RESOLUTION 04-01-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 685.010, to read as follows:

§ 685.010

(a) Interest accrues at the rate of ~~10 percent~~ one percent plus the prime interest rate on the date judgment is entered per annum on the principal amount of a money judgment remaining unsatisfied.

(b) The Legislature reserves the right to change the rate of interest provided in subdivision (a) at any time ~~to a rate of less than 10 percent per annum~~, regardless of the date of entry of the judgment or the date any obligation upon which the judgment is based was incurred. A change in the rate of interest may be made applicable only to the interest that accrues after the operative date of the statute that changes the rate.

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

PROPONENTS: H. Thomas Watson, David M. Axelrad, David S. Ettinger, Mitchell C. Tilner, Lisa Perrochet, John A. Taylor, Stephan E. Norris, Robert H. Wright, Jason R. Litt, Brad S. Pauley, Steve S. Fleischman, Mark A. Kressel, Eric S. Boorstin, Jens Koepke

STATEMENT OF REASONS

The Problem: Judgment debtors must either pay 10 percent annual interest on appealed judgments or tender payment of the judgment to stop the accrual of interest and hope they can recover that payment if the judgment is reversed. Although the Legislature reserved its right to change the 10 percent annual interest rate when it enacted section 685.010 in 1982, it has never done so. The prime interest rate was as high as 17 percent in 1982, but has been less than 5 percent for many years. For more than two decades, the amount of interest earned on safe investments has been far less than 10 percent. Thus, the fixed 10 percent interest rate provides a windfall to judgment creditors. This windfall discourages judgment creditors from negotiating settlements, and discourages the pursuit of potentially meritorious appeals. As a result, it likely insulates many erroneous judgments from appellate review. And when interest rates are high, which could soon happen now that the U.S. money supply is being greatly increased, the fixed interest rate may induce some judgment debtors to pursue weak or *un*meritorious appeals to delay payment while earning interest on the money they are not paying to the judgment creditor.

The Solution: As it true for interest on damages certain in California and for all money judgments in federal court, the interest rate accruing on California money judgments should be tied to the actual cost of money rather than being fixed at a rate unrelated to (and currently far higher than) that actual cost. Interest accruing on recovery of damages certain in California and on money judgments in federal court is tied to the rate of interest paid on 1-year treasury notes. (Civ. Code, § 3287, subd. (c); 28 U.S.C. § 1961.) Tracking that rule would be an improvement, but setting the interest rate equal to one plus the prime rate on the date the judgment is entered

provides a truer reflection of the actual cost of money. For litigants, the amendment will eliminate windfalls of interest accruing at a rate far higher than the actual cost of money in times when interest rates are low. The amendment also mitigates the problem of discouraging judgment debtors from pursuing potentially meritorious appeals to correct trial court errors. And when the prime interest rate is higher than ten percent, the amendment would mitigate inequity to judgment creditors from the incentive for judgment debtors to delay paying the judgments against them. The amendment has no significant fiscal impact on the courts or on municipal, county, or state finances, and may reduce litigation concerning interest accrual dates to the extent that collateral litigation is fueled by the disparity between the rate of interest accruing on unsatisfied judgments and the actual cost of money.

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

CURRENT OR PRIOR RELATED LEGISLATION
None

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 04-02-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 170.6, to read as follows:

§ 170.6

(a) (1) A judge, court commissioner, or referee of a superior court of the State of California shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge or court commissioner is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding.

(2) A party to, or an attorney appearing in, an action or proceeding may establish this prejudice by an oral or written motion without prior notice supported by affidavit or declaration under penalty of perjury, or an oral statement under oath, that the judge, court commissioner, or referee before whom the action or proceeding is pending, or to whom it is assigned, is prejudiced against a party or attorney, or the interest of the party or attorney, so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, court commissioner, or referee. If the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to, or who is scheduled to try, the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause with a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance. If the court in which the action is pending is authorized to have no more than one judge, and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall a judge, court commissioner, or referee entertain the motion if it is made after the drawing of the name of the first juror, or if there is no jury, after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing, other than the trial of a cause, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this paragraph, the procedure specified herein shall be followed as nearly as possible. The fact that a judge, court commissioner, or referee has presided at, or acted in connection with, a pretrial conference or other hearing, proceeding, or motion prior to trial, and not involving a determination of contested fact issues relating to the

merits, shall not preclude the later making of the motion provided for in this paragraph at the time and in the manner herein provided.

A motion under this paragraph may be made following an appellate court's reversal ~~on appeal~~ of a trial court's ruling, decision, or ~~following reversal on appeal of a trial court's~~ final judgment, if the trial judge in the prior proceeding is assigned to conduct ~~a new trial on~~ further proceedings in the matter. Notwithstanding paragraph (4), the party who filed the writ petition or appeal that resulted in the reversal of a ruling, decision or final judgment of a trial judge ~~court~~ may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment, subject to the provisions of this subdivision barring a motion after commencement of certain trial proceedings or after the judge's determination of contested fact issues relating to the merits if such proceedings or factual determinations occur after the appellate reversal.

(3) A party to a civil action making that motion under this section shall serve notice on all parties no later than five days after making the motion.

