 265, 268 (1962).

155. *See* *Moore v. Hall*, 250 Cal. App. 2d 25, 29, 58 Cal. Rptr. 70, 72 (1967).

156. *See* CAL. CIV. PROC. CODE §729.080(e); OFFICIAL COMMENTS, *supra* note 60, at 18-19.

157. *See* CAL. CIV. PROC. CODE §729.080(e).

ages the judgment creditor and subordinate lienholders to look to the status of the property being sold in order to protect their interests.¹⁵⁸

Case law provides that failure to give notice of an execution sale as required does not invalidate the sale.¹⁵⁹ Prior law provided, however, that the levying officer forfeit \$100 to the aggrieved party if the required notice was not delivered.¹⁶⁰ Chapter 1364 codifies this case law rule and removes the \$100 forfeiture by the levying officer to the aggrieved party when the required notice is not given.¹⁶¹

Prior to the enactment of Chapter 1364, the accepted rule had been that cash in full was required from the ordinary purchaser at an execution sale.¹⁶² Chapter 1364 modifies this rule by allowing a high bidder on an interest in real property to elect to treat a bid over \$5,000 as a credit transaction by paying \$5,000 or 10 percent of the amount bid, whichever is greater, in cash, and paying the balance with interest and any additional costs within 10 days of the sale.¹⁶³ Chapter 1364 also permits the high bidder of personal property exceeding \$2,500 to treat the sale as the same type of credit transaction as in real property sales.¹⁶⁴

Under existing law, an officer may bring an action against a defaulting purchaser and recover the differences and costs from a resale to the highest bidder.¹⁶⁵ Case law has held that the judgment debtor is also entitled to bring the action when the officer does not.¹⁶⁶ Chapter 1364 codifies this case law and provides that any costs accruing with regard to the property sold from the date of sale until the date the property is resold, including costs of resale with interest and costs and attorneys fees incurred in the action brought against the defaulting purchaser are recoverable.¹⁶⁷ Chapter 1364 adds a provision which requires that a minimum bid must be met.¹⁶⁸ This bid must exceed the total of the sum of (1) all preferred labor claims, (2) any state tax lien superior to the judgment creditor's lien,¹⁶⁹ (3) any deposit made by a third-party

158. *See id.* §729.080. *See* Official Comments, *supra* note 60, at 18-19.

159. *See* Smith v. Randall, 6 Cal. 47, 50 (1856).

160. CAL. STATS. 1957, c. 1914, §1, at 3345 (amending CAL. CIV. PROC. CODE §693).

161. *Compare* CAL. CIV. PROC. CODE §701.560 with CAL. STATS. 1957, c. 1914, §1, at 3345.

162. WITKIN, *supra* note 39, at §81(a).

163. CAL. CIV. PROC. CODE §701.590(c).

164. *Id.* §701.590(d). The terms of the credit transaction are to pay the greater of \$2,500 or 10% and the balance plus interests and costs within 10 days of the sale. *Id.*

165. CAL. CIV. PROC. CODE §701.600 (incorporating CAL. CODE AM. 1873-74, c. 383, §95 at 323 (amending CAL. CIV. PROC. CODE §695)); WITKIN, *supra* note 39, at §82.

166. *See* Meherin v. Saunders, 131 Cal. 681, 689-90, 63 P. 1084, 1086, 1901.

167. CAL. CIV. PROC. CODE §§685.010 (rate is 10%), 701.600(c)(1), 701.600(c)(2), 701.600(c)(3), 701.600(c)(4).

168. *Id.* §701.620.

169. *Id.* §§701.620(a)(1), (2).

claimant, and (4) all proceeds exemptions.¹⁷⁰ If the minimum bid does not exceed this statutory minimum the levying officer must release the property.¹⁷¹

Exemptions

The fundamental purpose of exemption statutes is to protect debtors and their families from financial misfortune and to prevent creditors from executing against all of the debtor's material possessions in satisfaction of their money judgments.¹⁷²

A. Motor Vehicles

Existing law allows a motor vehicles exemption without making a claim.¹⁷³ The value of the vehicle is determined under existing law by referring to the used car price guides used by California automobile dealers,¹⁷⁴ and the proceeds from the sale are exempt for a period of 90 days from the time they are actually received by the judgment debtor.¹⁷⁵ Prior law allowed only a \$500 exemption for a motor vehicle.¹⁷⁶ Chapter 1364 increases the amount of the exemption to \$1,200 and, in addition, allows the exemption to apply to insurance proceeds or other indemnification for the loss, damage, or destruction of the motor vehicle.¹⁷⁷

B. Personal and Household Items

Under existing law household furnishings, appliances, and apparel are, if ordinarily and reasonably necessary to the judgment debtor or the judgment debtor's family, exempt from execution.¹⁷⁸ Although prior law enumerated specific items to be exempt, however, it did not limit the exemption exclusively to those items.¹⁷⁹ Chapter 1364 provides in general terms the exemption for household furnishings and gives guidelines for determining whether an item of property is ordina-

170. *Id.* §§701.620(a)(3), (4).

171. *Id.* §701.620(c).

172. Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration*, 9 PAC. L.J. 889, 889 (1978).

173. CAL. CIV. PROC. CODE §704.010(d) (incorporating CAL. STATS. 1977, c. 683, §1, at 2209 (amending CAL. CIV. PROC. CODE §690.2)) (provides for an exemption of \$1,200 without making a claim if the judgment debtor has only one motor vehicle and it is sold at an execution sale).

174. *Id.* §704.010(c) (incorporating CAL. STATS. 1977, c. 683, §1, at 2209).

175. *Id.* §704.010(b) (incorporating CAL. STATS. 1977, c. 683, §1, at 2209).

176. CAL. STATS. 1977, c. 683, §1, at 2209.

177. CAL. CIV. PROC. CODE §704.010(a).

178. *Id.* §704.020(a) (incorporating CAL. STATS. 1970, c. 1523, §10, at 3070 (adding CAL. CIV. PROC. CODE §690.1)).

179. CAL. STATS. 1970, c. 1523, §10, at 3070.

rily and reasonably necessary.¹⁸⁰ The court must take into account the extent to which the particular type of item is ordinarily found in a household and whether the item has extraordinary value as compared to the value of the same type of item found in other households.¹⁸¹ This consideration is to help eliminate the unfairness inherent in the "station of life" test that was applied by the court in the past.¹⁸² Furthermore, Chapter 1364 sets forth a 90-day exemption period for the proceeds from the sale after the proceeds are actually received by the judgment debtor.¹⁸³

Existing law provides an exemption for jewelry, heirlooms and works of art of the judgment debtor or the judgment debtor's family.¹⁸⁴ Prior law restricted the application of this exemption to works of art of or by the judgment debtor or the judgment debtor's resident family.¹⁸⁵ Chapter 1364 eliminates this restriction but adds the requirement that the aggregate equity not exceed \$2,500.¹⁸⁶

C. Tools of the Trade

Articles reasonably necessary for the occupation of the judgment debtor are, under existing law, exempt from enforcement of a money judgment up to \$2,500.¹⁸⁷ Prior law allowed the exemption to be claimed by the judgment debtor exclusively.¹⁸⁸ Chapter 1364 makes the exemption available to the spouse of the judgment debtor and further allows a combined exemption of \$5,000.¹⁸⁹ In addition, the proceeds from an execution sale, or insurance or indemnification for loss, damage, or destruction are exempt for 90 days.¹⁹⁰ Chapter 1364 specifically addresses the claim of a motor vehicle under the motor vehicle exemption,¹⁹¹ and the *additional* claim of exemption of a motor vehicle under this exemption by disallowing the use of this exemption when the motor vehicle claimed exempt is also reasonably adequate for use

180. CAL. CIV. PROC. CODE §§704.020(a) (household furnishings, appliances, provisions, wearing apparel, and other personal effects), 704.020(b).

181. *Id.* §704.020(b).

182. See *Independence Bank v. Heller*, 275 Cal. App. 2d 84, 88, 79 Cal. Rptr. 868, 871 (1969); *Newport Nat'l Bank v. Adair*, 2 Cal. App. 3d 1043, 1045-46, 83 Cal. Rptr. 1, 2-3 (1969). See RECOMMENDATION, *supra* note 1, at 2394-95.

183. CAL. CIV. PROC. CODE §704.020(c).

184. *Id.* §704.040 (incorporating CAL. STATS. 1970, c. 1523, §10 at 3070).

185. CAL. STATS. 1970, c. 1523, §10, at 3070.

186. CAL. CIV. PROC. CODE §704.040.

187. *Id.* §704.060(1) [incorporating CAL. STATS. 1970, c. 1523, §16, at 3071 (adding CAL. CIV. PROC. CODE §690.4)].

188. CAL. STATS. 1970, c. 1523, §16, at 3071.

189. CAL. CIV. PROC. CODE §§704.060(a)(2), (3).

190. *Id.* §704.060(b).

191. *Id.* §704.010.

in a trade, business or profession.¹⁹²

D. Insurance

Prior law provided the judgment debtor and the judgment debtor's spouse and minor children with an exemption on any monies, benefits or privileges obtained from a life insurance policy when the annual premium did not exceed \$500.¹⁹³ This exemption also extended to protect the beneficiary.¹⁹⁴ Chapter 1364 restructures this exemption and provides that unmaturing life insurance policies are exempt without making a claim.¹⁹⁵ In addition, the loan value of these policies is exempt in the amount of \$4,000.¹⁹⁶ This exemption precludes a judgment creditor from reaching an unmaturing policy except for the loan value of the policy.¹⁹⁷ The exemption provided under Chapter 1364 is available to the spouse of the judgment debtor even if the spouse is also a judgment debtor under the judgment.¹⁹⁸ Furthermore, the spouses may combine their individual exemptions.¹⁹⁹ When applying the exemption, the court must first refer to those policies not before it and, if the exemption is not exhausted, to the policy at issue.²⁰⁰

E. Unemployment and Strike Funds

Existing law states that contributions to unemployment programs and the benefits from these programs prior to payment are exempt from enforcement of a money judgment without an exemption claim; however, after payment a claim must be made.²⁰¹ Chapter 1364 extends this claim procedure to apply to benefits provided to union members under a strike fund.²⁰²

192. *Id.* §704.060(c).

193. CAL. STATS. 1970, c. 1523, §11 at 3071; *Jackson v. Fisher*, 56 Cal. 2d 196, 201, 363 P.2d 479, 482, 14 Cal. Rptr. 439, 442 (1961) (exemption for a spouse and minor child is \$1,000).

194. See generally *Jackson v. Fisher*, 56 Cal. 2d 196, 14 Cal. Rptr. 439, 363 P.2d 479 (beneficiary protected against his own creditors as well as those of insured); WITKIN, *supra* note 39, at §57.

195. CAL. CIV. PROC. CODE §704.100(a).

196. *Id.* §704.100(b).

197. See *id.* §704.100.

198. *Id.* §704.100(b).

199. *Id.*

200. *Id.*

201. *Id.* §704.120(b)-(d) (incorporating: CAL. STATS. 1970, c. 1523, §48, at 3077 (amending CAL. CIV. PROC. CODE §690.13); CAL. STATS. 1970, c. 1523, §36 at 3073 (adding CAL. CIV. PROC. CODE §690.16); CAL. STATS. 1973, c. 1207, §3, at 2652 (amending CAL. CIV. PROC. CODE §690.175); CAL. STATS. 1978, c. 494, §1, at 1626 (amending CAL. CIV. PROC. CODE §690.18)).

202. *Id.* §704.120(b)(8).

F. Miscellaneous Exemptions

Existing law provides in addition to the exemptions discussed above many other exemptions that, although not extensively restructured by Chapter 1364, have some modifications.²⁰³ Chapter 1364 increases the inmate's trust account from \$40 to \$1,000²⁰⁴ and allows the spouse to claim the exemption concurrently with the inmate.²⁰⁵ In addition, Chapter 1364 provides for an exemption of damages in personal injury actions²⁰⁶ and wrongful death suits.²⁰⁷ Furthermore, Chapter 1364 expands the category of nongovernmental aid that is exempt.²⁰⁸ Additionally, Chapter 1364 now requires the judgment debtor to claim an exemption for relocation benefits after payment.²⁰⁹ Under Chapter 1364 there is an additional exemption for financial aid provided to a student by an institution of higher education.²¹⁰

G. Homestead Exemption

The apparent legislative intent of the dwelling exemption is to provide many of the benefits of the declared homestead law to those debtors who are unaware of the declared homestead and who fail to take advantage of it by recording a declaration of homestead before a creditor records an abstract of judgment in the county where the debtor's principal residence is located.²¹¹ Under existing law the homestead exemption is \$45,000 if the judgment debtor or spouse of the judgment debtor who resides in the homestead is either 65 years old or older, or a member of a family unit or both.²¹² Chapter 1364 clarifies this provision by adding that (1) regardless of whether the spouses are jointly obligated on the judgment and (2) regardless of whether the homestead consists of community or separate property or (3) both, the combined homestead exemptions of spouses on the same judgment must not ex-

203. See *id.* §§704.030 (incorporating CAL. STATS. 1935, c. 723, §17, at 1969 (adding CAL. CIV. PROC. CODE §690.17)); 704.090 (incorporating CAL. STATS. 1974, c. 1516, §18, at 3381 (amending CAL. CIV. PROC. CODE §690.21)); 704.170 (incorporating CAL. STATS. 1970, c. 1523, §40, at 3074 (adding CAL. CIV. PROC. CODE §690.19)), 704.180 (incorporating CAL. STATS. 1974, c. 47, §2, at 102 (adding CAL. CIV. PROC. CODE §690.8a)).

204. Compare CAL. CIV. PROC. CODE §704.090 with CAL. STATS. 1974, c. 1516, §18, at 3381.

205. CAL. CIV. PROC. CODE §704.090.

206. *Id.* §704.140.

207. *Id.* §704.150.

208. Compare *id.* §704.170 with CAL. STATS. 1970, c. 1523, §40, at 3074.

209. Compare CAL. CIV. PROC. CODE §704.180 with CAL. STATS. 1974, c. 47, §2, at 102 (adding CAL. CIV. PROC. CODE §690.8a).

210. CAL. CIV. PROC. CODE §704.190.

211. Adams, *Homestead Legislation in California*, 9 PAC. L.J. 723, 737 (1978).

212. CAL. CIV. PROC. CODE §704.730 (incorporating CAL. STATS. 1980, c. 15, §1, at 62 (amending CAL. CIV. CODE §1260)). This definition is similar to the previous definition in the Civil Code. CAL. STATS. 1980, c. 15, §1, at 62 (for all other persons the exemption is \$30,000).

ceed \$45,000.²¹³ If both spouses are entitled to a homestead exemption, the proceeds exemption of the homestead are to be apportioned between the spouses on the basis of their proportionate interests in the homestead.²¹⁴ This additional provision is intended to preclude the exemption of unduly large amounts and the inequitable application of exemptions that might otherwise occur because of the variety of ways that spouses can hold property and attempt to qualify for increased exemptions.²¹⁵

Existing law provides that whenever a judgment creditor seeks to enforce a judgment against a dwelling, whether or not the judgment was rendered in another county, the judgment creditor must apply to the proper court in the county where the dwelling is located.²¹⁶ The application must describe the dwelling and contain a statement that a reasonable search of the records of the county tax assessor indicates that there is or is not a current homeowner's exemption claimed by either the debtor or the spouse of the debtor on the subject dwelling and whether or not there is according to the records of the county recorder a homestead declaration recorded by the judgment debtor or the judgment debtor's spouse.²¹⁷ Prior law required that this application be for the issuance of a writ of execution.²¹⁸ It further required verification and a statement that the current value of the dwelling over and above all liens and encumbrances exceeded the amount of the allowed exemption.²¹⁹ Chapter 1364, unlike prior law, provides that the application must be for an order for the sale of the property after the execution levy.²²⁰ Promptly after a dwelling is levied upon, Chapter 1364, directs the levying officer to serve notice on the judgment creditor that levy has been made, and the judgment creditor has 20 days to file the application for sale.²²¹ The application does not need to be verified but only to be made under oath.²²² In addition to the previously mentioned contents of the application, Chapter 1364 requires that the search of the county tax assessor's records determine whether there is a homeowner's exemption, or a disabled veterans exemption claimed for the dwelling

213. CAL. CIV. PROC. CODE §704.730(b).

214. *Id.*

215. RECOMMENDATION, *supra* note 1 at 2418.

216. See CAL. CIV. PROC. CODE §704.750 (incorporating CAL. STATS. 1980, c. 1372, §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31)).

217. *Id.*

218. CAL. STATS. 1980, c. 1372, §3, at 4978-79.

219. *Id.* at 4979.

220. CAL. CIV. PROC. CODE §704.750(a).

221. *Id.*

222. Compare CAL. CIV. PROC. CODE §704.760 with CAL. STATS. 1980, c. 1372, §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31).

by the judgment debtor or judgment debtor's spouse.²²³ Failure to file the application as provided will result in the release of the property by the levying officer.²²⁴

Existing law requires that upon filing of the application by the judgment creditor, the court must set a time and place for a hearing and order the judgment debtor to show cause why an order for sale should not be made in accordance with the application.²²⁵ Prior law provided for notice to the judgment debtor of the hearing not later than 10 days prior to the date set for the hearing.²²⁶ Chapter 1364 changes this notice requirement; the hearing must not be set later than 45 days after the application is filed or, if upon good cause, at a later time as set by the court.²²⁷ The notice to the judgment debtor is then set not later than 30 days before the time set for the hearing.²²⁸

Prior to Chapter 1364, the burden of proof at the hearing for the order for sale of the property was on the judgment debtor to prove entitlement to the homestead exemption when the application of the judgment creditor states a claim of nonexempt status.²²⁹ Conversely, the burden was on the judgment creditor to prove that the value of the dwelling over and above all liens and encumbrances, exceeds the amount of the allowable exemption.²³⁰ Chapter 1364 creates a presumption that a debtor has a valid dwelling exemption if a homeowner's or veteran's property exemption has been filed.²³¹ Furthermore, if the application lists the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount in the application.²³²

Under the declared homestead provisions of existing law the court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling.²³³ Chapter 1364 incorporates this provision to allow the court under the homestead exemption provisions to appoint an appraiser.²³⁴

223. CAL. CIV. PROC. CODE §704.760.

224. *Id.* §704.750.

225. *Id.* §704.770 (incorporating CAL. STATS. 1980, c. 1372, §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31)).

226. CAL. STATS. 1980, c. 1372, §3, at 4978.

227. CAL. CIV. PROC. CODE §704.770.

228. *Id.*

229. CAL. STATS. 1980, c. 1372, §3, at 4978.

230. *Id.*

231. CAL. CIV. PROC. CODE §704.780(a)(1).

232. *Id.* §704.780(a)(2).

233. CAL. STATS. 1979, c. 185, §6, at 407 (adding CAL. CIV. PROC. CODE §1247).

234. CAL. CIV. PROC. CODE §704.780.

Existing law provides that if the judgment debtor, the judgment debtor's spouse, or the judgment debtor's attorney did not appear at the hearing on the order for sale of the dwelling a second notice is to be served on the debtor that will allow the judgment debtor, if the failure to appear was due to mistake, inadvertence, surprise, or excusable neglect to assert the exemption at another hearing.²³⁵ Prior law provided that upon receipt of the declarations for failure to appear by the debtor within five days prior to the scheduled sale date the levying officer must postpone the sale and notify the court of the postponement.²³⁶ Chapter 1364 allows the judgment debtor 10 days after service of the notice of the order to file with the levying officer the declaration for failure to appear.²³⁷ The hearing on the declaration of the judgment debtor is to be set no later than 20 days after the receipt of the declaration and the court clerk must promptly give notice of the hearing to all parties.²³⁸ Under prior law, subsequent applications by a judgment creditor within one year of a denial of a writ of execution had to be supported by a statement that there was a material change of circumstances affecting the exemption and putting forth proof of the change.²³⁹ Chapter 1364 does not continue this practice but prohibits the same judgment creditor from making any subsequent application for sale of the homestead within one year.²⁴⁰

According to prior declared homestead law, if no bid was received at the sale of the homestead that was 90 per cent or more of the fair market value, the property could not be sold unless the court granted a motion by the judgment creditor to accept the highest bid that exceeded the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property.²⁴¹ If the motion was not granted the court could issue a new order for the sale of the homestead.²⁴² This requirement was intended to protect the judgment debtor against sacrifice sales of the dwelling.²⁴³ Chapter 1364 continues and incorporates this provision of the declared homestead law into its homestead exemption section.²⁴⁴ In addition, Chapter 1364 contains a new provision requiring that when a homestead is sold pur-

235. *Id.* §704.790 (incorporating CAL. STATS. 1980, c. 1372, §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31)).

236. CAL. STATS. 1980, c. 1372, §3, at 4978.

237. CAL. CIV. PROC. CODE §704.790.

238. CAL. CIV. PROC. CODE §704.790.

239. CAL. STATS. 1980, c. 1372, §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31).

240. Compare CAL. CIV. PROC. CODE §704.800 with *id.*

241. CAL. STATS. 1979, c. 185, §20 at 410 (adding CAL. CIV. PROC. CODE §1254).

242. *Id.*

243. RECOMMENDATION, *supra* note 1, at 2093.

244. See CAL. CIV. PROC. CODE §704.800.

suant to a court order the amount payable to satisfy the lien or encumbrance not include any penalty for prepayment.²⁴⁵ Under existing law, the levying officer must distribute the proceeds of the sale of a homestead in a specific order.²⁴⁶ The distribution is first to the discharge of all liens and encumbrances on the property and second, to the judgment debtor in the amount of the exemption.²⁴⁷ Chapter 1364 inserts as the third priority item the reimbursement of the levying officer's costs.²⁴⁸ As provided in existing law, satisfaction of the amount of the execution is by the fourth priority item and finally all remaining proceeds go to the judgment debtor.²⁴⁹ In addition, Chapter 1364 sets forth the amount directed to the judgment creditor in a more detailed manner.²⁵⁰

H. Declared Homesteads

In order to obtain a declared homestead one must file a declaration of homestead in the office of the recorder of the county where the homestead is located.²⁵¹ Under existing law, a homestead may be selected from any freehold title, interest, or estate that vests the immediate right of possession in the homestead declarant or the declarant's spouse, even if the right of possession is not exclusive.²⁵² Chapter 1364 expands this class to any interest in real property whether present or future, vested or contingent, legal or equitable that is a dwelling.²⁵³ The only limitations are a leasehold with an unexpired term of less than two years and the beneficiary of a trust.²⁵⁴ Chapter 1364 appears to draw from the prior declared homestead law and from the homestead exemption provisions²⁵⁵ by incorporating the provision in Chap-

245. *See id.* §704.810.

246. *See* CAL. CIV. PROC. CODE §704.850 ((incorporating CAL. STATS. 1980, c. 1372, §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31)).

247. *Id.* §704.850.

248. *Compare* CAL. CIV. PROC. CODE §704.850 with CAL. STATS. 1980, c. 1372, §3, at 4978.

249. *See* CAL. CIV. PROC. CODE §704.850; CAL. STATS. 1980, c. 1372, §3, at 4978.

250. *Compare* CAL. CIV. PROC. CODE §704.850 with CAL. STATS. 1980, c. 1372, §3, at 4978. The costs and interest accruing after issuance of the writ is satisfied first. Then the amount due on the judgment with costs and interest as entered on the writ is satisfied. CAL. CIV. PROC. CODE §704.850.

251. *See* CAL. STATS. 1976, c. 463, §5, at 1201 (amending CAL. CIV. CODE §1262), CAL. STATS. 1872.

252. *See* *Bradley v. Scully*, 255 Cal. App. 2d 101, 105, 62 Cal. Rptr. 834, 837 (1967); *Estate of Kachigian*, 20 Cal. 2d 787, 790-91, 128 P.2d 865, 867 (1942) (property held in joint tenancy or tenancy in common may also be selected as a homestead); *Alexander v. Johnson*, 92 Cal. 514, 519, 28 P. 593, 594 (1891) (property that a claimant holds an equitable interest in may be selected as a homestead); CAL. CIV. PROC. CODE §704.910(c) (incorporating CAL. STATS. 1976, c. 463, §1, at 1200 (amending CAL. CIV. PROC. CODE §1238)). *See generally* Adams, *Homestead Legislation in California*, 9 PAC. L. J. 723 (1978).

253. CAL. CIV. PROC. CODE §704.910(c).

254. *Id.*

255. *Compare* CAL. CIV. PROC. CODE §704.910-704.990 with CAL. STATS. 1982 c. 798, §8, at —

ter 1364 that any levy pursuant to a writ of execution on a dwelling and the sale pursuant to the writ must be made in compliance with the provisions contained in the homestead exemption section.²⁵⁶ Chapter 1364 also requires that the judgment debtor and judgment creditor have all the rights and benefits provided by the homestead exemption sections.²⁵⁷ In addition, Chapter 1364 now provides that a judgment lien will attach to any surplus over the declared homestead and all liens and encumbrances on the homestead at the time the judgment is recorded to create the judgment lien.²⁵⁸

Exemption Procedure

Under existing law the judgment debtor is required to make a claim of exemption within 10 days of the date that notice of levy on the property is served.²⁵⁹ In addition, this claim must include the name and address of the judgment debtor and a description of the property claimed to be exempt.²⁶⁰ Chapter 1364 further provides that if the property claimed as exempt is a motor vehicle,²⁶¹ tools of a trade,²⁶² or life insurance policy,²⁶³ additional detailed information must be provided.²⁶⁴ Furthermore, promptly after the filing of the claim of exemption the levying officer must serve the judgment creditor with a notice of the claim of exemption containing a statement that unless the exemption is opposed the levying officer will release the property.²⁶⁵ Prior law required the judgment creditor to file with the levying officer within five days after service a counteraffidavit alleging that the property is not exempt or the value exceeds the applicable exempt amount.²⁶⁶ Either party had five days to move for a hearing to determine the exemption claim or the value of the property claimed to be

(repealing CAL. CIV. CODE §1237, and CAL. CIV. PROC. CODE §704.710-704.850 (incorporating CAL. STATS. 1980, c. 1372 §3, at 4978 (amending CAL. CIV. PROC. CODE §690.31)).

256. CAL. CIV. PROC. CODE §704.970.

257. *Id.*

258. *Id.* §704.950(c).

259. CAL. CIV. PROC. CODE §703.520 (incorporating CAL. STATS. 1978, c. 1133, §5, at 3461 (amending CAL. CIV. PROC. CODE §690.50)).

260. *See id.*

261. *Id.* §704.010 (motor vehicle claimed as exempted property).

262. *Id.* §704.060 (tools claimed as exempted property).

263. *Id.* §704.100 (life insurance claimed as exempted property).

264. *Id.* §703.520(b)(3) (requires the claimant to describe all other motor vehicles of the same type and tools plus the claimant must state the nature and amount of all other insurance policies of the same type owned by the judgment debtor or the spouse of the judgment debtor alone or in combination).

265. *Id.* §703.540 (incorporating CAL. STATS. 1978, c. 1133, §5, at 3461 (amending CAL. CIV. PROC. CODE §690.50)). The levying officer must serve a copy of the claim of exemption that contains a statement that the levying officer will release the property unless a notice of opposition to the claim of exemption and a copy of the notice of motion are served on the levying officer. *Id.*

266. CAL. STATS. 1978, c. 1133, §5, at 3461.

exempt.²⁶⁷ In addition, prior law stated that this hearing must be held not later than 15 days after the motion, and the opposing party was to be given notice not less than 5 days prior to the hearing.²⁶⁸ Chapter 1364 changes this procedure to provide that the judgment creditor file a notice of opposition and a notice of motion for an order determining the claim of exemption with the court and the levying officer within 10 days of service of the notice of the claim of exemption on the judgment creditor.²⁶⁹ Consequently, this change eliminates the five day delay that previously existed between the filing of opposition and the notice of motion.²⁷⁰ The hearing on the exemption is to be held no later than 20 days after the filing of the motion with the court.²⁷¹ In addition, Chapter 1364 requires that the claimant receive not less than 10 days²⁷² notice prior to the hearing.²⁷³

General Exemption Provisions

Chapter 1364 codifies case law by providing that the exemptions to the enforcement of a money judgment are applicable only to the property of a natural person²⁷⁴ and may not be waived.²⁷⁵ Recent court decisions have rejected an earlier case ruling which stated that the judgment debtor's applicable exemptions are those that existed at the time the obligation was incurred.²⁷⁶ These decisions provide that the exemptions available to the judgment debtor are those in effect at the time the lien is created on the property.²⁷⁷ This modification of the application of exemption statutes to pre-existing unsecured creditors apparently will reduce the diminished debtor protection created by inflationary conditions, making the level of protection the same against *all* unsecured creditors, not just those who contract with the debtor

267. *Id.*

268. *See id.*

269. *See* CAL. CIV. PROC. CODE §§703.550, 703.560.

270. *See* OFFICIAL COMMENTS, *supra* note 60, at 82. *Compare* CAL. CIV. PROC. CODE §703.550 with CAL. STATS. 1978, c. 1133, §5 at 3461 (amending CAL. CIV. PROC. CODE §690.50).

271. CAL. CIV. PROC. CODE §703.570.

272. *See* CAL. CIV. PROC. CODE §703.570(b).

273. *Id.* §703.570.

274. *See* Canal-Randolph Anaheim, Inc. v. Wilkoski, 103 Cal. App. 3d 282, 290, 163 Cal. Rptr. 30, 34 (1980).

275. *See* Industrial Loan and Inv. Co. v. Superior Ct., 189 Cal. 546, 547, 209 P. 360, 361 (1922). *See* CAL. CIV. PROC. CODE §§703.020, 703.040.

276. *Compare In re Rauer's Collection Co.*, 87 Cal. App. 2d 248, 253-54, 196 P.2d 803, 807 (1948) with *San Diego White Truck Co. v. Swift*, 96 Cal. App. 3d 88, 93-94, 157 Cal. Rptr. 745, 748 (1979) and *National Collection Agency, Inc. v. Fabila*, 93 Cal. App. 3d Supp. 1, Supp. 4, 155 Cal. Rptr. 356, 358 (1979).

277. *See* 96 Cal. App. 3d at 92, 157 Cal. Rptr. at 746-47; 93 Cal. App. 3d Supp. at 4, 155 Cal. Rptr. at 358.

subsequent to the remedial legislation.²⁷⁸

The retroactive application of exemption statutes presents a possible violation of the Contract Clause of both the United States and California constitutions.²⁷⁹ Chapter 1364 specifically addresses this possible violation by declaring that persons who enter into contracts do not do so in reliance on the assumption that the exemptions in effect at the time of the contract will govern enforcement and that the application of procedures in effect at the time of enforcement of a judgment is essential to the equality of treatment between judgment debtors and judgment creditors.²⁸⁰

Case law provides that the proper time for the determination of whether the property is exempt under the appropriate exemption statute is under the circumstances existing at the time the judgment creditor seeks to apply the judgment debtor's property to the satisfaction of the judgment.²⁸¹ Chapter 1364 codifies these decisions providing that the determination is to be made at the earliest of the following: (1) the time of levy on the property,²⁸² (2) the time of the commencement of court proceedings for the application of the property to the satisfaction of the money judgment,²⁸³ or (3) the time a lien is created under attachment or this title.²⁸⁴ In addition, Chapter 1364 allows the court discretion to take into consideration changes that occur between the time of levy or commencement of enforcement proceedings, or creation of the lien and the time of the hearing.²⁸⁵ Case law provides that the proceeds from exempt property²⁸⁶ when placed in a deposit account are exempt to the extent that these funds are traceable to the exempt property.²⁸⁷ Chapter 1364 codifies this rule and provides that proceeds from exempt property placed in a deposit account remain exempt and that the tracing is to be by the application of the lowest intermediate balance

278. See Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration*, 9 PAC. L. J. 889, 890 (1978).

279. U.S. CONST. art. I, §10, cl. 1; CAL. CONST. art. I, §16.

280. *In re Marriage of Bouquet*, 16 Cal. 3d 583, 592, 546 P.2d 1371, 1376, 128 Cal. Rptr. 427, 432 (1976) (sets the following criteria: (1) significance of state interest, (2) importance of retroactivity in effectuating state interests, (3) extent of reliance on the former law, and (4) private detriment inflicted by law); see CAL. CIV. PROC. CODE §703.060.

281. See *Medical Fin. Ass'n v. Rambo*, 33 Cal. App. 2d 756, 758-60, 86 P.2d 159, 160-61 (1938).

282. CAL. CIV. PROC. CODE §703.100(a)(1).

283. *Id.* §703.100(a)(2).

284. *Id.* §703.100(a)(3).

285. *Id.* §703.100(b).

286. *Id.* §§704.010(b) (90 day period of exemption), 704.020(c) (90 day period of exemption for household furnishings).

287. See *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 367, 521 P.2d 441, 450, 113 Cal. Rptr. 449, 458 (1974) (unemployment benefits in checking account).

principle.²⁸⁸

*Wage Garnishment Law*²⁸⁹

Existing law provides that the state must make an administrative hearing available to a taxpayer to reconsider or modify a withholding order for taxes.²⁹⁰ Under prior law, the determination made at this hearing was not subject to judicial review.²⁹¹ Chapter 1364 allows judicial review of the determination if a petition for a writ of mandate is filed within 90 days from the date that written notice of the state determination was delivered or mailed to the taxpayer.²⁹² The provision for judicial review added by Chapter 1364 may *possibly* be in conflict with existing law that prohibits review of the taxpayer's tax liability in any court proceeding.²⁹³

Written Interrogatories to Judgment Debtor

Under existing law, a judgment creditor can require the judgment debtor to answer interrogatories.²⁹⁴ Prior law required the judgment debtor to answer the interrogatories when represented by counsel.²⁹⁵ Chapter 1364 deletes this requirement and allows the use of written interrogatories whether or not the judgment debtor is represented by counsel.²⁹⁶ This amendment makes the use of postjudgment interrogatories consistent with the interrogatories used in civil discovery.²⁹⁷

Examination Proceedings

Existing law states that the judgment creditor may upon ex parte application require the judgment debtor to appear for a court ordered examination.²⁹⁸ Prior law required that the judgment debtor answer questions concerning the judgment debtor's property but prohibited this examination order from being made more frequently than once

288. CAL. CIV. PROC. CODE §703.080; see *Republic Supply Co. v. Richfield Oil Co.*, 79 F.2d 375, 379 (9th Cir. 1935) (determination of the lowest intermediate balance).

