

Memorandum 80-53

Subject: Study D-300 - Enforcement of Judgments (Third-Party Claims)

This memorandum considers comments we received on the portion of the Tentative Recommendation Relating to Enforcement of Judgments concerning third-party claims and related procedures (Sections 706.110-706.760). A new draft of the text and statute incorporating changes suggested by the persons who commented on the Tentative Recommendation as well as staff revisions is attached hereto. (The letters of comment referred to in this memorandum were previously sent to you attached to Memorandum 79-29 and the Second Supplement thereto.)

CHAPTER 5. THIRD-PARTY CLAIMS

Article 1. Definitions§§ 706.020-706.030. Creditor and debtor defined

The staff draft defines "creditor" and "debtor" to include plaintiffs and defendants in attachment and claim and delivery proceedings. This is not a substantive change since under existing law the third-party claims procedure is incorporated by the attachment law and the claim and delivery law. See Sections 488.090, 514.050. This change along with specific references to writs of attachment and prejudgment writs of possession (claim and delivery) should make the third-party claims procedure easier to use in prejudgment situations.

Article 2. Third-Party Claims of Ownership and Possession§ 706.110. Application of article (See TR §§ 706.110, 706.210)

The staff recommends that the procedure for obtaining a summary determination of a claim of ownership or the right to possession be extended to cases where real property is levied upon under a writ of attachment or writ of execution. Under existing law and the Tentative Recommendation, third-party claims procedures apply only to personal property. The owner of real property that the judgment creditor claims is property of the judgment debtor may seek to enjoin the execution sale. See *Einstein v. Bank of California*, 137 Cal. 47, 69 P. 616 (1902). If the property is sold on execution, the third person may

bring an action to quiet title. See *First Nat'l Bank v. Kinslow*, 8 Cal.2d 339, 345, 65 P.2d 796 (1937). The staff doubts that these are satisfactory remedies, particularly since the judgment creditor (or attachment creditor) is permitted to levy on real property standing in the name of a third person without any prior court review. The necessity of resorting to an independent action to quiet title may result in significant delay and expense to the third person. Several years ago when the Commission was working on revising the Attachment Law, we received a letter concerning the problem of attachment clouding title of third persons. (See Exhibit 1, attached hereto.) At that time, the question was deferred until the third-party claims procedure was considered in the enforcement of judgments study. The staff finds the letter persuasive, and we recommend the extension of the summary third-party claims procedure to cases where real property is levied upon under a writ of attachment or execution.

§ 706.140. Notice of third-party claim (TR § 706.220)

The staff has added a provision requiring service of the third-party claim on the judgment debtor so that the debtor will be aware of the adverse claim. The Tentative Recommendation contains a provision requiring notice to the judgment debtor of any hearing on a third-party claim. This provision is retained in the revised draft, but we also think the earlier notice of the claim would be beneficial since the property may be released without a hearing.

§ 706.160. Effect and contents of undertaking (TR §§ 706.240, 706.250)

The staff proposes to revise the provision governing the amount of the judgment creditor's undertaking given to prevent the release of property subject to a third person's claim of ownership or the right to possession. Existing law provides for an undertaking in an amount equal to twice the value of the property levied upon. The Tentative Recommendation provides for an undertaking in twice the amount of the interest levied upon. Either of these provisions will result in disputes concerning the valuation of the interest, even though there is not necessarily any relation between the probable amount of damages from a wrongful levy and the value of the property or interest levied upon. Draft Sections 706.160(b) and 706.260(b) adopt a new approach based on the

amount of a plaintiff's undertaking to obtain a writ of attachment (Section 489.220) which is set at a flat amount (\$7,500 in superior court, \$2,500 in municipal and justice court) subject to being increased. Under draft Section 706.160, the judgment creditor may give an undertaking in the amount of twice the value of the interest claimed if it is less than the applicable flat amount and may give a larger undertaking as desired. The amount of the undertaking is significant since under the draft statute the third person may obtain the release of the property by giving a counter-undertaking in the same amount as the judgment creditor's undertaking. (See the discussion of Article 6 infra.) This feature should result in a more efficient statute. We have also added a provision permitting the beneficiary to apply for a larger undertaking. See draft Section 706.770(f).

§§ 706.170, 706.270. Release for failure to make deposit or file undertaking (TR §§ 706.230, 706.330)

Lieutenant Bernard Morgan asks what happens if the property is to be released to the third person pursuant to Section 706.170(c) or 706.270(c) and the third person does not pick up the property. (Exhibit 9, pp. 3, 5.) Under the general provision on release of property (see Section 699.060 in Memorandum 80-33), if the property is not taken into custody by the person entitled thereto, it is sold and the proceeds deposited in the name of such person. We have revised these sections and their Comments to provide more detail on release.

Article 3. Third-Party Claim of Security Interest or Lien

§ 706.210. Application of article (TR § 706.310)

The staff recommends that third persons with superior liens on personal property be permitted to make claims under this article. The same policies in favor of permitting a secured party to make a claim and be bonded or paid off apply to superior lienholders such as prior execution creditors. If superior liens are paid off or bonded against, the property may be sold on execution free of the superior lien. This benefits all concerned. The purchaser obtains the property free of such liens. Superior lienholders obtain satisfaction of their liens without the necessity of tracking down the property after it is sold. A higher

price may be obtained at the sale, thus benefitting the judgment debtor and the judgment creditor.

§ 706.230. Claim of security interest (TR § 706.310)

Mr. Frederick Holden states that Section 706.310(b)(2) in the Tentative Recommendation is not accurate since the amount is not due under the security agreement but under related promissory notes or credit agreements referred to in the security agreement. (Exhibit 13, p. 23.) We think the language is sufficient but have added a reference to related papers in response to his comment. Mr. Holden also states that the amount of the secured obligation is usually unascertainable because it includes attorney's fees that may be incurred, various indemnity rights, and future advances to the debtor. Mr. Holden recognizes that the outstanding loan balance may be stated accurately in the secured party's claim and that this amount is sufficient if the secured party is to be paid off immediately. However, he states that the secured party may not have adequate protection if the judgment creditor gives an undertaking to prevent release of the property, unless the undertaking exceeds the amount eventually owing to the secured party. As discussed elsewhere, the draft statute provides for an undertaking in a flat amount or a larger amount as desired by the creditor. The secured party may then obtain the release of the property by giving an undertaking in the same amount or may apply for an increase of the undertaking. We think these options adequately protect secured parties. If the secured party is paid off, there should be no uncertainty regarding the amount due. If the judgment creditor provides an undertaking and files a statement claiming that the security interest is not entitled to be paid off (see draft Section 706.280), the secured party would be unwise to make future advances beyond the coverage of the undertaking. The property may be sold and the secured party may then resort to the undertaking as security. In any event, revisions in levy procedures involving property subject to a security interest should minimize the need of secured parties to make third-party claims.

It also appears that the reference to the amount due or to accrue above setoffs in Section 706.310(b)(2) of the Tentative Recommendation may lead to confusion. (See Exhibit 13, pp. 24-25.) Accordingly, we have deleted this language from draft Section 706.230.

§ 706.260. Amount of undertaking

As discussed under Section 706.160, supra, we have added a provision permitting the filing of an undertaking in a flat amount.

Article 4. Hearing on Third-Party Claim

§ 706.310 et seq. Pleadings in third-party claims hearings (TR § 706.410 et seq.)

Mr. Arthur Greenberg suggests that more extensive provisions be enacted concerning pleadings and discovery in third-party claims procedures so that the parties will be better informed and to avoid undue advantage and a waste of time. (Exhibit 5, p. 2.) As a model, he recommends the newly adopted Rules for Trial Courts in Pilot Project for Economical Litigation. See Cal. R. Ct. 1701 et seq. Specifically he recommends that the judgment creditor be required to provide witness and evidence statements to the third person. Failure to provide information may lead to barring witnesses or evidence at the hearing. The staff recommends that the law remain as it is.

§ 706.330. Papers filed by levying officer (TR § 706.430)

Mr. Carl Olsen suggests that this section also require the levying officer to file with the court any undertaking received from the judgment creditor in response to a third-party claim. (Exhibit 14, p. 3.) The staff recommends that this change be made. We have also provided for filing an undertaking with the court when no application for a hearing is made in draft Section 706.800.

§ 706.360. Burden of proof (TR § 706.460)

Mr. Frederick Holden approves the provision allocating the burden of proof to the judgment creditor if the third-party claim is based on a security interest since the security interest is presumptively valid. (Exhibit 13, p. 26.) Mr. Raymond Mushrush opposes shifting the burden in part because the secured party is in the best position to prove his or her claim. (Exhibit 10, p. 2.) Mr. Robert Sprague raises a similar point and suggests that the burden should be on the creditor only if the secured party has submitted a copy of the security agreement or of a filed UCC-1 form (financing statement). The staff notes that Section 706.310 of the Tentative Recommendation requires a secured party to give

a detailed description of the security interest claimed which we believe may provide more information than a UCC-1 form and at least as much information as the security agreement. The secured party's claim is forwarded to the court by the levying officer pursuant to draft Section 706.330 and constitutes the secured party's pleading pursuant to draft Section 706.380. It appears that Mr. Sprague's concern may be more with the reliability of the claim than the availability of needed information, because he goes on to suggest that the burden be shifted to the secured party if reliance is placed on a verified declaration rather than the security agreement or financing statement. The staff recommends that the burden remain as allocated in draft Section 706.360 but we have revised Section 706.230 to require that the secured party's claim be accompanied by a copy of any security agreement or financing statement.

Note that the burden does not shift to the judgment creditor in a case where the third person claims a superior lien on the property rather than a security interest.

§ 706.410. No jury trial

Mr. Frederick Holden suggests that it be made clear that there is no right to a jury trial in third-party claim proceedings. (Exhibit 13, p. 26.) The staff has added Section 706.410 for this purpose.

Article 5. Judgment Creditor's Demand for Third-Party Claim by Secured Party or Lienholder

§ 706.510 et seq. Demand for claim (TR § 706.610 et seq.)

