

Memorandum 83-52

Subject: Study D-326 - Bonds and Undertakings (Letter from Rick Schwartz)

Attached to this memorandum as Exhibit 1 is a letter from Rick Schwartz that includes two suggestions for changes in the law governing bonds and undertakings. The Bond and Undertaking Law was enacted upon Commission recommendation and the Commission has assumed responsibility for superintending the law in this area.

Time for Objection to Litigation Bond or Undertaking

If a bond or undertaking is given in connection with an action or proceeding, the beneficiary has 10 days after service of a copy of the bond or undertaking within which to object to its sufficiency. If the beneficiary does not object within 10 days, all objections are deemed waived except upon a showing of changed circumstances. Code Civ. Proc. § 995.930. Special statutes may provide different times for objection in particular situations; for example, the statute governing injunction undertakings requires objection within five days after service of the injunction. Code Civ. Proc. § 529.

Mr. Schwartz believes that these time periods may be too short in some situations. He gives an example of an injunction bond that was properly served on the Bank of America. The bond did not reach the appropriate litigation department attorney until after the time for objection had passed. Mr. Schwartz points out that the objection procedure is for the benefit of the beneficiary, and the only person hurt by failure to make a prompt objection is the beneficiary. He suggests that the time for making objection could be extended to 30 days in cases where no one would be prejudiced by the extension.

The staff believes the points made by Mr. Schwartz are good, with one qualification. In some cases the principal as well as the beneficiary is affected by the length of the period for making objections. Under the claim and delivery statute, for example, if the defendant gives an undertaking for redelivery of the property, the levying officer holds the property until the time for making objections to the undertaking has expired and, if no objection has been made, redelivers the property to the defendant. An extension of time to make objections from 10 to 30 days in such a situation would clearly prejudice the defendant.

Rather than a fixed 30-day time for objection, the staff believes a better solution would be to leave the time for objection at 10 days but to provide that the court may for good cause permit an objection after expiration of the 10-day period. Section 995.930 would be revised to read:

(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of good cause or changed circumstances.

Comment. Subdivision (c) of Section 995.930 is amended to permit an objection to a bond or undertaking after the time for making an objection has expired, upon a showing of good cause. Facts constituting good cause might include inadequate time for processing and response by a large entity. There is no time limit for late filing under this provision.

Claim and Delivery Redelivery Undertaking

The defendant's undertaking for redelivery of property, referred to above, is given in an amount equal to the plaintiff's undertaking for seizure of the property. Code Civ. Proc. § 515.020(a). Mr. Schwartz points out that if the plaintiff's undertaking is minimal because the defendant has a minimal interest in the property, the defendant will be able to obtain the redelivery of the property simply by posting a minimal bond.

This result is clearly inappropriate, since the redelivery undertaking is intended to protect the plaintiff against loss of the plaintiff's interest in the property and damages as well as litigation costs. Mr. Schwartz suggests that the defendant's redelivery undertaking should be keyed to the plaintiff's interest in the property. This would parallel the plaintiff's undertaking for seizure of the property, which is keyed to the defendant's interest in the property. The staff agrees with this proposed revision and would amend Section 515.020(a) to read:

(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 an undertaking 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 Section 515.010. The undertaking shall be in an amount not less than twice the value of the plaintiff's interest in the property. The value of the plaintiff's interest in the property is determined by reference to the plaintiff's claim in the application for a writ of possession pursuant to this chapter. 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; ~~not exceeding the amount of the undertaking~~. 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.

Comment. Subdivision (a) of Section 515.020 is amended to make the amount of the defendant's undertaking consistent with the security to be achieved by the undertaking. The reference to the limitation of liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety).

We have prepared a tentative recommendation along these lines, attached to this memorandum. If the tentative recommendation appears acceptable, we will distribute it for comment with the objective of a bill for the 1984 legislative session.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary



SOUTHERN CALIFORNIA HEADQUARTERS

July 7, 1983

RICK SCHWARTZ
Senior Counsel

(213) 228-2522

Nathaniel Sterling
Assistant Executive Secretary
The California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

RE: Bond and Undertaking and Enforcement of Judgment
Law changes

Dear Nat:

I am writing you this letter in response to our telephone conversation on June 16th. As I indicated, I believe the 10 day period specified in CCP §995.930(b) and similar sections is too short in many instances. We had a case where an injunction was issued on a \$5,000 bond. Although the bond was properly served upon Bank of America as specified in the CCP, it did not get to the appropriate litigation department attorney until after the time within which a motion objecting to the amount of the bond, sufficiency of the sureties, etc. could be made under §995.930(b). Since there was no change in circumstances, I believe that any motion we make regarding the bond amount now would probably not be successful.

I feel creditors and any other persons who may be affected by the issuance of a bond should have a greater period of time within which to review the sufficiency of the bond because no person would be harmed by a greater period of time within which to object to the sufficiency of a bond. Only the person against whom the bond is posted is the person who would have cause to object and who would be harmed by delays, therefore any legitimate objection should not be foreclosed by too short a time period. I suggest that the time period be reviewed and extended to 30 days where no one

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would be prejudiced by an extension of time within which to object to a bond. I believe the greater period of time will result in more due process rights for all affected persons. I fully understand that the current ten day period is extendable if service is by mail, however, if service is by personal service on Bank of America then 10 days is generally too short a period within which a proper response can be made.