289. CAL. CIV. PROC. CODE §706.010 (employees' earnings protection law under prior law).

290. *Id.* §706.075 (incorporating CAL. STATS. 1978, c. 1133, §7, at 3466 (adding CAL. CIV. PROC. CODE §723.075)).

291. See CAL. STATS. 1978, c. 1133, §7, at 3466 (adding CAL. CIV. PROC. CODE §723.082).

292. CAL. CIV. PROC. CODE §706.075(c) (the filing of the petition for a writ of mandate is pursuant to CAL. CIV. PROC. CODE §1094.5).

293. Compare *id.* §706.075(c) with *id.* §706.082.

294. CAL. CIV. PROC. CODE §708.020 (incorporating CAL. STATS. 1976, c. 308, §1, at 620 (adding CAL. CIV. PROC. CODE §714.5)).

295. CAL. STATS. 1976, c. 308, §1 at 620. See WITKIN *supra* note 39, §124A (Supp. 1981).

296. CAL. CIV. PROC. CODE §708.020.

297. CAL. CIV. PROC. CODE §2030; RECOMMENDATION, *supra* note 1, at 2126.

298. See *Lewis v. Neblett*, 188 Cal. App. 2d 290, 297, 10 Cal. Rptr. 441, 445 (1961); CAL. CIV. PROC. CODE §708.110.

every four months without proof that the judgment debtor had property that was being unjustly refused from application toward the satisfaction of the judgment.²⁹⁹ In addition, prior law permitted the use of the marital testimonial privilege to exempt the spouse from being examined as a debtor of the judgment debtor.³⁰⁰ Chapter 1364 states that the purpose of the appearance by the judgment debtor is to provide information to aid in the enforcement of money judgments.³⁰¹ This change appears to expand the type of information that may be obtained by examination proceedings.³⁰² In addition, Chapter 1364 provides that the time duration between allowable examination orders be at least 120 days.³⁰³ The 120 day duration is more precise than the previous four month period.³⁰⁴ The order may be made more frequently under Chapter 1364 if the judgment creditor shows that there is good cause³⁰⁵ regardless of whether execution has been issued against the property.³⁰⁶ Chapter 1364 further provides that the marital testimonial privilege is not applicable in examination proceedings.³⁰⁷ The purpose of this change is to prevent the privilege from being used as a collusive device for the spouse to conceal assets liable for the satisfaction of the judgment.³⁰⁸

The judgment debtor, under existing law, must be personally served with a copy of the order for examination.³⁰⁹ Chapter 1364 codifies case law by providing that service of the order creates a lien on the personal property of the judgment debtor.³¹⁰

Existing law permits the judgment creditor upon information and belief that a third person has possession of property of the judgment debtor or is indebted to the judgment debtor to apply for an order by the court to require the third person to appear to answer inquiries con-

299. CAL. STATS. 1974, c. 213, §1, at 410 (amending CAL. CIV. PROC. CODE §714); CAL. STATS. 1951, c. 1737, §110, at 4126 (amending CAL. CIV. PROC. CODE §715).

300. CAL. STATS. 1974, c. 214, §1, at 411 (amending CAL. CIV. PROC. CODE §717).

301. CAL. CIV. PROC. CODE §708.110(a).

302. Compare *id.* §708.110 with CAL. STATS. 1974, c. 213, §1, at 410. See also RECOMMENDATION, *supra* note 1, at 2488 (types of information obtainable might include future employment prospects).

303. CAL. CIV. PROC. CODE §708.110.

304. See RECOMMENDATION, *supra* note 1, at 2121 n.428.

305. CAL. CIV. PROC. CODE §708.110(c).

306. See CAL. STATS. 1951, c. 1737, §110, at 4126; RECOMMENDATION, *supra* note 1, at 2121. See *id.* §780.110(c).

307. See CAL. CIV. PROC. CODE §708.130(b).

308. RECOMMENDATION, *supra* note 1, at 2125.

309. CAL. CIV. PROC. CODE §708.110(d) (incorporating CAL. STATS. 1974, c. 214, §1, at 411 (amending CAL. CIV. PROC. CODE §717)).

310. See *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909); *Tucker v. Fontes*, 70 Cal. App. 2d 768, 773, 161 P.2d 697, 699-700 (1945); CAL. CIV. PROC. CODE §§708.110(d), 708.120(c).

cerning the property or indebtedness.³¹¹ Under prior law, the application to examine a third person could be filed only after issuance or return of a writ of execution.³¹² Chapter 1364 eliminates the prerequisite of issuing or returning a writ of execution and requires only that the judgment be enforceable to apply for examination.³¹³ Prior law also required that the third person's interest in the property or indebtedness owed to the judgment debtor exceed \$50.³¹⁴ The amount requirement has been increased by Chapter 1364 to \$250 taking into account the change in the value of the dollar.³¹⁵ Chapter 1364 provides that because the judgment debtor is an interested party, both the judgment debtor and the third person must be given notice not less than 10 days before the date set for the examination.³¹⁶

Prior law provided that nonexempt property in the possession of a third person or a debt owed the judgment debtor could be applied to the satisfaction of a judgment unless the third person claimed an adverse interest.³¹⁷ In this situation, the judgment creditor had to bring an independent action.³¹⁸ Chapter 1364 draws from existing probate procedure³¹⁹ and additionally provides that claims adverse to the judgment creditor may be determined in the examination by the court unless the third person's claim is made in good faith³²⁰ and one of the following conditions exist: (1) the court is not a proper court for an independent civil action on the claim and the third person objects to the determination of the matter,³²¹ (2) there is a civil action pending concerning the third person's interests,³²² or (3) the court determines that the interests in the property or existence of the debt should be determined in a creditor's suit.³²³ In addition, Chapter 1364 allows any other person claiming an interest in the property sought to be applied in an examination proceeding to intervene and have the matter determined by the procedure stated above.³²⁴ To encourage the judgment debtor and third persons to appear at the examination proceedings,

311. *Id.* §708.120(a) (incorporating CAL. STATS. 1974, c. 214, §1, at 411).

312. CAL. STATS. 1974, c. 214, §1, at 411.

313. *See* CAL. CIV. PROC. CODE §683.020 (enforcement of judgments). *Compare id.* §708.120(a) with CAL. STATS. 1974, c. 214, §1, at 411.

314. CAL. STATS. 1974, c. 214, §1, at 411.

315. CAL. CIV. PROC. CODE §708.120(a); *see* Official Comments, *supra* note 60, at 125.

316. CAL. CIV. PROC. CODE §708.120(b); RECOMMENDATION, *supra* note 1 at 2122.

317. CAL. STATS. 1951, c. 1737, §114, at 4127 (amending CAL. CIV. PROC. CODE §719).

318. CAL. STATS. 1951, c. 1737, §115, at 4127 (amending CAL. CIV. PROC. CODE §720).

319. *See generally* CAL. PROB. CODE §§851.5, 852, 853, 2520, 2521, 2522, 2523, 2524, 2526, 2527, 2528.

320. *See* Thomas v. Thomas, 192 Cal. App. 2d 771, 776, 13 Cal. Rptr. 872, 875-76 (1961).

321. CAL. CIV. PROC. CODE §708.180(b)(1).

322. *Id.* §708.180(b)(2).

323. *Id.* §708.180(b)(3).

324. *Id.* §708.190.

Chapter 1364 states that the orders to appear must contain a notice warning that failure to appear could make them liable to the judgment creditor for attorney's fees.³²⁵

Creditor's Suit

The creditor's suit under Chapter 1364 is expanded and made more readily available to creditors.³²⁶ Prior case law required that the judgment creditor resort to and exhaust all legal remedies before a creditor's suit could be maintained in equity.³²⁷ Chapter 1364 provides that an action may be brought without the necessity of levying under a writ of execution or resorting to any of the other possible legal remedies.³²⁸ Case law had provided that the general four year statute of limitations was applicable to creditor's suits and began to run from the return of the writ of execution.³²⁹ Chapter 1364 specifically provides that a creditor's suit is to be commenced before the expiration of the later of: (1) the time when a judgment debtor may bring an action against a third person concerning the property or debt³³⁰ or (2) one year after the creation of a lien if the lien is created at the time when the judgment debtor could bring an action against the third person.³³¹ Generally, under Chapter 1364, a creditor's suit may not be brought after the period for enforcement of the money judgment has expired.³³² If the suit is begun within the time period provided,³³³ however, it will continue to judgment even though the money judgment is no longer enforceable against the original judgment debtor because the period for enforcement has expired.³³⁴ Chapter 1364 codifies case law by providing that the service of a summons on the third person creates a lien on the interests of the judgment debtor in the debt or property that is the subject of the action.³³⁵ Chapter 1364, in addition, specifically provides that there

325. *See id.* §§708.110(e), 708.120(e)(1), 708.170(a)(2) (award of reasonable attorney's fees to the judgment creditor).

326. *See* OFFICIAL COMMENTS, *supra* note 60 at 130. *Compare* CAL. CIV. PROC. CODE §708.210 with CAL. STATS. 1951, c. 1737, §115, at 4127 (amending CAL. CIV. PROC. CODE §720).

327. *See* *Farmers and Merchants Bank v. Bank of Italy*, 216 Cal. 452, 455-58, 14 P.2d 527, 528-29 (1932) (resort to supplementary proceedings required); *Bond v. Bulgheroni*, 215 Cal. 7, 10-11, 8 P.2d, 130, 132 (1932) (resort to supplementary proceedings not required if inadequate or futile).

328. *See* CAL. CIV. PROC. CODE §708.210; OFFICIAL COMMENTS, *supra* note 60, at 130.

329. *See* *Sherman v. S.K.D. Oil Co.*, 185 Cal. 534, 538, 545, 197 P. 799, 801 (1921).

330. CAL. CIV. PROC. CODE §708.230(a)(1).

331. *Id.* §708.230(a)(2).

332. *Id.* §708.230(b).

333. *Id.* §§708.230(a)(1), (2).

334. *Id.* §780.230(c).

335. *See* *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 28-30, 87 P.2d 830, 844 (1939); *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 212-13, 100 P. 242, 245 (1909). *Cf.* *Seymour*

is no right to a jury trial in a creditor's suit.³³⁶ Under Chapter 1364, the costs incurred in bringing a creditor's suit are not recoverable from the judgment debtor as a cost of enforcing the judgment.³³⁷ Furthermore, Chapter 1364 creates a procedure that allows the judgment debtor to claim any applicable exemptions.³³⁸

Charging Orders

Chapter 1364 incorporates portions of the California Corporations Code which provide that a charging order may be used to apply the interest of the judgment debtor partner in the partnership to the satisfaction of the judgment.³³⁹ Case law provides for the creation of a lien on a charging order.³⁴⁰ Under prior law, the time of the creation and the effect of the lien were unclear.³⁴¹ Chapter 1364 clarifies this ambiguity by specifically providing that the lien is created by service of a notice of motion for the charging order³⁴² on the judgment debtor, other partners, or the partnership.³⁴³

Lien in Pending Action or Proceeding

When a judgment debtor is a party to a pending action or special proceeding, existing law provides that a judgment creditor who has a money judgment against the judgment debtor may obtain a lien upon all monies recovered by the judgment debtor in the proceedings.³⁴⁴ Prior law required the judgment creditor to file an application for the lien with the court where the action or special proceeding was pending.³⁴⁵ Chapter 1364 allows the lien to be obtained by filing a notice of lien in the action and an abstract or certified copy of the judgment

v. McAvoy, 121 Cal. 438, 441, 53 P. 946, 947 (1898) (filing bill in equity creates equitable lien); CAL. CIV. PROC. CODE §708.250.

336. See CAL. CIV. PROC. CODE §708.270; cf. *Misrach v. Liederman*, 14 Cal. App. 2d Supp. 757, 760, 58 P.2d 746, 747 (1936) (this case appears to provide that there is no right to a jury trial).

337. CAL. CIV. PROC. CODE §708.290.

338. See *id.* §708.260 (this procedure is comparable to that provided by CAL. CIV. PROC. CODE §708.120 under examination proceedings).

339. See *id.* §§708.310, 699.720(a)(2) (property not subject to execution); CAL. CORP. CODE §15028.

340. See *Taylor v. S & M Lamp Co.*, 190 Cal. App. 2d 700, 707-12, 12 Cal. Rptr. 323, 327-31 (1961).

341. See *id.*

342. Cf. *Ribero v. Callaway*, 87 Cal. App. 2d 135, 138, 196 P.2d 109, 111 (1948) (charging orders issued on noticed motion).

343. See CAL. CIV. PROC. CODE §§708.320(a) (this provision is analogous to the creation of a lien in an examination proceeding under art. 2 (commencing with §708.110) by service of the order of examination), 416.40 (service on partnership).

344. See *id.* §708.410(a) (incorporating CAL. STATS. 1970, c. 1523, §7.5, at 3069 (amending CAL. CIV. PROC. CODE §688.1)).

345. See CAL. STATS. 1970, c. 1523, §7.5, at 3069.

creditor's judgment.³⁴⁶ Furthermore, Chapter 1364 clarifies that this lien may reach property recovered by the judgment debtor.³⁴⁷ Case law has provided that if the judgment debtor obtained a money judgment against another but failed to enforce the judgment and have it paid to the judgment creditor, the judgment creditor's only remedy was an action to foreclose on the lien to reach the amount represented by the judgment.³⁴⁸ Chapter 1364 expands the remedies available to the judgment creditor in this situation to any applicable procedure including but not limited to the appointment of a receiver to collect the judgment.³⁴⁹ In addition, Chapter 1364 provides for an exemption procedure similar to the procedure available in creditor's actions.³⁵⁰

Assignment Order

Chapter 1364 provides a new procedure for reaching certain forms of property that are not reachable by levy under a writ of execution.³⁵¹ Case law had prohibited the use of garnishment procedures to allow a judgment creditor to reach future rental payments.³⁵² Under Chapter 1364, the right to future rental payments may be applied to the satisfaction of a judgment by use of an assignment order.³⁵³ Case law and Chapter 1364 provide that the nonexempt loan value of an unmaturing life insurance policy is not reachable by a levy of execution.³⁵⁴ It is, however, reachable by an assignment order as provided for in Chapter 1364.³⁵⁵ Furthermore, Chapter 1364 provides that other payments reachable by a court ordered assignment are commissions,³⁵⁶ royalties,³⁵⁷ and payments due from a patent or copyright.³⁵⁸ In determining whether to order an assignment, the court may in its discretion take into account the reasonable needs of the judgment debtor and those supported by the judgment debtor.³⁵⁹ In addition to the needs of the judgment debtor, the court may look to the amount being deducted in

346. See CAL. CIV. PROC. CODE §708.410(b).

347. See *id.*

348. See *Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc.*, 14 Cal. 3d 742, 748, 537 P.2d 399, 403, 122 Cal. Rptr. 567, 571 (1975).

349. See OFFICIAL COMMENTS, *supra* note 60, at 136; CAL. CIV. PROC. CODE §708.480.

350. See OFFICIAL COMMENTS, *supra* note 60, at 135.

351. See CAL. CIV. PROC. CODE §§708.510-708.560 (inclusive). See OFFICIAL COMMENTS, *supra* note 60, at 137.

352. See *Hustead v. Superior Court*, 2 Cal. App. 3d 780, 785-87, 83 Cal. Rptr. 26, 28-30 (1969).

353. CAL. CIV. PROC. CODE §708.510(a)(2).

354. *Id.* §699.720(a)(6); see *Equico Lessors, Inc. v. Metropolitan Life Ins. Co.*, 88 Cal. App. 3d 7-10, 151 Cal. Rptr. 618, 619-21 (1978).

355. CAL. CIV. PROC. CODE §708.510(a)(6).

356. *Id.* §708.510(a)(3).

357. *Id.* §708.510(a)(4).

358. *Id.* §708.510(a)(5).

359. *Id.* §708.510(c)(1).

satisfaction of other judgments and the amount remaining due on the money judgment.³⁶⁰ Chapter 1364 further provides an exemption procedure requiring that the judgment debtor apply to the court by noticed motion no later than three days before the date set for the hearing on the judgment creditor's application for the assignment order.³⁶¹ The court determines whether to allow the exemption claim at the hearing.³⁶²

Receiver to Enforce Judgment

Under prior law, a receiver could generally be appointed to enforce a judgment only when a writ of execution had been returned unsatisfied or the judgment debtor refused to apply property in satisfaction of the judgment.³⁶³ Chapter 1364 expands the situations when a receiver can be appointed and provides that a receiver may be appointed when a writ of execution would not reach property and other remedies appear inadequate.³⁶⁴ Chapter 1364 specifically states that an Alcoholic Beverage License may be sold through the use of a receiver.³⁶⁵ Transfer to the receiver, however, is precluded when the judgment debtor can demonstrate that the sale of the license is unlikely to yield any excess over the amount required to satisfy delinquent taxes³⁶⁶ and the claims of the creditors that have priority over the judgment creditor.³⁶⁷

Collection of Judgment—Debtor is Creditor of Public Entity

Existing law provides that when money is owing and unpaid to the judgment debtor by a public entity,³⁶⁸ the judgment creditor may file an abstract of the money judgment or a certified copy with the public entity.³⁶⁹ Under Chapter 1364, filing of the abstract or certified copy of the judgment creates a lien on the money owing and unpaid to the judgment debtor by the public entity.³⁷⁰ This provision is consistent with case law that equates filing of the required documents with levy on

360. *Id.* §708.510(c). See N.Y. CIV. PROC. LAW §5226 (McKinney 1978). This is based on the standard for fixing the amount of payments under the New York installment payment order procedure.

361. CAL. CIV. PROC. CODE §708.550(a).

362. *Id.* §708.550(c).

363. CAL. STATS. 1980, c. 1078, §1, at 3439; see *Olsan v. Comoro*, 73 Cal. App. 3d 642, 647-49, 140 Cal. Rptr. 835, 838-39 (1977).

364. See CAL. CIV. PROC. CODE §708.620; OFFICIAL COMMENTS, *supra* note 60 at 139.

365. CAL. CIV. PROC. CODE §708.630(a).

366. See CAL. BUS. & PROF. CODE §24049.

367. See *id.* §24074. CAL. CIV. PROC. CODE §708.630(b).

368. See CAL. CIV. PROC. CODE §708.710 (definition of public entity).

369. *Id.* §708.730(a), 708.740(a) (incorporating CAL. STATS. 1980, c. 1007, §2, at 3212 (amending CAL. CIV. PROC. CODE §710)).

370. CAL. CIV. PROC. CODE §708.780.

property and determines priority of interests at the time of filing.³⁷¹ In addition, Chapter 1364 requires that the judgment creditor serve notice of the filing on the judgment debtor.³⁷² To discharge the claim of the judgment debtor, existing law requires that the public entity deposit a warrant or check with the court.³⁷³ Chapter 1364 requires that the public entity serve a notice of deposit on the judgment debtor.³⁷⁴ This notice enables the judgment debtor to make a claim of exemption before the judgment creditor receives the money from the court.³⁷⁵ Chapter 1364, in addition, provides for an exemption procedure for the judgment debtor.³⁷⁶

Enforcement Against Public Franchise

Prior law allowed the sale of a franchise upon execution in the same manner and with the same effect as any other property.³⁷⁷ Chapter 1364 prohibits a public franchise from being subject to levy and sale under execution.³⁷⁸ Chapter 1364 provides, however, that a public franchise may be applied to the satisfaction of a judgment only pursuant to a court order made in the discretion of the court.³⁷⁹

Other Enforcement Procedures

Chapter 1364 allows a judgment debtor's beneficial interest in a trust to be used to satisfy a money judgment.³⁸⁰ Existing law provides that a contingent interest is not subject to the satisfaction of a money judgment under execution.³⁸¹ To prevent the occurrence of a sacrifice sale, Chapter 1364 permits the court to fashion a suitable remedy to balance the judgment debtor's interests with the rights of the judgment creditor.³⁸²

371. See *Department of Water & Power v. Inyo Chem. Co.*, 16 Cal. 2d 744, 751-53, 108 P.2d 410, 415-16 (1940); *Ott Hardware Co. v. Davis*, 165 Cal. 795, 800, 134 P. 973, 975 (1913).

372. CAL. CIV. PROC. CODE §708.730(b).

373. See *id.* §708.740(c), 708.750 (incorporating CAL. STATS. 1980, c. 1007, §2, at 3212).

374. *Id.* §708.770(a).

375. See Official Comments, *supra* note 60, at 142.

376. See generally CAL. CIV. PROC. CODE §708.770.

377. See CAL. STATS. 1931, c. 865, §1, at 1837 (adding CAL. CIV. PROC. CODE §724a).

378. See CAL. CIV. PROC. CODE §699.720(a)(7).

379. *Id.* §§708.920, 699.720(a)(7) (property not subject to execution).

380. *Id.* §709.010(b)(trusts); see OFFICIAL COMMENTS, *supra* note 60, at 144. "Enforcement processes may not reach the specific trust assets or the judgment debtor's interest in the trust except pursuant to a court order applying the interest or assets to the satisfaction of the judgment." *Id.* This remedy replaces the remedy of a creditor's suit that was formerly used. *Id.*

381. CAL. CIV. PROC. CODE §699.720(a)(9). See generally *Anglo California Nat'l Bank v. Kidd*, 58 Cal. App. 2d 651, 137 P.2d 460 (1943) (contingent interests are not subject to satisfaction of a money judgment).

382. See CAL. CIV. PROC. CODE §709.020.

Third-Party Claims

Prior law provided a third-party claim procedure to be used only for the personal property claims of parties alleging ownership *and* a right to possession.³⁸³ Third-party claims in real property were asserted in quiet title actions or actions to enjoin the execution of the sale of the property.³⁸⁴ Chapter 1364 makes a third-party claim procedure available for claims involving real or personal property when either ownership *or* the right to possession is claimed.³⁸⁵ Furthermore, Chapter 1364 allows those claiming a security interest in or lien on personal property to make a third-party claim.³⁸⁶

Chapter 1364 requires that the judgment debtor be given notice of any third-party claim proceedings and that two copies be made of the claim form, one for the creditor and one to be served on the judgment debtor.³⁸⁷ Chapter 1364 requires this claim to be filed after levy but before the property is applied to the satisfaction of the creditor's judgment.³⁸⁸ The requirement that the judgment debtor receive notice in the third-party proceedings will assist the court to correctly determine the interests of the parties.³⁸⁹

Under existing law, if the third party has filed an undertaking, the creditor must be notified that the property will be released unless the creditor objects to the undertaking.³⁹⁰ If the third party has not filed an undertaking the creditor must be notified that the property will still be released unless the creditor files an undertaking with the levying officer.³⁹¹ Prior law stated that the creditor had five days after the levying officer served the demand for an undertaking to comply.³⁹² Chapter 1364 extends the time period in which the creditor must either file an undertaking or object to the third party's undertaking to 10 days after service of the third-party claim.³⁹³ If the third party making the claim has a security interest or lien on personal property and has not filed an undertaking then the creditor is given the choice to either file the re-

383. See CAL. STATS. 1980, c. 309, §1, at 635 (amending CAL. CIV. PROC. CODE §689).

384. See WITKIN, *supra* note 39, §§115(1), (2).

385. CAL. CIV. PROC. CODE §720.110.

386. *Id.* §§720.110, 720.210(a).

387. See *id.* §§720.120, 720.140(c), 720.220, 720.240(c), 720.320(a)(1), 720.620, 720.640(a)-(b).

388. *Id.* §§720.120, 720.220.

389. See RECOMMENDATION, *supra* note 1, at 2146.

390. CAL. CIV. PROC. CODE §720.140(a)(3) (incorporating CAL. STATS. 1980, c. 309, §1, at 635 (amending CAL. CIV. PROC. CODE §689)).

391. *Id.* §720.140(a)(4).

392. See CAL. STATS. 1980, c. 309, §1, at 635; CAL. STATS. 1980, c. 309, §2, at 638 (amending CAL. CIV. PROC. CODE §§689, 689b).

393. CAL. CIV. PROC. CODE §720.140(b).

quired statement³⁹⁴ with a sufficient undertaking³⁹⁵ or deposit the amount claimed plus interest with the levying officer.³⁹⁶ Prior law required that the levying officer pay the deposit to the chattel mortgagee or conditional seller within five days after receipt by the officer.³⁹⁷ Under Chapter 1364 the levying officer is to promptly pay the deposit to the lienholder or secured party.³⁹⁸

Under existing law if the third party claims ownership and the right to possession then an undertaking filed to release the property may be twice the value of the property.³⁹⁹ If the claimant is a chattel mortgagee or conditional seller, however, the undertaking may be either twice the value of the property or twice the value of the amount due on the underlying contract.⁴⁰⁰ Chapter 1364 restructures the amount of the undertaking required by all third-party claimants and provides that the undertaking must be either twice the value of the property to be released or twice the amount of the creditor's lien on the property.⁴⁰¹ If the creditor has given an undertaking then the third party's undertaking must equal the creditor's.⁴⁰² Prior law required that the creditor's undertaking be twice the value of the property levied upon.⁴⁰³ Chapter 1364 now requires that the creditor's undertaking not exceed a statutorily set amount.⁴⁰⁴ If the action is pending or the judgment was entered in superior court the amount is \$7,500.⁴⁰⁵ If the action is pending or the judgment was entered in municipal or justice court the amount is \$2,500.⁴⁰⁶ In either case the lesser of (1) the statutory amount or (2) twice the amount of the execution lien as of the date of levy or twice the amount of other enforcement liens as of the date of its creation is to be used.⁴⁰⁷

Chapter 1364 exemplifies that a judgment or levy reaches only the interest in the property the judgment debtor had by providing that the superior interests of a third person in the property are not waived by

394. *See generally id.* §720.280 (requirement of statement).

395. *See generally id.* §720.260 (requirements of an undertaking).

396. *See id.* §720.240(a)(4).

397. *See* CAL. STATS. 1980, c. 309, §2, at 638 (amending CAL. CIV. PROC. CODE §689b).

398. *See* CAL. CIV. PROC. CODE §720.290(a).

399. *See id.* §720.630(b) (incorporating CAL. STATS. 1965, c. 1974, §1, at 4501 (amending CAL. CIV. PROC. CODE §710(b))).

400. *See id.*

401. *See id.* §720.630(c)(1), (2).

402. *See id.* §720.630(d).

403. *See* CAL. STATS. 1980, c. 309, §1, at 635 (amending CAL. CIV. PROC. CODE §689); CAL. STATS. 1980, c. 309, §2, at 638 (amending CAL. CIV. PROC. CODE §689b).

404. CAL. CIV. PROC. CODE §720.160(b).

405. *Id.* §720.160(b)(1).

406. *Id.* §720.160(b)(2).

407. *Id.* §720.160(b).

the failure to file a third-party claim.⁴⁰⁸ If the third party is a secured party or lienholder with an interest superior to that of the creditor the failure of the third party to file a claim within 30 days after service of a written demand for the claim by the creditor will not affect the third party's interest except to cause any previous superiority over the creditor to be lost.⁴⁰⁹ The third parties will then share only in any excess as will other junior lienholders.⁴¹⁰

A. Hearing on Third-Party Claims

Existing law provides that upon filing a third-party claim the parties have 15 days to petition for a hearing with the court.⁴¹¹ This hearing must be held within 20 days of the filing of the petition, and notice must be served on the nonpetitioning party and the judgment debtor not later than 10 days prior to the hearing.⁴¹² Furthermore, existing law requires that after the notice of the hearing on the third-party claim has been received by the levying officer the officer must promptly file the third-party claim with the court.⁴¹³ Chapter 1364, in addition, provides that the required statement be filed with the court along with any undertaking by the creditor that has been filed with the levying officer.⁴¹⁴

Chapter 1364 provides that if the third-party claim is by a secured party and the creditor has not filed a statement in opposition to that claim, but has petitioned for a hearing on the claim, the creditor must file a statement with the court when the creditor files the petition, and a copy of the statement must be served on the secured party.⁴¹⁵ Moreover, if the petitioner is the third party and the creditor has not previously filed a statement in opposition, the creditor must do so not later than five days before the hearing date.⁴¹⁶ Within this same time frame the creditor must serve a copy of the statement on the third party.⁴¹⁷ Chapter 1364 codifies case law providing that there is no right to a jury

408. See *id.* §720.150(b); OFFICIAL COMMENTS, *supra* note 60, at 152.

409. See CAL. CIV. PROC. CODE §§720.250(b), 720.550; RECOMMENDATION, *supra* note 1, at 2147.

410. See CAL. CIV. PROC. CODE §§720.250(b), 720.550.

411. CAL. CIV. PROC. CODE §720.310(a).

412. CAL. CIV. PROC. CODE §§720.310(c), 720.320(a) (incorporating CAL. STATS. 1980, c. 309, §1, at 635 (amending CAL. CIV. PROC. CODE §689); CAL. STATS. 1980, c. 309, §2, at 638 (amending CAL. CIV. PROC. CODE §689b).

413. CAL. CIV. PROC. CODE §720.330(a); see CAL. STATS. 1980, c. 309, §1, at 635; CAL. STATS. 1980, c. 309, §2, at 638.

414. CAL. CIV. PROC. CODE §720.330(c).

415. *Id.* §720.340(a).

416. *Id.* §720.340(b).

417. *Id.*

trial in a hearing on a third party claim.⁴¹⁸

B. Third-Party Undertakings to Release Property

Existing law permits a third party to file an undertaking to release personal property levied upon under execution for the satisfaction of a money judgment.⁴¹⁹ Prior law restricted this procedure to personal property under execution.⁴²⁰ Chapter 1364 expands this procedure to permit an undertaking to be filed by a third party claiming ownership or the right of possession to release real property levied upon under a writ of attachment or execution.⁴²¹

In addition, Chapter 1364 specifically provides that persons claiming ownership or right of possession in personal property levied on either under attachment, execution, or sale, may file an undertaking to release the property.⁴²² This procedure is also available to persons claiming a security interest in or lien on personal property.⁴²³ Under Chapter 1364, the undertaking must be filed with the levying officer at the time the third-party claim is filed.⁴²⁴ Chapter 1364 allows a third party that has previously filed a claim to file the undertaking before the levying officer applies the property to the satisfaction of the judgment.⁴²⁵

Existing law provides that the judgment creditor receive notice of any undertaking filed by the third-party claimant.⁴²⁶ Chapter 1364 specifies that both the judgment creditor and the judgment debtor must receive notice.⁴²⁷ If the undertaking is filed at the time of the claim then it is to be served on the parties with the claim.⁴²⁸ If, however, the undertaking is filed after the claim, the notice is to be served not later than five days after the undertaking is filed.⁴²⁹ The notice is to inform the creditor and the debtor that the property will be released unless the creditor objects to the undertaking.⁴³⁰ Prior law provided that a third

418. CAL. CIV. PROC. CODE §720.410. *See generally* *Misrach v. Liederman*, 14 Cal. App. 2d 757, 58 P.2d 746 (1936) (third-party claim is not a proceeding at common law to which a jury trial was available); *Mazuran v. Finn*, 53 Cal. App. 656, 200 P. 769 (1921).

419. *Id.* §§720.610(b), (c) (incorporating CAL. STATS. 1965, c. 1974, §1, at 4501 (amending CAL. CIV. PROC. CODE §710b)). *See generally id.* §§720.710, 720.800 (general provisions on undertakings in third-party claims).

420. *See* CAL. STATS. 1965, c. 1974, §1, at 4501 (amending CAL. CIV. PROC. CODE §710b).

421. CAL. CIV. PROC. CODE §720.610(a).

422. *Id.* §720.610(b).

423. *Id.* §720.610(c).

424. *Id.* §720.620(a).

425. *See id.* §720.620(b).

426. *See id.* §720.640 (incorporating CAL. STATS. 1965, c. 1923, §1, at 4444 (amending CAL. CIV. PROC. CODE §711)).

427. *Id.*

428. *Id.* §720.640(a).

429. *Id.* §720.640(b).

430. *Id.* §720.640.

party undertaking was effective 10 days after service on the creditor or if an objection to the undertaking was filed by the creditor, then it became effective when a new undertaking was filed as required.⁴³¹ Chapter 1364 simplifies this by making the undertaking effective when the property is released.⁴³²

Satisfaction of Judgment

Existing law provides that satisfaction of a money judgment must be entered in the register of actions when one of the three following events occurs:⁴³³ (1) a writ is returned satisfied for the full amount;⁴³⁴ (2) an acknowledgment of satisfaction of the judgment is filed with the court;⁴³⁵ or (3) the court enters the satisfaction of the judgment.⁴³⁶ Furthermore, existing law provides that if an abstract of a money judgment has been recorded with the county recorder and the judgment is then satisfied, the judgment creditor must file an acknowledgment of satisfaction with the court and serve it on the judgment debtor.⁴³⁷ Prior law allowed the judgment creditor 30 days to accomplish the filing with the court and service on the judgment debtor.⁴³⁸ Chapter 1364 eliminates this time limit and requires that both service and filing be carried out immediately after the judgment is satisfied.⁴³⁹

Existing law permits the judgment debtor to serve a written demand on the judgment creditor to execute, acknowledge, and deliver to the judgment debtor the acknowledgment of satisfaction of the judgment.⁴⁴⁰ The judgment creditor has, under existing law, 15 days after receipt of the demand to serve the judgment debtor with the acknowledgment.⁴⁴¹ Furthermore, if the acknowledgment is not delivered, the judgment creditor is liable for any resulting damages, a forfeiture of \$100, and reasonable attorney's fees.⁴⁴² Chapter 1364 requires that a warning stating these consequences of noncompliance accompany the

431. See CAL. STATS. 1933, c. 744, §139, at 1890 (amending CAL. CIV. PROC. CODE §713½).

432. Compare CAL. CIV. PROC. CODE §720.650 with CAL. STATS. 1933, c. 744, §139, at 1890 (amending CAL. CIV. PROC. CODE §720.650).

433. See CAL. CIV. PROC. CODE §724.020 (incorporating CAL. STATS. 1980, c. 600, §1, at 1622 (amending CAL. CIV. PROC. CODE §675)).

434. *Id.* §724.020(a) (incorporating CAL. STATS. 1980, c. 600, §1, at 1622).

435. *Id.* §724.020(b) (incorporating CAL. STATS. 1980, c. 600, §1, at 1622).