(4) If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to this section. In actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(5) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(6) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California, ss. PEREMPTORY CHALLENGE

County of _____

_____, being duly sworn, deposes and says: That he or she is a party (or attorney for a party) to the within action (or special proceeding). That ____ the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) action (or special proceeding) is pending (or to whom it is assigned) is prejudiced against the party (or his or her attorney) or the interest of the party (or his or her attorney) so that affiant cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee.

Subscribed and sworn to before me this

_____ day of _____, 20___.
(Clerk or notary public or other
officer administering oath)

(7) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(b) Nothing in this section shall affect or limit Section 170 or Title 4 (commencing with Section 392) of Part 2, and this section shall be construed as cumulative thereto.

(c) If any provision of this section or the application to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application and, to this end, the provisions of this section are declared to be severable.

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

PROPONENTS: H. Thomas Watson, Barry R. Levy, David M. Axelrad, David S. Ettinger, Mitchell C. Tilner, Lisa Perrochet, John A. Taylor, Jr., Robert H. Wright, Curt C. Cutting, Brad S. Pauley, Peder K. Batalden, Emily V. Cuatto

STATEMENT OF REASONS

The Problem: Under subdivision (a)(2): (1) litigants acquire both a new deadline for asserting a peremptory challenge and the opportunity to assert a *second* challenge if the appellate court reversed a "final judgment" and remands for a new trial, but (2) litigants acquire only a new deadline for asserting an *initial* peremptory challenge if the appellate court reversed any other ruling. (E.g., *McNair v. Superior Court* (2016) 6 Cal.App.5th 1227, 1233–1234; *First Federal Bank of California v. Superior Court* (2006) 143 Cal.App.4th 310, 313-315.) That makes no sense. The need for a challenge is the same whether the reversal concerns an interlocutory order or a final judgment and regardless whether a litigant previously exercised a challenge as to a different judge. (E.g., *People v. Superior Court* (*Maloy*) (2001) 91 Cal.App.4th 391, 395-396; *Pandazos v. Superior Court* (1997) 60 Cal.App.4th 324, 327.)

At the same time, the statute allows 60 days to make a challenge after a reversal, does not incorporate the limitations earlier in the subdivision barring otherwise timely motions if made after commencement of certain trial proceedings or judicial determinations. Those reasonable limitations avoid unwarranted disruption of court proceedings and should apply to motions made after an appellate reversal.

The Solution: The proposed amendment simplifies section 170.6 and both expands and limits the circumstances when litigants can assert a preemptory challenge after prevailing in the appellate courts. The amendment authorizes a party who had already challenged a previously assigned judge to challenge a later judge after that party obtains an appellate reversal of a ruling by that judge with respect to both interlocutory decisions and final judgments. The amendment also clarifies that any challenge after an appellate reversal may not be made after certain events specified in the statute, even if the 60-day deadline for making the motion has not passed.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION
None

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 04-03-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Code of Civil Procedure section 996.370, to read as follows:

§ 996.370

After a money judgment is affirmed on appeal and is satisfied, or after a money judgment is reversed on appeal in a decision that has become final by the issuance of the appellate court's remittitur, any undertaking to stay enforcement of the judgment pending appeal is extinguished by operation of law, without further court order to cancel or remove the bond from the court file.

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

PROPONENTS: H. Thomas Watson, Barry R. Levy, David M. Axelrad, David S. Ettinger, Lisa Perrochet, John A. Taylor, Jr., Robert H. Wright, Curt C. Cutting, Brad S. Pauley, Peder K. Batalden, Emily V. Cuatto, Eric S. Boorstin

STATEMENT OF REASONS

The Problem: Under existing law, an appeal bond should be canceled once the judgment is satisfied, because the purpose for which it was given is extinguished. (See Code Civ. Proc., § 995.430, subds. (b) & (c).) The same is true when a judgment has been reversed and the matter is remanded for new proceedings, after which a new judgment may be entered. There is then no further potential for liability on the surety's part. However, sureties underwriting appeal bonds often are not California companies, often are not familiar with California law, and continue to charge the judgment debtor premiums even after receiving an acknowledgment of satisfaction of the judgment from the judgment creditor, or after receiving the appellate court remittitur that memorializes reversal of the judgment for which the bond was given. Many sureties demand that the judgment debtor return to the trial court with a motion or stipulation to remove the bond or undertaking from the court file and return it to the surety, or a court order extinguishing the bond. (See Code Civ. Proc., § 995.360; Cal. Rules of Court, rule 3.1130(c).) This practice needlessly increases litigation costs and consumes attorney and court time for no valid reason.

The Solution: The proposed statute would clarify for litigants and sureties that a separate court order is not necessary to extinguish a surety's potential liability on an appeal bond, where a judgment for which the bond was given is satisfied in full or is reversed in a final appellate decision. Enacting section 996.370 will not change the rights and obligations of judgment creditors, judgment debtors, or sureties who issue undertakings to stay enforcement of money judgments pending appeal. It will, however, reduce litigation costs and free up time spent by counsel and the courts in unnecessarily retrieving appeal bonds from court files or otherwise obtaining superfluous orders to extinguish the bonds.

