

RESOLUTION 11-02-05

DIGEST

Orders of Examination: Tolling of Lien During Bankruptcy

Amends Code of Civil Procedure section 708.110 to toll the one-year lien created by an order of examination pending a bankruptcy stay.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 708.110 to toll the one-year lien created by an order of examination pending a bankruptcy stay. This resolution should be approved in principle because existing California and bankruptcy law are ambiguous as to whether the one-year lien period is tolled during the pendency of a bankruptcy proceeding.

Section 708.110 provides for the imposition of a lien against the personal property of a judgment debtor immediately upon the service of an order to appear for a debtor's examination (an "ORAP" lien). The ORAP lien lasts for one year from the date of service of the ORAP. (Code Civ. Proc., § 708.110, subd. (d).) There is no express provision in the statute for the extension of this lien during the pendency of bankruptcy proceedings, although it might be argued that other laws provide (at least by implication) for such an extension. (See 11 U.S.C., § 362, subds. (a)(4), (a)(5) [automatic stay of lien enforcement against a bankrupt debtor]; 11 U.S.C., § 108, subd. (c) [extending time in which to commence or continue actions against debtor].) However, these provisions are vague at best, and do not specifically answer the question of whether the ORAP lien is actually tolled during the bankruptcy proceedings.

The time left to enforce an ORAP lien after a bankruptcy filing should not be open to question. Parties holding a judgment against a debtor should not have to await the final disposition of the bankruptcy proceeding, then rush back to the state courts to try to enforce the lien or the ORAP before any remaining time on the lien runs out. The change suggested by the proponent would cure this ambiguity by providing explicitly that the one-year life of the ORAP lien is tolled during bankruptcy.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 708.110 to read as follows:

- 1 § 708.110
- 2 (a) The judgment creditor may apply to the proper court for an order requiring the judgment
- 3 debtor to appear before the court, or before a referee appointed by the court, at a time and place
- 4 specified in the order, to furnish information to aid in enforcement of the money judgment.
- 5 (b) If the judgment creditor has not caused the judgment debtor to be examined under this
- 6 section during the preceding 120 days, the court shall make the order upon ex parte application of
- 7 the judgment creditor.
- 8 (c) If the judgment creditor has caused the judgment debtor to be examined under this
- 9 section during the preceding 120 days, the court shall make the order if the judgment creditor by
- 10 affidavit or otherwise shows good cause for the order. The application shall be made on noticed
- 11 motion if the court so directs or a court rule so requires. Otherwise, it may be made ex parte.
- 12 (d) The judgment creditor shall personally serve a copy of the order on the judgment debtor
- 13 not less than 10 days before the date set for the examination. Service shall be made in the manner
- 14 specified in Section 415.10. Service of the order creates a lien on the personal property of the
- 15 judgment debtor for a period of one year from the date of the order unless extended or sooner

16 terminated by the court. This one-year period is tolled during any such time as the judgment debtor
17 or the judgment debtor's personal property is protected by a stay under bankruptcy law.
18 (e) The order shall contain the following statement in 14-point boldface type if printed or in
19 capital letters if typed: ANOTICE TO JUDGMENT DEBTOR. If you fail to appear at the time and
20 place specified in this order, you may be subject to arrest and punishment for contempt of court and
21 the court may make an order requiring you to pay the reasonable attorney's fees incurred by the
22 judgment creditor in this proceeding.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS:

Existing Law: Provides for a one-year lien against a judgment debtor's personal property upon service of an order to appear for judgment debtor's examination (Code Civil Proc., § 708.110). Neither state law nor bankruptcy law deals specifically with whether this one-year period continues to run during the pendency of the judgment debtor's bankruptcy; although Bankruptcy Code section 108, subdivision (c), by implication, may be argued to provide that the lien might be extended a maximum of 30 days after notice of the termination of an applicable stay is received by the creditor.

This Resolution: Would fill a void in the law, provide a fair mechanism to prevent a judgment debtor from shortening the period of a section 708.110 lien by filing for protection in bankruptcy; and save the judgment creditor from having to resort to expedited hearing procedures just in order to preserve its lien following the debtor's discharge or dismissal from a bankruptcy.

The Problem: No law deals with whether a section 708.110 one-year lien continues to expire during the pendency of a judgment debtor's bankruptcy. No law specifically addresses even a 30-day extension of a section 708.110 lien following the termination of a bankruptcy stay. Reactivating a state court case, setting a hearing and convincing a state court judge that such extension is provided under bankruptcy law, all within 30 days, is virtually impossible. Even then, all the judgment creditor can ask the judge to do is to extend the lien for some period of time, most equitably for the amount of time that expired while the debtor was protected by the Bankruptcy Code's automatic stay.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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