436. *Id.*

437. See *id.* §§724.050(a)(1), (2) (incorporating CAL. STATS. 1980, c. 600, §1, at 1622).

438. See CAL. STATS. 1980, c. 600, §1, at 1622 (amending CAL. CIV. PROC. CODE §675).

439. See CAL. CIV. PROC. CODE §§724.030, 724.040 (when a money judgment is satisfied the acknowledgment of satisfaction must be filed immediately with the court).

440. *Id.* §724.050(a) (incorporating CAL. STATS. 1980, c. 600, §1, at 1622 (amending CAL. CIV. PROC. CODE §675)).

441. *Id.* §724.050(c) (incorporating CAL. STATS. 1980, c. 600, §1, at 1622).

442. *Id.* §724.050(e) (incorporating CAL. STATS. 1980, c. 600, §1, at 1622 (amending CAL. CIV. PROC. CODE §675)).

written demand of the judgment debtor.⁴⁴³ Chapter 1364 permits the county clerk, for a \$3 fee, to issue a certificate of satisfaction of the judgment when satisfaction of the judgment has been entered in the register of actions.⁴⁴⁴ This certificate of satisfaction may be useful to the judgment debtor when an acknowledgment of satisfaction is not easily obtainable since the certificate serves the same purpose as the acknowledgment.⁴⁴⁵

Case law provides a procedure for the acknowledgment of a partial satisfaction of the judgment.⁴⁴⁶ Chapter 1364 incorporates this case law and further provides a specific statutory procedure similar to the provisions for acknowledgment of full satisfaction of a judgment.⁴⁴⁷ Chapter 1364 permits the judgment debtor or the owner of real or personal property that a judgment lien has been created on, to serve a written demand on the judgment creditor requiring the judgment creditor to execute, acknowledge, and deliver to the judgment debtor an acknowledgment of the partial satisfaction of the judgment within 15 days after receipt of the demand by the judgment creditor.⁴⁴⁸ Under Chapter 1364, if the judgment creditor does not comply with the demand within the designated time period the judgment debtor may apply to the court on noticed motion to have the court order the judgment creditor to comply.⁴⁴⁹ Unlike the provisions for fully satisfied judgments there are no statutory sanctions⁴⁵⁰ for the failure to comply with the judgment debtor's demand and no award for attorney's fees⁴⁵¹ to the prevailing party.⁴⁵²

Chapter 1364 provides an acknowledgment of the satisfaction of matured installments under an installment judgment.⁴⁵³ The procedure is similar to the procedures for full satisfaction of lump sum judgments.⁴⁵⁴ Chapter 1364 permits the judgment debtor or the owner of

443. *Id.* §724.050(b).

444. *Id.* §724.100(a).

445. *See* RECOMMENDATION *supra* note 1, at 2599.

446. *See generally* Campbell v. Southern Pacific Co., 22 Cal. 3d 51, 583 P.2d 121, 148 Cal. Rptr. 596 (1978) (partial satisfaction of judgment & acknowledgment), Kaplan v. Hacker, 113 Cal. App. 2d 571, 248 P.2d 464 (1952) (partial satisfaction of judgment); Dallman v. Dallman, 179 Cal. App. 2d 27, 3 Cal. Rptr. 383 (1960) (motion to compel plaintiff to acknowledge partial satisfaction of terms of interlocutory divorce decree); Partial Satisfaction form for Municipal Court, Los Angeles County.

447. *Compare* CAL. CIV. PROC. CODE §§724.110-724.120 with CAL. CIV. PROC. CODE §§724.010-724.100.

448. CAL. CIV. PROC. CODE §724.110(a).

449. *Id.* §724.110(b).

450. *See id.* §724.050(c) (sanctions imposed).

451. *See id.* §724.080 (award of attorney's fees).

452. *Compare id.* §724.110 with *id.* §724.050 and *id.* §724.080.

453. *See generally id.* §§724.210-724.250.

454. *Compare id.* Chapter 3 (commencing with §724.210) with *id.* Chapter 1 (commencing with §724.010).

real property to serve on the judgment creditor a written demand to execute, acknowledge, and deliver to the judgment debtor or owner of the real property an acknowledgment of satisfaction of matured installments under an installment judgment.⁴⁵⁵ The demand must include a warning informing the judgment creditor of the sanctions that may be imposed for failure to comply within 15 days after receipt of the demand.⁴⁵⁶ These sanctions include reasonable attorney's fees⁴⁵⁷ incurred in having the court determine the matter, resulting damages and a \$100 forfeiture.⁴⁵⁸ If the real property is subject to a judgment lien, the acknowledgment of satisfaction of matured installments permits the judgment debtor or other owner to transfer the property free of the lien.⁴⁵⁹

Conclusion

Chapter 1364 provides new comprehensive legislation that will give a full and clear statutory treatment of the law governing enforcement of judgments.⁴⁶⁰ Chapter 1364 creates alternatives to bringing actions on judgments by providing for a multiple renewal procedure to continue the enforcement of the judgment.⁴⁶¹ The exemptions are generally revised and increased to take into account the effects of inflation.⁴⁶² The provision for the creation of a judgment lien on personal property allows the judgment creditor to place a lien on the judgment debtor's property more quickly than would have been available under the execution provisions.⁴⁶³ Chapter 1364 adds a procedure, exclusive to the enforcement of judgments area, for execution as opposed to the incorporation and application utilized under prior attachment law.⁴⁶⁴ Proceedings supplemental to execution⁴⁶⁵ are modified and those procedures for examination have been significantly restructured.⁴⁶⁶ When a judgment has been partially satisfied by the judgment debtor, Chapter 1364 designates that an acknowledgement of judgment be filed

455. CAL. CIV. PROC. CODE §724.220(a).

456. *See id.* §§724.220(b), (c).

457. *Id.* §724.220(b).

458. *Id.* §724.240(b).

459. RECOMMENDATION *supra* note 1, at 167. *See* CAL. CIV. PROC. CODE §697.400(b).

460. *See* RECOMMENDATION *supra* note 1, at 2027.

461. *See* CAL. CIV. PROC. CODE §§683.110-683.220.

462. *See id.* §§704.010-704.990. *See* Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration* 9 PAC. L.J. 889, 890.

463. *Compare* CAL. CIV. PROC. CODE §§697.510-697.670 with CAL. STATS. 1977, c. 155, §1, at 617 (amending CAL. CIV. PROC. CODE §688).

464. *Compare* CAL. CIV. PROC. CODE §§699.010-701.830 with CAL. STATS. 1977, c. 155, §1, at 617 (amending CAL. CIV. PROC. CODE §688).

465. *See* CAL. CIV. PROC. CODE §§708.010-708.020, 708.210-709.030.

466. *See id.* §§708.110-708.205.

if requested by the judgment debtor.⁴⁶⁷ Chapter 497 also makes conforming revisions in various sections of the law.⁴⁶⁸

467. *Id.* §724.110.

468. *See* Chapter 497 (AB 798).

Civil Procedure; attachments

Code of Civil Procedure §§481.050, 481.150, 481.160, 481.230, 488.010, 488.020, 488.030, 488.040, 488.045, 488.050, 488.060, 488.070, 488.080, 488.090, 488.310, 488.320, 488.330, 488.340, 488.350, 488.360, 488.370, 488.380, 488.390, 488.400, 488.410, 488.420, 488.430, 488.500, 488.510, 488.520, 488.530, 488.540, 488.550, 488.555, 488.560, 488.570, 489.240, 490.050, 491.010, 491.020, 491.030, 491.040 (repealed); §§481.055, 481.113, 481.115, 481.117, 481.175, 481.195, 481.203, 481.205, 481.207, 481.223, 481.225, 483.015, 487.025, 487.030, 488.010, 488.020, 488.030, 488.040, 488.050, 488.060, 488.070, 488.080, 488.090, 488.100, 488.110, 488.120, 488.130, 488.140, 488.300, 488.305, 488.315, 488.325, 488.335, 488.345, 488.355, 488.365, 488.375, 488.385, 488.395, 488.405, 488.415, 488.425, 488.435, 488.445, 488.450, 488.455, 488.460, 488.465, 488.470, 488.475, 488.480, 488.485, 488.500, 488.510, 488.600, 488.610, 488.700, 488.710, 488.720, 488.730, 488.740, 491.110, 491.120, 491.130, 491.140, 491.150, 491.160, 491.170, 491.180, 491.190, 491.200, 491.310, 491.320, 491.330, 491.340, 491.350, 491.360, 491.370, 491.410, 491.420, 491.430, 491.440, 491.450, 491.460 (new); §§481.020, 481.030, 481.040, 481.080, 481.090, 481.110, 481.170, 482.060, 482.070, 482.080, 482.100, 483.010, 483.020, 484.020, 484.050, 484.070, 484.090, 484.100, 484.110, 484.320, 484.340, 484.350, 484.530, 485.520, 485.610, 486.020, 486.060, 486.080, 486.110, 487.010, 487.020, 489.320, 490.010, 490.020, 492.010, 492.040, 492.070, 493.010, 493.040, 904.1, 904.2 (amended); Commercial Code §9409 (amended); Government Code §26744 (amended).

AB 2332 (McAlister); STATS. 1982, Ch 1198

Support: California Law Revision Commission; Department of Finance

Enlarges the list of property subject to attachment; adds, amends, and renumbers levy procedures; alters the manner of service; defines the duties and liabilities of third persons after levy; establishes procedures for

obtaining a right to attach order on property involved in a special or pending action; addresses examinations of third persons; expands creditor's suits in the area of attachment; amends the types of appeals that may be taken from a Superior Court.

Introduction

Chapter 1198 makes numerous revisions to the statutes governing attachments.¹ The apparent intent of Chapter 1198 is to correct many of the problems that have been raised since the last major revision of the Attachment Law in 1976.² In addition, Chapter 1198 attempts to conform the law of attachments with the law dealing with the enforcement of judgments as set forth in Chapter 1364.³

Chapter 1198 specifies the types of property subject to,⁴ or exempt from⁵ attachment and makes major revisions regarding the various methods of attachment.⁶ Chapter 1198 also addresses the manner of service used in attachments,⁷ duties and liabilities of third persons after levy,⁸ liens in pending actions or procedures,⁹ the examination of third persons,¹⁰ and creditor's suits.¹¹

Finally in an unrelated change, Chapter 1198 addresses the types of appeals that may be taken from a superior court.¹² The changes involve writs of mandamus or prohibition,¹³ interlocutory judgments,¹⁴ and right to attach orders.¹⁵

Property Subject to Attachment

Chapter 1198 enlarges the list of property¹⁶ that may be subject to an attachment.¹⁷ Under existing law the plaintiff may attach (1) corporate property,¹⁸ (2) property of a partnership or an unincorporated associa-

1. *Recommendation Relating to Attachment*, 16 CAL. L. REVISION COMM'N REPORTS 707 (1982) [hereinafter cited as *Recommendation*].

2. *Id.*

3. *Id.*

4. CAL. CIV. PROC. CODE §487.010.

5. *Id.* §§487.020, 487.030.

6. *See id.* §§488.010-488.485.

7. *Id.* §482.070.

8. *Id.* §§488.600, 488.610.

9. *Id.* §§491.410-491.460.

10. *Id.* §§491.110-491.200.

11. *Id.* §§491.310-491.370.

12. *See id.* §904.1.

13. *Id.* §904.1(a)(4).

14. *Id.* §904.1(j).

15. *Id.* §904.1(e).

16. *Id.* §481.195 (definition of property).

17. Compare CAL. CIV. PROC. CODE §487.010 with CAL. STATS. 1976, c. 437, §24, at 1127 (amending CAL. CIV. PROC. CODE §487.010).

18. CAL. CIV. PROC. CODE §487.010(a).

tion;¹⁹ (3) real property²⁰ that is not subject to a leasehold for less than one year;²¹ (4) accounts receivable,²² chattel paper,²³ and general intangibles;²⁴ (5) equipment;²⁵ (6) farm products;²⁶ (7) inventory;²⁷ (8) final money judgments;²⁸ (9) money except for the first \$1000;²⁹ (10) negotiable documents of title;³⁰ (11) instruments;³¹ and (12) securities.³² Chapter 1198 adds (13) minerals to be extracted,³³ and (14) community property that fits into one of the categories listed in (3) through (13)³⁴ to the list of property that may be attached.³⁵

Moreover, Chapter 1198 further expands the categories of property that may be attached by providing that community property includes property interests of, or obligations owed to either spouse.³⁶ Consequently, even community property that is possessed or controlled by the defendant's spouse will be subject to attachment.³⁷

Dwelling Exemptions

Prior to the enactment of Chapter 1198 a defendant waived an allowable exemption for real property if it was not claimed at the hearing concerning the issuance of the right to attach order and writ of attachment.³⁸ Chapter 1198 provides that the exemption is not waived if unclaimed at the hearing.³⁹ In addition, the exemption may be claimed at any time prior to judgment.⁴⁰

Under prior law, a homestead declaration could defeat a prior attachment lien.⁴¹ With the enactment of Chapter 1198, the recording of

19. *Id.* §487.010(b).

20. *Id.* §481.203 (definition of real property).

21. *Id.* §487.010(c)(1).

22. *Id.* §481.030 (definition of account receivable).

23. *Id.* §481.040 (definition of chattel paper).

24. *Id.* §487.010(c)(2). *See id.* §481.115 (definition of general intangible).

25. *Id.* §487.010(c)(3).

26. *Id.* §487.010(c)(4). *See id.* §481.110 (definition of farm product).

27. *Id.* §487.010(c)(5).

28. *Id.* §487.010(c)(6).

29. *Id.* §487.010(c)(7).

30. *Id.* §487.010(c)(8); *Id.* §481.090 (definition of documents of title).

31. *Id.* §487.010(c)(9); *Id.* §481.117 (definition of instrument).

32. *Id.* §487.010(c)(10).

33. *Id.* §487.010(c)(11).

34. *Id.* §487.010(d).

35. *Id.*

36. *Id.* §487.010(d)(1).

37. *Id.* §487.010(d)(2).

38. *See* CAL. STATS. 1976, c. 437, §§8, 11, 14, 19, at 1120, 1122, 1123, 1125 (amending CAL. CIV. PROC. CODE §§484.070, 484.350, 484.530 and enacting CAL. CIV. PROC. CODE §485.610).

39. *See* CAL. CIV. PROC. CODE §§484.070, 484.350, 484.530, 485.610.

40. *Id.*

41. *See* *Becker v. Lindsay*, 16 Cal. 3d 188, 193-94, 545 P.2d 260, 263, 127 Cal. Rptr. 348, 351 (1976); *see also* *Recommendation*, *supra* note 1, at 709.

a homestead declaration no longer has an effect on the plaintiff's right to attach a declared homestead.⁴² Chapter 1198 specifies, however, that only the value of the homestead exceeding the *total* of any lien or encumbrance on the homestead at the time of attachment, plus \$30,000 or \$45,000 depending on the status of the defendant, will be subject to attachment.⁴³

Case law has held that homestead property subject to an encumbrance must be sold subject to that encumbrance.⁴⁴ Accordingly, any bid must exceed the homestead exemption before the property subject to the encumbrance can be sold.⁴⁵ Chapter 1198 follows this rationale by requiring a bid to exceed the amount of the homestead exemption, plus the amount of any additional encumbrances, before an order for sale can be enforced.⁴⁶ Consequently, unless the bid exceeds this amount, the homestead will be released from the court order for sale. Additionally, Chapter 1198 prohibits a subsequent court ordered sale for at least one year.⁴⁷

Chapter 1198 specifies a procedure for claiming an exemption for real property.⁴⁸ Under Chapter 1198, the exemption for real property may be claimed by (1) filing a claim of exemption with the levying officer and following the applicable procedures as set out for the enforcement of judgments⁴⁹ or (2) filing a notice of motion with the court.⁵⁰ These procedures for exempting real property will not be available, however, if the claim for exemptions has been previously denied and no circumstances have changed since that time.⁵¹

Levy Procedures

Chapter 1198 substantially revises and renumbers the provisions regarding levy procedures.⁵² In addition to addressing the general provisions relating to an attachment,⁵³ Chapter 1198 focuses on the various procedures available for attaching specific types of property.⁵⁴

Chapter 1198 establishes new procedures pertaining to the attach-

42. See CAL. CIV. PROC. CODE §487.025(a).

43. *Id.* §487.025(b).

44. Southern Pacific Milling Co. v. Milligan, 15 Cal. 2d 729, 731, 104 P.2d 654, 655 (1940).

45. *Id.*

46. See CAL. CIV. PROC. CODE §487.025(d).

47. See *id.* §§487.025(d), 704.800.

48. See *id.* §487.030.

49. *Id.* §487.030(b).

50. *Id.*

51. See *id.* §487.030(b), (d).

52. See generally *id.* §§488.010-488.740.

53. *Id.* §§488.010-488.140.

54. *Id.* §§488.315-488.485.

ment of personal property used as a dwelling,⁵⁵ property that is the subject of a pending or special action,⁵⁶ personal property in the custody of a levying officer,⁵⁷ property in a safe deposit box,⁵⁸ or property to be extracted or severed from the ground.⁵⁹ Moreover, some changes are made in the procedures affecting the attachment of farm products,⁶⁰ equipment of a going business,⁶¹ vehicles, vessels, mobilehomes,⁶² final money judgments,⁶³ property in the estate of a decedent,⁶⁴ personal property under the control of a third person,⁶⁵ chattel paper,⁶⁶ instruments,⁶⁷ negotiable documents,⁶⁸ securities,⁶⁹ account receivables, and general intangibles.⁷⁰ Finally, Chapter 1198 renumbers, but leaves intact the existing law governing the attachment of real⁷¹ and personal property under the defendant's control.⁷²

A. Levy Procedures: General Provisions

Under existing law, a writ of attachment must be directed toward a levying officer who is within the county where the property is located.⁷³ Additionally, Chapter 1198 requires that the writ be directed to a registered process server.⁷⁴ The levying officer is then to levy the writ and serve the defendant as instructed.⁷⁵ The content of the instruction, however, is very similar to that required under prior law.⁷⁶ The instructions by the plaintiff to the levying officer must at least contain (1) a statement describing the property that is the subject of the levy, (2) a determination of whether the property is a dwelling, and (3) a

55. *See id.* §488.415.

56. *See id.* §488.475.

57. *See id.* §488.355.

58. *See id.* §488.460.

59. *See id.* §488.325.

60. *Id.* §§488.395, 488.405.

61. *Id.* §488.375.

62. *Id.* §488.385.

63. *Id.* §488.480.

64. *Id.* §488.485.

65. *Id.* §488.345.

66. *Id.* §488.435.

67. *Id.* §488.440.

68. *Id.* §488.445.

69. *Id.* §488.450.

70. *Id.* §488.470.

71. *Id.* §488.315.

72. *Id.* §488.335.

73. *Id.* §488.020(a) (incorporating CAL. STATS. 1976, c. 437, §27, at 1129).

74. *Id.*; *see id.* §481.205 (definition of registered process server).

75. *Id.* §488.020(b).

76. *Id.* §488.030. Under prior law, the instructions were to contain a description of the property that was adequate enough to permit the levying officer to execute the writ, and the name and address of any person who is to be served with a copy of the writ and notice of attachment. CAL. STATS. 1976, c. 437, §27, at 1129 (amending CAL. CIV. PROC. CODE §488.030).

determination of whether the property is real or personal.⁷⁷ In the absence of actual knowledge to the contrary, the levying officer can rely on this information.⁷⁸

Prior to enactment of Chapter 1198, a registered process server had the authority to serve a writ of execution authorizing the sale, delivery, or taking into custody of property owned by the judgment debtor that was in the possession of another.⁷⁹ Chapter 1198 now permits a registered process server to also levy, under a writ of attachment, (1) real property;⁸⁰ (2) growing crops, timber to be cut, or minerals to be extracted;⁸¹ (3) personal property⁸² in the custody of a levying officer;⁸³ (4) equipment of a going business;⁸⁴ (5) motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business;⁸⁵ (6) farm products or inventory of a going business;⁸⁶ (7) personal property used as a dwelling;⁸⁷ (8) deposit accounts;⁸⁸ (9) property in safe deposit boxes;⁸⁹ (10) accounts receivable or general intangibles;⁹⁰ (11) final money judgements;⁹¹ or (12) defendant's interest in personal property in the estate of a decedent.⁹² In addition, Chapter 1198 outlines various procedures that a registered process server must comply with when making any of these levies.⁹³

Under existing law, a plaintiff must provide the levying officer with a sum sufficient to maintain the property for 15 days.⁹⁴ Prior to the enactment of Chapter 1198, this demand had to be in writing.⁹⁵ Chapter 1198 provides that this demand may also be made orally.⁹⁶ In addition, prior law allowed the demand to be for a sum sufficient to maintain the property for 90 days.⁹⁷ Chapter 1198 will only allow each demand to be for a sum sufficient to maintain the property for 30 days.⁹⁸

77. CAL. CIV. PROC. CODE §488.030(a).

78. *Id.* §488.030(c).

79. *See* 64 OP. ATT'Y GEN. 666 (1981).

80. CAL. CIV. PROC. CODE §488.080(a)(1).

81. *Id.* §488.080(a)(2).

82. *Id.* §481.175 (definition of personal property).

83. *Id.* §488.080(a)(3).

84. *Id.* §488.080(a)(4).

85. *Id.* §488.080(a)(5).

86. *Id.* §488.080(a)(6).

87. *Id.* §488.080(a)(7).

88. *Id.* §488.080(a)(8); *Id.* §481.080 (definition of deposit account).

89. *Id.* §488.080(a)(9).

90. *Id.* §488.080(a)(10).

91. *Id.* §488.080(a)(11).

92. *Id.* §488.080(a)(12).

93. *See id.* §488.080(b).

94. *Id.* §488.050(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3356).

95. CAL. STATS. 1974, c. 1516, §9, at 3356.

96. CAL. CIV. PROC. CODE §488.050(a)(2).

97. *See* CAL. STATS. 1976, c. 1516, §9, at 3356.

98. CAL. CIV. PROC. CODE §488.050(a)(2).

Chapter 1198 enacts provisions for the attachment of personal property that is located in a private place.⁹⁹ Chapter 1198 provides that the levying officer only has to make one request for delivery of the property from the judgment debtor.¹⁰⁰ At this time the levying officer must warn the judgment debtor that failure to comply with the request for delivery might result in the judgment debtor's liability for attorneys' fees and court costs incurred in any further proceedings.¹⁰¹ After notification of noncompliance the judgment creditor may ask the court to allow seizure of the property by the levying officer.¹⁰²

Chapter 1198 further provides that if property is to be taken into custody, a levying officer may (1) remove the property, (2) install a keeper, or (3) otherwise obtain possession or control.¹⁰³ Moreover, a levying officer obtains a special lien on property when costs have not been paid in advance.¹⁰⁴

Furthermore, Chapter 1198 provides that when any type of levy is made, copies of the writ of attachment and notice of attachment must be posted or served on the appropriate parties.¹⁰⁵

B. Personal Property Used as a Dwelling

Prior law contained no special provisions for attaching personal property that is used as a dwelling.¹⁰⁶ Chapter 1198 provides that attachment of this type of dwelling is accomplished by having the levying officer personally serve a copy of the notice of attachment and a copy of the writ of attachment on an occupant of the dwelling.¹⁰⁷ If this type of service is not possible, the levying officer must post the copies at a location on the property where the occupant will see them.¹⁰⁸ In addition, if requested by the judgment creditor, a keeper must be appointed to manage the property.¹⁰⁹ Finally, Chapter 1198 provides that an occupant may be removed from the property after (1) a motion asking for removal has been made to the court, (2) service has been made to the occupant and defendant, and (3) a hearing has been conducted on the motion.¹¹⁰

99. *See id.* §488.070.

100. *Id.* §§488.070, 699.030.

101. *Id.*

102. *Id.*

103. *Id.* §488.090.

104. *Id.* §488.100.

105. *Id.* §§488.120, 488.305.

106. *See Recommendation, supra* note 1, at 713.

107. CAL. CIV. PROC. CODE §§488.415, 700.080(a).

108. *Id.*

109. *Id.* §§488.415, 700.080(b).

110. *Id.* §§488.415, 700.080(c).

C. Property Subject to a Pending or Special Action

Prior to the enactment of Chapter 1198 there was no procedure for attaching property that was the subject of a pending or special procedure.¹¹¹ Chapter 1198 now permits the following types of property to be attached: (1) real property; (2) growing crops, timber to be cut, and minerals to be extracted; (3) tangible personal property; or (4) the defendant's interest in personal property from a decedent's estate.¹¹² If the subject property does not fall into one of these categories, it cannot be attached.¹¹³ According to Chapter 1198, an action or proceeding is pending if the action or proceeding has commenced but judgment has not yet been rendered.¹¹⁴ Furthermore, if judgment has been rendered, an action or proceeding is still pending if the time for appeal has not expired, or if the appeal has been filed, but not yet finally determined.¹¹⁵ If attachment of this property is not possible, Chapter 1198 provides that a levying officer may request a garnishee's memorandum.¹¹⁶

D. Personal Property in the Custody of a Levying Officer

Chapter 1198 now makes it possible to attach personal property that is in the custody of a levying officer.¹¹⁷ Chapter 1198 provides that an attachment may be accomplished when a plaintiff delivers a writ of attachment directed to the levying officer who has custody of the property.¹¹⁸ If the writ is directed to a levying officer who does not have custody of the property, that levying officer must serve copies of the writ of attachment and notice of attachment on the levying officer who does have custody.¹¹⁹ In addition, the levying officer who has custody of the personal property must give attention to and comply with the writs in the order in which the writs are received.¹²⁰ Chapter 1198 provides that the levying officer with custody will not be subject to the provisions of Chapter 1198 dealing with the duties and liabilities of third persons after levy.¹²¹

111. See *Recommendation*, *supra* note 1, at 714.

112. CAL. CIV. PROC. CODE §488.475(a).

113. *Id.* §488.475(b).

114. *Id.* §488.475(d).

115. *Id.*

116. *Id.* §488.475(c).

117. See *id.* §488.355.

118. *Id.* §§488.355, 700.050(a)(1).

119. *Id.* §§488.355, 700.050(a)(2).

120. *Id.* §488.355(b).

121. See *id.*

E. Growing Crops, Timber to be Cut, or Minerals to be Extracted

Prior law made no specific provisions for attaching minerals, including oil and gas.¹²² Chapter 1198 now permits attachment of the minerals to be extracted or the accounts receivable after sale of the minerals at the wellhead or minehead.¹²³

To attach growing crops, timber to be cut, or minerals to be extracted, Chapter 1198 requires the levying officer to record copies of the writ of attachment and notice of attachment with the recorder in the county where the crops, timber, or minerals are located.¹²⁴ The notice of attachment must describe the attached property, state where the property is located, and specify the defendant's interest in the property.¹²⁵ If the attached property, or the land where the attached property is located is in the name of a third person, then copies of the writ of attachment and the notice of attachment must be indexed under the names of the defendant *and* the third person.¹²⁶ Chapter 1198 additionally provides that the following people must be served after the attachment has taken place: (1) third persons who are the record owners of the attached property or the real property where the attached property is located, and (2) any secured party who had a financing statement on file prior to the attachment.¹²⁷

Furthermore, the levying officer must serve an occupant of the land where the attached property is located with copies of the writ of attachment and notice of attachment.¹²⁸ This may be accomplished by serving the occupant or by posting the copies on the land if personal service is not possible.¹²⁹

This method of attachment, however, is not available once the crops have been harvested, the timber cut, or the minerals extracted.¹³⁰ In these cases, attachment may be accomplished by (1) treating the property as tangible personal property, (2) placing a keeper on the land, or (3) placing a lien on the property.¹³¹

F. Deposit Accounts and Safe Deposit Boxes

Prior to the enactment of Chapter 1198, no specific procedure for

122. See *Recommendation*, *supra* note 1, at 768.

123. See CAL. CIV. PROC. CODE §488.325.

124. *Id.* §§488.325, 700.020(a).

125. *Id.*

126. *Id.*

127. *Id.* §§488.325, 700.020(b).

128. *Id.* §§488.325, 700.020(c).

129. *Id.*

130. See *Recommendation*, *supra* note 1, at 768.

131. See CAL. CIV. PROC. CODE §§488.335-488.365.

attaching property in a safe deposit box existed.¹³² Chapter 1198 provides similar methods for attaching both deposit accounts and property in safe deposit boxes.¹³³ Attachment of a deposit account evidenced by a negotiable certificate of deposit, however, must be attached using the method available for attaching instruments.¹³⁴ Under existing law, attachment of a deposit account is accomplished when the levying officer serves copies of the writ of attachment and notice of attachment on the financial institution where the deposit account is kept.¹³⁵ Chapter 1198 uses this same procedure for attaching safe deposit boxes.¹³⁶ Chapter 1198 further specifies that while the attachment is in effect, the financial institution¹³⁷ is prevented from allowing any transaction that would reduce the amount attached in the deposit account or cause the removal of attached property from the safe deposit box.¹³⁸ If a safe deposit box is attached, however, Chapter 1198 allows the person in whose name the box stands to comply with the attachment and voluntarily remove the attached property before a levying officer causes the forced opening of the box.¹³⁹

Moreover if third persons have their name on the deposit account or safe deposit box, Chapter 1198 requires that the levying officer also serve them with copies of the notice of attachment and writ of attachment.¹⁴⁰ Chapter 1198 requires the levying officer to provide the financial institution with an undertaking given by a corporate surety to ensure indemnification to third persons if they are damaged because of the attachment.¹⁴¹ Finally, if no objections are made, or the court finds that the undertaking is sufficient, the financial institution must honor the attachment.¹⁴² If the provisions regarding an undertaking are not followed, however, the attachment will have no effect and the financial institution will not have to comply with the attachment.¹⁴³

132. See *Recommendation*, *supra* note 1, at 713-714.

133. Compare CAL. CIV. PROC. CODE §488.455 with *id.* §488.460.

134. See *Recommendation*, *supra* note 1, at 781; see also CAL. CIV. PROC. CODE §§488.440, 700.110.

135. CAL. CIV. PROC. CODE §488.455(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3362).

136. See *id.* §488.460(a).

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

138. *Id.* §§488.455(c), 488.460(c).

139. *Id.* §488.460(d).

140. *Id.* §§488.455(b), 488.460(b).

141. *Id.* §488.465(b).

142. See *id.* §488.465.

143. *Id.* §488.465(b).

G. Farm Products or Equipment of a Going Business

Existing law provides that equipment of a going business may be attached when a levying officer files a notice of attachment with the Secretary of State.¹⁴⁴ In addition, Chapter 1198 authorizes the Secretary of State to issue a certificate, upon the request of any person, indicating whether there is a notice of attachment filed against the equipment of the equipment owner named in the request.¹⁴⁵

Chapter 1198 also provides procedures for the attachment of farm products or the inventory of a going business that is within the control of the defendant.¹⁴⁶ To attach this property the levying officer will place a keeper on the property who is in charge of taking custody of the proceeds from all sales of the produce or merchandise.¹⁴⁷ The business may continue to operate under the keeper for (1) 10 days, or (2) two days, depending on the status of the defendant.¹⁴⁸ The levying officer will take exclusive possession of the property at the conclusion of the keeper period, or earlier if the defendant objects to a keeper being placed in charge of the business.¹⁴⁹

Chapter 1198 also provides an alternative method for attaching farm products or inventory of a going business.¹⁵⁰ The plaintiff, however, must specifically instruct the levying officer to use the alternative method of attachment.¹⁵¹ This method of attachment requires the levying officer to file with the Secretary of State a notice of attachment containing the following: (1) a description of the farm product or inventory, (2) identifiable cash proceeds, and (3) if permitted by the writ or court order, after acquired property.¹⁵² No attachment lien will be created when the property includes (1) a vehicle, vessel, or mobilehome or (2) the inventory of a retail merchant, unless it includes durable goods with a unit price exceeding \$500.¹⁵³ In addition, any attachment lien created by this alternative method will be extinguished if the property becomes a fixture.¹⁵⁴

144. *Id.* §488.375(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3358).

145. *Id.* §488.375(c).

146. *Id.* §488.395.

147. *Id.* §488.395(a).

148. *Id.* §488.395(b).

149. *Id.* §488.395(c).

150. *Id.* §488.405.

151. *Id.* §488.405(a).

152. *Id.* §488.405(b), (c).

153. *Id.* §488.405(d).

154. *Id.* §488.405(e).

H. Final Money Judgments

Prior to the enactment of Chapter 1198 any judgment owed to the defendant could be attached using only one procedure.¹⁵⁵ Chapter 1198 provides a special procedure for the attachment of final money judgments.¹⁵⁶ According to Chapter 1198, a money judgment is final and subject to attachment if the time for appealing the judgment has expired or, if the appeal has been determined.¹⁵⁷

With the enactment of Chapter 1198, a final money judgment can be attached when a levying officer files copies of the writ of attachment and notice of attachment with a clerk of the court where the final money judgment was entered.¹⁵⁸ The clerk will then issue a statement acknowledging the attachment lien and the date it was created.¹⁵⁹ Furthermore, the person who is obligated to pay the final money judgment must also receive copies of the writ of attachment and notice of attachment from the levying officer.¹⁶⁰ This person will not be deemed to have knowledge of the attachment unless these copies are provided by the levying officer.¹⁶¹

I. Property in the Estate of the Decedent

Prior to the enactment of Chapter 1198 attachment of property in the estate of the decedent required the levying officer to file copies of the writ of attachment and notice of attachment in the office of the clerk of the court where the estate was being administered and to serve the decedent's personal representative with these copies.¹⁶² Chapter 1198 now only requires the levying officer to serve the personal representative.¹⁶³

Under existing law, this attachment does not affect the personal representative's administrative powers.¹⁶⁴ The personal representative, however, must report the attachment of the property in the estate of the decedent in court when any petition is filed requesting distribution of the estate.¹⁶⁵ Existing law also specifies that once this attachment is made, any decree ordering distribution to the defendant must instead

155. See CAL. STATS. 1974, c. 1516, §9, at 3363 (enacting CAL. CIV. PROC. CODE §488.420).

156. CAL. CIV. PROC. CODE §488.480.

157. *Id.* §488.480(a).

158. *Id.* §488.480(b).

159. *Id.*

160. *Id.* §488.480(c).

