Study D-1003 May 14, 2001

Memorandum 2001-45

**Debtor-Creditor Law: Technical Revisions**
**(Comments on Tentative Recommendation)**

This memorandum considers comments received on the Tentative Recommendation on *Debtor-Creditor Law: Technical Revisions* (March 2001). We have received only one comment letter, from Paul N. Crane, on behalf of the State Bar Committee on Administration of Justice (CAJ), which is attached as an Exhibit. (A copy of the tentative recommendation is also attached for Commissioners' reference at the meeting.)

**Undertaking for Writ of Possession Under Claim and Delivery Statute**

CAJ "concurs generally" with the proposed claim and delivery revisions, but notes that

> the proposed changes highlight a deficiency in the present statutory scheme, which the LRC does not address, in that the defendant can prevent seizure by posting a bond in an amount equal to that required by the court for the plaintiff, but that amount may have no relation to the harm that may be suffered by plaintiff.

Existing law requires the plaintiff to give an undertaking in an amount at least twice the value of the defendant's interest in the property. Code Civ. Proc. § 515.010. This rule and the related release bond developed in several steps.

The Commission's original claim and delivery proposal, enacted in 1973, required an undertaking in an amount double the value of the property, not just the defendant's interest in it. See 1973 Cal. Stat. ch. 526, § 2 (operative July 1, 1974); *Recommendation Relating to the Claim and Delivery Statute*, 11 Cal. L. Revision Comm'n Reports 301, 336 (1973); for legislative history, see 11 Cal. L. Revision Comm'n Reports 1124, 1190. This higher amount provided a greater level of protection and parity between the parties' undertakings, but at a higher cost.

The statutory feature of setting the release bond at the same amount as the plaintiff's bond has remained in place, but the original bond amount was revised in 1982 to provide for a bond "in an amount not less than twice the value of

defendant's interest in the property." See 1982 Cal. Stat. ch. 517, § 120; *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501, 508 n.8, 572 (1982). The Commission footnote explained, "This will avoid the need for and cost of a large initial undertaking in cases where the defendant has a relatively small interest in the property." *Id.* at 508 n.8.

Section 515.010 was last amended, on Commission recommendation, in 1984. See 1984 Cal. Stat. ch. 538, § 12; *Recommendation Relating to Creditors' Remedies*, 17 Cal. L. Revision Comm'n Reports 975, 998-99 (1984). The Comment elaborates as follows:

> The third sentence is amended to make clear that the plaintiff may give an undertaking in an amount that exceeds twice the value of the defendant's interest. This is not a substantive change. Under Section 515.020 the defendant can obtain the release of the property or prevent its seizure by giving an undertaking in the same amount as the plaintiff's undertaking. Under Section 515.010 the plaintiff may set the amount of the undertaking at a level sufficient to protect the plaintiff's interest in the property should the defendant give a release undertaking pursuant to Section 515.020.

The Comment makes clear that the Commission was aware of the issues involved in the interplay between the amount of the plaintiff's bond and the release bond. The approach of the statute, by this time, was to minimize the burden on the plaintiff in the typical case and to avoid a multiplicity of hearings. The plaintiff is in a position to balance the risk and the cost of the bond. In CAJ's example, if the plaintiff gambles and posts the minimum $10,000 bond (not $5,000) to cover the defendant's $5,000 interest in property worth $100,000, the plaintiff has assumed the risk and saved on the bond premium. If the defendant files a $10,000 bond to prevent seizure or obtain release of the property, it is because the plaintiff was willing to assume that risk. We also understand that release bonds are a rarity.

CAJ suggests revising the proposal to provide that

> (a) in all cases, the court should determine both the plaintiff's and defendant's bond requirements and (b) defendant's bond should be an amount necessary to prevent damage to the plaintiff prior to judgment. This obviously is a loose standard, but it is a standard, and allows the court to weigh the equities and also determine what risks there are of the property being damaged, destroyed or removed beyond the jurisdiction prior to judgment.

(Exhibit p. 2.)

The CAJ proposal to have the court determine the amount of the bond would be a significant change in the approach taken in the claim and delivery statute. It would be counter to the attempts to limit the burden on the courts in this type of proceeding. If the Commission thinks that the law is deficient, as argued by CAJ, **the staff believes it would be necessary to study the matter in more depth before making a recommendation requiring judicial determination of all bond amounts in claim and delivery.** Further study might indicate that there are problems with this aspect of the claim and delivery statute, but the Commission has not received any reports of difficulties arising from the existing undertaking rules, other than the concerns raised by the L.A. County Sheriff's Office, which instigated the technical cleanup proposal.