Mr. Rick Schwartz states that 30 days is not a sufficient time for the secured party to respond to the demand for a claim to avoid a waiver of the security interest. (Exhibit 12, p. 7.) Mr. Frederick Holden states that the 30-day period is an adequate time. (Exhibit 16, p. 26.) The staff also believes this is an adequate time; it is the same time provided by existing Section 689b(8). Mr. Schwartz suggests that service be required on the branch of a financial institution which actually holds the security interest, consistent with the provisions for service of writs, notices, or orders under Section 702.520(b) in the Tentative Recommendation. The revised provisions concerning manner of service already approved by the Commission are applicable to this procedure and

accomplish Mr. Schwartz' suggestion. Mr. Holden also suggests that, in view of the consequences of not responding to the demand, the demand should contain a warning to the secured party that the priority of the security interest is waived if no claim is made in the time allowed. We have incorporated this change in draft Section 706.530.

§ 706.550. Effect of failure to make third-party claim

The staff has revised this section to provide that a secured party or lienholder who fails to respond to the demand for a third-party claim within the time allowed forfeits the superiority of the security interest or lien, rather than the entire interest which is the case under existing law. See Section 689b(8). Thus, if property is sold and there are excess proceeds, the secured party or lienholder may share in the proceeds along with any other junior lienholder. If the property is released from levy for some reason, the rights of the secured party or lienholder will survive unimpaired.

Article 6. Third-Party Undertaking to Release Property

§ 706.610. Third-party undertaking to release property

Consistent with the extension of the third-party claims procedure to claims of ownership or the right to possession of real property (see the discussion under Section 706.110 supra), the staff has revised this article to permit the third person to give an undertaking to release real property from levy of attachment or execution. We have also made clear that a secured party or lienholder may obtain the release of property by an undertaking which is unclear under existing law.

§ 706.630. Contents of undertaking

Subdivision (d) of this section has been added by the staff to permit the third person to obtain the release of property on an undertaking in the same amount of a undertaking given by the judgment creditor in response to a third-party claim under Article 2 or Article 3. This provision will avoid court hearings on objections to the amount of undertakings. If the judgment creditor wants to preserve a lien on property and make it more expensive for the third person to obtain its release, the judgment creditor may give a larger undertaking in response

to a third-party claim. If the third person then provides the counter-undertaking under this article, the property will be released and the judgment creditor will have adequate security.

Article 7. Undertakings

§ 706.710 et seq. General undertakings provisions

The staff has drafted several sections governing undertakings in general under the third-party claims chapter. Existing law and the Tentative Recommendation incorporate the procedure applicable to attachment undertakings. This new material should be easier to understand since no translation from attachment to execution is required. The Comments to the sections explain that most provisions continue applicable attachment sections, with necessary qualifications.

Revision of Attachment Law

The staff proposes to clarify the Attachment Law provisions concerning the rights of third persons as indicated in the following discussion. We think that the existing wrongful attachment provisions, when read with the third-party claims procedure, are somewhat confusing and may overlap. This is partly due to the Commission's decision to postpone full consideration of third-party claims when the Attachment Law was drafted.

Unlike an execution creditor, a plaintiff seeking a writ of attachment must file an undertaking in a flat amount (\$7,500 in superior court, \$2,500 in municipal or justice court) indemnifying the defendant for any wrongful attachment. See Sections 489.210, 489.220. The elements of statutory wrongful attachment are spelled out in Section 490.010, subdivision (d) of which provides that a levy of attachment on property of a third person is a wrongful attachment (with certain exceptions). Section 490.050 permits a third person to intervene in the action and also deems the third person to be a beneficiary of the plaintiff's undertaking. The liability on the undertaking may be determined by a motion in the action pursuant to Section 490.030, but only after final judgment in the action. The third person may also object to the amount of the undertaking and obtain an order for an increased undertaking pursuant to Section 489.220(b).

Notwithstanding this procedure, a third person may make a third-party claim and obtain the release of the attached property or an undertaking indemnifying the third person. See Section 488.090 (incorporating the postjudgment third-person claims procedure). It is not clear whether the third person may resort to both undertakings if the creditor files an undertaking in response to a third-party claim. Nor is it clear whether the third person may resort to the attachment undertaking to collect damages where the attached property is released pursuant to a third-party claim.

In view of these and other uncertainties, the staff recommends that the portions of the Attachment Law concerned with wrongful attachment of property of a third person be repealed. The third person would still be able to make a third-party claim and obtain an undertaking or the release of the property. The third person would still have the common law remedies currently available. By repealing these provisions, the plaintiff's undertaking in attachment would be preserved for the protection of the defendant which is its primary purpose. From the standpoint of the third person, it is irrelevant whether the interfering levy takes place under a writ of attachment or a writ of execution. Hence, as far as third persons are concerned, there is no reason to provide a greater protection before judgment than after.

Respectfully submitted,

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EXHIBIT 1

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December 22, 1971

Mr. Jack Horton
California Law Revision Committee
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Re: Legislative Revision of California
Code of Civil Procedure Sections
537 et seq.

Dear Mr. Horton:

Earlier this fall, you and I had a phone conversation concerning a problem in connection with the legislative revision of California Code of Civil Procedure Sections 537 et seq. in the wake of the California Supreme Court's decision in Randone v. Appellate Department, 5 Cal. 3d 536 (1971). At your suggestion, I am setting forth my concern to you in this letter as a reminder. Also at your suggestion, I am sending copies of this letter to Professors Risenfeld and Warren.

Under C.C.P. §542(2) plaintiff may attach real property standing of record in the name of someone not involved in the lawsuit if plaintiff believes that the true beneficial owner of the property is the defendant in the lawsuit. Plaintiff is not required to allege the basis of his belief that the defendant owns the property either in the papers filed to secure the attachment or in his complaint in the main action.

Although attachments of this kind purport to reach only the interest of the defendant in the property, the practical effect of such an attachment is to totally cloud the title to the property of the record owner. No matter how strong the record owner's claim may be that he himself is the owner of the property, no title insurance company will issue a policy to a potential buyer without making an exception for the attachment. In turn, it is rare that a buyer will purchase the property with such an exception in his title policy. It is thus possible for an unscrupulous plaintiff to tie up the real property of someone not even involved in the action as a device to bring

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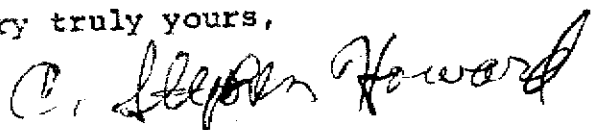
Mr. Jack Horton
December 22, 1971
page two

additional pressure upon the defendant to settle the lawsuit.

Under existing law the third party is helpless to obtain a prompt judicial hearing on his right to have his property free of the attachment. Where this kind of attachment occurs with respect to personal property, C.C.P. §689, governing third party claims, provides methods whereby the third party may obtain a prompt hearing for purposes of determining the real ownership of the property in question. However, C.C.P. §689 does not, by its own terms, apply to real property. Presumably, the legislature believed that an attachment of one's real property did not deprive him of use of such property in as severe a manner as the attachment of one's personal property. (However valid this rationale may be in the general case, it definitely does not apply where the owner of the real property wishes to sell his property to raise cash or for some other purpose.) The third party's only remedy under existing law is to intervene in the action, sue for wrongful attachment, and wait two or three years to get to trial. Meanwhile his property is completely tied up.

If the Legislature is revising C.C.P. Sections 537 et seq. to provide for prompt hearings in connection with attachments, one of the questions which the Legislature will have to decide is what issues should be determined upon the hearing. I would assume that such things as the probable merits of the plaintiff's claim and the likelihood that defendant would conceal or dissipate its assets would be appropriate subjects for determination at such hearings. This letter is to suggest that in the event of an attachment of property (real or personal) standing in the name of a third party, one of the issues which should be determined in the hearing is the true ownership of such property. That is, if a plaintiff is going to tie up the property of someone who is not even a party to the lawsuit, he should be put to the burden of proving in a hearing, by preponderance of the evidence, that the property is not in fact owned by such third party but actually owned by the defendant. Unless the plaintiff is put to such burden, he can, if he is unscrupulous, tie up the property of an innocent third party and bring improper pressure upon the defendant without ever having to be put to any judicial test of the propriety of his actions.

Very truly yours,



C. Stephen Howard

CSH:bl

cc: Professor Stefan A. Risenfeld
Professor William Warren

THIRD-PARTY CLAIMS AND RELATED PROCEDURES

Introduction

A levy on property to satisfy a judgment may infringe on the property rights of a third person (a person other than the creditor or the debtor). The third person may own the property or have the right to its possession or the third person may have a superior right under a lien or security interest to resort to the property for the satisfaction of an obligation. Although the superior rights of a third person are not lost if the property is applied to the satisfaction of the creditor's judgment, it may not be practical or economical for the third person to bring an appropriate action after the property has been sold on execution or otherwise applied to the satisfaction of a judgment.¹ In recognition of these difficulties, and also to protect the creditor and the levying officer from liability, existing law provides a summary special proceeding for the determination of certain third-party claims before the property is applied toward the satisfaction of a judgment.² The Commission recommends that third-party claims procedures be made available in a broader variety of situations, as discussed below, and that several revisions be made to improve the operation of the procedure.

1. An execution sale conveys the interest of the debtor in the property sold. See Sections 698, 699, 700. In appropriate circumstances, the third person may bring an action for specific recovery of personal property or for damages for conversion. See 5 B. Witkin, California Procedure Enforcement of Judgments § 115, at 3481 (2d ed. 1971). The third person may also seek declaratory relief. See Torrance v. Castner, 46 Cal. App.3d 76, 120 Cal. Rptr. 23 (1975).
2. See Sections 689, 689b. The existing third-party claims procedure derives from Section 218 of the Practice Act, enacted in 1851, under which the sheriff could summon a jury of six persons in the county to determine the validity of a third-party claim. The purpose of this procedure was to aid the sheriff, although he remained liable for a wrongful levy or for improperly releasing the property despite the determination of the jury which was held not to be conclusive against the parties. See Perkins v. Thornburgh, 10 Cal. 189 (1858); see generally 2 A. Freeman, Law of Executions § 276 (3d ed. 1900); G. Gilbert, The Law of Executions § 1 (London 1763); Curtis, A Legal Headache, 9 Cal. St. B.J. 167 (1934). In 1891, the statute was amended to substitute a provision for an undertaking in favor of the sheriff in place of the provision for a sheriff's jury. 1891 Cal. Stats. ch. 32, § 1. In light of this

Proposed Revisions

Third-Party Claims to Personal Property

Existing law permits a person claiming title and the right to possession of personal property or the rights of a chattel mortgagee or conditional seller in personal property to make a third-party claim if the property was levied upon under a writ of attachment or a writ of execution to satisfy a money obligation,³ or under a writ of possession in claim and delivery proceedings,⁴ or where a lien on personal property has been foreclosed.⁵ The proposed law expands the class of permissible claimants to include persons claiming any security interest in the property or claiming a lien on the property.⁶ However, only a third person claiming an interest superior to the creditor's lien may make a claim.⁷ The proposed law also makes clear that a third-party claim may be made where the property is levied upon under a postjudgment writ of possession.

history, it has frequently been stated by the courts that a primary purpose of the procedure is to protect the levying officer from liability for taking, holding, and selling the property. See, e.g., *Sunset Realty Co. v. Dadmun*, 34 Cal. App.2d Supp. 733, 736, 88 P.2d 947, 949 (1939). Section 689 has provided since 1929 that the undertaking is in favor of the third person and, since 1933, that the levying officer is not liable if he complies therewith. 1929 Cal. Stats. ch. 341, § 1; 1933 Cal. Stats. ch. 744, § 135.