161. See *id.*

162. CAL. STATS. 1976, c. 437, §32, at 1133 (amending CAL. CIV. PROC. CODE §488.430).

163. See CAL. CIV. PROC. CODE §488.485(a).

164. *Id.* (incorporating CAL. STATS. 1976, c. 437, §32, at 1133).

165. CAL. CIV. PROC. CODE §488.485(b).

be delivered to the levying officer.¹⁶⁶ Chapter 1198 gives the levying officer the authority to release any property that exceeds the amount necessary to satisfy the attachment.¹⁶⁷

J. Vehicle, Vessel, or Mobilehome

Under existing law, a levying officer could attach a vehicle or vessel, certified by the Department of Motor Vehicles, by filing a notice of attachment with the Department of Motor Vehicles.¹⁶⁸ Chapter 1198 specifies that a similar procedure may be used to attach a mobilehome or commercial coach certified by the Department of Housing and Community Development.¹⁶⁹ In this case, however, the levying officer must file a notice of attachment with the Department of Housing and Community Development.¹⁷⁰

K. Personal Property in a Third Party's Control

Under existing law, personal property within the possession or control of a third person may be attached once copies of the writ of attachment and notice of attachment have been served on the third person by the levying officer.¹⁷¹ If the property is in the possession of a third person who issued a negotiable document of title upon the property, Chapter 1198 provides that a levying officer can take the document into custody.¹⁷²

Chapter 1198 also delineates a procedure for attaching a negotiable document of title if the property upon which the document was issued is in the possession or control of a third person.¹⁷³ In this situation the levying officer must personally serve a copy of the writ of attachment and notice of attachment on the third person.¹⁷⁴ In addition, if the property is subject to a security interest, the plaintiff can request that the levying officer serve a copy of the writ of attachment and notice of attachment on the secured party.¹⁷⁵ This same procedure may be used by a levying officer to attach goods in the possession of a bailee other than the one who issued a negotiable document of title.¹⁷⁶

166. *Id.* (incorporating CAL. STATS. 1976, c. 437, §32, at 1133).

167. *Id.*

168. *Id.* §488.425 (incorporating CAL. STATS. 1976, c. 437, §30, at 1130).

169. *Id.*; see *Recommendation*, *supra* note 1, at 712-713.

170. See CAL. CIV. PROC. CODE §§488.425, 700.090.

171. *Id.* §§488.345, 700.040(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3357).

172. *Id.* §§488.445, 700.040(b), 700.120(a).

173. See *id.* §§488.445, 700.060.

174. *Id.* §700.060(a).

175. *Id.* §700.060(b).

176. See *id.* §488.365, 700.060.

L. Chattel Paper

Under existing law, a levying officer may take chattel paper into custody if it is in the possession of the defendant.¹⁷⁷ Existing law also provides that when a third person is in possession of the chattel paper, copies of the writ of attachment and notice of attachment must be served upon that third person by the levying officer.¹⁷⁸

Prior to the enactment of Chapter 1198, the levying officer had to provide the account debtor who was obligated on the attached chattel paper with a copy of the writ of attachment and notice of attachment.¹⁷⁹ If these copies were not received the account debtor's rights and duties would not be affected.¹⁸⁰ In contrast, Chapter 1198 requires the levying officer to make this type of service only when instructed to do so by the plaintiff.¹⁸¹ In addition, Chapter 1198 specifies that this attachment places a lien on the defendant's rights to other goods subject to the chattel paper.¹⁸²

M. Instruments and Negotiable Documents

Existing law allows a levying officer to take instruments or negotiable documents into custody if they are in the possession of a defendant.¹⁸³ Furthermore, if the instruments or negotiable documents are in the possession of third persons, the levying officer must personally serve those third persons with copies of the writ of attachment and notice of attachment.¹⁸⁴ With the enactment of Chapter 1198, an obligor under an instrument may be served personally or by mail with these copies if the plaintiff requests.¹⁸⁵

N. Securities

Chapter 1198 adopts the same procedure used for attaching a security as provided for in the Commercial Code.¹⁸⁶ This type of attachment is possible when the levying officer takes over custody of the security.¹⁸⁷ If the security is in escrow and has not been surrendered, the security may be attached at the source only if the escrow holder is

177. *See id.* §488.435(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3361).

178. *See id.* §§488.435(a), 700.100(a)(2).

179. CAL. STATS. 1974, c. 1516, §9, at 3361.

180. *See id.*

181. *See* CAL. CIV. PROC. CODE §700.100(b).

182. *See id.* §§488.435(b), 700.100(c).

183. *Id.* §§488.440, 488.445, 700.110(a)(1), 700.120(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3362).

184. *Id.*

185. *Id.* §§488.440, 700.110(b).

186. *Id.* §488.450. *See* CAL. COM. CODE §8317.

187. *See id.* §8317(1)(a).

served with a copy of the writ of attachment and notice of attachment.¹⁸⁸

O. Accounts Receivable or General Intangibles

Under existing law an account receivable or general intangible is attached when a levying officer personally serves copies of the writ of attachment and notice of attachment on the account debtor.¹⁸⁹ Prior law *required* the levying officer to serve any third person identified as an obligee before an amount owed to the defendant by the obligee could be attached.¹⁹⁰ Chapter 1198 gives the plaintiff the *option* of instructing the levying officer whether or not to serve the third person.¹⁹¹

P. Real and Personal Property in the Defendant's Control

Under existing law a levying officer may attach personal property in the possession or within the control of the defendant by taking the property into custody.¹⁹² Chapter 1198 makes no changes in the method of attaching real property.¹⁹³

Manner of Service

Prior to the enactment of Chapter 1198, the method of service used in a proceeding involving attachments was determined by whether the person¹⁹⁴ had or had not made an appearance in the action.¹⁹⁵ Depending on the circumstances, this could involve personal service on the party, service by mail, or service to the party's attorney.¹⁹⁶ Chapter 1198, however, provides that any writ, notice, order, or other paper related to an attachment of property may be served personally or by mail.¹⁹⁷ In addition, Chapter 1198 specifies that the manner of service and proof of service will be governed by the procedures regarding the enforcement of judgments.¹⁹⁸

Terms used in these procedures in relation to enforcement of judgments are substituted by Chapter 1198 with the appropriate corresponding term necessary to make the provision applicable to

188. *Id.* §8317(1)(b).

189. CAL. CIV. PROC. CODE §488.470(a) (incorporating CAL. STATS. 1974, c. 1516, §9, at 3361).

190. *See* CAL. STATS. 1974, c. 1516, §9, at 3361.

191. *See* CAL. CIV. PROC. CODE §488.470(b).

192. *Id.* §488.335 (incorporating CAL. STATS. 1974, c. 1516, §9, at 3357).

193. *See id.* §488.315, 700.015 (incorporating CAL. STATS. 1976, c. 437, §29, at 1129).

194. *Id.* §481.170 (definition of person).

195. *See* CAL. STATS. 1974, c. 1516, §9, at 3340 (enacting CAL. CIV. PROC. CODE §482.070).

196. *See* CAL. CIV. PROC. CODE §1010.

197. *See id.* §482.070(a).

198. *See* §§482.070(b), 684.010-684.120.

attachment procedures.¹⁹⁹ Moreover, Chapter 1198 provides that service must be made on the defendant's attorney of record, rather than on the defendant, unless service involves a subpoena that requires the defendant's attendance or is in regards to contempt of the defendant.²⁰⁰

Duties and Liabilities of Third Parties After Levy

Chapter 1198 provides that, in the absence of a valid excuse, a third person must (1) deliver attached property to the levying officer, unless the third person has a right to possession; (2) pay to the levying officer obligations owed prior to, and during the period of attachment; and (3) deliver any documents needed for transferring the property.²⁰¹ Failure to deliver the property or make payments to the levying officer will cause the third person to be liable for the lesser of either (1) the value of the defendant's interest or payments owed, or (2) the amount that would satisfy the attachment.²⁰² In addition, the third person remains liable until (1) delivery of the payments or property to the levying officer, (2) the release of the attachment, or (3) the satisfaction or discharge of the judgment.²⁰³

Chapter 1198 also addresses the issue of security interests in property that have been attached.²⁰⁴ If the security interest was in existence prior to the attachment and the property had not been taken into custody by the levying officer, the security interest prevails.²⁰⁵ When the security interest is satisfied, however, the remaining property and proceeds must be given to the levying officer.²⁰⁶ In contrast, if the security interest was not in existence prior to the attachment, then the secured party must pay the attached proceeds from the property to the plaintiff.²⁰⁷

Prior to the enactment of Chapter 1198, if an account debtor was obligated to pay under an account receivable, chattel paper, instrument, or general intangible that had been attached, the account debtor could pay the amounts owed on these obligations to the levying officer.²⁰⁸ Chapter 1198 *requires* the account debtor to make these pay-

199. See *id.* §482.070(c). These terms include (1) the use of "defendant" in place of "judgment debtor", (2) "plaintiff" in place of "judgment creditor", (3) "notice of attachment" in place of "notice of levy", and (4) "writ of attachment" in place of "writ".

200. *Id.* §482.070(e).

201. *Id.* §§488.600, 701.010(b).

202. *Id.* §§488.600, 701.020(a).

203. *Id.* §§488.600, 701.020(b).

204. See *id.* §§488.600, 701.040.

205. *Id.* §§488.600, 701.040(a).

206. *Id.* §§488.600, 701.040(b).

207. *Id.* §§488.600, 701.040(a).

208. See CAL. STATS. 1974, c. 1516, §9, at 3366 (enacting CAL. CIV. PROC. CODE §488.540).

ments to the levying officer in the absence of contrary instructions from the court or the levying officer.²⁰⁹ In addition, once the notice of attachment is received, the account debtor would remain liable to the levying officer even if payments were made to the defendant.²¹⁰ During the period of attachment, however, if the account debtor was required to make payments to third persons, instead of to the defendant, the account debtor must continue these payments until satisfaction of the obligation.²¹¹ When the obligation is satisfied, the account debtor will then start making payments to the levying officer.²¹² If by agreement the property can be returned to, or repossessed by, the defendant, the account debtor must deliver it to the levying officer, in the absence of other instructions.²¹³

Lien in a Pending Action or Proceeding

Prior to the enactment of Chapter 1198 there were no specific provisions that dealt with obtaining a right to attach order when the defendant was a party to a pending or special action.²¹⁴ Chapter 1198 provides that a plaintiff can obtain a lien on either (1) the defendant's rights to money or property under a judgment, or (2) any cause of action brought by the defendant.²¹⁵ This type of lien may be obtained by the plaintiff by filing a right to attach order and notice of lien in the form prescribed by Chapter 1198.²¹⁶ The right to attach order may be obtained if the defendant is entitled to money or property from the special or pending action.²¹⁷ Consequently, any judgment for the defendant cannot be enforced, compromised, settled, dismissed, or satisfied without obtaining written permission from the plaintiff.²¹⁸

Examination of a Third Person

Existing law provides that a third person may be ordered before a court to address questions dealing with the property or debt subject to attachment.²¹⁹ Chapter 1198 gives a court appointed referee²²⁰ the au-

209. CAL. CIV. PROC. CODE §§488.600, 701.050(a).

210. *Id.*

211. *See id.* §§488.600, 701.050(b).

212. *Id.*

213. *Id.* §§488.600, 701.050(c).

214. *See Recommendation, supra* note 1, at 813.

215. *See* CAL. CIV. PROC. CODE §491.410(a).

216. *Id.* §491.410(b).

217. *See id.* §491.410(a).

218. *Id.* §491.440(a).

219. *See id.* §491.110 (incorporating CAL. STATS. 1976, c. 437, §43, at 1139).

220. *Id.* §491.130 (a referee must be a member of the State Bar of California).

thority to conduct this type of examination.²²¹ Although a court appointed referee has most of the general powers that the court has, a court appointed referee cannot (1) hold a party in contempt for disobeying the referee's order, (2) award attorneys' fees to the plaintiff when a third party has, without good cause, failed to appear before the court, or (3) determine a third party claim.²²²

Chapter 1198 also provides that a corporation, partnership, association, trust, or other association must send individuals who are familiar with the property or debt in question to the examination.²²³ The selection is a matter of choice unless the order to appear specifically names an individual.²²⁴

In addition, should a third party fail to appear at the examination, Chapter 1198 provides that the person may be brought before the court and found in contempt or the court may award to the plaintiff attorneys' costs.²²⁵ If the failure to appear was a result of willful improper service, however, the person responsible could be found guilty of a misdemeanor.²²⁶

Prior to the enactment of Chapter 1198, a court could not, in an examination proceeding, determine the adverse claim of a third person regarding property that is the subject of an attachment.²²⁷ Chapter 1198 provides a method to determine claims that is consistent with the methods used in the disposition of estates, guardianships, or conservatorships.²²⁸ Upon a plaintiff's request, Chapter 1198 allows the court to make a determination on these adverse claims.²²⁹ The authority of a court to make this determination, however, does not exist if the claim is made in good faith²³⁰ and (1) the court could not have properly tried the matter in an independent civil action,²³¹ (2) there is an independent civil action pending involving the property,²³² or (3) the court decides that a creditor's suit would be the best way to settle the matter.²³³ Finally, the court may prevent, through a court order, any

221. *Id.* §491.130(a).

222. *Id.*

223. *Id.* §491.140(a).

224. *See id.* §491.140(b), (c).

225. *Id.* §491.160(a).

226. *Id.* §491.160(b).

227. *See Recommendation, supra* note 1, at 808.

228. *See Recommendation Relating to Enforcement of Judgments*, 15 CAL. L. REVISION COMM'N REPORTS 2500 (1980).

229. *See* CAL. CIV. PROC. CODE §491.170(a).

230. *See* *Thomas v. Thomas*, 192 Cal. App. 2d 771, 776-77, 13 Cal. Rptr. 872, 875-76 (1961) (requiring good faith in a claim of interest in property).

231. CAL. CIV. PROC. CODE §491.170(b)(1).

232. *Id.* §491.170(b)(2).

233. *Id.* §491.170(b)(3).

transfer of the property or payment of the debt to the defendant until the interests in the property have been determined.²³⁴

Creditor's Suits

Under existing law, a plaintiff can bring an action against a third party who has possession or control of defendant's property or simply owes the defendant a debt.²³⁵ This action is meant to force the third party to abide by the attachment lien.²³⁶ Chapter 1198 expands the area of creditor's suits involving attachment liens to include provisions consistent with the provisions involving the enforcement of judgments.²³⁷

Chapter 1198 provides that, although a defendant may be joined in this action, the defendant will not be considered an indispensable party in a creditor's suit.²³⁸ In addition, the defendant's residence will not be used to determine venue.²³⁹

Chapter 1198 also provides that before a creditor's suit can be commenced, an attachment lien must be in effect and must stay in effect while the action is being prosecuted.²⁴⁰ An action may be commenced before the expiration of both (1) the time a defendant could bring an action against the third party concerning the property or debt, and (2) one year after the attachment lien was created.²⁴¹

Moreover, Chapter 1198 permits a plaintiff to apply for either (1) an order preventing the transfer of the attached property or payment to the defendant, or (2) a temporary restraining order or preliminary injunction preventing third persons from transferring the property.²⁴² Finally, Chapter 1198 specifies that the plaintiff has no right to a jury trial in a creditor's suit, and must bear the costs of the suit.²⁴³ In addition, a judgment for the plaintiff and against the third person may be enforced in the same manner as it would be enforced if obtained by the defendant.²⁴⁴

234. *See id.* §491.170(c), (d).

235. *See id.* §491.310 (incorporating CAL. STATS. 1974, c. 1516, §9, at 3366).

236. *See id.*

237. *See Recommendation, supra* note 1, at 810.

238. CAL. CIV. PROC. CODE §491.320.

239. *Id.* (unless otherwise provided for by contract between the defendant and the third person).

240. *Id.* §491.330(b), (c).

241. *Id.* §491.330(a).

242. *Id.* §491.340.

243. *Id.* §§491.350, 491.370.

244. *Id.* §491.360.

Appeals

Chapter 1198 addresses the unrelated issue of appeals taken from a superior court.²⁴⁵ Prior to the enactment of Chapter 1198 a litigant from a municipal or justice court could appeal the granting or denial of a writ of mandamus or prohibition by a Superior Court to the Court of Appeal as a matter of right.²⁴⁶ As a result, the Court of Appeal was required to provide a written opinion based on their decision.²⁴⁷

With the enactment of Chapter 1198 an appeal may not be taken as a matter of right from the Superior Court regarding a petition for a writ of mandamus or prohibition directed toward a municipal or justice court judge.²⁴⁸ Although the municipal or justice court litigant no longer has this *right* to review by the Court of Appeal, Chapter 1198 provides that the Court of Appeal may, in its *discretion*, review the judgment.²⁴⁹ The request for review, however, must be made through a petition for an extraordinary writ.²⁵⁰

The apparent purpose of Chapter 1198 is to close a "loophole in the appellate system"²⁵¹ that allowed a municipal or justice court litigant to go to the Court of Appeal as a matter of right.²⁵² Under existing law, a litigant in the Superior Court does not have the same right to appeal.²⁵³ This right of appeal often led to additional court expenses and postponements while the lower court waited for the appeal to end.²⁵⁴ By giving the Court of Appeal discretionary review over writs of mandate and prohibition involving municipal or justice courts, the litigants may be spared the delays and expenses that result from successive appeals.²⁵⁵

Existing law allows an appeal to be taken in a superior court from an order discharging or refusing to discharge an attachment.²⁵⁶ Chapter 1198 provides that an order granting a right to attach is also appealable.²⁵⁷

245. *See id.* §904.1.

246. *See* CAL. CONST. art. VI, §§10, 11. *See* Bloom v. Municipal Court, 16 Cal. 3d 71, 74, 127 Cal. Rptr. 317, 319 (1976). *See also* Gilbert v. Municipal Court, 73 Cal. App. 3d 723, 728, 140 Cal. Rptr. 897, 900 (1977).

247. CAL. CONST. art. VI, §14.

248. *See* CAL. CIV. PROC. CODE §904.1(a)(4).

249. *Id.*

250. *Id.*

251. *See* Burrus v. Municipal Court, 36 Cal. App. 3d 233, 238, 111 Cal. Rptr. 539, 543 (1973).

252. *See id.*

253. *See id.*

254. *See id.* at 238-39, 111 Cal. Rptr. at 543-44.

255. *See id.*

256. *See* CAL. CIV. PROC. CODE §904.1(e).

257. *Id.*

In addition, Chapter 1198 allows an appeal to be taken from a superior court involving an interlocutory judgment of dissolution of marriage.²⁵⁸ The appeal may include the property interests of the parties, regardless of whether the court has reserved jurisdiction on this issue.²⁵⁹

Conclusion

Chapter 1198 conforms the law of attachments to that which governs the enforcement of judgments.²⁶⁰ Chapter 1198 makes substantial revisions regarding property subject to attachment,²⁶¹ and property exempt from attachment.²⁶² In addition, Chapter 1198 addresses the various procedures dictating the method of attaching property,²⁶³ and confronts the many areas surrounding attachment, specifically, manner of service,²⁶⁴ duties, liabilities,²⁶⁵ examinations of third persons,²⁶⁶ liens in pending actions,²⁶⁷ and creditor's suits.²⁶⁸ Finally, Chapter 1198 amends the unrelated area of appeals taken from a superior court.²⁶⁹

258. *See id.* §904.1(j).

259. *Id.* §904.1(e).

260. *See Recommendation, supra* note 1, at 707.

261. *See* CAL. CIV. PROC. CODE §487.010.

262. *See id.* §487.030.

263. *See id.* §§488.010-488.485.

264. *See id.* §482.070.

265. *See id.* §§488.600, 488.610.

266. *See id.* §491.110.

267. *See id.* §§491.410-491.460.

268. *See id.* §§491.310-491.370.

269. *See id.* §904.1.

Civil Procedure; videotape depositions

Code of Civil Procedure §2019 (amended).

AB 1950 (Sher); STATS. 1982, Ch 192

Support: California Judges Association; Judicial Council; State Bar of California

Prior to the enactment of Chapter 192, videotaping of depositions¹ was permitted only when the notice of taking deposition stated that the deposition would also be videotaped.² Chapter 192 permits the taking of videotape depositions, absent prior notice, upon the consent of all

1. CAL. CIV. PROC. CODE §2004 (definition of deposition).

2. *See* CAL. STATS. 1980, c. 970, §2 at 3071 (amending CAL. CIV. PROC. CODE § 2019(c)). *See also* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 287 (1981).

parties.³

In *Bailey v. Superior Court of Kern County*,⁴ the court left unanswered the question of whether the parties could, by agreement, supplement a written transcript with a videotape record or entirely forego the written transcript and only videotape the deposition.⁵ Chapter 192 responds by providing that the stenographic transcript of the deposition remains the official record of the deposition even if the proceedings are videotaped.⁶ Chapter 192 also requires that the written transcripts of the videotape deposition be certified, delivered, and used in the same manner as other transcripts.⁷

Chapter 192 broadens the potential use of videotape depositions by permitting an original videotape deposition to be played at a court proceeding, other than an appeal, upon a showing of good cause.⁸ Chapter 192 also authorizes the Judicial Council to adopt rules governing the display and presentation of videotape depositions in court.⁹

Chapter 192 specifies obligations and rights regarding retention and access to videotape depositions.¹⁰ The operator who records the original videotape deposition must retain it and provide any party with a copy of the recording upon request and payment of a reasonable charge.¹¹ The operator, however, is permitted to discard the videotape after written notice to all parties unless a party promptly objects in writing.¹²

3. CAL. CIV. PROC. CODE §2019(c).

4. 19 Cal. 3d 970, 568 P.2d 394, 140 Cal. Rptr. 669 (1977).

5. *Id.* at 978 n.12, 568 P.2d at 399, 140 Cal. Rptr. at 674; see B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §962A (1982 Supp.).

6. CAL. CIV. PROC. CODE §2019(e)(2).

7. *Id.* §2019(e)(3).

8. *Id.* §2019(e)(2).

9. *Id.* §2019(h).

10. See *id.* §2019(e)(3).

11. *Id.*

12. *Id.*

Civil Procedure; discovery of expert witnesses

Code of Civil Procedure §§2037, 2037.1, 2037.2, 2037.3, 2037.4, 2037.5 (amended).

AB 3689 (Ingalls); STATS. 1982, Ch 1400

Support: Los Angeles County Bar Association

Chapter 1400 expands the scope of discovery provisions¹ that authorize the exchange of lists of expert witnesses used in the preparation of civil litigation.² Chapter 1400 facilitates the exchange of discoverable³ information and permits, upon a showing of good cause,⁴ judicial flexibility for discovery.⁵ Moreover, to increase court efficiency, Chapter 1400 removes the requirement that the parties must file the list of their expert witnesses with the clerk of the court.⁶

Under existing law, a party to a civil action may demand from the opposing party a list of expert witnesses.⁷ Chapter 1400, enacted to provide the parties with more efficient methods in which to complete discovery,⁸ now allows each party to demand,⁹ in addition to the list of expert witnesses, the exchange of the reports and writings¹⁰ of each identified expert witness.¹¹ Chapter 1400 requires that the demand include (1) a request for all discoverable¹² reports and writings of each identified expert witness' proposed testimony and preparations to tes-

1. These "provisions" are contained in the Civil Discovery Act. *See* CAL. CIV. PROC. CODE §§2016-2037.9. *See generally* 10 PAC. L.J., REVIEW OF SELECTED 1978 CALIFORNIA LEGISLATION 321 (1979); CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE §§8.11, 8.11A (Supp. 1982); 1 B. WITKIN, CALIFORNIA EVIDENCE, *Discovery and Production of Evidence* §§996, 996(A)-996(O) (Supp. 1982); 3 J. HOGAN, MODERN CALIFORNIA DISCOVERY, *Civil Discovery* §§12.15, 1801 (3d ed. 1981).

2. Compare CAL. CIV. PROC. CODE §§2037-2037.5 with CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §§2037-2037.5). *See generally* STATE BAR OF CALIFORNIA, 1981 CONFERENCE RESOLUTION 9-22 to 9-25 [hereinafter cited as BAR RESOLUTION]; FED. R. CIV. P. 26(b)(4) (federal discovery procedure of expert witnesses), CAL. CIV. PROC. CODE § 1258.020 (exchange of information in eminent domain proceedings).

3. The use of "discoverable" denotes that the amendments only apply to that information that does not infringe upon privileged information. *See* CAL. CIV. PROC. CODE §2016(g) (attorney work product). *See, e.g.,* Jasper Construc., Inc. v. Foothill Junior College Dist., 91 Cal. App. 3d 1, 153 Cal. Rptr. 767 (1979) (narrowing the work product limitations on expert witness information). *But see, e.g.,* South Tahoe Public Utility Dist. v. Superior Court, 90 Cal. App. 3d 135, 139, 154 Cal. Rptr. 1, 3 (1979) (disallowing discovery of expert witnesses).

4. CAL. CIV. PROC. CODE §2036 (showing of good cause).

5. BAR RESOLUTION, *supra* note 2, at 9-22a.

6. CAL. CIV. PROC. CODE §2037.2.

7. *Id.* §2037.

8. *See* BAR RESOLUTION, *supra* note 2, at 9-22d. The Bar Resolution states that there is usually insufficient time to obtain the reports and writings before trial. *See* CAL. R. CT. 222 (limiting discovery to a period 30 days before trial). Since these reports and writings are generally discoverable, Chapter 1400 merely adds that these reports and writings now be included in these provisions that mandate the simultaneous exchange. *See* BAR RESOLUTIONS, *supra* note 2, at 9-22d.

9. CAL. CIV. PROC. CODE §2037. The demand is now set out in the following form:

"You are requested to serve a list of expert witnesses in compliance with Section 2037 of the Code of Civil Procedure not later than the date of exchange thereby established. Except as otherwise provided in that article, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses at trial." *Id.* §2037. The request for reports and writings is in the following form: "All parties are also requested to produce for inspection and copying, at a time and place set forth herein, all discoverable reports and writings of each identified expert witness's proposed testimony and preparations to testify." *Id.* §2037.

10. CAL. EVID. CODE §250 (definition of writings).

11. Compare CAL. CIV. PROC. CODE §2037 with CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037).

12. *See supra* note 3.

tify¹³ and (2) the time and place for inspection of the reports and writings.¹⁴ The copying and inspection of reports and writings of the expert witnesses may be performed at any reasonable time after the date of exchange.¹⁵

Existing law provides that when a party is required to furnish a witness list it must include the name and business address of each expert witness who is expected to testify, a brief narrative statement of the expert's qualifications, and the general substance of the expected testimony.¹⁶ Chapter 1400 now provides that if the demand contains a request for reports and writings, all discoverable reports and writings concerning the expert witness' proposed testimony and preparations to testify must be included with the information sought.¹⁷ Furthermore, if the producing party does not make the witness available for deposition *and* provide all discoverable reports and writings that party may only call that witness for purposes of witness impeachment.¹⁸

Existing law specifies that the date of exchange of lists will be 20 days after the date of service of demand or 50 days prior to the trial date, whichever is later.¹⁹ In order to compel the earlier exchange of expert witness' reports and writings in complex litigation,²⁰ Chapter 1400 permits the Court to require an earlier exchange upon a showing of good cause by the moving party.²¹ Chapter 1400 states that good cause will exist for this earlier exchange if the date for trial has been set less than 90 days after the trial setting conference.²²

Prior law allowed a party, when receiving a list of expert witnesses through the mail combined with the demand from the opposing party, additional time to respond.²³ Chapter 1400, enacted to remedy this inequity,²⁴ now declares that neither party, when exchange is served

13. CAL. CIV. PROC. CODE §2037.

14. *Id.*

15. *Id.*; see *id.* §2037.1 (definition of date of exchange).

16. *Id.* §2037.3. See generally *Kennemur v. California*, 133 Cal. App. 3d 907, 184 Cal. Rptr. 393 (1982).

17. Compare CAL. CIV. PROC. CODE §2037.3 with CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037.3).

18. CAL. CIV. PROC. CODE §2037.5. See CAL. EVID. CODE §§780, 785, 791 (impeachment of adverse witnesses). See generally 133 Cal. App. 3d 907, 184 Cal. Rptr. 393. However, upon a showing of good faith by the non-complying party, the court may allow the witness to testify. See CAL. CIV. PROC. CODE §2037.6.

19. CAL. CIV. PROC. CODE §2037.1.

20. BAR RESOLUTION, *supra* note 2, at 9-23b.

21. CAL. CIV. PROC. CODE §2037.1.

22. *Id.*

23. CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037.1).

24. See BAR RESOLUTION, *supra* note 2, at 9-25b ("An oversight in the drafting of the Section has resulted in an unintentional inequity, in that the party serving the demand is required to furnish a list of expert witnesses 5 days earlier than the responding party.").

through the mail, will have the additional time afforded by the applicable statute²⁵ and requires the exchange of expert witness lists to be simultaneous.²⁶

Under existing law a party required to produce a witness list must give notice to the other party, if the party later decides to call a witness not included on the list.²⁷ Existing law also requires the party amending the list to make available to the other party the new witness for deposition.²⁸ Chapter 1400, to comply with the other added provisions,²⁹ provides that when an expert witness is added after service of that list, the requesting party will also be able to obtain all writings and reports of the expert witness.³⁰

Prior law required all parties, either receiving or serving a demand, to deposit with the clerk of the court their list of expert witnesses.³¹ The clerk of the court was to make the list available to the court for the limited purpose of facilitating proper application of the expert witness discovery provisions.³² In an attempt to reduce the burden of material filed with the clerk of the court,³³ Chapter 1400 requires that the parties no longer must file their lists with the court clerk.³⁴

25. See CAL. CIV. PROC. CODE §1013 (afforded additional time for return mail service).

26. Compare *id.* §2037.1 with CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037.1). See generally BAR RESOLUTION, *supra* note 2, at 9-22, 9-25.

27. CAL. CIV. PROC. CODE §2037.4.

28. *Id.*

29. See *id.* §§2037-2037.5.

30. Compare *id.* §2037.4 with CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037.4).

31. CAL. STATS. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037.2).

32. *Id.*

33. BAR RESOLUTION, *supra* note 2, at 9-22a.

34. Compare CAL. CIV. PROC. CODE §2037.2 with Cal. Stats. 1978, c. 1069, §1, at 3286 (enacting CAL. CIV. PROC. CODE §2037.2).

Civil Procedure; pre-judgment interest

Civil Code §3291 (new); Code of Civil Procedure §§1710.15, 1710.25 (amended).

SB 203 (Rains); STATS. 1982, Ch 150

Existing law permits entry of a sister state judgment when the judgment creditor has satisfied specified requirements.¹ The amount entered includes the unpaid balance of the foreign judgment, together

1. See CAL. CIV. PROC. CODE §1710.15. The judgment creditor must: file an application, executed under oath, containing specified information; attach a properly authenticated copy of the sister state judgment. See *id.*

with accrued interest and the filing fee for the application for entry of the judgment.² While prior law authorized computation of this interest at the applicable sister state rate,³ it also specified that the rate could not exceed seven percent per annum.⁴ Chapter 150 deletes this limitation and permits pre-entry interest computation to be based solely on the applicable sister state rate.⁵ Furthermore, Chapter 150 provides for post-entry interest accrual at the rate applicable to any judgment in this state.⁶

Prior case law precluded assessment of prejudgment interest in personal injury actions, except in specified situations.⁷ Chapter 150 provides that when a defendant in a personal injury action fails to accept a plaintiff's *written* offer of settlement⁸ either within thirty days of the offer or before trial, whichever occurs first,⁹ and when the plaintiff subsequently obtains a judgment more favorable than the proposed settlement, interest on the judgment may be assessed from the date of the plaintiff's first offer that exceeded the judgment, calculated at the rate of ten percent per annum.¹⁰ Chapter 150, however, limits this prejudgment interest assessment to personal injury actions in which the injuries are either negligently or intentionally inflicted by a person, corporation, association,¹¹ or partnership.¹² Chapter 150 further provides that public entities or public employees whose injury-causing acts occur within the scope of employment are specifically exempt from any liability for this prejudgment interest.¹³

2. *Id.* §1710.25(a).

3. CAL. STATS. 1977, c. 232, § 1, at 1030 (amending CAL. CIV. PROC. CODE §1710.15(b)(3)).

4. *Id.*

5. *See* CAL. CIV. PROC. CODE §1710.15(b)(3).

6. *Id.* §1710.25(b). *See* CAL. CIV. PROC. CODE §685.010(a) (interest accrues at ten percent per annum); 14 PAC. L.J., REVIEW OF SELECTED 1982 CALIFORNIA LEGISLATION — (1983).

7. *Southern Pac. Transp. Co. v. State*, 115 Cal. App. 3d 116, 122, 171 Cal. Rptr. 187, 191 (1981) (prejudgment interest in tort action recoverable only in cases involving oppression, malice or fraud).

8. CAL. CIV. PROC. CODE §998(b) (written offer of settlement must be made at least ten days prior to the commencement of trial).

