#39.90 10/31/72

First Supplement to Memorandum 72-68

Subject: Study 39.90 - Claim and Delivery Statute

Attached to this memorandum are additional comments received concerning the tentative recommendation relating to claim and delivery. Included are the comments of the Ad Hoc Committee of the State Bar. (Exhibit II.) We consider all of the comments in the section-by-section analysis which follows.

Section 511.060. The State Bar (Exhibit II, p. 1) suggests that only a judge--not any judicial officer--be authorized to perform the duties required by this chapter. The staff notes that the United States Supreme Court just this past year held that a court clerk qualifies as a magistrate authorized to issue a misdemeanor warrant. Our statute does not go that far and we believe that a court commissioner can perform the tasks required by this chapter adequately.

Section 511.100. The State Bar (Exhibit II, pp. 1-3) objects to the definition of "probable validity" but we are not sure what they would substitute in its place. They ask: "Does 'more likely than not' involve a value judgment that does not require a plaintiff to set forth evidence which would, if true, establish his burden of proof on each fact essential to maintaining his claim?" Our answer is "no"; this test would clearly seem to require the plaintiff to establish a prima facie case. They also ask: "Does it permit a plaintiff to go forward [i.e., obtain relief?], even though the defendant might have set forth evidence that could sustain a defense?" Our answer is "a qualified yes"; the plaintiff can obtain relief if, despite the defendant's evidence, the court believes that the plaintiff will more likely than not

prevail. For example, the court may not believe the defendant's testimony. The State Bar seems to recognize this possibility but suggests we be "more explicit." What does the Commission want to do? We could simply add a Comment to the effect that the plaintiff must at least establish a prima facie case and the judicial officer must then consider the relative merits of the positions of the respective parties and make a determination of the probable outcome of the litigation.

Section 512.020. The State Bar (Exhibit II, p. 2) suggests that the introductory clause of this section be revised. The staff suggests that their objection be satisfied by making the present section subdivision (a), renumbering subdivisions (a) through (f) as (1) through (6), and adding subdivision (b) as follows:

> (b) The requirements of subdivision (a) may be satisfied by separate affidavits filed together with the application.

The State Bar (Exhibit II, p. 2) and another commentator (Exhibit I) suggest that it is "unnecessary to state the name and address of the person the plaintiff designates to accept service of pleadings. . . . The name, address and telephone number of the plaintiff or his attorney is required on all pleadings in any event. . . ." Does the Commission accordingly wish to delete Sections 512.020(e), 512.040(d), and 512.080(e)?

Section 512.030. On the basis of an oral suggestion by the Legislative Counsel's Office, we suggest that the introductory clause be revised as follows:

> 512.030. No writ shall be issued under this chapter except after a hearing by a judicial officer. Prior to the hearing, the defendant shall be served with all of the following:

This is simply an editorial change to make clear that writs may be issued only after a noticed hearing; this was implicit in the procedures provided but should be made explicit.

Section 512.050. The policy behind this section is critized again in Exhibit I. See also Memorandum 72-68, p.4. If no change in substance is desired, the staff suggests that this section be revised as follows:

> 512.050. Each party shall file with the court and serve upon the other party within the time prescribed by rule any affidavits and points and authorities intended to be relied upon at the hearing. The judicial officer shall make his determinations upon the basis of the pleadings and other papers in the record provided that, upon good cause shown, he may receive and consider additional evidence and authority produced at the hearing or he may continue the hearing for the production of such additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.

Section 512.060. The State Bar (Exhibit II, pp. 3-4) suggests that the court be given broad discretion to consider factors other than probable validity in determining whether a writ should issue. This issue was previously discussed and the idea rejected, but you may wish to reconsider it.

Section 513.010. The State Bar (Exhibit II, pp. 4-5) has three comments here. The first (A) and last (C) are related. Our intent here is to simply incorporate the general procedures for issuance of a temporary restraining order. We have, however, stated certain grounds for issuance and certain limitations on the provisions of the order (see Section 513.020). Subject to these exceptions, we believe the general procedures are adequate and will continue to be adequate and that the statute and Comments are clear enough as to what this statute does.