3. See Sections 488.090 (attachment), 689 (title and right to possession in execution), 689b (chattel mortgage or conditional sale in execution).
4. See Section 514.050.
5. See *Lawler v. Solus*, 101 Cal. App.2d 816, 226 P.2d 348 (1951) (judgment foreclosing chattel mortgage).
6. See Division 9 (commencing with Section 9101) of the Commercial Code (secured transactions). Under existing law, a lienholder may not make a third-party claim. See *Palmquist v. Palmquist*, 228 Cal. App.2d 789, 791-93, 39 Cal. Rptr. 871 (1964).
7. Existing law is not specifically limited to determination of superior interests in property levied upon, but it would be futile for a third person to make a claim on the basis of an interest in the property that is inferior to that of the creditor since inferior interests do not stand in the way of the levy. An inferior lien is lost when the property is sold on execution although the inferior lienholder has the right to share in any excess proceeds at the sale. See *Mitchell v. Alpha Hardware & Supply Co.*, 7 Cal. App.2d 52, 57, 45 P.2d 442 (1935).

Amount of Judgment Creditor's Undertaking

Under the proposed law, if a third-party claim is timely filed with the levying officer,⁸ the officer serves a copy of the claim on the creditor.⁹ If the third person is claiming ownership or the right to possession of the property, the judgment creditor must file an undertaking within 10 days after service of the claim or the property will be released.¹⁰ If the third person is claiming a security interest or lien, the creditor must file an undertaking or make a deposit of the amount claimed within 10 days after service of the claim or the property will be released.¹¹

Under existing law, the creditor's undertaking to prevent release of the property is required to be in an amount equal to twice the value

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8. Sections 689 and 689b refer only to disposition by sale under the writ but, inasmuch as these provisions specifically apply to garnishment of intangibles and to claim and delivery proceedings (see Section 514.050), they must be read broadly to include collection and payment and to delivery of possession to the judgment creditor. Cf. *National Bank v. Finn*, 81 Cal. App. 317, 337, 253 P. 757, 766 (1927) (third-party claim must be made before it has become impossible for sheriff to deliver property to claimant or to obtain undertaking from creditor).
 9. Under Sections 689 and 689b(3), the third-party claim is served on the creditor by registered or certified mail. Under the proposed law, the claim is served personally or by first-class mail. See the discussion under "Service of Writs, Notices, and Other Papers" supra.
 10. Under Section 689, the creditor is allowed five days after service (date of mailing) of the claim within which to file the undertaking. This time is extended pursuant to Section 1013 when the claim is served by mail. See California State Sheriffs' Ass'n, Civil Procedural Manual 10.04-10.05 (rev. ed. 1980). If the claim is served by mail under the proposed law, the time allowed for filing an undertaking is also extended. See the discussion under "Service of Writs, Notices, and Other Papers" supra.
 11. Under Section 689b(4), the creditor is allowed five days after receipt of the claim within which to file an undertaking or make a deposit. This time period is not subject to extension when the claim is mailed. See California State Sheriffs' Ass'n, Civil Procedural Manual 10.04-10.05 (rev. ed. 1980). If the claim is served by mail under the proposed law, the time allowed for filing an undertaking is extended. See the discussion under "Service of Writs, Notices, and Other Papers" supra.

of the property claimed by an owner¹² or twice the amount of the interest claimed by a chattel mortgagee or conditional seller.¹³ The proposed law takes a different approach, permitting the creditor to give an undertaking in a flat amount in response to a third-party claim. If the action is pending or judgment was rendered in superior court, the amount of the undertaking is \$7,500; if the action is pending or judgment was rendered in municipal or justice court, the amount of the undertaking is \$2,500. This provision, derived from the Attachment Law, eliminates the need for the courts to consider objections to the amount of undertakings based on the value of the property claimed by the third person or the amount of the indebtedness secured by the property.¹⁴ However, the proposed law permits the third person to object to the undertaking and obtain a court order that the undertaking be increased to an amount sufficient to compensate the third person for any damages that probably may result from the levy should the third person ultimately prevail in the proceedings. As an alternative to objecting to the amount of the undertaking, the third person may obtain the release of the property by filing an undertaking in the same amount as the undertaking given by the creditor.¹⁵ The creditor may give an undertaking in a greater amount than that required by statute and thereby reduce the chance that the third person will object to its amount. If the creditor files a larger undertaking, the third person will also have to file a larger undertaking to obtain the release of the property. These features of the proposed law give the parties greater flexibility than that provided by existing law, and enable the parties to fashion a course of action most appropriate in the circumstances of the case.

12. Section 689, para. 1.

13. Section 689b(9).

14. See Section 489.220(a) (plaintiff's undertaking in attachment). The fourth and fifth paragraphs of Section 689 provide an appraisal procedure for determining an objection to the amount of an undertaking to indemnify an unsecured third-party claimant. Section 689b(9) gives the levying officer discretion to determine the value of the property for the purpose of setting the amount of the undertaking required to maintain the levy against a claim by a secured party.

15. See the discussion under "Third Person's Undertaking to Release Property" infra.

Third-Party Claims to Real Property

Existing law limits third-party claims to interests in personal property.¹⁶ The proposed law permits a third-party claim of ownership or the right to possession of real property levied upon under a writ of attachment or writ of execution if the interest claimed in the real property is superior to the creditor's lien. Levy under a writ of attachment or a writ of execution can create a cloud on title preventing a third person who is the rightful owner from selling the property. Existing remedies do not provide adequate protection to the third person. In an action to enjoin the sale, the third person must provide an undertaking¹⁷ whereas a person who is permitted to file a third-party claim need not file an undertaking and is entitled to the benefit of the creditor's undertaking if the property is not released pursuant to the claim. If the third person relies on an action to quiet title¹⁸ after the property is sold on execution, considerable delay and expense will be involved.

Hearing on Third-Party Claim

Under existing law, if the creditor gives an undertaking in response to a third-party claim, the third person may choose to rely on the undertaking and permit the property to be sold or otherwise applied toward the satisfaction of the judgment.¹⁹ However, if either the

16. See Sections 689, 689b. The usual remedy where real property is wrongfully sold on execution is an action to quiet title. See *First Nat'l Bank v. Kinslow*, 8 Cal.2d 339, 345, 65 P.2d 796, 799 (1937). If the third person acts quickly enough, an execution sale of property may be enjoined. See *Einstein v. Bank of California*, 137 Cal. 47, 69 P. 616 (1902).

17. See Section 529.

18. See *First Nat'l Bank v. Kinslow*, 8 Cal.2d 339, 65 P.2d 796 (1937).

19. See Sections 689, para. 7, 689b(9). If the creditor makes a deposit with the levying officer in the amount of the indebtedness claimed by a secured party (and also a lienholder under the proposed law), the interest of the secured party passes to the creditor and the property may be sold free of the security interest. See Section 689b(6). The creditor is then entitled to be reimbursed in the amount of the satisfied security interest from the proceeds obtained at the execution sale. See Section 689c.

creditor or the third person petitions the court within 15 days after the third-party claim is filed with the levying officer, a hearing may be held on the third-party claim and the matter brought to a prompt resolution.²⁰ Even in a case where the property has been released because the creditor refuses or fails to file an undertaking within the time allowed, either the creditor or the third person may petition for a hearing within 15 days after the claim is filed with the levying officer.²¹ At a hearing on the claim, the third person has the burden of proof.²² The proposed law continues this procedure, but in a case where a secured party has made a third-party claim, the proposed law places the burden of proof on the creditor in recognition of the general presumption of the validity of security interests.²³

Notice to Debtor

Existing law ignores the interests of the debtor in third-party claim proceedings, even though it is readily apparent that the debtor is vitally interested in the disposition of the property. The proposed law requires that a copy of any third-party claim be served on the debtor at the same time that it is served on the creditor. Furthermore, if a hearing is held on the third-party claim, the petitioning party must give notice of the hearing to the debtor. Participation of the debtor should guard against an incorrect determination of the respective interests of the parties and a misallocation of the property.²⁴

20. Unless continued by the court, a hearing must be held within 20 days from the filing of the petition. See Sections 689, para. 8, 689b(10). There is no right to a jury trial in a hearing on a third-party claim. *Mazuran v. Finn*, 53 Cal. App. 656, 200 P. 769 (1921). This holding is codified in the proposed law.

21. See Sections 689, para. 8, 689b(10). If the creditor prevails at the hearing on the third-party claim, the property may again be levied upon or otherwise sought to be applied to the satisfaction of the judgment. Id.

22. See Sections 689, para. 8, 689(10).

23. See Com. Code § 9201.

24. See, e.g., *Rubin v. Barasch*, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

Creditor's Demand for Claim by Secured Party or Lienholder

Existing law permits the judgment creditor to serve a secured party with a demand that the secured party file a third-party claim or lose the security interest.²⁵ The proposed law modifies this procedure to provide that if the secured party (or other lienholder) does not file a third-party claim within the time allowed, any superiority the security interest or lien may have had over the creditor's lien is lost, but the security interest or lien itself remains. This provision preserves the rights of secured parties and lienholders in situations where the property is later released rather than sold on execution. In a situation where there are excess proceeds at the execution sale, this provision entitles such demoted secured parties or lienholders to a share along with any other junior lienholders.²⁶

Third Person's Undertaking to Release Property

Under existing law, a third person may give an undertaking to release personal property levied upon to satisfy a money judgment if the third person claims ownership and the right to possession of the property.²⁷ The proposed law extends this useful remedy to cover the following cases:

(1) Where the third person claims ownership or the right to possession of real property levied upon under a writ of attachment or a writ of execution.

