

Memorandum 75-5

Subject: Study 39.70 - Prejudgment Attachment

This memorandum discusses various proposed amendments to the Commission's attachment statute. The changes recommended by the staff are included in a draft recommendation attached hereto. We hope the Commission will approve desirable changes so that the Attachment Law can be amended before it goes into effect on January 1, 1976.

§ 482.060. Court Commissioners

Section 482.060, which designated the judicial duties to be performed under the Attachment Law as "subordinate judicial duties," was amended out before final passage. The staff recommends that this section be proposed as an amendment, and it is included in the attached draft recommendation.

§ 482.080. "Turnover Order"

At the November meeting, the Commission directed the staff to consider whether Section 482.080 (providing for an optional "turnover order" enforceable by contempt) is superfluous and, if it is not, whether it should be amended. The staff has no strong feelings about this section. As its original Comment indicates, it is derived from Section 512.070 in the claim and delivery statute which provides as follows:

§ 512.070. Order for transfer of possession to plaintiff; failure to comply; contempt or arrest

512.070. 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 or the party in possession of such property, that failure to turn over possession of such property to plaintiff may subject the defendant, or person in possession of such property, to being held in contempt of court or arrest.

Comment. Section 512.070 is new. It makes clear that the court has power to issue a "turnover" order directing the defendant to cooperate in transferring possession. Such order is not issued in lieu of a writ but rather in addition to or in aid of a writ, permitting the plaintiff to select a more informal and less expensive means of securing possession.

In the claim and delivery statute, the intent of the provision is to avoid using a levying officer to get possession of the property; the defendant is ordered to turn possession over to the plaintiff. However, the attachment section directs the defendant to turn property over to the levying officer. Thus in attachment there is no saving resulting from not using the levying officer. The order could in some cases dissuade a defendant from attempting to inhibit the levying officer in the performance of his duties under the writ of attachment. It is hard to say how courts will apply this provision. A plaintiff will probably request such an order in every case since all he need do is check the appropriate box on the form. Whether the court will automatically issue this "turnover order" is a matter of speculation.

On balance, since the provision has already been enacted, the staff sees no strong reason to recommend its repeal. However, the words "or arrest" should be amended out of the last sentence. This language is either superfluous (since contempt may or may not entail arrest) or contrary to the policy reflected in the Civil Arrest recommendation (since there should be no civil arrest independent of contempt proceedings). The attached draft recommendation accordingly recommends the deletion of "or arrest."

§ 483.010. Actions in Which Attachment Authorized

The staff draft of the recommendation would eliminate the "engaged in a trade, business, or profession" standard from subdivision (a) of Section 483.010 (providing the cases in which attachment is authorized). The staff concurs with Professor Warren that the "used primarily for personal, family,

or household purposes" in subdivision (c) is sufficient to prevent attachment in the sorts of cases the Commission intended. The only situation where attachment might be prevented by the "engaged in a trade, business, or profession" standard but not by the "used primarily" standard that occurred to the staff is that of a charity. But this possibility depends upon a determination that a charity is not a "trade, business, or profession" which in many cases is subject to argument. It should also be noted that reliance on the standard of subdivision (c) leaves to the courts the questions of when the personal, family, or household use must occur and what "primarily" means.

§ 487.010. Property Which May Be Attached

The "engaged in a trade, business, or profession" standard needs to be deleted from Section 487.010 (property subject to attachment) if it is deleted from Section 483.010. The attached draft recommendation deletes this language from subdivision (c) which applies to individuals and subdivision (d) which applies to individual liability for partnership debts. Money which may be attached (see subdivision (c)(7)) is still limited to that found "on the premises where the defendant conducts a trade, business, or profession."

Guarantors

A sentence has been added to the Comment to Section 483.010 to the effect that a guarantor on a commercial contract is subject to attachment. By eliminating the "trade, business, or profession" standard, the difficult problem of determining whether the guarantor is so engaged is avoided. The guarantor would seem to be tied to the defendant under the "personal,

family, or household purposes" standard, but we do not deal in the Comment with the situation where a person who makes a business of being a guarantor guarantees the defendant's performance on a noncommercial contract.

