

Memorandum 78-63

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

Attached to this memorandum is a draft of the chapter on third-party claims to be included in the Enforcement of Judgments Law. This draft incorporates all Commission decisions to date. We intend this to be the final review of this chapter until the entire Enforcements of Judgments Law is submitted for approval.

The substance of the third-party claims chapter is summarized in the preliminary text accompanying the draft statute. The staff has the following matters to discuss:

§ 703.130. Third-party claims to property seized to satisfy tax liability

The staff was asked to investigate whether there is any policy reason for conducting third-party claim proceedings only in the superior court in cases involving enforcement of a tax liability. We have discovered no particular reason for this provision in existing Section 689d.

Code of Civil Procedure Section 86(a)(1) confers jurisdiction on municipal and justice courts in civil cases where the amount in controversy does not exceed \$5,000 "except cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, except such courts shall have jurisdiction in actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant." In several other respects, the tax collectors may employ the services of officers of the municipal or justice courts. For example, the warrant issued pursuant to Revenue and Taxation Code Section 26191 (bank and corporation tax) may be levied by a sheriff, marshal, or constable. Moreover, Revenue and Taxation Code Section 26251 permits the Franchise Tax Board to bring suit "in the courts of this state" to collect a delinquent tax. Clearly, there is no consistent policy of hearing tax-related matters solely in superior court. In any event, the determination of third-party claims is not essentially a matter involving the tax laws with which municipal and justice courts would probably be unfamiliar. There may be some issues arising under the tax laws, such as whether the tax lien has priority over the third person's interest or whether the appropriate administrative procedure for handling the third-party claim was followed.

The staff discussed this matter with three attorneys involved in collecting taxes. The consensus is that there is no identifiable policy reason for hearing third-party claims in superior court although it is more convenient because they have to deal with only one court. This is not really an important issue, however, because very few third-party claims are made in these cases.

Seeing no obstacles to permitting other courts to determine third-party claims in such cases, we have revised Section 706.130(b) in accordance with the suggestion made at the May meeting by deleting the reference to the superior court. Subdivision (c) has also been revised to make the place of filing the claim more specific.

The staff proposes to delete the language in brackets in subdivision (a) of Section 706.130 referring to the Revenue and Taxation Code and the Unemployment Insurance Code because similar provisions also appear in the Public Resources Code. See, e.g., Pub. Res. Code §§ 3423, 3772.2. We see no reason to distinguish among the various types of taxes because of the codes under which they arise.

§ 706.460. Burden of proof

The Commission requested the staff to consider whether it would be appropriate to place the burden of proof in a hearing on a third-party claim on the judgment creditor if the property has been levied upon in the possession of some person other than the judgment debtor. This would be a departure from existing law which places the burden on the third person in all cases. The Commission has previously decided to place the burden on the judgment creditor where the third person is claiming a security interest in the property.

The staff believes that it is unnecessary to shift the burden in cases where the property is in the third person's possession. A garnishee may refuse to turn property over to the levying officer if the garnishee claims the right to possession and may refuse to pay a debt if the debt is denied. The judgment creditor may then proceed by way of a creditor's suit in which the burden is on the creditor.

A nongarnishee third person is not in a position to resist the levy, but we do not see this as a significant set of cases. Most nongarnishee third persons will be secured parties, and the Commission has already decided to shift the burden to the judgment creditor in such

cases. Another typical situation involving nongarnishee third persons occurs when a joint bank account is levied upon. In this case, the judgment creditor is required to furnish a bond in twice the amount of the judgment or the amount sought to be applied to the judgment in order to indemnify the joint account holder. We think it is probably a rare case in which a levying officer levies on tangible personal property in the hands of one third person which is claimed by another third person. In sum, the magnitude of the problem does not appear to justify further tinkering with the existing allocation of the burden of proof.

To shift the burden of proof would also present some procedural difficulties because the manner of levy would have to be stipulated to or determined at the hearing before the burden of proof could be placed. It would be possible to require the levying officer to file some sort of statement with the court which indicated the manner of levy on the property which is the subject of the third-party claim, but that too involves additional administrative costs.

Switching the burden to the judgment creditor where the third person claims a security interest is in part justifiable by the fact that the terms of the security interest are a matter of prior written contract and are filed with the levying officer and served on the judgment creditor along with the third-party claim. However, it is not nearly as likely that other types of interests in personal property for which a third-party claim may be made will have been reduced to a reliable writing.