(2) Where the third person claims ownership or the right to possession of personal property levied upon under a writ of attachment, a writ of execution, or a writ of sale.

(3) Where the third person claims a security interest in or a lien on personal property levied upon under a writ of attachment, a writ of execution, or a writ of sale.

As noted earlier, the proposed law also permits the third person to obtain the release of property where the creditor has given an undertaking to preserve the lien in response to the third party's claim by

25. See Section 689b(8).

26. See the discussion under "[Distribution of Proceeds]" supra.

27. Section 710b.

giving a counterundertaking in the same amount. If the third person has not previously filed a third-party claim to the property, the proposed law requires a third-party claim to be filed with the levying officer when the release undertaking is filed. If the creditor has not given an undertaking to preserve the lien, the amount of the release undertaking under the proposed law is twice the value of the property or twice the amount of the judgment, whichever is the lesser.²⁸ The proposed law requires the release undertaking to be filed with the levying officer rather than with the court, as provided under existing law,²⁹ since the levying officer must be informed of matters affecting the disposition of the property. If a hearing is held on the third party's claim, the levying officer will file the undertaking with the court along with the claim. If a hearing is not held, the levying officer will file the undertaking with the court when the writ is returned.

General Provisions Relating to Undertakings

The proposed law sets forth general provisions governing undertakings in third-party claims proceedings, whereas existing law contains some provisions and otherwise incorporates provisions governing undertakings in attachment.³⁰ In addition, the proposed law makes clear that the beneficiary of an undertaking may enforce the liability of sureties by a motion in the action without the necessity of bringing an independent action.³¹

28. This provision continues existing law. See Section 710c.

29. Section 711.

30. See Sections 689, 689b, 710c-713-1/2.

31. See Section 1058a (enforcement of liability of sureties).

CHAPTER 5. THIRD-PARTY CLAIMS AND RELATED PROCEDURES

Article 1. Definitions§ 706.010. Application of definitions

706.010. Unless the provision or context otherwise requires, these definitions govern the construction of this chapter.

Comment. This article provides special definitions of "creditor" and "debtor" which are necessary because this chapter governs third-party claims to property levied upon under writs of attachment and prejudgment writs of possession. See, e.g., Section 706.110 (article extends to attachment and prejudgment writ of possession).

100/971

§ 706.020. Creditor

706.020. "Creditor" means the judgment creditor or, in the case of a levy under a writ of attachment or prejudgment writ of possession, the plaintiff.

Comment. See the Comment to Section 706.010. See also Section 680.____ ("judgment creditor" defined).

101/125

§ 706.030. Debtor

706.030. "Debtor" means the judgment debtor or, in the case of a levy under a writ of attachment or prejudgment writ of possession, the defendant.

Comment. See the Comment to Section 706.010. See also Section 680.____ ("judgment debtor" defined).

100/957

Article 2. Third-Party Claims of
Ownership and Possession§ 706.110. Application of article

706.110. A third person claiming ownership or the right to possession of property may make a third-party claim under this article, if the

interest claimed is superior to the creditor's lien on the property, in any of the following cases:

(a) Where real property has been levied upon under a writ of attachment or a writ of execution.

(b) Where personal property has been levied upon under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale.

Comment. Section 706.110 supersedes a portion of the first paragraph of former Section 689 which permitted claims of title and the right to possession of personal property only.

Subdivision (a) of Section 706.110 makes the summary third-party claims procedure available to a person claiming a superior ownership or possessory right in real property that is subjected to attachment or execution to satisfy a money obligation. Under former law, a quiet title action was the usual remedy where real property was wrongfully sold on execution. See *First Nat'l Bank v. Kinslow*, 8 Cal.2d 339, 345, 65 P.2d 796, 799 (1937). Nothing in this chapter precludes the use of a quiet title action; Section 706.110 merely makes available the additional remedy of the summary third-party claims procedure. See also Section 706.150 (third-party's interest not affected by failure to make third-party claim).

Subdivision (b) sets forth the cases in which the procedure of this article is available to assert superior claims of ownership or right to possession where personal property has been levied upon. Former Section 689 applied to cases where the property was levied upon under execution and also was incorporated for attachment (see Section 488.090), and claim and delivery, i.e., prejudgment writs of possession (see Section 514.050). The former procedure was also available to determine third-party claims to property seized to satisfy a judgment foreclosing a chattel mortgage. See *Lawler v. Solus*, 101 Cal. App.2d 816, 226 P.2d 348 (1951). Subdivision (b) makes clear that this procedure applies in these cases and also where property is levied upon under a postjudgment writ of possession. As to a third-party claim of a security interest or lien on the property levied upon, see Article 3 (commencing with Section 706.210). See also Section _____ (third-party claims where tax liability enforced).

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Writ § 680. _____

Writ of possession, postjudgment § _____

Writ of sale § _____

§ 706.120. Time and manner of making third-party claim

706.120. A person making a third-party claim under this article shall file the claim with the levying officer, together with two copies of the claim, after levy on the property but before the levying officer does any of the following:

- (a) Sells the property.
- (b) Delivers possession of the property to the creditor.
- (c) Pays proceeds of collection to the creditor.

Comment. Section 706.120 supersedes a portion of the first paragraph of former Section 689. See the Comment to Section 706.110. Two copies of the claim are required to be filed so that one may be served on the debtor and one on the creditor. See Section 706.140. The former statute, unlike Section 706.120, did not specify the time within which a third-party claim could be filed, but in *National Bank of New Zealand v. Finn*, 81 Cal. App. 317, 337, 253 P. 757, 766 (1927), involving attachment of a check, it was stated that the claim must be made before the property was sold or otherwise applied to the satisfaction of the plaintiff's demand.

CROSS-REFERENCES

Claims of secured parties and lienholders §§ 706.210-706.280
 Defined terms
 Creditor § 706.020
 Levying officer § 680.____
 Writ § 680.____
 Delivery of possession § _____
 Distribution of proceeds § 701.810
 Effect of filing or not filing claim § 706.150
 Sale under writ of execution § _____
 Sale under writ of sale § _____

101/155

§ 706.130. Contents of claim

706.130. The third-party claim shall be executed under oath and shall contain all of the following:

- (a) The name of the third person and an address in this state where service by mail may be made on the third person.
- (b) A description of the property in which an interest is claimed.
- (c) A description of the interest claimed, including a statement of the facts upon which the claim is based.

(d) A statement of the reasonable value of the interest claimed.

Comment. Section 706.130 supersedes a portion of the first paragraph of former Section 689.

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5

101/157

§ 706.140. Service upon creditor and debtor of notice and copy of claim

706.140. (a) Not later than five days after the third-party claim is filed with the levying officer, the levying officer shall serve the following personally or by mail on the creditor:

(1) A copy of the third-party claim.

(2) A statement whether the third person has filed an undertaking to release the property pursuant to Article 6 (commencing with Section 706.610).

(3) If the third person has filed an undertaking to release the property, a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor objects to the undertaking.

(4) If the third person has not filed an undertaking to release the property, a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor files with the levying officer an undertaking that satisfies the requirements of Section 706.160.

(b) Subject to Section 684.040 governing extension of time where notice is served by mail, the time allowed the creditor for objecting to the third person's undertaking to release the property or for filing an undertaking is 10 days after service under subdivision (a).

(c) Within the time allowed for service on the creditor under subdivision (a), the levying officer shall serve personally or by mail on the debtor a copy of the material specified in subdivision (a).

(d) The levying officer may serve the copy of the third-party claim and the statement and notice pursuant to this section notwithstanding any defect, informality, or insufficiency of the claim.

Comment. Subdivision (a) of Section 706.140 supersedes a portion of the first paragraph of former Section 689. Paragraphs (3) and (4) recognize that it is unnecessary for the creditor to file an undertaking to preserve the lien on the property if the third person has filed an undertaking to release it. Subdivision (b) allows the creditor at least 10 days within which to respond to the claim, whereas the first paragraph of former Section 689 allowed five days. Subdivision (c) is new. Subdivision (d) continues the substance of the first sentence of the sixth paragraph of former Section 689.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Debtor § 706.030

Levying officer § 680.

Manner of service §§ 684.010-684.070

101/126

§ 706.150. Effect of filing or not filing third-party claim

706.150. (a) Except as otherwise provided by statute, if a third-party claim is timely filed, the levying officer shall not do any of the following:

- (1) Sell the property.
- (2) Deliver possession of the property to the creditor.
- (3) Pay proceeds of collection to the creditor.

(b) The interest of the third person in the property levied upon is not affected by the third person's failure to file a third-party claim under this article.

Comment. Section 706.150 is new. Subdivision (a) makes clear that enforcement procedures against an item of property claimed by a third person must cease except as otherwise provided. See, e.g., Sections 699.070 (disposition of perishable property), 706.160 (effect of filing undertaking), 706.430 (satisfaction from released property after hearing). Subdivision (b) makes clear that a third person does not waive a superior interest in the property levied upon by failure to make a third-party claim pursuant to this article. This principle is a corollary of the general rule that a judgment or levy reaches only the interest of the debtor in the property. See Section _____.

CROSS-REFERENCES

Claims of secured parties and lienholders §§ 706.210-706.280
Defined terms
 Creditor § 706.020
 Levying officer § 680.____
 Writ § 680.____
Delivery of possession § _____
Distribution of proceeds § 701.810
Sale under writ of execution § _____
Sale under writ of sale § _____

404/085

§ 706.160. Effect and contents of creditor's undertaking

706.160. (a) If the creditor files an undertaking that satisfies the requirements of this section within the time allowed:

(1) The levying officer shall execute the writ in the manner provided by law unless the court otherwise orders or the third person files an undertaking to release the property pursuant to Article 6 (commencing with Section 706.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims of the third person for which the creditor has given the undertaking.