§ 489.130. Insufficient Undertakings and Wrongful Attachment

The staff proposes a new section to deal with a problem revealed in a letter from Mr. Robert Hecht. (See Exhibits I and II.) A plaintiff may obtain a writ of attachment or a temporary protective order with a \$7,500 bond in superior court. On the defendant's objection to the undertaking, the court may determine that the undertaking is insufficient and should be increased. If the plaintiff is unable to increase the undertaking, the attachment is released and the insufficient undertaking remains in effect. However, the statute does not say whether obtaining a writ of attachment or temporary protective order on the basis of an undertaking later determined to be insufficient is a wrongful attachment. The staff has drafted Section 489.130 to deal with this problem.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

EXHIBIT I

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879-3161

November 18, 1974

John H. De Moully,
Executive Secretary
California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Attachment - AB 2948, signed September 27, 1974

Dear Mr. De Moully:

In reviewing the above bill, I note that Sec 489.220(a) C.C.P. is identical to the same section in the Commission recommendation of December, 1973.

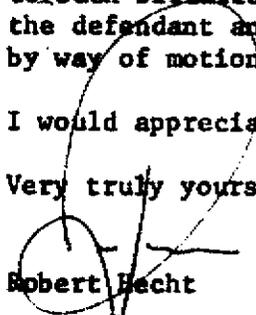
My inquiry concerns the reasoning of the membership which has resulted in the requirement of an arbitrary amount of undertaking on the part of the plaintiff. In my experience of many years, I felt that a fifty percent requirement was equitable to all parties concerned. If the security was insufficient, Sec. 539 C.C.P. enabled the defendant to move for an increase in the undertaking.

I am of the opinion that the posting of a \$7500.00 undertaking in any Superior Court attachment would be extremely unfair to the plaintiff in an action where the amount of the bond would exceed the actual claim. I also see a difficult situation where the claim is substantial. I suggest that a plaintiff bringing such suit may be able to obtain an undertaking for \$7500.00 but not for example \$50,000.00 which the Court may subsequently require on motion of the defendant 489.220(b). If he had proceeded with a \$7500.00 bond and later was unable to post increased security the writ would be dissolved leaving the Surety and the plaintiff to ensuing problems. I would contemplate that many such problems would result.

The present statute 539 C.C.P. requiring fifty percent has not given rise to such situations. The initial bond usually is sufficient to indemnify the defendant and I do not recall a single instance of increase of security by way of motion.

I would appreciate your reaction.

Very truly yours,


Robert Hecht

RH/gs

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December 11, 1974

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IN REPLY PLEASE
REFER TO FILE NO.

1939-000/KEL

California Law Revision Commission
School of Law
Stanford, California 94305

Re: New Attachment Law

Gentlemen:

Will you please send me your recommendations relating to prejudgment attachments. I obtained your name from Robert Hecht who sent me a copy of your letter to him dated November 25, 1974. We represent a large number of the major bonding and surety companies in California and are very interested in the proposed new legislation. After reading your letter to Mr. Hecht of November 25, 1974, it would be my suggestion that the law should be recast to provide for the 50% of the claim requirement the same as it used to be but with a \$7,500 minimum. This would take care of a situation in which the damages might not necessarily be measured by a bond in the amount of 50% of the amount sued for, and yet in those circumstances where a 50% bond would exceed \$7,500, the party pursuing the attachment would necessarily have to post a larger bond at the time he made his initial attachment. This would obviate the problem of going back for a later bond and having it rejected as Mr. Hecht suggested in his letter might possibly occur in some situations.

In any event, I would like to receive a copy of your recommendations as we are vitally interested in this legislation. Thank you.

Yours very truly,


KENNETH E. LEWIS

KEL:dma

STAFF DRAFT

RECOMMENDATION

relating to

AMENDMENTS TO THE ATTACHMENT LAW

The Attachment Law (Code Civ. Proc. §§ 481.010-492.090) was enacted in 1974¹ on recommendation of the Law Revision Commission. See Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701 (1973).² The new law will go into effect on January 1, 1976.³ The Commission has reviewed the Attachment Law as enacted, and this recommendation proposes a number of revisions in that statute.⁴

Court Commissioners

In its 1973 recommendation, the Commission recommended enactment of a provision stating that the judicial duties to be performed under the Attachment Law are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.⁵ This provision was

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1. Cal. Stats. 1974, Ch. 1516 (Assembly Bill No. 2948).
 2. See also Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate Journal 13010 (August 21, 1974).
 3. Cal. Stats. 1974, Ch. 1516, § 49.
 4. In addition to the revisions discussed below, the Commission recommends that the words "or arrest" at the end of Section 482.080 (order directing transfer) be deleted.
 5. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 739, 760 (1973).

deleted from the Commission's recommended legislation because it proved to be extremely controversial and jeopardized the passage of the legislation. Nevertheless, delegation of duties to commissioners under the Attachment Law is necessary for efficiency and economy, and the Commission again recommends that such delegation be expressly authorized by statute.

