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"Obtaining a Writ of Possession"

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Here's How and When to Do It

ACTION GUIDE

August 2004

Obtaining a Writ of Possession

Peter M. Rehon



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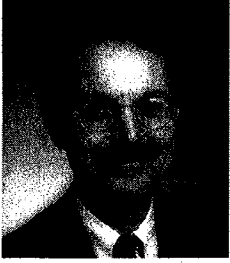
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CEB appreciates and gratefully acknowledges the valuable contributions to earlier versions of this Action Guide made by the following consultants:

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Norma Piatt, CEB Attorney, was the Project Manager for this Action Guide. Enrique De Anda and Norma Piatt performed legal editing. Paul Green copyedited and handled production. Sally St. Lawrence and Ken Scudder provided legal research analysis.

Cutoff Dates

We completed legal editing of this Action Guide at the end of June 2004.

We reviewed case citations through Shepard's California Citations at 32 C4th 409, 115 CA4th 1031, 157 L Ed 2d 1059, 356 F3d 798, 296 F Supp 2d 1374.

We reviewed California statutes for amendments and repeals through Stats 2004, ch 26.

We try to add significant statutory and judicial developments, subsequent histories of cases, and other matters such as new forms and regulations after legal editing is done, but you should not assume that all developments after the listed cutoff dates have been included.

Obtaining a Writ of Possession

by Peter M. Rehon

Before Seeking Writ of Possession

STEP 1. DETERMINE WHETHER A WRIT OF POSSESSION IS APPROPRIATE

WHEN TO USE IT

You typically seek the writ to:

Defaulted Debt

Regain possession of *personal* property when the:

- a. Property is security for repayment of a debt owed your client; and
- b. Debtor is in default on the debt.

Reclaim Property

Reclaim personal property that has been loaned, leased, or bailed to defendant.

Ownership Dispute

Obtain personal property whose ownership your client and defendant are disputing.

NOTE

To obtain possession of *real* property, use unlawful detainer. See Handling Unlawful Detainers (Cal CEB Action Guide Winter 2003).

WHAT IT IS

Writ of possession is a provisional *prejudgment* remedy (sometimes known as claim and delivery), which, if successful, allows plaintiff (or cross-complainant) to (CCP §§511.010–516.050):

- a. Levy on defendant's (or cross-defendant's) personal property in which plaintiff has a:
 - (1) *Specific* ownership interest; or
 - (2) Security interest.
- b. Obtain temporary possession, pending final judgment in an action to recover the same personal property.

DISTINGUISH FROM OTHER REMEDIES

Review the following potential remedies to determine which one is appropriate in your case:

Attachment

- a. Pursue this prejudgment remedy if plaintiff or cross-complainant client:
 - (1) Has an *unsecured* claim; and
 - (2) Seeks to levy on defendant's property to ensure sufficient property available to satisfy judgment against that defendant.

- b. Recognize that attachment will not issue on a claim secured by real property, *except* if the security for the claim (CCP §483.010(b)):
- (1) Has become valueless; or
 - (2) Has decreased in value to less than the amount then owing on the claim.

NOTE

The attachment may issue in an amount that does not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim.

Further Research: See Obtaining a Writ of Attachment (Cal CEB Action Guide Fall 2000).

Receivership

You may wish to have a receiver appointed if (CCP §§564–570):

- a. Your client has a security interest in *all* of the assets of a going concern; and
- b. You want to preserve the status of the business rather than liquidate its assets.

General TRO/Preliminary Injunction

- a. Recognize that the temporary restraining order (TRO) provisions that are part of the writ of possession remedy (CCP §513.010) are *not* the same as the general injunction provisions (CCP §§525–534).
- b. Seek a general TRO/preliminary injunction under CCP §§525–534 *if*:
 - (1) The value of defendant's collateral does not warrant the time and cost of pursuing a writ of possession; *but*
 - (2) You do not want defendant to dispose of the property pending final judgment.

NOTE

To not seek an injunction alone to compel the defendant to turn over personal property to which the plaintiff is entitled. "The appropriate prejudgment remedy to recover possession of personal property is a writ of possession under the claim and delivery law, not an injunction." *Simms v NPCK Enters., Inc.* (2003) 109 CA4th 233, 236, 134 CR2d 557.

CONSIDER ADVANTAGES AND DISADVANTAGES

For a discussion of the advantages and disadvantages of pursuing writ of possession, see step 3, below.

Further Research: See 6 Witkin, California Procedure, *Provisional Remedies* §§247–275 (4th ed 1997); Debt Collection Practice in California, chap 6 (2d ed Cal CEB 2002), referred to throughout this Action Guide as Debt Collection.

STEP 2. DETERMINE WHETHER A WRIT OF POSSESSION IS AVAILABLE**WHEN AVAILABLE TO PLAINTIFF**

A writ of possession is available only if plaintiff satisfies all three of the following elements:

- a. Action for recovery of property is pending;

- b. Application includes all required elements; and
- c. Showing made at hearing of legal requirements.

Pending Action

Plaintiff has filed an action for recovery of specific property (CCP §512.010; see Debt Collection §§6.111, 6.117); and

Required Elements of Application

Plaintiff's application includes all the following elements (CCP §512.010(b); see steps 11 and 13, below):

- a. *Entitlement to property* (CCP §512.010(b)(1)):
 - (1) Plaintiff is entitled to possession of the property; and
 - (2) Description of the basis of plaintiff's claim (usually because defendant defaulted under the security agreement);

NOTE 

If the basis of plaintiff's claim is a written instrument, attach a copy of it.

- b. *Wrongful detention by defendant*: Defendant is wrongfully detaining the property (CCP §512.010(b)(2); see *Englert v IVAC Corp.* (1979) 92 CA3d 178, 185, 154 CR 804);
- c. *Property description*:
 - (1) Description of property and statement of its value (CCP §512.010(b)(3)); and
 - (2) Statement of location of property (CCP §512.010(b)(4)); and
- d. *Property not taken or seized*: Property has not already been (CCP §512.010(b)(5)):
 - (1) Taken under a statute for a:
 - (a) Tax;
 - (b) Assessment; or
 - (c) Fine; or
 - (2) Seized under an execution against plaintiff's property;

NOTE 

If the property has been seized, plaintiff must show that it is exempt by statute from seizure.

Required Showing at Hearing

Plaintiff satisfies the requirements of CCP §512.060(a), *i.e.*:

- a. *Probable validity of claim*: Plaintiff establishes "probable validity" (CCP §511.090) of claim to possession; and
- b. *Bond*: Provides necessary bond (undertaking). CCP §515.010; see step 10, below.

NOTE 

Be aware that under CCP §511.090, "probable validity" means that it is "more likely than not that the plaintiff will obtain a judgment against the defendant on that claim." See *RCA Serv. Co. v Superior Court* (1982) 137 CA3d 1, 187 CR 602. See also *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 130 CR2d 641 (discussing the "probable validity" standard in other similar statutes).