#39.70 10/4/73

First Supplement to Memorandum 73-83

Subject: Study 39.70 - Prejudgment Attachment

In Memorandum 73-83 (page 7), we noted that one commentator objected to our basic issuance procedure and suggested that the general right to attachment be declared after the preliminary hearing and then, as under prior law, the plaintiff could locate and levy upon whatever assets he could find. This issue is discussed generally in Memorandum 73-83. However, a related problem still remains. Section 484.090 (page 571) now provides that a right to attach order and writ of attachment shall issue if the court finds that the plaintiff has established probable validity and has provided a proper undertaking and the defendant has failed to prove that all the property sought to be attached is exempt. Implicit in this last requirement is the rule that, if the defendant successfully claims that the specific property sought to be attached is exempt, neither a writ nor a right to attach order may be issued. The staff believes that such a result is inadvertent and is unsatisfactory as a matter of policy. We believe that, if the plaintiff can show probable validity and has filed a proper undertaking, he should be entitled to a right to attach order whether or not a writ of attachment may issue. It seems unnecessary and wasteful of judicial resources to require another hearing on the issue of probable validity just because the plaintiff loses the contested hearing on the claim of exemption. (Note Section 484.070 provides that, if the plaintiff does not oppose the claim of exemption, no hearing is held at all.) It could be argued that to permit a right to attach order to issue will encourage the plaintiff to list property indiscriminately in his initial application without regard to whether such property will probably be subject to attachment. However, we do not believe

that there is a significant danger of this happening; we would, at least, rather risk this danger than have a statute which requires multiple hearings on probable validity because the plaintiff has difficulty showing that the property he seeks to attach is subject to attachment. We would accordingly revise Section 484.090 as set out in Exhibit I and would further revise Sections 484.310 (page 573), 484.320(a)(page 574), and 484.510(a)(page 577) to eliminate the requirement that a writ of attachment must have previously been issued.

Respectfully submitted,

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Assistant Executive Secretary

First Supplement to Memorandum 73-83

EXHIBIT I

§ 484.090. Hearing; issuance of order and writ

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.

(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 a writ of attachment. The writ of attachment shall specify the amount to be secured by the attachment and the property to be levied on.**

**(c) If the court determines that property of the defendant is exempt from attachment, in whole or in part, the right to attach order shall describe such property and prohibit attachment of such property.**

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider additional evidence and authority produced at the hearing or it may continue the hearing for the production of additional evidence, oral or documentary, or the filing of other affidavits or points and authorities.