The other section which I mentioned in our telephone conversation was CCP §515.020 which provides for the redelivery of property to the defendant if the defendant provides an undertaking "in an amount equal to the amount of the plaintiff's undertaking required by Section 515.010." The problem here is that if the plaintiff provides a minimum undertaking because the defendant has no interest in the property, the defendant could obtain redelivery of the property by providing an equal undertaking.

This problem is best illustrated by a situation where the equipment has a fair market value of \$100,000.00 and the debt against the equipment amounts to \$100,000.00. This is not an unusual fact situation. Indeed, the debt frequently exceeds the value. In this hypothetical case the defendant would have no interest or equity in the personal property, but the plaintiff would have \$100,000.00 interest in it. The defendant should not be able to obtain redelivery of the personal property by posting no bond or undertaking, but should be required under §515.020 to post a bond or undertaking at least sufficient to cover the interest of the plaintiff in the property (i.e. \$100,000).

I also enclose a copy of my June 30th letter to The California Judicial Council suggesting that they should create Judicial Council forms for the new debtor examination and debtor of a debtor examination proceedings provided for in the new Enforcement of Judgments Law §§708.110 to 708.205.

After conducting several seminars, programs and speeches on the new Enforcement of Judgments Law, it is readily apparent to me that one of the sleeper issues in the new law is the lien created by §708.110(d) which is a lien "on the personal property of the judgment debtor". Based on the official comment, this lien has a duration of the life of the judgment (i.e., ten years from the entry of judgment). I presume, although it is not clear, that the lien is on all of the personal property of the judgment debtor wherever located.

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The primary objection of most persons who are familiar with this sleeper section is that the lien is a "secret" lien and not readily ascertainable by any public records. Indeed, in order for anyone to determine the existence of the lien, they would have to be advised by the judgment debtor that an ORAP had been served or search the records of all Superior and Municipal courts for the prior ten years showing the debtor as a judgment debtor. This would require a review of records in all 58 counties in the State of California as well as the records of all federal courts, since federal courts also use the new Enforcement of Judgments Law procedures in California. This search burden is almost impossible.

If the California Law Revision Commission can determine some method for public notice by central filing of these personal property debtor exam liens, I believe substantial criticisms would be eliminated. The CLRC may also desire to specify that the lien attaches only to property of the judgment debtor at the time of service of the order and perhaps provide for a specific, shorter duration for the lien than the 10 year life of the judgment.

I believe that the Secretary of State's office would object to a requirement that notice of personal property debtor exam liens be filed with the Secretary of State, however, I believe filing notice with the Secretary of State within a specified period to time after service is the best solution particularly if the judgment debtor is engaged in business. If the staff is considering this problem or if you have any suggestions or thoughts, I would be pleased to hear from you.

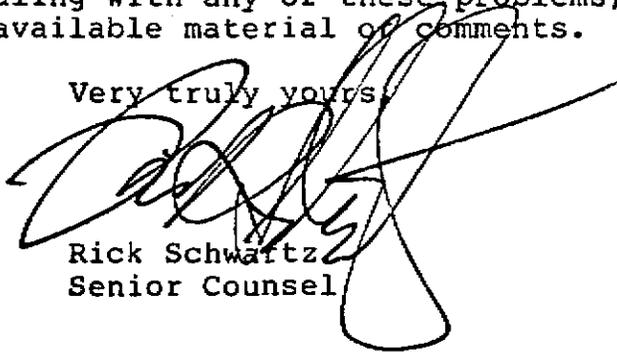
Another area of some concern to commercial lenders relates to the priority of a judgment lien as defined in Commercial Code §9301 as against a consensual security interest. The priority of the judgment lien dates from the creation of the lien by filing of the notice of personal property judgment lien with the Secretary of State. However, the priority of a security interest dates from the later of the UCC-1 filing which perfects a security interest or the attachment of the security interest which requires a security agreement and "value".

I believe that the easiest way to resolve this priority problem would be to provide that priority between a personal property judgment lien and a consensual security interest shall be determined by a first to perfect or file rule except as specified under 9301(4). I enclose a copy of

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Eldon Parr's letter of June 30th on this subject. If the staff is currently dealing with any of these problems, I would be interested in any available material or comments.

Very truly yours,

A large, stylized handwritten signature in black ink, appearing to read 'Rick Schwartz', is written over the typed name and title.