Actions in Which Attachment is Authorized

Section 483.010 of the Attachment Law as enacted provides:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action against a defendant engaged in a trade, business, or profession on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. Each claim shall be based upon a contract, express or implied.

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

(c) An attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

An attachment may be issued on an unsecured contract claim or claims in the fixed or readily ascertainable amount of \$500, provided that two additional requirements are satisfied: (1) under subdivision (a), the defendant must be "engaged in a trade, business, or profession" and (2) under subdivision (c), "an attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes." The purpose of these two requirements is to limit attachment to commercial situations and to prevent attachment in consumer transactions.

The Commission has concluded that it is unnecessary to retain both of these requirements. The presence of two overlapping requirements would cause confusion. The purpose of precluding attachment in consumer transactions is adequately accomplished by subdivision (c). Hence, the "engaged in a trade, business, or profession" language of subdivision (a) should be deleted.⁶

6. Deleting this language would also make clear that guarantors on commercial contracts are subject to attachment. Under the Attachment Law as enacted it is unclear whether an occasional guarantor on commercial contracts is "engaged in a trade, business, or profession."

In addition, the difficult problem of determining when the defendant must have been "engaged in a trade, business, or profession" in order for an attachment to issue would be avoided by the repeal of that language. It is unclear whether a defendant must be so "engaged" when the contract was made, when the claim arose, when the action was brought, when the attachment was sought, or at some or all of these times.

Property Subject to Attachment

The elimination of the "engaged in a trade, business, or profession" standard would require some technical amendments to Section 487.010 which describes the property subject to attachment. As enacted, subdivisions (c) and (d) provide:

(c) Where the defendant is an individual engaged in a trade, business, or profession, all of his real property and all of the following property:

(1) Accounts receivable, chattel paper, and choses in action except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

(2) Deposit accounts except the first one thousand dollars (\$1,000) deposited in any single financial institution or branch thereof; but, if the defendant has more than one deposit account, the court, upon application of the plaintiff, may direct that the writ of attachment be levied on balances of less than one thousand dollars (\$1,000) if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of levy.

(3) Equipment.

(4) Farm products.

(5) Inventory.

(6) Judgments arising out of the conduct of the trade, business, or profession.

(7) Money on the premises where the trade, business, or profession is conducted.

(8) Negotiable documents.

(9) Negotiable instruments.

(10) Securities.

(d) Where the defendant is an individual who is a partner and is sued for his individual liability as a partner of a partnership which is engaged in a trade, business, or profession, all of the defendant's real property and all of his property which is of a type described in subdivision (c) and which is used or held for use in the partnership's trade, business, or profession.

The restatements of the "engaged in a trade, business, or profession" standard in the first clause of subdivision (c) and in subdivision (d) should be deleted.

Insufficient Undertaking and Wrongful Attachment

Under the Attachment Law as enacted, it is unclear whether it is a wrongful attachment under Section 490.010 where the plaintiff fails to increase an undertaking when ordered to do so pursuant to Section 489.220 (undertaking to obtain a writ of attachment or protective order) or Section 489.410 (undertaking on appeal). The Commission recommends that it be made clear that the plaintiff's failure to increase the amount

of the undertaking is not of itself a wrongful attachment. The defendant is adequately protected in the event of a wrongful attachment under Section 490.010 because the original undertaking remains in effect,⁷ thereby providing a fund for recovery of damages for a wrongful attachment, and because the rights obtained by filing the now insufficient undertaking immediately cease,⁸ thereby minimizing any injury to the defendant's interests.

Revision of Official Comments

The Comments to Sections 489.110 and 490.010 were not revised to reflect amendments made by the Senate Judiciary Committee. These Comments, revised to reflect the Senate Judiciary Committee amendments, are set out as an exhibit to this recommendation.

7. See Section 489.090(d). As provided in subdivision (a) of Section 489.220, the amount of the undertaking is \$2,500 in municipal court and \$7,500 in superior court.

8. See Sections 489.090(c) and 489.410(a).

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

An act to amend Sections 482.060, 483.010, and 487.010 of, and to add Sections 482.060 and 489.130 to, the Code of Civil Procedure, relating to attachment.