9. CAL. CIV. CODE §3291.

10. *Id.*

11. CAL. CORP. CODE §24000 (definition of unincorporated association).

12. CAL. CIV. CODE §3291; CAL. CORP. CODE §15006 (definition of partnership).

13. CAL. CIV. CODE §3291.

Civil Procedure; statutory bonds and undertakings

Business and Professions Code §§7071.12, 8697.6, 9547.4, 9702.3, 10238, 10541, 10542, 17773.1, 22391 (repealed); §7071.12 (new); §§125.5, 125.7, 125.8, 656, 1705.5, 2311, 2545, 2559, 2672, 2971, 3131,

3430, 3533, 5122, 5527, 6872, 7028.3, 7071.5, 7071.6, 7071.8, 7071.9, 7071.10, 7071.11, 7074.5, 7873, 8693, 8697, 8697.2, 9533.6, 9547, 9547.1, 9851, 9884.14, 9890.81, 10072, 10237.8, 10540, 11013.4, 17540.7, 17766.3, 18690, 22353, 22357, 22390 (amended); Civil Code §§1812.66, 1812.105, 2780, 2781, 2851, 2852, 3080.12, 3080.13, 3080.14, 3227, 3228 (repealed); §§3441, 3442, 3443, 3445, 3446, 3447, 3448, 3449 (new); §§1812.54, 1812.65, 1812.67, 1812.104, 1812.214, 1861.12, 1861.19, 1861.21, 1861.22, 1861.23, 1861a, 3061.5, 3080.10, 3080.11, 3248, 3415, 3439, 3440 (amended); Code of Civil Procedure §§304, 304.1, 304.2, 391.5, 431.60, 489.010, 489.020, 489.030, 489.040, 489.050, 489.070, 489.080, 489.090, 489.100, 489.110, 489.120, 490.030, 535, 676, 677, 677½, 678, 678½, 679, 679½, 680, 680½, 920, 1035, 1041, 1042, 1054a, 1056, 1057, 1057a, 1057b, 1058, 1058a, 1059 (repealed); §§995.010, 995.020, 995.030, 995.040, 995.050, 995.110, 995.120, 995.130, 995.140, 995.150, 995.160, 995.170, 995.180, 995.185, 995.190, 995.210, 995.220, 995.230, 995.240, 995.250, 995.260, 995.310, 995.320, 995.330, 995.340, 995.350, 995.360, 995.370, 995.380, 995.410, 995.420, 995.430, 995.440, 995.510, 995.520, 995.610, 995.620, 995.630, 995.640, 995.650, 995.660, 995.710, 995.720, 995.730, 995.740, 995.750, 995.760, 995.770, 995.810, 995.820, 995.830, 995.840, 995.850, 995.910, 995.920, 995.930, 995.940, 995.950, 995.960, 996.010, 996.020, 996.030, 996.110, 996.120, 996.130, 996.140, 996.150, 996.210, 996.220, 996.230, 996.240, 996.250, 996.310, 996.320, 996.330, 996.340, 996.350, 996.360, 996.410, 996.420, 996.430, 996.440, 996.450, 996.460, 996.470, 996.480, 996.490, 996.495, 996.510, 996.520, 996.530, 996.540, 996.550, 996.560 (new); §166, 259, 340, 391, 391.3, 489.060, 489.230, 489.420, 512.080, 514.030, 515.010, 515.020, 515.030, 529, 529.1, 529.2, 532, 566, 567, 571, 581, 674, 729, 731c, 917.1, 917.4, 917.5, 917.9, 921, 922, 1029.5, 1029.6, 1030, 1054, 1054.1, 1166a, 1210, 1213, 1215, 1220, 1255.240, 1255.250 (amended); Commercial Code §§6103, 7601 (amended); Corporations Code §§5710, 6513, 7710, 8513, 15038, 25216, 25530, 31113, 31400 (amended); Education Code §§48270, 48271 (repealed); §§39450, 48269, 81400, 90225 (amended); Financial Code §§12206.1, 12210, 12211, 12224, 17202.1, 17203.2, 17204 (repealed); §1824, 1881, 1893, 3102, 5611, 9004, 9517, 12206, 12207, 12223, 17202, 17203, 17205, 17623, 18346, 18370, 18495, 30606, 34101, 34113 (amended); Fish and Game Code §12150.6, (amended); Food and Agriculture Code §57194 (repealed); §§11935, 55649, 57193, 59958 (amended); Government Code §§1502, 1503, 1550, 1551, 1552, 1553, 1554, 1555, 1556, 1557, 1558, 1559,

1560, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 8217, 8218 (repealed); §§1530, 1531, 8212, 8214, 8216, 8222, 25549.11, 26855.3, 50512, 50513, 53461, 53464, 53466, 71682 (amended); Harbors and Navigation Code §§495.5, 495.6, 515, 731, 4042 (amended); Health and Safety Code §11126 (repealed); §§1318, 1392, 1560, 1712, 1812, 8734, 11574, 11586, 42355 (amended); Insurance Code §§848, 849, 1300.5, 1664, 1766, 1803.5, 11696, 11698, 11711, 11712 (repealed); §§847, 1326, 1616, 1620, 1665, 1760.5, 1765, 1841, 11011, 12629.43 (amended); Labor Code §§1688.5, 1691, 1700.17, 1700.42, 1700.43 (repealed); §§240, 1684, 1687, 1688, 1693, 1697, 3712, 6000, 7303, 7343, 7912 (amended); Military and Veteran's Code §925 (amended); Penal Code §1276 (new); §706, 1447, 1448, 11202, 11232, 11308, 11314 (amended); Probate Code §§541.3, 545, 546, 547, 548, 551, 552, 553, 553.6, 554, 2331, 2332, 2336 (repealed); §§287, 541, 549, 550, 553.3, 553.5, 580, 684, 759, 2329, 2334, 2335, 3150 (amended); Public Resources Code §§3205.5, 3344, 3728.5, 4606 (amended); Public Utilities Code §§4839, 6066, 6067, 6068 (repealed); §§1074, 3575, 4840, 6010, 6301, 16541 (amended); Revenue and Taxation Code §§7488, 7489, 14178, 30145, 32105 (repealed); §§2954, 2955, 3006, 7390, 7391, 7486, 30141, 32102, 41117 (amended); Streets and Highways Code §§1052, 1188, 5242, 5254, 5291, 10502, 26022, 30158, 30159, 30867, 31127, 31128 (amended); Vehicle Code §§11301.3, 11710.1 (repealed); §§1815, 4158, 9924, 11102, 11102.1, 11110, 11301.5, 11612, 11614, 11710, 11710.2, 16434, 38055 (amended); Water Code §§2020, 22308, 43308, 50658, 50659, 60339, 70176, 71689.3, 75632, 75633, 75902 (amended).

AB 2750 (McAlister); STATS. 1982, Ch 517

Support: California Law Revision Commission; Department of Motor Vehicles

AB 2751 (McAlister); STATS. 1982, Ch 998

Support: California Law Revision Commission; Department of Finance; Department of Motor Vehicles

Under prior law, various statutes permitted or required the giving of more than 500 different bonds¹ and undertakings,² each governed by

1. *Karsh v. Fidelity Union Casualty Co.*, 119 Cal. App. 543, 546, 6 P.2d 980, 981 (1932) (definition of a bond).

2. CONNERS, CONTINUING EDUCATION OF THE BAR, CALIFORNIA SURETY AND FIDELITY BOND PRACTICE §21.2 (1969) [HEREINAFTER CITED AS CONNERS] (definition of an undertaking). The significant distinction between a bond and an undertaking is that bonds are executed by both the principal and the surety, whereas undertakings are executed by the surety or sureties alone. Compare CAL. CIV. PROC. CODE §995.140 with *id.* §995.190.

similar but not identical procedures.³ Repetition of those procedural rules was wasteful, added to the complexity and length of the statutes, and created the likelihood of inconsistent wording and interpretation of the procedures.⁴ Chapter 998 compiles the general procedural bond and undertaking provisions into one statute, the Bond and Undertaking Law.⁵ Furthermore, Chapter 517 repeals the duplication procedures from the codes and amends existing codes to conform to the Bond and Undertaking Law.⁶

General Provisions

The provisions of Chapter 998 do not govern all statutory bonds and undertakings.⁷ These provisions, for example, do not apply to a bail bond or an undertaking of bail.⁸ Chapter 998 emphasizes that the provisions apply to a bond or undertaking given as security pursuant to any California statute, except to the extent that the statute prescribes a different rule or is inconsistent.⁹ The Bond and Undertaking Law is, therefore, supplemented by common law and provisions of statutory law that govern all bonds and undertakings.¹⁰ The provisions of Chapter 998 apply to a bond or undertaking given on or after January 1, 1983, or before that date if another surety¹¹ is substituted for the original surety on or after January 1, 1983, or if the principal¹² gives a new, additional, or supplemental bond or undertaking on or after January 1, 1983.¹³

Chapter 998 recognizes that the terms "bond" and "undertaking" are

3. See RECOMMENDATION RELATING TO STATUTORY BONDS AND UNDERTAKINGS, 16 CAL. L. REVISION COMM'N REPORTS 507 (1982) [hereinafter cited as RECOMMENDATION] An undertaking may be necessary to procure a provisional remedy such as attachment, claim and delivery, a temporary restraining order or preliminary injunction, or to stay enforcement of a judgment on appeal. Bonds may be required of government officials and of many permittees and licensees. *Id.*

4. *Id.*

5. See CAL. CIV. PROC. CODE §995.010. See generally *id.* §§995.010-996.560.

6. See generally RECOMMENDATION, *supra* note 3, at 508.

7. See generally CAL. CIV. PROC. CODE §995.020.

8. CAL. CIV. CODE §2780 (definition of bail); see CAL. CIV. PROC. CODE §995.020(c). Prior law required that an action upon an undertaking in a criminal action for a forfeiture or penalty to the State be commenced within one year. Case law has held that the statute did not apply to bail bonds in criminal cases, see *People v. Burton*, 146 Cal. App. 2d 878, 882, 305 P.2d 302, 304 (1956). But see *People v. United Bonding Ins. Co.*, 5 Cal. 3d 898, 907, 489 P.2d 1385, 1391, 98 Cal. Rptr. 57, 63 (1971) (without sufficient excuse, forfeiture may be declared). In complying with this holding, Chapter 517 deletes this reference to an undertaking in a criminal action. See CAL. STATS. 1973, c. 20, §1 at 32 (amending CAL. CIV. PROC. CODE §340).

9. See CAL. CIV. PROC. CODE §995.020(a).

10. See RECOMMENDATION, *supra* note 3, at 513; CAL. CIV. CODE §22.2 (the common law, so far as it is not repugnant to or inconsistent with the Constitution or laws of this state, is the rule of decision in all the courts of this state).

11. CAL. CIV. PROC. CODE §995.185; CAL. CIV. CODE §2787 (definition of a surety).

12. *Id.* §995.170 (definition of a principal).

13. See *id.* §995.020(b).

used interchangeably in both statutes and cases.¹⁴ This recognition is a codification of case law, which held that an undertaking may be given in lieu of a bond when a statute requires a bond, and a bond may be given in lieu of an undertaking when a statute requires an undertaking.¹⁵

Case law has determined that courts have the common law authority to waive bond requirements at the request of indigents.¹⁶ Chapter 998 codifies case law by authorizing a court to waive a statutory requirement for a bond if the principal is indigent and is unable to obtain sufficient sureties.¹⁷ In exercising this discretion, the court must take into consideration the character of the action, the nature of the beneficiary,¹⁸ the potential harm to the beneficiary if the bond is waived, and other relevant factors if applicable.¹⁹

Chapter 998 continues the exemption of all governmental entities and officers²⁰ from giving a bond and provides that they will have the same rights, remedies, and benefits as if the bond is given.²¹ If a statute allows costs to a party in an action, Chapter 998 continues the provision that the costs include the premium on a statutory litigation bond,²² as well as bonds not required by statute but reasonably paid by the party in connection with the action or proceeding.²³

Execution and Filing

Unless the statute providing for the bond requires execution by an admitted surety insurer,²⁴ Chapter 998 requires that a bond be executed

14. See *id.* §995.210.

15. See *Associates Capital Services Corp. v. Security Pac. Nat'l Bank*, 91 Cal. App. 3d 819, 824, 154 Cal. Rptr. 392, 395 (1979); *Alexander v. Superior Court*, 91 Cal. App. 312, 315, 266 P. 993, 994 (1928); *Connors, supra* note 2, §21.2 at 308. While a bond is executed by the principal by the sureties, the signature of the principal provides no additional security to the beneficiary. See CAL. CIV. PROC. CODE §996.460; RECOMMENDATION, *supra* note 3, at 517.

16. See *Conover v. Hall*, 11 Cal. 3d 842, 847, 523 P.2d 682, 684, 114 Cal. Rptr. 642, 644 (1974) (waiver of an injunction bond because of indigency); *Roberts v. Superior Court*, 264 Cal. App. 2d 235, 238, 70 Cal. Rptr. 226, 228 (1968) (waiver of appeal bond); *Bank of America v. Superior Court*, 255 Cal. App. 2d 575, 578, 63 Cal. Rptr. 366, 368 (1967) (waiver of cost bond); *County of Sutter v. Superior Court*, 244 Cal. App. 2d 770, 776, 53 Cal. Rptr. 424, 428, (1966) (waiver of cost bond).

17. See CAL. CIV. PROC. CODE §995.240.

18. See *id.* (the beneficiary may be public or private).

19. See *id.*

20. *Id.* §995.160 (definition of officer).

21. Compare *id.* §995.220 with CAL. STATS. 1939, c. 521, §1, at 1905 (amending CAL. CIV. PROC. CODE §1058) (county, city, district, and other local governmental entities and officers, and state and federal agencies and officers are exempt).

22. Compare CAL. CIV. PROC. CODE §995.250(a) with CAL. STATS. 1951, c. 1327, §1, at 3217 (enacting CAL. CIV. PROC. CODE §1035).

23. COMPARE CAL. CIV. PROC. CODE §995.250(b) with CAL. STATS. 1951, c. 1327, §1, at 3217. See generally *Acoustics Inc. v. Trepte Constr. Co.*, 14 Cal. App. 3d 887, 92 Cal. Rptr. 723 (1971).

24. CAL. CIV. PROC. CODE §995.120 (definition of an admitted surety insurer).

by either one admitted surety insurer, or two or more personal sureties.²⁵ Even if the statute providing for the bond requires execution by personal sureties, an admitted surety insurer may be substituted for the personal sureties.²⁶ Prior law allowed a corporation to be *one* of the sureties on an official bond²⁷ of which the penal sum amounted to more than \$1000, or to be accepted as *sole* and sufficient surety upon any bond.²⁸ Chapter 998 deletes the \$1000 limitation and incorporates intact the other provisions into the Bond and Undertaking Law.²⁹

Existing law requires that a bond be in writing and signed by the sureties under oath.³⁰ In addition, the writing must state that the sureties are jointly and severally liable on the obligation under the bond.³¹ The bond must also give the address where the principal and the sureties may be served with notices and other documents³² as well as a description of any property or interest in property upon which the bond may be based.³³ Prior law required the amount of an undertaking in a claim and delivery³⁴ procedure to be based upon the value of the property.³⁵ In an apparent effort to impose a more realistic bond without detriment to the interest of any other party, Chapter 517 permits the amount of an undertaking to be based upon the defendant's interest in the property rather than the total value of the property.³⁶

Chapter 998 provides that the Judicial Council³⁷ may prescribe the form of a bond and other forms relating to bonds given in an action or proceeding.³⁸ Chapter 998 continues the requirement that a bond be filed with the court unless the statute requires that the bond be given to another person.³⁹ Chapter 998 adds the requirement that if the statute providing for the bond requires that the bond be given to an officer, the

25. *See id.* §995.310.

26. *See id.* §995.610 (the admitted surety insurer is subject to all the liabilities and entitled to all the rights of personal sureties).

27. CAL. GOV'T CODE §§1500, 1501 (definition of an official bond). Official bonds, made payable to the State of California, require that the principal will well, truly, and faithfully perform all official duties then required of the principal by law, and also all additional duties as may be imposed on the principal by any existing law of the State or law enacted subsequently to the execution of the bond. *Id.* §1501.

28. *See* CAL. STATS. 1943, c. 134, §1502, at 963 (amending CAL. GOV'T CODE §1502).

29. *See* CAL. CIV. PROC. CODE §995.310.

30. *Id.* §995.320.

31. *Id.* §995.320(a)(1).

32. *Id.* §995.320(a)(2).

33. *Id.* §995.320(a)(3) (the value of the property or interest is determined by the principal's estimate or the estimate of the beneficiary or court).

34. *Blair v. Pitchess*, 5 Cal. 3d 258, 264-65, 486 P.2d 1242, 1246, 96 Cal. Rptr. 42, 46 (1971) (definition of claim and delivery).

35. *See* CAL. STATS. 1978, c. 373, § 1, at 1114 (amending CAL. CIV. PROC. CODE §515.010).

36. *See* CAL. CIV. PROC. CODE §515.010.

37. CAL. CONST. art. VI, §1a (formation of the Judicial Council).

38. CAL. STATS. 1982, c. 998, §2, at —.

39. *Compare* CAL. CIV. PROC. CODE §995.340(a) with CAL. STATS. 1978, c. 373, §§1, 2, at 114

officer must file the bond with the court, unless a statute provides otherwise.⁴⁰

Existing law requires that upon the filing of a bond with the court in an action or proceeding, the clerk must enter in the register of actions⁴¹ the date and amount of the bond⁴² and the names of the sureties on the bond.⁴³ A bond given in an action or proceeding may be withdrawn from the file and returned to the principal on order of the court if stipulated by the beneficiary⁴⁴ or if the bond is no longer in force and effect.⁴⁵ At the time that a bond is given, the principal must serve a copy of the bond on the beneficiary.⁴⁶ An affidavit of service must be given and filed with the bond.⁴⁷

Prior law provided that the officer and the sureties were equitably bound to the State or the interested party on an official bond regardless of whether the bond was defective in form or if there were defects in the approval⁴⁸ or filing.⁴⁹ The State could recover, by court action, the proper and equitable demand or damages.⁵⁰ Chapter 998 deletes the provision relating to equitable liability.⁵¹ Following case law,⁵² the Bond and Undertaking Law permits the beneficiary of a bond to enforce the liability against the principal and sureties to the extent provided by statute.⁵³

Approval and Effect

Chapter 998 provides that a bond becomes effective without approval unless the statute providing for the bond requires that the bond be approved by the court or officer.⁵⁴ Under prior law, judges at cham-

(amending CAL. CIV. PROC. CODE §§ 515.010, 515.020) and CAL. STATS. 1903, c. 91, §3, at 99 (enacting CAL. CIV. PROC. CODE §677.5).

40. See CAL. CIV. PROC. CODE §995.340(b); *id.* §682a (bond given to an officer is transmitted to a financial institution); CAL. REV. & TAX. CODE §2954 (bond filed with tax collector; only proof need be filed with court).

41. See CAL. CIV. PROC. CODE §1052 (definition of register of actions).

42. *Id.* §995.350(a)(1).

43. *Id.* §995.350(a)(2). If the bond is lost, the register entries supply prima facie evidence that the bond was given as required by statute. See *id.* §995.350(b).

44. *Id.* §995.360(a).

45. *Id.* §995.360(b).

46. *Id.* §995.370. Chapter 998 states that service of a notice, paper, or other document will be made in the same manner as service of process in civil actions generally. *Id.* §995.030.

47. *Id.* §995.370. Chapter 998 provides for standards of an affidavit made pursuant to the Bond and Undertaking Law. See *id.* §§437c, 995.040.

48. See *id.* §995.410(b) (definition of approval of a bond).

49. See CAL. STATS. 1943, c. 134, §1554, at 965 (enacting CAL. GOV'T CODE §1554).

50. See *id.*

51. See CAL. CIV. PROC. CODE §995.380.

52. See *Powers Regulator Co. v. Seaboard Sur. Co.*, 204 Cal. App. 2d 338, 348, 22 Cal. Rptr. 373, 379 (1962) (surety on a bond is liable to the extent provided by statute).

53. See CAL. CIV. PROC. CODE §995.380(b); RECOMMENDATION, *supra* note 3, at 523.

54. See CAL. CIV. PROC. CODE §995.410(a). The court or officer may approve or disprove

bers were only allowed to approve bonds in relation to matters of probate.⁵⁵ Chapter 517 authorizes judges at chambers to approve all bonds and undertakings.⁵⁶

Chapter 998 continues the rule that unless a statute provides otherwise, a bond is effective at the time that it is given, or if it is required to be approved, at the time it is approved.⁵⁷ If a statute provides for a different effective date, the statute governs unless an objection is made to the bond before the effective date.⁵⁸ If the court determines that the bond is sufficient, the bond becomes effective at that time.⁵⁹

Existing law provides that a bond remain in effect until (1) the sureties withdraw or cancel the bond;⁶⁰ (2) a new bond is given in place of the original bond;⁶¹ (3) the purpose for which the bond is given is satisfied or the purpose is abandoned without liability;⁶² (4) a judgment of liability that exhausts the amount of the bond is satisfied;⁶³ or (5) the term of the bond expires.⁶⁴

Personal Sureties

Existing law requires that a personal surety on a bond meet certain qualifications⁶⁵ and that a bond executed by personal sureties be accompanied by an affidavit of the surety's qualifications.⁶⁶ Under prior law, if the amount of the bond was in excess of \$2000, the affidavit had to contain additional information pertaining to property used to qualify the surety on the bond.⁶⁷ If the amount of the bond exceeded \$3000

the bond on the basis of the affidavit or certificate of the sureties, or may require the attendance of witnesses and the production of evidence and may examine the sureties under oath regarding their qualifications. *Id.* §995.410(b).

55. See CAL. STATS. 1979, c. 730, §16, at 2472 (amending CAL. CIV. PROC. CODE §166).

56. See CAL. CIV. PROC. CODE §166.

57. Compare *id.* §995.420(a) with CAL. STATS. 1976, c. 437, §36.5, at 1136 (amending CAL. CIV. PROC. CODE §489.060).

58. CAL. CIV. PROC. CODE §995.420(b).

59. *Id.*

60. *Id.* §995.430(a).

61. *Id.*

62. *Id.* §995.430(b).

63. *Id.* §995.430(c).

64. *Id.* §995.430(d). A bond given as a condition of a license or permit remains in full force during the license or permit period plus any renewals or until cancellation of the surety from the bond. *Id.* §995.440.

65. Compare CAL. CIV. PROC. CODE §995.510 with CAL. STATS. 1963, c. 137, §1, at 810 (amending CAL. CIV. PROC. CODE §1057) (the surety must be a state resident other than the principal; cannot be an officer of the court or a member of the State Bar; must be worth the amount of the bond in real or personal property, or both; situated in the State over and above all debts and liabilities exclusive of property exempt from execution).

66. Compare CAL. CIV. PROC. CODE §995.520 with CAL. STATS. 1963, c. 137, §1, at 810.

67. See CAL. STATS. 1963, c. 137, §1, at 810 (the affidavit had to contain information regarding personal or real property that was relied upon in qualifying the surety on the bond or undertaking).

and was executed by more than two personal sureties, prior law allowed that one surety could have assets worth less than the amount of the bond, if the aggregate worth of all sureties executing the bond was twice the amount of the bond and if the affidavit stipulated that this qualification was met.⁶⁸ In recognition of the change in the value of the dollar since the enactment of the former law, Chapter 998 changes the above amounts from \$2000 to \$5000 and from \$3000 to \$10,000.⁶⁹

Admitted Surety Insurers

Chapter 998 continues to allow two or more admitted surety insurers to be sureties on a particular bond by executing the same or separate bonds when the value totals the required amount of that bond.⁷⁰ In this case, each admitted surety insurer is jointly and severally liable to the amount of liability assumed by it.⁷¹ Prior law provided that an admitted surety insurer could not be approved as surety on a bond unless the bond was executed in the name of the insurer under penalty of perjury, or unless the fact of execution of the bond was duly acknowledged in the presence of an officer of this state authorized to take and certify acknowledgements.⁷² Chapter 998 deletes the requirement that the officer taking the acknowledgement be "of this state."⁷³ This change allows out-of-state acknowledgements to be used if they comply with other statutory provisions.⁷⁴

Chapter 998 requires that an objection to the sufficiency of an admitted surety insurer must include a certificate of the county clerk stating that the insurer is not certified or that certification has been revoked,⁷⁵ and an affidavit of facts establishing the insufficiency of the insurer.⁷⁶ If an objection is made, the insurer must submit, to the court or officer, the original or a certified copy of the unrevoked instrument authorizing that person to execute bonds,⁷⁷ a certified copy of the certificate of au-

68. *Id.*

69. See CAL. CIV. PROC. CODE §995.520.

70. Compare *id.* §995.620 with CAL. STATS. 1935, c. 145, §11698, at 720 (enacting CAL. INS. CODE §11698).

71. *Id.*

72. See CAL. STATS. 1976, c. 740, § 1, at 1764 (amending CAL. CIV. PROC. CODE §1056); CAL. R. CT. 242(a), 530(a).

73. See CAL. CIV. PROC. CODE §995.630.

74. See CAL. CIV. CODE §1189 (acknowledgements taken outside of the state that are in accordance with the laws of the place where the acknowledgement takes place will be sufficient in this state).

75. *Id.* §995.650(a) (insurer must be certified by the Insurance Commissioner). The county clerk has authority to issue a certificate stating that the admitted surety insurer has been granted authority by the Insurance Commissioner to transact surety insurance. *Id.* §995.640.

76. *Id.* §995.650(b).

77. *Id.* §995.660(a)(1).

thority,⁷⁸ a certificate from the county clerk of the county where the court or officer is located stating that, according to the clerk's records, the certificate of authority is valid,⁷⁹ and a financial statement of the insurer.⁸⁰ If these documents are in order, the insurer is considered sufficient and must be approved as surety on the bond.⁸¹

Deposit in Lieu of Bond

Chapter 998 continues the provision allowing a deposit in lieu of a bond.⁸² The principal may deposit with the officer either (1) money that must be maintained in an interest-bearing trust account,⁸³ (2) bearer bonds or notes of the United States or the State of California,⁸⁴ (3) certificates of deposit,⁸⁵ (4) savings accounts assigned to the officer,⁸⁶ (5) investment certificates or share accounts assigned to the officer,⁸⁷ or (6) certificates for funds or share accounts assigned to the officer.⁸⁸ The deposit must have a value equal to or in excess of the amount required to be secured if a bond is given.⁸⁹ The principal must also submit an executed agreement authorizing the officer to apply the deposit to enforce the liability of the principal.⁹⁰ Interest on the deposit must be paid to the principal according to statute.⁹¹ If the principal incurs liability, the amount must be paid within 30 days after the judgment of liability.⁹² If not paid within that time period, the deposit will be collected, sold, or otherwise applied to the liability upon order of the court.⁹³ If no liability is incurred, the deposit must be returned to the principal upon substitution of a sufficient bond, or at the time provided

78. *Id.* §995.660(a)(2).

79. *Id.* §995.660(a)(3).

80. *Id.* §995.660(a)(4) (the financial statement must be made by an officer's certificate), CAL. CORP. CODE §173.

81. *See id.* §995.660(b) (this approval is subject to CAL. INS. CODE §12090).

82. *Compare id.* §995.710 with CAL. STATS. 1957, c. 1495, §1, at 2820 (amending CAL. CIV. PROC. CODE §1054a). The deposit has the same force and is subject to the same liability as a bond. CAL. CIV. PROC. CODE §995.730.

83. CAL. CIV. PROC. CODE §995.710(a)(1).

84. *Id.* §995.710(a)(2).

85. *Id.* §995.710(a)(3) (must be payable to the officer and issued by banks or by savings and loan associations authorized to do business in this state).

86. *Id.* §995.710(a)(4).

87. *Id.* §995.710(a)(5).

88. *Id.* §995.710(a)(6).

89. *Id.* §995.710(b) ("value" means amount, face value, or market value). The market value is determined by agreement between the principal and beneficiary or, if given in an action or proceeding, by the court. *Id.* §995.720.

90. *Id.* §995.710(c) (the agreement must include the address at which the principal may be served with notice and documents).

91. *See id.* §995.740.

92. *See id.* §995.750(a).

93. *See id.* §995.760(a).

by statute.⁹⁴

Bonds to the State

Chapter 998 provides that the State is the beneficiary of a bond given by an officer of the court for the performance of duties⁹⁵ and of a bond in which no beneficiary is specified.⁹⁶ The bond must be approved by the court⁹⁷ and any party for whose benefit the bond is given may enforce the bond.⁹⁸

Existing law provides that one making a bid⁹⁹ to a public entity¹⁰⁰ may bring an action against the public entity for the recovery of an amount forfeited because of mistake.¹⁰¹ Prior law required that a bond of an admitted surety insurer of not less than \$500 be filed with the complaint.¹⁰² In *Beaudreau v. Superior Court*,¹⁰³ the California Supreme Court held that requiring the plaintiff to file an undertaking in an action against a public entity was unconstitutional.¹⁰⁴ Chapter 517 deletes the cost bond provision because it failed to meet the constitutional standards enunciated in *Beaudreau*.¹⁰⁵

Objections to Bonds

Chapter 998 specifies a procedure to be used by a beneficiary who wishes to object to a bond because the sureties are insufficient; the amount is insufficient; or the bond, for any other cause, is insufficient.¹⁰⁶ The objection procedure is limited to cases in which there are adverse parties and a court to resolve disputes.¹⁰⁷ In other situations the officer required to approve a bond or undertaking must do so without the objection procedure.¹⁰⁸ The objection must be by written notice of motion¹⁰⁹ and must be made within 10 days after service of a copy of

94. See *id.* §995.770.

95. See *id.* §995.820.

96. See *id.* §995.830.

97. *Id.* §995.840(a).

98. See *id.* §995.850.

99. CAL. GOV'T CODE §4200(b) (definition of a bid).

100. *Id.* §4200(a) (definition of a public entity).

101. See *id.* §4201 (bidder may recover the amount forfeited because of the mistake in the bid).

102. See CAL. STATS. 1971, c. 1584, §2 at 3195-96 (amending CAL. GOV'T CODE §4201).

103. 14 Cal. 3d 443, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

104. *Id.* at 465, 535 P.2d at 724, 121 Cal. Rptr. at 596.

105. Compare CAL. GOV'T CODE §4201 with CAL. STATS. 1971, c. 1584, §2, at 3195-96; RECOMMENDATION, *supra* note 3, at 596, 597.

106. See CAL. CIV. PROC. CODE §§995.910-995.960.

107. See *id.* §995.910; RECOMMENDATION, *supra* note 3, at 536.

108. RECOMMENDATION, *supra* note 3, at 536.

109. *Id.* §995.930(a); see *id.* §1010 (requirements of a notice of motion).

the bond on the beneficiary.¹¹⁰ If the objection is not made within the required time period, the beneficiary waives all objections unless there is a showing of changed circumstances.¹¹¹

Upon proper objection, the court will conduct a hearing¹¹² and will determine whether the bond is sufficient.¹¹³ If deemed insufficient, the court will order that a new, additional, or supplemental bond be given within five days.¹¹⁴ If a sufficient bond is not given within the time ordered, all rights obtained by the giving of the original bond cease.¹¹⁵ Additionally, the court may determine that the bond is excessive and may reduce the amount of the bond at its discretion.¹¹⁶

Release or Substitution of Sureties

Chapter 998 provides for the release and substitution of sureties on a bond given in an action or proceeding.¹¹⁷ If a surety applies to the court to be released from liability on a bond,¹¹⁸ the principal may apply to the court for a substitution of the surety.¹¹⁹ Notice of hearing on the application for release must be given¹²⁰ and upon hearing of the application, the court will determine whether injury to the beneficiary would result from a substitution or release of the surety¹²¹ and render its decision accordingly.¹²²

Under Chapter 998 a substitute surety is subject to all the provisions to which the original surety was subject.¹²³ A released surety is liable on all acts, omissions, or causes existing before the release.¹²⁴ The released surety is not liable, however, for any act, default, or misconduct of the principal or breach of condition of the bond that occurs after the release.¹²⁵ In addition, the release does not alter the bond or the liability as to the remaining sureties.¹²⁶

110. *Id.* §995.930(b).

111. *Id.* §995.930(c).

112. *Id.* §995.950(a) (the hearing on an objection must be held not less than two nor more than five days after service of the notice of motion).

113. *Id.* §995.960(a).

114. *Id.* §995.960(b)(1).

115. *Id.*

116. *See id.* §996.030(a).

117. *See id.* §§996.110-996.150.

118. *See id.* §996.110(a).

119. *Id.* §996.110(b).

120. *See id.* §996.110(c) (service must be made not less than 15 days before the hearing).

121. *See id.* §996.120.

122. *See id.*

123. *See id.* §996.130(a).

124. *See id.* §996.150(a).

125. *Id.* §996.150(b).

126. *Id.* §996.150(c).

Cancellation and Withdrawal

A surety may cancel or withdraw from a bond, unless given in an action or proceeding, by giving notice to the officer to whom the bond was given¹²⁷ and a copy of the notice to the principal.¹²⁸ Cancellation or withdrawal is effective 30 days after notice is given,¹²⁹ the date that a new surety is substituted,¹³⁰ or the date that a new bond becomes effective.¹³¹

If the principal does not give a new bond within 30 days after notice is given, all benefits obtained by giving the original bond cease.¹³² If the withdrawal of the surety does not reduce the amount of the bond or lower the number of sureties below the minimum required by statute, the original bond remains in effect.¹³³ In either case, the withdrawn surety is liable for acts, omissions, or causes existing before withdrawal¹³⁴ but is not liable for any act, default, or misconduct of the principal or breach of condition of the bond that occurs after withdrawal or cancellation.¹³⁵ In addition, the withdrawal or cancellation does not alter the bond or the liability of the remaining sureties.¹³⁶

New, Additional, and Supplemental Bonds

Chapter 998 requires that the principal give, upon order of the court or officer, a new, additional, or supplemental bond.¹³⁷ The bond must be in the same form and have the same obligation as the original bond¹³⁸ and is subject to all the provisions applicable to the original bond.¹³⁹ If a new bond is given, the original bond remains liable for all acts, omissions, or causes existing before the change,¹⁴⁰ but the original bond will not be liable for any act, default, or misconduct of the principal or any breach of condition of the bond that arises after the new bond becomes effective.¹⁴¹

An additional or supplemental bond does not affect the original

127. *Id.* §996.320 (notice is to be given in the same manner in which notice of the bond was given).

128. *Id.*

129. *Id.* §996.330(a).

130. *Id.* §996.330(b).

131. *Id.* §996.330(c).

132. *See id.* §996.340(a).

133. *Id.* §996.350.

134. *See id.* §996.360(a).

135. *Id.* §996.360(b).

136. *Id.* §996.360(c).

137. *See id.* §996.210(a).

138. *Id.* §996.220(a).

139. *Id.* §996.230.

140. *Id.* §996.240(a).

141. *Id.* §996.240(b).

bond.¹⁴² The principal and sureties become liable upon either or both bonds and the beneficiary may enforce liability and recover separately on both bonds.¹⁴³ If the sureties on either bond are required to pay on account of the principal, the sureties required to pay may recover from the sureties on the remaining bond, a distributive part of the sum paid.¹⁴⁴

Liability of Principal and Sureties

Chapter 998 provides that the beneficiary may enforce the liability on a bond against both the principal and the sureties.¹⁴⁵ Unless the principal, beneficiary, and surety all provide for a shorter period, the statute of limitations for commencement of an action on a bond is four years.¹⁴⁶ Enforcement is in a civil action and both the principal and the sureties are to be joined as parties.¹⁴⁷ If the bond was given in an action or proceeding, enforcement is by motion made after entry of the final judgment in the action or proceeding in which the bond was given.¹⁴⁸ Notice of motion must be served on the principal and sureties in accordance with statute.¹⁴⁹

Judgment will be entered against the principal and sureties unless they file affidavits in opposition.¹⁵⁰ If a triable issue of fact is presented, the trial enforcing the bond is by the court.¹⁵¹ A judgment of liability on the bond will obligate the principal and the sureties jointly and severally.¹⁵² The amount of the judgment is determined by the court and does not include costs or reasonable attorneys' fees.¹⁵³

Chapter 998 provides a general rule that the total liability of a surety is limited to the amount of the bond.¹⁵⁴ Unless otherwise provided by

142. *Id.* §996.250(a).

