

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Debtor-Creditor Law: Technical Revisions

March 2001

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 7, 2001**.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

This tentative recommendation addresses a number of technical issues identified by sheriffs concerning procedures under the claim and delivery statute (Code Civ. Proc. § 511.010 *et seq.*) and the Enforcement of Judgments Law (Code Civ. Proc. § 680.010 *et seq.*), both of which were enacted on Commission recommendation. Technical revisions should be made to address the problem where there is no undertaking given in claim and delivery, the disposition of exemption claims ordered off calendar and stays pending final determination of exemption claims in enforcement of judgments, and notation of the final day to vacate premises under a writ of possession.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

## DEBTOR -CREDITOR LAW: TECHNICAL REVISIONS

1 The statutes governing prejudgment claim and delivery and the enforcement of  
2 judgments were enacted on recommendation of the Law Revision Commission.<sup>1</sup>  
3 From time to time, the Commission learns of technical problems in statutes  
4 enacted on its recommendation and proposes amendments to address them. A  
5 number of technical issues have been identified by levying officers<sup>2</sup> that are  
6 addressed in this recommendation.

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

8 The Claim and Delivery Law requires a plaintiff to post an undertaking before  
9 the court issues a writ of possession for personal property.<sup>3</sup> A copy of the  
10 undertaking is required to be delivered to the person in possession of the property  
11 at the time of levy.<sup>4</sup> The Judicial Council form titled “Writ of Possession (Claim  
12 and Delivery) (CD-130)” states that a “copy of the plaintiff’s undertaking must be  
13 attached to the original writ and all copies served.” The defendant may obtain  
14 redelivery of seized property by posting an undertaking in the amount of the  
15 plaintiff’s undertaking.<sup>5</sup>

16 The Commission is informed that courts frequently issue prejudgment writs of  
17 possession without requiring the plaintiff to post an undertaking, if the court finds  
18 that the defendant has no interest in the property.<sup>6</sup> Consequently, the levying  
19 officer is faced with two problems: (1) the plaintiff’s undertaking cannot be served  
20 on the defendant as required by statute, and (2) the amount and effect of the  
21 defendant’s undertaking for redelivery is problematic, since the redelivery bond is  
22 in an amount “equal to the amount of the plaintiff’s undertaking.”<sup>7</sup>

23 This problem is inherent in the claim and delivery statute. It may have been  
24 implicit that if the defendant claimed no interest, there would be no need for the  
25 remedy. But the undertaking amount can also be zero where the value of the  
26 property is completely offset by amounts owed the plaintiff. While this problem is

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1. Claim and delivery: Code Civ. Proc. §§ 511.010-515.030; see *Recommendation Relating to the Claim and Delivery Statute*, 11 Cal. L. Revision Comm’n Reports 301 (1973) (1973 Cal. Stat. ch. 526).

Enforcement of judgments: Code Civ. Proc. §§ 680.010-724.260; see *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm’n Reports 2001 (1980) (1982 Cal. Stat. chs. 497, 1364).

All further statutory references are to the Code of Civil Procedure.

2. Letter from Sgt. Michael Torres, Los Angeles County Sheriff’s Dep’t, to California Law Revision Commission, Sept. 28, 1999 (Memorandum 99-58, Exhibit pp. 11-17).

3. Sections 512.060(a)(2), 515.010.

4. Section 514.020(a).

5. Section 515.020. The defendant may also prevent seizure of the property by filing the undertaking before levy. *Id.*

6. See Torres, *supra* note 2, at Exhibit p. 11.

7. Section 515.020(a).

1 not common, the Commission is informed that it arises at least once every two or  
2 three months in Los Angeles County.

3 The Commission recommends amending the claim and delivery statute to  
4 provide for delivering a copy of the court order for issuance of the writ of  
5 possession, as well as a copy of the plaintiff’s undertaking, if any.<sup>8</sup> This will give  
6 appropriate notice to the defendant in cases where the writ of possession has been  
7 issued without an undertaking. The Commission considered the alternative of  
8 imposing a minimum undertaking amount, such as applies to writs of attachment,  
9 but rejected this option as an unnecessary departure from the existing statutory  
10 scheme that would impose additional costs on plaintiffs and, ultimately, on  
11 defendants.<sup>9</sup>

12 **“Off Calendar” Claim of Exemption Hearing Under Enforcement of Judgments Law**

13 Under the Enforcement of Judgments Law, the court is required to issue an order  
14 determining any exemption claims after notice and a hearing.<sup>10</sup> The statute does  
15 not address the situation where an exemption hearing is taken “off calendar” and  
16 not adjudicated by the court.<sup>11</sup> Should property that has been levied upon be  
17 applied to satisfaction of the judgment or returned to the debtor?

