



## BUSINESS LAW SECTION

### INSOLVENCY LAW COMMITTEE

THE STATE BAR OF CALIFORNIA

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***PROPOSAL TO CLARIFY CODE OF CIVIL PROCEDURE SECTION 701.680 TO EXPLICITLY STATE THAT IT DOES NOT AFFECT, LIMIT OR ELIMINATE THE EQUITABLE RIGHT OF REDEMPTION***

**LEGISLATIVE PROPOSAL (BLS-2013-04)**

**TO:** Office of Governmental Affairs  
**FROM:** Leib M. Lerner  
Robert G. Harris  
Business Law Section (the "Section") Insolvency Law Committee (the "Committee")  
**DATE:** May 21, 2012  
**RE:** Proposal to Amend C.C.P. § 701.680 to Explicitly State That it Does Not Affect, Limit or Eliminate the Equitable Right of Redemption

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#### SECTION ACTION AND CONTACTS

Date of Approval by Section Executive Committee ((the "Executive Committee"): June 1, 2012  
Approval Vote: For: 14 Against: 0

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## HISTORY, DIGEST AND PURPOSE

The mission statement of the Insolvency Law Committee of the State Bar of California (the “Committee”) provides that it shall seek “to promote predictability, efficiency and consistency in the administration of the federal and California laws governing insolvency and the rights and duties of creditors and debtors.” The mission statement further provides that the Committee “evaluates and advocates changes in federal and state statutes and regulations affecting creditors and debtors.” The proposed change to California Code of Civil Procedure section 701.680 (“CCP §701.680”) affects both creditors and debtors. The Committee has concluded that it is consistent with its mission to propose a specific amendment to CCP §701.680 to make explicit that the equitable right of redemption is not affected, limited or eliminated by the statute, in harmony with the holding of *Lang v. Roche*, (2011) 201 Cal.App. 4th 254 and legislative history.

### History.

In 1982, the Legislature enacted the Enforcement of Judgments Law (“EJL”). California Code of Civil Procedure section 680.010 *et seq.* Among other things, the EJL addresses the procedures for enforcing judgments by writ of execution. Under the statutory scheme, an execution sale “is absolute and may not be set aside for any reason.” CCP §701.680(a). If the judgment forming the basis for the sale is subsequently reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of the sale, with interest. CCP §701.680(a). If the sale “was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason,” and the purchaser at the sale is the judgment creditor, the judgment debtor may institute an action to set aside the sale within 90 days. *Id.*, at (c)(1).<sup>1</sup> In an action to set aside the sale, the judgment debtor “may recover damages caused by the impropriety” and the damages offset against the judgment to the extent the judgment is not satisfied. *Id.*, at (c)(2).

State law historically protected a titleholder when the purchaser at a judicial sale was a party to the underlying litigation. Under the statutory scheme in effect before the enactment of the EJL, if the plaintiff in an action purchased the defendant's property at an execution sale, the former owner, after reversal on appeal, could have the sale set aside and be restored to possession. *Arrow Sand & Gravel, Inc. v. Superior Court* (1985) 38 Cal.3d 884, 888-889.

One of the purposes of the EJL was to change California law and repeal the statutory right to redeem property sold at execution sales. *Gonzalez v. Toews* (2003) 111 Cal.App.4th 977, 983; *Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1346. The comprehensive revision of the EJL “completely eliminated the possibility that judicial sales be set aside on reversal of the underlying

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<sup>1</sup> The statute was amended in 1985 to clarify that a judgment debtor or the judgment debtor’s successor in interest is only entitled to bring an action to set aside the sale if the property was purchased by the judgment creditor, but not if the property was purchased by a third party. The statute was amended in 1988 to provide for reattachment of liens that were extinguished by the execution sale, if the sale is set aside, and to shorten the time to bring such an action from six months to 90 days.

judgment regardless of the identity of the purchaser.” *Arrow Sand & Gravel, Inc. v. Superior Court*, *supra*, 38 Cal.3d at p. 890. “By declaring that all execution sales are absolute, the new law necessarily means that none of the property sold is subject to redemption.” *Yancey v. Fink*, *supra*, 226 Cal.App.3d at p. 1351; *see* Legis. Com. com., 16B West's Ann. Code Civ. Proc. (2009 ed.) foll. § 701.680, p. 488 (“Section 701.680 reflects the repeal of the statutory right of redemption after execution sales.”).