Both the State Bar (Exhibit II, pp. 4-5) and Exhibit III question our treatment of credit cards. The staff believes that we could avoid controversy by including a section in our recommendation permitting ex parte seizure of credit cards. A section accomplishing this purpose is set out in Exhibit V.

Section 513.020. The State Bar (Exhibit II, pp. 5-7) seems ambivalent concerning this section. As we understand them, they would seem to prefer

to give the court great discretion concerning the ambit of the TRO. They would, in effect, delete the material following the semicolon in subdivision (a). We are not sure how they would treat raw materials and work in process. Section 513.020 now merely lists certain things which the TRO may do. It says nothing about raw materials and the court would be on its own if the plaintiff asked to have certain processing halted or whatever. Such broad discretion seems to be what the State Bar desires, so we frankly do not understand their suggestion that inventory include work in process or raw materials.

Exhibit IV also comments on the problem of permitting sales in the ordinary course of business. The activities described here we would not characterize as in the ordinary course of business, but the fact still remains that, if the defendant is left in possession, abuses of the order can occur. This, however, seems to be an unavoidable consequence of the constitutional requirements stated by the courts.

Section 514.010. The State Bar comments with respect to this section are no longer applicable. (See Exhibit II, p. 7,) We had already revised this section to remove the objectionable clause before receiving their comments.

Section 514.020. The staff has no objection to the State Bar's suggestion here. (See Exhibit II, p. 7.) Their suggestion could be accomplished as follows:

> 514.020. . . . If no one is in possession of the property at the time of levy, the levying officer shall serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service shall be accomplished in the manner provided by Chapter 5 (commencing with Section 1010) of Title 14 of this part. If the defendant has not appeared in the action, service shall be accomplished in the manner provided for the service of summons and complaint by [this code] [Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 of this part].

Section 514.030. The State Bar (Exhibit II, p. 7) suggests that the defendant may have to pay the sheriff's fees before obtaining redelivery. We doubt that, in practice, this will ever occur because the sheriff will demand his fees in advance before he does anything. The section is phrased in the way it is: (1) to continue existing law (see Section 516) and (2) to foreclose the objection of the levying officers that they do not want to give up possession until they are paid their statutory fees.

The State Bar suggests that subdivision (a) of this section be reworded in part as indicated on page 8 (Exhibit II). The staff has no objection to the changes suggested (after correction of the typographical errors). The suggestion, although concededly more verbose, has the virtue of being more explicit.

Finally, the State Bar (Exhibit II, pp. 8-9) suggests that, in some undefined instances, the levying officer be permitted to retain custody of the repossessed goods. In the absence of any more definite reasons for this suggestion, the staff is opposed to this suggestion because it would simply increase the levying officer's fees for no very good reason. We have heard of no complaints with the present practice, and the defendant is protected by the plaintiff's bond where the plaintiff takes and keeps possession.

Section 515.010. We do not understand the State Bar's first comment on this section. (See Exhibit II, p. 10.) Although generally the court will require an undertaking before granting a TRO, the general statute does not require one. See Code Civ. Proc. § 529. We think an undertaking should always be required and have therefore so provided in this section. The comment regarding redelivery seems appropriate and could be satisfied by rephrasing the first sentence of subdivision (a) as follows:

515.010. (a) The judicial officer shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court a written undertaking that, if the plaintiff fails to recover judgment in the section, the plaintiff will return the property to the defendant, if return thereof be ordered, and will pay all costs that may be awarded to the defendant and all damages referred to in subdivision (b), not exceeding the amount of the undertaking. . . .

Section 515.020. We think the statute is clear that the time of levy of a writ of possession is the time that the sheriff takes possession of the property. See Section 514.020. This gives rise to the potential problem suggested by the State Bar on page 10 of Exhibit II. That is, the defendant may not get actual notice of the levy until more than 10 days after the levy takes place. The staff believes that this would be a rare occurrence at most and, because we have eliminated all ex parte repossession, there should be no case where the defendant has not been given notice of the potential taking prior to levy. Hence, the defendant should always have an opportunity to post an undertaking prior to levy and the 10-day period after levy is simply a bonus period. We have, accordingly, little sympathy for the State Bar complaint here. Does the Commission wish to make any change.