(b) Subject to Section 706.770, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be the lesser of the following amounts:

(1) Twice the value of the interest claimed by the third person.

(2) Seven thousand five hundred dollars (\$7,500) if the action is pending or the judgment was entered in the superior court, or two thousand five hundred dollars (\$2,500) if the action is pending or the judgment was entered in a municipal or justice court.

(c) An undertaking given by the creditor under this article shall be made in favor of the third person and shall indemnify the third person against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings. The undertaking shall be conditioned on a final judgment that the third person owns or has the right of possession of the property.

Comment. Subdivision (a) of Section 706.160 supersedes the seventh paragraph of former Section 689. Subdivisions (b) and (c) supersede portions of the first and second paragraphs of former Section 689. The option of giving an undertaking in a flat amount pursuant to subdivision (b) is new. The amounts are the same as the amounts set for an initial undertaking in attachment. See Section 489.220(a). The third person may apply to the court for an order requiring an undertaking in a greater amount pursuant to Sections 706.760-706.770, or may obtain the release of the property by giving an undertaking pursuant to Article 6 (commencing with Section 706.610) in the same amount as the creditor's undertaking. Whether or not the creditor has filed an undertaking, the debtor may in some circumstances forestall a sale or other proceeding under the writ by obtaining a stay pursuant to Section 706.380.

CROSS-REFERENCES

Defined terms

Creditor § 706.020
 Levying officer § 680._____
 Delivery of possession § _____
 Distribution of proceeds § 701.810
 Sale under writ of execution § _____
 Sale under writ of sale § _____
 Undertaking to release property §§ 706.610-706.660
 Undertakings, general provisions §§ 706.710-706.800

368/219

§ 706.170. Release for creditor's failure to file undertaking

706.170. (a) In a case where the third person has not filed an undertaking to release the property pursuant to Article 6 (commencing with Section 706.610), if the creditor does not within the time allowed file with the levying officer an undertaking that satisfies the requirements of Section 706.160, the levying officer shall release the property, unless it is to be held under another lien or unless otherwise ordered by the court.

(b) Except as otherwise provided in this section, release is governed by Section 699.060.

(c) If personal property that has been taken into custody is to be released to the debtor pursuant to Section 699.060 and the debtor has not claimed the property within 10 days after notice was served pursuant to Section 699.060, the levying officer shall release the property to the third person making the claim.

(d) A hearing may be had on the third-party claim pursuant to Article 4 (commencing with Section 706.310) notwithstanding the release of the property pursuant to this section.

Comment. Subdivision (a) of Section 706.170 supersedes a portion of the first paragraph of former Section 689. The introductory clause recognizes that this section applies only where the third person has not filed an undertaking to release the property. The time allowed the creditor for filing an undertaking depends on the manner of service of the third-party claim pursuant to Section 706.140. See Section 684.____ (service by mail).

Subdivision (b) makes clear that the general rules governing release of property apply except as provided in this section. Accordingly, if a third person to whom property is to be released pursuant to subdivision (b) or subdivision (c) does not claim property in the levying officer's custody, the property generally will be sold and the proceeds deposited with the county in the name of the third person. See Section 699.060(b).

Subdivision (c) supersedes former Section 689.5. If the property to be released was levied upon in the possession of the debtor, the property will be released to the debtor as provided by the general rules governing release. See Section 699.060 (tangible personal property released to person from whom it was taken). However, if the debtor does not claim the property, the third person who claimed it under this article is entitled to its possession as provided in subdivision (c). This is an exception to the general release provision that, if the debtor does not claim the property, it is to be sold and the proceeds deposited in the name of the debtor. See Section 699.060(b).

Subdivision (d) makes clear that the third-party claim may be determined under the appropriate procedure even though the property has been released because the creditor has not filed an undertaking. See Sections 706.310-706.430. If the creditor prevails at the hearing, the released property may again be levied upon as provided in Section 706.430.

CROSS-REFERENCES

Custody of levying officer § _____
 Defined terms
 Creditor § 706.020
 Levying officer § 680.____

10174

Article 3. Third-Party Claim of Security Interest or Lien

§ 706.210. Application of article

706.210. Where personal property has been levied upon under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ

of possession, or a writ of sale, a third person claiming a security interest in or lien on the personal property may make a third-party claim under this article if the security interest or lien claimed is superior to the creditor's lien on the property.

Comment. Section 706.210 supersedes a portion of former Section 689b(2). See the Comment to Section 706.110. This article permits a secured party or other lienholder to make a third-party claim concerning personal property, whereas former Section 689b governed only claims by conditional sellers and chattel mortgagees. See Division 9 (commencing with Section 9101) of the Commercial Code (secured transactions).

CROSS-REFERENCES

Attachment § 481.010 et seq.

Defined terms

Creditor § 706.020

Lien § 680.____

Security interest § 680.____

Writ § 680.____

Writ of execution §§ _____

Writ of possession, postjudgment § _____

Writ of possession, prejudgment § 511.010 et seq.

Writ of sale § _____

405/386

§ 706.220. Time and manner of making third-party claim

706.220. A person making a third-party claim under this article shall file the claim with the levying officer, together with two copies of the claim, after levy on the property but before the levying officer does any of the following:

- (a) Sells the property.
- (b) Delivers possession of the property to the creditor.
- (c) Pays proceeds of collection to the creditor.

Comment. Section 706.220 supersedes the first sentence of former Section 689b(2). See the Comment to Section 706.210. Two copies of the claim are required to be filed so that one may be served on the debtor and one on the creditor. See Section 706.240. As to the specification in Section 706.220 of the time within which the third-party claim must be filed, see the Comment to Section 706.120.

CROSS-REFERENCES

Defined terms

- Creditor § 706.020
- Levying officer § 680.____
- Writ § 680.____
- Delivery of possession § _____
- Distribution of proceeds § 701.810
- Effect of filing or not filing claim § 706.250
- Sale under writ of execution § _____
- Sale under writ of sale § _____

10372

§ 706.230. Contents of claim

706.230. ~~The~~ third-party claim shall be executed under oath and shall contain all of the following:

(a) The ~~name~~ of the secured party or lienholder and an address in this state where service by mail may be made on the secured party or lienholder.

(b) A description of the property in which a security interest or lien is claimed.

(c) A detailed description of the security interest or lien claimed, including a ~~statement~~ of the facts upon which it is based. In the case of a security interest, a copy of the security agreement and any financing statement shall ~~be~~ attached to the third-party claim.

(d) A ~~statement~~ of the total amount of sums due or to accrue under the security interest or lien and the applicable rate of interest on amounts due.

Comment. Section 706.230 supersedes a portion of former Section 689b(2).

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5

Defined terms

- Financing statement § 680.____
- Lien § 680.____
- Secured party § 680.____
- Security agreement § 680.____
- Security interest § 680.____

§ 706.240. Service on creditor and debtor of notice and copy of claim

706.240. (a) Not later than five days after the third-party claim is filed with the levying officer, the levying officer shall serve personally or by mail on the creditor both of the following:

(1) A copy of the third-party claim.

(2) A statement whether the third person has filed an undertaking to release the property pursuant to Article 6 (commencing with Section 706.610).

(3) If the third person has filed an undertaking to release the property, a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor objects to the undertaking.

(4) If the third person has not filed an undertaking to release the property, a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor does one of the following:

(A) Files with the levying officer an undertaking that satisfies the requirements of Section 706.260 and a statement under Section 706.280.

(B) Deposits with the levying officer the amount claimed plus interest at the applicable rate to the estimated date of tender to the secured party or lienholder.

(b) Subject to Section 684.040 governing extension of time where notice is served by mail, the time allowed the creditor for objecting to the third person's undertaking to release the property or for filing an undertaking and statement or making a deposit pursuant to subdivision (a) is 10 days after service under subdivision (a).

(c) Within the time allowed for service on the creditor under subdivision (a), the levying officer shall serve personally or by mail on the debtor a copy of the material specified in subdivision (a).

(d) The levying officer may serve the copy of the third-party claim and the statement and notice pursuant to this section notwithstanding any defect, informality, or insufficiency of the claim.

Comment. Subdivision (a) of Section 706.240 supersedes subdivision (3) and a portion of the first paragraph of subdivision (9) of former Section 689b. Paragraphs (3) and (4) recognize that it is unnecessary for the creditor to file an undertaking to preserve the lien on the property or to pay off the secured party or lienholder if the property is to be released on a third person's undertaking. The creditor may make a deposit in lieu of an undertaking pursuant to Section 1054a, but such a deposit has the effect of an undertaking given under this article rather than a deposit made to satisfy the claim of the secured party or lienholder.

Subdivision (b) allows the creditor at least 10 days within which to respond to the claim, whereas former Section 689b(4) allowed five days after receipt. Subdivision (c) is new. Subdivision (d) continues the substance of the second sentence of former Section 689b(2).

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Debtor § 706.030

Levying officer § 680.

Manner of service §§ 684.010-684.070

101/128

§ 706.250. Effect of filing or not filing third-party claim

706.250. (a) Except as otherwise provided by statute, if a third-party claim is timely filed, the levying officer shall not do any of the following with respect to property in which the security interest or lien is claimed:

- (1) Sell the property.
- (2) Deliver possession of the property to the creditor.
- (3) Pay proceeds of collection to the creditor.

(b) The interest of a secured party or lienholder in the property levied upon is not affected by the failure of the secured party or lienholder to file a third-party claim under this article.

Comment. Section 706.250 is new. See the Comment to Section 706.150. See also Section 706.260 (effect of undertaking or deposit). Subdivision (b) makes clear that a secured party or lienholder does not waive a superior interest in the property levied upon by failure to make a third-party claim pursuant to this article. See the Comment to Section 706.150.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Debtor § 706.030

Lien § 680.____

Secured party § 680.____

Writ § 680.____

Distribution of proceeds § 701.810

Sale under writ of execution § _____

Sale under writ of sale § _____

405/910

§ 706.260. Effect of undertaking or deposit; contents of undertaking

706.260. (a) If the creditor files an undertaking that satisfies the requirements of this section and a statement that satisfies the requirements of Section 706.280, or makes a deposit with the levying officer of the amount claimed under Section 706.230, within the time allowed:

(1) The levying officer shall execute the writ in the manner provided by law unless (A) the court otherwise orders or (B) in a case where the creditor files an undertaking, the secured party or lienholder files an undertaking to release the property pursuant to Article 6 (commencing with Section 706.610).

