

## Memorandum 75-17

Subject: Study 39.70 - Prejudgment Attachment (Cases in Which Attachment Authorized)

This memorandum presents several alternative drafts of Section 483.010 which provide for the cases in which attachment is authorized. Exhibit I, attached hereto, traces the development of Section 483.010 as enacted; Exhibit II contains various meanings of "trade," "business," and "profession."

1. Leave Section 483.010 as it is

Section 483.010 as enacted reads as follows:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action against a defendant engaged in a trade, business, or profession on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. Each claim shall be based upon a contract, express or implied.

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

(c) An attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

This provision has been the subject of several critical comments. It does not make clear the time at which the defendant must have been engaged in the trade, business, or profession; this is a critical factor in cases of retirees and persons who have otherwise ceased activity which is classed as a trade, business, or profession. A second difficulty is that the terms "trade, business, or profession" are subject to widely differing interpretations. (See Exhibit II.) The precise meaning of these terms is important as regards both the particular activity (e.g., is a mechanic who is an employee engaged in a trade or business?) and the degree of involvement in that activity (is occasional or one-time conduct of a trade covered? is a guarantor on a business debt covered?). A third problem is that the standard provided in subdivision (c) overlaps the "engaged in a trade, business, or profession" standard. Finally, it should again be noted that, as enacted, subdivision (a) of Section 483.010 does not in any way tie the claim to the defendant's trade, business, or profession. The alternative of leaving Section 483.010 as it is would leave these problems to the courts.

2. Amend subdivision (a) to provide when defendant must be engaged in a trade, business, or profession

The following amendment of subdivision (a) makes clear that a person engaged in a trade, business, or profession may not shield himself from attachment by retiring or ceasing his conduct of the business.

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action against a defendant engaged in a trade, business, or profession on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. Each claim shall be based upon a contract, express or implied.

when the claim arose,

This amendment does not solve the ambiguity inherent in the term "trade, business, or profession," nor does it eliminate the two-pronged standard.

3. Return to "claim arising out of conduct of trade, business, or profession" standard; delete subdivision (c)

Section 483.010 could be revised as follows:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action against a defendant engaged in a trade, business, or profession on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. Each claim shall be based upon a contract, express or implied

and shall arise out of the conduct by the defendant of a trade, business, or profession.

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

~~(c) An attachment may not be issued where the claim is based on the sale or lease of a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.~~

ALL IN STRIKE OUT

(c) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

This is how Section 483.010 appeared in the Commission's printed recommendation. At the May 1974 meeting, the Commission was persuaded to change to the present language. (See items 8-10 in Exhibit I.) It should be noted that returning to this version would not solve the ambiguity of the term "trade, business, or profession" nor would it make clear whether guarantors and one-time and occasional business persons are subject to attachment. Of course, guarantors could be specifically mentioned in Section 483.010. This alternative does eliminate the overlap between subdivisions (a) and (c) and

it avoids the necessity of specifying the time at which the defendant must be engaged in business.

4. "Hand grenade" approach

In an effort to allow attachment on all nonconsumer contract claims, Section 483.010 could be amended to list a variety of standards, any one of which may hit a given defendant. This approach assumes that the standard of existing Section 483.010(a) will be interpreted in a manner that prevents attachment in cases where we want attachment. It also assumes that subdivision (a) must specify the sorts of defendants against whom attachment may be issued because reliance solely on the standard provided in subdivision (c) would allow attachment in cases where we do not want attachment. (This assumption is contrary to the assumption supporting alternative number 5.) With this in mind, consider the following version of subdivision (a):

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action ~~against-a-defendant engaged-in-a-trade,-business,-or-profession~~ on a claim or claims for money based upon a contract, express or implied, in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees ~~--Each-claim-shall-be-based-upon-a-contract, express-or-implied--~~, against any of the following defendants:

- (1) A corporation.
- (2) A partnership.
- (3) An individual engaged in a trade, business, or profession.
- (4) A guarantor on an obligation arising out of a trade, business, or profession.
- (5) An individual, where the claim arose out of his conduct of a trade, business, or profession.