The second sentence of subdivision (b) contains an erroneous reference to the now deleted order to show cause procedure. The State Bar also suggests that the defendant be permitted to serve the undertaking in some way other than by mail. (See Exhibit II, p. 10(B).) The staff suggests that the second sentence of subdivision (b) be revised as follows:

515.020. . . . (b) . . . A copy of the undertaking shall be served on the plaintiff and proof of such service shall be filed with the court at the time the undertaking is filed. Service may be accomplished in the manner provided for service of notices by Chapter 5 (commencing with Section 1010) of Title 14 of this part.

If the State Bar's suggestion for revision of subdivision (a) of Section 514.030 is adopted (and we think it should be), the State Bar's last suggestion concerning Section 515.020 (see Exhibit II, p. 11) will also be satisfied.

Section 515.030. The problem raised by the State Bar (Exhibit II, p. 11) concerning the reference to levy is more acute here. However, the statute does not now require service of the writ and undertaking on the defendant in all situations; hence, we cannot always tie the period for filing exceptions to the time of service of the undertaking. Our thought was that the defendant generally would be the person in possession at the time of levy and, when he was not, he would receive notice promptly. Perhaps the best way to alleviate the problem is to extend the time limit in subdivision (a) from five to 15 or 20 days. What is the Commission's desire?

Section 516.020. Please note the comments in Exhibit I, page 2 concerning the broad discretion given the Judicial Council to prescribe forms. The staff believes that it is highly desirable that there be statewide uniformity in the forms and that the Judicial Council will properly fulfill its responsibilities here. Finally, as a practical matter, the Judicial Council's legislative representative will ask for a provision substantially the same as that provided if we do not include this provision in our bill. We therefore recommend that no change be made in this section.

Section 516.030. The State Bar (Exhibit II, p. 11) raises an issue here that was previously considered and the language that they cite was rejected as unnecessary and undesirable.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

First Supplement to Memorandum 72-68

EXHIBIT I

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DANIEL I. REITH
ROBERT R. WELLINGTON

AREA CODE 408
TELEPHONE 375-3181

October 24, 1972.

California Law Revision Commission
School of Law
Stanford, California 94305

Re: Tentative Recommendation on Claim and Delivery Statute

Gentlemen:

I approve of your recommendation to eliminate completely pre-hearing seizure of personal property and substituting therefor temporary restraining orders to assure the availability of the property for seizure after a hearing. My comments are therefore limited to a few small points which seem to complicate the procedure unnecessarily.

First, it seems unnecessary to state the name and address of the person the plaintiff designates to accept service of pleadings in the application, notice of application and writ, as required in proposed Sections 512.020(e), 512.040(d), and 512.070(a). The name, address and telephone number of the plaintiff or his attorney is required on all pleadings in any event, and if it is felt that defendants need some special instructions to direct their pleadings to the plaintiff or his attorney at the address given, then the printed form should simply make reference to the name and address which appears in the upper left corner of the forms.

Secondly, I do not believe that a defendant should be required to file an affidavit in opposition to the plaintiff's application for issuance of the writ of possession, but should simply be permitted to appear at the hearing and present evidence. I realize that it is a convenience and aid for the court, the plaintiff and the plaintiff's attorney to have an affidavit outlining the defendant's contentions, but I believe that a defendant should be permitted to appear and tell his story without necessarily going through any paperwork. This is particularly important since the hearing will be held on fairly short notice. I think it is particularly burdensome to require service of all affidavits sometime in advance of the hearing as contemplated by proposed Section 512.050, since very often the defendant will have little time to contact an attorney to prepare a fairly simple affidavit, with more time required to gather documents and prepare affidavits for other witnesses. In short, I feel that a hearing should be just that, an occasion when testimony will be presented to a judge. Obviously, most attorneys for defendants will want to get their

side of the story before the judge in advance of the hearing and will prepare affidavits in support of their contentions.

