

## Memorandum 72-39

Subject: Study 39.70 - Prejudgment Attachment Procedure (Wrongful Attachment; Undertakings)

Attached to this memorandum as Exhibits I and II are staff draft provisions relating to the attachment undertaking and wrongful attachment liability. These provisions are necessarily incomplete since not all the attachment procedures have been formulated and the Commission has yet to make policy decisions relating to wrongful attachment liability.

Scheme of draft provisions. The function of the chapters on undertakings and wrongful attachment is to isolate and segregate these provisions so that they will not unnecessarily clutter the attachment procedural sections.

The first chapter on undertakings contains general provisions that we hope ultimately to be able to incorporate by reference in other provisional remedies. The subsequent chapters contain provisions peculiar to the type of undertaking and the particular procedures involved.

The undertaking and wrongful attachment draft provisions to a large extent recapitulate prior or existing law. Where they do not, this fact is noted in the Comment. Some of the major deviations and major policy decisions are noted below.

Objection to undertaking. Under present law, there are two ways of attacking an attachment undertaking: excepting to the sufficiency of sureties and moving for increase or decrease of the amount. The staff draft, borrowing from provisions elsewhere in the Code of Civil Procedure, combines these two types of attack in a single procedure called an objection to the undertaking.

Plaintiff liable directly for wrongful attachment. Under present law, the plaintiff is not directly liable for wrongful attachment but only indirectly through subrogation of the surety. The staff draft makes the plaintiff liable directly for any damages and for the full amount of damages. Previously, the plaintiff's liability was limited by the surety's liability, which could not exceed the penalty on the undertaking. Also, there were artificial restrictions on the measure of damages recoverable.

Sureties liable directly on undertaking. Under present law, the surety is not liable directly on the undertaking. The beneficiary must first attempt to collect from the principal and, if he fails, must bring an independent action against the surety. The surety has numerous defenses and opportunities for delay.

The staff believes the surety should be directly liable on the undertaking without necessity of an independent action by the beneficiary and without having first to attempt to recover from the principal. The attached provisions are drafted on the assumption that this is a necessary change and on the assumption that part of this change will be accomplished by AB 605 (Warren 1972). A copy of the latest amended version of the Warren bill, which is modeled after Code of Civil Procedure Section 535 (injunctions), is attached as Exhibit III. If the Warren bill is not enacted, the staff believes we should draft something similar for attachment.

Respectfully submitted,

Nathaniel Sterling  
Legal Counsel

EXHIBIT I

Chapter 10. Undertakings

Article 1. General Provisions

- § 489.010. Application of article
- § 489.020. Definitions
- § 489.030. Waiver of undertaking
- § 489.040. Number of sureties required
- § 489.050. Estimate of value of property in undertaking
- § 489.060. Filing and approval of undertaking
- § 489.070. [Reserved for future use]
- § 489.080. Grounds for objection to undertaking
- § 489.090. Manner of making objection
- § 489.100. Hearing and determination of objection
- § 489.110. Hearing unnecessary where undertaking increased to amount of beneficiary's estimate of property value
- § 489.120. Liability of surety
- § 489.130. Limitations period for recovery on undertaking

Article 2. Undertakings to Obtain Writ of Attachment or Protective Order

- § 489.210. Undertaking required
- § 489.220. Amount of undertaking
- § 489.230. Notice to defendant
- § 489.240. Deposit account, or contents of safe deposit box, not wholly in name of defendant

Article 3. Undertaking to Obtain Release of Attachment or Order

[not yet drafted]

Article 4. Undertaking on Third-Party Claim

[not yet drafted]

Article 5. Undertaking on Appeal

[not yet drafted]

CHAPTER 10. UNDERTAKINGS

Article 1. General Provisions

§ 489.010. Application of article

489.010. Unless expressly provided by statute, the provisions of this article apply only to undertakings required in this title.

Comment. Section 489.010 limits the application of this article to undertakings in attachment proceedings. The provisions of this article supplement the general provisions that govern undertakings in Sections 1041-1059 of the Code of Civil Procedure and are in turn supplemented by specific provisions relating to particular undertakings in other articles of this chapter.

§ 489.020. Definitions

489.020. As used in this article:

- (a) "Beneficiary" means the person to be benefited by an undertaking.
- (b) "Principal" means the person who files an undertaking.