143. *Id.* §996.250(b).

144. *Id.* §996.250(d).

145. *See id.* §996.410(a). If the beneficiary is a class of persons, anyone in the class may enforce liability. *Id.* §996.410(b).

146. *See id.* §§337, 996.450.

147. *Id.* §996.430(a). If the bond was given in an action or proceeding, the enforcement must be in the court where the original action was pending. If the bond was not given in an action or proceeding, the enforcement may take place in any court of competent jurisdiction. *Id.* §996.430(b).

148. *Id.* §§996.440(a), 996.440(b).

149. *See id.* §996.440(c) (must be served at least 30 days before the time set for hearing the motion). The notice must state the amount of the claim and be supported by affidavits setting forth facts on which the claim is based. *Id.*

150. *Id.* §996.440(d).

151. *See id.* (there is no right to a trial by jury). The right to a trial by jury is not denied on a bond executed prior to the passage of Chapter 998. *See* CAL. STATS. 1972, c.391, §2, at 714 (enacting CAL. CIV. PROC. CODE §1058a).

152. *See* CAL. CIV. PROC. CODE §996.460(a).

153. *Id.* §996.460(b); RECOMMENDATIONS, *supra* note 3, at 550.

154. *See* CAL. CIV. PROC. CODE §996.470(a). If the bond is given in an amount greater than

statute, the liability of the principal will not be limited.¹⁵⁵ The liability of a surety may be less than the amount of the bond if the bond stipulates either that liability is limited to the worth of the surety¹⁵⁶ or that the liability is less than the bond pursuant to a statute.¹⁵⁷

After final judgment for the beneficiary, a surety may make a voluntary payment on the bond.¹⁵⁸ If the beneficiary makes a claim for payment on a bond given in an action or proceeding and the surety fails to pay, the surety is liable for costs in obtaining a judgment, reasonable attorneys' fees, and interest on the judgment from the date of the claim.¹⁵⁹

Enforcement Lien

If an action enforcing the liability on a bond is for the benefit of the State, Chapter 998 requires that an affidavit be filed,¹⁶⁰ certified,¹⁶¹ and recorded.¹⁶² Any judgment recovered is a lien for the amount of liability on the judgment¹⁶³ upon all real property belonging to the defendant that is situated in the county where the certificate is filed.¹⁶⁴

Conclusion

Chapter 998 represents a major revision in the law of bonds and undertakings.¹⁶⁵ The Chapter consolidates many of the procedural statutes governing statutory bonds and undertakings into one general statute, the Bond and Undertaking Law.¹⁶⁶ Correspondingly, Chapter 517 makes the necessary revisions to conform the various codes to the Bond and Undertaking Law.¹⁶⁷

that required by statute, the liability of the surety is limited to the statutory amount, unless the amount has been increased voluntarily or by agreement by the parties. *Id.* §996.470(b).

155. *Id.* §996.470(a).

156. *Id.* §996.470(c)(1).

157. *Id.* §996.470(c)(2).

158. *See id.* §996.480(a)(1).

159. *See id.* §996.480(a)(2).

160. *See id.* §996.520 (the affidavit must state that the bond was executed by the defendant, the bond is one to which the Bond and Undertaking Law applies, the defendant has real property or an interest in real property in a designed county, and the liability is being enforced for the benefit of the State).

161. *Id.* §996.530 (must be certified to the recorder of the county where the real property is located).

162. *Id.* §996.540 (recorded by the county recorder).

163. *Id.* §996.550(b).

164. *Id.* §996.550(a).

165. *See generally* RECOMMENDATION, *supra* note 3.

166. *See generally* RECOMMENDATION, *supra* note 3.

167. *See generally* RECOMMENDATION, *supra* note 3.

Civil Procedure; writs of mandate

Civil Procedure Code §§1088.5, 1089.5, (new); §§527, 1033, 1094, 1094.5, 1107 (amended).

AB 606 (Stirling); STATS. 1982, Ch 193

(Effective May 5, 1982)

Support: California Rural Legal Assistance Foundation

SB 2025 (Maddy); STATS. 1982, Ch 812

Support: California Council of Civil Engineers and Land Surveyors;
California Hospital Association; California Judges Association

The procedure for obtaining a writ¹ of mandate² differs from the procedure used in other civil actions.³ Previously, the application of the procedure indicated a lack of uniformity throughout the state courts.⁴ Chapters 193 and 812 revise the procedure for obtaining a writ of mandate in order to conform more closely to the procedure used in obtaining judicial relief in ordinary civil actions.⁵ Chapter 812 also authorizes courts to issue temporary restraining orders and preliminary injunctions in class actions before the class has been certified,⁶ and specifies the procedure for claiming costs after a dismissal is granted.⁷

Existing law provides that a petition⁸ for a prerogative writ⁹ should be accompanied by proof of service¹⁰ of a copy of the petition on the

1. CAL. CIV. PROC. CODE §17(6) (definition of writ). See generally E. FRANK, CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL WRITS §2.2 (1970) [hereinafter cited as FRANK]; 5 B. WITKIN, CALIFORNIA PROCEDURE EXTRAORDINARY WRITS §1 (2nd ed. 1971).

2. See Bodinson Mfg. Co. v. Cal. Employment Comm'n, 17 Cal. 2d 321, 328, 109 P.2d 935, 940 (1941) (definition of writ of mandate). See generally CAL. CIV. PROC. CODE §§1084 (writ of mandamus may be denominated as a writ of mandate); 1087 (writ may be either alternative or peremptory); FRANK, *supra* note 1, §§2.11, 5.7; WITKIN, *supra* note 1, §4.

3. Compare CAL. CIV. PROC. CODE §§1084-1097 with *id.* §§307-989. See generally Wenzler v. Municipal Court, 235 Cal. App. 2d 128, 132, 45 Cal. Rptr. 54, 57 (1965) (judicial remedy of mandamus is not a civil action, but a special proceeding of a civil nature, that is available for specified purposes and for which statutory procedures are provided); FRANK, *supra* note 1, §11.2 (service before filing is a major procedural distinction between initiating actions for extraordinary relief and commencing ordinary civil actions).

4. See generally FRANK, *supra* note 1, §§11.2, 11.4, 11.5, 11.6 (local superior court practices vary greatly).

5. Compare CAL. CIV. PROC. CODE §§ 1088.5, 1089.5, 1094, 1094.5, 1107 with *id.* §§411.10, 411.20, 412.10.

6. See CAL. CIV. PROC. CODE §527.

7. See *id.* §1033.

8. See generally *id.* §1086 (a writ is issued upon the verified petition of the party beneficially interested).

9. See FRANK, *supra* note 1, §2.2 (at common law, special or prerogative writs allowed extraordinary intervention by the law courts); WITKIN, *supra* note 1, §1 at 3780 (a writ of mandamus is an extraordinary or prerogative writ).

10. See CAL. CIV. PROC. CODE §1011 (definition of service).

respondent¹¹ and on any real party in interest¹² named in the petition, unless the court, in its discretion, allowed filing without notice¹³ and service.¹⁴ Some courts have interpreted the method of service to mean personal service and strictly enforced the requirement.¹⁵ Chapter 812 specifies that service of a copy of the petition for a prerogative writ may be accomplished by mail.¹⁶ Chapter 193 provides that when an application is filed for the issuance of an alternative writ,¹⁷ the application must be accompanied by proof of service of a copy upon the respondent and the real party in interest.¹⁸ When a peremptory writ¹⁹ is sought, however, the petition may be filed and served in the same manner as an ordinary civil action.²⁰ Specifically, it is not necessary that proof of service accompany the petition for a peremptory writ at the time of filing.²¹ Proof of service of a copy of the filed petition, however, must be filed with the court prior to a hearing or any other action by the court.²²

Prior practice by the courts called for the filing of the return on or before the date of the hearing on the merits of the action.²³ Existing law requires the respondent to file the return²⁴ of an alternative writ by the date fixed by the court and specified in the writ.²⁵ In specifying the time of return when a peremptory writ is sought, Chapter 193 provides that the respondent answer within 30 days following receipt of a copy of the record of the proceedings to be reviewed.²⁶ If the record is filed with the petition or if no record is required, the respondent must an-

11. See generally FRANK, *supra* note 1, §5.23 (writ of mandate is issued to compel performance of an act by the respondent, who must have a present duty, present ability, and legal authority to perform that act).

12. See *id.* §10.18 at 194 (the real party in interest is any person or entity whose interest will be directly affected by the proceeding). See generally WITKIN, *supra* note 1, §132.

13. CAL. CIV. PROC. CODE §18 (definition of notice).

14. See *id.* §1107.

15. See generally *Walters v. Contractor's State License Bd.*, 229 Cal. App. 2d 449, 40 Cal. Rptr. 390 (1964) (a clerk refused to file a petition for writ of mandate for lack of an affidavit of personal service); FRANK, *supra* note 1, §11.4 (Los Angeles County exemplifies the strict application of the requirement of personal service).

16. See CAL. CIV. PROC. CODE §307 (only one form of civil action); *id.* §1107.

17. See *id.* §1087 (the alternative writ commands a party to do the act required to be performed or to show cause why the party has not done so).

18. See *id.* §1107.

19. See *id.* §1087 (the peremptory writ is similar in form to the alternative writ except that the words requiring the party to show cause why the party has not done as commanded are omitted); see also WITKIN, *supra* note 1, §5.45 (a peremptory writ cannot be granted by default).

20. See CAL. CIV. PROC. CODE §1107.

21. See *id.* §1088.5.

22. See *id.*

23. See FRANK, *supra* note 1, §15.11.

24. See *id.* §15.1 (definition of return).

25. See CAL. CIV. PROC. CODE §1089.

26. See *id.* §1089.5.

swer within 30 days after service of the petition.²⁷

If no return is made, existing law allows the case to be heard on the petitioner's pleading.²⁸ If the respondent answers, but raises only questions of law or immaterial questions of fact, the answer is in substance a demurrer and the matter is heard on the pleadings, other verified documents, and oral argument.²⁹ If no alternative writ is sought, Chapter 193 provides a procedure to be used if the petition presents no material issues of fact or is based solely on a review of an administrative record.³⁰ In those cases, the court may render a decision upon noticed motion³¹ by any party for a judgment on the peremptory writ.³²

Existing law provides that when a writ of mandate is sought for the purpose of reviewing the quasi-judicial determinations of an administrative agency, the record of the administrative hearings may be filed with the petition, with the respondent's points and authorities,³³ or upon order by the court.³⁴ Chapter 193 provides that the cost of preparing the record will be paid by the petitioner, except when other provisions apply.³⁵ If the petitioner is proceeding in forma pauperis,³⁶ the cost of preparing the record, if it is needed to properly review the administrative hearing, will be paid by the respondent.³⁷ If a peremptory writ is sought, Chapter 193 requires that the administrative record be filed as soon as possible.³⁸ Therefore, the respondent may file the record with the petition after payment of the costs by the petitioner, when required, or as ordered by the court.³⁹ In all cases, existing law requires that if the expense of preparing the record had been borne by the prevailing party, the expense shall be taxable as costs.⁴⁰

Existing law requires that the party in whose favor a civil judgment is ordered and who claims costs,⁴¹ must serve, within 10 days of the

27. *See id.*

28. *See id.* §§420, 1094 (definition of pleading). *See generally* FRANK, *supra* note 1, §17.7 (the writ cannot be granted by default); WITKIN, *supra* note 1, §164.

29. *See* CAL. CIV. PROC. CODE §1094; FRANK, *supra* note 1, §17.8 at 407. *See generally* WITKIN, *supra* note 1, §164.

30. *See* CAL. CIV. PROC. CODE §1094.

31. *See id.* §1010 (definition of notice of motion). *See generally* FRANK, *supra* note 1, §5.48.

32. *See* CAL. CIV. PROC. CODE §1094.

33. *See generally* FRANK, *supra* note 1, §12.1 (the respondent and any real party in interest, may, within five days after service and filing of the petition, serve and file points and authorities in opposition to the granting of the petition).

34. *See* CAL. CIV. PROC. CODE §1094.5(a).

35. *See id.*

36. *See* CAL. GOV'T CODE §68511.3 (proceedings in forma pauperis).

37. *See* CAL. CIV. PROC. CODE §1094.5(a).

38. *See id.*

39. *See id.*

40. *See id.*

41. *See generally id.* §§1021-1032.6 (costs and disbursements in a civil action or proceeding).

entry of judgment, a memorandum of costs incurred in the action or proceeding upon the adverse party.⁴² A party who excepts to the costs may file, within 10 days after service of the memorandum of costs, a motion to have the costs taxed by the court where the judgment was rendered.⁴³ Chapter 812 applies the same requirements of service to a party claiming costs in whose favor a dismissal is granted.⁴⁴ Similarly, the adverse party may except to the costs by filing a motion to have the costs taxed by the court where the dismissal was granted.⁴⁵

Existing law also describes the grounds sufficient to grant a temporary restraining order⁴⁶ or a preliminary injunction⁴⁷ in a civil case.⁴⁸ Chapter 812 authorizes courts to issue temporary restraining orders, preliminary injunctions, or both in class actions,⁴⁹ regardless of whether the class has been certified.⁵⁰

42. *See id.* §1033. The memorandum must be verified by the oath of the party, the party's attorney, clerk of the attorney, or agent. *Id.*

43. *See id.*

44. *See id.*

45. *See id.*

46. *See* *Paddington Corp. v. Foremost Sales*, 13 Ill. App. 3d 170, 175, 300 N.E.2d 484, 487 (1973) (definition of temporary restraining order); CAL. CIV. PROC. CODE §527 (implementation of temporary restraining order).

47. *See* 13 Ill. App. 3d at 175, 300 N.E.2d at 487 (definition of preliminary injunction); *Nat'l Pac. Corp. v. Am. Fin. Corp.*, 348 So.2d 735, 736 (La. App. 1977); CAL. CIV. PROC. CODE §525.

48. *See* CAL. CIV. PROC. CODE §527(a).

49. *See* *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 703, 433 P.2d 732, 738, 63 Cal. Rptr. 724, 730 (1967) (definition of class action); CAL. CIV. PROC. CODE §382 (authorization for class action).

50. *See* CAL. CIV. PROC. CODE §527(a).

Civil Procedure; subpoenas and subpoenas duces tecum

Code of Civil Procedure §§1985, 1987.5, 2034 (amended); Evidence Code §§1560, 1563 (amended); Financial Code §1582 (amended).

SB 1288 (Davis); STATS. 1982, Ch 138

Support: Los Angeles County Municipal Court Judges' Association; State Bar Committee on the Administration of Justice

SB 1372 (Davis); STATS. 1982, Ch 452

Support: California Bankers Association; California Hospital Association; State Bar of California

Chapters 138 and 452 amend existing laws concerning subpoenas¹ and subpoenas duces tecum² to make them consistent with each other.³

1. CAL. CIV. PROC. CODE §1985 (definition of subpoena).

2. *Id.* (definition of subpoena duces tecum).

3. *Compare id.* §1985 with CAL. STATS. 1979, c. 458, §1, at 1607 (amending CAL. CIV. PROC.

Chapter 452 requires that custodians of records who personally appear in civil proceedings in answer to a subpoena duces tecum be paid the same witness fees as other persons summoned to testify by subpoena in civil actions,⁴ and specifies the time allowed for custodians of records to comply with the subpoena requirements.⁵ Furthermore, Chapter 452 amends provisions of law pertaining to recoverable costs that result from compliance with lawfully issued subpoenas duces tecum.⁶

Subpoenas

Subpoenas to compel a person to testify as a witness may be issued under existing law by the court clerk, the judge, or the attorney of record in any action or proceeding.⁷ Prior to the enactment of Chapter 138, only the refusal of any person to obey specified subpoenas⁸ issued by a *court* could be punishable as contempt.⁹ Chapter 138 now provides the same penalties for attorney-issued subpoenas by punishing as contempt refusal to obey *any* lawfully issued subpoena that requires a person to attend a deposition¹⁰ or be sworn as a witness.¹¹

Subpoena duces tecum

Under prior law, a subpoena duces tecum could only be signed and issued by either the judge or court clerk in any action or proceeding.¹² In an apparent effort to make the provision pertaining to the issuance of subpoenas and subpoenas duces tecum consistent, Chapter 452 extends the power to sign and issue subpoenas duces tecum to attorneys of record.¹³

Existing law requires a copy of the affidavit¹⁴ upon which a sub-

CODE §1985) (both subpoenas and subpoenas duces tecum can be issued by attorneys); *compare* CAL. CIV. PROC. CODE §2034 with CAL. STATS. 1981, c. 714, §75, at — (amending CAL. CIV. PROC. CODE §2034) (refusing to answer subpoenas issued by courts *or* attorneys is a contempt); *compare* CAL. FIN. CODE §1582 with CAL. STATS. 1951, c. 364, §1582, at 909 (enacting CAL. FIN. CODE §1582) (trust companies are required to answer to subpoenas issued by courts *or* attorneys).

4. *Compare* CAL. EVID. CODE §1563(c) with CAL. STATS. 1981, c. 1014, §2, at — (amending CAL. EVID. CODE §1563).

5. *Compare* CAL. EVID. CODE §1560(2)(b) with CAL. STATS. 1969, c. 199, §2, at 484 (amending CAL. EVID. CODE §1560).

6. *Compare* CAL. EVID. CODE §1563(b)(6) with CAL. STATS. 1981, c. 1014, §2, at —.

7. CAL. CIV. PROC. CODE §1985.

8. *See id.* §2034(b)(1) (subpoenas to require a person to attend a deposition, be sworn as a witness, attend a session of court, or obey any other order made by the court).

9. CAL. CIV. PROC. CODE §1209 (definition of contempt). *See* CAL. STATS. 1981, c. 714, §75, at —. *See generally* CAL. CIV. PROC. CODE §1218 (punishment for contempt).

10. CAL. CIV. PROC. CODE §2004 (definition of deposition).

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

12. *See* CAL. STATS. 1979, c. 458, §1, at 1607 (amending CAL. CIV. PROC. CODE §1985).

13. *Compare* CAL. CIV. PROC. CODE §1985 with CAL. STATS. 1979, c. 458, §1, at 1607. *See generally* 11 PAC. L.J. REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 378 (1980).

14. CAL. CIV. PROC. CODE §2003 (definition of affidavit).

poena duces tecum is based to be served along with the subpoena for the service to be valid.¹⁵ Prior law required the original affidavit to be filed with the court issuing the subpoena before the time designated for the witness to appear and the records and materials described in the subpoena to be produced.¹⁶ In recognition of the statutory change permitting attorneys of record to issue both subpoenas and subpoenas duces tecum, Chapter 452 states that the original affidavit is to be filed in the court where the action is pending.¹⁷

Under prior law, business records¹⁸ requested by a party to the cause of action were required to be produced by the custodian of records within five days after the receipt of the subpoena.¹⁹ Chapter 452 retains the five day limit in the case of criminal actions²⁰ but increases the time for response in civil actions²¹ to 15 days.²² In *all* actions, however, Chapter 452 allows the time limit to be any period agreed on by the party who served the subpoena and the custodian of records.²³

Prior law stated that witnesses not a party to the action or proceeding who are required to produce all or part of their business records pursuant to a subpoena duces tecum could charge the party requiring the records all reasonable costs incurred in meeting the subpoena.²⁴ Chapter 452 limits the recovery of reasonable costs²⁵ to those incurred by witnesses in a *civil* proceeding.²⁶ Prior to the enactment of Chapter 452, when the personal attendance of the custodian of the records was necessary,²⁷ the custodian was entitled to 20 cents a mile for one-way mileage actually traveled, up to 12 dollars a day,²⁸ plus reasonable costs incurred in the production of the records.²⁹ Chapter 452 specifies that when the personal attendance of the custodian is required in a civil proceeding, the custodian is entitled to recover the same fees and mileage expenses given to other witnesses required to testify before a court in answer to a subpoena,³⁰ established by existing law as \$35 a day plus

15. See *id.* §1987.5.

16. CAL. STATS. 1968, c. 95, §2, at 306 (amending CAL. CIV. PROC. CODE §1987.5).

17. Compare CAL. CIV. PROC. CODE §1987.5 with CAL. STATS. 1968, c. 95, §2, at 306).

18. See CAL. EVID. CODE §§1270, 1271 (definition of business records).

19. CAL. STATS. 1969, c. 199, §2, at 484 (amending CAL. EVID. CODE §1560(b)).

20. See CAL. EVID. CODE §§130, 903 (definition of criminal action).

21. See *id.* §§120, 902 (definition of civil action).

22. *Id.* §1560(b)(6).

23. Compare *id.* with CAL. STATS. 1969, c. 199, §2, at 484.

24. See CAL. STATS. 1981, c. 1014, §2, at — (amending CAL. EVID. CODE §1563(b)).

25. CAL. EVID. CODE §1563(b)(1) (definition of reasonable costs).

26. See *id.* §1563(b).

27. See *id.* §1564 (specifies when and how personal attendance is necessary).

28. See CAL. STATS. 1981, c. 1014, §2, at — (amending CAL. EVID. CODE §1563(c)).

29. See *id.*

30. See CAL. EVID. CODE §1563(c). See generally CAL. PENAL CODE §1329 (definition of witness fees paid to persons required to testify in answer to a subpoena).

mileage actually traveled, both ways, at 20 cents per mile.³¹ Chapter 452 retains provisions under existing law that allow custodians to recover all reasonable costs incurred in the production of records required by a subpoena duces tecum.³² Under prior law, reproduction and clerical costs incurred by a custodian of records when personal attendance was not required could be recovered according to statutory provisions.³³ Chapter 452 limits the fees paid when the personal attendance of the custodian of the records is not required and no photocopying or reproduction is performed in order to comply with the subpoena to an amount not to exceed twelve dollars.³⁴

Under existing law, a trust company³⁵ must not disclose information concerning the existence, condition, management, or administration of any private trust³⁶ confided to it except in specified circumstances.³⁷ Chapter 452 specifically requires trust companies to disclose this information when it is requested in a subpoena or subpoena duces tecum issued by an attorney.³⁸ In summary, Chapters 138 and 452 provide attorneys with better opportunities to obtain all necessary testimony and documentary evidence through the use of the subpoena and the subpoena duces tecum.³⁹

31. CAL. GOVT. CODE §68093 (witness fees in civil actions).

32. See CAL. EVID. CODE §1563(c). Compare *id.* with CAL. STATS. 1981, c. 1014, §2, at —.

33. See CAL. STATS. 1981, c. 1014, §2, at —.

34. CAL. EVID. CODE §1563(b)(6).

35. CAL. FIN. CODE §107 (definition of trust company).

36. *Id.* §1581 (definition of private trust).

37. See *id.* §1582 (circumstances are (1) when disclosure is authorized by the trust terms, (2) when disclosure is determined by an officer of the trust company to be necessary in the administration of the trust, and (3) when such disclosure is required by a court of competent jurisdiction).

38. *Id.*

39. See generally CAL. CIV. PROC. CODE §§1985, 1987.5, 2034; CAL. EVID. CODE §§1560, 1563; CAL. FIN. CODE §1582.

Civil Procedure; subpoenas for arbitration proceedings

Code of Civil Procedure §1282.6 (amended)

AB 1883 (Stirling); STATS. 1982, Ch 108

Support: State Bar of California

Under prior law, subpoenas¹ for compelling the attendance of witnesses and subpoenas duces tecum² in arbitration proceedings³ had to

1. CAL. CIV. PROC. CODE §1985 (definition of subpoena).

2. *Id.* (definition of Subpoena duces tecum).

3. See BLACK'S LAW DICTIONARY 96 (5th ed. 1979) (definition of arbitration).

be issued by a neutral arbitrator.⁴ Apparently, in practice, the requesting party would complete the subpoena compelling the attendance of a witness and then the arbitrator would sign it.⁵ Before the arbitrator would sign a subpoena duces tecum, however, the requesting party would have to declare the relevance of the prayed for material.⁶ In comparison, existing law provides that in civil cases the court clerk or judge may issue a presigned but otherwise blank subpoena to a requesting party who will fill it in prior to service.⁷ The enactment of Chapter 108 provides uniformity⁸ between the methods of issuing subpoenas in civil cases and in arbitration proceedings⁹ by permitting all subpoenas in arbitration proceedings to be issued in blank and filled in prior to service by the requesting party.¹⁰

Under prior law, subpoenas used in arbitration proceedings could only be issued by a neutral arbitrator.¹¹ Chapter 108 provides that subpoenas used in arbitration proceedings can now be issued either by a neutral arbitrator, or if stipulated by the arbitration agreement, by a neutral association, organization, government agency or office.¹² The subpoena will be signed but the remainder of the subpoena will be blank and filled in by the party requesting the subpoena.¹³

4. See CAL. STATS. 1961, c. 461, §2 at 1543 (enacting CAL. CIV. PROC. CODE §1282.6).

5. Telephone interview with Donald H. Wollett, Panel member of the American Arbitration Association and the Federal and State Mediation and Conciliation Services (July 30, 1982) (notes on file at the *Pacific Law Journal*).

6. *Id.*

7. See CAL. CIV. PROC. CODE §1985.

8. See Assemblyman Larry Stirling, Press Release (copy on file at the *Pacific Law Journal*).

9. Compare CAL. CIV. PROC. CODE §1985 with *id.* §1282.6.

10. Compare *id.* §1282.6(b) with CAL. STATS. 1961, c. 461, §2 at 1543.

11. See CAL. STATS. 1961, c. 461, §2, at 1543.

12. CAL. CIV. PROC. CODE §1282.6(b).

13. *Id.* §1282.6(b), (c).

Civil Procedure; subpoenas—consumer records

Code of Civil Procedure §1985.3 (amended).

AB 2473 (Moore); STATS. 1982, Ch 666

Support: California Bankers Association; California Land Title Association

Existing law details the procedures to be followed when a subpoenaing party¹ seeks to discover a consumer's² personal records.³ Chapter

1. CAL. CIV. PROC. CODE §1985.3(a)(3) (definition of subpoenaing party). See generally 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 624, 626 (1982) (excluded from

666 broadens the definition of "personal records" and revises provisions relating to notice, proof of compliance, and motions to quash or modify a subpoena duces tecum.⁴

Under existing law, "personal records" are those items⁵ pertaining to a consumer that are maintained by specified parties.⁶ Chapter 666 extends the list of specified parties to include security⁷ brokerage firms,⁸ underwritten title companies,⁹ institutions of the Farm Credit System,¹⁰ and any telephone company that is a public utility.¹¹

Under prior law, subpoenaing parties had to serve constructive notice¹² upon consumers whose records were being sought at least 15 days prior to the date set for production of personal records by the subpoena duces tecum.¹³ In addition, a certificate of compliance with the notice requirement had to be served on the witness¹⁴ by the subpoenaing party simultaneously with the service of the subpoena.¹⁵ Chapter 666 now provides that the required notification¹⁶ must be delivered¹⁷ to the consumer at least 10 days prior to the date set for the production of records.¹⁸ Furthermore, in order to show compliance with the notifica-

the definition of a subpoenaing party are all entities of the Judicial Department, including the State Bar, and all parties not bringing an action under the Code of Civil Procedure).

2. CAL. CIV. PROC. CODE §1985.3(a)(2) (definition of consumer).

3. *Id.* §1985.3(a)(1) (definition of personal records); *see id.* §1985.3. *See generally* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 300 (1981).

4. *Compare* CAL. CIV. PROC. CODE §1985.3 with CAL. STATS. 1981, c. 1014, §1, at —.

5. Under prior law the items were described as certain books, documents, or things. *See* CAL. STATS. 1981, c. 1014, §1, at —. Chapter 666 describes the items as certain books, documents, or writings. *See* CAL. CIV. PROC. CODE §1985.3(a)(1).

6. *See* CAL. CIV. PROC. CODE §1985.3 (existing specified parties are physicians, hospitals, banks, savings and loans, credit unions, trust or insurance companies, accountants and attorneys).

7. CAL. CORP. CODE §25019 (definition of a security).

8. *See id.* §25004 (definition of broker-dealer).

9. CAL. INS. CODE §12340.5 (definition of underwritten title company).

10. 12 U.S.C. §2002 (list of institutions comprising the Farm Credit System).

11. CAL. PUB. UTIL. CODE §216. *Compare* CAL. CIV. PROC. CODE §1985.3 with CAL. STATS. 1981, c. 1014, §1, at —.

12. *See generally* 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 300 (1981) (the review describes the method for effecting constructive notice).

13. CAL. STATS. 1981, c. 1014, §1, at —.

14. CAL. CIV. PROC. CODE §1985.3(a)(1) (the term witness, as used in this section, refers to the party that maintains the consumer's personal records).

15. CAL. STATS. 1981, c. 1014, §1, at —.

16. *Compare* CAL. CIV. PROC. CODE §1985.3 with CAL. STATS. 1981, c. 1014, §1, at — (although the term "constructive" has been dropped, Chapter 666 retains the essential elements of notice as previously enacted). Notification is effected by delivering to the consumer a copy of the subpoena, the affidavit supporting it, and a notice indicating that the consumer's records are being sought and mentioning the procedure to be followed if the consumer objects to production of the records. CAL. CIV. PROC. CODE §1985.3(b), (e). Chapter 666 adds a provision that a notice of deposition may be set forth in a single document accompanying the required notice. *Id.* §1985.3(e).

17. CAL. CIV. PROC. CODE §1985.3(b)(1) (the notice may be delivered to the consumer personally, or at the consumer's last known address, or in accordance with existing notice procedures).

18. *Id.* §1985.3(b)(2). Additional times provided for services by mail are as follows: five days

tion requirements, Chapter 666 requires the subpoenaing party to provide the witness with either proof of service upon the consumer or the consumer's written release of the records, prior to the date set for production of records.¹⁹ The subpoena, however, must be served in sufficient time to allow the witness to locate and produce the requested records.²⁰

Existing law authorizes a consumer to bring a motion to quash or modify a subpoena.²¹ Prior law required that this motion be brought within 10 days from receipt of the subpoena.²² Chapter 666 removes this time limitation and permits a consumer to file a motion to quash or modify at any time prior to the date set for production of records.²³ In addition, the consumer must notify the witness that the motion has been brought.²⁴

Under existing law a subpoenaing party, upon a showing of good cause and due diligence and provided that the rights of the parties are preserved, is entitled to an order shortening the time for service or waiving the notification requirements.²⁵ Absent this order, Chapter 666 provides that any failure to comply with these provisions constitutes a sufficient basis for the witness to refuse to produce the requested records.²⁶ Specified proceedings, however, remain exempt from these provisions.²⁷

for addresses located in California, 10 days if the address is outside of California but within the United States, and 20 days if the address is outside of the United States. *See id.* §§1013, 1985.3(b)(2).

19. *Id.* §1985.3(c) (the release may be signed by the consumer or the consumer's attorney of record). In addition, the witness may presume that any attorney who signs the release has the authority to act on the consumer's behalf. *Id.*

20. *Id.*

21. *Id.* §1987.1.

22. CAL. STATS. 1981, c. 1014, §1, at —.

23. Compare CAL. CIV. PROC. CODE §1985.3(f) with CAL. STATS. 1981, c. 1014, §1, at — (this is the same time period specified for the bringing of the motion as originally enacted by this section).

24. CAL. CIV. PROC. CODE §1985.3(f).

25. *Id.* §1985.3(g).

26. *Id.* §1985.3(j). But see *id.* §1985.3(h) (the witness may not refuse to produce the records if a particular consumer cannot be identified from the information).

27. *Id.* §1985.3(i). See 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 624, 627 (1982) (the exempted proceedings involve the Department of Industrial Relations, Workers' Compensation and Insurance, and Retraining and Rehabilitation of full time public employees).

Civil Procedure; imminent lawless action and terrorism

Code of Civil Procedure §527.7 (new); Penal Code §§11410, 11411 (new).

SB 267 (Watson); STATS. 1982, Ch 1624

Support: Attorney General; California Association of Black Lawyers; Peace Officers Research Association of California; State and Consumer Services Agency

Opposition: Friends Committee on Legislation; Northern American Civil Liberties Union Board, California Democratic Council

Chapter 1624 was enacted in an apparent attempt to curtail the recent upsurge of terrorist activities by California extremist groups.¹ In 1976, the Ralph Civil Rights Act² was enacted. This Act provides that all persons have a right to be free from any violence or threat of violence against their persons or property instigated because of their race, color, religion, ancestry, national origin, political affiliation, sex, or position in a labor dispute.³ Chapter 1624 expands this legislative policy by statutorily recognizing that the advocacy of unlawful violent acts against other persons or groups under circumstances that create a risk of imminent death or great bodily injury is *not* constitutionally protected and threatens public order and safety.⁴ Chapter 1624 specifically states that it is unlawful for any group, association, organization, society, or other assemblage of two or more persons to meet, advocate, and take substantial action in furtherance of the commission of an unlawful act of force or violence directed to and likely to incite or produce the

1. See D. Deukmejian, *Organized Crime in California 1980: Annual Report to the California Legislature—Part 2 Terrorism*, BUREAU OF ORGANIZED CRIME AND CRIMINAL INTELLIGENCE (June 1981) (discussion of terrorism and extremist groups in California referring specifically to Iranian Extremists, the Ku Klux Klan, Creation Extremists, youth gangs, the Nuestra Familia, and American Nazis); *Issues, Emotions of the Ku Klux Klan*, L.A. Daily Journal, Dec. 2, 1980, p. 1, col. 5; Harris, *Advocacy of Imminent Violence is Not Protected by the First Amendment*, L.A. Daily Journal, April 14, 1981, at 4, col. 3; Gardner, *KKK: 'Terrorism of a Physical Nature'*, L.A. Daily Journal, March 26, 1982, at 4, col. 3.