Finally, and I think most importantly, I object to proposed Section 516.020 if, as the comment indicates, "the Judicial Council has complete authority to adopt and revise forms as necessary and may require additional information in the forms or may omit information from the forms that it determines is unnecessary." It appears to me that the proposed statutes adequately describe the items which should be contained in such forms, and the Judicial Council's function should simply be the preparation of uniform forms to present the required material, with adequate space for the attorneys to set forth the specific facts of the case where appropriate. Practicing attorneys are generally unhappy over the job that the Judicial Council has done in preparing some of the domestic relations forms, and it seems inappropriate to permit the Judicial Council to have what amounts to the legislative power to amend the statutes by either requiring additional information beyond what the statute requires or reducing the information required by statute by the simple process of providing no space for the information on the forms.

Very truly yours,

Daniel I. Reith

DIR/mk

First Supplement to Memorandum 72-68

EXHIBIT II

AD HOC COMMITTEE ON ATTACHMENTS

COMMENTS REGARDING THE LAW REVISION COMMISSION TENTATIVE RECOMMENDATION RELATING TO THE CLAIM & DELIVERY STATUTE DATED SEPTEMBER, 1972

SECTION	COMMENTS
511.060	As our courts have been pointing out in their recent decisions, prejudgment deprivations of property are most serious. They should be treated as being of sufficient importance to justify the attention of a judge rather than a "judicial officer" which may include "any commissioner or other officer appointed by the trial court to perform the duties required by this title."
511.100	This section defines the concept of "probable validity." We have sometimes questioned the propriety of attempting to define this concept. The proposed section proposes to define that as "more likely than not" that plaintiff will prevail. Does "more likely than not" involve a value judgment that does not require a plaintiff to set forth evidence which would, if true, establish his burden of proof on each fact essential to maintaining his claim? Does it permit a plaintiff to go forward, even though the defendant

might have set forth evidence that could sustain a defense? While it would seem appropriate to have the court balance conflicting evidence for the purpose of reaching an opinion as to the truth, to the extent possible, wouldn't it be better to be a little more explicit about what is meant by probable validity, if it is to be defined at all. Further thoughts on this subject are contained in the comments regarding Section 512.060, infra.

512.020 This section seems to state that the application itself must include all of the requirements set forth in the section. It seems that the affidavits in support of that application might just as well include some of those items. The Law Revision Commission does indicate that the application may "of course, be supported by a separate affidavit," but that "of course" conflicts with the precise words of the section itself. Perhaps it would be better to amend this to read: "The application and the supporting affidavits shall be executed under oath and shall include all of the following:"

512.040(d) This section should not be necessary, since the information must be contained in the

application and the application must be served with the Notice.

512.060

Pursuant to this section, the issuance of a writ of possession is dependent entirely on a finding of probable validity of the plaintiff's claim. While a finding of probable validity is undoubtedly required by the Blair, Fuentes and Randone decisions, it would be wise to broaden the court's discretion and permit it to take into account other factors such as the relative harm to the parties if the writ were or were not issued and the adequacy of damages as a remedy. The Ad Hoc Committee elaborated on this concept (as applied to attachment) in its Report dated March 15, 1972, part IV-B.

An additional problem implicit in this area is the one discussed by Professor Warren in his background study. That is, should a judicial repossession be permitted where the creditor acquired his security interest on account of a loan, rather than on account of a purchase money transaction. Professor Warren points out that a debtor ought to be able to deal with his property in any manner that he wishes, including giving security interests therein. The counter

argument is that sophisticated creditors will be able to shape transactions so that they always take security interests in furniture, etc. and many debtors may not be able to resist giving that sort of security, as a practical matter. However, if the approach of the Ad Hoc Committee, as outlined above, is followed, the court will be able to consider this issue.

513.010 A. The judicial officer should be required to find probable validity on the basis of the plaintiff's papers before issuing a t.r.o. We question that the procedure will be constitutional if that sort of finding is not made, since the t.r.o. will definitely be interfering with the debtor's right to possession and use of his property. Moreover, the court should also, to the extent possible, make the determination of "injury" as suggested in our comments to 512.060. This is not an extreme burden to impose upon the plaintiff, since only his papers will be in question.

