



Dave Kenagy
Executive Director

Wendy Johnson
Deputy Director

Gerald Watson
Special Counsel

Sam Sears
Staff Attorney

Lisa Ehlers
Legal Assistant

OREGON LAW COMMISSION

Report to the 2007 Legislative Assembly

Judgments and Judicial Sales Work Group: Judgments and Judicial Sales Clean-Up Senate Bill 322

Prepared by Gerald G. Watson
Special Counsel
Oregon Law Commission

From the Offices of the Executive Director
David R. Kenagy
and Deputy Director
Wendy J. Johnson

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I. Introductory Summary

For the 2007 Legislative Session, the Oregon Law Commission's Judgments and Judicial Sales Work Group proposes a bill that deals with "clean up" and "follow up" issues from legislation involving judgments and judicial sales that was approved in 2003 and 2005.

II. History of the Project

In 2005, the Legislative Assembly dealt with and approved large and significant bills involving judgments/garnishments (HB 2359) and judicial sales (SB 920). The Judgments bill itself was the continuation of a major overhaul of Oregon judgments law approved by the 2003 Legislative Assembly, culminating in HB 2646. At its meeting on March 31, 2006, the Program Committee of the Oregon Law Commission acknowledged that cross-referencing problems and unintended consequences were likely to come up involving this legislation, and that the Work Group should continue for the purpose of dealing with "clean up" and "follow-up" issues. The Law Commission accepted that recommendation at its meeting on July 19, 2006, authorizing a reorganized work group to meet and consider such issues.

Law Commissioner John DiLorenzo served as chair of the Judgments and Judicial Sales Work Group.¹ The work group met four times in the fall of 2006, most recently by telephone conference on November 29, 2006. The Work Group decided to divide its task into manageable components. LC 1351, the legislative proposal addressed here, incorporates the Work Group's recommendations with regard to most, but not all, issues involving judgments and judicial sales that it intends to address for the 2007 Legislative Session.²

¹ The Work Group included the following members:

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|-----------------|---------------------------------------------------------------|
| Cleve Abbe | Oregon Land Title Association |
| Gary Blackledge | Greene & Markley PC |
| Doug Bray | Oregon Judicial Department |
| Mark Comstock | Garrett, Hemann, Robertson, Jennings, Comstock & Trethewey PC |
| Nori Cross | Oregon Judicial Department |
| John Davenport | Davenport & Hasson LLP |
| Brian DeMarco | Oregon Judicial Department |
| David Hercher | Miller Nash LLP |
| Randy Jordan | Oregon Department of Justice |
| Tim Leader | Washington County Sheriff's Office |
| Jim Markee | Markee & Associates |
| Jim Nass | Appellate Courts Staff Attorney |
| Dennis Paterson | Davis Wright Tremaine LLP |
| Marshall Ross | Multnomah County Sheriff's Office |

Jerry Watson, Special Counsel to the Oregon Law Commission, provided staff and research assistance
Dave Heynderickx, Special Counsel to the Legislative Counsel, provided drafting assistance.

² Remaining issues have been referred to subcommittees of the Work Group for more detailed consideration. The Work Group anticipates bringing those remaining issues to the Law Commission in one or more additional legislative drafts at a subsequent meeting of the Commission.

III. The Problems that This Proposal Addresses

This proposal addresses a series of issues or perceived problems. Each of those matters is specifically addressed below. The matters are listed in the order covered by the statutory proposal, with sections of the proposal indicated as appropriate.

Judgment Lien Priority (Section 1). ORS 18.165 was enacted into law in 2005. It establishes circumstances in which a judgment lien is and is not entitled to priority over a “conveyance” of the property, including mortgages and trust deeds on the property. This provision is a substantial re-write of former ORS 18.370. It has been suggested that as currently written, ORS 18.165(1)(d) gives absolute priority to all purchase money mortgages, trust deeds and other such security instruments over judgment liens.

On review, the Work Group determined that the intent of ORS 18.165(1)(d) was to specifically provide priority for mortgage lenders who provided a purchase money mortgage to the judgment debtor. Although there is language in the initial segment of subsection 1 of ORS 18.165 limiting the effect to conveyances of real property of the debtor, the Work Group determined that it would be desirable to provide additional clarifying language to ORS 18.165(1)(b), (c), and (d) indicating that the conveyance must be “by the debtor” or “of the debtor’s interest” in the property. The proposal also adds language to ORS 18.165(1)(a) indicating that a conveyance to a good faith purchaser must be “delivered and accepted” prior to the entry or recording of a judgment in the county where the property is located. See Section 1 revising ORS 18.165 at subparagraphs 1(a)-(d).

