

First Supplement to Memorandum 80-70

Subject: Study D-300 - Enforcement of Judgments (Division 4--Third-Party Claims)

Under the proposed law, when notice of a third-party claim is served on the creditor, the creditor must file an undertaking or the property will be released. Public entities are generally exempt, however, from statutory undertakings. Code Civ. Proc. § 1058. Under existing law, the practice has developed that, when the creditor is a public entity, the creditor gives the levying officer a letter stating that they wish to avail themselves of the exemption. California State Sheriff's Ass'n, Civil Procedural Manual 13.02 (rev. ed. 1980).

The Commission has previously approved a provision in the Tentative Recommendation of March 1979 which required the public entity to file with the levying officer a notice of opposition to the third-party claim in lieu of filing an undertaking when the claim arose in the context of enforcement of a state tax liability. The staff has concluded that this provision ought to be generalized to apply to all third-party claims where the creditor is a public entity. This would be accomplished by revising proposed Sections 706.160, 706.170, 706.260, and 706.270 as indicated in the attachment to this memorandum. The following paragraph would also be added to footnote 10 on page 3 of the preliminary part (green pages) attached to Memorandum 80-70:

If the creditor is a public entity, the creditor is exempt from filing the undertaking. Section 1058. The proposed law therefore provides for the public entity to file with the levying officer a notice of opposition to the third-party claim. This is drawn from the existing practice of giving the levying officer a letter stating that the public entity is exempt from giving an undertaking. See California State Sheriff's Ass'n, Civil Procedural Manual 13.02 (rev. ed. 1980).

Respectfully submitted,

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§ 720.160. Effect and contents of creditor's undertaking

720.160. (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 third person files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(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 720.770, 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 in the amount of 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 chapter 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.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

Comment. Subdivision (a) of Section 720.160 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 720.760-720.770, or may obtain the

release of the property by giving an undertaking pursuant to Chapter 6 (commencing with Section 720.610) 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.

Subdivision (d) is new and is drawn from existing practice developed as a result of Section 1058 which provides that public entities are generally exempt from giving statutory undertakings. See California State Sheriff's Ass'n, Civil Procedural Manual 13.02 (rev. ed. 1980).

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

720.170. (a) In a case where the third person has not filed an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610), if the creditor does not within the time allowed file with the levying officer an undertaking , or, if a public entity, a notice, that satisfies the requirements of Section 720.160, 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 Chapter 4 (commencing with Section 720.310) notwithstanding the release of the property pursuant to this section.

Comment. Subdivision (a) of Section 720.170 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 720.140. See Section 684.040 (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 chapter 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 720.310-720.430. If the creditor prevails at the hearing, the released property may again be levied upon as provided in Section 720.430.

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

720.260. (a) If the creditor files an undertaking that satisfies the requirements of this section and a statement that satisfies the requirements of Section 720.280, or makes a deposit with the levying officer of the amount claimed under Section 720.230, within the time allowed:

(1) The levying officer shall execute the writ in the manner provided by law unless, in a case where the creditor has filed an undertaking, the secured party or lienholder files an undertaking to release the property pursuant to Chapter 6 (commencing with Section 720.610).

(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 720.770, 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 in the amount of of 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 chapter 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.

(d) If the creditor is a public entity exempt from giving an undertaking, the public entity shall, in lieu of filing the undertaking, file with the levying officer a notice stating that the public entity opposes the claim of the third person. When so filed, the notice is deemed to satisfy the requirement of this section that an undertaking be filed.

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 720.760-720.770, or may obtain the release of the property by giving an undertaking pursuant to Chapter 6 (commencing with Section 720.610) in the same amount as the judgment creditor's undertaking.

Subdivision (d) is new and is drawn from existing practice developed as a result of Section 1058 which provides that public entities are generally exempt from giving statutory undertakings. See California State Sheriff's Ass'n, Civil Procedural Manual 13.02 (rev. ed. 1980).

§ 720.270. 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 Chapter 6 (commencing with Section 720.610), if the creditor does not within the time allowed file with the levying officer an undertaking , or, if a public entity, a notice, that satisfies the requirements of Section 720.260 and a statement under Section 720.280, or deposit with the levying officer the amount claimed under Section 720.230, 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 Chapter 4 (commencing with Section 720.310) notwithstanding the release of the property pursuant to this section.

Comment. Subdivision (a) of Section 720.270 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 720.240. See Section 684.040 (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 720.170(b).

Subdivision (c) supersedes former Section 689.5. See the Comment to Section 720.170(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 720.310-720.430. If the creditor prevails at the hearing, the released property may again be levied upon as provided in Section 720.430.