B. Should Section 510(c)(2) of the present law, which reads "The property consists of one or more negotiable instruments or credit cards," be eliminated? The Commission

has suggested that it is not necessary to retain that concept. However, notice that the proposed section says nothing about the possibility that the property will be used in such a way as to detriment the plaintiff. (See discussion regarding 513.020, infra.)

C. Perhaps the Commission means to implicitly incorporate the law relating to temporary restraining orders into this area. However, it does not explicitly do so. Therefore, shouldn't this section provide that the plaintiff must submit an undertaking before the order issues?

513.020(a) The temporary restraining order permitted by this section may prohibit the defendant from transferring any interest in the property, "provided, however, if the property is inventory or farm products held for sale or lease, the order shall not prohibit the defendant from dealing with the property in the ordinary course of business." We are generally in accord with the purpose of this proviso, which is to preclude the possibility that a temporary restraining order prohibiting transfer of property would seriously impair an entire business. However,

one can imagine a case where the plaintiff's claim is so clearly meritorious and the consequences of disposal of the property are so severe that a restraint on transfer of the property would be justified even though it interfered with the defendant's business operations. For example, consider a case where a travel agent is in wrongful possession of blank airplane tickets which could be wrongfully utilized to provide thousands of dollars worth of airplane transportation. Accordingly, it would be preferable if there were no absolute ban on the issuance of a restraining order involving property held for resale. Instead, this should be a factor for the court to take into account. Moreover, if the statute prohibits injunctions against the sale of "inventory" in the ordinary course of business, that ban should not be as limited as the Commission's recommendation. In this regard, "inventory" as defined in Section 511.050 does not include "raw materials, work in process, or materials used or consumed in" the defendant's business because to quote the comment, such property "would not be sold in the ordinary course of business." However, a manufacturer can be just as badly hurt by a restraining order

which prohibits him from processing raw materials or other property as a retailer can be hurt by a prohibition against the sale of goods. This problem could be solved by broadening the definition of "inventory" to parallel Section 9109 of the Commercial Code which the Commission quotes in its comment to Section 511.050.

514.010(a) The phrase "upon good cause shown," appears in the law recently adopted by the legislature. However, upon good cause shown by whom, and when, and how, and to whom, and at whose discretion?

514.020 Is it necessary to serve this document in the manner of serving a summons and complaint? Couldn't it be served in that manner, or if an appearance has been made, in the manner provided in Section 1010 et seq. What would happen if the sheriff could not serve it in the manner provided for summons and complaint in the usual ways, and must publish it, etc.? (cf. 514.040)

514.030 A. The defendant should not have to pay the sheriff's expenses before his property is delivered back to him, but this section would contemplate that possibility.

B. Also, wouldn't the section be more accurate,

though admittedly more verbose, if the second sentence were replaced with the following: "Except as otherwise provided by Section 514.050:

(1) If an undertaking for redelivery is not filed and plaintiff's sureties are not excepted to, the sheriff shall deliver the property to plaintiff ten days after levy of the writ of possession, upon receiving his fees for taking and necessary expenses for keeping the property.

(2) If an undertaking for redelivery is filed and defendant's sureties are not expected to, the sheriff shall redeliver the property to defendant upon expiration of the time to so except.

(3) If the sureties of plaintiff or defendant are expected to, the sheriff shall not deliver or redeliver the property until the time provided in Section 515.030."

C. This section provides that the levying officer after the passage of a relatively brief period of time shall deliver the property to the plaintiff. While we recognize that this is the historical function of claim and delivery, would it not be more appropriate, at least in some cases, simply to have the

levying officer retain possession of the property pending the outcome of the case. At the very least, this should be an option open to the court in issuing the writ of possession, and delivery of the property to the plaintiff should be ordered only upon an appropriate showing of his need for it pending trial. In addition, if this suggestion is adopted, we would suggest that appropriate amendments be made to Section 515.020(b), which would allow the defendant to file an undertaking in order to obtain redelivery of the property at any time prior to trial in those cases where the property remains in the possession of the levying officer.