Subdivisions (b), (c), and (d) could remain as they are.

This alternative would not eliminate the overlap of standards for cases in which an attachment may issue; in fact, it would add additional overlapping standards. It would not clarify the meaning of "trade, business, or profession." However, this alternative would make clear that guarantors and retirees are

subject to attachment on business debts. Subdivision (c) would have to be retained to limit the scope of paragraph (3).

5. Repeal "engaged in trade, business, or profession" standard

In Memorandum 75-5, the staff recommended that the "engaged in a trade, business, or profession" language of subdivision (a) be simply repealed. This recommendation is based on the conclusion that the standard in subdivision (c) (used primarily for personal, family, or household purposes) provides the more important protection and that it completely obscures the standard in subdivision (a). The category of cases excluded by the standard in subdivision (c) (consumer cases) is believed to be mutually exclusive of the cases where we want to permit attachment--commonly referred to as commercial or business cases. If one is of the opinion that "engaged in a trade, business, or profession" denotes independent contractors, corporations, and partnerships, but not employees, then the repeal of the standard of subdivision (a) will be seen as expanding attachment into those cases where an employee may have a contract claim against him for property, money, services, and the like which he did not use primarily for personal, family, or household purposes. This would seem to be a rare sort of case.

However, if one is of the opinion that "engaged in a trade, business, or profession" denotes any money-making activity, including wage earning, then the repeal of this language does not expand the availability of attachment. Remember that the types of property which may be attached are still limited as provided in Section 487.010 and that individuals have the opportunity to claim the exemptions stated in Section 487.020.

Section 483.010 could be amended to read as follows:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action ~~against a defendant engaged in a trade, business, or profession~~ on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. ~~Each claim shall be based upon a contract, express or implied, and the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.~~

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.

~~(c) An attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.~~

ALL IN STRIKEOUT

(c) ~~(b)~~ An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

A less extensive revision would merely delete the language "against a defendant engaged in a trade, business, or profession" from subdivision (a). The revision set out above is thought to be preferable because it puts the very important limitation now provided in subdivision (c) in subdivision (a).

Note that "contract" is assumed to be identical to "sale or lease or a

license to use property, the furnishing of services, or the loan of money." Existing Section 537.1 uses similar language instead of "contract" but also specifies claims based on negotiable instruments.

6. Define "engaged in trade, business, or profession"

We could attempt to define "engaged in a trade, business, or profession" for the purposes of the Attachment Law. This definition could be in the first chapter or as a subdivision or sentence in Section 483.010. A definition could be used with any of the first four alternatives discussed supra. Many different wordings are possible as is obvious from the examples provided in Exhibit II; we offer the following for your consideration:

"Defendant engaged in a trade, business, or profession" includes a corporation [whether or not organized for profit], a partnership, an individual engaged in any activity for the purpose of making money, [but does not include an individual who is solely an employee].

The Comment would point out that this includes a guarantor. A guarantor on a consumer debt would presumably not be subject to attachment by virtue of Section 483.010(c)(used primarily for personal, family, or household purposes).

Respectfully submitted,

Stan G. Ulrich  
Legal Counsel

EXHIBIT I

Development of Section 483.010 (Cases in Which Attachment is Authorized)

1. At the December 1971 meeting, the Commission considered a preliminary draft of an attachment statute prepared by Professor Riesenfeld. The Minutes indicate that the Commission decided to deal with the problem of exemption of necessities as required by Randone in a direct manner:

The Commission considered at some length the problems of defining and dealing with "necessities." The staff was directed to consider the following guidelines in working with these problems. The general definitional standard for necessities should be more liberal than "essential for support" and "necessities" should not be limited to those items which are commonly required by all or nearly all persons but should include those items which are necessary for the particular defendant and his family. On the other hand, a defendant should not be able to continue to maintain an extravagant or lavish life style.