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

Section 1. Section 482.060 is added to the Code of Civil Procedure, to read:

§ 482.060. Judicial duties are "subordinate judicial duties"

482.060. The judicial duties to be performed under this title are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution, and may be performed by appointed officers such as court commissioners.

Comment. Section 482.060 authorizes the use of court commissioners to perform any of the judicial duties required by this title. See CAL. CONST., Art. VI, § 22; compare CODE CIV. PROC. § 259.

Sec. 2. Section 482.080 of the Code of Civil Procedure is amended to read:

482.080. If a writ of attachment is issued, the court may also issue an order directing the defendant to transfer possession of the property sought to be attached to the levying officer. Such order shall contain a notice to the defendant that failure to turn over possession of such property to the levying officer may subject the defendant to being held in contempt of court ~~or arrest~~.

Comment. The amendment to Section 482.080 deletes the words "or arrest" from the end of the last sentence. This amendment makes clear that the defendant is not subject to arrest independent of contempt proceedings. A person may still be arrested in the course of contempt proceedings. See Code Civ. Proc. §§ 1212, 1214.

Sec. 3. Section 483.010 of the Code of Civil Procedure is amended to read:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action ~~(against a defendant engaged in a trade, business, or profession)~~ on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. Each claim shall be based upon a contract, express or implied.

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

(c) An attachment may not be issued where the claim is based on the sale or lease ~~or~~ a license to use property, the furnishing of services, or the loan of money and, the property sold, or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

(1)
of property,
(2)

(1)

Comment. Section 483.010 is amended to delete the limitation of attachment to actions "against a defendant engaged in a trade, business, or profession" formerly provided in subdivision (a). The purpose of precluding attachment to consumer transactions is accomplished by the language of subdivision (c). Prior to this amendment, the plaintiff seeking attachment would have had to satisfy both requirements. The amendment avoids the confusion and repetitive effort which would have resulted from the application of both standards but still retains the essential restriction of attachment to commercial actions. Under the standard of subdivision (c), a guarantor on a commercial contract is subject to attachment.

The amendment of subdivision (c) is technical.

Sec. 4. Section 487.010 of the Code of Civil Procedure is amended to read:

487.010. The following property is subject to attachment:

(a) Where the defendant is a corporation, all corporate property for which a method of levy is provided by Article 2 (commencing with Section 488.310) of Chapter 8.

(b) Where the defendant is a partnership, all partnership property for which a method of levy is provided by Article 2 (commencing with Section 488.310) of Chapter 8.

(c) Where the defendant is an individual ~~engaged in a trade, business, or profession~~, all of his real property and all of the following property?

of the defendant

(1) Accounts receivable, chattel paper, and choses in action except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150).

(2) Deposit accounts except the first one thousand dollars (\$1,000) deposited in any single financial institution or branch thereof; but, if the defendant has more than one deposit account, the court, upon application of the plaintiff, may direct that the writ of attachment be levied on balances of less than one thousand dollars (\$1,000) if an aggregate of one thousand dollars (\$1,000) in all such accounts remains free of levy.

- (3) Equipment.
- (4) Farm products.
- (5) Inventory.
- (6) Judgments arising out of the conduct of the trade, business, or profession.
- (7) Money on the premises where the trade, business, or profession is conducted.
- (8) Negotiable documents.
- (9) Negotiable instruments.
- (10) Securities.

defendant conducts

B

(d) Where the defendant is an individual who is a partner and is sued for his individual liability as a partner ~~of a partnership which is engaged in a trade, business, or profession~~, all of the defendant's real property and all of his property which is of a type described in subdivision (c) and which is used or held for use in the partnership's ~~trade, business, or profession~~.

Comment. Section 487.010 is amended to reflect the elimination of the "trade, business, or profession" standard for issuance of an attachment in Section 483.010.

Sec. 5. Section 489.130 is added to the Code of Civil Procedure, to read:

§ 489.130. Insufficient undertaking not wrongful attachment

489.130. Where the court orders the amount of the undertaking increased pursuant to Sections 489.220 or 489.410, the plaintiff's failure to increase the amount of the undertaking is not a wrongful attachment within the meaning of Section 490.010.