If this proposal is accepted, we recognize that this aspect of Claim & Delivery would become much like an attachment. But since the courts are requiring us to rework the area of prejudgment remedies, perhaps this will be an excellent opportunity to meld concepts, rather than continuing operation in rigid historical categories. Thus, we have suggested some further overlap of the traditional concepts of injunction, attachment and claim & delivery.

515.010

This section seems to contemplate that the temporary restraining order will require a bond, but that is not specifically provided for in the statute. See, comments to 513.010. Also, shouldn't the undertaking expressly be for "redelivery" as is provided by the current law?

515.020(b)

A. Should defendant's bond be conditioned on delivery? The defendant's filing of an undertaking is tied into the day of "levy of the writ of possession." But, when is the writ of possession actually levied? Is it on the date that the property is taken, or is it the date that service of the writ is made upon the defendant? In this regard, Section 514.020 (the section providing for service of the writ) seems to suggest that levy is actually the date that the property is taken into the sheriff's possession. However, if that is the case the defendant could conceivably have the obligation of filing his redelivery undertaking before he has even received the levy papers and possibly before he knows of the levy.

B. Shouldn't the defendant be able to serve the plaintiff in some other manner, if he wishes to do so?

515.020 [general]	Shouldn't this section, or some other section, expressly provide for redelivery of the property to the defendant?
515.030	This section has the same problem as to what constitutes "levy."
516.030	Should this be expanded to contain the exemption for those acting in a representative capacity, which appears in Section 437c of the Code of Civil Procedure? That is, should the following language be inserted, "when the defendant appears in a representative capacity, such as a trustee, guardian, executor, administrator, or receiver, the affidavit in opposition by such representative may be made upon his information or belief."

First Supplement to Memorandum 72-68

EXHIBIT III

The following comment on the tentative recommendation relating to the claim and delivery statute was received from Clyde E. Miller, San Francisco attorney:

> Our firm does a lot of credit card collection work. Very often a debtor will continue to use the credit card to substantially increase the debt even after he has been served with Summons & Complaint. An attachment of the credit card itself would be beneficial. We now use the T.R.O. and order to show cause however it is not as satisfactory. The civil fraud situation might come under the "exceptional circumstances" case, however should give rise independently to the Summary remedy of attachments. Thirty days to answer a complaint, also, is too long.

First Supplement to Memorandum 72-68

EXHIBIT IV

The following comment on the tentative recommendation relating to the claim and delivery statute was received from Max O. Hogue, Credit Manager for RCA Distributing Co., Los Angeles:

> In our business merchandise can disappear over a weekend for various reasons.
>
> Prior to 1971, when we strongly suspected such action might occur, we would surprise the dealer with an attachment before he had the opportunity to dispose of the merchandise. Now that the defendant knows there will be an attachment in a few days, occasionally one of them will dispose of the merchandise before the attachment can be levied.
>
> Under 513.020 (a) the dealer can continue to sell inventory "in the ordinary course of business". Unless he is required to keep his selling price at least as high as his cost and unless he is required to keep the money from such sales available, there will be some remarkable "sales" during this period and creditors will take some sizable losses. I recall one such instance not too many years ago. The debtor held a "sale" over the weekend--sold some TV's for as little as $50.--everything for cash. Then he said he went to Las Vegas to try to double the money to pay his creditors. Unfortunately, he lost it all.
>
> Possibly the temporary restraining order can be a little more restrictive on the defendant and possibly the time lapse from the time legal action is started until the attachment is finally levied can be reduced a few days.

First Supplement to Memorandum 72-68

EXHIBIT V

Civil Code § 1747.95. Ex parte repossession of credit card under claim and delivery procedure

1747.95. In lieu of a temporary restraining order issued pursuant to Section 513.010 of the Code of Civil Procedure, the judicial officer may issue a writ of possession in an action to recover possession of a credit card where he determines that the holder of such card threatens to use it to the detriment of the plaintiff.

Comment. Section 1747.95 preserves the substance of subdivision (c) of former Section 510 of the Code of Civil Procedure insofar as it provided an ex parte procedure for the repossession of credit cards. See Cal. Stats. 1972, Ch. 855.