Rick Schwartz
Senior Counsel

RS:pa

Encl.

cc: John De Mouly
Executive Secretary
California Law Revision Commission

STAFF DRAFT

TENTATIVE RECOMMENDATION

relating to

REVISION OF THE LAW OF BONDS AND UNDERTAKINGS

The Bond and Undertaking Law was enacted upon recommendation of the California Law Revision Commission.¹ Since its enactment the Commission has maintained a continuing review of the law.² Two problems that require revision of the law have come to the attention of the Commission.³

If a litigation bond or undertaking is given, Code of Civil Procedure Section 995.930 requires that the beneficiary make objections within 10 days or the objections are waived. Although the 10-day period is appropriate in many cases and protects the beneficiary as well as the principal, in some cases it does not afford adequate time for the beneficiary. This may occur, for example, where a bond or undertaking is properly served on a large entity but by the time the bond or undertaking has been routed to the appropriate litigation department attorney, the time for making objection has expired. In such a situation the beneficiary should be permitted to make a late objection, upon a showing of good cause.

In claim and delivery proceedings, the defendant may obtain redelivery of the property by giving an undertaking "in an amount equal to the amount of the plaintiff's undertaking."⁴ The amount of the plaintiff's undertaking is based on the defendant's interest in the property, which may be nominal. The result is that the defendant in such a case may obtain the redelivery of the property by giving a nominal undertaking even though the plaintiff's interest in the property and potential

1. Code Civ. Proc. §§ 995.010-996.560; Recommendation Relating to Statutory Bonds and Undertakings, 16 Cal. L. Revision Comm'n Reports 501 (1982).
2. 1983 Cal. Stats. ch. 18; Recommendation Relating to Conforming Changes to the Bond and Undertaking Law, 16 Cal. L. Revision Comm'n Reports 2239 (1982).
3. The Commission is indebted to Mr. Rick Schwartz of Los Angeles for calling these matters to the Commission's attention.
4. Code Civ. Proc. § 515.020(a).

damages are great. The defendant's redelivery undertaking should be based on the plaintiff's interest in the property, just as the plaintiff's undertaking is based on the defendant's interest in the property. This will ensure that the plaintiff is adequately protected, which is the purpose of the redelivery undertaking.

Other technical changes in these and related statutes should also be made. The technical changes are explained in the Comments set out below.

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 515.010, 515.020, 515.030, and 995.930 of the Code of Civil Procedure, relating to bonds and undertakings.

The people of the State of California do enact as follows:

28034

Code of Civil Procedure § 515.010 (amended)

SECTION 1. Section 515.010 of the Code of Civil Procedure is amended to read:

515.010. The court shall not issue a temporary restraining order or a writ of possession until the plaintiff has filed with the court an undertaking. The undertaking shall provide that the sureties are bound to the defendant ~~in the amount of the undertaking~~ 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 plaintiff. The undertaking shall be in an amount not less than twice the value of defendant's interest in the property. 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 other facts as may be necessary to determine the defendant's interest in the property.

Comment. The reference in Section 515.010 to the limitation of liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety).

Code of Civil Procedure § 515.020 (amended)

SEC. 2. 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 an undertaking 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 Section 515.010.~~ The undertaking shall be in an amount not less than twice the value of the plaintiff's interest in the property. The value of the plaintiff's interest in the property is determined by reference to the plaintiff's claim in the application for a writ of possession pursuant to this chapter. 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, ~~not exceeding the amount of the undertaking.~~ 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.

(b) 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.

(c) If an undertaking for redelivery is filed and 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 property to the defendant. If an undertaking for redelivery is filed and defendant's undertaking is objected to, the provisions of Section 515.030 apply.

Comment. Subdivision (a) of Section 515.020 is amended to make the amount of the defendant's undertaking consistent with the security to be achieved by the undertaking. The reference to the limitation of liability to the amount of the undertaking is deleted as unnecessary. See Section 996.470 (limitation on liability of surety).

Code of Civil Procedure § 515.030 (amended)

SEC. 3. Section 515.030 of the Code of Civil Procedure is amended to read:

515.030. (a) The defendant may object to the plaintiff's undertaking not later than 10 days after levy of the writ of possession. The defendant shall mail notice of objection to the levying officer.

(b) The plaintiff may ~~except to the defendant's sureties~~ object to the defendant's undertaking not later than 10 days after the defendant's undertaking is filed. The plaintiff shall mail notice of objection to the levying officer.

(c) If the court determines that the plaintiff's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the court shall vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession and, if levy has occurred, order the levying officer or the plaintiff to return the property to the defendant. If the court determines that the plaintiff's undertaking is sufficient, the court shall order the levying officer to deliver the property to the plaintiff.

(d) 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.

Comment. Subdivision (b) of Section 515.030 is amended for consistency with the Bond and Undertaking Law. See Section 995.920 (objection to undertaking).

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Code of Civil Procedure § 995.930 (amended)

SEC. 4. Section 995.930 of the Code of Civil Procedure is amended to read:

995.930. (a) An objection shall be in writing and shall be made by noticed motion. The notice of motion shall specify the precise grounds for the objection. If a ground for the objection is that the amount of

the bond is insufficient, the notice of motion shall state the reason for the insufficiency and shall include an estimate of the amount that would be sufficient.

(b) The objection shall be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond.

(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of good cause or changed circumstances.

Comment. Subdivision (c) of Section 995.930 is amended to permit an objection to a bond or undertaking after the time for making an objection has expired, upon a showing of good cause. Facts constituting good cause might include inadequate time for processing and response by a large entity. There is no time limit for late filing under this provision.