

Memorandum 2000-10

Debtor-Creditor Law: Technical Revisions

At the October 1999 meeting, the Commission decided to consider a number of technical issues in debtor-creditor law raised by the Civil Procedures Committee of the California State Sheriffs' Association. The letter from Sgt. Michael Torres of Long Beach, on behalf of the Sheriffs' Association, dated September 28, 1999, was attached to Memorandum 99-58, Exhibit pp. 11-17. For convenience, the text of the letter has been copied into this memorandum.

Commission attention to these matters is appropriate because most of the statutes in question were enacted on Commission recommendation, following extensive study in the 1970s. In areas where the Commission has been particularly active in substantive revision, we have customarily continued to monitor experience under the law and recommend appropriate revisions to the Legislature.

If the Commission approves all or part of these proposed amendments, the staff will draft a tentative recommendation for consideration at a meeting in the near future, so that a Commission recommendation can be prepared in time for introduction in the 2001 legislative session.

1. WRIT OF POSSESSION UNDER CLAIM AND DELIVERY LAW

Sheriffs' Description of Problem

Existing Law

Existing law (CCP 512.060, 514.020, 515.010 and 515.020) requires a plaintiff to post an undertaking prior to the court issuing a writ of possession (claim and delivery). The Judicial Council form Writ of Possession (Claim and Delivery) (CD-130) states, "A copy of the plaintiff's undertaking must be attached to the original writ and all copies served." The defendant may obtain redelivery of seized property by posting an undertaking indemnifying the plaintiff in the amount of the plaintiff's undertaking.

Levying Officer's Concern

Courts frequently issue writs of possession (claim and delivery) without requiring the plaintiff to post an undertaking if the court

finds that the defendant has no interest in the property as determined by CCP 515.010. Consequently, the levying officer is faced with two problems: (1) the plaintiff's undertaking is not served on the defendant as required by statute; and, (2) the amount of the defendant's undertaking for redelivery is problematic. Since CCP 515.020 allows the defendant to post a redelivery bond "equal" to the amount the plaintiff's undertaking (which is non-existent), the levying officer faces a dilemma.

Staff Analysis

This problem is inherent in the Claim and Delivery Law. Probably it was assumed that if the defendant claimed no interest, there would be no need for the remedy. But the undertaking amount can be zero where the value of the property is completely offset by amounts owed the plaintiff. It appears not to be a common problem, but arises at least in Los Angeles County once every two or three months.

The Sheriffs suggest including a copy of the court order under Section 514.020 to conform the statute to the Judicial Council forms. The Order for Writ of Possession (CD-120) instructs the clerk to attach it to the Writ of Possession (CD-130).

The draft revisions below adopt the Sheriffs' proposal for dealing with the zero undertaking problem. An alternative solution would be to provide for a minimum undertaking amount. The Attachment Law provides for a minimum \$2,500 undertaking in "limited civil cases" and \$7,500 otherwise. Code Civ. Proc. § 489.220. Of course, in attachment the parties don't know what will be attached and can't value it ahead of time. Under the Claim and Deliver Law, the plaintiff must be greatly tempted to value the property below setoffs, thus reducing the value of the defendant's interest to zero. Even if the plaintiff's valuation of the property and the amount owed by the defendant is indisputable, the undertaking still has a purpose, since it covers the defendant's costs in recovering the property, in the rare case where that occurs. Another factor to keep in mind is that turnover orders and writs of possession are generally issued by commissioners and may not receive a lot of scrutiny.

The Sheriffs' solution is set out below. If the Commission decides to impose a minimum undertaking as in the Attachment Law, we would implement that scheme in the draft tentative recommendation.

Draft Amendments

The Sheriffs propose amending Sections 512.060, 514.020, 515.010, and 515.020 as follows (with additional staff revisions and draft Comments):

Code Civ. Proc. § 512.060. Issuance of writ of possession

512.060. (a) At the hearing, a writ of possession shall issue if both of the following are found:

(1) The plaintiff has established the probable validity of ~~his~~ the plaintiff's claim to possession of the property.

(2) ~~The plaintiff has provided an undertaking as required by requirements of Section 515.010 are satisfied.~~

(b) No writ directing the levying officer to enter a private place to take possession of any property shall be issued unless the plaintiff has established that there is probable cause to believe that ~~sueh~~ the property is located there.