(2) After sale, payment, or delivery of the property pursuant to the writ, the property is free of all claims or liens of the secured party or lienholder for which the creditor has given the undertaking or made the deposit.

(b) Subject to Section 706.770, unless the creditor elects to file an undertaking in a larger amount, the amount of the undertaking filed by the creditor under this section shall be the lesser of the following amounts:

(1) Twice the amount claimed by the secured party or lienholder.

(2) Seven thousand five hundred dollars (\$7,500) if the action is pending or the judgment was entered in the superior court, or two thousand five hundred dollars (\$2,500) if the action is pending or the judgment was entered in a municipal or justice court.

(c) An undertaking given by the creditor under this article shall be made in favor of the secured party or lienholder and shall indemnify the secured party or lienholder against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings. The undertaking shall be conditioned on a final judgment that the security interest or lien of the third person is entitled to priority over the creditor's lien.

Comment. Subdivision (a) of Section 706.260 supersedes parts of subdivisions (8) and (9) of former Section 689b. Under paragraph (2) of subdivision (a), the property may be sold free of all interests for which an undertaking is given or deposit is made. However, whether or not the creditor has filed an undertaking or made a deposit, the secured party or lienholder may prevent a sale in an appropriate case by obtaining a stay pursuant to Section 706.380.

Subdivisions (b) and (c) supersede portions of the first and second paragraphs of subdivision (9) of former Section 689b. The option of giving an undertaking in a flat amount pursuant to subdivision (b) is new. The amounts are the same as the amounts set for an initial undertaking in attachment. See Section 489.220(a). The secured party or lienholder may apply to the court for an order requiring an undertaking in a greater amount pursuant to Sections 706.760-706.770, or may obtain the release of the property by giving an undertaking pursuant to Article 6 (commencing with Section 706.610) in the same amount as the judgment creditor's undertaking.

CROSS-REFERENCES

- Amount claimed by secured party or lienholder §§ 706.230, 706.240(4)(B)
- Defined terms
 - Creditor § 706.020
 - Levying officer § 680.____
 - Lien § 680.____
 - Secured party § 680.____
 - Security interest § 680.____
- Delivery of possession § _____
- Distribution of proceeds § 701.810
- Sale under writ of execution § _____
- Sale under writ of sale § _____
- Undertaking to release property §§ 706.610-706.660
- Undertakings, general provisions §§ 706.710-706.800

405/909

§ 706.270. Release for creditor's failure to make deposit or file undertaking and statement

706.270. (a) In a case where the third person has not filed an undertaking to release the property pursuant to Article 6 (commencing

with Section 706.610), if the creditor does not within the time allowed file with the levying officer an undertaking that satisfies the requirements of Section 706.260 and a statement under Section 706.280, or deposit with the levying officer the amount claimed under Section 706.230, the levying officer shall release the property, unless it is to be held under another lien or unless otherwise ordered by the court.

(b) Except as otherwise provided in this section, release is governed by Section 699.060.

(c) If property that has been taken into custody is to be released to the debtor pursuant to Section 699.060 and the debtor has not claimed the property within 10 days after notice was served pursuant to Section 699.060, the levying officer shall release the property to the secured party or lienholder making the claim.

(d) A hearing may be had on the third-party claim pursuant to Article 4 (commencing with Section 706.310) notwithstanding the release of the property pursuant to this section.

Comment. Subdivision (a) of Section 706.270 supersedes subdivision (4) and a portion of the first paragraph of subdivision (9) of former Section 689b. The introductory clause recognizes that this section applies only where the third person has not filed an undertaking to release the property. The time allowed the creditor for filing an undertaking and statement or making a deposit depends on the manner of service of the third-party claim pursuant to Section 706.240. See Section _____ (service by mail).

Subdivision (b) makes clear that the general rules governing release of property apply except as provided in this section. See the Comment to Section 706.170(b).

Subdivision (c) supersedes former Section 689.5. See the Comment to Section 706.170(c).

Subdivision (d) makes clear that the claim of the secured party or lienholder may be determined under the appropriate procedure even though the property has been released because the creditor has not filed an undertaking and statement or made a deposit. See Sections 706.310-706.430. If the creditor prevails at the hearing, the released property may again be levied upon as provided in Section 706.430.

CROSS-REFERENCES

Custody of levying officer § _____

Defined terms

Creditor § 706.020

Debtor § 706.030

Levying officer § 680. _____

Secured party § 680. _____

Security interest § 680. _____

§ 706.280. Statement concerning security interest

706.280. At the time the creditor files an undertaking with the levying officer in response to a third-party claim by a secured party, the creditor shall do both of the following:

(a) File with the levying officer a statement executed under oath that the security interest is invalid, that the security interest is not entitled to priority over the creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled, for the reasons specified therein.

(b) Serve personally or by mail a copy of the statement on the secured party.

Comment. Section 706.280 supersedes a portion of the first paragraph of subdivision (9) of former Section 689b. This section permits the creditor to resist the claim of the secured party on the grounds that the security interest is not entitled to priority or is excessive, whereas former law required a statement that the chattel mortgage or conditional sale was void or invalid. See Section 706.210 (application of article); Com. Code § 9301 (priority of lien creditor over unperfected security interest).

CROSS-REFERENCES

Declaration under penalty of perjury § 2015.5

Defined terms

Creditor § 706.020

Levying officer § 680. ____

Secured party § 680. ____

Security interest § 680. ____

Manner of service §§ 684.010-684.070

§ 706.290. Payment to secured party

706.290. (a) If the levying officer receives a sufficient deposit from the creditor, the levying officer shall promptly tender or pay it to the secured party or lienholder who made the third-party claim unless the deposit is made by personal check, in which event the levying officer is allowed a reasonable time for the check to clear.

(b) Upon tender, the interest of the secured party or lienholder in the property for which payment is made passes to the creditor making the payment.

(c) If the tender is refused, the amount thereof shall be deposited with the county treasurer payable to the order of the secured party or lienholder.

Comment. Section 706.290 continues the substance of subdivisions (5)-(7) of former Section 689b, except that the officer is required to tender or pay promptly rather than within five days.

CROSS-REFERENCES

Defined terms

Creditor § 706.020
Levying officer § 680.____
Secured party § 680.____
Security interest § 680.____

406/255

Article 4. Hearing on Third-Party Claim

§ 706.310. Application for hearing

706.310. (a) Not later than 15 days after the third-party claim is filed with the levying officer pursuant to Section 706.120 or 706.220, either the creditor or the third person may petition the court for a hearing to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the claim.

(b) A hearing may be held whether or not an undertaking has been filed, but not if a deposit has been made pursuant to Section 706.260.

(c) The hearing shall be held within 20 days after the filing of the petition unless continued by the court for good cause shown.

Comment. Subdivisions (a) and (b) of Section 706.310 continue the substance of the first two sentences of the eighth paragraph of former Section 689 and the first sentence of subdivision (10) of former Section 689(b). Subdivision (c) continues the substance of the third and fifth sentences of the eighth paragraph of former Section 689 and the second and fourth sentences of subdivision (10) of former Section 689b.

CROSS-REFERENCES

Defined terms

Court § 680.____
Creditor § 706.020
Levying officer § 680.____

§ 706.320. Notice of hearing

706.320. (a) Not less than 10 days prior to the hearing, the petitioner shall serve personally or by mail notice of the time and place of the hearing on all of the following:

(1) The creditor or the third person (whichever person is not the petitioner).

(2) The debtor.

(3) The levying officer.

(b) The notice shall include a statement that the purpose of the hearing is to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the third-party claim.

Comment. Section 706.320 supersedes the fourth sentence of the eighth paragraph of Section 689 and the second sentence of subdivision (10) of former Section 689b. This section also requires notice to be sent to the debtor to avoid the misapplication of funds that could occur under former law. See *Rubin v. Barash*, 275 Cal. App.2d 835, 80 Cal. Rptr. 337 (1969).

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Debtor § 706.030

Levying officer § 680.

Manner of service §§ 684.010-684.070

§ 706.330. Papers filed by levying officer

706.330. Promptly after receipt of the notice of the hearing on the third-party claim, the levying officer shall file the following papers with the court:

(a) The third-party claim that was filed with the levying officer pursuant to Section 706.120 or 706.220.

(b) Any statement filed by the creditor with the levying officer pursuant to Section 706.280 in opposition to the third-party claim of a secured party.

(c) Any undertaking of the creditor filed with the levying officer pursuant to Section 706.160 or Section 706.260.

Comment. Section 706.330 supersedes a portion of the eleventh sentence of the eighth paragraph of former Section 689. Former law did not require the levying officer to file the creditor's statement or undertaking with the court. See former Sections 689, 689b. An undertaking in the possession of the levying officer that is not filed with the court pursuant to this section should be filed pursuant to Section 706.790.

CROSS-REFERENCES

Defined terms

Court § 680.____
Creditor § 706.020
Levying officer § 680.____
Secured party § 680.____

968/872

§ 706.340. Filing and service of statement in opposition to claim of secured party

706.340. If the creditor has not filed a statement with the levying officer pursuant to Section 706.280 in opposition to a third-party claim by a secured party:

(a) In a case where the creditor petitions for a hearing on the third-party claim, the creditor shall file the statement with the court at the time the petition is filed and shall serve a copy thereof on the secured party with notice of the hearing served pursuant to Section 706.320.

(b) In a case where the secured party has petitioned for a hearing on the third-party claim, the creditor shall file the statement with the court and serve personally or by mail a copy of the statement on the secured party not later than five days before the date set for the hearing.

Comment. Section 706.340 is new.

CROSS-REFERENCES

Defined terms

Court § 680.____
Creditor § 706.020
Levying officer § 680.____
Secured party § 680.____
Manner of service §§ 684.010-684.070

§ 706.350. Pleadings

706.350. (a) Subject to the power of the court to permit an amendment in the interest of justice:

(1) The third-party claim constitutes the pleading of the third person.

(2) In the case of a third-party claim by a secured party, the creditor's statement constitutes the pleading of the judgment creditor.

(b) A third-party claim of ownership, right to possession, or a lien, shall be deemed controverted by the creditor.