§ 489.030. Waiver of undertaking

489.030. An undertaking may be waived in writing by the beneficiary.

Comment. Section 489.030 is modeled after a portion of Section 920 (waiver of appeal bond). See also Merrit v. J. A. Stafford Co., 68 Cal.2d 619, 440 P.2d 927, 68 Cal. Rptr. 447 (1968)(parties may agree to appeal bond in less than required amount).

§ 489.040. Number of sureties required

489.040. An undertaking shall be executed by two or more sureties.

Comment. Section 489.040 generalizes the provision for at least two sureties, formerly found throughout the attachment chapter. See former Sections 539, 539a, 540, 553, 555. The requirement formerly found in many of these sections that the sureties be "sufficient" is continued in Sections 1057 (affidavit of sureties), 489.060 (approval of undertaking), and 489.080 (objection to undertaking). Cf. Tibbet v. Tom Sue, 122 Cal. 206, 54 P. 741 (1898)(provision for attachment undertaking incorporates Section 1057).

Any undertaking required in this title may, in lieu of personal sureties, be executed by a corporate surety. See Section 1056. Cf. Brandt v. Superior Court, 67 Cal.2d 437, 432 P.2d 31, 62 Cal. Rptr. 429 (1967)(undertaking in libel and slander action may be made by corporate surety as well as by personal sureties).



§ 489.050. Estimate of value of property in undertaking

489.050. Where the amount of an undertaking depends upon the value of property, the undertaking shall include the principal's estimate of the market value of such property.

Comment. Section 489.050 adopts the method used under Sections 677 (action to set aside fraudulent conveyance) and 710c (third-party claims on execution), whereby the person filing the undertaking supplies the estimate of value. The provision of former Section 555 for a court-appointed appraisal of property is not continued. However, the judicial officer may order an appraisal of property upon a subsequent objection by the beneficiary. See Section 489.100(a).

§ 489.060. Filing and approval of undertaking

489.060. (a) An undertaking shall be presented to a judicial officer for approval and upon approval shall be filed with the court in which the action is pending. The undertaking becomes effective upon filing.

(b) Nothing in this chapter shall be construed to preclude approval of an undertaking in an amount larger than that required.

Comment. Section 489.060 requires approval of any undertaking under this title by a judicial officer before it may be filed. This generalizes the requirement of former Section 540 (undertaking for release of attached property). The judicial officer approves the undertaking if he determines that the undertaking on its face and the affidavits of the sureties are sufficient. Such approval has no effect on the right of the beneficiary to object to the sufficiency of the undertaking.

The undertaking is filed with the court in which the action is pending. Under prior law, the undertaking was filed with the court in some instances (former Section 540) and with the levying officer in others (former Section 539a). However, since an undertaking must be approved by a judicial officer in all cases, all undertakings are required to be filed with the court. See also Section 1057 (clerk to enter undertaking in register of actions).

Subdivision (b) of Section 489.060 is based on a sentence found in former Section 539.

\$ 489.070. [Reserved for future use]

§ 489.080. Grounds for objection to undertaking

489.080. The beneficiary may object to the sufficiency of an undertaking on either of the following grounds:

- (a) The sureties are insufficient.
- (b) The amount of the undertaking is insufficient.

Comment. Section 489.080 continues prior law. See, e.g., former Sections 539 (exceptions to sureties, increase of undertaking on motion), 554 (justification of sureties), 555 (justification of sureties). The combination of both exception to sureties and adequacy of the amount of the undertaking in a single objection to the sufficiency of the undertaking is modeled upon Sections 678 (undertaking in action to set aside transfer of property) and 711-1/2 (undertaking by third-party claimant on execution).

The qualifications of sureties are set out in Sections 1056 and 1057. The amount of the undertaking is prescribed in Sections \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

§ 489.090. Manner of making objection

489.090. (a) An objection to the sufficiency of the undertaking shall be made by a noticed motion. The notice of motion shall specify the precise ground for the objection.

(b) Where the objection is made on the ground that the market value of the property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the notice of motion shall state the beneficiary's estimate of the market value of the property.