18 The Commission recommends amending the statute to make clear that the  
19 property levied upon should be applied to satisfaction of the judgment in cases  
20 where there is no determination of the exemption within the statutory time limits.<sup>12</sup>  
21 The law is clear that the exemption claimant has the burden of proof.<sup>13</sup> If the  
22 exemption claim is not diligently pursued to a conclusion, the allocation of the  
23 burden dictates that the exemption claim is lost, with the consequence that the  
24 property should be applied to satisfaction of the judgment.

25 **Stay Pending Final Determination of Exemption Claim Under Enforcement of Judgments**  
26 **Law**

27 In the case of a claim of exemption under the Enforcement of Judgments Law,  
28 disposition of the property by the levying officer is specifically stayed until the  
29 time to appeal has expired.<sup>14</sup> Section 703.610 does not purport to be a complete  
30 listing of all circumstances that constitute a “final determination of the exemption”  
31 or that require the levying officer to hold the property. The section is subject to

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8. See proposed amendments of Sections 512.060, 514.020, 515.010, 505.020 *infra*. The Judicial Council forms will need to be revised in accordance with these amendments.

9. The Attachment Law provides for a minimum \$2,500 undertaking in “limited civil cases” and \$7,500 otherwise. Section 489.220. In attachment, however, the parties don’t know what will be attached and can’t value it ahead of time.

10. Section 703.580.

11. See Torres, *supra* note 2, at Exhibit p. 13.

12. See proposed amendment of Section 703.580 *infra*.

13. Section 703.580(b).

14. See Section 703.610.

1 other statutory rules, as recognized in the initial clause of subdivision (a),  
2 “[e]xcept as otherwise provided by statute.” Other exceptions are noted in the  
3 Official Comment.<sup>15</sup>

4 The Commission is informed that many levying officers are unaware of the  
5 language in the Comment to Section 703.610 concerning the automatic stay.<sup>16</sup>  
6 Moreover, courts occasionally order the levying officer to immediately apply or  
7 release property levied upon, notwithstanding the statutory language.<sup>17</sup>

8 The Commission recommends amending Section 703.610 to recognize the effect  
9 of court orders and to codify more explicit language concerning the effect of  
10 appeals that now appears in the Comment.<sup>18</sup>

### 11 **Five-Day Notice To Vacate Premises Under Enforcement of Judgments Law**

12 The Enforcement of Judgments Law provisions applicable to unlawful detainer  
13 cases require the debtor to vacate the premises not later than five days after service  
14 of a writ of possession of real property.<sup>19</sup> The five-day period runs from the date of  
15 personal service on an occupant or, if no occupant is present, by posting a copy of  
16 the writ on the property and serving a copy on the judgment debtor personally or  
17 by mail.<sup>20</sup> There is no statutory requirement to insert the date of service and the  
18 last day to vacate the premises on the writ. Levying officers utilize in-house five-  
19 day notice to vacate forms that are served with the writ indicating the date of  
20 service and the last day to vacate.<sup>21</sup> These in-house forms are not uniform. In

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15. The Comment to Section 703.610 reads:

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.

1982 *Creditors’ Remedies Legislation*, 16 Cal. L. Revision Comm’n Reports 1001, 1397 (1982).

16. See Torres, *supra* note 2, at Exhibit pp. 12-13.

17. *Id.*

18. See proposed amendment of Section 703.610 *infra*.

19. Section 715.020.

20. See Section 715.020(a) (service on occupant), (b) (posting and service on judgment debtor), (c) (five-day period). Subdivision (c) makes clear that the “provisions of Section 684.120 extending time” for mailed service do not apply to the five-day period to vacate the premises. See also Molhol & Weigel, *Unlawful Detainer: Judgment and Posttrial Proceedings*, in 2 Landlord-Tenant Practice § 13.67, at 1143-44 (Cal. Cont. Ed. Bar, 2d ed. 2000).

21. See Torres, *supra* note 2, at Exhibit p. 15.

1 addition, the current practice places a burden on levying officers to print and  
2 complete a form not mandated by law.

3 The Commission recommends amending Section 715.010 to provide for  
4 insertion of the vacation date. Omission of the date or statement of an incorrect  
5 date would not invalidate the service of the writ.

PROPOSED LEGISLATION

**Code Civ. Proc. § 512.060 (amended). Issuance of writ of possession**

SECTION 1. Section 512.060 of the Code of Civil Procedure is amended to read:

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 ~~such~~ 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**

SEC. 2. Section 514.020 of the Code of Civil Procedure is amended to read:

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. A copy of the order for issuance of the writ is included so that the person served will receive the necessary information in cases where there is no undertaking.

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

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

SEC. 3. Section 515.010 of the Code of Civil Procedure is amended to read:

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

1 with the court an undertaking. The undertaking shall provide that the sureties are  
2 bound to the defendant for the return of the property to the defendant, if return of  
3 the property is ordered, and for the payment to the defendant of any sum recovered  
4 against the plaintiff. The undertaking shall be in an amount not less than twice the  
5 value of the defendant's interest in the property or in a greater amount. The value  
6 of the defendant's interest in the property is determined by the market value of the  
7 property less the amount due and owing on any conditional sales contract or  
8 security agreement and all liens and encumbrances on the property, and such any  
9 other factors as ~~may be~~ necessary to determine the defendant's interest in the  
10 property.