Respectfully submitted,

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THIRD-PARTY CLAIMS AND RELATED PROCEDURES

Existing Law

Third-Party Claims

Sections 689 and 689b¹ provide summary special proceedings permitting a person other than the judgment creditor or the judgment debtor to claim certain interests in personal property² that has been levied upon.³ Section 689 applies where the third person claims title and the right to possession of the property. Section 689b applies where the

1. Except as otherwise noted, all statutory citations are to the Code of Civil Procedure.
2. 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). 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 (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 for the provision for a sheriff's jury. 1891 Cal. Stats., Ch. 32, § 1. In light of this 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. The third-party claims procedure also applies to the determination of adverse claims in attachment (see Section 488.090) and claim and delivery (see Section 514.050). In at least one case, Section 689 was applied in an unspecified manner to a dispute between an innkeeper asserting a lien on a violin and the owner even though there was no levy and no levying officer was involved. See *Rudolph Wurlitzer Co. v. Farb*, 120 Cal. App. Supp. 773, 774, 6 P.2d 358, 358 (1932).

third person claims a security interest based on a conditional sale or chattel mortgage. In general, these procedures are parallel, but there are some significant differences.

Under both procedures, once property has been levied upon but before it has been sold or otherwise disposed of,⁴ the third person may file a claim with the levying officer who then serves a copy of the claim on the judgment creditor by certified or registered mail. If the judgment creditor does not respond within five days after receipt⁵ of the claim and the demand for an undertaking, the property is released from the levy.

If the third person claims title and right to possession under Section 689, the judgment creditor may maintain the levy by posting with the levying officer an undertaking in twice the value of the property⁶ which indemnifies the third person for any loss caused by the levy.⁷

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4. 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).
 5. Section 689 requires an undertaking "within five days after written demand . . . made by registered or certified mail," whereas Section 689b requires the undertaking or deposit "[w]ithin five days after receipt by the plaintiff or his attorney of such officer's demand." It appears that the practice is to allow five days after the date of receipt of the demand as shown by the return receipt. See Marshal's Manual of Procedure §§ 533.2, 542.2 (n.d.).
 6. The procedures for objecting to the sufficiency of sureties and for the justification of sureties in attachment proceedings are incorporated by the third paragraph of Section 689 and the second paragraph of subdivision (9) of Section 689b. The fourth and fifth paragraphs of Section 689 also provide an appraisal procedure for determining an objection to the amount of an undertaking to indemnify an unsecured third-party claimant. Subdivision (9) of Section 689b 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.
 7. Under the second paragraph of Section 689, there is no liability on the undertaking if the property is required by law to be registered or recorded in the name of the owner and, at the time of levy, the

Under Section 689b, a third person's claim under a conditional sale or chattel mortgage is required to include a demand for payment of all sums due or to accrue under the agreement, plus interest to date of tender. In order to maintain the levy, the judgment creditor must either deposit with the levying officer the amount demanded or file with the levying officer an undertaking and a verified statement contesting the validity of the third person's contract or mortgage. Whichever course is chosen, the property is sold free and clear of any claim or lien of the third person.⁸

The judgment creditor can initiate this procedure by serving a demand on the secured party that a claim be made and, if the secured party does not make a claim within 30 days after being served with the demand, the property may be sold free of any claim or lien of the third person.⁹

Within 15 days after the third-party claim is filed with the levying officer, either the judgment creditor or the third person may petition for a hearing to determine the validity of the claim.¹⁰ This may be done whether or not an undertaking is filed in response to a claim under Section 689, or an undertaking is filed or a deposit is made under Section 689b. The court may order the sale of perishable property and may stay the sale, transfer, or other disposition of the property while the proceedings are pending. The hearing is required to be held within 20 days from the filing of the petition unless a continuance is granted. Ten days' notice must be given the levying officer and the judgment creditor or third person, whichever one is not the petitioner. The judgment debtor is not required to be given notice.¹¹ The third person has the burden of proof at the hearing. At the conclusion of the

judgment debtor was the registered or recorded owner, so long as the judgment creditor relied in good faith on the registered or recorded ownership in making the levy.

8. Section 689b(9), 689c.

9. Section 689b(8).

10. Sections 689, para. 8, 689b(10).

11. See Rubin v. Barasch, 275 Cal. App.2d 835, 837, 80 Cal. Rptr. 337, (1969).

hearing, the court gives judgment determining the validity of the claim, which is conclusive between the third person and the judgment creditor.

Undertaking to Release Property

Where the property has been levied upon under a writ of execution issued to enforce a money judgment, a third person claiming ownership may obtain the release of the property by posting an undertaking in twice the value of the property (but not more than twice the amount for which execution was levied) on condition that, if the property is determined to belong to the judgment debtor, the third person will pay a sum equal to the estimated value of the property subjected to levy.¹² This procedure may be used whether or not the third person has filed a third-party claim and may accomplish the release of the property even though the judgment creditor has given an undertaking in response to a claim.¹³

Recommendations

The Commission has concluded that the third-party claims procedures have operated in a generally satisfactory manner, but that several modifications should be made to clarify the existing procedures and to promote their more efficient operation.

