

Not Your Brother's Keeper

by Patrick Bulmer



As California county sheriffs' departments become financially strapped and are forced to cut services to meet ever tightening budgets, judgment creditors will seek more creative remedies to obtain timely satisfaction from their debtors. One possible option is to seek appointment of a receiver to fulfill the duties traditionally handled by a levying officer when conducting a keeper levy.



In situations where a judgment is entered against a debtor who is the owner of a going business, such as in the case of a sole proprietorship or husband and wife partnership, or where the judgment debtor is itself a business entity such as a corporation or limited liability company, one common method of enforcement is to install a keeper pursuant to California Code of Civil Procedure §700.070. A keeper, often a civilian employee or independent contractor of the sheriff or marshal¹, is placed in charge of a going business for a period of up to ten days². During that time, the keeper may continue to operate the business in its ordinary course and make sales for cash or equivalent, provided that all sales are final³.

The keeper is authorized by law to take custody of cash on hand and all tangible personal property of the business immediately if the judgment debtor objects to placement of the keeper in the business. The keeper is also compelled to seize personal property upon instruction of the judgment creditor or at the end of the ten day period following installation of the keeper, whichever occurs first⁴.

This seemingly idyllic remedy against business debtors with unpaid debts has a number of practical drawbacks. Indeed, the process does not always operate as easily as one might expect, imposing costly delay and less than satisfactory results for the unwary judgment creditor. Several county sheriff departments typically require a lead time of several weeks after delivery of the writ of execution and instructions before a keeper can be installed at the business location.

Predictable reasons for problems associated with installation of keepers include the typical budget issues that affect all levels of government. As an example, the sheriff's departments in Alameda⁵, San Mateo⁶ and Santa Clara⁷ counties, to name a few, have long since discontinued service of "non-mandated" civil process, including bank levies, third party levies and earnings withholding orders, and have relegated those tasks to private registered process servers.

What is more, the problem will likely to continue and worsen with the current state budget crisis. In April 2008, Contra Costa County Sheriff Warren Rupf was asked to cut \$10 Million from his 2008-2009 budget by the County's Board of Supervisors—an equivalent of 57 deputy positions⁸. Similarly, Fresno County Sheriff Margaret Mims is looking at a \$14 Million budget cut, requiring elimination of some 200 staff positions unless the money can be found elsewhere—a prospect that appears to be without much real hope⁹.

It's easy to see how non-critical services with no direct relation to public safety, such as civil process, will inevitably take a back seat to arguably more important services like crime prevention, enforcement and community support.

Even so, for the sheriff's departments that continue to provide civil process service—and indeed, the departments are still required by law to handle mandated process upon request, the only questions are how quickly and how efficiently—provision of these services seems to be a certain losing proposition financially. With the cost of an 8-hour keeper averaging \$205.00, or about \$25.00 per hour gross, it's hard to imagine a department paying a competent employee to do the job, plus handling of the administrative overhead, without dipping into the department's general operating budget. One can begin to understand why a typical county sheriff may only employ a single keeper department-wide and require a judgment creditor wanting to utilize the keeper's services to wait their turn in line for six to eight weeks or longer.

Enter the court appointed receiver, an officer appointed directly by the court in certain circumstances, among other purposes, to aid in enforcement of judgments¹⁰. While court appointed receivers are typically endowed with broad powers to accomplish the goals for which they are appointed, receivers can also be appointed for specific limited purposes, such as to collect or freeze assets subject to a pending court proceeding. In California, receivers have been given specific statutory authority, subject to the direction and supervision of the appointing court, to conduct sales of real and personal property in the same manner as a levying officer¹¹.

When time is of the essence, using a receiver can provide some distinct advantages over a sheriff's keeper. With *ex parte* appointment, a receiver can often move in to the same effect as a keeper within a couple of business days after the court order is obtained. A receiver will invariably be able to offer more flexibility in terms of on-site scheduling at the business location. However, these added benefits will come at a cost—an experienced receiver will typically charge \$150 per hour or more, but the work of monitoring the business operation can usually be handled by the receiver's employees at a substantially reduced rate. As a comparison, figure about \$700.00 per 8-hours for a receiver-as-keeper¹². The good news is that, like a sheriff's keeper, these costs and the related expenses are typically taxed to the judgment debtor as a necessary enforcement cost.

Despite the potentially gloomy picture, a judgment creditor seeking to levy on a going business should always contact the local sheriff's department civil division as a first step. Questions should be asked about how quickly the keeper will enter the business and perform the levy after the writ of execution and instructions are received. Will the keeper go to the business on the days that I designate? What will the keeper do if the judgment debtor refuses to keep the business open? Do I need to provide any special instructions or an additional deposit for the keeper to take and store personal property of the business? Many times, the sheriff will give acceptable answers to these questions and if so, will provide an orderly and cost effective method of enforcement for the judgment creditor.



When the above questions are met with ambiguous or unacceptable responses, the judgment creditor is faced with the unhappy choice of either foregoing execution or seeking extraordinary relief to satisfy their judgment. And make no mistake—appointment of a receiver is extraordinary.

The judgment creditor should expect the Court to ask, and be prepared in advance to answer,

“Why don’t you just install a keeper?”