As enacted, the EJL in general and CCP §701.680 in specific are silent on whether the equitable right of redemption as set forth in set forth in *Odell v. Cox* (1907) 151 Cal. 70, *Webb v. Vercoe* (1927) 201 Cal. 754, 764-765, *Smith v. Kessler* (1974) 43 Cal.App.3d 26 and elsewhere survived their enactment. The court in *Lang v. Roche*, *supra*, traced both the history of the EJL and the right to equitable redemption, and held that such right did survive the EJL. In recommending the statute’s adoption, the California Law Revision Commission (“CLR Commission”) acknowledged that the EJL “eliminates the statutory right of redemption from judicial sales.... [but] would not affect the equitable right of a judgment debtor to redeem from a sale at a grossly inadequate price where the purchaser is guilty of unfairness or has taken undue advantage.” *See* 1982 Creditor's Remedies Legislation Report, Recommendation Relating to Enforcement of Judgments Law (Sept. 1982) 16 Cal. Law Revision Com. Rep. (1982) pp. 1119-1120 & fn.406, citing *Odell*, *supra* and *Smith*, *supra*.

The Senate Committee on Judiciary did, in fact, adopt the CLR Commission report, stating that its contents "reflect the intent of the Senate Committee on Judiciary in approving the various provisions of Assembly Bills Nos. 707 and 798." (Rep. of Sen. Com. on Judiciary on Assem. Bills Nos. 707 (1981-1982 Reg. Sess.) and 798 (1981-1982 Reg. Sess.) p. 1.) The 1982 Legislative Committee Comments—Assembly acknowledge that "The elimination of the statutory right to redeem after a sale pursuant to this article does not affect rights to redeem afforded by other law." (16B West's Ann. Code Civ. Proc., *supra*, foll. § 701.680, p. 488.) The legislative committee comments list various statutes as examples, but do not specifically mention preexisting law regarding equitable redemption. “The CLR Commission report makes clear that equitable redemption survives the enactment of the EJL.” *Lang v. Roche*, *supra*, at 264.

### **Relevant Existing Code Sections.**

The relevant code section to be amended is CCP §701.680. Pursuant to that statute, an execution sale “is absolute and may not be set aside for any reason.” CCP §701.680(a). If the judgment forming the basis for the sale is subsequently reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of the sale, with interest. CCP §701.680(a). If the sale “was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason,” and the purchaser at the sale is the judgment creditor, the judgment debtor may institute an action to set aside the sale within 90 days. *Id.*, at (c)(1). In an action to set aside the sale, the judgment debtor “may recover damages caused by the impropriety” and the damages offset against the judgment to the extent the judgment is not satisfied. *Id.*, at (c)(2).

## Proposal.

The Committee proposes amending CCP §701.680 to add a subsection stating that the equitable right of redemption is not affected, limited or eliminated by the statute. This will make explicit the holding in *Lang v. Roche, supra*, based upon the statute's legislative history, that the equitable right of redemption is not affected, limited or eliminated by the statute.

## Reasons for the Proposal.

As aptly put by Professor Dan Schechter in his published comments on the *Lang v. Roche* case, "it is unfortunate that the statute does not expressly deal with [the right of equitable redemption] and had to be interpreted in light of the comments of the Law Review Commission. Perhaps the Legislature might consider an amendment to the statute, adopting the rule developed by the court in this case." See Schechter, 2011 *Comm. Fin. News*. 98, Judgment Debtor's Right of Equitable Redemption May Overturn Void Execution Sale, Even Though Statutory Right of Redemption Has Been Abolished.

In a long-running dispute, one neighbor ("Roche") deliberately misspelled the other neighbor's name ("Lang") on a defamation lawsuit, falsely claimed to the trial court that Lang could not be found, and obtained a default judgment after serving Lang by publication under the misspelled name. Eight years later, Roche obtained a writ of execution. Lang discovered the default judgment as Roche prepared to execute on it, and filed a lawsuit against Roche seeking to void the judgment and enjoin the sheriff's sale. Lang failed to obtain the injunction and Roche bought Lang's property for \$100 at the sheriff's sale. *Lang v. Roche, supra*, at 258.

The default judgment was ultimately vacated and the lawsuit dismissed. Thereafter, Lang filed a lawsuit against Roche seeking to quiet title to the property that Roche obtained at the sheriff's sale. Since the lawsuit was filed six years after execution, Roche demurred to Lang's complaint on that basis that CCP 701.680(c)(1) required that an action to set aside the sheriff's sale needed to be filed within 90 days after the sale occurred. The trial court agreed, and sustained the demurrer without leave to amend on the ground that Lang's claim was time barred. *Id.* at 259.

