2001] 123

#### STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Debtor-Creditor Law: Technical Revisions

May 2001

California Law Revision Commission 4000 Middlefield Road, Room D-1 Palo Alto, CA 94303-4739

#### **NOTE**

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Debtor-Creditor Law: Technical Revisions*, 31 Cal. L. Revision Comm'n Reports 123 (2001). This is part of publication #212 [2001-2002 Recommendations].

#### STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION 4000 Middlefield Road, Room D-1

4000 Middlefield Hoad, Hoom D-1 Palo Alto, CA 94303-4739 650-494-1335

DAVID HUEBNER, Chairperson JOYCE G. COOK, Vice Chairperson BION M. GREGORY SENATOR BILL MORROW SANFORD M. SKAGGS ASSEMBLY MEMBER HOWARD WAYNE

May 18, 2001

To: The Honorable Gray Davis Governor of California, and The Legislature of California

This recommendation addresses a number of technical issues identified by the Los Angeles County Sheriff's Department 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 recommendation of the Law Revision Commission.

The Commission recommends making technical revisions to address the following issues: (1) determination of the amount of the defendant's release undertaking in claim and delivery where the plaintiff has not provided an undertaking, (2) disposition of exemption claims in enforcement of judgments where hearings are taken off calendar, (3) clarification of rules concerning stays pending final determination of exemption claims, and (4) notation of the final day to vacate premises under a writ of possession.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner *Chairperson* 

2001] 127

## DEBTOR-CREDITOR LAW: TECHNICAL REVISIONS

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

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

The claim and delivery statute requires a plaintiff to post an undertaking in an amount at least twice the value of the defendant's interest in the property before the court will issue a writ of possession for personal property.<sup>3</sup> A copy of the undertaking is required to be delivered to the person in possession of the property at the time of levy.<sup>4</sup> The Judicial

<sup>1.</sup> 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) (enacted by 1973 Cal. Stat. ch. 526); see also *Recommendation Relating to Turnover Orders Under the Claim and Delivery Law*, 13 Cal. L. Revision Comm'n Reports 2079 (1976) (enacted by 1976 Cal. Stat. ch. 145); *Recommendation Relating to Statutory Bonds and Undertakings*, 16 Cal. L. Revision Comm'n Reports 501 (1982) (enacted by 1982 Cal. Stat. chs. 517, 998).

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.

<sup>2.</sup> Letter from Sgt. Michael Torres, Los Angeles County Sheriff's Dep't, to California Law Revision Commission, Sept. 28, 1999 (attached to Commission Staff Memorandum 99-58 (Oct. 1, 1999), Exhibit pp. 11-17).

<sup>3.</sup> Sections 512.060(a)(2), 515.010.

<sup>4.</sup> Section 514.020(a).

Council form titled "Writ of Possession (Claim and Delivery) (CD-130)" states that 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 in the amount of the plaintiff's undertaking.<sup>5</sup>

Courts may issue prejudgment writs of possession without requiring the plaintiff to post an undertaking, if the court finds that the defendant has no interest in the property.<sup>6</sup> Conse-

It is implicit in the statutory language that an undertaking will be filed: "The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking." Section 515.010. This language derives from the Commission's original claim and delivery proposal, enacted in 1973, which 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.

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 recommendation 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 to the 1984 amendments elaborates on setting undertaking amounts 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.

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

<sup>6.</sup> See Torres, *supra* note 2, at Exhibit p. 11.

quently, the levying officer is faced with two problems: (1) the plaintiff's undertaking cannot be served on the defendant as required by statute, and (2) the amount and effect of the defendant's undertaking for redelivery is problematic, since the redelivery bond is in an amount "equal to the amount of the plaintiff's undertaking." While this problem is not common, the Commission is informed that it arises at least once every two or three months in Los Angeles County.

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

# "Off Calendar" Claim of Exemption Hearing Under Enforcement of Judgments Law

Under the Enforcement of Judgments Law, the court is required to issue an order determining any exemption claims after notice and a hearing.<sup>10</sup> The statute does not address the situation where an exemption hearing is taken "off calendar"

<sup>7.</sup> Section 515.020(a).

<sup>8.</sup> 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.

<sup>9.</sup> 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.

<sup>10.</sup> Section 703.580.

and not adjudicated by the court.<sup>11</sup> Should property that has been levied upon be applied to the satisfaction of the judgment or returned to the debtor?

A judgment debtor must make an exemption claim within 10 days after notice of levy is served on the debtor.<sup>12</sup> 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.<sup>13</sup> 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. 14 The claim of exemption and notice of opposition constitute the pleadings and the court may make its determination based on these papers, although the court can continue the hearing for production of other evidence.<sup>15</sup> The burden in the hearing is on the claimant.<sup>16</sup> The levying officer holds the property pending a determination,<sup>17</sup> which creates a problem if the exemption claim is not resolved.

The Commission recommends amending the statute to make clear that the property levied upon should be released from levy<sup>18</sup> in cases where there is no determination of the exemp-

<sup>11.</sup> See Torres, *supra* note 2, at Exhibit p. 13.