The statute should separately describe those items which must be absolutely exempted without limitation and without requiring the defendant to file a claim. These items should include a fixed amount in a bank account, [ordinary] household furnishings and wearing apparel at the principal place of residence, and earnings. . . . Certain tools, equipment, and vehicles should, if possible, also be included here. However, the staff was directed to investigate whether nonpossessory remedies could be devised to deal with these kinds of assets.

In dealing with business property, e.g., accounts receivable, inventory, equipment and other capital assets, the staff should consider treating the sole proprietorship separately from a business operated in a corporate or partnership form--and should focus on protection for the defendant-owner who "works with the tools."

2. At the January 1972 meeting, the Commission considered Memorandum 72-6 which quoted Professor Riesenfeld as follows:

As I see it, the Commission ought to choose between four options:

(1) Abolish attachment and rely solely on equitable remedies such as injunctions and perhaps in particularly risky situations the appointment of receivers;

(2) Limit attachment so that it is issuable only by a magistrate in exceptional situations, such as an absconding debtor or fraudulent concealment. . . .

(3) Reduce the scope of attachment but still leave cases where notice and hearing of the probable validity of the claim may be necessary, but revise the methods of levy;

(4) Change all methods of levy so that there are never any "use" restrictions placed on the debtor and therefore no notice and hearing may be required.



3. At the January 1972 meeting, the Commission also considered a letter from Mr. Harold Marsh, which should reflect the intent of the interim legislation.

In part, it reads as follows:

\* \* \* \* \*

Specifically, the principle upon which our suggestions are based is that commercial cases should be dealt with separately from consumer cases and that the prejudgment remedy of attachment, with a modified procedure to meet the objections in Randone to the present statute, be preserved in those cases where credit is extended to a business.

It seems apparent from a reading of the entire Randone opinion that the Court is focusing almost entirely upon the plight of a consumer who is being deprived, without a hearing, of the necessities of life upon the basis of a claim which (in the Court's eyes) is probably fraudulent. In footnote 26 the Court quotes a Congressman, who was previously quoted in the Sniadach case, to the effect that "In a vast number of cases the debt is a fraudulent one, settled on a poor ignorant person who is trapped in an easy credit nightmare, in which he is charged double for something he could not pay for even if the proper price was called for, and then hounded into giving up a pound of flesh." It is clear that the Court was preoccupied with the plight of a poverty stricken person who has bought a color TV set for five times the list price and is forced to let his family starve by the legal process employed by the seller to collect the debt.

On the other hand, the factual situation with which we are concerned involves as a typical case one business corporation selling goods on open account to another business corporation for \$10,000 or \$50,000 or \$100,000 and desiring to have some effective means of enforcing the obligation, which has never been disputed, short of waiting for a case come to trial on the trial calendar two or three years after it is filed.

We do not believe that there is any reason to assume that the California Supreme Court would take the same view of a properly restricted prejudgment attachment statute applied to the latter case as they did with respect to the former. We doubt that a statute can be devised which is both constitutional (in the view of the present members of the California Supreme Court) and provides any effective prejudgment remedy for the collection of consumer debt. Therefore, the suggestions which are made below exclude the remedy of attachment in that situation.

Based upon the foregoing general principles we have the following suggestions regarding the restriction and revision on the remedy of prejudgment attachment in California, which we believe would clearly survive the constitutional tests set down in the Randone case.