Comment. Section 489.130 makes clear that the mere failure of the plaintiff to increase the amount of an undertaking when ordered to do so pursuant to Section 489.220 (undertaking to obtain a writ of attachment or protective order) or Section 489.410 (undertaking on appeal) is not a wrongful attachment under Section 490.010. The insufficient undertaking remains in effect pursuant to subdivision (d) of Section 489.090,

and the plaintiff's liability for wrongful attachment pursuant to Section 490.010 is limited to the amount of the insufficient undertaking by subdivision (b) of Section 490.020. However, where an order to increase the amount of the undertaking is not complied with, the rights obtained by filing the insufficient undertaking cease as provided in subdivision (c) of Section 489.090 and subdivision (a) of Section 489.410.

EXHIBIT

The Comment to Section 489.110 should read as follows:

Comment. Section 489.110 supplements Section 1058a. Under Section 1058a, a motion to enforce liability on an undertaking is directed to the sureties. Section 489.110 makes clear that the liability may be enforced directly against the sureties. In contrast with what appeared to be the former law, the beneficiary need not attempt to satisfy his judgment first from the assets of the principal. *Cf.* former Section 552; *Bezaire v. Fidelity & Deposit Co.*, 12 Cal. App.3d 888, 91 Cal. Rptr. 142 (1970); CIVIL CODE §2845. It is not clear whether the enactment in 1972 of Section 1058a changed the former rule.

Section 489.110 in no way interferes with the contractual relationship between principal and surety.

The Comment to Section 490.010 should read as follows:

Comment. Section 490.010 provides a statutory cause of action for wrongful attachment in four specific situations. As Section 490.060 makes clear, the liability provided by Section 490.010 is not exclusive. The defendant may pursue his common law remedies if he chooses.

Subdivision (a). Subdivision (a) provides that wrongful attachment occurs when a writ of attachment is levied or a protective order is served in an action where attachment is not authorized. An exception is provided, however, which protects the plaintiff where levy is not authorized because the goods, services, or money furnished were used primarily for consumer purposes but the person who furnished them reasonably believed that they would not be so used. This provision is based on a portion of subdivision (a) of former Section 539 which provided for recovery where "the restraining order or the attachment is discharged on the ground that the plaintiff was not entitled thereto under Sections 537 to 537.2, inclusive."

Subdivision (b). Subdivision (b) provides that wrongful attachment occurs when a writ of attachment is levied or a protective order is served where judgment in the action is not in favor of the plaintiff. This provision is based on another portion of subdivision (a) of former Section 539 which provided for recovery where "the defendant recovers judgment."

Subdivision (c). Subdivision (c) provides that wrongful attachment occurs when the plaintiff levies an ex parte writ of attachment on property which is exempt from attachment except where the writ was obtained under Chapter 12 (nonresident attachment) of this title or where the plaintiff reasonably believed that the property was not exempt from attachment. See Section 487.020 (property exempt from attachment). The determination that the property was not exempt made pursuant to Sections 484.520, 485.220, or 485.540 does not preclude a finding that the plaintiff acted unreasonably. For example, the determination may have been based on false affidavits or inadequate investigation by the plaintiff. Attachment of exempt property was classified as a form of abuse of process. See *White Lighting Co. v. Wolfson*, 68 Cal.2d 336, 349, 438 P.2d 345, 353, 66 Cal. Rptr. 697, 705 (1968); *McNabb v. Byrnes*, 92 Cal. App. 337, 268 P. 428 (1928).

Subdivision (d). Subdivision (d) provides that wrongful attachment occurs when a writ of attachment is levied against property of a person other than the person against whom the writ is issued. This will generally be a nonparty but may include a codefendant. An exception is provided comparable to that provided in Section 689. Under former law, the remedy of a third person was to file a complaint in intervention (see *Beshara v. Goldberg*, 221 Cal. App.2d 392, 34 Cal. Rptr. 501 (1963)), a third-party claim under Code of Civil Procedure Section 689, or a separate action for damages for conversion, trespass, or some other tort (see *McPheeters v. Baleman*, 11 Cal. App.2d 106, 53 P.2d 195 (1936); *Edwards v. Sonoma Valley Bank*, 59 Cal. 136 (1881)), or for specific recovery (see *Taylor v. Bernheim*, 58 Cal. App. 104, 209 P. 55 (1922)). See generally 5 B. WITKIN, CALIFORNIA PROCEDURE ENFORCEMENT OF JUDGMENT §§ 103-115 at 3468-3481 (2d ed. 1971). Subdivision (d) does not preclude such actions (see Section 490.060) but provides a statutory alternative.