Comment. Subdivision (a)(1) of Section 706.350 continues the substance of a portion of the eleventh sentence of the eighth paragraph of former Section 689. Unlike subdivision (a)(2), former Section 689b did not prescribe the effect of the judgment creditor's statement in opposition to the claim of a secured party.

Subdivision (b) continues the substance of a portion of the eleventh sentence of the eighth paragraph of former Section 689, but is limited to third-party claims of ownership, right to possession, or a lien, whereas the former provision applied to all claims under former Section 689 or 689b.

CROSS-REFERENCES

Defined terms

Court § 680.

Creditor § 706.020

Security interest § 680. ___

999/320

§ 706.360. Burden of proof

706.360. (a) At a hearing on a third-party claim of ownership, right to possession, or a lien, the third person has the burden of proof.

(b) At a hearing on a third-party claim of a security interest, the creditor has the burden of proof.

Comment. Subdivision (a) of Section 706.360 continues the substance of the tenth sentence of the eighth paragraph of former Section 689. Subdivision (b) is new; under former law, all third-party claimants had the burden of proof.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

§ 706.370. Dismissal

706.370. If the petition for a hearing was made by the third person, neither the petition nor the proceedings pursuant thereto may be dismissed without the consent of the creditor.

Comment. Section 706.370 continues the substance of the sixth sentence of the eighth paragraph of former Section 689.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

§ 706.380. Stay of sale during pendency of proceedings

706.380. (a) Notwithstanding any other provision of this chapter, the court may make an order staying the sale of the property under a writ or enjoining any transfer or other disposition of the property levied upon under a writ until proceedings for the determination of the rights of a third person can be commenced and prosecuted to termination and may require such undertaking as it considers necessary as a condition for making the order.

(b) After the filing of a third-party claim, notwithstanding Sections 706.160 and 706.260, the creditor, the debtor, or the third person may apply to the court ex parte, or on noticed motion if the court so directs or a court rule so provides, for an order staying the sale of the property under a writ or enjoining any transfer or other disposition of the property until proceedings under this article can be commenced and prosecuted to termination.

(c) An order made pursuant to this section may be modified or vacated by the court at any time prior to the termination of the proceedings upon such terms as are just.

Comment. Subdivisions (a) and (b) of Section 706.380 supersede the eighth sentence of the eighth paragraph of former Section 689. Subdivision (c) continues the substance of the ninth sentence of the eighth paragraph of former Section 689. See Section 699.070 (disposition of perishable property).

CROSS-REFERENCES

Defined terms

Court § 680.____
Creditor § 706.020
Debtor § 706.030
Writ § 680.____

968/976

§ 706.390. Determination of claim; disposition of property

706.390. At the conclusion of the hearing, the court shall give judgment determining the validity of the third-party claim and may order the disposition of the property or its proceeds in accordance with the respective interests of the parties. Subject to Section 706.420, the judgment is conclusive between the parties to the proceeding.

Comment. Section 706.390 continues the substance of a portion of the fourteenth and fifteenth sentences of the eighth paragraph of former Section 689 and the third sentence of subdivision (10) of former Section 689b. See also Section 699.070 (disposition of perishable property).

CROSS-REFERENCES

Defined terms

Court § 680.____

968/977

§ 706.400. Findings

706.400. No findings are required in proceedings under this article.

Comment. Section 706.400 continues the thirteenth sentence of the eighth paragraph of former Section 689.

406/114

§ 706.410. No right to jury trial

706.410. There is no right to a jury trial in a proceeding pursuant to this article.

Comment. Section 706.410 codifies *Misrach v. Liederman*, 14 Cal. App.2d Supp. 757, 58 P.2d 746 (1936).

§ 706.420. Appeal

706.420. An appeal may be taken from a judgment given pursuant to Section 706.390 in the manner provided for appeals from the court in which the proceeding takes place.

Comment. Section 706.420 continues the seventeenth sentence of the eighth paragraph of former Section 689.

8397

§ 706.430. Satisfaction from released property

706.430. If property has been released pursuant to Section 706.170 or 706.270, it may be levied upon or otherwise sought to be applied to the satisfaction of the judgment only if it is determined in the hearing on the third-party claim that the debtor has an interest in the property that may be levied upon or otherwise applied to the satisfaction of the judgment.

Comment. Section 706.430 supersedes the sixteenth sentence of the eighth paragraph of former Section 689 and the second paragraph of subdivision (10) of former Section 689b. Former law referred only to relevy upon property that had been released, but this section recognizes that other enforcement procedures may also be employed. See, e.g., Chapter 6 (commencing with Section 708.010) (miscellaneous creditor's remedies).

CROSS-REFERENCES

Defined terms

Debtor § 706.030

Judgment § 680.____

404/342

Article 5. Creditor's Demand for Third-Party
Claim by Secured Party or Lienholder

§ 706.510. Application of article

706.510. A creditor may make a demand as provided in this article that a secured party or lienholder file a third-party claim to personal property that has been levied upon under a writ of attachment or a writ of execution.

Comment. Section 706.510 supersedes a portion of former Section 689b(8).

CROSS-REFERENCES

Defined terms

- Creditor § 706.020
- Writ of attachment § _____
- Writ of execution § _____

405/415

§ 706.520. Demand for claim

706.520. (a) The creditor's demand for a third-party claim by the secured party or lienholder, together with a copy of the demand, shall be filed with the levying officer after levy on the property but before the levying officer sells the property or pays proceeds of collection to the creditor.

(b) Promptly after the demand and a copy thereof are filed, the levying officer shall personally serve the demand on the secured party or lienholder. Service of the demand on the secured party or lienholder shall be attested by the certificate of the levying officer and the certificate shall be filed in the action promptly after service.

(c) The demand shall be served by the levying officer who levied on the property or by any other levying officer whose office is closer to the place of service. If service is made by another levying officer, such levying officer's costs shall be paid out of the costs prepaid to the levying officer who levied on the property.

Comment. Section 706.520 supersedes a portion of former Section 689b(8).

CROSS-REFERENCES

Defined terms

- Costs § 680. _____
- Creditor § 706.020
- Levying officer § 680. _____
- Manner of service §§ 684.010-684.070

§ 706.530. Contents of demand for claim

706.530. The demand for a third-party claim served on a secured party or lienholder shall contain all of the following:

- (a) The name and address of the secured party or lienholder.
- (b) The name and address of the creditor.
- (c) A detailed description of the property levied upon and the date of levy.

(d) A statement that if the secured party or lienholder does not file a third-party claim pursuant to Article 3 (commencing with Section 706.210) within 30 days after service of the demand, the secured party or lienholder shall be deemed to have waived any priority the security interest may have over the creditor's lien on the property levied upon.

Comment. Section 706.530 is new. See Section 706.550 and the Comment thereto.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

67/707

§ 706.540. Prohibition of release, sale, or other disposition

706.540. Except as otherwise provided by statute, the levying officer may not release, sell, or otherwise dispose of the property described in the demand before the expiration of 30 days after service of the demand on the secured party or lienholder.

Comment. Section 706.540 is new. The introductory clause recognizes that the property may be sold or released in certain circumstances before the expiration of the 30-day period, such as where the property is perishable (see Section 699.070) or where the property is released pursuant to the claim of the secured party upon whom the demand was served or of some other third person (see Sections 706.170 and 706.270).

CROSS-REFERENCES

Defined terms

Levying officer § 680.____

§ 706.550. Effect of failure to make third-party claim

706.550. If the secured party or lienholder does not file a third-party claim with the levying officer pursuant to Article 3 (commencing with Section 706.210) within 30 days after service of the demand, the secured party or lienholder shall be deemed to have waived any priority the security interest or lien may have over the creditor's lien on the property levied upon and the property may be applied toward the satisfaction of the judgment free of the security interest or lien.

Comment. Section 706.550 supersedes a portion of the first sentence of subdivision (8) of former Section 689b. Under Section 706.550, a secured party or lienholder who fails to make a third-party claim within the time allowed waives only the superiority of the security interest or lien over the creditor's lien, whereas under former law it appeared that the secured party forfeited all rights in the property or its proceeds. Under Section 706.550, the secured party or lienholder who fails to make a claim within the time allowed retains the right to share in excess proceeds as a junior lienholder pursuant to Section 701.810, but if there are no excess proceeds, the security interest or lien is lost. See Section _____ (extinction of inferior liens upon sale). If the property described in a demand for a claim under this article is released rather than sold, such as in a case where the judgment is satisfied by voluntary payment or resort to other property, the creditor's lien is extinguished and the security interest or lien of a third person served with a demand for a claim would in effect be restored to its former position of priority.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Levying officer § 680.____

67716

Article 6. Third-Party Undertaking
to Release Property§ 706.610. Application of article

706.610. A third person may give an undertaking to release property pursuant to this article in the following cases:

(a) Where the third person claims ownership or the right to possession of real property that has been levied upon under a writ of attachment or a writ of execution.

(b) Where the third person claims ownership or the right to possession of personal property that has been levied upon under a writ of attachment, a writ of execution, or a writ of sale.

(c) Where the third person claims a security interest in or a lien on personal property that has been levied upon under a writ of attachment, a writ of execution, or a writ of sale.

Comment. Section 706.610 supersedes former Section 710b which applied only to personal property levied upon to satisfy a money judgment in a case where the third person "claimed" the property. Compare former Section 689 (paragraph seven of which referred to release under former Section 710b) with former Section 689b (which contained no reference to former Section 710b).

CROSS-REFERENCES

Writ of attachment § _____
Writ of execution § _____
Writ of sale § _____

043/149

§ 706.620. Filing of undertaking to release property

706.620. The third person shall file the undertaking to release property with the levying officer, together with two copies of the undertaking:

(a) At the time the third person files a third-party claim pursuant to Article 2 (commencing with Section 706.110) or Article 3 (commencing with Section 706.210).

(b) If the third person has previously filed a third-party claim to the property, at any time before the levying officer sells the property, delivers possession of the property to the creditor, or pays proceeds of collection to the creditor.