Multiple Judgments on a Single Writ of Execution (Section 2). The issue here is simply whether a single writ of execution may be issued for two or more judgments. The issue arose during the course of Work Group deliberations. The existing relevant statute, ORS 18.860, simply doesn’t speak to this question. The Work Group determined that a single writ should be allowed so long as the judgments are against the same judgment debtor and are entered in the same case. See Section 2 amending ORS 18.860 to that effect by adding a new subsection (3).

Satisfaction of Judgments (Section 3). ORS 18.235(1) allows 1) a judgment debtor or 2) a person with an interest in real property against which a judgment lien exists to seek a court order declaring a judgment satisfied. The problem is that under the existing statutory language the phrase “with an interest in real property against which a judgment lien exists,” can be interpreted to describe both “person” and “judgment debtor” and not just “person.” The Work Group determined that that minor changes to the wording of ORS 18.235 would clarify the intent. See Section 3 amending ORS 18.235.

Money Award (Sections 2 and 4-7). The current version of Ch. 18 does not explicitly address post judgment inclusion of post judgment interest and costs and expenses accruing after the date of entry of judgment as amounts collectible under the money award. After discussion it was decided that statutory clarification was appropriate in those statutory provisions that use the term “money award” to distinguish between the two types of references to “money award”: (1) the amount awarded at the time of judgment; and (2) the balance due on the judgment. Changes were made in Section 5 of LC 1351 by adding a new statutory section explicitly including

interest accruing on the money award, as well as expenses defined elsewhere in statute (ORS 18.999) as amounts owing on the money award. Sections 2, 6 and 7 make conforming changes, respectively to ORS 18.860, 18.868 and 18.936 by adding the phrase “amounts owing on” before the term “money award,” to make clear that the reference was to the current balance (after application of credits and additions) due on the judgment and not the static amount awarded at the time of entry of the judgment.

Challenge to Execution (Sections 8 and 9). The issue addressed here is whether the circumstances under which a judgment debtor can challenge an execution should be expanded. The issue arose in the context of the Work Group’s discussion of money awards and the amount(s) collectable under such awards. Existing law allows a judgment debtor to use a Challenge to Execution form only to claim such exemptions as are permitted by law. The Work Group recognized that a judgment debtor should also have a mechanism to challenge a writ of execution where the amount specified in the writ is greater than the amount owed under the money award. Section 8 provides for this additional use by adding a new subsection (1)(b). Section 9 amends the Challenge to Execution form set out in ORS 18.896 to conform to changes in Section 8.

Orders in Aid of Execution (Sections 10 and 11). The issue raised here is whether there should be a detailed statutory process for and method of authorizing orders in aid of execution that allow the Sheriff authority to enter into structures, commercial or residential, and occupied or not occupied. The law is presently silent on this matter. Representatives from Sheriff’s offices expressed a strongly felt need for court direction when asked to enter a structure or other enclosure, in order to protect a sheriff’s office from claims of unlawful entry. The Work Group determined that a procedure to obtain such an order should be specified in statute, that the order should allow for the use of reasonable force, and that such an order could then be relied upon by a sheriff in entering a structure or other enclosure for the purposes of levying on personal property. Section 11 sets forth the procedural requirements for an order for entry of premises, and provides that a sheriff may rely on such an order.

Effect of Levy by Sheriff (Alternative Method of Levy) (Sections 12 and 13). An issue was raised about the impact on creditor rights of using the alternative method of levy set forth in ORS 18.880, particularly by “rendering the property inoperable,” if such a levy is challenged by a Trustee in bankruptcy. The Work Group agreed that the intended effect of a levy was to establish the priority of a judgment creditor over other interests to the fullest extent allowed by law. Section 12 implements this policy by amending ORS 18.878 (ORS 18.878 incorporates a reference to ORS 18.880) to provide that upon levy, the interest of a judgment creditor in personal property is the same as that of a secured creditor with a perfected security interest in the property. Section 13 contains a minor amendment to ORS 18.888 to conform its provisions to the changes made to ORS 18.878.