2. See WEST'S ANNOTATED CIVIL CODE §51.7, Historical Note at 324.

3. CAL. CIV. CODE §51.7.

4. CAL. PENAL CODE §11410. Existing law provides that it is a felony to advocate criminal syndicalism, to assemble as a paramilitary organization for the purpose of practicing with weapons, or to conspire to commit an unlawful act of violence. *Id.* §§11401, 11460, 182.

California Penal Code sections 422 and 422.5 make it unlawful to willfully threaten to commit a dangerous crime with the intent to terrorize or in reckless disregard of terrorizing another. *Id.* But cf. *People v. Mirmirani*, 30 Cal. 3d 375, 382-83, 636 P.2d 1130, 1134-35, 178 Cal. Rptr. 792, 796-97 (1981) The California Supreme Court struck down California Penal Code sections 422 and 422.5 on grounds of vagueness because they provided neither sufficient notice to the citizenry of the prohibited act nor explicit standards to those who must enforce them. *Id.*

imminent and unlawful infliction of serious bodily injury or death of another person within the State of California.⁵

Under existing law, an injunction⁶ may be issued against any person or association that denies a party the rights guaranteed under the Ralph Civil Rights Act.⁷ The violator must, however, be engaged in a *pattern or practice* of interfering with the rights guaranteed to others before an injunction can be granted.⁸ Chapter 1624 also allows an aggrieved individual the right to seek an injunction when it reasonably appears that an assemblage has met and has actually taken substantial action in furtherance of an unlawful act of violence *and* will engage in those acts in the future.⁹ Upon a showing of these requirements by clear and convincing evidence, the *advocacy* of the commission of any such act of violence at any future meeting may be enjoined.¹⁰ Chapter 1624 specifies that only an aggrieved individual may bring this civil action.¹¹ If the action was groundless and brought in bad faith to harass the defendant, however, the court may award to the defendant, attorneys' fees and court costs incurred in defending the action.¹²

Moreover, Chapter 1624 makes it a misdemeanor for any person to burn or desecrate a cross or other religious symbol if that person knows that the item is a religious symbol and acts for the purpose of terrorizing another, or in reckless disregard of that risk.¹³ Chapter 1624 also declares that it is a misdemeanor to place or display a sign, mark, symbol, emblem, or other physical impression, including the Nazi swastika, on the private property of another without authorization and with the intent to terrorize¹⁴ another person.¹⁵ Under Chapter 1624, punishment for these offenses is imprisonment not to exceed one year in the county jail, a fine not to exceed \$5000 for a first conviction, or both fine and imprisonment.¹⁶ In addition to the one year jail term, subsequent convictions will result in a fine not to exceed \$15,000.¹⁷

5. CAL. CIV. PROC. CODE §527.7(a).

6. *Id.* §527 (general provisions for an injunction).

7. CAL. CIV. CODE §52(c); *see id.* §51.7. *See generally* 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 784 (1982).

8. CAL. CIV. CODE §52(c).

9. CAL. CIV. PROC. CODE §527.7(b).

10. *Id.*

11. *Id.* Compare *id.* with CAL. CIV. CODE §52(c) (the attorney general, district attorney, city attorney, or any aggrieved individual may seek an injunction under the Ralph Civil Rights Act).

12. CAL. CIV. PROC. CODE §527.7(c).

13. CAL. PENAL CODE §1411.

14. "Terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

COMMENT

Historically, any system of prior restraint bears a heavy presumption against its constitutionality and requires a showing of a compelling interest.¹⁸ This enactment raises a constitutional question concerning the right of government to restrict freedom of speech and the right to assemble.¹⁹

In *Brandenburg v. Ohio*,²⁰ the United States Supreme Court articulated the standard for determining whether the advocacy of violence exceeds free speech activity.²¹ Because Chapter 1624 expressly employs the *Brandenburg*²² language in requiring that the advocacy and substantial action relating to the unlawful violence have the potential to produce *imminent* and *unlawful* harm,²³ the statute, if narrowly construed, may be immune from constitutional attack under the first amendment.

Since potential abuse of this chapter is possible, this legislation may be stricken by the overbreadth doctrine as limiting constitutionally protected speech.²⁴ In applying the overbreadth doctrine, the United States Supreme Court in *Broadrick v. Oklahoma*,²⁵ held that a statute is unconstitutionally overbroad only if it is *substantially* overbroad and incapable of cure through case-by-case analysis of situations when the

18. See *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("any system of prior restraints of expression comes to the court bearing a heavy burden against its constitutional validity"); *Near v. Minn.*, 283 U.S. 697 (1930) (general discussion that liberty of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion of state action). See generally B. WITKIN, SUMMARY OF CALIFORNIA LAW *Constitutional Law* §155(1), at 3407-3408 (discussion of constitutional guarantees which protect against prior restraints); Cf. *Ex Parte Wood*, 194 Cal. 49, 57, 227 P. 908, 911 (1924) (the mere arrest and punishment of one will not afford an adequate protection, while an injunction will prohibit the activity and all the participants as well).

19. See notes 21, 23, 31 *infra*. See generally U.S. CONST. amend. I.

20. 395 U.S. 444 (1969).

21. "... The Constitutional guarantees of free speech do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." 395 U.S. 444, 447 (1969); See *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (affirming that the *Brandenburg* test is the formula for determining when speech that advocates criminal conduct is constitutionally impermissible); *Socialist Workers Party v. Hardy*, 480 F. Supp. 941, 944, 945-946 (1977) (application of the *Brandenburg* formula); F. Shauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685, 720-731 (discussion of *Brandenburg*).

22. 395 U.S. 444 (1969).

23. CAL. CIV. PROC. CODE §527.7(a).

24. See J. NOWAK, R. ROTUNDA, AND J. YOUNG, CONSTITUTIONAL LAW (1978) at p. 722 [hereinafter cited as NOWAK]. Although there is concern that Chapter 1624 may be overbroad, the Bill of Attainder Clause, U.S. CONST. art. I, §9, cl. 3, art. 1 §10, cl. 1, which forbids "legislative trials", would have been violated had the legislation specifically identified a class of persons. See *People v. McClennegen*, 195 Cal. 445, 471, 195 P. 91, 101-102 (1925). In supporting the Criminal Syndicalism Act regarding the Industrial Workers of the World, the court held that the legislature has the power to pass all needful police regulations so long as they bear with equal weight upon all in like situations of the same class. *Id.* There cannot be a false and arbitrary classification. *Id.*

25. 413 U.S. 601 (1973).

sanctions of the statute may not be applied.²⁶ The Court did, however, distinguish the statute before it as noncensorial.²⁷ Since Chapter 1624 is a censorial law, the courts may be less tolerant of the potential for overbreadth and may find the language susceptible of broader interpretation, thus striking it as unconstitutional.²⁸

Ostensibly, this enactment seeks to avoid an infringement on the freedom of assembly by limiting the injunction to the *advocacy* of the commission of violent acts at future meetings and not prohibiting the meetings themselves.²⁹ Moreover, Chapter 1624 explicitly recognizes the constitutional rights of expression and association.³⁰ In addition, Chapter 1624 requires that the parties take substantial action in furtherance of the challenged advocacy before an injunction can be issued.³¹ Finally, absent a concise definition of *imminent*, *likely*, and *substantial action*, the provisions may also be susceptible to an attack for vagueness.³²

26. 413 U.S. at 615-16 (1973).

27. *Id.* See generally NOWAK, *supra* note 24, at 725 (censorial law seeks to burden the advocacy of matters of public concern, such as criminal syndicalism laws).

28. *Id.*

29. CAL. CIV. PROC. CODE §527.7(b).

30. CAL. PENAL CODE §11410.

31. CAL. CIV. PROC. CODE §527.7(a).

32. See NOWAK, *supra* note 24, at 726-728; 30 Cal. 3d 375, 382-383, 636 P.2d 1130, 1134-1135, 178 Cal. Rptr. 792, 796, 797 (1981) (the California Supreme Court recognized that criminal statutes that have an impact on First Amendment rights require a greater precision to survive challenges based on vagueness).

Civil Procedure; unlawful detainer actions

Code of Civil Procedure §§1170.5, 1170.7 (new); §1169 (amended).
SB 1762 (Boatwright); STATS. 1982 Ch 1620

Support: California Apartment Owners Association; California Association of Realtors

Opposition: California Labor Federation; California Rural Legal Assistance; Department of Consumer Affairs; Department of Housing and Community Development

Existing law provides for an unlawful detainer action to remove a tenant from possession of real property.¹ If, at the appointed time, the defendant served with summons does not appear and defend, existing

1. CALIFORNIA CONTINUING EDUCATION OF THE BAR, CALIFORNIA REAL PROPERTY REMEDIES PRACTICE §10.2 (1982); see CAL. CIV. PROC. CODE §§1161-1179a.

law allows the plaintiff to apply for a default judgment.² Chapter 1620 mandates that this application be in writing.³ In addition, Chapter 1620 requires that the plaintiff supply proof of service of summons and complaint before a default judgment will be entered.⁴ Chapter 1620 also provides that, if the plaintiff requests, the clerk⁵ must immediately enter judgment for restitution of the premises and issue a writ of execution.⁶

If the defendant appears and answers or demurs, Chapter 1620 expedites the summary proceeding by requiring that the trial be held within 20 days of the request to set the time of trial.⁷ Chapter 1620 allows an extension of this time upon agreement of both parties.⁸ In the absence of an agreement, however, an extension will only be granted after a hearing by the court.⁹ Moreover, if the time for the trial is extended and there is reasonable probability that the plaintiff will prevail the court must determine the plaintiff's damages as a result of the extension.¹⁰ As long as the defendant remains in possession of the premises, Chapter 1620 requires the defendant to pay the estimated amount of damages either to the court or into an escrow account.¹¹ If the defendant fails to make the ordered payment, Chapter 1620 mandates that trial of the action be held within 15 days after payment was due.¹²

Finally, Chapter 1620 expressly authorizes a motion for summary judgment in an unlawful detainer action.¹³ Although this motion is usually not allowed until 60 days after a general appearance,¹⁴ Chapter 1620 states that, in an unlawful detainer action, a motion for summary judgment may be made at anytime after the answer is filed and after giving five days notice.¹⁵

2. CAL. CIV. PROC. CODE §1169.

3. Compare *id.* §1169 with CAL. STATS. 1951, c. 1737, §159, at 4140 (amending Cal. Civ. Proc. Code §1169).

4. CAL. CIV. PROC. CODE §1169.

5. If there is no clerk the judge will enter judgment. *Id.* §1169.

6. *Id.*

7. *Id.* §1170.5(a).

8. *Id.* §1170.5(b).

9. *Id.*

10. *Id.* §1170.5(c) (determination of amount of damages).

11. *Id.* §1170.5(c); see *id.* §§1170.5(e) (cost of administration of escrow), 1170.5(g) (investment of escrow).

12. *Id.* §1170.5(d).

13. *Id.* §1170.7.

14. *Id.* §437c.

15. *Id.* §1170.7.

Civil Procedure; assignments for the benefit of creditors

Civil Code §1954.1 (new); §3439.09 (amended); Code of Civil Procedure §1800 (amended).

AB 1582 (Imbrecht); STATS. 1982, Ch 35

(Effective February 17, 1982)

Support: Credit Manager's Association

A general assignment for the benefit of creditors¹ is an out-of-court device that can be used to avoid a more costly and time consuming formal bankruptcy proceeding.² The debtors³ assign their assets to their trustee who holds the assets for four months, liquidates them, and then pays the creditors⁴ from the assets.⁵ Chapter 35 increases the rights of an assignee in a general assignment for the benefit of creditors.⁶

Recovery of Preferential Transfers

Existing law permits certain types of transfers⁷ made prior to an assignment to be recovered by an assignee in a general assignment for the benefit of creditors when the transfer is (1) made to or for the benefit of a creditor, (2) made for or on account of antecedent debt owed by the assignor before the transfer, (3) made while the assignor was insolvent, (4) made on or within 90 days before the date of the assignment,⁸ (5) made to enable this creditor to receive more than another creditor of the same class, and (6) not subject to any of the listed exceptions⁹ that will prevent recovery.¹⁰ Chapter 35 conforms the California law to the federal law¹¹ by authorizing the recovery of insider transfers of the

1. CAL. CIV. PROC. CODE §493.010 (definition of a general assignment for the benefit of creditors).

2. See Greenfield, *Alternatives to Bankruptcy for the Business Debtor*, 51 L.A.B.J. 135, 135 (1975); Federal Bankruptcy Reform Act of 1978, 11 U.S.C. §§101-151326 (Supp. II 1978).

3. CAL. CIV. CODE §3429 (definition of debtor).

4. *Id.* §3430 (general definition of creditor).

5. 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 312, 312 (1981).

6. See CAL. CIV. CODE §1954.1. Compare *id.* §3439.09 with CAL. STATS. 1939, c. 329, §11, at 1669 (enacting CAL. CIV. CODE §3439.09). Compare CAL. CIV. PROC. CODE §1800 with CAL. STATS. 1979, c. 394, §5, at 1467 (enacting CAL. CIV. PROC. CODE §1800). See generally 12 PAC. L.J., REVIEW OF SELECTED 1980 CALIFORNIA LEGISLATION 312 (1981).

7. CAL. CIV. PROC. CODE §1800(a)(10) (definition of transfer).

8. *Id.* §1800(f) (the assignor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the making of the assignment).

9. *Id.* §1800(c).

10. *Id.* §1800(b); 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION, 339, 342 (1980).

11. CAL. STATS. 1982, c. 35, §4, at —. Compare CAL. CIV. PROC. CODE §1800(a)(3), (b)(4) with 11 U.S.C. §547(b)(4)(B) (1978).

assignor's property beyond the 90 day period.¹² Upon the satisfaction of the other conditions, Chapter 35 now permits the recovery of transfers made between 90 days and one year before the assignment was made, by a creditor who was, at the time of the transfer, an *insider*¹³ with reasonable cause to believe the debtor was insolvent¹⁴ at the time of the transfer.¹⁵

Fraudulent Conveyances

Under existing law, unless a person seeking to avoid a conveyance on the grounds that it was fraudulent falls within one of the classes designated by the statutes, that person has no standing in court to complain of the fraudulent transaction.¹⁶ Prior to enactment of Chapter 35, these classes included only creditors¹⁷ of the transferor and assignees of these creditors.¹⁸ Thus, assignees of debtors could not recover wrongfully conveyed assets because they were considered as standing in the shoes of the debtor.¹⁹ Chapter 35 extends the existing rights available to creditors and their assignees to avoid fraudulent transactions to an assignee in a general assignment for the benefit of creditors.²⁰

Lease Restrictions During Assignment

Prior to enactment of Chapter 35, a lessor²¹ of a debtor making a general assignment for the benefit of creditors could receive preferential treatment over other creditors by allowing the lessor to increase the rent subsequent to the date of assignment.²² Furthermore, many leases include antiassignment clauses that would allow the lessor, upon assignment by the lessee, to terminate the lease.²³ In recognition of the disruptive effect these practices have upon the rehabilitative nature of a bankruptcy proceeding, the federal law includes the automatic stay provisions²⁴ to prevent termination of the lease during the winding up

12. Compare CAL. CIV. PROC. CODE §1800 with CAL. STATS. 1979, c. 394, §5, at 1467.

13. CAL. CIV. PROC. CODE §1800(a)(3) (definition of insider).

14. *Id.* §1800(a)(1) (definition of insolvent).

15. *Id.* §1800(b)(4).

16. See *Peterson v. First Nat. Bank*, 101 Cal. App. 532, 539, 281 P. 1104, 1107 (1929); see also *H.D. Rosen Co. v. Pacific Radio Publishing Co.*, 123 Cal. App. 525, 536, 11 P.2d 873, 877 (1932).

17. CAL. CIV. CODE §3439.01 (the meaning of creditors in the Uniform Fraudulent Conveyances Act as codified in California at Sections 3439.01 through 3439.13 of the Civil Code).

18. See CAL. STATS. 1939, c. 329, §11, at 1669 (enacting CAL. CIV. CODE §3439.09), §12, at 1669 (enacting CAL. CIV. CODE §3439.10).

19. See *Moore v. Schneider*, 196 Cal. 380, 386, 238 P. 81, 82 (1925).

20. CAL. CIV. CODE §3439.09.

21. *Stone v. Los Angeles*, 114 Cal. App. 192, 199, 299 P. 838, 841 (1931) (definition of a lessor).

22. See CAL. STATS. 1982, c. 35, §4, at —.

23. *Farnum v. Hefner*, 79 Cal. 575, 580, 21 P. 955, 957 (1899).

24. 11 U.S.C. §362 (Supp. II 1978).

period²⁵ of the bankruptcy process.²⁶ Similarly, Chapter 35 suspends the right of a lessor of an assignor in a general assignment to terminate the lease for a period up to 90 days after the date of the assignment.²⁷ Chapter 35 protects the assignor's right to assign even if the lease contains a provision allowing termination upon assignment of the lease or insolvency of the lessee.²⁸ The assignee's right to occupy the leased premises during the 90 day period, however, applies only to business property²⁹ and only upon timely payment of the monthly rental reserved in the lease for that period of occupancy.³⁰

The analogous federal provision³¹ has raised several issues regarding this 90 day period when the lessor's rights to change the original agreement are suspended that Chapter 35 apparently fails to resolve.³² These issues include (1) who is responsible for the rent accruing during that period, (2) could the period be terminated by any event other than the assignor moving out of the premises,³³ and (3) would the lessor be obligated to continue making out-of-pocket expenditures, pursuant to the lease agreement, to maintain services related to the premises.³⁴

Regarding the third issue, the federal solution has been to find that the lessor is not obligated to make these expenditures.³⁵ The problem, however, could be more difficult to resolve in California because the federal solution would probably conflict with existing law.³⁶ For example, in California a landlord is not allowed to intentionally interrupt any utility services furnished to a tenant, whether or not that service is under the control of the landlord.³⁷

25. *Id.* §362(c) (unless a request is granted for an earlier termination, the winding up period coincides with the existence of the bankruptcy estate).

26. *Id.* §362(a)(3). See Fogel, *Executory Contracts and Unexpired Leases in the Bankruptcy Code*, 64 MINN. L. REV. 341, 365 (1980).

27. CAL. CIV. CODE §1954.1.

28. *Id.*

29. *Id.* "Business" is not separately defined in Chapter 35 but, unless the lease provides otherwise, use of the premises for a commercial purpose would probably make it business property for purposes of this code section because, unless the lease stipulates that the premises shall be used for a designated purpose, they may be used for any purpose for which they are appropriate. See *Keating v. Preston*, 42 Cal. App. 2d 110, 115, 108 P.2d 479, 482 (1940).

30. CAL. CIV. CODE §1954.1. The rental reserved in the lease is established as the reasonable rental value of the premises occupied during the period when the lessor's rights to change the original agreement are suspended. *Id.*

31. 11 U.S.C. §362(a)(3) (Supp. II 1978).

32. See generally Musa, *Representing the Landlord/Creditor in Bankruptcy Proceedings*, 56 CAL. ST. B.J. 284 (1981).

33. *Id.* For example, would the period of suspension of the lessor's rights end upon the termination of the assignment? *Id.*

34. See *id.*

35. 11 U.S.C. §365(b)(4) (Supp. II 1978).

36. Compare *id.* with CAL. CIV. CODE §789.3(a).

37. CAL. CIV. CODE §789.3(a).

Conclusion

In summary, Chapter 35 revises the California law concerned with preferential transfers, fraudulent conveyances and the rights of lessor creditors in general assignments for the benefit of creditors.³⁸ These revisions were made in conformance with the Federal Bankruptcy Act of 1978.³⁹

38. See *id.* §§1954.1, 3439.09; CAL. CIV. PROC. CODE §1800.

39. See CAL. STATS. 1982, c. 35, §4, at —; Federal Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-151326 (Supp. II 1978).

Civil Procedure; trial preferences

Code of Civil Procedure §37 (new).
AB 3509 (Goggin); STATS. 1982, Ch 514

Under existing law, various civil actions¹ are entitled to precedence or preference over other civil actions.² Existing law also declares that it is of public interest to indemnify and assist in the rehabilitation of individuals who, as the direct result of a crime, suffer a pecuniary loss that they are unable to recoup without suffering serious financial hardship.³ Chapter 514 creates a trial calendar preference for civil actions based on personal injuries caused during the commission of a felony once the defendant has been convicted.⁴ When a motion for preference is granted, Chapter 514 provides that the court endeavor to try the action within 120 days.⁵

1. CAL. CIV. PROC. CODE §30 (definition of civil action).

2. See *id.* §§35, 36(a), 460.5(c), 526a, 527(a), 1062a, 1141.20, 1179a, 1260.010; CAL. GOV'T CODE §§4207, 83121; CAL. PUB. RES. CODE §21168.3; CAL. REV. & TAX CODE §5146; CAL. CIV. CODE §323.3(a); CAL. BUS. & PROF. CODE §11525.1; 4 B. WITKIN, CALIFORNIA PROCEDURE *Trial* §47 (2nd ed. 1971 & Supp. 1981). See generally Comment, *California Preference Statutes*, 40 CALIF. L. REV. 288 (1952) (detailed enumeration of precedence statutes and actions in California); Comment, *Trial Calendar Advancement*, 6 STAN. L. REV. 323 (1953) (historical background of trial preference and precedence and survey of state practices).

3. CAL. GOV'T CODE §13959. See generally *id.* §§13959-13969.1 (California victim compensation program).

4. See CAL. CIV. PROC. CODE §37(a).

5. *Id.* §37(b).

Civil Procedure; motions

Code of Civil Procedure §453 (repealed); §§436, 437, 1019.5 (new); §§396b, 431.10, 435, 472a, 585, 586, 589, 591 (amended).

AB 2766 (Goggin); STATS. 1982, Ch 704

Support: California Judges Association; Los Angeles Municipal Court Judges Association

Chapter 704 clarifies various provisions relating to a motion to strike.¹ In addition, Chapter 704 requires the party prevailing on any motion to notify all other parties or their attorneys of the decision of the court.² Finally, Chapter 704 allows a defendant time to file pleadings after a motion to transfer is denied.³

Provisions for a Motion to Strike

A motion to strike is used to object to pleadings not subject to a demurrer.⁴ Prior law gave the court the discretion to strike irrelevant or redundant matter and sham answers.⁵ Chapter 704 redefines the grounds for a motion to strike by providing that the court may, upon motion or at its own discretion, strike any irrelevant,⁶ false, or improper matter from a pleading.⁷

Case law has provided that a court has the inherent power to strike pleadings filed in disregard of established procedural requirements or otherwise violative of orderly judicial administration.⁸ For example, courts have permitted pleadings to be stricken in the following instances: (1) when the pleading is filed without leave of the court,⁹ (2) when the pleading is not filed in a timely manner,¹⁰ (3) when the pleading is not verified as required,¹¹ or (4) when an amended complaint is filed after the statute of limitations has run and the pleading states an entirely different set of facts.¹² Chapter 704 codifies these

1. See CAL. CIV. PROC. CODE §§431.10, 435, 436, 437, 589(b).

2. *Id.* §1019.5.

3. *Id.* §396b.

4. CONTINUING EDUCATION OF THE BAR, 1 CALIFORNIA PROCEDURE BEFORE TRIAL §10.1 (1977) [hereinafter cited as C.E.B.]; 3 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §860 (2d ed. 1971).

5. CAL. CODE CIV. PROC. OF 1872, §453 (repealed by CAL. STATS. 1982, c. 704, §5, at —).

6. See CAL. CIV. PROC. CODE §431.10(b), (c) (stating that irrelevant matter means immaterial allegation).

7. CAL. CIV. PROC. CODE §§435(a)(2) ("pleading" means a demurrer, answer complaint, or cross-complaint). 435(b)(1), 436(a).

8. *Neal v. Bank of America*, 93 Cal. App. 2d 678, 683, 209 P.2d 825, 827 (1949); see also *Muller v. Tanner*, 2 Cal. App. 3d 438, 443, 82 Cal. Rptr. 734, 736-37 (1969); *Taliaferro v. Prettnner*, 135 Cal. App. 2d 157, 160-161, 286 P.2d 977, 979 (1955).

9. *Stafford v. Ballinger*, 199 Cal. App. 2d 289, 297-98, 18 Cal. Rptr. 568, 572-73 (1962); see also WITKIN, *supra* note 4, at §862(c); C.E.B., *supra* note 4, at §10.2(2).

10. *Buck v. Morrossis*, 114 Cal. App. 2d 461, 464-65, 250 P.2d 270, 273 (1952); see also WITKIN, *supra* note 4, at §862(b); C.E.B., *supra* note 4, at §10.2(3).

11. *Perlman v. Mun. Ct. L.A.*, 99 Cal. App. 3d 568, 575, 160 Cal. Rptr. 567, 570 (1979); see also WITKIN, *supra* note 4, at §862(a); C.E.B., *supra* note 4, at §10.2(5).

12. See *Pagett v. Indemnity Ins. Co.*, 54 Cal. App. 2d 646, 649, 129 P.2d 700, 702 (1942); see also C.E.B., *supra* note 4, at §10.2(4).

holdings by providing that a court may strike any pleading that does not conform to a state law, a court rule, or a court order.¹³

Furthermore, Chapter 704 specifically provides that when the grounds for the motion are that the matter is false, irrelevant, or improper, a motion to strike raises an issue of law.¹⁴ Chapter 704 does not specifically state whether an issue of law or fact is raised when the grounds for the motion are that the matter is not filed in conformity with a state law, a court rule, or a court order.¹⁵

Chapter 704 expressly states that the grounds for a motion to strike must be apparent from the challenged pleading or from any matter of which the court is required to take judicial notice.¹⁶ This addition codifies case law by establishing that a motion to strike that must be supported by extraneous facts¹⁷ will be treated as a motion for summary judgment.¹⁸ Moreover, Chapter 704 states that if grounds for the motion are matters subject to judicial notice by the court,¹⁹ the moving party must specify the matter in the notice of the motion or in the supporting points and authorities unless the court permits otherwise.²⁰

Prior law mandated that the hearing on a motion to strike be set within 15 days of the filing date.²¹ Chapter 704 removes this requirement and prescribes that at least 15 days notice be given prior to the hearing of a motion to strike an answer or a complaint.²² In addition, Chapter 704 requires that the hearing for a demurrer and a motion to strike the demurrer be held concurrently.²³

Notification of a Judicial Decision on Motions

Existing law mandates that the prevailing party in a contested action or special proceeding notify all other parties of entry of judgment.²⁴ Chapter 704 enacts similar provisions by requiring the prevailing party in the hearing of a motion to give notice of the decision of the court to

13. CAL. CIV. PROC. CODE §436(b).

14. *Id.* §589(b).

15. *Compare id.* §436 with *id.* §589(b).

16. CAL. CIV. PROC. CODE §437(a).

17. A motion to strike that must be supported by facts outside the pleadings is commonly known as a "speaking motion." *Lerner v. Ehrlich*, 222 Cal. App. 2d 168, 171, 35 Cal. Rptr. 106, 107 (1963).

18. *Vesely v. Sager*, 5 Cal. 3d 153, 167-69, 486 P.2d 151, 161-62, 95 Cal. Rptr. 623, 633-34 (1971). *See also* *Mediterranean Exports, Inc. v. Superior Ct.*, 119 Cal. App. 3d 605, 615, 174 Cal. Rptr. 169, 175 (1981).

19. CAL. EVID. CODE §§452, 453.

20. CAL. CIV. PROC. CODE §437(b).

21. CAL. STATS. 1971, c. 244, §33, at 387 (amending CAL. CIV. PROC. CODE §435).

22. CAL. CIV. PROC. CODE §§435(b)(2), 1005. *Compare id.* §435(b)(2) with CAL. STATS. 1971, c. 244, §33, at 387.

23. CAL. CIV. PROC. CODE §435(b)(3).

24. *Id.* §664.5(a).

all other parties or their attorneys.²⁵ This legislation codifies existing procedures of the San Francisco and Los Angeles Superior Courts.²⁶

Change of Venue Proceedings

Existing law enables a defendant to move for a change of venue without answering or demurring if the motion is filed within the time limit for the pleadings.²⁷ If an appeal is taken and the denial of a change of venue is affirmed, existing law mandates that the court grant time for the defendant to respond²⁸ to the complaint.²⁹ It has been unclear whether this provision permitted additional time when the defendant did not appeal the denial.³⁰ Chapter 704 expressly states that if a motion for a change of venue is denied, the court must then allow time for the defendant to respond to the complaint.³¹ Chapter 704 further provides that if the defendant does not respond within the time granted, a default judgment will be entered.³²

Conclusion

Chapter 704 redefines the substantive grounds for a motion to strike,³³ codifies case law allowing a motion to strike on form grounds,³⁴ requires that the grounds for the motion be apparent from the challenged pleading or from any matter of which the court is required to take judicial notice,³⁵ and makes changes in the time requirements for hearing a motion to strike.³⁶ In addition to its provisions pertaining to motions to strike, Chapter 704 requires prevailing parties on a motion to notify the other parties or their attorneys of the decision.³⁷ Finally, Chapter 704 specifically authorizes a party to file pleadings after a motion for change of venue is denied.³⁸

25. *Id.* §1019.5. Compare *id.* §664.5(a) with *id.* §1019.5.

26. COURT RULES FOR NO. CAL. (L.A. DAILY J.) San Francisco Co., Law and Motion §17, at 6 (1978); COURT RULES FOR SO. CAL. (L.A. DAILY J.) Los Angeles Co., Law and Motion §17, at 9 (1980).

27. CAL. CIV. PROC. CODE §396b(a).

28. *Id.* §586(6)(d) ("to respond" means: to answer, to demur, or to move to strike).

29. *Id.* §586(6)(c).

30. Compare *id.* with 4 B. WITKIN, CALIFORNIA PROCEDURE *Proceedings Without Trial* §§133, 135(b) (2d ed. 1975) and CONTINUING EDUCATION OF THE BAR, 2 CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §30.18 (1978) (if the motion is denied the court will set a time for the defendant to answer).

31. CAL. CIV. PROC. CODE §396b(e).

32. *Id.* §586(6)(a).

33. See *id.* §436(a).

34. See *id.* §436(b).

35. See *id.* §437(a).

36. Compare *id.* §435(b)(2), (b)(3) with CAL. STATS. 1971, c. 244, §33, at 387.

37. CAL. CIV. PROC. CODE §1019.5.

38. *Id.* §396b(e).

Civil Procedure; pleading proper venue

Code of Civil Procedure §396a (amended).

AB 1667 (Elder); STATS. 1982, Ch 38

Support: Department of Consumer Affairs; Long Beach Bar Association

Existing law requires that whenever a consumer installment contract¹ or an automobile sales contract² action is commenced in a justice³ or municipal⁴ court the plaintiff must state facts alleging proper venue.⁵ The case will be dismissed without prejudice if the supporting facts are not included in the complaint or in an affidavit filed with the permission of the court subsequent to the filing of the complaint.⁶ Additionally, if the facts stated by the plaintiff show improper venue, the defendant need not file a motion for change of venue⁷ since the court, on its own motion, will transfer the action to the proper court.⁸ Chapter 38 expands the applicability of these provisions to unlawful detainer actions⁹ and actions on consumer contracts for personal, family, or household use.¹⁰

Under existing law, the defendant in a consumer installment contract action or an automobile sales contract action may allow the action to remain in the court where it was commenced even though venue is improper.¹¹ Moreover, a defendant represented by counsel may consent to improper venue¹² notwithstanding specified provisions to the contrary.¹³ Chapter 38, however, specifically states that a defendant in an unlawful detainer action or an action on a consumer contract for personal, family, or household use may not consent to improper venue

1. See CAL. CIV. CODE §1802.6 (definition of consumer installment contract).

2. *Id.* §2981(a) (definition of automobile sales contract).

3. CAL. CONST. art. VI, §5 (definition of justice court).

4. *Id.* (definition of municipal court).

5. CAL. CIV. PROC. CODE §396a; *see id.* §395 (definition of venue). See generally CAL. CIV. CODE §§1812.10, 2984.4 (proper venue for installment and automobile sales contract actions).

6. CAL. CIV. PROC. CODE §396a.

7. See *id.*

8. *Id.*

9. *Id.* §1161 (definition of unlawful detainer).

10. See *id.* §396a. See generally *id.* §395(b) (proper venue for actions on consumer contracts for personal, family, or household use).

11. *Id.* §396a (the defendant must consent either in writing or in open court).

12. See *id.*

13. Proper venue may not be waived in a consumer installment contract action, *see* CAL. CIV. CODE §1801.1, and an automobile sales contract may not contain a provision that permits improper venue. See CAL. CIV. CODE §2983.7(f).

unless represented by counsel at the time consent is given.¹⁴

14. See CAL. CIV. PROC. CODE §396a.

Civil Procedure; simplified pleading and procedures in Municipal and Justice Courts

Code of Civil Procedure §§90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 1823.15 (new); Government Code §§ 72602.1, 74641 (amended).

SB 1820 (Rains); STATS. 1982, Ch 1581

Support: Department of Finance; Economical Litigation Review Committee; Judicial Council

In 1976, citing a need for the development of simplified procedures to reduce the expense of litigation through experimentation with procedural innovations, the Legislature enacted the Economical Litigation Pilot Project.¹ Chapter 1581 adopts many of the procedural reforms introduced in the pilot project, and implements several significant changes in procedure for municipal and justice court cases when the amount in controversy² is less than \$15,000.³ Chapter 1581 eliminates certain pretrial motions on pleadings,⁴ limits discovery⁵ and modifies trial procedures⁶ in an attempt to reduce the expenses of litigation that make it difficult to enforce small claims and disadvantageous to defend against invalid claims.⁷

The reforms enacted by Chapter 1581 apply to every civil action, including cases entering arbitration, pending in the municipal and justice courts on or after July 1, 1983.⁸ Small claims and unlawful detainer cases, however, are exempt from the provisions of Chapter 1581.⁹

1. CAL. CIV. PROC. CODE §§1823-1833; *See id.* §1823.15 (extending the termination date of the Economical Litigation Pilot Project to July 1, 1983). *See generally* 2 B. WITKIN, CALIFORNIA PROCEDURE *Court* §262B, C, D (1981 supp.). The five-year pilot project has been limited to two courts in Los Angeles County and two in Fresno County, and has experimented with the use of simplified pleadings, practices and procedures in cases involving less than \$25,000. CAL. CIV. PROC. CODE §1823.15.

