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)

• • 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)

• • 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.

• • 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.