First Supplement to Memorandum 75-5

Subject: Study 39.70 - Prejudgment Attachment

This supplementary memorandum considers additional suggestions concerning the Attachment Law from Mr. David Battin of the Judicial Council Advisory Committee on Legal Forms. Mr. Battin's letter is attached as an Exhibit; the following discussion considers his comments in the order they appear in the letter. Any changes approved by the Commission will be incorporated into the draft recommendation attached to Memorandum 75-5.

§ 488.080(b). Inventory

Subdivision (b) of Section 488.080 provides:

> (b) The levying officer, at the time of service, shall request any person who retains property in his possession or any account debtor or judgment debtor levied upon to give him a memorandum, describing the property or debt and stating its value or the amount owing, within 10 days after such service. If the person fails to give such memorandum within the time specified, the levying officer shall state such fact at the time he makes his return pursuant to Section 488.070. A person failing to give such memorandum within the time specified may be required to pay the costs of any proceedings taken for the purpose of obtaining the information required by such memorandum.

Mr. Battin suggests that this provision is applicable only to third persons but seems to apply to defendants since it employs the unrestricted words "any person." The reason for this wording is that the August 1972 draft had this provision in Section 488.330 (levy on tangible personal property in possession of third person) where it was clear that it applied to third persons; in the October 1972 draft, this provision was moved to its present location. The letter suggests that it might be inferred from this provision that the defendant could retain

possession of property sought to be attached. Of course, in some cases he does retain possession although that is by virtue of the levy procedures, not any reading of Section 488.080. The staff believes that no real harm would result should this provision remain as it is; however, it would be more precise if the first sentence were amended as follows:

> (b) The levying officer, at the time of service, shall request any <u>third</u> person who retains property <u>levied upon</u> in his possession or any account debtor or judgment debtor levied upon to give him a memorandum, describing the property or debt and stating its value or the amount owing, within 10 days after such service.

<u>§ 487.020(d). Property exempt from attachment</u>

Section 487.020 provides:

> 487.020. Notwithstanding Section 487.010, the following property is exempt from attachment:
>
> (a) All property exempt from execution.
>
> (b) Property which is necessary for the support of an individual defendant and members of his household.
>
> (c) All compensation paid or payable by an employer to an employee for personal services performed by such employee whether denominated as wages, salary, commission, bonus, or otherwise.
>
> (d) All property not subject to attachment pursuant to Section 487.010.

Mr. Battin suggests that subdivision (d) is without meaning and should be deleted.

The staff thinks subdivision (d) is necessary. Only the property listed in Section 487.010 may be attached. If property not listed in Section 487.010 is attached, whether intentionally or mistakenly, in the absence of subdivision (d) of Section 487.020, there would be no provision in the attachment law for preventing attachment of such property or releasing such property. The staff thinks that the Comment is clear:

Subdivision (d) makes clear that property not subject to attachment under Section 487.010 may be claimed as "exempt" under the various procedures for claiming an exemption. See, e.g., Section 485.230.

The statute provides that the defendant may claim exemptions (see, e.g., Sections 484.070 and 485.230); for drafting purposes, we did not want to have to say "exemptions and property not subject to attachment" every time. It should also be remembered that the class of exempt property is not identical to the class of property not subject to attachment. Consider the following example: The plaintiff seeks to attach a truck owned by the defendant, an individual. As part of his application under Section 484.020, the plaintiff describes the truck and states that he is informed and believes that it is subject to attachment. This means he thinks it falls within the definition of "equipment" (Section 481.100) which is subject to attachment under Section 487.010(c)(3). The plaintiff is not required under the noticed hearing procedure to make a showing in his application for the order and writ that the property sought to be attached is also not exempt; the defendant has the opportunity to claim exemptions later in the proceedings before the property is actually attached. If the court finds that the truck is subject to attachment, and if the defendant then claims no exemptions, then the truck would be attached. However, the defendant may claim that the truck is exempt on the grounds that it is exempt from execution (Sections 487.020(a), 690.4) or that it is necessary for the support of his family (Section 487.020(b)). By virtue of subdivision (d) of Section 487.020, he may also use the exemption procedure to show that the truck is not in fact "equipment" since it is not "used or bought for use primarily in the defendant's trade, business, or profession." Without subdivision (d), technically there would be no way to make a claim that the property is not subject to attachment.

