

39.70

4/1/75

First Supplement to Memorandum 75-27

Subject: Study 39.70 - Prejudgment Attachment (Prelevy Third-Party Claims Procedure)

Attached to this supplementary memorandum are two drafts of a prelevy third-party claims procedure, discussed briefly below. At the March meeting, one suggested approach was to conform the prelevy third-party claims procedure to the postlevy third-party claims procedure provided by Sections 689 and 689b. The staff has rejected this approach because without important modifications the postlevy procedure would not make sense before the status quo has been altered by levy on the disputed property. In attachment the plaintiff has already given an undertaking upon which the third person can recover for a wrongful attachment; hence, the procedure for the third person's demand for an undertaking in Section 689 would be redundant. The time limits provided in the postlevy claims procedure would either delay the issuance of the writ or the part of it applicable to the property claimed by the third person. In the postlevy procedure, the claims and undertakings are filed with the levying officer; this would make no sense prior to levy of a writ of attachment. Finally, the Commission will presumably make some changes in the postlevy third-party claims procedure when this subject is considered in the course of the enforcement of judgments study; it would be premature to incorporate existing law at this time.

Before considering the specific proposals, it should be noted that two separate but related problems are involved: the third person's right to notice and an opportunity for a hearing before his property in the hands of the defendant is levied upon and the determination of ownership for purposes of allocating liability for the wrongful attachment of such property.

Exhibit I - Single hearing procedure; Defendant Claims Exemption and Gives Notice

The lengthy series of amendments and additions in Exhibit I would provide a prelevy third-party claims procedure which seeks to dispose of third-party claims at the hearing on the issuance of the writ, if possible. This alternative attempts to continue the policy of holding only one hearing where possible and the policy of delaying the issuance of the writ as little as possible. This alternative puts a burden on the defendant who wishes to avoid liability for the attachment of a third person's property in his possession to notify the third person of the intended attachment and file a claim of exemption for the property. A third person who receives notice in time must file a claim of exemption before the hearing or request a continuance in order to preserve his right to wrongful attachment damages, except that, if he does nothing, the plaintiff will still be liable for an attachment in violation of the description of property in the writ. If the third person has received notice and does not intervene, he is precluded from using the postlevy third-party claims procedure. Only a third person who has not received proper notice may use the postlevy procedure provided by Section 488.090 which incorporates Section 689.

Exhibit I also extends to third persons the right to give an undertaking to release property as provided in Section 489.310.

Exhibit II - Separate Hearing Procedure; Defendant Gives Notice

Exhibit II presents a separate prelevy third-party claims procedure which provides generally for a later hearing on the claim. The defendant is not required to file a claim of exemption for the third person's property in his possession but must give the third person timely notice in order to avoid liability for wrongful attachment. The third person must file his claim before the hearing to preserve the liability of the plaintiff or the defendant for a

wrongful attachment. The third person may not ignore the notice and make a postlevy claim. Upon filing the claim, the writ may not permit the attachment of the claimed property; a writ is issued for any other property which is not exempt. A temporary protective order may be issued prohibiting the transfer by the defendant or the third person of the claimed property. The property is deemed exempt from attachment unless 15 days after the third-party claim is filed, the plaintiff petitions for a hearing. The hearing is held within 20 days from the petition on 10 days' notice to the third person and the defendant. If the property is determined to be the third person's, the writ may not issue.

In addition to the provisions set out in Exhibit II, the right to give an undertaking to release property as provided in Section 489.310 should be extended to third persons and notice and wrongful attachment provisions need to be amended to conform with this procedure.

Respectfully submitted,

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Legal Counsel

EXHIBIT I

SECTION 1. Section 484.050 of the Code of Civil Procedure is amended
to read:

484.050. The notice of application and hearing shall inform the defendant of all of the following:

(a) A hearing will be held at a place and at a time, to be specified in the notice, on plaintiff's application for a right to attach order and a writ of attachment.

(b) The order will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decisions at the hearing on the application for the order.

(c) If the right to attach order is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment. However, the order will not be limited to the property described in the application but may later be extended to any nonexempt property of the defendant.

(d) If the defendant desires to oppose the issuance of the order, he shall file with the court a notice of opposition and supporting affidavit as required by Section 484.060 not later than five days prior to the date set for hearing.