I. Restrict the remedy of attachment to an action against a business or a non-resident.

While there obviously is a problem in formulating a satisfactory definition which will distinguish "businesses" from "consumers," we believe that the following avenues of approach to that distinction are worth consideration:

A. In one respect it is very easy to distinguish debtors who are in business and that is simply to provide that the remedy of attachment is always available against a corporation or against a partnership with respect to partnership property. A business corporation or a partnership exists only to engage in business and the assets contributed to those artificial entities are a trust fund for their creditors. Any concern about depriving the defendant of the "necessities of life," with which the Randone case was so preoccupied, is obviously irrelevant in connection with a corporate or partnership debtor. We suggest that in addition to providing for the remedy of attachment against such business entities in the Code of Civil Procedure, an amendment should be made to the Corporations Code to make it a condition to the charter of every domestic corporation and of the qualification to do business in this State of every foreign corporation, and a condition of the formation of any general or limited partnership under the provisions of the Corporations Code, that the entity is subject to the rights of its creditors to attach its property in accordance with the provisions of the Code of Civil Procedure.

B. With respect to a sole proprietorship, there is obviously greater difficulty in distinguishing between a true business situation and the small artisan without employees or capital goods who is merely working for himself rather than for an employer, and who therefore should probably be treated the same as an employee (or, in other words, as a "consumer"). However, at least one approach would be to provide that those businesses referred to in Division 6 of the Uniform Commercial Code dealing with bulk sales notices, even though conducted as sole proprietorships, would be treated in the same manner as corporations and partnerships with respect to the right of attachment. These businesses include retail and wholesale merchants and certain service businesses (baker, cafe or restaurant owner, garage owner, cleaner and dyer). It might also be possible to include in the "business" category

a sole proprietorship based upon the number of its employees, even though it is not a merchant or one of the specific types of service businesses listed in Division 6 of the Uniform Commercial Code. In particular, a suggestion has been made that building contractors should be included in this category even when they are operated as sole proprietorships.

In any event, we do not believe that it is an impossible task to formulate a reasonable definition of an individual who should be treated like a corporation or partnership because he is "in business" on a substantial scale.

C. In addition to the foregoing categories, we believe that the remedy of attachment should be available with respect to non-residents and persons who are not subject to personal service of process, in order to permit a California creditor to obtain jurisdiction in this State. . . .

D. In addition to the preceding categories of debtors, an attachment should unquestionably be permitted with respect to any goods which have been made the subject of a bulk sales notice. . . .

II. Restrict the nature of the claims for which an attachment can be levied to debts consisting of liquidated claims for money based upon money loaned, goods sold and delivered, rent, or services rendered.

One of the problems with the way in which the remedy of attachment has been broadened in California has been its extension to cover claims where there is a rather large probability that the defendant has at least an arguable defense to the claim, as opposed to those claims where such a defense probably will exist in only a minute fraction of the claims asserted. For example, to permit an attachment in an action for personal injury is to permit it in a situation where there is no reason to suppose that the claimant is more likely to prevail than the defendant and where it is virtually impossible to judge the relative merits of their positions without a full scale trial.

On the other hand, we believe that the concept behind the restriction in resident cases in the past to actions on a contract "for the direct payment of money" was a sound one. In other words, the Legislature was groping for a formula which would segregate those cases where it is highly improbable that the defendant is going to have any valid defense to the claim. Unfortunately, the California courts paid no attention to this limitation in the statute and extended the remedy to cases of "implied contract" where there had been a rescission of a previous transaction, or where a plaintiff "waived the tort and sued in assumpsit," and where probably a complex legal dispute was involved in which either party was as likely to be in the right as the other.

We believe that restricting the remedy of attachment to those types of business debts mentioned above, where the debtor has agreed to pay a specified sum of money for goods or services or in repayment of a loan, would mean that in the overwhelming proportion of the cases there could be no legitimate argument as to whether the debt was or was not owed.

There would of course be a minority of cases in these categories where the defendant had a valid defense, and the procedure which we suggest below would give him every reasonable opportunity to assert that defense at the initiation of the proceeding.

\* \* \* \* \*

4. At the January 1972 meeting, the Commission made the following decision:

The provisional remedies provided should be available in an action: (a) for the recovery of money in a fixed or reasonably ascertainable amount (but not less than five hundred dollars, exclusive of interest and attorney's fees) upon a contract either express or implied where the contract is unsecured or the original security has become valueless without the act of the plaintiff; (b) for the recovery of money if the remedy is necessary for the exercise of jurisdiction; (c) for the collection of taxes or an obligation or penalty imposed by law; (d) for the recovery of public funds paid over to a person engaged in the unlawful sale of narcotics in the course of an investigation of such activities.