The CAJ suggestion to add a standard for determination of the release bond amount is a good one. It would seem that a standard is also needed for the court to require an undertaking from the plaintiff even though the defendant has no interest in the property. But on further consideration of an appropriate standard for a plaintiff's undertaking, the staff is unclear on when such an undertaking should be required and what standard the court would apply. After having determined the probable validity of the plaintiff's claim and that the defendant has no interest in the property, what is there for the plaintiff to bond against? **The staff recommends revising the new subdivision (b) proposed to be added to Section 515.010 as follows:**

> (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~~ shall waive the requirement of the plaintiff's undertaking~~. If the plaintiff's undertaking is waived, the court~~ and shall include in the order for issuance of the writ the amount of the defendant's undertaking provided by sufficient to satisfy the requirements of subdivision (a) of 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 sufficient to pay costs and damages the plaintiff may sustain by reason of the loss of possession of the property. See Section 515.020(a).

This proposed revision also takes care of the CAJ concern about references to "waiving" the undertaking requirement. (See Exhibit p. 2, sixth paragraph.)

CAJ also suggests some additional wording changes in the last sentence of Section 515.010(a). (See Exhibit p. 2, fifth paragraph.) The revisions in the tentative recommendation are purely stylistic — replacing "such" in a manner consistent with Legislative Counsel drafting preferences. The CAJ proposal is not purely technical, nor is its purpose clear to the staff.

The typographical error will be corrected. (See Exhibit p. 2, seventh paragraph.)

**Hearing on Exemption Claim in Enforcement of Judgments**

CAJ disagrees with the proposal to amend Code of Civil Procedure Section 703.580(f) to apply property to the satisfaction of the judgment where it has been claimed as exempt but the hearing is taken off calendar. (See Exhibit p. 3.) In the view of CAJ, since the creditor has the burden of putting the exemption at issue, the creditor should bear the loss, and the property released to the debtor, unless the court orders otherwise. CAJ also notes that typically

> the creditor will be represented by counsel and, as the moving party in the exemption proceeding, is more likely to be able to control the calendaring of the exemption claim. It is not uncommon for court clerks to take matters off calendar solely at the request of the moving party.

CAJ also suggests that the levying officer won't know whether an exemption is *taken* off calendar or *ordered* off calendar, so that the statutory rule dependong on an order may not be practicable.

The original proposal from the L.A. County Sheriff's Office suggested that the property be released from the levy if the exemption was not adjudicated and the matter was taken off calendar. (See Memorandum 2000-10, pp. 7-8.) The Commission concluded, however, that since the burden is on the debtor to prove the exemption, the default should be to apply the property to satisfaction of the judgment. Exemption claims must be made within 10 days after notice of levy is served on the judgment debtor. Section 703.520(a). The levying officer promptly serves a copy of the claim on the judgment creditor, informing the creditor that the property will be released unless a notice opposition and notice of motion are received within 10 days. Sections 703.540, 703.550. A hearing on the motion is to be held within 20 days from filing the notice of motion, unless continued for

good cause, and notice is given the judgment debtor at least 10 days before the hearing. Section 703.570. The claim of exemption and notice of opposition constitute the pleadings and the court may make its determination based on these papers, though the court can continue the hearing for production of other evidence. Section 703.580(a), (c). The burden in the hearing is on the claimant. Section 703.580(b). The levying officer holds the property pending a determination, under Section 703.610, and that creates a problem when there is no determination.

**Does the Commission wish to reconsider the policy decision that the burden of no determination falls on the debtor?**

Regardless of whether the property is released or applied to satisfaction of the judgment, the staff thinks the "off calendar" language is troublesome, as noted by CAJ. Whether the rule is made consistent with the debtor's burden of proof, or the creditor's burden of going forward on a notice of opposition, the levying officer should be able to dispose of the property one way or the other when the statutory periods have run. Accordingly, the staff would revise proposed subdivision (f) of Section 703.580 as follows:

> (f) Unless otherwise ordered by the court, if an exemption is not determined within the time provided by Section 703.570, [whether because the hearing is ~~ordered~~ taken off calendar or for some other reason,] the property claimed to be exempt shall be applied to the satisfaction of the judgment ~~if a hearing is not held or rescheduled within the time provided by Section 703.570~~.

The language in brackets could also be omitted as surplus, if desired.

**Writ of Possession of Real Property**

CAJ concurs with the proposal to provide for endorsing the date and manner of service and the last date to vacate on the writ of possession. (See Exhibit p. 3.)