Nature of Interests Which May Be Claimed

Any third person who claims an interest in personal property levied upon which is superior to the judgment creditor's lien should be permitted to assert that interest through the third-party claims procedure. Existing law is limited to persons claiming title and right to possession or claiming under a conditional sales agreement or chattel mortgage.

Scope of Summary Procedure

A third person may resort to the procedures provided by Sections 689 and 689b when personal property is levied upon under a writ of at-

12. See Sections 689, para. 7, 710b to 713-1/2.

13. See Sections 689, para. 7, 710b; *Mazuran v. Finn*, 53 Cal. App. 656, 657-58, 200 P. 769, 770 (1921).

tachment,¹⁴ a writ of execution,¹⁵ a prejudgment writ of possession issued in claim and delivery proceedings,¹⁶ or a writ issued to enforce a judgment for sale of property.¹⁷ Under the proposed law, this summary remedy would also be available where property is levied upon under a postjudgment writ of possession.

A third person claiming title to property levied upon to collect certain state taxes may take advantage of the summary procedure provided by Section 689.¹⁸ There is no reason to permit the summary determination of claims of title but not of the claims of secured parties. Accordingly, the proposed law applies the third-party claim procedure uniformly to procedures for the collection of any state or local tax. Where the tax is collected by means of a levy by a levying officer, the normal procedure would be applicable except that, since public entities are not required to file undertakings,¹⁹ the proposed law requires the agency collecting the tax to file a notice with the levying officer in order to maintain the lien on the property. Where the property is reached by a notice of levy served by agency personnel²⁰ or through seizure provisions,²¹ the agency itself will perform the duties of the levying officer.²²

14. Section 488.090.

15. Sections 689, 689b.

16. Section 514.050.

17. See *Lawler v. Solus*, 101 Cal. App.2d 816, 818, 226 P.2d 348, ____ (1951) (judgment foreclosing a chattel mortgage).

18. Section 689d applies to notices of levy and warrants and notices of levy issued pursuant to Unemployment Insurance Code Sections 1755 and 1785 and Revenue and Taxation Code Sections 6776, 7881, 9001, 10111, 18906, 26191, 30341, and 32365. Revenue and Taxation Code Section 6799 also provides for the determination of third-party claims of an interest in or lien on property seized for the purpose of sale to collect the sales and use tax, but does not incorporate Section 689 or 689b.

19. Section 1058.

20. See, e.g., Unemp. Ins. Code § 1755.

21. See, e.g., Rev. & Tax. Code § 6796.

22. This is consistent with the procedure developed under Unemployment Insurance Code Section 1755.

Notice of Hearing Given to Judgment Debtor

The judgment debtor should be given notice of a hearing on the third-party claim since the judgment debtor is vitally interested in the disposition of the property. Participation of the judgment debtor will guard against an incorrect determination of the respective interests of the parties and a misallocation of the property or its proceeds.²³

Burden of Proof

Under existing law, the burden of proof in the hearing on the third-party claim is on the third person.²⁴ The proposed law continues this provision with regard to claims of title, right to possession, or any other interest that is not a security interest, but places the burden of proof on the judgment creditor in a case where the third person claims a security interest. This change is made in recognition of the fact that security interests are afforded a general presumption of validity.²⁵

Additional Changes

For the sake of uniformity, the general provisions pertaining to objections to undertakings and to the release of property should be incorporated by the third-party claims procedure.²⁶ Notices mailed by the levying officer should be sent by first-class rather than registered or certified mail, because first-class mail is more likely to be received expeditiously.

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

24. See Section 689b(10), incorporating the hearing provisions of Section 689.

25. See Com. Code § 9201.

26. See Sections 489.040-489.100, 1056 (general provisions relating to undertakings). The provision in Section 689.5 to the effect that, if the judgment debtor cannot be found, the property should be released to the third-party claimant should be retained as an exception to the general rules pertaining to release. Ordinarily property is released to the person from whom it was taken. Additional technical revisions are explained in the Comments to the proposed statute and in the Appendix, infra.

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CHAPTER 6. THIRD-PARTY CLAIMS

Article 1. General Provisions§ 706.110. Application of chapter

706.110. A third-party claim of an interest in personal property sought to be applied to the satisfaction of a judgment may be asserted and determined pursuant to this chapter where enforcement is sought by levy under or service of any of the following:

- (a) A writ of attachment.
- (b) A writ of execution.
- (c) A prejudgment or postjudgment writ of possession.
- (d) A writ of sale.
- (e) Process issued by the state or a local public entity to enforce a tax liability.