Comment. Section 706.620 supersedes a portion of former Sections 710b and 711. This section permits the filing of an undertaking to release property at any time that a third person could make a third-party claim as to property that can be released pursuant to Section 706.610 and also requires that the third person file a third-party claim. Former law did not prescribe the time for filing an undertaking to release property, nor did it require the third person to file a third-party claim. Section 706.620 requires the undertaking to be filed

with the levying officer, whereas former Section 711 provided for filing with the court. Undertakings filed with the levying officer under this chapter are eventually filed with the court. See Sections 706.330(c), 706.800.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Levying officer § 680._____

405/418

§ 706.630. Contents of undertaking

706.630. (a) The undertaking shall contain a description of the property to be released and shall describe the interest of the third person.

(b) The undertaking shall be made in favor of the creditor and shall provide that, if the debtor is finally adjudged to have an interest in the property levied upon, the third person shall pay in satisfaction of the judgment under which the writ of execution or writ of sale was issued a sum equal to the value of the debtor's interest or the amount of the judgment remaining unsatisfied at the time liability on the undertaking is determined, whichever is the lesser.

(c) Except as provided in subdivision (d) and unless the third person elects to file an undertaking in a larger amount, the amount of the undertaking shall be the lesser of the following amounts:

- (1) Twice the value of the property sought to be released.
- (2) Twice the amount of the creditor's lien on the property sought to be released.

(d) If the creditor has given an undertaking in response to the third person's claim regarding the property pursuant to Section 706.160 or 706.260, the third person's undertaking shall be in the amount of the creditor's undertaking.

Comment. Section 706.630 supersedes portions of former Section 710c. Subdivision (b) recognizes that the creditor is not entitled to resort to the undertaking in an amount exceeding the amount of the judgment remaining unsatisfied.

Subdivision (c) continues the substance of a portion of former Section 710c, subject to the exception provided in subdivision (d).

Subdivision (d) enables the third person to obtain the release of the property only by giving an undertaking in the amount of the creditor's undertaking filed in response to the third-party's claim.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Debtor § 706.030

Third-party claim of ownership or possession § 706.110 et seq.

Third-party claim of security interest or lien § 706.210 et seq.

Value of property, estimate in undertaking § 706.740

Writ of execution § _____

Writ of sale § _____

404/957

§ 706.640. Service of undertaking to release property

706.640. (a) If the undertaking to release property is filed with the levying officer at the time the third-party claim is filed, the levying officer shall serve a copy of the undertaking on the creditor and on the debtor with the notice of the filing of the third-party claim served pursuant to Section 706.140 or Section 706.240.

(b) If the undertaking to release property is filed with the levying officer after the third-party claim is filed, not later than five days after the undertaking is filed, the levying officer shall serve a copy of the undertaking personally or by mail on the creditor and on the debtor.

Comment. Section 706.640 is new. Under former Section 711, the third person was required to serve a copy of the undertaking on the creditor.

CROSS-REFERENCES

Defined terms

Court § 680.

Creditor § 706.020

Debtor § 706.030

Levying officer § 680.

Manner of service §§ 684.010-684.070

§ 706.650. Effective date of undertaking

706.650. The third person's undertaking becomes effective when the property described therein is released pursuant to this article.

Comment. Section 706.650 supersedes former Section 713-1/2 which provided that the undertaking was effective 10 days after service on the creditor or, if an objection to the undertaking was made, when a new undertaking was given. Under Section 706.650, the undertaking is effective when it achieves its purpose--the release of the property it describes--by which time the period for making an objection will have expired. See Section 706.760.

§ 706.660. Release of property pursuant to undertaking

706.660. Subject to Section 684.040 governing extension of time where notice is served by mail, the levying officer shall release the property described in the third person's undertaking in the manner provided by Section 706.170 promptly after the expiration of 10 days from the date the notice of filing with the court and the copy of the undertaking were served on the creditor pursuant to subdivision (b) of Section 706.630, unless the creditor objects to the undertaking.

Comment. Section 706.660 supersedes a portion of the seventh paragraph of former Section 689 and a portion of former Section 713-1/2.

CROSS-REFERENCES

Defined terms

Creditor § 706.020

Levying officer § 680.____

Objection to undertaking § 706.760

Undertakings, general provisions §§ 706.710-706.800

Article 7. Undertakings

§ 706.710. Application of article

706.710. The provisions of this article apply to undertakings given pursuant to this chapter.

Comment. Section 706.710 makes clear that the provisions of this article govern only undertakings given in connection with third-party claims and related procedures. Former Sections 689 and 689b (third-party claims) incorporated certain procedural provisions applicable to attachment, whereas former Sections 711-1/2 through 713-1/2 (undertaking to release) contained detailed provisions relating to undertakings.

406/480

§ 706.720. Definitions

706.720. As used in this article:

(a) "Beneficiary" means the person to be benefited by an undertaking.

(b) "Principal" means the person who files an undertaking.

Comment. Section 706.720 is the same as Section 498.020 (attachment).

968/620

§ 706.730. Number of sureties

706.730. An undertaking shall be executed by two or more personal sureties or by one corporate surety possessing a certificate of authority from the Insurance Commissioner authorizing it to write surety insurance defined in Section 105 of the Insurance Code.

Comment. Section 706.730 continues the requirement of two or more personal sureties found in several provisions of former law. See the first paragraph of former Section 689, former Section 710c; see also former Section 689b(9). Section 706.730 also makes clear that a corporate surety may be used in lieu of personal sureties. See Section 1056.

968/622

§ 706.740. Estimate of value of property

706.740. If the amount of an undertaking depends upon the value of property or an interest therein, the undertaking shall include the principal's estimate of the market value of the property or interest.

Comment. Section 706.740 is the same in substance as Section 489.050 (attachment). See Sections 706.160 (amount of undertaking for claim of ownership or right to possession), 706.620(b) (amount of undertaking to release property).

100/882

§ 706.750. Undertaking effective upon filing

706.750. Except as otherwise provided by statute, an undertaking is effective upon filing.

Comment. Section 706.750 is derived from a portion of Section 489.060 (undertakings in attachment). The introductory clause recognizes that an undertaking to release property is effective when the property is released. See Section 706.650.

968/646

§ 706.760. Beneficiary's objection to undertaking

706.760. (a) The beneficiary may object to an undertaking on either or both of the following grounds:

- (1) The sureties are insufficient.
- (2) The amount of the undertaking is insufficient.

(b) The objection to an undertaking shall be made by noticed motion within 10 days after service of a copy of the undertaking on the beneficiary. If no objection is made within such time, the beneficiary is deemed to have waived any objections. The notice of motion shall specify the precise ground for the objection and shall be served personally or by mail on the principal and the levying officer.

(c) If the objection is made on the ground that the market value of the property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the notice of motion shall state the beneficiary's estimate of the market value of the property.

Comment. Section 706.760 continues the substance of Sections 489.070 and 489.080 (attachment) which were incorporated by former Sections 689 and 689b, and supersedes a portion of former Section 711-1/2. The time for objecting to an undertaking has been changed from five days after notice of receipt of the undertaking (see the third paragraph of former Section 689) to 10 days after service.

§ 706.770. Hearing on objection

706.770. (a) Unless the parties otherwise agree, the hearing on an objection shall be held not less than two nor more than five days after service of the notice of motion.

(b) The hearing shall be conducted in such manner as the court determines is proper. The court may permit witnesses to attend and evidence to be procured and introduced in the same manner as in the trial of a civil case. The court may appoint one or more disinterested persons to appraise property for the purpose of ascertaining its value.

(c) If the court determines that the undertaking is insufficient, the court shall specify in what respect it is insufficient and shall order that an undertaking with sufficient sureties and in a sufficient amount be filed within five days. If the order is not complied with, all rights obtained by filing the original undertaking immediately cease.

(d) If the court determines that an undertaking is insufficient, the undertaking remains in effect until an undertaking with sufficient sureties and in a sufficient amount is filed in its place.

(e) If the court determines that an undertaking is sufficient, no future objection to the undertaking may be made except upon a showing of changed circumstances.

(f) If the beneficiary objects to an undertaking on the ground that the amount is insufficient to indemnify the beneficiary, the court shall order the amount of the undertaking increased to the amount it determines to be the probable recovery of the beneficiary if the beneficiary ultimately prevails in proceedings to enforce the liability on the undertaking.

Comment. Section 706.770 continues the substance of Section 489.090 (attachment) which was incorporated by former Sections 689 and 689b, and supersedes portions of former Sections 712 and 712-1/2 (undertaking to release property). Subdivision (f) is derived from Section 489.220(b) (undertakings in attachment).

§ 706.780

968/706

§ 706.780. Acceptance of beneficiary's estimate of value

706.780. If an objection to an undertaking is made on the ground that the market value of property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the principal may accept the beneficiary's estimated value of the property and immediately file an increased undertaking based on such estimate. In such case, no hearing may be held on the objection, and the beneficiary is bound by the estimate of the value of the property in any hearing on the sufficiency of the undertaking.

Comment. Section 706.780 continues the substance of Section 489.100 (attachment) which was incorporated by former Sections 689 and 689b, and supersedes portions of former Sections 711-1/2 and 712-1/2 (undertaking to release property).

968/714

§ 706.790. Liability of surety

706.790. (a) Notwithstanding Section 2845 of the Civil Code, a judgment of liability on an undertaking shall be in favor of the beneficiary and against the sureties and may be enforced by the beneficiary directly against the sureties. The liability of a surety is limited to the amount of the undertaking. Nothing in this section affects any right of subrogation of a surety against the principal.

(b) The beneficiary may enforce the liability of sureties on the undertaking by a motion in the court pursuant to Section 1058a without the necessity of an independent action.

Comment. Subdivision (a) of Section 706.790 is the same as Section 489.110 (attachment). See Section 1058 and the Comment to Section 489.110. Subdivision (b) makes clear that a judgment creditor or third person who is a beneficiary of an undertaking given pursuant to this chapter may enforce the liability of sureties by motion in the court having jurisdiction of the enforcement proceedings.

968/725

§ 706.800. Undertaking filed in action

706.800. If an undertaking has been filed with a levying officer pursuant to this chapter, and the undertaking remains in the levying

officer's possession when the writ is to be returned, the levying officer shall file the undertaking with the court at the time the writ is returned.

Comment. Section 706.800 is new. Former law did not provide for the disposition of the undertaking. In cases where an undertaking is given and a hearing is held, the levying officer will file the undertaking with the court prior to the hearing. See Section 706.330(c).