Respectfully submitted,

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Assistant Executive Secretary

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May 4, 2001

Law Revision Commission
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By Facsimile and U.S. Mail

Nathaniel Sterling, Esq.
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Re: Debtor-Creditor Law: Technical Revisions

Dear Mr. Sterling:

I am writing on behalf of the Committee on Administration of Justice of the State Bar of California which has reviewed the Commission's March, 2001, draft of proposed technical revisions to the debtor-creditor law.

A. Undertaking for Writ of Possession.

The Committee concurs generally with the proposed changes in sections 512.060 through 515.020, but notes that the proposed changes highlight a deficiency in the present statutory scheme, which the LRC does not address, in that the defendant can prevent seizure by posting a bond in an amount equal to that required by the court for the plaintiff, but that amount may have no relation to the harm that may be suffered by plaintiff.

Thus, for example, if the goods have a fair market value of $100,000, and there is a $95,000 lien in favor of plaintiff, plaintiff can obtain seizure by posting a $5,000 bond. But the defendant can prevent seizure by posting a $5,000 bond. The LRC's proposal is that if the plaintiff's undertaking is waived, the court shall include in its order the amount of the defendant's bond necessary to prevent seizure, but otherwise does not address the amount of the defendant's bond.

Under the proposal (a) if there is a $5,000 bond required of plaintiff, the defendant's bond also is $5,000, but if the plaintiff's bond amount is zero, the court can determine the defendant's bond amount and (b) there are no standards proposed for determining the amount of the defendant's bond.

The Committee would suggest that the statutes should be amended to provide that (a) in all cases, the court should determine both the plaintiff's and defendant's bond requirements and (b) defendant's bond should be an amount necessary to prevent damage to the plaintiff prior to judgment. This obviously is a loose standard, but it is a standard, and allows the court to weigh the equities and also determine what risks there are of the property being damaged, destroyed or removed beyond the jurisdiction prior to judgment.

I might note that for drafting purposes the LRC might compare the bond requirements in a Lis Pendens proceeding. Code of Civil Procedure §405.33 requires a bond "in such amount as will indemnify the claimant for all damages proximately resulting from the expungement which the claimant may incur if the claimant prevails upon the real property claim." Code of Civil Procedure §405.34, pertaining to the release bond, provides that the bond shall be "in such amount as the court may determine to be just," a much looser standard. The Committee has not taken a position on what the release bond standard might be; I merely point out that there is a somewhat analogous statutory provision which might be adapted for this situation.

In addition, the Committee makes the following drafting suggestions:

The proposed changes to the last sentence of section 515.010(a) are satisfactory, but the sentence might read better if further amended to: "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 *secured obligations, the effect of* other liens or encumbrances on the property, and any other factors necessary to determine the *value of the* defendant's *right to possession of* the property."

In proposed section 515.010(b) it would be preferable to say "or the court may determine that no undertaking is required" rather than "or waive the undertaking." Usually it is the opposing party that "waives" whereas it is the court that "determines."

At line 28 of page 6, the word should be "of" rather than "or."

B. Hearing on Exemption Claim.

The Committee does not concur with the proposed addition of Code of Civil Procedure §703.580(f).

The present statutory scheme is that the debtor files an exemption claim with the levying officer. If the creditor seeks to put the matter at issue, the creditor has the burden of going forward with pursuing opposition to the claim of exemption, but in those hearings the burden of proof is on the debtor to prove the exemption. Accordingly, since it is the creditor who has the burden of bringing the matter to the court and obtaining the court's ruling on the exemption, if the creditor fails to pursue the matter through an order of court, it is the creditor who should bear the loss (i.e. the property should be released) unless the court orders otherwise. Furthermore, in the more typical situation, the creditor will be represented by counsel and, as the moving party in the exemption proceeding, is more likely to be able to control the calendaring of the exemption claim. It is not uncommon for court clerks to take matters off calendar solely at the request of the moving party.

In addition, the language proposed for Code of Civil Procedure §703.580(f) refers to an exemption hearing "ordered off calendar." It is unlikely that the levying officer will be able to determine whether an exemption claim is "taken" off calendar or "ordered" off calendar. Perhaps more importantly, the phrase "off calendar" is a shorthand expression for removing a matter from the court's consideration. I have not had the opportunity to check, but the phrase may not appear elsewhere in the Code of Civil Procedure. In any event, the creditor has not met the burden of having the court rule on the matter if it is removed from the court's consideration.

C. Writ of Possession of Real Property.

The Committee concurs with the proposal to have the levying officer endorse on the copy of the writ the date and manner of service and the last date to vacate.

The Committee on Administration of Justice of the State Bar of California appreciates having been afforded the opportunity to comment on these proposals.

Very truly yours,

Paul N. Crane

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