(e) If the defendant claims that the property described in the application, or a portion thereof, is exempt from attachment, he shall include such claim in the notice of opposition filed pursuant to Section 484.060 or file a separate claim of exemption with respect to the property as provided in Section 484.070. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(f) The defendant may obtain a determination at the hearing whether property not described in the application is exempt from attachment, but the failure to claim that property not so described is exempt from attachment will not preclude him from making a claim of exemption with respect to such property at a later time.

(g) If the plaintiff's application describes property of a person, other than the defendant, in the defendant's possession, the defendant shall file and serve on the plaintiff a claim of exemption for such property as provided by Section 484.070 not later than five days prior to the date set for the hearing and file and serve a notice of intended attachment on such other person as provided by Section 484.075 not later than 10 days prior to the date set for the hearing. If the defendant does not file and serve a claim of exemption for such property and file and serve on such other person a notice of intended attachment, the defendant may be liable to such other person for wrongful attachment damages as provided by Section 490.025 should such property be attached.

- (h) ~~(g)~~ Either the defendant or his attorney or both of them may be present at the hearing.
- (i) ~~(h)~~ The notice shall contain the following statement:
"You may seek the advice of an attorney as to any matter connected with the plaintiff's application. Such attorney should be consulted promptly so that he may assist you before the time set for hearing."

Comment. Section 484.050, as amended by the addition of a new subdivision (g), provides that the notice to the defendant of the plaintiff's application shall inform the defendant that, if he wishes to avoid liability for the damages occasioned by the attachment of property of a third person in his possession which is described in the plaintiff's application, he must file and serve on the plaintiff a claim of exemption for such property and serve notice on the third person that the plaintiff proposes to attach the third person's property. See Sections 484.070, 484.075, 490.025. See also Sections 484.340, 484.350, 484.355 (similar requirements under additional writs procedure). Under Section 487.010, such property is not subject to attachment and is therefore exempt as provided by subdivision (d) of Section 487.020. However, it should be noted that, even if the defendant fails to file and serve as required by Sections 484.070 and 484.075, he will not be liable where the third person intervenes in the action pursuant to Section 484.077.

SEC. 2. Section 484.070 of the Code of Civil Procedure is amended to read:

484.070. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

Where property of a person, other than the defendant, in the defendant's possession is described in the plaintiff's application, the defendant shall claim an exemption for such property as provided in this section.

(b) If the defendant desires to claim at the hearing that property not described in the plaintiff's application is exempt from attachment, in whole or in part, the defendant shall claim such exemption as provided in this section. Such a claim may not be made for property in the defendant's possession on the ground that it is property of a person other than the defendant. Failure to make such claim does not preclude the

defendant from later claiming the exemption. If the claim is made as provided in this section but the defendant fails to prove that the property is exempt from attachment, he may not later claim that the property, or a portion thereof, is exempt unless he shows that the right to the exemption is the result of a change in circumstances occurring after the hearing.

(c) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

If property is claimed to be exempt because it is property of a person other than the defendant in the defendant's possession, the claim of exemption shall so state without specifying a statute section.

(3) If property is claimed to be exempt because it is property of a person, other than the defendant, in the defendant's possession, the claim of exemption shall state the name of such other person and an address where he can be served.

(d) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues raised.

(e) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five days before the date set for the hearing.

(f) If the plaintiff desires to oppose the claim of exemption made pursuant to this section, he shall file and serve on the defendant and on any other person for whose property the defendant claims an exemption, not

less than two days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the plaintiff does not file and serve a notice of opposition as provided in this subdivision, no writ of attachment shall be issued as to the property claimed to be exempt. If all of the property described in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition as provided in this subdivision, no hearing shall be held and no right to attach order or writ of attachment shall be issued.

(g) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant or any other person who intervenes pursuant to Section 484.077 has the burden of proving that the property is exempt from attachment.

Comment. The amendments of Section 484.070 implement in part a prelevy third-party claims procedure. See Sections 484.050, 484.075, 484.077, 484.080, and 484.100. See also Sections 484.340, 484.350, 484.355, 484.357, 484.360 (additional writs). Subdivision (a) is amended to make clear that the defendant is required to claim an exemption for property of a third person in his possession which is described in the plaintiff's application for a writ of attachment. At the time exemptions must be claimed (at least five days prior to the hearing), the defendant is in the best position to claim an exemption for such property. Although a third person whose property in the defendant's possession is proposed to be attached may intervene before the hearing pursuant to Section 484.077, frequently this fact will not be known before the time for the defendant to claim exemptions has passed.

