

RESOLUTION 10-07-06

DIGEST

Judgment Debtor Exams: Priority of Liens

Amends Code of Civil Procedure section 708.110 to prioritize the lien created upon service of an order of examination and limits the lien to personal property in California.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend C.C.P. § 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
- 3 judgment debtor to appear before the court, or before a referee appointed by the court, at a
- 4 time and place specified in the order, to furnish information to aid in enforcement of the
- 5 money judgment.
- 6 (b) If the judgment creditor has not caused the judgment debtor to be examined under
- 7 this section during the preceding 120 days, the court shall make the order upon ex parte
- 8 application of the judgment creditor.
- 9 (c) If the judgment creditor has caused the judgment debtor to be examined under this
- 10 section during the preceding 120 days, the court shall make the order if the judgment
- 11 creditor by affidavit or otherwise shows good cause for the order. The application shall be
- 12 made on noticed motion if the court so directs or a court rule so requires. Otherwise, it may
- 13 be made ex parte.
- 14 (d) The judgment creditor shall personally serve a copy of the order on the judgment
- 15 debtor not less than 10 days before the date set for the examination. Service shall be made
- 16 in the manner specified in Section 415.10. Service of the order creates a lien on the personal
- 17 property located in this state of the judgment debtor for a period of one year from the date of
- 18 the order unless extended or sooner terminated by the court. The lien created by this
- 19 subsection is an unperfected lien subordinate to the rights of parties identified in § 9317(a)
- 20 of the Commercial Code.
- 21 (e) The order shall contain the following statement in 14-point boldface type if printed
- 22 or in capital letters if typed: “NOTICE TO JUDGMENT DEBTOR. If you fail to appear at
- 23 the time and place specified in this order, you may be subject to arrest and punishment for
- 24 contempt of court and the court may make an order requiring you to pay the reasonable
- 25 attorney’s fees incurred by the judgment creditor in this proceeding.”

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

PROPONENT: Beverly Hills Bar Association

STATEMENT OF REASONS

Existing Law: Under current law, personal service of an order for a judgment debtor examination "creates a lien on the personal property of the judgment debtor for a period of one year from the

date of the order unless extended or sooner terminated by the court." Notwithstanding that the existence of that lien is not indexed in any centralized filing system, this difficult to research lien has been held to be perfected against third parties.¹

This Resolution: Amends Code of Civil Procedure ("C.C.P.") section 708.110(d) to provide that the lien created by service on the judgment debtor of an order for judgment debtor exam is an unperfected lien against personal property assets located in this State.

The Problem: Public filing systems were adopted to create order and foster predictability for those extending credit and those holding liens against collateral. Affording secret liens priority status makes the public filing system less reliable and the outcome over priority disputes uncertain. If this lien is perfected as against third parties, it is a secret lien that other creditors and those considering extending credit to the judgment debtor effectively cannot discover without searching the records of every federal and state courthouse in California. It also gives creditors with these secret liens an advantage over other creditors, creating a "rush to the courthouse" to obtain their secret liens.

While it may be noted that other secret liens exist, most arise under situations where a third party creditor or lender ordinarily would be charged with knowledge or inquiry of an adverse claim, and do not affect all assets of the judgment debtor. For instance, attorneys' liens on litigation they are handling; warehousemen's liens on items they are storing; and repairmen liens against items they repaired while they retain possession. The changes proposed by this amendment should result in decreased uncertainty from these secret liens to lenders, and lower the cost of credit to businesses and consumers alike in California.²

The C.C.P. already provides judgment creditors with the ability to perfect judgment liens as against third parties by public filings and recordation. As to personal property, C.C.P. § 697.510 *et seq.* provides for filing a Notice of Judgment Lien with the Secretary of State (i.e. official form JL1). As to real property, § 697.310 *et seq.* provides for perfecting the judgment lien by recording an abstract of judgment in the county where the real property is located. Existing mechanisms to perfect liens under these procedures and by execution adequately protect judgment creditors seeking to collect their judgments.

This resolution corrects the uncertainty and surprise created by recent decisions that afford perfected status to judgment debtor exam liens without considering the other mechanisms for perfecting such liens and the effect of such perfection upon commercial transactions generally.³

¹ See Southern California Bank v. Zimmerman (In re Hilde), 120 F.3d 950 (9th Cir. 1997).

² Commercial Code § 9617 provides, among other things, that unperfected liens are junior to the rights of various parties, including creditors holding perfected liens and lien creditors.

³ Hilde failed to consider the ability of judgment creditors to perfect judgment liens against personal property by filing a Notice of Judgment Lien with the Secretary of State. That case suggested legislative action be taken to change the result or correct any problems. In addition, at least one respected commentator has questioned whether this lien encumbers personal property located outside the State of California, potentially creating perfection conflicts with the laws of

This resolution will eliminate the problems created and general inequity of treating judgment liens as perfected but secret liens. It will also remove problems of asserting that California law creates perfected liens on personal property located outside of this state.

IMPACT STATEMENT

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

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other states and countries. Alan M. Ahart, California Practice Guide: Enforcing Judgments & Debts ¶ 6:1302 (The Rutter Group 2005).