The Commission continued its determination to deal directly with necessities:

Under no circumstances may "necessities" be seized. Necessities may, however, be made subject to a lien. Normally, a corporation or partnership should not be entitled to an exemption for necessities. However, even where a defendant is doing business in a corporate or partnership form, he should be permitted to show that he is substantially equivalent to a self-employed sole proprietor and, hence, should be afforded an exemption for necessities. . . .

5. The basic structure of the statute as it was printed in the tentative and final recommendations appeared in August 1972. At the September meeting, the Commission approved a provision which limited attachment to contract claims "arising out of the conduct by the defendant of a trade, business, or profession." The attempt to specify exempt property was abandoned and a section like Section 487.020 was approved. The Minutes

record that the "staff was directed to continue working on a comprehensive revision of an attachment statute which provides relief only in commercial cases."

6. The questionnaire sent out in 1972 stated that commercial cases are "cases where the writ of attachment was issued in an action brought against a going business to recover payment for money loaned or for materials, goods, or services provided to the business by an unsecured creditor." A consumer case was described as an "action against an individual for goods or services furnished to him for his own use or for the use of his family (e.g., medical services, furniture, appliances)."

7. In a letter of April 11, 1974, Mr. Harold Marsh proposed that Section 487.010(c)(property of an individual subject to attachment) be amended as follows:

(c) Where the defendant is an individual engaged in a trade, business, or profession (including a partner who is individually liable for the partnership debt) all of his real property and all of his following property if it is used or held for use in the defendant's trade, business, or profession or if the property of that type then owned was reflected in any financial statement furnished to the plaintiff for the purpose of obtaining credit.

The Commission did not accept this proposed amendment to AB 2948.

8. At the May 1974 meeting, the Commission considered the following proposal of Mr. John Bessey:

The Executive Committee of the California Association of Collectors has asked me to bring to your attention several provisions of the above-referenced bill with which they have objection. I make specific reference to Section 483.010 which describes the type of actions in which an attachment is authorized. As you are aware, under the present law the nature of the claim is not limited to one that arises out of conduct by the defendant in a trade, business or profession. You have so limited the nature of the action in your proposed legislation. The problem arises in specifically defining the nature of the debt such that it falls within the criteria of your proposed Section 483.010. Often a direct loan of money is made and it is not known whether it was used in a business activity or used for personal services. In that the type of defendant is limited to one who is engaged in a business or profession and the type of property subject to attachment is severely limited within the

ambits of the Randone decision, it is our opinion that this further restriction on the nature of the action is unwarranted. We would hope you would consider seriously deleting this provision.

9. In Memorandum 74-32, the staff responded to Mr. Bessey's suggestion as follows:

We believe Mr. Bessey's letter is self-explanatory. In response to his objections, we reproduce below excerpts from pages 722-725 of our printed final recommendation. We also note that we do not believe that it will be very difficult for a plaintiff to know (or show) that a claim arises out of the conduct of a business. . . .

### **Cases in Which Attachment Is Authorized**

The situations where attachment may be authorized are limited by constitutional requirements. A dominant theme of the recent California and federal court decisions in the area of prejudgment remedies is that assets of an individual which are "necessities of life" are constitutionally entitled to special protection because of the extreme hardship to the individual which results when he is deprived of their use. In its discussion of "necessities," the court in *Randone* referred in part to such consumer goods as "television sets, refrigerators, stoves, sewing machines and furniture of all kinds." Certainly a partially effective, if indirect, way of preventing attachment of such consumer necessities is to deny the use of the remedy in actions based on obligations generally and to authorize attachment only in actions to recover debts arising out of the conduct by the defendant of a trade, business, or profession. The 1972 legislation took just such an approach; it provides for attachment where the action is for an unsecured liquidated sum of money based on money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property, or services rendered *and* is against any corporation, partnership, or individual engaged in a trade or business.