<sup>12.</sup> Section 703.520(a).

<sup>13.</sup> Sections 703.540, 703.550.

<sup>14.</sup> Section 703.570.

<sup>15.</sup> Section 703.580(a), (c).

<sup>16.</sup> Section 703.580(b).

<sup>17.</sup> Section 703.610.

<sup>18.</sup> For rules governing the manner of releasing property from levy under a writ of execution, see Section 699.060. In general, unless the court orders otherwise, if property was taken into custody, it is returned to the person from whom it was taken; if it was not taken into custody, the release is accomplished by giving a notice of release in the manner of levy.

tion within the statutory time limits.<sup>19</sup> This is consistent with the exemption claim procedure outlined above. Although the exemption claimant has the burden of proof where an exemption is contested, the creditor has the burden of putting the exemption at issue and appropriately should bear the loss, with the property claimed to be exempt released to the debtor, unless the court orders otherwise.

#### Stay Pending Final Determination of Exemption Claim Under Enforcement of Judgments Law

In the case of a claim of exemption under the Enforcement of Judgments Law, disposition of the property by the levying officer is specifically stayed until the time to appeal has expired.<sup>20</sup> Section 703.610 does not purport to be a complete listing of all circumstances that constitute a "final determination of the exemption" or that require the levying officer to hold the property. The section is subject to other statutory rules, as recognized in the initial clause of subdivision (a), "[e]xcept as otherwise provided by statute." Other exceptions are noted in the Official Comment.<sup>21</sup>

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

<sup>19.</sup> See proposed amendment of Section 703.580 infra.

<sup>20.</sup> See Section 703.610.

<sup>21.</sup> The Comment to Section 703.610 reads:

The Commission is informed that many levying officers are unaware of the language in the Comment to Section 703.610 concerning the automatic stay.<sup>22</sup> Moreover, courts occasionally order the levying officer to immediately apply or release property levied upon, notwithstanding the statutory language.<sup>23</sup>

The Commission recommends amending Section 703.610 to recognize the effect of court orders and to codify more explicit language concerning the effect of appeals that now appears in the Comment.<sup>24</sup>

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

The Enforcement of Judgments Law provisions applicable to unlawful detainer cases require the debtor to vacate the premises not later than five days after service of a writ of possession of real property.<sup>25</sup> The five-day period runs from the date of personal service on an occupant or, if no occupant is present, by posting a copy of the writ on the property and serving a copy on the judgment debtor personally or by mail.<sup>26</sup> There is no statutory requirement to insert the date of service and the last day to vacate the premises on the writ.

provisions governing enforcement and stays pending appeal, see Sections 916-923.

- 22. See Torres, *supra* note 2, at Exhibit pp. 12-13.
- 23. Id.
- 24. See proposed amendment of Section 703.610 infra.
- 25. Section 715.020.
- 26. 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).

<sup>1982</sup> Creditors' Remedies Legislation, 16 Cal. L. Revision Comm'n Reports 1001, 1397 (1982).

Levying officers utilize in-house five-day notice to vacate forms that are served with the writ indicating the date of service and the last day to vacate.<sup>27</sup> These in-house forms are not uniform. In addition, the current practice places a burden on levying officers to print and complete a form not mandated by law.

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

<sup>27.</sup> See Torres, *supra* note 2, at Exhibit p. 15.

#### 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 an undertaking 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, the court shall waive the requirement of the plaintiff's undertaking and shall include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of subdivision (b) 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 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 last clause 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(b).

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

- SEC. 4. Section 515.020 of the Code of Civil Procedure is amended to read:
- 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) of Section 515.010. The
- (b) 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.

<del>(b)</del>

(c) 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.

<del>(c)</del>

(d) 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). The section is retabulated to permit easy reference to the contents of the undertaking. See Section 515.010(b).

## Code Civ. Proc. § 703.580 (amended). Hearing and order on exemption claim

- SEC. 5. Section 703.580 of the Code of Civil Procedure is amended to read:
- 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) Unless otherwise ordered by the court, if an exemption is not determined within the time provided by Section 703.570, the property claimed to be exempt shall be released.

**Comment.** Subdivision (f) is added to Section 703.580 to govern the disposition of property where the matter is not determined within the 20-day statutory time limit, such as where the hearing on the exemption claim has been taken off calendar or for any other reason.

## Code Civ. Proc. § 703.610 (amended). Disposition of property during pendency of proceedings

- SEC. 6. Section 703.610 of the Code of Civil Procedure is amended to read:
- 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 any orders for disposition of the property as that 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 any terms as that 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.

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

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

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. The levying officer shall enter on the copy of the writ served pursuant to Section 715.020 the date and manner of service and the last date to vacate the premises. An error or omission in the levying officer's entries does not affect the validity of the service or the 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). If the occupant is served under subdivision (a), the five-day period is counted from the date of delivery. If the writ is posted and personally served on or mailed to the judgment debtor under subdivision (b), the five-day period is counted from the date of personal service or mailing. As provided in Section 715.020(c), the five-day period is not subject to the extension of time rules in Section 684.120.