Definitions: Tangible Personal Property and Intangible Personal Property (Section 14). The existing statute lacks definitions of several significant terms, including “tangible personal property,” and “intangible personal property.” This can create confusion and uncertainty because remedies and procedural requirements for execution on and sale of property under ORS Chapter 18 depend upon the type of property involved. The Work Group considered whether

reliance on common law definition of such terms is adequate or whether statutory definitions were needed. The Work Group determined that the terms were inherently difficult to define and declined to create statutory definitions. Instead it decided to resolve the matter by specifically allowing court determination of whether property is tangible or intangible by ex parte order. See Section 14 amending ORS 18.884.

Impact of Deficiency Judgment Restrictions on Priority (Sections 15-17). The issue here is whether the effect of ORS 88.075, defining a purchase money mortgage, should be expressly limited to restricting the right of a purchase money mortgage lender under ORS 88.070 to a “deficiency judgment” when the mortgage is foreclosed. Apparently the IRS has argued that ORS 88.075 also governs priority between a mortgage and a pre-existing judgment or tax lien. ORS 88.075 was added to existing provisions on lien foreclosure in 1975. Placement of this provision in the statutory chapter (Chapter 88) on lien foreclosure led the Work Group to conclude that its logical and intended purpose was limited to defining and restricting the rights of a mortgagor to a deficiency judgment under ORS 88.070, rather than to more generally govern priority between a mortgage and other encumbrances. Sections 15-17 deal with this issue. Section 15 incorporates the provisions of current ORS 88.075 into ORS 88.070, clarifying its sole application to that provision. Section 17 repeals ORS 88.075 as now unnecessary. Section 16 makes minor conforming changes to ORS 86.770 by deleting reference to ORS 88.075.

Creditor Bond Requirement (Sections 18 and 19). The issue here is whether a sheriff’s right to require a bond is substantially absolute or should be based on objective standards. Under current law (ORS 18.886) a sheriff may require a creditor’s bond or irrevocable letter of credit if property is perishable, the sheriff has actual notice of a third-party claim, or the sheriff has “doubt” as to actual ownership or any encumbrance on the property. This provision vests very broad discretion in a sheriff to require a bond or letter of credit. No standards for determining “doubt” or “reasonableness” are set forth in the current statutory provision. Sheriff’s offices were concerned to protect themselves from potential liability to parties whose interests were adversely affected by execution or sale; judgment creditors wished to avoid the additional time and expense involved in providing a bond or letter of credit. After extensive consideration, the Work Group determined that the most appropriate way to handle the matter was to always allow sheriffs to require a bond or letter of credit if there is an identified third party with an interest in the property or if the property is perishable. If the property is not perishable and there is no identified third party, and the sheriff has reasonable doubts concerning the ownership or any encumbrance on the property, the sheriff is to be allowed to request a bond or letter of credit, unless the judgment creditor provides the sheriff with title documents or other appropriate records from state or federal government agencies establishing that no encumbering interests exist that would be affected by execution or sale. See Section 18 amending ORS 18.886 to this effect. Section 19 contains a conforming amendment to ORS 18.950 to add an “irrevocable letter of credit” to the list of costs of sale recoverable from the proceeds of sale. A “bond” was already a listed allowed recoverable cost.

Form and Style (Section 20). This provision simply expresses form and style provisions of Legislative Counsel.

IV. Conclusion

The proposed bill creates new provisions, amends ORS 18.165, 18.235, 18.860, 18.868, 18.878, 18.884, 18.886, 18.888, 18.892, 18.896, 18.936, 18.950, 83.770 and 88.070, and repeals ORS 88.075. This bill addresses inconsistencies, ambiguities and unintended consequences of existing law dealing with judgments and executions on judgments and resolves such issues in an appropriate manner.

V. Possible Amendment

The Oregon Judicial Department is expected to request a minor, non-substantive amendment to Section 5 of SB 322 to clarify that this section does not require court clerks to calculate interest on judgments. Clerks do not do so now, at least on civil judgments. Section 5 is a new provision to make clear that accruing interest and collection expenses are included in the money award. This matter was briefly discussed by the workgroup at its meeting on January 9, 2007. The Work Group does not object to the introduction of this amendment. The Oregon Law Commission has not considered the proposed amendment and, therefore, the Commission does not take a position, either in favor or opposition, to such an amendment.