



Writ Of Possession (Claim And Delivery) - General Concepts

The writ of possession (claim and delivery) procedure is often used:

- to obtain possession of tangible property that is security for a debt in default (e.g., a debt secured by a chattel mortgage);
- to reclaim chattels that have been loaned, leased or bailed to another and not returned;
- to obtain property whose ownership is in dispute.

To obtain a writ for immediate possession of property, the plaintiff must show that he or she:

- has the right to immediate possession of tangible personal property; and
- the property is being wrongfully withheld by defendant. [Ca Civ Pro § 512.010]

The property sought to be recovered must exist in some concrete or "tangible" form, capable of identification and seizure. A writ of possession cannot be used to levy on intangibles--e.g., bank accounts, accounts receivable, etc.

If a certificate has been issued representing shares of stock, the stock certificate is subject to seizure under a writ of possession. [See Ca Coml § 8112(a)]

Court Procedure

Complaint Prerequisite To Application: An application for a W/P cannot be made unless a complaint is filed (commencing the action). [Ca Civ Pro § 512.010(a)] The complaint usually prays inter alia for a writ of possession.

The complaint, if verified, may also serve the purpose of proving facts for issuance of the W/P. However, if so used, facts must be stated as they would be in an affidavit or declaration (rather than broad "ultimate facts"). [See Ca Civ Pro § 516.030]

Ex Parte Issuance Of Writ: A writ of possession will issue ex parte (without a noticed hearing on very short notice) only if:

1. The property was stolen, or

2. The property is a credit card, or
3. The property was acquired by defendant for commercial purposes, is not necessary for support, will not be available for levy by reason of removal, or destruction, and immediate seizure is necessary to protect it. [Ca Civ Pro § 512.020(b)]

An ex parte writ of possession cannot issue in any other circumstances. [Ca Civ Pro § 512.020(a)]

The TRO can remain in effect for a maximum 15 days, unless the court authorizes a 22-day duration for good cause shown. [Ca Civ Pro §§ 513.010(a), 527(d)(1)]

Noticed Hearing: The usual method of obtaining a writ of possession is by order following noticed hearing. [Ca Civ Pro § 512.020(a)] The substantive prerequisites for issuance of the writ must be shown at the hearing, and defendant must be given an opportunity to oppose its issuance.

Once an application for writ of possession is filed, plaintiff may seek a temporary restraining order (TRO) to prevent defendant from concealing, removing or transferring the property or any interest therein, or otherwise impairing its value "either by acts of destruction or by failure to care for the property in a reasonable manner." [Ca Civ Pro § 513.020] The TRO remains in effect only until a writ issues. At that time, the court may issue a preliminary injunction with the same terms as the TRO, to remain in effect until the property is seized by the levying officer. [Ca Civ Pro § 513.010(c)]

Showing Required: At the hearing the plaintiff must show:

- the probable validity of his or her claim to possession of the property (under applicable substantive law); and
- a probability of "immediate danger" that the property will be transferred, concealed or removed, or may become substantially impaired in value; and
- that an undertaking has been filed pursuant to Ca Civ Pro § 515.050 [Ca Civ Pro § 513.010 (b)]

"Probable validity" means it is "more likely than not" that plaintiff will obtain judgment against defendant on the claim to possession of the property. [Ca Civ Pro § 511.090]

To obtain either a temporary restraining order or writ of possession, plaintiff must post a bond of twice the value of defendant's interest in the property--i.e., market value, less amounts of liens or balances due under conditional sales contracts or security agreements. [Ca Civ Pro § 515.010] The levying officer will deliver the undertaking to defendant (together with a copy of the writ and of the order for issuance of the writ) upon seizure of the property. [Ca Civ Pro § 514.020(a)]

Note: If the court finds that defendant has no interest in the property, no undertaking is required. [Ca Civ Pro § 515.010(b)]

Defendant may prevent plaintiff from taking possession of the property under a writ of possession or may regain possession of the property seized, by posting a bond in the same amount as plaintiff's bond. [Ca Civ Pro § 515.020(a)]

Service And Proof Of Service: As with any proceeding, the court cannot go ahead unless the complaint, the moving papers, and all the supporting documents are timely served (Ca Civ Pro § 1005). Any TRO already issued will be dissolved if the hearing is thwarted due to lack of service. [Ca Civ Pro § 527(d)(3)]

The Hearing: Except in rare cases where special permission is granted, the hearing will normally be conducted only on affidavits and declarations. After resolving objections, the court will admit into evidence, by reference to the file, the affidavits, declarations, and (if applicable) the verified complaint.

- Gene Kinsey

Gene Kinsey Kinsey Law Offices 1198 Pacific Coast Hwy., Suite 353 Seal Beach, CA 90740	Phone: (562) 596-8177 Email: KinseyE@ix.netcom.com Web: www.kinseylaw.com www.realpropertypartition.com
---	---