In essence, then, the 1972 act tends to restrict the availability of attachment to commercial situations by generally permitting attachment only against persons or organizations engaged in commercial activities. Unfortunately, the 1972 act does not specifically tie the types of alleged debts which may form the basis for attachment to the business activities of the defendant. Hence, for example, the 1972 act would not permit the attachment of the property of an ordinary resident wage earner in an action based on the furnishing of medical services or the sale of consumer goods to such individual. The act would, however, permit the attachment of the property of an individual doing business as a grocer or self-employed plumber

on the same type of debt.<sup>10</sup> This inconsistency should be eliminated. The Commission recommends that the policy implicit in the 1972 act be continued by authorizing nonjurisdictional attachment only in those cases where the claim is based on an unsecured contract, whether express or implied, and arises out of the conduct by the defendant of a trade, business, or profession.

\* \* \* \* \*

<sup>10</sup> There is a possibility that the 1972 statute is void insofar as it authorizes attachment in consumer—as distinguished from commercial—actions. The title to the 1972 enactment provides that it is one "relating to attachment in commercial actions." Section 9 of Article IV of the California Constitution provides in part: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void."

10. At the May 1974 meeting, the Commission decided to amend AB 2948 in response to Mr. Bessey's suggestions:

The Commission directed the staff to draft proposed amendments to Assembly Bill 2948 (prejudgment attachment) and to conform the Comments to the statute to implement the following policy: Attachment should not generally be available where the person on whose behalf the attachment is sought knew or should have known at the time he sold or leased the property, furnished the services, or loaned the money on which the claim is based that these were to be used wholly for other than a commercial or business purpose (or primarily for personal, family, or household purposes). The staff was further directed to consider whether additional amendments are needed to protect the plaintiff from liability for wrongful attachment where he reasonably believes that the claim is based on a commercial--as distinguished from a consumer--transaction.

11. At the June 1974 meeting, the Commission considered Memorandum 74-29 which dealt with the change approved at the May meeting:

At the May meeting, the Commission directed the staff to attempt to draft amendments to AB 2948 which would permit attachment generally against a business defendant but preclude attachment where the person on whose behalf the attachment is sought knew or should have known that the property or services he provided were to be used wholly for other than commercial purposes. Set out below is a revised version of Section 483.010 which indicates the changes from the present bill which could perhaps implement this directive.

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action against a defendant engaged in a trade, business, or profession on a claim or claims for money in which the total sum claimed is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees. Each claim shall be based upon a contract, express or implied, and shall arise out of the conduct by the defendant of a trade, business, or profession. The claim shall not be

(b) An attachment may not be issued if the claim is secured by any interest in real or personal property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty, any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code, and any statutory, common law, or equitable lien). However, an attachment may be issued (1) where the claim was originally so secured but, without any act of the plaintiff or the person to whom the security was given, such security has become valueless or (2) where the claim was secured by a nonconsensual possessory lien but such lien has been relinquished by the surrender of the possession of the property.



~~(b)~~ (c) An attachment may not be issued where the person who sold or leased, or gave a license to use, the property, furnished the services, or loaned the money on which the claim is based knew or should have known at that time that these were to be used [wholly for other than a commercial or business purpose] [primarily for personal, family, or household purposes].

(d) An attachment may be issued pursuant to subdivision (a) whether or not other forms of relief are demanded.

The staff is not satisfied with this proposal. We believe that "consumer" attachment should be precluded in any event regardless of the plaintiff's knowledge or lack of knowledge. We think a better alternative to subdivision (c) would be the following:

(c) An attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used [wholly for other than a commercial or business purpose] [primarily for personal, family, or household purposes].