Comment. Section 489.090 provides a procedure for objecting to the sufficiency of the undertaking but places no limitation on the time within which objections must be made. Contrast former Sections 539, 539a, 553.5, 554 (five days).

Subdivision (b) is new. Its purpose is to facilitate voluntary agreement on the amount of an undertaking by the parties. See Section 489.110. Where the parties are unable to agree on property valuation, the court determines the amount of the undertaking. See Section 489.100.

§ 489.100. Hearing and determination of objection

489.100. (a) Unless the parties otherwise agree, the hearing on the objection shall be held not less than two nor more than five days after service of notice of motion.

(b) The hearing shall be conducted in such manner as the judicial officer determines is proper. He may permit witnesses to attend and evidence to be procured and introduced in the same manner as in the trial of a civil case. He may appoint one or more disinterested persons to appraise property for the purpose of ascertaining its value.

(c) If the judicial officer determines that the undertaking is insufficient, he shall specify in what respect it is insufficient and shall order that an undertaking with sufficient sureties and in a sufficient amount be filed within five days. If the order is not complied with, all rights obtained by filing the original undertaking shall immediately cease.

(d) Where the judicial officer determines an undertaking is insufficient, the undertaking shall remain in effect until an undertaking with sufficient sureties and in a sufficient amount is filed in its place.

(e) Where the judicial officer determines an undertaking is sufficient, no future objection may be made to the undertaking except upon a showing of changed circumstances.

Comment. Section 489.100 is derived from numerous provisions of the Code of Civil Procedure. See, e.g., Sections 678, 678-1/2, 679, 711-1/2, 712, 712-1/2, 833-835, 1030, and 1057.

§ 489.100

The time for hearing on the sufficiency of an undertaking in subdivision (a) continues prior law. See former Section 539.

Subdivision (b) is intended to provide the judicial officer with a wide variety of tools. He may examine sureties under oath; he may appoint appraisers; he may order a full-dress hearing. Subdivision (b) is permissive rather than restrictive.

If a new undertaking is filed after the original undertaking is found insufficient, it must of course be approved by a judicial officer before it may take effect. Section 489.060. The new or increased undertaking is subject to objection in the same manner as the original undertaking. Section 489.080. However, a judicial officer's determination that an undertaking is sufficient is binding in any subsequent proceedings, absent changed circumstances. Subdivision (e).

Orders for a sufficient undertaking made under this section are not subject to appeal. See Murillo v. Toole, 47 Cal. App.2d 725, 118 P.2d 895 (1941). See also Section 904.1 et seq.

Subdivision (d) is new. The effect of this provision is to continue the liability of the surety on an insufficient undertaking until the surety is exonerated either by the filing of a sufficient undertaking, or the failure of the condition of the surety's liability.

§ 489.110. Hearing unnecessary where undertaking increased to amount of beneficiary's estimate of property value

489.110. Where an objection to an undertaking is made on the ground that the market value of property on which the amount of the undertaking depends exceeds the value estimated in the undertaking, the principal may accept the beneficiary's estimated value of the property and file at once an increased undertaking based upon such estimate. In such case, no hearing shall be held on the objection, and the beneficiary is bound by his estimate of the value of the property in any hearing on the sufficiency of an undertaking filed by the principal in the action.

Comment. Section 489.110 is derived from Sections 678, 679, 711-1/2, and 712-1/2. The beneficiary is bound by his estimate of the value of the property on which the amount of the undertaking depends but may object to the sufficiency of the increased undertaking on any other ground.



§ 489.120. Liability of surety

489.120. Notwithstanding Section 2845 of the Civil Code, a judgment of liability on an undertaking shall be in favor of the beneficiary and against the sureties and may be enforced by the beneficiary directly against the sureties. The liability of a surety is limited to the amount of the undertaking. Nothing in this section affects any right of subrogation of a surety against his principal.

Comment. Section 489.120 supplements Section 1058a. Under Section 1058a, a motion to enforce liability on an undertaking is directed to the sureties. Section 489.120 makes clear that the liability may be enforced directly against the sureties. In contrast with 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. This provision in no way interferes with the contractual relation between principal and surety.

Section 489.120 limits only the liability of a surety; the principal is liable to the beneficiary to the extent of the full amount of damages caused. See Section 490.020.

Note. This section assumes the enactment of Section 1058a (Assembly Bill 605, 1972 Reg. Sess.). Section 1058a is modeled after Section 535 (undertakings for injunctions). If Section 1058a is not enacted, Section 489.120 should be amended to incorporate its substance.

§ 489.130. Limitations period for recovery on undertaking

489.130. A motion to enforce liability on an undertaking shall be filed and notice served no later than one year after final judgment in the action in which the undertaking is given has been entered and the time for appeal has expired.

Comment. Section 489.130 is derived from Section 1166a.

Article 2. Undertakings to Obtain Writ of

Attachment or Protective Order

§ 489.210. Undertaking required

489.210. Before issuance of a writ of attachment or a protective order, the judicial officer shall require that the plaintiff have filed an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action.

Comment. Section 489.210 supersedes the first sentence of former Section 539.

For damages on wrongful attachment, see Chapter 11 (Section 490.010 et seq.). The recovery for a wrongful attachment includes not only damages but also attorney's fees. See Section 490.020. See also Section 490.010 (acts constituting wrongful attachment).

§ 489.220. Amount of undertaking

489.220. (a) Except as provided in subdivision (b), the amount of an undertaking filed pursuant to this article shall be one-half of the amount sought to be recovered by the plaintiff in the action in which the writ of attachment or protective order is sought.

(b) If, upon objection to the undertaking, the judicial officer determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, he shall order the amount of the undertaking increased to the amount he determines to be the probable recovery for wrongful attachment if it is ultimately determined that there was a wrongful attachment.

Comment. Section 489.220 supersedes portions of former Section 539 but provides no authorization for decrease of the amount of an undertaking.

Subdivision (a). Subdivision (a) makes no provision for attachment based on a partial amount of a plaintiff's claim. Compare the second sentence of former Section 539.

Subdivision (b). Under former law, the undertaking could be increased only to the amount for which the writ was issued. See the last sentence of former Section 539.

§ 489.230. Notice to defendant

489.230. (a) The notice of levy of the writ of attachment shall include a statement, in a form adopted by the Judicial Council, advising the defendant that the undertaking has been filed and informing him of his right to object to the sufficiency of the undertaking.

(b) A protective order shall include a statement comparable to the one required by subdivision (a), the content of which shall be prescribed by rule adopted by the Judicial Council.

Note. This section needs more work. We have not yet drafted a provision requiring that a defendant be given notice of levy in cases, for example, where the property levied on is in the possession of a third party and the writ was obtained ex parte.

§ 489.240. Deposit account, or contents of safe deposit box, not wholly in name of defendant

489.240. (a) Notwithstanding any other provision of law, the provisions of this section shall be complied with if the debt, credit, or other personal property sought to be attached under a writ of attachment is any of the following:

(1) A bank account, or interest therein, not standing in the name of the defendant or defendants or standing in the name of the defendant or defendants and one or more other persons who are not defendants.

(2) A savings and loan association share, investment certificate, or account, or interest therein, not standing in the name of the defendant or defendants or standing in the name of the defendant or defendants and in one or more other persons who are not defendants.

(3) Property in a safe deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe deposit business and rented by it to a person or persons other than a defendant or defendants or rented by it to one or more such defendants and to one or more other persons who are not defendants.

(b) The amount of an undertaking filed to obtain a writ of attachment of property described in subdivision (a) shall be an amount not less than twice the amount sought to be recovered by the plaintiff in the action in which the writ is sought. The undertaking shall secure the payment of any recovery for wrongful attachment by any person, other than the defendant whose interest is sought to be attached, rightfully entitled to such debt, credit, or other personal property (which person need not be named specifically in the undertaking but may be referred to generally in the same manner as in this sentence).

(c) Objections to the undertaking may be made by any person claiming to be the rightful owner of the debt, credit, or other personal property sought to be levied upon.

Comment. Section 489.240 continues the substance of a portion of former Section 539a except that the provision for delivery of the undertaking to the beneficiary through the sheriff and bank is not continued. See Comment to Section 489.060.

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EXHIBIT II

Chapter 11. Liability for Wrongful Attachment

- § 490.010. Acts constituting wrongful attachment
- § 490.020. Liability for wrongful attachment
- § 490.030. Procedure for recovery for wrongful attachment
- § 490.040. Setoff of wrongful attachment recovery
- § 490.050. Recovery by third-party claimants
- § 490.060. Common law remedies not limited



CHAPTER 11. LIABILITY FOR WRONGFUL ATTACHMENT

§ 490.010. Acts constituting wrongful attachment

490.010. A wrongful attachment consists of any of the following:

(a) The levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized.

(b) The levy of a writ of attachment or the service of a protective order in an action in which the plaintiff does not recover judgment.

(c) The levy of a writ of attachment in an action in which the plaintiff recovers judgment in an amount less than one-half the value of the property levied on.

(d) The levy of a writ of attachment on property exempt from attachment.

(e) The levy of a writ of attachment on property of a person not a party to the action.

Note. Subdivision (c) is included to present a problem area for discussion. Subdivision (e) deals with the situation where the property of a third person is attached by mistake, such as where property of a person having the same name as the defendant is levied on. The relation between third-party claims and wrongful attachment liability is yet to be explored.

§ 490.020. Liability for wrongful attachment

490.020. (a) The liability of a plaintiff for causing a wrongful attachment includes both of the following:

(1) All damages proximately caused to the defendant or any other person by the wrongful attachment, whether direct or consequential.

(2) All costs and expenses, including attorney's fees, reasonably expended in recovering for wrongful attachment.

(b) The liability of a plaintiff for wrongful attachment is not limited by the amount of the undertaking.

Comment. Section 490.020 provides a standard that will make the defendant whole. Contrast Vesper v. Crane Co., 165 Cal. 36, 130 P. 876 (1913).

Subdivision (a). The extent of wrongful attachment liability is the actual damage caused by the attachment and includes such items as loss of credit and business losses. Contrast Gray v. American Sur. Co., 129 Cal. App.2d 471, 277 P.2d 436 (1954); Atlas Dev. Co. v. National Sur. Co., 190 Cal. 329, 212 P. 196 (1923); Elder v. Kutner, 97 Cal. 490, 32 P. 563 (1893); Bailey v. McDougal, 196 Cal. App.2d 178, 16 Cal. Rptr. 204 (1961).

Subdivision (b). Compare Section 489.120 (liability of surety limited). Contrast Finn v. Witherbee, 126 Cal. App.2d 45, 271 P.2d 606 (1954).

§ 490.030. Procedure for recovery for wrongful attachment

490.030. (a) A defendant may recover damages for wrongful attachment by motion filed in the trial court without necessity of an independent action.

(b) A motion under this section shall not be filed or served on the plaintiff until after entry of the final judgment in the action for which damages are sought and expiration of the time for appeal from such judgment. The motion may not be filed or served more than one year thereafter.

(c) The defendant may join in such motion the sureties on an undertaking for wrongful attachment liability, and any judgment of liability shall bind the plaintiff and sureties jointly and severally, but the liability of a surety is limited to the amount of the undertaking.

(d) The procedure for recovery of wrongful attachment damages on motion of the defendant shall be as provided in Section 1058a for recovery on an undertaking.

Comment. Section 490.030 provides for recovery of wrongful liability damages in the same manner as recovery on an undertaking. See subdivision (d).

Subdivision (a). Subdivision (a) provides for a direct wrongful attachment action against the plaintiff. See Section 490.020.

Subdivision (b). Compare Section 489.130.

Subdivision (c). For the extent of the liability of a surety, see Section 489.120.

[Subdivision (d). Section 1058a is proposed by Assembly Bill 605 (1972). Failure to enact this bill will require a similar proposal in the attachment statute.]

§ 490.040. Setoff of wrongful attachment recovery

490.040. The amount of any recovery for wrongful attachment shall be offset insofar as possible against any unsatisfied amounts owed to the plaintiff by the defendant on the judgment in the action for which wrongful attachment damages are awarded.

§ 490.050. Recovery by third-party claimants

490.050. A person not a party to an action whose property is wrongfully attached is entitled to recover damages for wrongful attachment to the same extent and in the same manner as a defendant in the action. For this purpose, the person whose property is attached shall be deemed to be the beneficiary of the undertaking for the attachment of such property and shall have all rights of the beneficiary, including the right to recover such damages by using the procedure provided by Section 490.030.

Note. Section 490.050 is not fully developed. See note to Section 490.010. The problem of third-party rights is also the subject of Senate Bill 378 (1972), a bill that the author has dropped because the Commission is studying this matter.

§ 490.060. Common law remedies not limited

490.060. Nothing in this chapter limits the right to recover for damages caused by an attachment or protective order on any common law theory of recovery.

Comment. Section 490.060 makes clear that this chapter does not limit the common law remedies for wrongful attachment such as malicious prosecution and abuse of process. See, e.g., White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

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EXHIBIT III

AMENDED IN ASSEMBLY MAY 11, 1972  
AMENDED IN ASSEMBLY APRIL 25, 1972  
AMENDED IN ASSEMBLY APRIL 13, 1972

CALIFORNIA LEGISLATURE—1972 REGULAR SESSION

**ASSEMBLY BILL**

**No. 605**

Introduced by Assemblyman Warren

February 29, 1972

REFERRED TO COMMITTEE ON JUDICIARY

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*An act to amend Section 2845 of the Civil Code and to add Section 1058a to the Code of Civil Procedure, relating to undertakings and bonds.*

LEGISLATIVE COUNSEL'S DIGEST

AB 605, as amended, Warren (Jud.). Actions against sureties.

Provides that where bond or undertaking is given in an action or proceeding, other than a bond or undertaking of a public officer or fiduciary, surety submits to jurisdiction of court. Authorizes and specifies procedure for notice to and recovery against surety without independent action.

Provides that right of the surety to require his creditor to proceed against his principal is subject to these provisions.

Vote—Majority; Appropriation—No;  
Fiscal Committee—No.

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

1 SECTION 1. Section 2845 of the Civil Code is  
2 amended to read:

3 2845. A surety may require his creditor, subject to the  
4 provisions of Section 1058a of the Code of Civil  
5 Procedure, to proceed against the principal, or to pursue  
6 any other remedy in his power which the surety cannot  
7 himself pursue, and which would lighten his burden; and  
8 if in such case the creditor neglects to do so, the surety  
9 is exonerated to the extent to which he is thereby  
10 prejudiced.

11 SEC. 2. Section 1058a is added to the Code of Civil  
12 Procedure, to read:

13 1058a. Whenever any security is given in the form of  
14 a bond or undertaking, other than a bond or undertaking  
15 of a public officer or fiduciary, in any action or  
16 proceeding, each surety submits himself to the  
17 jurisdiction of the court in all matters affecting his  
18 liability on the bond or undertaking. Such bond or  
19 undertaking shall state the address at which the surety  
20 may be served with notices and papers authorized by this  
21 section. The liability of such surety or sureties, if any, may  
22 be enforced on motion filed in the trial court without the  
23 necessity of an independent action. Such motion shall not  
24 be filed until ~~rendition~~ *entry* of the final judgment in the  
25 action or proceeding for which the bond or undertaking  
26 is given *and the time for appeal has expired*. Notice of  
27 the motion shall be served on the persons whose liability  
28 is sought to be enforced at least 30 days prior to the time  
29 set for hearing of the motion. The notice shall state the  
30 amount of the claim and shall be supported by an  
31 affidavit or affidavits setting forth the facts on which the  
32 claim is based. Such notice and affidavit may be served in  
33 accordance with any procedure authorized by Chapter 5  
34 (commencing with Section 1010), Title 14, Part 2.  
35 Judgment may be entered in accordance with the notice  
36 against the person or persons served therewith, unless  
37 such person or persons shall serve and file an affidavit or  
38 affidavits in opposition to the motion showing such facts



1 as may be deemed by the judge hearing the motion  
2 sufficient to present a triable issue of fact. If such showing  
3 is made, the issues to be tried shall be specified by the  
4 court and trial thereof shall be set for the earliest date  
5 convenient to the court, allowing sufficient time for ~~such~~  
6 ~~discovery proceedings as may be requested.~~ The  
7 *discovery.* The surety shall not in such a proceeding be  
8 permitted to assert any counterclaim or any  
9 ~~cross/complaint against the principal, nor to obtain a stay~~  
10 of the proceedings pending the determination of any  
11 third-party claims. Affidavits filed pursuant to this section  
12 shall conform to the standards prescribed for affidavits  
13 filed pursuant to Section 437c.

O