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

CURRENT OR PRIOR RELATED LEGISLATION: None

AUTHOR AND/OR PERMANENT CONTACT:
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RESPONSIBLE FLOOR DELEGATE: H. Thomas Watson

RESOLUTION 04-04-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure Section 1282.6, to read as follows:

§ 1282.6

(a) A subpoena requiring the attendance of witnesses, and a subpoena duces tecum for the production of books, records, documents and other evidence, at an arbitration proceeding or a deposition under Section 1283, and if Section 1283.05 is applicable, for the purposes of discovery, shall be issued as provided in this section. In addition, the neutral arbitrator upon his own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents and other evidence.

(b) Subpoenas shall be issued, as of course, signed but otherwise in blank, to the party requesting them, by a neutral association, organization, governmental agency, or office if the arbitration agreement provides for administration of the arbitration proceedings by, or under the rules of, a neutral association, organization, governmental agency or office or by the neutral arbitrator.

(c) The party serving the subpoena shall fill it in before service. ~~Subpeonas~~ Subpoenas shall be served and enforced in accordance with Chapter 2 (commencing with Section 1985) of Title 3 of Part 4 of this code.

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

PROPONENT: BNANSDC

STATEMENT OF REASONS

The Problem (including Existing Law): There is a typo in subsection (c). How embarrassing! Let's fix it.

The Solution: Properly spelling the word subpoenas.

IMPACT STATEMENT

This resolution does not affect any other law, statute, or rule. 36T

CURRENT OR PRIOR RELATED LEGISLATION

None known

AUTHOR AND/OR PERMANENT CONTACT:

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RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde, Esq.

RESOLUTION 04-05-2021

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2020.410, to read as follows:

§ 2020.410

(a) A deposition subpoena that commands only the production of business records for copying shall designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item, and shall specify the form in which any electronically stored information is to be produced, if a particular form is desired.

(b) Notwithstanding subdivision (a), specific information identifiable only to the deponent's records system, like a policy number or the date when a consumer interacted with the witness, is not required.

(c) A deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it. It shall be directed to the custodian of those records or another person qualified to certify the records, and may be served personally, by overnight delivery, by facsimile transmission if the business entity publicly agrees to accept service via facsimile, or by electronic means if the business entity publicly agrees to accept service via electronic means. ~~It~~ The deposition subpoena that commands only the production of business records shall command compliance in accordance with Section 2020.430 on a date that is no earlier than 20 days after the issuance, or 15 days after ~~the~~ receipt of service, of the deposition subpoena, whichever date is later.

(d) If, under Section 1985.3 or 1985.6, the one to whom the deposition subpoena is directed is a witness, and the business records described in the deposition subpoena are personal records pertaining to a consumer, the service of the deposition subpoena shall be accompanied either by a copy of the proof of service of the notice to the consumer described in subdivision (e) of Section 1985.3, or subdivision (b) of Section 1985.6, as applicable, or by the consumer's written authorization to release personal records described in paragraph (2) of subdivision (c) of Section 1985.3, or paragraph (2) of subdivision (c) of Section 1985.6, as applicable.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem (including Existing Law): Requiring "personal" service on a business that is typically required to have a designated agent for service of process is unnecessarily burdensome and costly on parties that have a right to seek business records pursuant to a subpoena duces tecum from such entity. Less expensive and burdensome means of service, including overnight mail, facsimile or electronic means (if the entity agrees), are typically acceptable for service of process in other contexts, and there is no good reason for requiring personal service as the sole

manner to legally serve a business with a subpoena demanding only the production of business records. In practice, the "personal service" requirement has been used by corporations and other entities to "reject" service attempted by mail or other means, even after actual service has been effected (by FedEx delivery, for example). Personal service can also be harassing to third parties that may be burdened by process servers that must currently serve subpoenas, in person, to their business, which is potentially needlessly disrupting to business during business hours. Thus, the personal service requirement can be used to make service more difficult on the propounding party and/or as a way to harass businesses or permit third parties to avoid/delay responding to discovery. It also unnecessarily increases the costs to obtain discovery on litigants because personal service costs are typically higher than service by other, equally effective, means.

The Solution: Offering other recognized means to serve a subpoenas duces tecum for business records, including by overnight delivery, facsimile transmission, and possibly even electronic service (when a business offers an electronic mailbox to accept service of process) will provide less expensive and less burdensome options to serve third party subpoenas on corporate entities, while still protecting the entities' legal right to proper notice of the same.

IMPACT STATEMENT
This resolution would expand the means of service for subpoenas exclusively seeking the production of business records in a civil case, and is not intended to impact any other type of deposition subpoena. This resolution will require review and possible conforming changes to Code of Civil Procedure section 1987, Civil Procedure section 2020.220, and Evidence Code section 1560. (*See* Cal. Code Civ. Proc. § 2020.030, noting the provisions of Civil Procedure Code section 1985 et seq., and Evidence Code section 1560 et seq., also apply to deposition subpoenas under the Civil Discovery Act that section 2020.410 is a part of.)

CURRENT OR PRIOR RELATED LEGISLATION
Unknown.

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