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

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

21 **Code Civ. Proc. § 515.020 (amended). Defendant's undertaking**

22 SEC. 4. Section 515.020 of the Code of Civil Procedure is amended to read:

23 515.020. (a) The defendant may prevent the plaintiff from taking possession of  
24 property pursuant to a writ of possession or regain possession of property so taken  
25 by filing with the court in which the action was brought an undertaking in an  
26 amount equal to the amount of the plaintiff's undertaking ~~required by pursuant to~~  
27 subdivision (a) of Section 515.010 or in the amount determined by the court  
28 pursuant to subdivision (b) or Section 515.010. The undertaking shall state that, if  
29 the plaintiff recovers judgment on the action, the defendant shall pay all costs  
30 awarded to the plaintiff and all damages that the plaintiff may sustain by reason of  
31 the loss of possession of the property. The damages recoverable by the plaintiff  
32 pursuant to this section shall include all damages proximately caused by the  
33 plaintiff's failure to gain or retain possession.

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

37 (c) If an undertaking for redelivery is filed and the defendant's undertaking is  
38 not objected to, the levying officer shall deliver the property to the defendant, or, if  
39 the plaintiff has previously been given possession of the property, the plaintiff  
40 shall deliver ~~such~~ the property to the defendant. If an undertaking for redelivery is  
41 filed and the defendant's undertaking is objected to, the provisions of Section  
42 515.030 apply.



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

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

4 SEC. 5. Section 703.580 of the Code of Civil Procedure is amended to read:

5 703.580. (a) The claim of exemption and notice of opposition to the claim of  
6 exemption constitute the pleadings, subject to the power of the court to permit  
7 amendments in the interest of justice.

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

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

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

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

26 (f) Unless otherwise ordered by the court, if an exemption hearing is ordered off  
27 calendar, the property claimed to be exempt shall be applied to the satisfaction of  
28 the judgment if a hearing is not held or rescheduled within the time provided by  
29 Section 703.570.

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

32 **Code Civ. Proc. § 703.610 (amended). Disposition of property during pendency of**  
33 **proceedings**

34 SEC. 6. Section 703.610 of the Code of Civil Procedure is amended to read:

35 703.610. (a) Except as otherwise provided by statute or ordered by the court, the  
36 levying officer shall not release, sell, or otherwise dispose of the property for  
37 which an exemption is claimed until the final determination of an appeal is  
38 waived, the time to file an appeal has expired, or the exemption is finally  
39 determined.

40 (b) At any time while the exemption proceedings are pending, upon motion of  
41 the judgment creditor or a claimant, or upon its own motion, the court may make

1 such orders for disposition of the property as may be proper under the  
2 circumstances of the case. ~~Such an~~ The order may be modified or vacated by the  
3 court at any time during the pendency of the exemption proceedings upon such  
4 terms as are just.

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

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

11 **Code Civ. Proc. § 715.010 (amended). Writ of possession of real property**

12 SEC. 7. Section 715.010 of the Code of Civil Procedure is amended to read:

13 715.010. (a) A judgment for possession of real property may be enforced by a  
14 writ of possession of real property issued pursuant to Section 712.010. The  
15 application for the writ shall provide a place to indicate that the writ applies to all  
16 tenants, subtenants, if any, name named claimants, if any, and any other occupants  
17 of the premises.

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

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

22 (2) A statement that if the real property is not vacated within five days from the  
23 date of service of a copy of the writ on the occupant or, if the copy of the writ is  
24 posted, within five days from the date a copy of the writ is served on the judgment  
25 debtor, the levying officer will remove the occupants from the real property and  
26 place the judgment creditor in possession. The levying officer shall enter on the  
27 copy of writ served pursuant to Section 715.020 the date and manner of service  
28 and the last date to vacate the premises. An error or omission in the levying  
29 officer's entries does not affect the validity of the service or the writ.

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

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

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

1 (6) The daily rental value of the property as of the date the complaint for  
2 unlawful detainer was filed unless a summons, complaint, and prejudgment claim  
3 of right of possession were served upon the occupants in accordance with Section  
4 415.46.

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

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

13 **Comment.** Subdivision (b)(2) of Section 715.010 is amended to provide for notice of the date  
14 to vacate, consistent with the substantive rule in Section 715.020(c). If the occupant is served  
15 under subdivision (a), the five-day period is counted from the date of delivery. If the writ is  
16 posted and personally served on or mailed to the judgment debtor under subdivision (b), the five-  
17 day period is counted from the date of personal service or mailing. As provided in Section  
18 715.020(c), the five-day period is not subject to the extension of time rules in Section 684.120.