Comment. Subdivision (a)(2) of Section 512.060 is amended to recognize that an undertaking is not required in certain cases. See Section 515.010.

Code Civ. Proc. § 514.020 (amended). Service of writ of possession

514.020. (a) At the time of levy, the levying officer shall deliver to the person in possession of the property a copy of the writ of possession ~~with,~~ a copy of the plaintiff's undertaking attached, if any, and a copy of the order for issuance of the writ.

(b) If no one is in possession of the property at the time of levy, the levying officer shall subsequently 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 Article 3 (commencing with Section 415.10) of Chapter 4 of Title 5 ~~of this part.~~

Comment. Subdivision (a) of Section 514.020 is amended to recognize that an undertaking is not required in certain cases. See Section 515.010. The copy of the court order

The amendments in subdivision (b) are technical, nonsubstantive revisions to eliminate surplus language.

Code Civ. Proc. § 515.010 (amended). Plaintiff's undertaking

515.010. ~~The~~ (a) Except as provided in subdivision (b), the court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking. The undertaking shall provide that the sureties are bound to the

defendant for the return of the property to the defendant, if return of the property is ordered, and for the payment to the defendant of any sum recovered against the plaintiff. The undertaking shall be in an amount not less than twice the value of the defendant's interest in the property or in a greater amount. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances on the property, and such any other factors ~~as may be~~ necessary to determine the defendant's interest in the property.

(b) If the court finds that the defendant has no interest in the property or that the value of the interest is zero, the court may set the amount of the plaintiff's undertaking to be filed with the court or waive the undertaking. If the plaintiff's undertaking is waived, the court shall include in the order for issuance of the writ the amount of the defendant's undertaking provided by Section 515.020.

Comment. Subdivision (b) is added to Section 515.010 to dispense with the plaintiff's undertaking where the defendant has no monetary interest in the property. This provision avoids the idle act of requiring an undertaking in the amount of zero dollars. Where there is no plaintiff's undertaking, the second sentence of subdivision (b) makes clear that the court must set an amount of the defendant's undertaking to retain or regain possession under Section 515.020.

Code Civ. Proc. § 515.020. Defendant's undertaking

515.020. (a) The defendant may prevent the plaintiff from taking possession of property pursuant to a writ of possession or regain possession of property so taken by filing with the court in which the action was brought an undertaking in an amount equal to the amount of the plaintiff's undertaking required by pursuant to subdivision (a) of Section 515.010 or in the amount determined by the court pursuant to subdivision (b) or Section 515.010. The undertaking shall state that, if the plaintiff recovers judgment on the action, the defendant shall pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property. The damages recoverable by the plaintiff pursuant to this section shall include all damages proximately caused by the plaintiff's failure to gain or retain possession.

(b) The defendant's undertaking may be filed at any time before or after levy of the writ of possession. A copy of the undertaking shall be mailed to the levying officer.

(c) If an undertaking for redelivery is filed and the defendant's undertaking is not objected to, the levying officer shall deliver the property to the defendant, or, if the plaintiff has previously been given possession of the property, the plaintiff shall deliver such the property to the defendant. If an undertaking for redelivery is filed and the defendant's undertaking is objected to, the provisions of Section 515.030 apply.

Comment. Subdivision (a) of Section 515.020 is amended to recognize that the amount of the defendant's undertaking may be set by the court pursuant to Section 515.010(b).

2. STAY PENDING FINAL DETERMINATION OF CLAIM OF EXEMPTION UNDER ENFORCEMENT OF JUDGMENTS LAW

Sheriffs' Description of Problem

Existing Law

In the case of a claim of exemption, the levying officer is stayed until the time to appeal has expired pursuant to CCP 703.610(a).

Levying Officer's Concern

Many levying officers are unaware of the Legislative Committee's Comment concerning CCP 703.610(a) concerning the automatic stay. Also, courts occasionally order the levying officer to immediately apply or release levied property notwithstanding CCP 703.610(a).