When making an application for appointment of a receiver to perform a levy on a going business, the judgment creditor should submit a supporting declaration that contains the information obtained from the sheriff’s department, for example:

“I am Joe Creditor, the judgment creditor in this action. On April 1, 2008, I telephoned the Civil Division of the Western County Sheriff’s Department and spoke with Deputy Bill Smith. Upon my inquiry regarding placement of a keeper at the business of the judgment debtor, Deputy Smith informed me that there would be a delay in placing a keeper at the business of approximately six to eight weeks after receipt of my instructions and no specific day of the week could be guaranteed. I was further informed that, in the event the judgment debtor was not open for business, an additional delay of six to eight weeks could occur before the keeper would be available again. I was also informed that if the judgment debtor refuses to remain open for business while the keeper is installed, the keeper would leave without taking custody of the personal property located at the business because, due to budget constraints, the sheriff’s department does not have the resources to handle a levy in this manner. These conditions will not provide for satisfaction of the judgment because the debtor maintains irregular hours, open only on Friday, Saturday and Sunday, and seizure of the debtor’s business personal property may be necessary in the event that the debtor does not cooperate with the levy...”

The order appointing the receiver in lieu of a keeper should be simple yet specific, granting the receiver the authority to assume all of the responsibilities that a levying officer and keeper would hold under the applicable statutes, along with some customary terms necessary for receivership orders, such as the identity of the appointed receiver, the amount of the receiver’s bond, the receiver’s rate and similar provisions¹³.

With or Without Notice?

One key decision in this process is whether to seek appointment of the receiver as a keeper via noticed motion or *ex parte* application. Although state law requires that a bond must be posted by an *ex parte* applicant for appointment of a receiver “in case the applicant shall have procured the appointment wrongfully, maliciously, or without sufficient cause”¹⁴—and indeed, an entry-level bond in a pre-judgment case would be at least \$10,000.00—several arguments exist for *ex parte* appointment of a receiver as keeper with only a *de minimus* applicant’s bond:

- The risk of loss or diminution if advance notice to the debtor is given¹⁵;
- A sheriff’s keeper under a writ of execution occurs without advance notice to the debtor; and
- The debtor owes a subsisting obligation to the applicant by way of the unsatisfied judgment that can be setoff against any damages that may result from wrongful appointment of a receiver.

There are some heightened requirements to apply for a receiver *ex parte*, but they are not complex and should of course be part of a successful application. The matter will also be returnable on an order to show cause within no longer than 22 days¹⁶, which should provide sufficient time for the receiver to conduct the duties as keeper for 10 days and then take any remaining personal property into custody¹⁷.

As in nearly all cases where a party applies for appointment of a receiver, there are some tactical advantages to giving notice to the debtor. Often, the debtor will realize that a drastic and expensive remedy to satisfy the judgment is imminent, and will make serious arrangements to satisfy the debt through voluntary payment. As courts typically view receivership of any kind as a drastic and expensive remedy, notice to the debtor and an opportunity to respond will likely be required in all but the most exigent of circumstances.



It is important to note that, as with a sheriff's keeper, the judgment creditor will need to deposit sufficient funds with the receiver to cover the receiver's fees for the projected time on-site at the business. Additional deposits may be necessary for costs and expenses of removing, securing and storing any tangible personal property (other than cash or cash equivalent) pending sale.

Due to cost considerations, the receiver-as-keeper approach should only be attempted when there is a significant amount of personal property assets or cash income to the business and the judgment is of substantial amount to warrant such action—\$20,000.00 or more—and, of course, when the less expensive version is not available under acceptable terms through the county sheriff. But in cases where a flexible and specialized keeper would present the best solution to satisfying a sizeable judgment, using a limited purpose receiver may be just the remedy your case needs.

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A sample order for appointment of a receiver as a keeper
and other documents can be found at:
<http://www.calreceiver.com/keeper-article>

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End Notes

¹ Although the term “levying officer” applies to the sheriff or marshal under California Code of Civil Procedure §680.260, this article primarily discusses situations where a county sheriff is acting as the levying officer, the most common occurrence when enforcing judgments entered in California state courts.

² California Code of Civil Procedure §700.070(b)(3).

³ California Code of Civil Procedure §700.070(a).

⁴ California Code of Civil Procedure §700.070(b).

⁵ Source: <http://www.alamedacountysheriff.org/CWS/civil.htm>

⁶ Source:
http://www.co.sanmateo.ca.us/smc/departments/home/0,2151,14095463_580653327,00.html

⁷ Source: <http://www.sccsheriff.org/> under “Civil Division”.

⁸ Source: “Contra Costa Sheriff Fears Big Budget Axe”, Contra Costa Times - April 8, 2008.

⁹ Source: “Fresno Sheriff Fighting to Keep the Peace”, KFSN / ABC 30, Fresno, CA - June 17, 2008.

¹⁰ California Code of Civil Procedure §§564(b)(4) and 708.620.

¹¹ California Code of Civil Procedure §568.5.

¹² Per eight hours: Receiver’s employee or agent at \$50.00 per hour, plus two hours of Receiver’s time (average) at \$150.00.

¹³ A sample order for appointment of a receiver as a keeper and other documents can be found at <http://www.calreceiver.com/keeper-article>

¹⁴ California Code of Civil Procedure §566(b).

¹⁵ California Rule of Court 3.1204(b)(3).

¹⁶ California Rule of Court 3.1176(a).

¹⁷ California Code of Civil Procedure §700.070(b)(3).