Comment. Section 706.110 is new. Under former law, the third-party claims procedure was specifically made applicable to attachment (see Section 488.090), claim and delivery (see Section 514.050), execution (see Sections 689, 689b), and the enforcement of certain state tax liabilities by means of a notice of levy or warrant (see Section 689d). The procedure was also used 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, 818, 226 P.2d 348, ____ (1951). Subdivision (c) of this section extends this remedy to claims regarding property levied upon to enforce a judgment for possession of personal property. Subdivision (e) extends this remedy to all cases of enforcement of a tax liability.

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§ 706.120. Time for filing claim

706.120. A third person may file a third-party claim at any time after levy but before the levying officer has sold, delivered, or otherwise disposed of the property claimed.

Comment. Section 706.120 is new. Former law did not provide for the time within which a third-party claim must be filed, but in *Nat'l 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 subjected to the satisfaction of the plaintiff's demand.

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§ 706.130. Third-party claims to property seized to satisfy tax liability

706.130. (a) Except as otherwise provided by statute, the provisions of this chapter apply to third-party claims regarding personal

property sought to be applied to the satisfaction of a tax liability [pursuant to the Revenue and Taxation Code or the Unemployment Insurance Code]. For the purpose of this section, "judgment creditor" means the public entity which seeks to collect the tax, and "judgment debtor" means the tax debtor.

(b) Third-party claims under this section shall be heard and determined in the county where the property claimed is located.

(c) If a levy is not made by a levying officer, the third-party claim shall be filed with the department or agency of the public entity in charge of enforcement of the tax liability.

(d) The public entity shall file a notice with the levying officer if an undertaking would otherwise be required pursuant to Article 2 (commencing with Section 706.210). The notice shall state that the public entity opposes the claim of the third person.

Comment. Section 706.130 supersedes former Section 689d, which made former Section 689 applicable to the determination of a third-party claim of title to property reached by a notice of levy or warrant issued to collect certain state taxes, and a portion of Revenue and Taxation Code Section 6799, which provided an independent procedure for determining third-party claims to property to be sold to satisfy a liability for state sales and use taxes. Section 706.130 applies the third-party claims procedure to all proceedings for the collection of state or local tax liabilities.

Subdivision (b) continues the substance of a portion of former Section 689d, but does not require claims to be heard in the superior court.

Subdivision (c) is a general provision which codifies the practice developed under former Section 689d and Unemployment Insurance Code Section 1755.

Subdivision (d) is new. It is based on the practice developed under existing law as a result of Section 1058 which provides that public entities are not required to file an undertaking. The public entity is required to file a verified statement pursuant to Article 3 (commencing with Section 706.310) as a condition to maintaining the lien on the property, so the notice provided by subdivision (d) is unnecessary in such proceedings.

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§ 706.140. Duty to mail notice and copy of claim

706.140. The levying officer shall mail the notice and copy of the verified third-party claim to the judgment creditor pursuant to Section 706.220 or 706.320, notwithstanding any defect, informality, or insufficiency of the claim.

Comment. Section 706.140 supersedes the first sentence of the sixth paragraph of former Section 689 and the second sentence of subdivision (2) of former Section 689b. Section 706.140 requires the levying officer to mail the notice and claim whereas former law appeared to give the officer discretion.

§ 706.150. Objections to undertakings

706.150. (a) An undertaking given under this chapter shall satisfy the requirements of Sections 489.040, 489.050, and 1056.

(b) Objections to undertakings shall be made and determined as provided in Sections 489.070 to 489.100, inclusive.

Comment. Subdivision (a) of Section 706.150 supersedes a portion of the first paragraph of former Section 689.

Subdivision (b) supersedes the third, fourth, and fifth paragraphs of former Section 689, the second sentence of the second paragraph of subdivision (9) of former Section 689b, and former Sections 711-1/2 through 713-1/2.

Article 2. Third-Party Claim of Title, Right to Possession,
or Interest Other Than Security Interest

§ 706.210. Claim of title, right to possession, or an interest other
than a security interest

706.210. (a) A third person may claim title, the right to possession, or any other interest in personal property that is not a security interest, if the interest claimed is superior to the judgment creditor's lien on the property, by filing with the levying officer a verified written third-party claim, together with a copy thereof.

(b) The third-party claim shall contain all of the following:

(1) A description of the interest claimed, including a statement of the facts upon which the claim is based.

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

(3) The address in this state to which notice may be mailed to the third person.

Comment. Section 706.210 supersedes a portion of the first paragraph of former Section 689. Under former Section 689, the claimant was required to show title and right to possession. See *Palmquist v. Palmquist*, 228 Cal. App.2d 789, ___, 39 Cal. Rptr. 871, ___ (1964) (attaching creditor could not use third-party claims procedure). Section 706.210(a) also makes clear that the procedure under this article is not available unless the interest of the third person is superior to the lien of the judgment creditor.