"Subdivision (a) of Section 703.610 continues the substance of subdivision (h) and the second sentence of subdivision (j) of former Section 690.50. Although the language in subdivision (j) of former Section 690.50 pertaining to waiver of an appeal has not been specifically continued, subdivision (a) of Section 703.610 continues its substance since an exemption is finally determined if an appeal is waived. Subdivision (a) requires, as did former Section 690.50(h), that the levying officer preserve the status quo by maintaining the levy on the property. For exceptions to the general rule provided in subdivision (a), see Sections 685.100 (release for failure to pay levying officer's costs), 699.060 (release in general), 699.070 (sale to preserve value of property), 720.660 (release pursuant to third person's undertaking). Subdivision (b) continues the substance of subdivision (g) of former Section 690.50, except that orders for the disposition of perishable property are governed by Section 699.70. Subdivision (c) is new. For provisions governing enforcement and stays pending appeal, see Sections 916-923. [16 Cal. L. Rev. Comm. Reports 1397 (1982)]."

Staff Analysis

We don't see any problem in adding the suggested clarifications, but have reworded the suggested language relating to "the right to appeal is waived in open court" because it seems too specific.

The Sheriffs also proposed adding "notwithstanding subdivision (a) and prior to receipt of notice of appeal by the levying officer" at the beginning of subdivision (b) and "notwithstanding subdivisions (a) and (b)" at the beginning of subdivision (c), but the purpose and operation of these clauses is unclear and we have omitted them. We will seek further clarification of their intent. Perhaps the problem is addressed by the staff's addition of "or otherwise ordered by the court" in subdivision (a).

Historical Note: The "Legislative Committee's Comment" referred to by the Sheriffs is actually a revised Commission Comment. In an earlier era, when Comments had to be revised to reflect changes made in the bill during its passage through the Legislature, the mechanism was to submit revised Comments to the committee at the hearing and request that they be approved and published in the journal of that house. As a result of this process, the Comments were entitled "Legislative Committee Comments." The Commission reprinted them as appendices to its Annual Report and in that form they were sent to the law publishers for publication in the annotated codes. That process ended largely because the legislative committees preferred not to incur the expense and trouble of publication in the journals. This also saved us from the problem of typographical errors that were introduced in the process of entering the Commission's revised Comments in the journals. Since that time revised Comments are submitted to the relevant legislative committees and the Governor, but are not published in the journals. The reports on revised Comments are still published for the official record as appendices to the Commission's Annual Report. (Two such reports are on the agenda for this meeting.)

Draft Amendment

Code Civ. Proc. § 703.610. Disposition of property during pendency of proceedings

703.610. (a) Except as otherwise provided by statute or ordered by the court, the levying officer shall not release, sell, or otherwise dispose of the property for which an exemption is claimed until ~~the~~

final determination of an appeal is waived, the time to file an appeal has expired, or the exemption is finally determined.

(b) At any time while the exemption proceedings are pending, upon motion of the judgment creditor or a claimant, or upon its own motion, the court may make such orders for disposition of the property as may be proper under the circumstances of the case. ~~Such an~~ The order may be modified or vacated by the court at any time during the pendency of the exemption proceedings upon such terms as are just.

(c) If appeal of the determination of a claim of exemption is taken, notice of the appeal shall be given to the levying officer and the levying officer shall hold, release, or dispose of the property in accordance with the provisions governing enforcement and stay of enforcement of money judgments pending appeal.

Comment. Subdivision (a) of Section 703.610 is amended to recognize other exceptions to the levying officer's duty to hold the property that is subject to an exemption claim.

3. "OFF CALENDAR" CLAIM OF EXEMPTION HEARING UNDER ENFORCEMENT OF JUDGMENTS LAW

Sheriffs' Description of Problem

Existing Law

CCP 703.580 requires the court to issue an order determining a claim of exemption following a claim of exemption hearing.

Levying Officer's Concern

There is no statutory provision regarding an exemption hearing that has been taken "off calendar" and not adjudicated by the court.

Staff Analysis

This proposal looks fine, although the "off calendar" language does not have much of a statutory feel. There may be a better way to describe the situation. Should "off calendar" situations always result in releasing the property? Should the burden of an exemption hearing being taken off calendar always fall on the creditor?

Draft Amendments

The Sheriffs propose amending Section 703.610 as follows (with additional staff revisions and draft Comment):

Code Civ. Proc. § 703.580. Hearing and order on exemption claim

703.580. (a) The claim of exemption and notice of opposition to the claim of exemption constitute the pleadings, subject to the power of the court to permit amendments in the interest of justice.

