

First Supplement to Memorandum 75-82

Subject: Study 39.160 - Revision of Attachment Law (Excessive Attachment)

Memorandum 75-82 presents some amendments to deal with the problem of avoiding or releasing an excessive attachment. After further study, the staff has concluded that a different scheme may be preferable.

1. A section would be added to the general provisions (Chapter.2) to the effect that a court has the discretion to limit the property to be described in the writ of attachment and designate the order of levy where the court finds that the defendant's interest in property described in the plaintiff's application clearly exceeds the amount reasonably sufficient to satisfy the amount of the plaintiff's claim. The order of levy provision is part of Section 488.010 in the current draft of the revision recommendation. The new section would read substantially as follows:

§ 482.120. Determination of order of levy; order restricting attachment

488.120. If the court finds at the hearing on issuance of a writ of attachment under this title that the value of the defendant's interest in the property described in the plaintiff's application clearly exceeds the amount reasonably sufficient to satisfy the amount to be secured by the attachment, the court may direct the order of levy on the property described in the writ or restrict the amount of the property to be levied upon.

Comment. Section 482.120 provides a procedure whereby the court can protect against an excessive attachment. After levy, the defendant may seek an order releasing an excessive attachment pursuant to Section 488.555. The provision in Section 482.120 for an order directing the order of levy continues the substance of a provision of former law. See the last sentence of former Section 538.4. The provision for an order restricting the amount of property to be levied upon recognizes the court's discretion to examine the plaintiff's application and to seek to avoid the attachment of an excessive amount of the defendant's property by ordering issuance of a writ describing a lesser amount of the defendant's property than was described in the plaintiff's application for the writ. This provision makes explicit the authority implied by the last sentence of subdivision (b) of Section 484.090. Similar provisions formerly appeared in Sections 484.370, 484.520, 485.220(b), 485.540, 492.030(b), and 492.090. The enactment of this provision is not intended to require a more detailed description of property in the plaintiff's application than that which satisfies subdivision (e) of Section 484.020.

2. A related change would amend all sections providing for the issuance of a right to attach order to make clear that the court must find that the plaintiff has established the amount to be secured by the attachment (usually the amount of the plaintiff's claim against the defendant). For example, subdivisions (a) and (b) of Section 484.090 would be amended as follows:

484.090. (a) At the hearing, the court shall consider the showing made by the parties appearing and shall issue a right to attach order if it finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based and the amount to be secured by the attachment .

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(b) If, in addition to the findings required by subdivision (a), the court finds that the defendant has failed to prove that all the property sought to be attached is exempt from attachment and the plaintiff has provided the undertaking required by Article 2 (commencing with Section 489.210) of Chapter 9, it shall issue order the issuance of a writ of attachment. ~~The writ of attachment shall state the amount to be secured by the attachment and describe the property to be levied upon.~~

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The right to attach order should state the amount to be secured by the attachment since that is determined at the time the court determines whether to issue the right to attach order. All writs issued on the basis of that right to attach order are aimed at satisfying that amount.

3. Subdivision (a) of Section 488.010 would be amended to state the contents of the writ of attachment, but the provision for the court ordering the order of levy would be included in the new Section 482.120, as discussed at the outset of this memorandum. Subdivision (a) of Section 488.010 would read:

(a) The writ of attachment shall identify the defendant whose property is to be attached, state the amount to be secured by the attachment, and describe the property to be levied upon to satisfy such amount. If the writ of attachment does not describe the property or interest therein in a manner adequate to permit the levying officer to execute the writ, the plaintiff shall give to the levying officer instructions in writing, signed by the plaintiff or his attorney of record, which contain a description of such property adequate to permit the levying officer to execute the writ and the name and address of any person who is to be served with a copy of the writ and the notice of attachment.

4. Finally, subdivision (a) of Section 488.555 as proposed in the Memorandum 75-82 should read as follows:

(a) The defendant may apply by noticed motion to the court in which the action is pending for an order releasing the attachment of property to the extent that the value of the defendant's interest in the property clearly exceeds the amount reasonably sufficient to satisfy the amount to be secured by the attachment.

Respectfully submitted,

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