§ 706.220. Notice to judgment creditor of third-party claim

706.220. Not later than five days after the third-party claim is filed with the levying officer, the levying officer shall mail to the judgment creditor both of the following:

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

(b) A notice that the property will be released unless, within 10 days after the notice was mailed, the judgment creditor files with the levying officer an undertaking that satisfies the requirements of Section 706.250.

Comment. Section 706.220 supersedes a portion of the first paragraph of former Section 689. Under this section, a notice is sent by first-class mail, whereas under former Section 689, a demand was sent by registered or certified mail. See Section 702.510 (manner of mailing notice).

§ 706.230. Release for failure to file undertaking

706.230. (a) Subject to subdivision (b), if the judgment creditor does not, within 10 days after the levying officer mails notice pursuant to Section 706.220, file with the levying officer an undertaking that satisfies the requirements of Section 706.250, the levying officer shall release the property in the manner provided by Section 703.290, unless it is to be held under another lien or unless otherwise ordered by the court.

(b) If property which has been taken into custody is to be released to the judgment debtor and the judgment debtor has not claimed the property within 10 days after notice was mailed pursuant to Section 703.290, the levying officer shall release the property to the third person making the claim.

Comment. Subdivision (a) of Section 706.230 supersedes a portion of the first paragraph of former Section 689. This section affords the judgment creditor 10 days after the notice is mailed within which to file the undertaking, whereas former Section 689 provided a five-day period running from the time the demand for an undertaking was made.

Subdivision (b) supersedes former Section 689.5 and provides an exception to the general rules governing release of property. See Section 703.290.

§ 706.240. Delay of sale or delivery of possession; interest conveyed

706.240. (a) If a third-party claim is filed prior to sale, payment, or delivery of possession under the writ, the property described in the claim may not be sold, paid, or delivered unless an undertaking is filed by the judgment creditor. If an undertaking is filed, the levying officer shall maintain the lien on the property and apply the property toward the satisfaction of the judgment in the manner provided by law unless enforcement is stayed or the third person filed an undertaking to release the property pursuant to Article 6 (commencing with Section 706.710). Upon sale, payment, or delivery, the property is free of all liens or claims of the third person for which an undertaking is given.

(b) If no third-party claim is made before sale, payment, or delivery under the writ, the property remains subject to the interest of the third person.

Comment. Subdivision (a) of Section 706.240 supersedes the seventh paragraph of former Section 689. Under the last sentence of subdivision (a), the property may be sold free of all interests for which an undertaking is given. The third person may prevent a sale by obtaining a stay of enforcement pursuant to Section 706.480 or, in the case of a money judgment or a judgment for the sale of personal property, by giving an undertaking to release pursuant to Section 706.710. Moreover, a third person need not press a claim immediately since, under subdivision (b), if no claim is presented before sale, the property remains subject to the third person's interest.

Section 706.240, unlike former law, refers to delivery of possession, recognizing that the third-party claims procedure applies to claim and delivery proceedings and the enforcement of a judgment for possession of personal property. See Sections 514.050, 706.110(c).

§ 706.250. Form of undertaking

706.250. (a) An undertaking given under this article shall be made in favor of the third person in an amount equal to twice the value of the interest claimed by 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.

(b) If the property levied upon is required by law to be registered or recorded in the name of the owner and it appears at the time of the levy that the judgment debtor was the registered or record owner of the

property and the judgment creditor caused the levy to be made and the lien maintained in good faith and in reliance upon such registered or recorded ownership, neither the judgment creditor, the judgment creditor's sureties, nor the levying officer is liable to the third person for the levy itself.

Comment. Section 706.250 continues the substance of a portion of the first and second paragraphs of former Section 689. Under subdivision (b), where a levy has been made based on a good faith reliance upon the registered or recorded ownership, there is no liability for the levy; but, after making a proper claim, the third person's interest must be recognized and a failure to deal properly with such interest may result in liability to the third person. For provisions relating to undertakings generally, see Section 706.150.

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Article 3. Third-Party Claim of Security Interest

§ 706.310. Claim of security interest

706.310. (a) A secured party may claim a security interest in personal property, if the security interest claimed is superior to the judgment creditor's lien on the property, by filing with the levying officer a verified written third-party claim, together with a copy thereof.

(b) The third-party claim shall contain all of the following:

(1) A detailed description of the security interest claimed, including a statement of the facts upon which the security interest is based.

(2) A statement of the total amount of sums due or to accrue under the security agreement, above setoffs, with interest to date of tender, and the applicable rate of interest.

(3) The address in this state to which notice may be mailed to the secured party.

Comment. Section 706.310 supersedes the first sentence of subdivision (2) of former Section 689b. This article applies to claims by all secured parties, 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).

405/812

§ 706.320. Notice to judgment creditor of secured party claim

706.320. Not later than five days after the third-party claim is filed with the levying officer, the levying officer shall mail to the judgment creditor both of the following:

(a) A copy of the claim.