(b) At a hearing under this section, the exemption claimant has the burden of proof.

(c) The claim of exemption is deemed controverted by the notice of opposition to the claim of exemption and both shall be received in evidence. If no other evidence is offered, the court, if satisfied that sufficient facts are shown by the claim of exemption (including the financial statement if one is required) and the notice of opposition, may make its determination thereon. If not satisfied, the court shall order the hearing continued for the production of other evidence, oral or documentary.

(d) At the conclusion of the hearing, the court shall determine by order whether or not the property is exempt in whole or in part. Subject to Section 703.600, the order is determinative of the right of the judgment creditor to apply the property to the satisfaction of the judgment. No findings are required in a proceeding under this section.

(e) The court clerk shall promptly transmit a certified copy of the order to the levying officer. Subject to Section 703.610, the levying officer shall, in compliance with the order, release the property or apply the property to the satisfaction of the money judgment.

(f) The levying officer shall release property claimed as exempt at the expiration of 20 days after the date the exemption hearing was ordered off calendar and not rescheduled for hearing.

Comment. Subdivision (f) is added to Section 703.580 to govern the disposition of property where the hearing on the exemption claim has been off calendar for 20 days.

4. ELECTRONIC FILING

Sheriffs' Description of Problem

Existing Law

There are various statutory schemes concerning electronic filing. For example, SB 367 added CCP 1010.6 to permit the electronic filing of a complaint and the issuance of a summons in electronic form.

Levying Officer's Concern

E-commerce promises to significantly impact levying officers in the very near future. Legislation is required to authorize the courts to issue electronic files in lieu of hard copy writs, subpoenas and

other process. Similarly, legislative change is needed to permit levying officers to accept and execute electronic process. Supplemental proceedings such as claims of exemption and third party claims should permit the electronic transmission of claims, forms and orders between the courts and levying officers.

Staff Analysis

The new statute authorizes experimentation under local rules and imposes a duty on the Judicial Council to establish uniform rules by January 1, 2003. We are reluctant to amend this section unless it is clearly a consensus change. The proposal to strike “that must be served with a summons” in subdivision (a)(5) could have broader effects than intended. The staff does not recommend including this section without further careful review and consultation with the sponsors of SB 367, the Judicial Council. It may be preferable to leave Section 1010.6 alone and add a section dealing with the levying officers’ related problems.

Draft Amendments

The Sheriffs propose amending Section 1010.6 as follows:

Code Civ. Proc. § 1010.6. Electronic filing and service

1010.6. (a) A trial court may adopt local rules permitting electronic filing and service of documents, subject to rules adopted pursuant to subdivision (b) and the following conditions:

(1) A document that is filed electronically shall have the same legal effect as an original paper document.

(2) (A) When a document to be filed requires the signature, not under penalty of perjury, of an attorney or a person filing in ~~propria~~ *propria* persona, the document shall be deemed to have been signed by that attorney or person if filed electronically.

(B) When a document to be filed requires the signature, under penalty of perjury, of any person, the document shall be deemed to have been signed by that person if filed electronically and if, prior to filing, a printed form of the document has been signed by that person. The attorney or person filing the document represents, by the act of filing, that the declarant has signed the document. The attorney or person filing the document shall maintain the printed form of the document bearing the original signature and make it available for review and copying upon the request of the court or any party to the action or proceeding in which it is filed.

(3) Any document that is electronically filed with the court after the close of business on any day shall be deemed to have been filed on the next court day. “Close of business,” as used in this

paragraph, shall mean 5 p.m. or the time at which the court would not accept filing at the court's filing counter, whichever is earlier.

(4) The court receiving a document filed electronically shall issue a confirmation that the document has been received and filed. The confirmation shall serve as proof that the document has been filed.

(5) Upon electronic filing of a complaint, petition, or other document ~~that must be served with a summons~~, a trial court may electronically transmit a summons or other process with the court seal and the case number to the party requesting the process filing the complaint. Personal service of a printed form of the electronic summons or other process shall have the same legal effect as personal service of an ~~original summons~~ a summons or other process. If a trial court plans to electronically transmit a summons or other process to the party filing a complaint requesting the process, the court shall immediately upon receipt of the complaint, petition, or other document notify the attorney or party that a summons or other process will be electronically transmitted to the electronic address given by the person filing the complaint, petition, or other document.