§ 489.310(a). Undertaking for release of attachment

Mr. Battin reads Section 489.310(a) to require the defendant to go to the court in each county where a writ has been levied in order to release the property. Under Section 540 of existing law, this is required only where the defendant seeks to prevent levy or to release levy before the sheriff has made his return. After the writ is returned, Sections 544 and 555 require approval only by the court where the action is pending.

The staff believes that Section 489.310(a) was intended to change this practice. Section 489.310(a) provides that "a defendant . . . may apply to the court in which the action is pending, or, if a writ of attachment is levied in another county, to a court in such county . . ., for an order . . ." of release. Compare this language to part of existing Section 540: "security . . . which must first be approved by a judge of the court issuing the writ, or if said writ of attachment is issued to another county then by a judge of a court . . . in the county where the levy shall have been, or is about to be, made . . . ." (Emphasis added.) Unfortunately, the Comment to Section 489.310 does not refer to this change; however, the Comment to Section 489.060 (requiring the approval of all undertakings by a proper court and their filing with the court where the action is pending) contains the following:

> It should be noted that in some instances an undertaking may be approved by a court in a county other than the county in which the action is pending. See Section 489.310. However, following approval, all undertakings must be filed with the court in which the action is pending. (Emphasis added.)

In view of the ambiguity of Section 489.310(a), it might be amended as follows:

> (a) Upon reasonable notice to the plaintiff, a defendant whose property has been or is subject to being attached and who has appeared in the action may apply to the court in which the action is pending for an order permitting him to substitute an undertaking for any property which has been or is subject to being attached. Alternatively, the defendant may make such application to a court in another county having jurisdiction in cases involving the amount specified in the writ for an order permitting him to substitute an undertaking for any property in that county which has been or is subject to being attached.

Or it might be made to read:

> (a) A defendant who has appeared in the action may, upon reasonable notice to the plaintiff, apply to either of the following courts for an order permitting him to substitute an undertaking for property that has been attached or is subject to being attached:
>
> (1) The court of the county in which the property is located having jurisdiction in cases involving the amount specified in the writ.
>
> (2) The court in which the action is pending.

A third alternative is to make some minor amendment to Section 489.310 and explain its meaning in the Comment.

The Commission may wish to eliminate the provision for getting an order in a county other than where the action is pending.

Another minor ambiguity should be noted. As enacted, Section 489.310 allows application to a court in another county only when the writ "is levied." If this means that, contrary to the language in the first and last parts of the section to the effect that the order may be sought to release property which "has been or is <u>subject to</u> being attached," an order may be obtained in another county only where the writ has been levied, it is a change from existing law.

Finally, the scope of the order is unclear under the section as enacted. Presumably, the order issued in another county applies only to property levied upon or subject to levy in that county; whereas, the order issued by the court where the action is pending may release property throughout the state.

§ 489.230(a). Notice to defendant of right to object to undertaking

Subdivision (a) of Section 489.230 provides:

> 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 undertaking on the grounds provided in Section 489.070.

Mr. Battin writes that this provision "has no implementing clause," and asks when and how is the notice served. The objection to the undertaking is governed by Sections 489.070-489.090. The notice of levy of the writ is the same as the notice of attachment and is described in Section 488.020. The manner and time of service is provided in Chapter 8. The Comments contain adequate cross-references. The staff sees no problem here.

§ 486.050(a). Temporary protective order

Section 486.050 provides:

> 486.050. (a) Except as otherwise provided in subdivision (b) and in Sections 486.040 and 486.060, the temporary protective order may prohibit any transfer by the defendant of any of his property in this state subject to the levy of a writ of attachment.
>
> (b) If the property is farm products held for sale or is inventory, the order may not prohibit the defendant from transferring the property in the ordinary course of business, but the order may impose appropriate restrictions on the disposition of the proceeds from such transfer.