(b) A notice that the property will be released unless, within 10 days after the notice was mailed, the judgment creditor either files with the levying officer an undertaking that satisfies the requirements of Section 706.360 and a verified statement under Section 706.370, or deposits with the levying officer the amount claimed.

Comment. Section 706.320 supersedes subdivision (3) and a portion of the first paragraph of subdivision (9) of former Section 689b. Under this section, a notice is sent by first-class mail, whereas under former Section 689, a demand was sent by registered or certified mail. See Section 702.510 (manner of mailing notice).

405/909

§ 706.330. Release for failure to make deposit or file undertaking and statement

706.330. (a) Subject to subdivision (b), if the judgment creditor does not, within 10 days after the levying officer mails notice pursuant to Section 706.320, file with the levying officer an undertaking that satisfies the requirements of Section 706.360 and a verified statement under Section 706.370, or deposit with the levying officer the amount claimed, the levying officer shall release the property in the manner provided by Section 703.290, unless it is to be held under another lien or unless otherwise ordered by the court.

(b) If property which has been taken into custody is to be released to the judgment debtor and the judgment debtor has not claimed the property within 10 days after notice was mailed pursuant to Section 703.290, the levying officer shall release the property to the secured party making the claim.

Comment. Subdivision (a) of Section 706.330 supersedes subdivision (4) and a portion of the first paragraph of subdivision (9) of former Section 689b. This section affords the judgment creditor 10 days after the notice is mailed within which to file the undertaking and verified statement or make a deposit whereas former Section 689b(4) provided a five-day period running from the receipt of the officer's demand.

Subdivision (b) supersedes former Section 689.5 and provides an exception to the general rules governing release of property. See Section 703.290.

405/910

§ 706.340. Delay of sale or delivery of possession; interest conveyed

706.340. (a) If a third-party claim is made prior to sale, payment, or delivery of possession under the writ, the property described

in the claim may not be sold, paid, or delivered unless an undertaking and verified statement are filed or a deposit is made. If an undertaking and verified statement are filed or a deposit is made, the levying officer shall maintain the lien on the property and apply the property toward the satisfaction of the judgment in the manner provided by law unless enforcement is stayed. Upon sale, payment, or delivery, the property is free of all liens or claims of the secured party for which an undertaking is given or a deposit is made.

(b) If no third-party claim is made before sale, payment, or delivery under the writ, the property remains subject to the interest of the secured party except as otherwise provided by Article 5 (commencing with Section 706.610).

Comment. Subdivision (a) of Section 706.340 supersedes parts of subdivisions (8) and (9) of former Section 689b. Under the last sentence of subdivision (a), the property may be sold free of all interests for which an undertaking is given or deposit is made. The secured party may prevent a sale by obtaining a stay of enforcement pursuant to Section 706.480. Moreover, a secured party need not press a claim immediately since, under subdivision (b), if no claim is presented before sale, the property remains subject to the secured party's interest unless the judgment creditor has resorted to the procedure for demanding a claim which is set forth in Sections 706.610-706.630.

Section 706.340, unlike former law, refers to delivery of possession, recognizing that the third-party claims procedure applies to claim and delivery proceedings and enforcement of a judgment for possession of personal property. See Sections 514.050, 706.110(c).

406/002

§ 706.350. Payment to secured party

706.350. (a) If the levying officer receives a deposit from the judgment creditor, the levying officer shall promptly tender or pay it to the secured party 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 in the property for which payment is made passes to the judgment 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.

Comment. Section 706.350 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.

§ 706.360. Form of undertaking

706.360. An undertaking given under this article shall be made in favor of the secured party in an amount equal to twice the amount claimed by the secured party and shall indemnify the secured party against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings.

Comment. Section 706.360 supersedes portions of the first and second paragraphs of subdivision (9) of former Section 689b.

§ 706.370. Verified statement concerning security interest

706.370. At the time the undertaking is filed with the levying officer in response to a third party claim by a secured party, the judgment creditor shall file with the levying officer a verified statement that the security interest is invalid, that the security interest is not entitled to priority over the judgment creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled under the security agreement, for the reasons specified therein, and shall mail a copy of the verified statement to the secured party.

Comment. Section 706.370 supersedes a portion of the first paragraph of subdivision (9) of former Section 689b. This section permits the judgment 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 706.110 (third-party claim of superior interest); Com. Code § 9301 (priority of lien creditor over unperfected security interest).

Article 4. Hearing on Third-Party Claims

§ 706.410. Application for hearing

706.410. (a) Not later than 15 days after the third-party claim is filed with the levying officer, either the judgment creditor or the third person may petition the court from which the writ was issued 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 706.350.

(c) The matter shall be set for hearing within 20 days after the filing of the petition. The court may continue the matter for good cause shown.