(6) Where notice may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the notice and any accompanying documents may be authorized when a party has agreed to accept service electronically in that action. Electronic service is complete at the time of transmission, but any period of notice or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic transmission by two court days, but the extension shall not apply to extend the time for filing notice of intention to move for new trial, notice of intention to move to vacate judgment pursuant to Section 663a, or notice of appeal. This extension applies in the absence of a specific exception provided for by any other statute or rule of court.

(7) The court shall permit a party or attorney to file an application for waiver of court fees and costs, in lieu of requiring the payment of the filing fee, as part of the process involving the electronic filing of a document. The court shall consider and determine the application in accordance with Section 68511.3 of the Government Code and shall not require the party or attorney to submit any documentation other than that set forth in Section 68511.3 of the Government Code. Nothing in this section shall require the court to waive a filing fee that is not otherwise waivable.

(8) If a trial court adopts rules conforming to paragraphs (1) to (7), inclusive, it may provide by order that all parties to an action

file documents electronically in a class action, a consolidated action, or a group of actions, a coordinated action, or an action that is deemed complex under Judicial Council rules, provided that the trial court's order does not cause undue hardship or significant prejudice to any party in the action.

(b) By January 1, 2003, the Judicial Council shall adopt uniform rules for the electronic filing and service of documents in the trial courts of the state, which shall include statewide policies on vendor contracts, privacy, and access to public records. These rules shall conform to the conditions set forth in this section, as amended from time to time.

(c) Any printed summons, writ, or other process electronically issued by the court pursuant to this section shall have the same legal effect as an original paper document and may served by the sheriff, marshal or constable in the same manner as a paper document.

5. NOT FOUND FEE

Sheriffs' Description of Problem

Existing Law

Existing law provides that the sheriff, marshal or constable may change a "not found" fee if the process cannot served within a "judicial district."

Levying Officer's Concern

Trial court unification has obfuscated the notion of a "judicial district." Also, some judicial districts encompass large geographical areas serviced by several sheriff or marshal offices. For example, the Los Angeles Judicial District is serviced by the six Branches of the Los Angeles Sheriff's Department (San Pedro Branch, West Los Angeles Branch, Beverly Hills Branch, Van Nuys Branch, Los Angeles Branch and San Fernando Branch.)

Staff Analysis

The Commission is intimately familiar with the changes wrought by trial court unification, as the major source of legislative implementation of the constitutional mandate. This specific issue described above is being addressed in AB 1768 (Steinberg), relating to sheriff's fees generally, which has passed the Assembly and is in Senate Appropriations. AB 1768 amends the bill as suggested in the Sheriffs' letter, and also changes the fee language. Hence, we do not need to address the problem here.

Draft Amendments

The Sheriffs propose amending Government Code Section 26738 as follows:

Gov't Code § 26738. Not-found return

26738. The fee for making a not found return on a summons, affidavit and order, order for appearance, subpoena, writ of attachment, writ of execution, writ of possession, order for delivery of personal property, or other process or notice required to be served, certifying that the person or property cannot be found ~~within the judicial district in which~~ at the address specified is situated, is twenty-four dollars (\$24).

6. FIVE-DAY NOTICE TO VACATE UNDER ENFORCEMENT OF JUDGMENTS LAW

Sheriffs' Description of Problem

Existing Law

CCP 715.020 provides that a debtor must vacate the premises no later than 5 days after service of a writ of possession of real property. There is no requirement to insert the date of service and the last day to vacate the premises on the writ. Consequently, levying officers utilize an in-house 5-day notice to vacate forms which are served with the writ indicating the date of service and the last day to vacate.

Levying Officer's Concern

The 5-day notice to vacate forms utilized by the various levying officers are not uniform. Also, the practice places a burden on levying officers to print and complete a form not mandated by law.

Staff Analysis

The proposal appears useful and acceptable. We have omitted the phrase "the form of which shall be prescribed by the Judicial Council," which the Sheriffs included at the end of subdivision (b)(2). The Judicial Council has general authority to prepare forms under Section 681.030 and we try to avoid putting in express duties relating to one minor feature of the form. It is assumed that the Judicial Council will revise the form as necessary if the revision is enacted and their attention is drawn to the change, without the need to put in express language in this one case.