2. CAL. CIV. PROC. CODE §91(a) (amount in controversy means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, which is in controversy in the action, exclusive of attorney fees, interest, and costs).

3. *Compare id.* §§90-100 with *id.* §§1823-1833.

4. *Id.* §92.

5. *Id.* §94.

6. *See id.* §§90-100.

7. *See* CAL. STATS. 1982, c. 1581, §5, at — (declaring a compelling state interest in reducing the expense of litigation to the litigants in cases involving less than \$15,000).

8. CAL. CIV. PROC. CODE §91(a).

9. *Id.* §91(b); *see id.* §§116, 1063.

In addition, upon noticed motion, a court may release any action from these special procedures upon a finding that it would be impractical to prosecute or defend the case within the limitations imposed.¹⁰

Chapter 1581 prohibits the use of any special demurrers,¹¹ and permits motions to strike¹² only on the grounds that damages are not supported by the complaint.¹³ One of the innovations of Chapter 1581 is the use of case questionnaires that are designed to elicit fundamental information about each party's case, including (1) the names and addresses of all witnesses with knowledge of any relevant facts, (2) a list of all documents relevant to the case, (3) a statement of the nature and amount of damages, and (4) information concerning insurance coverages, injuries and treating physicians.¹⁴ The plaintiff has the option to serve a case questionnaire with the complaint and any defendant so served must serve a completed questionnaire upon the requesting plaintiff along with the answer.¹⁵

Chapter 1581 limits discovery to any combination of 35 of the following: (1) interrogatories,¹⁶ (2) requests to identify or produce documents,¹⁷ or (3) requests for admission.¹⁸ Furthermore, discovery is restricted by Chapter 1581 to (1) one deposition,¹⁹ (2) subpoenas duces tecum requiring documents, books or records to be mailed to the requesting party's counsel,²⁰ (3) physical, mental or blood examinations,²¹ and (4) the identity of expert witnesses.²² Under the procedures established by Chapter 1581, a court, upon noticed motion, may allow additional discovery upon a showing that a party would otherwise be unable to prosecute or defend the case effectively,²³ or upon stipulation of the parties.²⁴

Chapter 1581 also requires that a statement listing witnesses and evidence be furnished upon demand by any adverse party.²⁵ The request

10. *Id.* §91(c).

11. *Id.* §92(c); *see id.* §430.

12. *Id.* §92(d), (e); *see id.* §435 (as amended by CAL. STATS. 1982, c. 704, §3, at —); 14 PAC. L.J., REVIEW OF SELECTED 1982 CALIFORNIA LEGISLATION — (1982).

13. CAL. CIV. PROC. CODE §92(c),(d),(e).

14. *Id.* §93(c).

15. *Id.* §93(a),(b), (the Judicial Council is responsible for designing and developing forms for case questionnaires).

16. *Id.* §94(a)(1); *see id.* §2030.

17. *Id.* §94(a)(2); *see id.* §2031.

18. *Id.* §94(a)(3); *see id.* §2033.

19. *Id.* §94(b); *see id.* §§2016-2025.

20. *Id.* §94(c); *see* CAL. EVID. CODE §1561.

21. CAL. CIV. PROC. CODE §94(d); *see id.* §2032.

22. *Id.* §94(e); *see id.* §2037.

23. *Id.* §95(a).

24. *Id.* §95(b).

25. *Id.* §96(a).

must be served no more than 45 days and no less than 30 days prior to the date first set for trial, unless otherwise ordered.²⁶ Responses to the request must be served within 20 days from its service.²⁷ Failure to comply with a timely response may result in the exclusion of evidence or witnesses at trial.²⁸ No sanction would be imposed, however, for a failure to list the individual responding party, an adverse party, witnesses or evidence used to impeach, or evidence obtained by authorized discovery.²⁹ The court may permit a party to call an unlisted witness or introduce evidence that is required to be, but is not included in the list, if the court finds that the party has made a good faith effort to comply, or upon a finding that the failure to comply was the result of mistake, inadvertence, surprise, or excusable neglect.³⁰ Chapter 1581 also permits the use of written, sworn affidavits or declarations in lieu of witness testimony provided, when all or part of the statement is in the form of a deposition, the opposing party is afforded an opportunity to participate in the deposition.³¹

A judgment or final order issued in a proceeding held pursuant to Chapter 1581 operates as collateral estoppel only between the parties to the action and their successors in interest.³² In addition, existing law governing appeals also applies to actions litigated under the procedures established by Chapter 1581.³³

26. *Id.* §96(b).

27. *Id.* §96(c).

28. *Id.* §96(a).

29. *Id.* §97(a), (b).

30. *Id.* §97(b)(5); *see id.* §473.

31. *Id.* §98; *see id.* §98(a). A copy of the affidavits, together with the current address of the affiant, must be served on the party against whom it is offered at least 30 days prior to the trial, and the affiant must be available for service of process at a place designated by the proponent, within 150 miles of the place of trial, at least 20 days prior to trial. *Id.*

32. *Id.* §99.

33. *Id.* §100.

Civil Procedure; summary judgment and nonsuit

Code of Civil Procedure §§437c, 581c (amended).

AB 1799 (Robinson); STATS. 1981, Ch 1510

Support: California Trial Lawyers Association

Opposition: Association of California Insurance Companies

Under existing law, a defendant may be granted a summary judgment

ment¹ or nonsuit² upon sufficient showing that there are no triable issues of material fact³ or no evidence sufficient to support a verdict.⁴ If there is more than one defendant in the suit, the court may grant a summary judgment or nonsuit to one or more of the defendants.⁵ Once either motion is granted, it has the effect of a final judgment⁶ for the moving party, and the judge may not review issues relating solely to the former codefendant.⁷ Under prior law, once a defendant in a multiple defendant case had been granted a summary judgment or a nonsuit, defense counsel could place blame on the former codefendant in an attempt to provide a defense for the remaining defendants.⁸ The defense counsel's attack on the former codefendant could confuse the jury and often would result in one or all of the remaining codefendants escaping liability.⁹ Chapter 1510 prevents this practice in personal injury or property damage actions and specifically states that once a defendant is granted a summary judgment or a nonsuit, the remaining codefendants may not, over plaintiff's objection, during the course of the proceedings attribute fault to or comment on the absence or involvement of the defendant who was granted the motion.¹⁰ Chapter 1510 forces a codefendant either to present any arguments at the time the motion¹¹ is made explaining why the other party should not be granted the motion or risk facing liability alone by remaining silent about the moving codefendant.¹²

1. See CAL. CIV. PROC. CODE §437c; 4 B. WITKIN CALIFORNIA PROCEDURE PROCEEDINGS WITHOUT TRIAL §173 (2d ed. 1971).

2. See CAL. CIV. PROC. CODE §581c; 4 B. WITKIN, CALIFORNIA PROCEDURE TRIAL §350 (2d ed. 1971).

3. See CAL. CIV. PROC. CODE §437c.

4. *Hale v. Safeway Stores, Inc.*, 129 Cal. App. 2d 124, 131, 276 P.2d 118, 123 (1954) (for explanation of no evidence sufficient to support a verdict); see CAL. CIV. PROC. CODE §§581c, 437c.

5. See *Hanna v. DeGarmo*, 140 Cal. 172, 173, 73 P. 830, 831 (1903).

6. CAL. CIV. PROC. CODE §577 (definition of judgment). See generally 4 B. WITKIN, CALIFORNIA PROCEDURE TRIAL §350 (Supp. 1981). Where there are multiple issues, a motion for nonsuit may be granted to some of the issues. No final judgment, however, may be granted until termination of the action. *Id.* Judgment however, will be awarded in accordance with the issues determined on the motion. *Id.*

7. See *id.* §§ 437c, 581c(b); *Conway v. Bughouse*, 105 Cal. App. 3d 194, 202, 164 Cal. Rptr. 585, 590 (1980).

8. Letter from Stanley M. Wieg, Associate Legislative Director, California Trial Lawyers Association, to the *Pacific Law Journal*, August 11, 1981 (copy on file at the *Pacific Law Journal*).

9. See *id.*

10. CAL. CIV. PROC. CODE §§437c(j), 581c(d).

11. See letter, *supra* note 8.

12. *Id.*

Civil Procedure; consolidation of civil actions

Code of Civil Procedure §404 (amended).

AB 3396 (Harris); STATS. 1982, ch. 250

Support: Judicial Council

Chapter 250 was enacted in an apparent attempt to expedite the consolidation procedure¹ and to reduce the administrative role of the Judicial Council.² Existing law provides for the coordination and possible consolidation of civil actions sharing a common question of fact or law that are pending in different courts.³ The coordination proceeding is commenced by the filing of a petition⁴ with the Judicial Council requesting that a coordinating motion judge be assigned to determine whether the actions should be coordinated.⁵

Under prior law, if an action was pending in a superior court and a municipal or justice court within the *same* county, the assigned coordinating judge could order the municipal or justice court action transferred to the superior court and consolidated with that action.⁶ Chapter 250 now provides that if the actions share a common question of fact or law and are pending within the *same* county, neither the Judicial Council nor the coordination judge has to be an intermediary.⁷ Chapter 250 allows any party to apply directly to the superior court for superior court consolidation of the superior and municipal or justice court actions.⁸ Chapter 250 requires that the motion requesting a

1. See generally *Estate of Baker*, 131 Cal. App. 3d 471, 485, 182 Cal. Rptr. 550, 559 (1982) (purpose of consolidation is to promote trial convenience and economy by avoiding duplication of procedure).

2. See generally JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT TO THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS *Coordination of Multicourt Civil Actions* at p. 42 (1982) [hereinafter cited as *Report*] (statistical analysis of petitions for coordination in 1981).

3. CAL. CIV. PROC. CODE §§404-404.8 (coordination statute); CAL. RULES OF COURT §§1501-1550 (coordination procedure). See generally *Keenan v. Superior Court*, 111 Cal. App. 3d 336, 340-342, 168 Cal. Rptr. 561, 563 (1980) (outline of coordination procedure); 4 PAC. L.J., REVIEW OF SELECTED CALIFORNIA LEGISLATION 333-334 (1972) (discussion of coordination procedure).

4. CAL. CIV. PROC. CODE §404. The petition may be filed by the presiding judge of any court where an action is pending on its own motion or on the motion of any party supported by an affidavit. Additionally, all the parties plaintiff or defendant may request the Chief Justice to assign a judge to determine whether coordination of the actions is appropriate.

5. *Id.*

6. *Id.* §404.3(b); see *Report*, *supra* note 2, at 42. Of the 285 petitions filed during 1981, 105 were consolidated under the new option for "vertical" proceedings, 46 were granted, 26 were denied, 25 became moot, 3 were withdrawn, and the remaining were awaiting determination by the coordination motion judge at the time of the report. *Id.*

7. CAL. CIV. PROC. CODE §404.

8. *Id.*

transfer be accompanied by an affidavit specifying that the actions meet the designated standards.⁹

9. *Id.* §404.1 (if common questions of fact or law significantly predominate the litigation and convenience, efficiency, and the ends of justice would be promoted by the coordination). *Id.* §404.

Civil Procedure; actions-dismissals

Code of Civil Procedure §581a (amended).

SB 1150 (Beverly); STATS. 1982, Ch 600

Support: Association of California Insurance Companies

Opposition: California Trial Lawyers Association

Existing law requires that any action¹ commenced by complaint or cross-complaint be dismissed when the summons is not served and returned to court within three years after the filing of the action.² Additionally, existing law provides that actions will be dismissed if, after service upon the defendant or the general appearance of the defendant, no answer has been filed, and the plaintiff fails to have judgment³ entered within three years.⁴

Case law has established several implied exceptions to the statutory three year dismissal requirement for both the plaintiff's failure to return the service of summons and failure to have judgment entered on the plaintiff's behalf when the defendant fails to answer.⁵ Chapter 600, however, has specifically codified only two of these case law exceptions by providing that the time period for the required action can be extended when (1) the plaintiff's compliance was impossible or impracticable⁶ or (2) the defendant or cross-defendant was estopped to complain.⁷ Chapter 600 now states that the three year statute of limita-

1. CAL. CIV. PROC. CODE §22 (definition of action).

2. *See id.* §581a(a), (b).

3. *Id.* §577 (definition of judgment).

4. *Id.* §581a(c).

5. *See* Hocharian v. Superior Court of Los Angeles County, 28 Cal. 3d 714, 722, 621 P.2d 829, 832-33, 170 Cal. Rptr. 790, 793-94 (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 for Los Angeles County, 266 Cal. App. 2d 907, 918, 72 Cal. Rptr. 561, 568 (1968).

6. *See* CAL. CIV. PROC. CODE §581a(f)(2). *Compare id.* with 50 Cal. 2d at 740-41, 329 P.2d at 491-92 (for the implied exceptions of impossibility & impracticability). Failure to discover relevant facts or evidence will not excuse compliance. CAL. CIV. PROC. CODE §581a(f)(2).

7. *See* CAL. CIV. PROC. CODE §581a(f)(1). *Compare id.* with 5 Cal. 3d at 439, 487 P.2d at 1217, 96 Cal. Rptr. at 577 and 266 Cal. App. at 918, 72 Cal. Rptr. at 568 (for the implied exception of a defendant being estopped to complain).

tions is jurisdictional⁸ and that noncompliance with the statute may only be excused if a statutory exception applies.⁹

8. See *Edwards v. Steele*, 25 Cal. 3d 406, 412, 599 P.2d 1365, 1369, 158 Cal. Rptr. 662, 666 (1979). The effect of a jurisdictional statute of limitations is to divest the court of jurisdiction over the matter once the statute of limitations has expired. *Id.*

9. See CAL. CIV. PROC. CODE §581a(f).

Civil Procedure; in forma pauperis—subsequent repayment

Government Code §68511.3 (amended).

SB 1564 (Stiern); STATS. 1982, Ch 1221

Support: County Clerks Association of California; County of San Bernadino; County Supervisors Association of California; Department of Finance.

Existing law permits a court to waive payment of court fees when the court approves a litigant's application to proceed in forma pauperis.¹ The court will grant in forma pauperis status if it makes the determination, based on information submitted by the litigant, that the litigant is unable to pay court fees or costs and continue to provide for the common necessities of life.² In addition, existing law requires the court to grant in forma pauperis status to any litigant who files a form application containing declarations that the litigant (1) receives government financial assistance,³ or (2) has a monthly income that is 125 percent or less of the current monthly poverty threshold,⁴ unless the court has reason to question the truthfulness of the applicant's declarations.⁵

In an apparent attempt to encourage closer scrutiny of the financial status of in forma pauperis applicants, Chapter 1221 mandates that the Judicial Council formulate rules empowering a court to authorize the court clerk, county financial officer, or other appropriate county officer to confirm the financial condition of the applicant.⁶ Chapter 1221 also

1. CAL. GOV'T CODE §26720.5. See CAL. GOV'T. CODE §68511.3(a)(6); CAL. R. CT. 985(b). See generally CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §6.7 (1982).

2. See CAL. GOV'T CODE §68511.3(a)(6)(B). This provision is applicable if the litigant or the litigant's family would be deprived of the common necessities of life. *Id.*; see CAL. R. CT. 985(b).

3. See CAL. GOV'T CODE §68511.3(a)(6)(A); CAL. R. CT. 985(b).

4. See CAL. GOV'T CODE §68511.3(a)(6)(B); CAL. R. CT. 985(b).

5. CAL. GOV'T. CODE §68511.3(a)(6). See *Earls v. Superior Court*, 6 Cal. 3d 109, 114, 420 P.2d 814, 816, 98 Cal. Rptr. 302, 304 (1971); *In re Marriage of Reese*, 73 Cal. App. 3d 120, 124, 140 Cal. Rptr. 589, 591 (1977) (courts are required to grant motion for in forma pauperis unless they doubt the truthfulness of the applicant's declarations).

6. CAL. GOV'T. CODE §68511.3(a)(5).

directs the Judicial Council to formulate and adopt rules requiring a litigant applying for in forma pauperis status on the basis of the poverty threshold prerequisite, to prepare and submit a financial statement as a part of the application process.⁷ Furthermore, Chapter 1221 provides that these rules and forms must require an in forma pauperis applicant to submit specified information, in addition to financial information, to be used by the court in determining the ability of the applicant to pay any or all of the applicable court fees and costs.⁸ This information must include (1) the litigant's current address and date of birth;⁹ (2) the adverse party's current address and date of birth, if known to the litigant;¹⁰ and (3) the name of any person paid by the litigant, and the amount paid, for preparation or assistance in the preparation of documents presented to the court.¹¹

Chapter 1221 further provides that a court may recover fees and costs from the other party to the action if the in forma pauperis litigant would have been entitled to recover the fees and costs from the other party.¹² In addition, Chapter 1221 authorizes a court to recover waived fees and costs from an in forma pauperis litigant when the court determines, at any time within three years after granting in forma pauperis status, that the changed financial circumstances of the litigant enable the litigant to repay any or all of the fees and costs.¹³ The court is authorized, under Chapter 1221, to compel the litigant to appear for examination before making its determination of the litigant's ability to pay costs and fees.¹⁴ Chapter 1221 provides, however, that these appearances will be restricted to four-month intervals.¹⁵ Chapter 1221 further specifies that execution of any order resulting from these recovery proceedings must be issued in the same manner as on a judgment in a civil action.¹⁶

Finally, Chapter 1221 authorizes the disposal of in forma pauperis applications by the court clerk after three years of the date of filing of the application.¹⁷ The court clerk is also authorized to dispose of the applications at any time after the applications have been microfilmed.¹⁸

7. *Id.* §68511.3(a)(6)(B).

8. *Id.* §68511.3(b).

9. *Id.* §68511.3(b)(1),(2).

10. *Id.*

11. *Id.* §68511.3(b)(3).

12. *Id.* §68511.3(c).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* §68511.3(d).

18. *Id.*

Civil Procedures; disqualification of judges

Code of Civil Procedure §§170, 170.6 (amended).

AB 2593 (Ingalls); STATS. 1982, Ch 1644.

(Effective October 1, 1982).

Support: California Judges Association

Prior to 1981, judges were permitted to ignore or strike from the files a declaration alleging judicial bias¹ if the judge against whom the motion was filed found the supporting statements to be legally insufficient² to show prejudice.³ In 1981 legislation was enacted to preclude judges, challenged on the ground of prejudice, from hearing or passing upon any questions of law or fact concerning the statements alleging bias filed against them.⁴ This legislation specifically stated that the provisions precluding judges from ruling on the legal sufficiency of disqualification motions was not intended to change the authority of any judge to stay proceedings pending determination on the motion to disqualify.⁵ The practical effect of the 1981 legislation was to preclude judges in *any* case, when a motion for disqualification was filed against them, from hearing the case on the merits even when the motion was insufficient to show prejudice.⁶

Chapter 1644 does not require judges to stay proceedings when a verified statement⁷ of disqualification has been filed.⁸ Chapter 1644 instead provides that the judge may now proceed with the trial or hearing until the question of disqualification is determined, unless the statement is filed by the prosecution on the first day of a criminal trial.⁹ Furthermore, Chapter 1644 does not require judges to grant a continuance of a trial or hearing because a statement of disqualification has

1. See CAL. STATS. 1979, c. 730, §17, at 2472 (amending CAL. CIV. PROC. CODE §170); *In re Marriage of Lemen*, 113 Cal. App. 3d 769, 789, 170 Cal. Rptr. 642, 652 (1980) (holding ". . . if the declaration of actual bias is legally insufficient as a ground of disqualification, it may be ignored or stricken from the files by the trial judge").

2. See *In re Morelli*, 11 Cal. App. 3d 819, 843, 91 Cal. Rptr. 72, 82 (1970) (indicating what constitutes statements that are legally insufficient to support a finding of judicial prejudice).

3. See CAL. CIV. PROC. CODE §170(a) (setting forth the conditions under which a judge is biased).

4. See CAL. STATS. 1981, c. 255, §1, at 9 (amending CAL. CIV. PROC. CODE §170).

5. See CAL. STATS. 1981, c. 255, §2, at 12.

6. See generally 13 PAC. L.J., REVIEW OF SELECTED 1981 CALIFORNIA LEGISLATION 601 (1982) [hereinafter referred to as CALIFORNIA LEGISLATION].

7. See CAL. CIV. PROC. CODE §170(c).

8. See *id.* §170(d)(4).

9. See *id.*

been filed unless a continuance is required for the convenience of the court or good cause is shown.¹⁰ If a continuance is granted, Chapter 1644 specifies that the cause of action can be continued either day-to-day or for a limited time and then transferred for trial or hearing as promptly as possible.¹¹

Under existing law, in most circumstances a peremptory challenge¹² alleging judicial prejudice is permitted at any time prior to the commencement of the trial or hearing.¹³ Existing law provides two exceptions (1) the 10-day-5-day provision¹⁴ and (2) the master calendar provision.¹⁵ Chapter 1644 provides an additional constraint on the filing of a peremptory challenge when the action is pending in a court authorized to have no more than one judge by requiring the moving party to make the motion within 30 days from the date of the first appearance of that moving party in the action.¹⁶

10. *See id.* §170(d)(5).

11. *See id.*

12. *See Solberg v. Superior Court*, 19 Cal. 3d 182, 204 n.23, 137 Cal. Rptr. 406, 474 (1977) (defining peremptory challenge as a motion resulting in disqualification of the judge without any further act or proof). *But see* CALIFORNIA LEGISLATION, *supra* note 6 at 602.

13. *See* CAL. CIV. PROC. CODE §170.6(2); *In re Abdul Y.*, 130 Cal. App. 3d 847, 855, 182 Cal. Rptr. 146, 150 (1982).

14. *See* CAL. CIV. PROC. CODE §170.6(2) (requiring that if the identity of the judge is known at least 10 days before the date of the trial or hearing, the motion to disqualify must be made at least 5 days before that date).

15. *See id.* (requiring that if the trial is held in a court with a master calendar, the motion to disqualify must be made to the judge supervising the calendar no later than the time the cause of action is assigned for trial).

16. *See id.*

Civil Procedure; attorney telephone appearances

Code of Civil Procedure §§575.5, 1006.5 (new).

AB 1209 (Harris); STATS. 1982, Ch 411

Existing law allows superior courts¹ in civil cases to adopt rules to govern the time, nature, and manner of pretrial matters.² Generally, in these pretrial proceedings, appearances by counsel are made in person.³

1. *See generally* CAL. CONST. art. VI, §84, 16 (establishing superior courts); CAL. GOV'T CODE §§69500-69539 (general provisions); 1 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §132 (2d ed. 1970).

2. CAL. CIV. PROC. CODE §575; *see* CAL. R. CT. 206-221, 245(a)(3).

3. *See* CAL. R. CT. 217, 220.2(a); 4 B. WITKIN, CALIFORNIA PROCEDURE, *Trial* §37(a) (2d ed. 1970 & Supp. 1981) [hereinafter cited as WITKIN]; CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL §§26.40-26.42 (1977) [hereinafter cited as CEB] (appearance at trial setting conference); CAL. R. CT. 210(a), 217; WITKIN, *supra*, at §62(2) (Supp. 1981); CEB, *supra*, at §26.40 (appearance at pre-trial conference); CAL. R. CT. 202(c), 502(c); 3 B. WITKIN, CALIFORNIA PROCEDURE *Pleading* §833 (2d ed. 1971); CEB, *supra*, at §9.30 (appearance

Apparently enacted to conserve attorneys' time, reduce litigation costs, and increase judicial economy and efficiency,⁴ Chapter 411 states that the Judicial Council⁵ must formulate criterion to regulate an attorney's appearance by telephone in lieu of a personal appearance at specified judicial proceedings.⁶

Chapter 411 requires the Judicial Council to formulate a standard of judicial administration that will govern the telephone appearance of counsel at any pretrial, trial setting, or arbitration determination conference in a civil case.⁷ The standard established by the Judicial Council, however, will prohibit appearances by telephone at any conference that is combined with a settlement conference⁸ or when the court orders a personal appearance by the attorney.⁹

Similarly, Chapter 411 mandates the Judicial Council to promulgate guidelines to govern an attorney's telephone appearance at a hearing of a demurrer, an order to show cause, or pretrial motion.¹⁰ The standard of judicial administration will not apply, however, in any hearing in which either party intends to present oral testimony, when proceedings are filed pursuant to the Family Law Act,¹¹ or when the court orders a personal appearance by counsel.¹²

Existing statutory law provides all courts with the latitude to adopt local rules¹³ not inconsistent with the rules prescribed by the Judicial Council.¹⁴ In this respect, Chapter 411 requires the superior court of each county to notify the Judicial Council within six months of the Council's formulation of these standards, whether the superior court intends to incorporate the standards, modify them, or not adopt any

at hearing of a demurrer); 4 B. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §30 (2d ed. 1971); CEB, *supra*, at §23.68 (appearance at hearing for show cause order); CEB, *supra*, at §§26A.5-26A.9 (Supp. 1982) (arbitration determination conference). *But see* CEB, *supra*, at §23.55, 4 B. WITKIN, CALIFORNIA PROCEDURE, *Proceedings Without Trial* §22 (2d ed. 1971) (no mandatory attendance of counsel at pre-trial motion hearings).

4. *See generally* CAL. CIV. PROC. CODE §§1823-1833.2; Seltzer, *California's Pilot Project in Economical Litigation*, 53 SO. CAL. L. REV. 1497 (1980); *Experiments Tackle Trial Delay, Costs* 67 A.B.A.J. 1096 (Sept. 1981); CAL. R. CT. 1801-1859; WITKIN, *supra* note 3, at §30A (Supp. 1981).

5. *See generally* CAL. CONST. art. VI, §6; CAL. GOV'T CODE §§68500-68536.

6. CAL. CIV. PROC. CODE §§575.5, 1006.5 (pre-trial conference, trial setting conference, arbitration determination conference, demurrer hearing, hearing for a show cause order, or hearing on a pre-trial motion).

7. CAL. CIV. PROC. CODE §575.5(a).

8. *See generally* CAL. R. CT. 207.5, 212, 213, 217; CEB, *supra* note 3, at §§26.75, 33.16-33.32.

9. CAL. CIV. PROC. CODE §575.5(b).

10. *Id.* §1006.5(b).

11. *See* CAL. CIV. CODE §§4000-5138 (Family Law Act). *See generally* CAL. R. CT. 1201-1296.40.

12. CAL. CIV. PROC. CODE §1006.5(b).

13. CAL. R. CT. 981(d) (definition of rules).

14. CAL. GOV'T CODE §68070; *See* 1 B. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§121-131 (2d ed. 1971 & Supp. 1981).

local rules governing the use of telephone appearances by attorneys.¹⁵

15. CAL. CIV. PROC. CODE §§575.5(c), 1006.5(c).

Civil Procedure; sanctions

Code of Civil Procedure §177.5 (new).

AB 3573 (Stirling); STATS. 1982, Ch 1564

Support: Department of Finance; Superior Court of Los Angeles;
Superior Court of San Diego

Opposition: State Public Defender

Under existing law, judicial officers have the authority to impose monetary sanctions against persons who interfere with the efficient administration of civil actions.¹ Existing law provides that if the interference is a willful violation² of a lawful court order,³ the court may impose a fine not in excess of \$500.⁴ Notwithstanding this provision, and for the apparent purpose of ensuring the orderly administration of judicial proceedings,⁵ Chapter 1564 provides that a judicial officer now has the authority to impose a fine not to exceed \$1,500 when a witness, a party, or a party's attorney violates a court order.⁶ No fine will be imposed, however, if the person charged shows good cause or substantial justification for the violation.⁷ Under Chapter 1564, the violation must be either noticed in a party's moving or responding papers, or noticed by the court on its own motion.⁸ Additionally, before the imposition of sanctions, the person charged must be afforded notice and an opportunity to be heard.⁹ Finally, Chapter 1564 requires that the order imposing the sanctions be in writing and explain the conduct or circumstances justifying the order.¹⁰

1. See CAL. CIV. PROC. CODE §§128, 1218.

2. See *In re Liu*, 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85, 90 (1969) (providing that, among other things, the violation of a court order must be willful before an action against the violator may ensue).

3. See generally CAL. CIV. PROC. CODE §1003 (definition of court order); *id.* §1209(5) (providing that disobedience of a lawful court order is contempt).

4. *Id.* §1218. Compare *id.* with *id.* §177.5.

5. *Id.* §177(2). See generally *People v. Smith*, 13 Cal. App. 3d 897, 91 Cal. Rptr. 786 (1970) (the court has the inherent power to see to it that all persons indulge in no act or conduct calculated to obstruct the administration of justice).

6. *Id.* §177.5.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

Civil Procedure; surety bond statute of limitations

Code of Civil Procedure §359.5 (new).

AB 2134 (Lancaster); STATS. 1982, Ch 106

Support: American Insurance Association, Associated General Contractors, Office of Planning and Research

Past court decisions have established the general rule that the running of the applicable statute of limitations¹ on a principal obligation did not bar an action against the surety² of that obligation.³ In an apparent response to *Regents of the University of California v. Hartford Accident & Indemnity Co.*,⁴ in which the California Supreme Court held that certain construction sureties did not come within the purview of the statute of limitations applicable to their principals,⁵ legislation was enacted to provide that, in latent defect actions,⁶ the same statute of limitations applies to both the principal and the construction surety.⁷ Although this narrowly drawn legislation⁸ prevents an injured party from recovering from a construction surety after the expiration of the applicable statute,⁹ it does not bar an action against other sureties after

1. See *Elkins v. Derby*, 12 Cal. 3d 410, 525 P.2d 81, 115 Cal. Rptr. 641 (1974) (fundamental purpose of statutes of limitations); *San Filippo v. Griffiths*, 51 Cal. App. 3d 640, 124 Cal. Rptr. 399 (1975) (nature of right involved determines applicability of statute of limitations).

2. See CAL. CIV. PROC. CODE §2787 (definition of sureties). See generally *id.* §§2787-2855.

3. See *Regents of the Univ. of Cal. v. Hartford Acc. & Indem. Co.*, 21 Cal. 3d 624, 633-39, 581 P.2d 197, 202-06, 147 Cal. Rptr. 486, 491-95 (1978); *Bloom v. Bender*, 48 Cal. 2d 793, 797-98, 313 P.2d 568, 571 (1957); *State Bd. of Equalization v. Balboa Ins. Co.*, 89 Cal. App. 3d 499, 503, 155 Cal. Rptr. 205, 207 (1978).

4. 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978). Compare *id.* with CAL. CIV. PROC. CODE §337.15(a). See generally *Anderson v. Brouwer*, 99 Cal. App. 3d 176, 160 Cal. Rptr. 65 (1979) (comparison between CAL. CIV. PROC. CODE §§ 337 and 337.15); 11 PAC. L.J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION, 365 (1980) [hereinafter referred to as REVIEW].

5. See 21 Cal. 3d at 632-33, 581 P.2d at 201, 147 Cal. Rptr. at 490. See generally Note, *Regents of the University of California v. Hartford Accident & Indemnity Co.: Running of Statute of Limitations in Favor of a Principal Does not Exonerate a Surety*, 67 CALIF. L. REV. 563 (1979); 2 B. WITKIN, CALIFORNIA PROCEDURE, Actions §299 (Supp. 1981).

6. The court in *Regents* dealt directly with statutes of limitations applicable to suits arising from latent defects in the development of real property. 21 Cal. 3d at 629-32, 581 P.2d at 197, 147 Cal. Rptr. at 486. See generally CAL. CIV. PROC. CODE §§337.1, 337.15; Annot., 93 A.L.R. 3d 1242 (1979); Annot., 1 A.L.R. 3d 914 (1965).

7. See CAL. CIV. PROC. CODE §337.15(a); see also *id.* §§2825 (sureties are not exonerated by the discharge of their principals by operation of law), 2809 (the liability of sureties is co-extensive and commensurate with that of their principals). See generally REVIEW, *supra* note 4, at 365 (legislative review of CAL. CIV. PROC. CODE §337.15).

8. See Telephone conversation with R. LeBoy, Assembly Judiciary Committee Consultant (July 22, 1982) (conversation regarding legislative intent) (notes on file at the *Pacific Law Journal*).

9. Compare CAL. CIV. PROC. CODE §337.15(a) with CAL. STATS. 1971, c. 1569, §1, at 3148 (enacting CAL. CIV. PROC. CODE §337.15). See generally REVIEW, *supra* note 4, at 365 (legislative review of CAL. CIV. PROC. CODE §337.15).

the running of their principal's statute.¹⁰

Chapter 106 bars all suits under *any* surety bond whenever the statute of limitations has expired on the principal obligation.¹¹ Specifically, Chapter 106 states that the running of the statute against the principal will also bar any actions against the surety or the principal, other than the obligations of the principal under the bond, unless the terms of the bond provide otherwise.¹² Chapter 106 could possibly be interpreted¹³ to prevent principals from remaining indefinitely liable¹⁴ to their sureties on an implied obligation of reimbursement,¹⁵ although it is a separate cause of action.¹⁶

10. See REVIEW, *supra* note 4, at 366; Note, *supra* note 6, at 570-73; see also 21 Cal. 3d at 649, 581 P.2d at 212, 147 Cal. Rptr. at 501 (Clark, J., concurring and dissenting).

11. CAL. CIV. PROC. CODE §359.5.

12. *Id.*

13. See REVIEW, *supra* note 4, at 366; Note, *supra* note 5, at 570-73; see also 21 Cal. 3d at 649, 581 P.2d at 212, 147 Cal. Rptr. at 501 (Clark, J., concurring and dissenting).

14. Since the purpose of the principal's statute of limitations is to protect the principal from liability extending indefinitely into the future, it has been argued that the court in *Regents* misinterpreted the intent of the Legislature with respect to the running of a statute of limitations against sureties. See *Leaf v. City of San Mateo*, 104 Cal. App. 3d 398, 404-05, 163 Cal. Rptr. 711, 714 (1980). Compare CAL. CIV. PROC. CODE §337.15 with *id.* §337.1.

15. See generally *supra* note 9; CAL. CIV. CODE §2847 (reimbursement of sureties by principals); *Commercial Standard Ins. Co. v. Bank of America*, 57 Cal. App. 3d 241, 129 Cal. Rptr. 91 (1976) (implied obligation of reimbursement); *Berrington v. Williams*, 244 Cal. App. 2d 130, 52 Cal. Rptr. 772 (1966).

16. See 21 Cal. 3d at 638, 581 P.2d at 205, 147 Cal. Rptr. at 494; REVIEW, *supra* note 4, at 366-67.