Mr. Battin states that subdivision (a) is "clearly unconstitutional" and suggests that the addition of the words "specified in the order" after the word "property" would save it.

The staff thinks it is improbable that this provision would be held unconstitutional. Section 486.040 (referred to in Section 486.050) provides that the order "shall contain such provisions as the court determines would be in the interest of justice and equity to the parties, taking into account the effects on both the defendant and the plaintiff under the circumstances of the particular case." Section 486.050 provides that the order may prohibit any transfer of any of the defendant's property--this clearly indicates that the order may be fashioned to prohibit only certain types of transfers of certain types of property. The language suggested by Mr. Battin would do no more than this. Section 486.060 allows the defendant to continue to issue checks for a variety of purposes. Finally, the order may be issued only in extraordinary circumstances. The staff thinks that the "horrible" suggested in the letter would be unlikely ever to occur; it certainly would not be justifiable by the standards provided in the Attachment Law.

§ 486.060. Effect on deposit accounts

Section 486.060 provides:

> 486.060. Notwithstanding Section 486.050, the temporary protective order issued under this chapter shall permit the defendant to issue any number of checks:
>
> (a) In an aggregate amount of not more than one thousand dollars ($1,000) against any of his deposit accounts in this state for any purpose.
>
> (b) In any amount so long as the aggregate amount remaining on deposit in this state is more than the amount of the plaintiff's claim.
>
> (c) In any amount in payment of any payroll expense (including taxes and premiums for workmen's compensation and unemployment insurance) falling due in the ordinary course of business prior to the levy of a writ of attachment.
>
> (d) In any amount in payment for goods thereafter delivered to the defendant C.O.D. for use in his trade, business, or profession.
>
> (e) In any amount in payment of taxes if penalties will accrue for any delay in payment.
>
> (f) In any amount in payment of reasonable legal fees and reasonable costs and expenses required for the representation of the defendant in the action.

The staff is uncertain whether this section would require the court to make an affirmative finding in the temporary protective order that the defendant may issue checks as provided in this section. The intent of the provision is to restrict the extent of the temporary protective order. It might be best if the substance of Section 486.060 were contained in the temporary protective order so that the defendant would know without looking at the statute for what purposes he may issue checks. There would then be no problem of overly broad temporary protective orders depriving defendants of rights under the statute. However, the language does not seem to require the court to make a finding, as Mr. Battin suggests.

The language change suggested by Mr. Battin is acceptable to the staff although then it would seem to be unlikely that the substance of Section 486.060 would be included in the order. What does the Commission wish to do?

§ 486.020. Issuance of temporary protective order

Mr. Battin asks why there is no requirement in obtaining a temporary protective order that the court find the property is nonexempt as is required when obtaining an ex parte writ of attachment. (Compare Sections 486.020 and 485.210(c)(3).) The theories of the ex parte writ and the temporary protective order are different. They are issued under the same showing of extraordinary circumstances. However, property is actually attached under the ex parte writ so that it is absolutely necessary to prevent as much as feasible the attachment of exempt property. Under the temporary protective order procedure, the court has discretion in fashioning the order so as to avoid serious hardship on the defendant, as discussed above. The basic purpose of the temporary protective order is to preserve the status quo--no property is actually attached. There is no necessity of showing that the property is not

exempt since the defendant still has the use of his necessities (and other exempt property). In the rare case where the defendant would be unnecessarily inhibited by the temporary protective order, Section 486.100 provides for modification or vacation of the order on ex parte application of the defendant (or if the court so orders, on noticed hearing).

§ 488.010(b). Levy on real property

Mr. Battin suggests that the word "standing" be changed to "recorded" in subdivision (b) of Section 488.010:

> (b) Where the property sought to be attached is real property standing in the name of a third person, whether alone or together with the defendant, the writ of attachment shall identify such third person.