Comment. Subdivisions (a) and (b) of Section 706.410 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.

968/618

§ 706.420. Notice of hearing

706.420. Not less than 10 days before the date set for the hearing, the petitioner shall mail notice of the time and place of the hearing to the judgment creditor or the third person (whichever person is not the petitioner) and to the judgment debtor and the levying officer. The notice shall state 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 706.420 supersedes the fourth sentence of the eighth paragraph of Section 689 and the second sentence of subdivision (10) of former Section 689b. See also Section 702.510 (manner of mailing notice). This section also requires notice to be sent to the judgment 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).

968/674

§ 706.430. Papers filed by levying officer

706.430. 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 which was filed with the levying officer pursuant to Section 706.210 or 706.310.

(b) The judgment creditor's verified statement, if the verified statement has been filed with the levying officer pursuant to Section 706.370.

Comment. Section 706.430 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 judgment creditor's verified statement with the court. See former Section 689b.

§ 706.440. Filing and service of verified statement

706.440. If the judgment creditor has not filed a verified statement with the levying officer pursuant to Section 706.370:

(a) In a case where the judgment creditor petitions for a hearing on the third-party claim, the judgment creditor shall file the verified statement with the court at the time the petition is filed and shall mail a copy thereof to the secured party at the time notice of the hearing is given pursuant to Section 706.420.

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

Comment. Section 706.440 is new.

§ 706.450. Pleadings

706.450. (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) The judgment creditor's verified statement constitutes the pleading of the judgment creditor.

(b) A third-party claim of title, right to possession, or any other interest that is not a security interest, shall be deemed controverted by the judgment creditor.

Comment. Subdivision (a)(1) of Section 706.450 continues the substance of a portion of the eleventh sentence of the eighth paragraph of former Section 689. Subdivision (a)(2) is new. Former Section 689b did not provide for the effect of the judgment creditor's verified statement.

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 title, right to possession, or any other interest that is not a security interest, whereas the former provision applied to all claims under former Section 689 or 689b.

§ 706.460. Burden of proof

706.460. (a) At a hearing on a third-party claim of title, right to possession, or any other interest that is not a security interest, the third person has the burden of proof.

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

Comment. Subdivision (a) a Section 706.460 continues the substance of the tenth sentence of the eighth paragraph of former Section 689. Subdivision (b) is new.

§ 706.470. Dismissal

706.470. If the third person has petitioned for a hearing, neither the petition nor the proceedings pursuant thereto may be dismissed without the consent of the judgment creditor.

Comment. Section 706.470 continues the substance of the sixth sentence of the eighth paragraph of former Section 689.

§ 706.480. Disposition of property during pendency of proceedings

706.480. (a) Notwithstanding Sections 706.240 and 706.340, upon application by the judgment creditor, the judgment debtor, or the third person, made ex parte or, if the court so orders, upon noticed motion, the court may:

(1) Order the sale of any perishable property in the custody of the levying officer and direct the disposition of the proceeds of the sale.

(2) Stay the sale of the property under a writ, and enjoin any transfer or other disposition of the property, until proceedings under this chapter can be commenced and prosecuted to termination.

(b) As a condition for an order under paragraph (2) of subdivision (a), the court may require such bond as it considers necessary.

(c) An order made pursuant to subdivision (a) 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. Subdivision (a) continues the substance of the seventh and a portion of the eighth sentences of the eighth paragraph of former Section 689 and clarifies the manner of application for such orders.

Subdivision (b) continues the substance of a portion of 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.

968/976

§ 706.490. Determination of claim; disposition of property

706.490. 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, and the proceeds of any property, in accordance with the respective interests of the parties. The judgment is conclusive between the parties to the proceeding.

Comment. Section 706.490 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.

968/977

§ 706.500. Findings

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

Comment. Section 706.500 continues the thirteenth sentence of the eighth paragraph of former Section 689.

368/243

§ 706.510. Appeal

706.510. An appeal may be taken from a judgment given pursuant to Section 706.490 in the manner provided for appeals from the court in which the proceeding takes place.

Comment. Section 706.510 continues the seventeenth sentence of the eighth paragraph of former Section 689.

405/922

§ 706.520. Relevy; additional writs

706.520. If property has been released pursuant to Section 706.230 or 706.330, 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 judgment debtor has an interest in the property that may be applied to the satisfaction of the judgment.

Comment. Section 706.520 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

relevey upon property that had been released, but this section recognizes that other enforcement procedures may also be employed. See, e.g., Chapter 5 (commencing with Section 705.110) (special procedures for enforcement of money judgments).

405/415

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

§ 706.610. Judgment creditor's demand for claim by secured party

706.610. (a) Upon receipt of the judgment creditor's written request therefor, the levying officer shall serve upon a designated secured party a written demand that the secured party file a claim pursuant to Article 3 (commencing with Section 706.310).