Historically, California case law has provided for an equitable right of redemption where the property was sold at a sheriff's sale for a grossly inadequate price, and the purchaser was guilty of unfairness or has taken unfair advantage. *Odell, supra*, 151 Cal. at 75. In *Smith, supra*, 42 Cal.App. 3d at 28-31, the plaintiff was not served with the summons and complaint, and had no notice of the underlying lawsuit against her until after the defendant – the plaintiff in the underlying lawsuit – had obtained a default judgment and bought the plaintiff's property for less than \$1000 at a sheriff's sale. The plaintiff did not learn of the sale until after the applicable statute of limitation had expired. Nevertheless, the court held that a subsequent suit by the plaintiff to set aside the sheriff's sale based on equitable grounds was not time barred. *Id.*

The *Lang v. Roche* court discussed whether the equitable right of redemption survived the enactment of CCP §701.680, concluding that "[t]he CLR Commission report makes clear that

equitable redemption survives the enactment of the E JL.” *Lang v. Roche, supra*, at 264. The court carefully examined the legislative history of the E JL in general, and CCP §701.680 in particular. In recommending the statute’s adoption, the CLR Commission acknowledged that the E JL “eliminates the statutory right of redemption from judicial sales... [but] would not affect the equitable right of a judgment debtor to redeem from a sale at a grossly inadequate price where the purchaser is guilty of unfairness or has taken undue advantage.” *Lang v. Roche, supra*, at 262. The Senate Committee on Judiciary adopted the CLR Commission report. The 1982 Legislative Committee Comments—Assembly acknowledge that “[t]he elimination of the statutory right to redeem after a sale pursuant to this article does not affect rights to redeem afforded by other law.”

The holding in *Lang v. Roche* makes sense, and should be codified so that CCP §701.680 reflects that original intent of the legislature when the statute was first adopted.

#### **APPLICATION**

If enacted, the proposed amendment would become effective on January 1, 2014.

#### **PENDING LITIGATION**

No pending litigation would be affected. The amendment codifies existing law, as held by the Court in *Lang v. Roche, supra*. The Committee is unaware of any pending cases that would be affected by the amendment.

#### **LIKELY SUPPORT AND OPPOSITION**

Debtor’s rights organizations are likely to support the proposal. The Committee does not anticipate any opposition.

#### **FISCAL IMPACT**

No fiscal impact is anticipated.

#### **GERMANENESS**

The proposed amendment would codify existing law affecting the rights of judgment creditors and judgment debtors. It is appropriate for the Committee to submit the proposal because the matter requires the special knowledge, training, experience and technical expertise of the lawyers of the Committee. The Committee is composed of 23 lawyers practicing in the area of bankruptcy and financial law.

#### **DISCLAIMER**

This position is only that of the Insolvency Law Committee of the Business Law Section of the State Bar of California. This position has not been adopted by the State Bar’s Board of

Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Insolvency Law Committee and in the Business Law Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

### **TEXT OF PROPOSAL**

SECTION 1. Section 701.680 of the Code of Civil Procedure is amended to read:

701.680. (a) Except as provided in paragraph (1) of subdivision (c), a sale of property pursuant to this article is absolute and may not be set aside for any reason.

(b) If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale pursuant to the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment.

(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason:

(1) The judgment debtor, or the judgment debtor's successor in interest, may commence an action within 90 days after the date of sale to set aside the sale if the purchaser at the sale is the judgment creditor. Subject to paragraph (2), if the sale is set aside, the judgment of the judgment creditor is revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor is entitled to interest on the amount of the judgment as so revived as if the sale had not been made. Any liens extinguished by the sale of the property are revived and reattach to the property with the same priority and effect as if the sale had not been made.

(2) The judgment debtor, or the judgment debtor's successor in interest, may recover damages caused by the impropriety. If damages are recovered against the judgment creditor, they shall be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they shall be applied to the judgment to the extent the judgment is not satisfied.

(d) For the purposes of subdivision (c), the purchaser of the property at the sale is not a successor in interest.

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[Inserted text begins](e) This section shall not affect, limit or eliminate the judgment debtor's equitable right of redemption.[Inserted text ends]