12. At the June 1974 meeting, the Commission approved the proposed amendments to Section 483.010, including the following version of subdivision (c):

(c) An attachment may not be issued where the claim is based on the sale or lease or a license to use property, the furnishing of services, or the loan of money and the property sold or leased, or licensed for use, the services furnished, or the money loaned was used primarily for personal, family, or household purposes.

The Commission also directed the staff to "resist any further substantive changes when the bill is heard by the Senate Judiciary Committee in August."

EXHIBIT II

A. Statutory Definitions of Trade or Business and Related Terms

1. Corporations Code § 15002 (Uniform Partnership Act):

"Business" includes every trade, occupation, or profession.

2. Evidence Code Section 1270 defines "business," for purposes of the business record exception, as follows:

As used in this article, "a business" includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

3. Government Code Section 7260(d) defines "business," for purposes of relocation assistance, as follows:

(d) \* \* \* "Business" means any lawful activity, except a farm operation, conducted primarily:

(1) For the purchase, sale, lease, or rental of personal and real property, and  
\* \* \* for the manufacture, processing, or marketing of products, commodities, or any other personal property:

\* \* \* (2) For the sale of services to the public;

\* \* \* (3) By a nonprofit \* \* \* organization; or

(4) Solely for the purpose of Section 7262 for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display, whether or not such display is located on the premises on which any of the above activities are conducted.

4. Government Code Section 82005 (Proposition 9--Political Reform Act of 1974) defines "business entity," as follows:

"Business entity" means any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

5. For purposes of workmen's compensation, the Labor Code provides the following definitions:

**§ 3351. Employee**

"Employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

(a) Aliens and minors.

(b) All elected and appointed paid public officers.

(c) All officers and members of boards of directors of quasi-public or private corporations while rendering actual service for such corporations for pay; provided that, where the officers and directors of any such private corporation are the sole shareholders thereof, the corporation and such officers and directors shall come under the compensation provisions of this division only by election as provided in Section 4151(a).

## § 3352. Employee

"Employee" excludes:

(a) **Casual employment.** Any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer.

(b) **Newspaper and magazine.** Any person engaged in vending, selling, offering for sale, or delivering directly to the public, any newspaper, magazine, or periodical where the title thereto has passed to the person so engaged.

(c) **Religious charitable or relief workers.** Any person performing services in return for aid or sustenance only, received from any religious, charitable or relief organization.

(d) **Deputies for own convenience.** Any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for his own convenience, and who receives no compensation from the county or municipal corporation or from the citizens thereof for his services as such deputy. This exclusion is operative only as to employment by the county or municipal corporation and does not deprive any person so deputized from recourse against a private person employing him for injury occurring in the course of and arising out of such employment.

(e) **Convict labor.** Any convict whose labor is used by the State Highway Commission on state highways or roads.

(f) **Domestics.** Any person engaged in household domestic service except as provided in Section 3358.5. For purposes of this subdivision, household domestic service shall include, but not be limited to, the part-time care and supervision of children in a private residence.

(g) **Camp volunteers.** Any person performing voluntary services at or for a recreational camp, hut or lodge operated by a nonprofit organization, exempt from federal income tax under Section 101(6) of the Internal Revenue Code, of which he or a member of his family is a member and who receives no compensation for such services other than meals, lodging or transportation.

(h) **Part-time gardeners.** Any person engaged as a part-time gardener in connection with a private dwelling; provided, the number of hours devoted to such work for any individual does not regularly exceed 44 hours per month. This exclusion is operative only as to his employment by the owner or occupant of such a private dwelling, and does not deprive any such part-time gardener from recourse under this division against any other person employing him for injuries occurring in the course of and arising out of the employment.

(i) **Ski patrolmen.** Any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities.

(j) **Participants in sports or athletics.** Any person, other than a regular employee, participating in sports or athletics who receives no compensation for such participation other than the use of athletic equipment, uniforms, transportation, travel, meals, lodgings or other expenses incidental thereto. [Other provisions contain additional exclusions.]

**§ 3353. Independent contractor**

"Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.