(b) The demand shall describe the property which has been levied upon.

(c) If the secured party does not file a claim with the levying officer within 30 days after service of the demand, the secured party shall be deemed to have waived any superior interest the secured party may have in the property levied upon.

Comment. Section 706.610 supersedes a portion of subdivision (8) of former Section 689b. The secured party must claim the interest in the property even though there are no amounts currently due. Subdivision (a) clarifies prior law by providing that the levying officer serves the demand for the claim pursuant to the judgment creditor's request; under former law, the manner of initiating this procedure was unclear.

67707

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

706.620. Except as otherwise provided by this chapter or pursuant to court order, the levying officer may not release, sell, or otherwise dispose of the property described in the demand until the expiration of 30 days after the service of the demand on the secured party.

Comment. Section 706.620 is new. The introductory clause recognizes that the court may order sale of the property if it is perishable, that the property may be released pursuant to the claim of the secured party upon whom the demand was served or of some other third person.

405/416

§ 706.630. Service of demand for claim

706.630. (a) The demand for a claim shall be served in the manner provided for the service of summons and complaint by Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5. Service shall be

attested by the certificate of the levying officer and the certificate shall be filed in the action promptly after service.

(b) The demand may be served by the levying officer or by any other levying officer whose office is closer to the place of service. The costs of the other levying officer shall be paid out of the prepaid costs in the possession of the levying officer.

Comment. The first sentence of subdivision (a) of Section 706.630 is new. The second sentence continues the substance of a portion of subdivision (8) of former Section 689b. Subdivision (b) continues the substance of the second sentence of subdivision (8) of former Section 689b. See also Section 701.160 ("costs" defined).

67716

Article 6. Third-Party Undertaking
to Release Property

§ 706.710. Third-party undertaking to obtain release of property

706.710. Where personal property has been levied upon under a writ of execution, a third person, who claims title or right to possession, in whole or in part, may give an undertaking, as provided in this article, to obtain the release of the property.

Comment. Section 706.710 continues the substance of former Section 710b.

405/418

§ 706.720. Contents of undertaking

706.720. (a) The property claimed shall be described in the undertaking.

(b) The amount of the undertaking given pursuant to Section 706.610 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 judgment creditor's lien on the property sought to be released.

(c) The undertaking shall provide that, if the judgment 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 was issued a sum equal to the value of the judgment debtor's interest or the amount of the judgment remaining unsatisfied, whichever is the lesser.

Comment. Section 706.720 continues the substance of portions of former Section 710c except for subdivision (c) which recognizes that the

judgment creditor is not entitled to resort to the undertaking in an amount exceeding the amount of the judgment remaining unsatisfied. See also Section 706.160 (general provisions relating to undertakings).

404/957

§ 706.730. Filing and service of undertaking

706.730. The third person shall:

(a) File the undertaking to release property in the action with the court.

(b) Serve on the judgment creditor a notice of the filing of the undertaking with the court pursuant to subdivision (a) and a copy of the undertaking.

(c) File with the levying officer a notice of the filing of the undertaking with the court, a copy of the undertaking, and proof of service on the judgment creditor pursuant to subdivision (b).

Comment. Subdivision (a) of Section 706.730 continues the substance of a portion of former Section 711. Subdivision (b) supersedes the remainder of former Section 711. Subdivision (c) is new. This provision has been added to prevent release of the property before the time for making an objection to the undertaking has expired. See Section 706.760.

67/717

§ 706.740. Effective date of undertaking

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

Comment. Section 706.740 supersedes former Section 713-1/2 which provided that the undertaking was effective 10 days after service on the judgment creditor or, if an objection to the undertaking was made, when a new undertaking was given. Under Section 706.740, 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 706.750.

67/719

§ 706.750. Release of property pursuant to undertaking

706.750. 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 judgment creditor pursuant to subdivision (b) of Section 706.730, the levying officer shall release the property described in the third person's undertaking in the manner provided by Section 706.230 except in the following cases:

(a) Where the property described in the undertaking is to be held under another lien.

(b) Where the court orders a different disposition of the property.

(c) Where the judgment creditor makes an objection to the undertaking.

Comment. Section 706.750 supersedes a portion of the seventh paragraph of former Section 689 and a portion of former Section 713-1/2.

67/718

§ 706.760. Objection to undertaking

706.760. The judgment creditor may make an objection to the third person's undertaking not later than 10 days after the notice of the filing of the undertaking with the court and a copy of the undertaking are served on the judgment creditor pursuant to subdivision (b) of Section 706.730.

Comment. Section 706.760 continues the substance of the first sentence of former Section 711-1/2. See also Section 706.160 (general provisions regarding undertaking).