Draft Amendments

The Sheriffs propose amending Section 715.010 as follows (with minor staff revisions and draft Comment):

Code Civ. Proc. § 715.010. Writ of possession of real property; application; contents; service

715.010. (a) A judgment for possession of real property may be enforced by a writ of possession of real property issued pursuant to Section 712.010. The application for the writ shall provide a place to indicate that the writ applies to all tenants, subtenants, if any, ~~name~~ named claimants, if any, and any other occupants of the premises.

(b) In addition to the information required by Section 712.020, the writ of possession of real property shall contain the following:

(1) A description of the real property, possession of which is to be delivered to the judgment creditor in satisfaction of the judgment.

(2) A statement that if the real property is not vacated within five days from the date of service of a copy of the writ on the occupant or, if the copy of the writ is posted, within five days from the date a copy of the writ is served on the judgment debtor, the levying officer will remove the occupants from the real property and place the judgment creditor in possession. At the time of service, the levying officer shall indicate the date and manner of service (personal, leaving with occupant, or mailing) and the last date to vacate the premises on the copy of writ.

(3) A statement that any personal property, except a mobilehome, remaining on the real property after the judgment creditor has been placed in possession will be sold or otherwise disposed of in accordance with Section 1174 of the Code of Civil Procedure unless the judgment debtor or other owner pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the real property.

(4) The date the complaint was filed in the action which resulted in the judgment of possession.

(5) The date or dates on which the court will hear objections to enforcement of a judgment of possession that are filed pursuant to Section 1174.3, unless a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46.

(6) The daily rental value of the property as of the date the complaint for unlawful detainer was filed unless a summons, complaint, and prejudgment claim of right of possession were served upon the occupants in accordance with Section 415.46.

(7) If a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46, a statement that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises.

(c) At the time the writ of possession is served or posted, the levying officer shall also serve or post a copy of the form for a claim of right to possession, unless a summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46.

Comment. Subdivision (b)(2) of Section 715.010 is amended to provide for notice of the date to vacate, consistent with the substantive rule in Section 715.020(c).

7. “LOCK OUT DATE” UNDER ENFORCEMENT OF JUDGMENTS LAW

Sheriffs’ Description of Problem

Existing Law

The contents of a writ of possession of real property are prescribed by CCP 712.010, 715.010 and 715.020. However, many courts have adopted the practice of inserting on the writ a statement indicating that “no lock out shall occur prior to [insert date]”.

Levying Officer’s Concern

Levying officers have been compelled by local courts to execute writ of possession forms which include a “no lockout prior [date]” statement that does not comport with the Code of Civil Procedure. Additionally, the “no lockout prior to” date frequently conflicts with the statutory 5-day notice on the writ itself. For example, if the writ has been marked “no lockout prior to June 15” and the writ is served on June 5, the levying officer has been instructing the debtor to vacate the premises no later June 14 rather than 5 days after service of the writ. Some debtors vacate the premises within 5 days after service of the writ, while others wait until the expiration of the “no lockout prior to” date.

Staff Analysis

We are sympathetic to the concern, but have doubts whether the proposal will solve the problem. If local rules and practice can ignore the language of the Code of Civil Procedure, we are not sure that court clerks won’t continue to do so in the face of the new language. An alternative would be to make the five-day statutory rule subject to a longer period that is stipulated or ordered by the court — in other words, conform the statute to the practice.

Draft Amendments

The Sheriffs propose amending Section 712.010 as follows (with draft Comment):

Code Civ. Proc. § 712.010. Issuance of writ of possession or sale

712.010. After entry of a judgment for possession or sale of property, a writ of possession or sale shall be issued by the clerk of the court upon application of the judgment creditor and shall be directed to the levying officer in the county where the judgment is to be enforced. The application shall include a declaration under penalty of perjury stating the daily rental value of the property as of the date the complaint for unlawful detainer was filed. However, the clerk of the court shall not issue a writ of possession of real property more than five days prior to a stipulated or court ordered lockout date. A separate writ shall be issued for each county where the judgment is to be enforced. Writs may be issued successively until the judgment is satisfied, except that a new writ may not be issued for a county until the expiration of 180 days after the issuance of a prior writ for that county unless the prior writ is first returned.