**§ 3354. Casual**

"Casual" refers only to employments where the work contemplated is to be completed in not exceeding 10 working days, without regard to the number of men employed, and where the total labor cost of such work is less than one hundred dollars (\$100); such amount not to include charges other than for personal services.

**§ 3355. Course of trade, business, profession or occupation of his employer**

"Course of trade, business, profession or occupation of his employer" includes all services tending toward the preservation, maintenance, or operation of the business, business premises, or business property of the employer.

**§ 3356. Trade, business, profession, or occupation of his employer**

"Trade, business, profession, or occupation of his employer" includes any undertaking actually engaged in by the employer with some degree of regularity, irrespective of the trade name, articles of incorporation, or principal business of the employer.

6. Labor Code Section 6303(b) defines "employment" for purposes of the occupational safety and health act as follows:

(b) "Employment" includes the carrying on of any trade, enterprise, project, industry, business, occupation or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire except household domestic service.

7. Revenue and Taxation Code Section 6013 defines "business" for purposes of the Sales and Use Taxes Law as follows:

"Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

8. Revenue and Taxation Code Section 17020 defines "trade or business" for purposes of the Personal Income Tax Law as follows:

"Trade or business" includes the performance of the functions of public office.

9. Revenue and Taxation Code Section 25120(a) defines "business income" for purposes of the Uniform Division of Income for Tax Purposes Act as follows:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

10. Unemployment Insurance Code Section 621 defines "employee" as follows:

**§ 621. Definition**

"Employee" means all of the following:

(a) Any officer of a corporation.

(b) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

(c) (1) Any individual, other than an individual who is an employee under subdivision (a) or (b), who performs services for remuneration for an employing unit if the contract of service contemplates that substantially all of such services are to be performed personally by such individual either:

(A) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or drycleaning services, for his principal.

(B) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) An individual shall not be included in the term "employee" under the provisions of this subdivision if such individual has a substantial investment in facilities used in connection with the performance of such services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for whom the services are performed.

(d) Any individual who is an employee pursuant to Section 601.5 or 680. T

12. Internal Revenue Code Section 126(a) provides as follows:

(a) There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

This provision of course applies to individual employees, e.g., for traveling expenses and professional education.

B. Case Law Definitions of Trade or Business

1. Long v. City of Anaheim, 255 Cal. App.2d 191, 63 Cal. Rptr. 56 (1967), summarizes several definitions of "business" as follows:

The term "business" as used in a law imposing a license tax on businesses, trades, professions and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood. . . . In statutes relating to license taxes, the word "business" means that which occupies the time, attention, and labor of men for purposes of livelihood or for profit. . . . Business in its broad sense embraces everything about which one can be employed; the word is often synonymous with calling, occupation, or trade engaged in for the purpose of obtaining a livelihood or profit or gain. . . . An occupation or employment will not be excluded from the classification of business merely because it actually results in loss instead of profit; but it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word.

2. In the process of construing a will, the court in Estate of Friedrichs, 107 Cal. App. 142, 290 P. 54 (1930), said:

Business is not a technical word and has no definite, popular or legal meaning. If dictionaries are searched the definitions are found to be vague and shifting, such as "employment," "work," "buying and selling," and among other definitions "a commercial or industrial enterprise." . . . Courts may properly give a wider significance to a particular word than is given by dictionary definition.

3. City of Los Angeles v. Rancho Homes Inc., 40 Cal.2d 764, 256 P.2d 305 (1953), concerning the interpretation of a license tax ordinance, contains the following:

"Trade" has been defined as "equivalent to occupation, employment or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade." . . . "The word 'occupation' . . . is an extremely broad term sufficient to include any business, trade, profession, pursuit, vocation, or calling." . . .

4. In In re Sozzi, 54 Cal. App.2d 304, 129 P.2d 40 (1942), interpreting an ordinance of a sanitary district, the court determined that "gathering garbage" is not a trade, business, or occupation "in any proper sense."