

Memorandum 74-62

Study 39.70 - Creditors' Remedies (Prejudgment Attachment)

Attached is a copy of Assembly Bill 2948 in the form in which it passed the Legislature. The Governor approved the bill.

Four sections were amended by the Senate Judiciary Committee when the bill was heard by that committee during the final days of the 1974 session. The amendments were adopted by the committee knowing that they were not Commission recommendations. The committee recognized that the Commission will submit corrective bills if the Commission concludes that corrective legislation is needed.

It is anticipated that any such corrective bills would be strongly opposed by the California Credit Managers Association.

The amendments made by the committee are shown by strike-out and italics in the attached bill and are noted below.

Section 485.010 (page 23 of bill)

Subdivision (b)(1) of Section 485.010 was amended. The revised language may be somewhat ambiguous, but it does not appear that any substantive change was made. See also the Comment to Section 485.010 (Exhibit I). I do not believe corrective legislation is needed now. If experience under the section discloses a deficiency in the section, an amendment can be made then.

Section 486.010 (page 28 of bill)

The change in subdivision (b) permits an affidavit for a temporary protective order to be based on information and belief. (The affidavit for a writ cannot be based on information and belief.) See Section 482.040 (pages 10-11) which states the requirements for affidavits. I do not believe corrective legislation is needed.

Section 487.010 (pages 31-32 of bill)

The introductory portion of subdivision (c) and subdivision (c)(7) are revised. The effect is that the property attached is not necessarily limited to property used in the trade, business, or profession. However, by virtue of the definitions, much of the property listed in subdivision (c) is restricted to that used in the trade, business, or profession:

(1) "Real property" was not restricted to property used in the trade, business, or profession under the Commission's recommendation.

(2) "Accounts receivable," "chattel paper," and "choses in action" are defined in Sections 481.030, 481.040, and 481.050, respectively. For all practical purposes, these items will be limited to assets connected with the trade, business, or profession.

(3) "Deposit account" is not limited to the trade, business, or profession. See Section 481.080.

(4) "Equipment," "farm products," and "inventory" are defined in Sections 481.100, 481.110, and 481.120, respectively. For all practical purposes, these items will be limited to matters connected with the trade, business, or profession.

(5) "Judgments" is limited by Section 487.010(c)(6) to business judgments; "Money" is limited to money on the business premises by Section 487.010(c)(7).

(6) "Negotiable documents," "negotiable instruments," and "securities" are defined in Sections 481.090, 481.160, and 481.210 by reference to the Commercial Code. The definitions do not restrict the assets to those used in the trade, business, or profession.

I do not believe that corrective legislation is needed. See in this connection Section 487.020.

Section 490.020 (page 59 of bill)

Subdivision (b) is amended to limit liability of a plaintiff for wrongful attachment to the amount of the undertaking. I believe that the Commission should recommend legislation to the 1975-76 session to restore Section 490.020(b) to its form prior to the Senate Judiciary Committee amendment. I believe that the Commission's recommendation-- that liability for wrongful attachment should not be limited to the amount of the undertaking where the order or writ was obtained ex parte-- was a sound recommendation.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I

Code of Civil Procedure

Section 485.010. Prerequisite of great or irreparable injury

Comment. Section 485.010 is based on former Section 538.5. Subdivision (a) of former Section 538.5 has been replaced by the substantively similar provisions of paragraphs (2) and (3) of subdivision (b) and subdivision (c) of Section 485.010. Paragraph (3) of subdivision (b) does not, however, modify the exclusive scheme of priorities provided by Section 24074 of the Business and Professions Code (see *Grover Escrow Corp. v. Cole*, 71 Cal.2d 61, 453 P.2d 461, 77 Cal. Rptr. 21 (1969)) but merely provides for levy in the circumstances contemplated in the last paragraph of Section 24074. Subdivisions (b) and (c) of former Section 538.5 have been replaced by paragraphs (1) and (4) of subdivision (b) of Section 485.010. These two paragraphs authorize ex parte relief on a showing of circumstances from which it may be inferred that there is a danger that property will be concealed, substantially impaired in value, or otherwise made unavailable to levy or a showing of any other circumstance that indicates that the plaintiff would suffer great or irreparable injury if issuance of the writ were delayed until the matter could be heard on notice.

The introductory clause to Section 485.010 recognizes the specific authorization to issue an ex parte attachment provided by other statutes. See e.g., HARB. & NAV. CODE § 495.1; HEALTH & SAF. CODE § 11501; REV. & TAX. CODE §§ 6713, 7864, 8972, 11472, 12680, 18833, 26251, 30302, and 32352. See also Chapter 12 (commencing with Section 492.010) (nonresident attachment).