Comment. Section 712.010 is amended to provide a rule coordinating the statutory five-day period in Sections 715.010 and 715.020 special “lockout” dates.

8. RESTORING DEBTOR TO POSSESSION OF PREMISES

Sheriffs’ Description of Problem

Existing Law

Case law (*Cardenas v Noren*, 235 CA3d 1344) provides that a levying officer lacks the ministerial duty to restore a debtor possession following an improper eviction.

Levying Officer’s Concern

On occasion, a levying officer, through inadvertence or without knowledge of a valid court ordered stay or bankruptcy automatic stay (11 USC 362(a)) may improperly evict a debtor. The efforts of the levying officer to restore the debtor to possession are problematic and usually futile. Codification of *Cardenas v Noren* would clearly relieve the levying officer of the duty to restore the debtor to possession and provide the debtor a remedy to seek “extraordinary relief from the court which issued the writ of possession.”

Staff Analysis

The staff is uncertain about this proposal. In *Cardenas v. Noren*, 235 Cal. App. 3d 1344, 1 Cal. Rptr. 2d 367 (1991), the court held that mandate did not lie because the sheriff was not under a “present, ministerial duty” to restore the improperly evicted tenant to possession. While both tenants had been named in

the unlawful detainer action, the landlord had, for unexplained reasons, named only one of them in the enforcement papers. The court agreed with the sheriff's argument that the tenant should have used the statutory procedure to claim his right to possession:

Appellant's rights were violated, but before eviction he could have protected himself by presenting a claim of right to possession. After eviction appellant could have sought an injunction or filed an action for declaratory relief against the landlords regarding their respective rights and duties under the lease, or he might have sought extraordinary relief from the court which issued the writ of possession.... Appellant had remedies from which to choose, but mandate was not one of them.

(*Id.*, at 1350.) This would seem to settle the issue. Is there really a need to codify the limitation on mandate?

In addition, we have concerns about the language proposed, since it is limited to "inadvertence" and stays on appeal or in bankruptcy. If the difficulty is practical, as indicated by the Sheriffs' letter, then the proposed rule shouldn't be so limited. If it is a theoretical problem of the extent of the ministerial duty that must exist as a precondition to mandate, the problem is also not limited to the inadvertence or stay situations.

If some recognition of the lack of duty is needed, then we would suggest just making clear that the levying officer cannot restore a person to possession in the absence of a court order, but that seems obvious.

Draft Amendments

The Sheriffs propose amending Section 715.020 as follows:

Code Civ. Proc. § 715.020. Execution of writ

715.020. To execute the writ of possession of real property:

(a) The levying officer shall serve a copy of the writ of possession on one occupant of the property. Service on the occupant shall be made by leaving the copy of the writ with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found upon the property when service is attempted who is either an employee or agent of the occupant or a member of the occupant's household.

(b) If unable to serve an occupant described in subdivision (a) at the time service is attempted, the levying officer shall execute the writ of possession by posting a copy of the writ in a conspicuous place on the property and serving a copy of the writ of possession

on the judgment debtor. Service shall be made personally or by mail. If the judgment debtor's address is not known, the copy of the writ may be served by mailing it to the address of the property.

(c) If the judgment debtor, members of the judgment debtor's household, and any other occupants holding under the judgment debtor do not vacate the property within five days from the date of service on an occupant pursuant to subdivision (a) or on the judgment debtor pursuant to subdivision (b), the levying officer shall remove the occupants from the property and place the judgment creditor in possession. The provisions of Section 684.120 extending time do not apply to the five-day period specified in this subdivision.

(d) Notwithstanding subdivision (c), unless the person is named in the writ, the levying officer may not remove any person from the property who claims a right to possession of the property accruing prior to the commencement of the unlawful detainer action or who claims to have been in possession of the property on the date of the filing of the unlawful detainer action. However, if the summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46, no occupant of the premises, whether or not the occupant is named in the judgment for possession, may object to the enforcement of the judgment as prescribed in Section 1174.3.

(e) Notwithstanding the eviction of a debtor by a levying officer due to inadvertence or lack of notice of a bankruptcy stay under 11 USC 362(a) or other court ordered stay, the levying officer lacks the duty and authority to restore the debtor to possession of the property. The debtor make seek extraordinary relief from the court that issued to writ to compel the landlord/creditor to restore the debtor to possession.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary