# 6-21/000.00 Writ of Possession (Claim and Delivery)

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References

**BPC – Business and Professions Code**
**CC – Civil Code**
**CCP – Code of Civil Procedure**
**COMM – Commercial Code**
**CRC – California Rules of Court**
**ELEC – Elections Code**
**FAM – Family Code**
**FIN – Financial Code**
**GC – Government Code**
**HS – Health and Safety Code**
**INS – Insurance Code**
**LAB – Labor Code**
**MVC – Military and Veterans Code**
**PC – Penal Code**
**PROB – Probate Code**
**RTC – Revenue and Taxation Code**
**UIC - Unemployment Insurance Code**
**VEH – Vehicle Code**

**HNC – Harbors and Navigation Code** **WIC – Welfare and Institutions Code**

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## • 6-21/100.00 Writ of Possession (Claim and Delivery)

Claim and delivery is not an action in and of itself. It is a provisional remedy available to a plaintiff in an action for recovery of specific personal property in the possession of the defendant. The provisional remedy cannot be employed independently, but only under the action for recovery of the property. (McFaddin v. H.S. Crocker Co., 219 CA 2d 585)

A claim and delivery action is merely an action for the recovery of the possession of personal property, and the possession obtained by the auxiliary proceedings is a temporary possession and does not operate to give the one so gaining possession the full right of possession like a final judgment in the action. A plaintiff gaining possession through claim and delivery proceedings must keep the property so that it may be returned to the defendant in case the final judgment awards it to the defendant, and the plaintiff cannot sell the property prior to final judgment and thus make it impossible for the defendant to regain possession. (Steele

v. Marlborough, 100 CA 491)

Claim and delivery is only available against defendants who have actual or constructive possession of the property sought to be recovered. (Lamus v. Engwicht, 39 CA 523) Property may properly be seized from possession of a person acting as agent for defendant and claiming no ownership interest. (Phillips Aviation Co. v. Superior Court, 246 CA 2d 46)

An owner of personal property that has been attached in an action in which the owner is not a defendant may recover the property through Claim and Delivery proceedings. (Kellogg v. Burr, 126 CA 38; Rhodes v. Patterson, 3 CA 469) The attaching creditor may be joined as a defendant with the attaching officer in the replevin action. (Taylor v. Bernheim, 58 CA 404) If the sheriff or other officer holding personal property under writ of attachment or execution is made a defendant in an action for possession of that property, the officer will deliver the property to the coroner under Claim and Delivery proceedings upon service of a copy of the writ and undertaking covering such officer. An officer so relinquishing the attached property has the duty to object to the plaintiff's undertaking on the Claim and Delivery as agent of the creditor, unless relieved from that duty. (Noble v. Desmond, 72 CA 330; CCP 995.910-995.960)

Tangible personal property in the possession or under the control of the judgment debtor or in the custody of the levying officer is subject to a levy under attachment or execution notwithstanding that the property is subject to the claim and delivery proceeding. The property may not be sold or otherwise disposed of under the attachment or execution levy until the action under which the claim and delivery was made is finally determined.

A receiver appointed by a state court is not entitled to take possession from the officer unless a redelivery bond has been given. (Miller v. Superior Court, 63 CA 1

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## • • 6-21/110.00 Definitions

### • • • 6-21/110.10 Complaint

"Complaint" includes a cross-complaint. (CCP 511.020)

### • • • 6-21/110.20 Defendant

"Defendant" includes a cross-defendant. (CCP 511.030)

### • • • 6-21/110.30 Farm Products

"Farm products" means crops or livestock or supplies used or produced in farming operations or products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, honey, milk, and eggs) while in the possession of a defendant engaged in raising, fattening, grazing, or other farming operations. If tangible personal property is a farm product, it is not inventory. (CCP 511.040)

### • • • 6-21/110.40 Inventory

"Inventory" means tangible personal property in the possession of a defendant who holds it for sale or lease or to be furnished under contracts of service. (CCP 511.050)

### • • • 6-21/110.50 Levying Officer

"Levying officer" means the sheriff or marshal who is directed to execute a writ of possession issued under this chapter. (CCP 511.060)

### • • • 6-21/110.60 Person

"Person" includes an individual, a corporation, a partnership or other unincorporated association, a limited liability company, and a public entity. (CCP 511.070)

### • • • 6-21/110.70 Plaintiff

"Plaintiff" means a person who files a complaint or cross-complaint. (CCP 511.080)

### • • • 6-21/110.80 Probable validity

A claim has "probable validity" where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim. (CCP 511.090)

### • • • 6-21/110.90 Public entity

"Public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state. (CCP 511.100)

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### • • • 6-21/120.00 Noticed Hearing Procedure

Upon the filing of the complaint or at any time thereafter, the plaintiff may apply pursuant to this chapter for a writ of possession by filing a written application for the writ with the court in which the action is brought. (CCP 512.010(a)) No writ shall be issued under this chapter except after a hearing on a noticed motion. (CCP 512.020(a)) Prior to the hearing, the defendant shall be served with a copy of the summons and complaint, a Notice of Application for Writ of Possession and Hearing, and a copy of the Application for Writ of Possession with any supporting affidavits. (CCP 512.030) Service is made in the same manner as 6-07/000.00 Summons and Complaint. However, service must be made 16 court days before the hearing. (CCP 1005)

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### • • • 6-21/130.00 Ex Parte Procedure

A writ may be issued ex parte (without notice to the defendant) if the plaintiff establishes probable cause that (CCP 512.020(b)):

1. The defendant feloniously took the property, or
2. The property is a credit card, or
3. The defendant acquired the property in the ordinary course of business and it is not necessary for support of the debtor or the debtor's family and it is in immediate danger of being transferred or concealed, and the issuance of an ex parte order is necessary to protect the property.

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### • • • 6-21/140.00 Temporary Restraining Order

At or after the time the plaintiff files the application for writ of possession, the plaintiff may apply for a temporary restraining order by setting forth in the application a statement of grounds justifying the issuance of such order. (CCP 513.010)

1. The plaintiff has established the probable validity of his claim to possession of the property.
2. The plaintiff has provided an Undertaking by Personal Sureties (CD-140) as required by CCP 515.010.
3. The plaintiff has established the probability that there is an immediate danger that the property claimed may become unavailable to levy by reason of being transferred, concealed, or removed or may become substantially impaired in value.

If the court determines the plaintiff is not entitled to a writ, the temporary restraining order shall be dissolved. If the court determines a writ is to be issued, a preliminary injunction may also be issued until the property is seized.

### • • • 6-21/150.00 Issuance of Writ of Possession (Claim and Delivery)

At the hearing if the plaintiff establishes probable validity of the claim to possession and an Undertaking by Personal Sureties (CD-140) as required by CCP 515.010, the court may issue the Writ of Possession. (CCP 512.060, 515.010, 512.020)

### • • • • 6-21/150.10 Undertaking

The undertaking is to compensate the defendant for the return of the property and any sum recovered against the plaintiff. The undertaking is in an amount not less than twice the value of the defendant's interest in the property or in a greater amount as 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. (CCP 515.010(a))

The court may waive the requirement of an undertaking if the defendant has no interest in the property. If the undertaking is waived, it must be indicated on the Order for Issuance of Writ of Possession. However, the Sheriff requires a court order or the plaintiff's written instructions stating that the court has ordered no undertaking because the defendant has been found to have no equity in the property per CCP 515.010. In lieu of a separate order directed to the Sheriff, Item 5 (c) of the Order for Writ of

Possession may be modified to include the wording "No bond required." If the undertaking is waived, the court shall indicate the amount of the defendant's undertaking for redelivery of the property to satisfy CCP 515.020 on the Order for Writ of Possession (CD-120) (CCP 515.010(b).

An "undertaking" or "bond" means a surety, indemnity, fiduciary, or like undertaking executed by the sureties alone. (CCP 995.190, 995.140) In a case where the plaintiff posts a cash deposit rather than an undertaking, a receipt from the clerk of the court is not sufficient to satisfy CCP 515.010. A court order directing the issuance of a writ "upon posting of an undertaking (or cash collateral) is also not sufficient. A court order is unnecessary because cash can be deposited in lieu of a bond (undertaking). (CCP 995.710(a)(1)) The deposit must be accompanied by an agreement setting forth the terms and conditions of the deposit. The receipt of cash deposit must be accompanied by an agreement setting forth the terms and conditions of the deposit a copy of which must be served.

### • • • 6-21/160.00 Order Directing Transfer

If a writ of possession is issued, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. Such order shall contain a notice to the defendant that failure to turn over possession of such property to plaintiff may subject the defendant to being held in contempt of court. (CCP 512.070)

### • • • 6-21/170.00 Contents of Writ of Possession (Claim and Delivery)

If the plaintiff establishes at the hearing the probable validity of the plaintiff's claim to possession of the property and has provided any required undertaking, the court shall issue the Writ of Possession (CD-130).

The writ must be directed to the levying officer in the county in which the property is located and shall include the following (CCP 512.080):

1. Court seal (CCP 153) Please note: the writ *may* be issued in an electronic form (GC 68150(g)).
2. Property description
3. Direction for levying officer to seize, retain, release and sell according to law
4. Defendant's rights including the right to object to plaintiff's bond and to post a redelivery bond

CCP 512.080(c) also refers to the requirement of a private place description. This is not a mandatory requirement for the issuance of the writ. The private place endorsement is only ordered after the plaintiff established probable cause to believe the property or some part of the property may be found at the private place.

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## • 6-21/200.00 Levy and Custody

The specified property can only be seized. Seizure is from the possession of the defendant or an agent of the defendant. The levying officer shall either remove the property to a place of safekeeping or install a keeper. If the property is used as a dwelling, such as a mobile home or boat, a keeper shall be placed in charge of the property for two days after which the levying officer shall remove the occupants and any contents and shall take exclusive possession of the property.

The levying officer has no authority to enter or search any private place except where endorsed and specified on the writ of possession. If the endorsement is specified on the writ of possession, the levying officer shall at the time possession of the property is demanded announce the officer's identity, purpose, and authority. If the property is not voluntarily delivered, the levying officer may break open any building or enclosure in a manner that will cause the least damage. If the levying officer believes that risk of serious bodily harm or death may result from such forced entry, the levying officer shall refrain and shall promptly make a return to the court from which the writ issued setting forth the reasons for his belief that the risk exists.

(CCP 514.010)

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## • • 6-21/210.00 Seizure From Third Party

If the property is in the possession of a warehouse or other lienholder claiming a storage, material or labor lien dependent on possession (CC 3051, 3051a), the plaintiff may payoff the lien either directly or through the levying officer. In this event the lien would be extinguished and the levying officer may take the property from the warehouse or other bailee as an agent of the defendant. Without prior payment, the property cannot properly be taken unless the lienholder is a named defendant and covered by the undertaking. (International Airports, Inc. v. Finn, 132 CA 293)

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## • • 6-21/220.00 Private Place

The provisions requiring a court order based on probable cause prior to levying on property in a private place should be complied with prior to levying on personal property physically on the person or held in the hands of a defendant.

Unless consent is freely, voluntarily and knowledgeably given, the levying officer is not authorized to enter any private place to seize property unless in possession of a writ or other order of court directing the officer to enter that specific private place.

Fourth Amendment protections against unreasonable searches and seizures extend to civil as well as criminal matters. Intrusions into private places in execution of process are searches and seizures within meaning of Fourth Amendment, and a search is unreasonable unless supported by a warrant (order) issued by a magistrate upon a showing of probable cause. Where government officials rely on consent to justify the lawfulness of a search, the burden is on them to show by clear and positive evidence that consent was freely, voluntarily and knowledgeably given. The occupant of the premises is confronted not only by the intimidating presence of an officer of law, but also by the existence of legal process which appears to justify the intrusion. In such a situation, acquiescence in the intrusion generally cannot operate as a voluntary waiver of Fourth Amendment rights. Although it is established that one may waive the Fourth Amendment right to be free from unreasonable searches and seizures, the courts indulge every reasonable presumption against waiver of fundamental constitutional rights. Invitations to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. (Blair v. Pitchess, 5 Cal.3d 258)

The preceding paragraphs set forth objective standards to be followed by the levying officer in executing the officer's ministerial duties. These objective standards, however, are based upon the levying officer having knowledge of whether the property is located in a "private place," as such term is used in connection with the Fourth Amendment proscription against unreasonable searches and seizures. In this context the law, through the doctrine of stare decisis or case law, is continually changing. The situation is exacerbated by the fact that, although the courts look to objective factors to decide if the defendant exhibited an expectation of privacy in order to make a specific location a "private place," it is the defendant's subjective intent as demonstrated by these objective factors that are controlling. The following cases offer some insight into the uncertainty of what may or may not be found to be a "private place." In each and every case some independent judgment will be required based on the specific facts and circumstances. Each levy situation should be approached from the standpoint that if it is unclear whether the location is a "private place," the actions to be taken should be consistent with those that would be authorized if the location were a "private place."

Homes, offices and hotel rooms fall within the category of maximum protection from unreasonable searches. Certain places carry with them expectation of privacy which, although considerable, is less intense and insistent than in the case of homes, offices and hotel rooms; such places may be searched upon probable cause alone under circumstances of less demanding urgency, and include automobiles, and trunks consigned to common carrier. Some sites are regarded as so public in nature that searches are justifiable without any particular showing of cause or exigency, and include places which might be classified as open fields and places in which the defendant has not exhibited a subjective expectation of privacy or where such an expectation would be unreasonable. (People v. Dumas, 9 CA 3d 871)

A resident of a house may justifiably rely upon privacy of surrounding areas as protection from peering of officers, unless the resident is exposed to that intrusion by existence of public pathways or other invitations to

the public to enter upon the property. (Lorenzana v. Superior Court, 9 CA 3d 626)

A fenced front yard does not necessarily show an expectation of privacy. The determining factor in considering whether an individual's yard is protected by the Fourth Amendment is what reasonable expectation of privacy was exhibited, not what the defendant subjectively claimed. There is no reasonable expectation of privacy in a front yard of a residence in the absence of a locked gate, high solid fence blocking the front yard from view, a written notice to keep out or beware of a dog, or perhaps a doorbell at the front gate. (People v. Mendoza, Super., 122 CA 3d Supp. 12)

In People v. Moreno (204 CA Rptr. 17), the court held that an attached garage, whether or not it has a common entry, is considered an integral part of the house and is simply one room of several which together compose the dwelling. Consequently, attached garages may not be entered to make a levy or for any other purpose unless the deputy has first obtained the occupant's consent or is in possession of a court order authorizing entry into the specified garage.

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## • • • 6-21/220.10 Private Place Endorsement

If the specified property or any part of it is in a private place, and the writ of possession includes an endorsement specifying any private place that may be entered to take possession of the property or some part of it, the levying officer shall at the time he demands possession of the property announce his identity, purpose, and authority. If the property is not voluntarily delivered, the levying officer may cause any building or enclosure where the property may be located to be broken open in such a manner as he reasonably believes will cause the least damage and may call upon the power of the county to aid and protect him, but, if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property and shall promptly make a return to the court from which the writ issued setting forth the reasons for his belief that the risk exists. In such case, the court shall make such orders as may be appropriate. (CCP 514.010(c), 512.080)

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## • • • 6-21/220.20 Private Place No Endorsement

If the personal property sought to be seized is located in a private place of the defendant, and the writ of possession does not specify a private place endorsement, the levying officer making the levy shall demand delivery of the property by the defendant and shall advise such person of potential liability for additional costs and attorney's fees that may be incurred in further proceedings to obtain delivery of the property. If the defendant does not deliver the property, the levying officer shall promptly notify the plaintiff of the failure to obtain custody of the property and shall make no further attempt to obtain custody of the property until a court order is delivered to the officer which states that there is probable cause to believe that the specific property sought to be levied upon is in a specific location described in the order.

The plaintiff in an ex parte motion may apply to the court for an order directing the levying officer to enter a private place to search for and seize the property. The plaintiff may also petition the court for an order to search for and seize the specified property in a different private place indicated on the writ of possession. (CCP 512.090)

Upon receipt of the ex parte court order, the levying officer may proceed with the levy in accordance with 6-21/220.10 Private Place Endorsement.

## • 6-21/300.00 Service of Process

At the time of levy, the levying officer shall deliver to the person in possession of the property copies of the writ of possession, plaintiff's undertaking and order for writ of possession. If no one is in possession of the property at the time of levy, the levying officer shall subsequently serve the process on the defendant. If service on the defendant is required, it shall be by personal service, or if the defendant has not appeared in the action, in the manner provided for the service of summons and complaint. If the defendant has appeared in the action, service is made by leaving with a person at least 18 years of age at the defendant's residence between the hours of 8 a.m. and 6 p.m. If at the time of attempted service between said hours no such person can be found, service may be made by first-class mail at the defendant's office address as last given on any document filed in the cause by the defendant and served on the plaintiff; otherwise, at the defendant's residence address. If the defendant's residence address is unknown, then service is effected by delivery to the clerk of the court. The plaintiff's instructions should indicate whether the defendant has appeared in the action, not at the hearing.

## • • 6-21/310.00 After Hearing Writ

If the writ is an After Hearing Writ of Possession (Claim and Delivery), the levying officer shall serve defendant or the person in possession of the property copies of the:

a. Writ of Possession (CD-130)
b. Copy of the Undertaking (unless waived by the court on the Order for Writ of Possession)
c. Order for Writ of Possession (CD-120)

The process shall be served on the person in possession of the property at the time of levy. If no one is in possession, the defendant shall be served.

If the defendant has not appeared in the action, the process shall be served in the same manner as a summons. (CCP 514.020)

If the defendant has appeared in the action, the process shall be served in the manner specified in CCP 1011:

- Personally served the defendant or the defendant's attorney
- Serving the defendant's attorney at the attorney's office with the receptionist or person in charge between 9 a.m. and 5 p.m.
- At the defendant's attorney's residence with a person at least 18 years of age

- At the defendant's residence between 8 a.m. and 8 p.m. with a person at least 18 years of age

- If a person at least 18 years old cannot be found at the defendant's residence, the process may be mailed
- If the defendant's residence is not known, the process may be delivered to the clerk of the court

## • • 6-21/320.00 Ex Parte Writ

If the writ is an Ex Parte Writ of Possession (Claim and Delivery), the levying officer shall serve copies of the:

a. Writ of Possession (CD-130)
b. Copy of the Undertaking (unless waived by the court on the Order for Writ of Possession)
c. Order for Writ of Possession (CD-120)
d. Summons and Complaint
e. Application for Writ of Possession (CD-100)
f. Any affidavits in Support of Application
g. Notice of Application for Writ of Possession and Hearing (CD-110)

The process shall be served on both the defendant and the person in possession of the property at the time of levy unless they be one and the same. The process shall be served in the same manner as a summons. (CCP 512.020, 514.020)

## • 6-21/400.00 Remedies of Defendant

The defendant may obtain the release of the property by objecting to the undertaking, posting a redelivery bond, or, in the case of an ex parte writ, make a motion to quash the writ.

## • • 6-21/410.00 Objection to Undertaking

The defendant may object to the plaintiff's undertaking by filing a notice of objection to undertaking with the court and mailing a copy to the levying officer within 10 days after levy. The plaintiff may object to an undertaking filed by the defendant for redelivery of the property by filing a notice of objection to undertaking with the court and mailing a copy to the levying officer within 10 days after the defendant filed the undertaking

for redelivery with the court. (CCP 515.030(a), (b))

If the court determines that the defendant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the court shall order the levying officer to deliver the property to the plaintiff, or, if the plaintiff has previously been given possession of the property, the plaintiff shall retain possession. If the court determines that the defendant's undertaking is sufficient, the court shall order the levying officer or the plaintiff to deliver the property to the defendant. (CCP 515.030(c))

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## • • 6-21/420.00 Motion to Quash Ex Parte Writ

A defendant whose property has been taken pursuant to a writ issued ex parte may apply for an order that the writ be quashed and any property levied on pursuant to the writ be released. The application shall be made by noticed motion. (CCP 512.020 (B)(3)(iii))

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## • • 6-21/430.00 Redelivery Bond

Except as required by court order or pursuant to a third party claim, the levying officer shall only redeliver the property to the defendant after the levying officer has received a notice of the filing of an undertaking for redelivery by the defendant within 10 days after the levy, and the plaintiff does not file a timely objection thereto.

Since the plaintiff's objection must be filed with the court within 10 days of the date the defendant filed the undertaking with the court, and a copy of the objection is only required to be mailed to the levying officer within that time, the levying officer should allow for an additional time to receive a notice of objection that may have been timely filed and mailed. As a consequence, absent receipt of the notice of objection, the property should not be redelivered until 15 days have elapsed from the defendant's filing of an undertaking for redelivery, unless the officer has independent knowledge that the notice of objection was in fact not filed within the 10 days, in which case the property should be redelivered at the expiration of the 10 days.

(CCP 514.030)

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## • 6-21/500.00 Third Party Claim

Where the property taken is claimed by a third person, the general rules and proceedings for third party claims apply. (CCP 514.050) See 6-31/000.00 Third Party Claims.

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## • 6-21/600.00 Delivery to the Plaintiff

Except as required by court order or pursuant to a third party claim, the property shall be delivered to the plaintiff 10 days after the levy, unless within that time the levying officer receives a notice of objection to

plaintiff's undertaking or a notice of the filing of an undertaking for redelivery. (CCP 514.030(a)(3))

## • 6-21/700.00 Perishable Property Sale

Perishable property may only be sold pursuant to an order of the court, in which case the proceeds of the sale shall be deposited in the court to abide the judgment in the action. (CCP 514.030(b))

## • 6-21/800.00 Return of Writ

The levying officer shall return the writ of possession within 30 days after levy or 60 days after the writ is issued. (CCP 514.040)