We probably used the word "standing" to be consistent with Section 488.310 which provides for the manner of levy on real property:

> (b) Where, on the date of recording, the property stands in the name of a third person, either alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person.
>
> (c) Promptly after recording and in no event more than 15 days after the date of recording, the levying officer shall mail a copy of the writ and the notice to the defendant and to any third person in whose name the property stands on the date of recording. Such copies shall be mailed to the address of the defendant and any third person as shown by the records of the office of the tax assessor of the county where the property is located.

The word "standing" in Section 488.310 comes from existing law and dates back to 1872. Subdivision 1 of Section 542 begins: "Real property, standing upon the records of the county in the name of the defendant . . . ." Section 488.010 is derived from part of the first sentence of Section 542 which reads: ". . . in the case of real property . . . the name of the record owner of the real property to be attached . . . ."

The staff does not envision any problems arising from the language as enacted, but we have no strong feelings on the matter. Should "standing" be changed to "recorded" in Section 488.010? Should the word "stands" be eliminated from Section 488.310? Or should we return to the language of existing law?

§ 483.010. Actions in which attachment authorized

This problem is dealt with in Memorandum 75-5.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

First Supplement to
Memorandum 75-5

EXHIBIT I

JUDICIAL COUNCIL ADVISORY COMMITTEE
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19 December 1974

John H. DeMoully, Executive Secretary
The California Law Revision Commission
School of Law
Stanford University
Stanford, California 94305

Re: Attachment Law

Dear John:

The Attachment Subcommittee has the following suggestions and comments:

1. CCP 488.080(b) at p. 35. This section should be amended to read: "(b) The levying officer, at the time of service, shall request any person not the defendant, who retains property - - - -". As the section now reads, the phrase "any person" would be inclusive of the defendant. This section infers that the defendant could retain possession of the property sought to be attached.

2. CCP 487.020(d) at p. 32. This section is without meaning hence should be deleted.

3. CCP 489.310(a) at p. 55. The language ". . . or, if a writ of attachment is levied in another county, to a court in such county having jurisdiction in cases involving the amount specified in the writ, . . .", should be deleted. Why force the defendant to incur the expense of seeking relief in an additional forum? This would require a new proceeding, an additional appearance fee, and would be an unnecessary burden on the clerk and the court of the non-forum county. The original forum clearly has the statewide power to grant the relief expressed in 489.310(a).

4. CCP 489.230(a) at p. 53. This isolated section has no implementing clause. When is the notice of levy served? How is it served, etc.?

5. CCP 486.050(a) at p. 29. This section is clearly unconstitutional. The section should be amended to read: ". . ., the temporary protective order may prohibit any transfer by the defendant of any of his property, specified in the order, in the state subject to the levy of a writ of attachment." For example: $500.00 claim against P.G. & E., and an order pursuant to 486.050(a) against the corporation. This would paralyze the company.

6. CCP 486.060 at p. 30. This section should be amended to read: "Notwithstanding Section 486.050, the defendant may issue any number of checks as follows: (a) etc., etc. Why require the court to make an affirmative finding in the TPO re checks?

7. CCP 486.020 at p. 28. Why is there no required finding that certain property (if any) is nonexempt, as required in 485.210(c)(3)?

8. CCP 488.010(b) at p. 33. The word "standing" has no legal meaning. The standard dictionaries do not reveal a definition or use of the word that is relevant. Why not substitute the word "<u>recorded</u>"?

9. CCP 483.010 at p. 12. We remain concerned with the use of the phrase: "<u>defendant engaged in</u>". "Engaged" when the claim arose, at the time the action is filed, at the time of the hearing, etc.?

Our next forms drafting session is 17 January 1975. I would truly appreciate receiving a reply to this letter by 16 January 1975.

Cordially,

David Howard Battin,
Committee Staff Attorney

Judicial Council Advisory
Committee on Legal Forms

DHB:shm

cc: Hon. Harry L. Hupp
Messrs. Weatherford and Hill