



# Forebearance: Buying time

*Bisno may be an earthquake for judgment debtors, but if your plaintiff becomes a judgment creditor, take heed*

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Let's chat. Let's chat about earthquakes. I love to chat. After the Napa shaker of 2014, news pundits threaten the next big earthquake tomorrow, the next day, next week... or never. I love the names of earthquakes: Loma Prieta (1989), Fukushima (2011), Northridge (1971), and the grand poster child, San Francisco (1906). And what about *Bisno v. Kahn* (2014) 225 Cal.App.4th 1087? Why is *Bisno* an earthquake?

*Bisno* is a red meat, macho man, cave guy story. A real chest bumper. Robert Bisno (Mr. Bisno) owed big money on a series of judgments. Mr. Bisno sought forbearance from execution, entered into a series of agreements and shelled out \$525,000 in forbearance fees, which was more than 10 percent of the judgment. Mr. Bisno paid the underlying judgment but claimed that the forbearance payments were interest and alleged usury. Bisno and the co-debtor filed actions to recover treble damages, punitive damages and attorneys' fees. So far, so good? After a survey of usury, the court posed the question whether usury prohibits a judgment creditor from charging a forbearance fee in addition to the statutory interest imposed by Code of Civil Procedure section 685.010(a) at 10 percent per annum [simple]. Pay me or I will execute on the judgment. Legal? Good question.

Let's chat about this issue. The court pondered whether a judgment creditor could charge good money in exchange for a forbearance from execution which would not be credited against the principal of the



judgment or accruing interest. Compelling the judgment debtor to pay a fee to forestall enforcement is, shall we admit, subversive, sly and very clever. The court examined the statute and held that the usury law did not cover "judgments."

The court found that a judgment debtor was not a borrower. "A judgment debtor simply cannot be characterized as a borrower who intends to return something of value that was borrowed." After beating back a cavalcade of other claims, the court concluded that usury, and even the Enforcement of Judgment law, does not bar the judgment creditor from charging a free standing forbearance fee.

What do we have here? *Bisno* licenses a judgments creditor to charge money in exchange for forbearance from execution and free of any restriction. The judgment creditor need not apply the fee towards the interest or the judgment itself. Pocket the money. The judgment creditor can charge any sum of money. *Bisno* offers open season and open sesame.

Let's work this out. Plaintiff sues. Plaintiff wins a \$1 million judgment. Interest accrues at 10 percent per annum. Defendant does not have \$1 million in cash at hand. Defendant seeks a payment program at \$100,000 per month for 60 months. Pre-*Bisno*, assuming that the judgment creditor went along with the



deal and agreed to forbear enforcement, and assuming the judgment debtor makes timely payments, we would credit the \$100,000 first to interest and the balance to principal. The interest paid by the judgment debtor is \$274,822.68 which is not too bad.

### Post-Bisno, try these strategies

- Option A: In the event of default, all payments as received constitute payment of forbearance fees only, and not payment for interest on the judgment or principal. In the event of default, the unpaid balance of the judgment is accelerated and deemed immediately due and payable for the total thereof and includes all interest from the date of entry.

*What does this mean?* If in default, the debtor forfeits crediting the payments stream as payment of interest or principal, owes the total judgment plus all accrued interest. If the debtor paid, say \$200,000, but defaults, the debtor would still owe the total of the judgment (\$1 million) plus the accrued interest of \$500,000 at 60 months. The total haul would be \$1.7 million or an effective rate of return at 14 percent.

- Option B: The judgment debtor is entitled to a stay of enforcement of the judgment on the condition that the judgment debtor pays the sum of \$100,000 a month. In the event of default by nonpayment of any installment when due and without notice or grace, the balance of the judgment shall be accelerated, declared immediately due and payable, and the judgment creditor shall be entitled to enforce the judgment without notice. Interest accrues on the judgment at the rate

of 10 percent per annum, and 50 percent of the monthly payments shall be applied on account of interest, and the balance to a forbearance fees charged by the judgment creditors a condition of the stay herein.

*What does this mean?* This is a touch less draconian than Option A because the debtor enjoys the benefit of at least 50 percent of payments against the judgment. This option might appeal to the faint of heart.

- Option C: The judgment creditor shall stay enforcement of this judgment, save and except the recording and filing of all liens allowed under the Enforcement of Judgment law, for three years from date of execution herein on the condition that first day of each quarter, starting 30 days from this date, that the judgment debtor pay \$50,000 as a forbearance fee, and on interest. The forbearance fee is a charge paid by the judgment debtor in exchange for a stay of enforcement. The judgment shall accrue interest at the rate of 10 percent. In the event that the judgment is paid on or before three years from date hereof, and payment of the forbearance fees on time, the judgment creditor will credit all forbearance fees on account of accrued interest and the balance to the principal of the judgment.

However, in the event of nonpayment of any forbearance fee, or nonpayment of the judgment, the forbearance fees are kept and applied by the judgment creditor on account of the obligation in the forbearance agreement, and not applied on account of interest or principal of the judgment.

*What does this mean?* Face the fact that many judgment debtors will only pay when they sell a capital asset, such as a home or other real property. Pummeling the debtor is a bad idea lest the debtor files bankruptcy, or defaults on the senior liens that lead to foreclosure. Sitting tight is a viable enforcement strategy. Call this harvesting the judgment as a long term asset. This option encourages the debtor to pay the judgment or suffer a great financial burden from the forbearance fees without any commensurate reduction in the debt.

Do you like the Legal Zoom guy, Robert Shapiro? I do. He's great. Here is his tagline: "We put the law on your side." Well, forget Legal Zoom, because "Bisno puts free money in your hands." You don't have to say anything, and you don't have to do anything... except to incorporate *Bisno* into your settlement agreements.



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