The amendment of subdivision (b) prevents the defendant from claiming an exemption for property of a third person in his possession where such property is not described in the plaintiff's application for a writ. The prelevy third-party claims procedure may be used only where the plaintiff has indicated his intent to attach property of a third person which is in the defendant's possession by describing it in the application for the writ.

The amendment of paragraph (2) of subdivision (c) makes clear that the defendant claiming an exemption for property of a third person which is in his possession need not cite statutory authority. Of course, the defendant still must accompany the claim with an affidavit containing sufficient factual information and points and authorities as required by subdivision (d). Paragraph (3) is added so that the plaintiff will know where to serve the notice of opposition provided by subdivision (f).

The amendment of subdivision (f) requires the plaintiff to serve the notice of opposition to the claim of exemption on any third person whose property the defendant has claimed as exempt. This requirement insures that the third person will know before the hearing whether the plaintiff still intends to attach the property which the defendant claims is property of the third person. In many cases, the plaintiff will fail to oppose the claim or will not oppose the claim as to such property with the result that the property will not be attached. It should also be noted that the plaintiff is not required to file and serve a notice of opposition to a claim of exemption made by a third person who intervenes pursuant to Section 484.077. This would be impossible in many cases because the plaintiff would not be given notice of the intervention and the claim of exemption by the third person until two days before the hearing is scheduled at which time it would be too late to comply with the two-day notice requirement of subdivision (f).

The amendment of subdivision (g) makes clear that the third person who intervenes pursuant to Section 484.077 shares the burden of proving the exemption.

SEC. 3. Section 484.075 is added to the Code of Civil Procedure, to read:

484.075. (a) If the plaintiff's application for a writ of attachment describes property of a person, other than the defendant, in the defendant's possession, the defendant shall file and serve upon such other person not later than 10 days prior to the date set for the hearing a notice of intended attachment. The notice of intended attachment shall inform such other person of all of the following:

(1) The plaintiff's application for a writ of attachment in his action against the defendant describes property of the person upon whom notice is served which is in the defendant's possession.

(2) The defendant is required to file a claim of exemption for such property pursuant to Section 484.070 not less than five days prior to the date set for the hearing on the plaintiff's application.

(3) The claim of exemption will be considered at the hearing on the plaintiff's application which will be held at a place and at a time to be specified in the notice.

(4) The person upon whom notice is served may intervene in the action for the purpose of claiming an exemption for property described in the plaintiff's application or supporting the claim of exemption as provided by Section 484.077 or may request a continuance as provided by subdivision (c) of Section 484.080.

(5) If the person upon whom notice is served receives notice no later than 10 days prior to the hearing on the plaintiff's application or intervenes in the action pursuant to Section 484.077, such person may not make a postlevy third-party claim pursuant to Section 488.090.

(6) If the defendant files and serves a notice of intended attachment as provided by this section and files and serves on the plaintiff a claim of exemption as provided by Section 484.070, the defendant is not liable to the person upon whom notice is served for a wrongful attachment if the property is attached. If the plaintiff in good faith and in reliance on the description in the writ of attachment of property to be levied upon causes such property to be attached, the plaintiff is not liable to such other person for the attachment of such property.

(b) The plaintiff may file and serve the notice provided by subdivision (a).

Comment. Section 484.075 provides the basic requirements for the "notice of intended attachment." See Section 482.030 (Judicial Council to prescribe forms). Subdivision (a) requires the defendant to file and serve on a third person whose property is in his possession a notice of intended attachment. See Section 484.050(g). Subdivision (b) permits the plaintiff to file and serve on a third person the notice of intended attachment whether or not the defendant has filed and served the notice. This provision may in some cases facilitate an early resolution of third-party claims.

SEC. 4. Section 484.077 is added to the Code of Civil Procedure, to read:

484.077. (a) Regardless of whether he has received the notice provided by Section 484.075, a person, other than the defendant, whose property in the defendant's possession is sought to be attached, may inter-

vene in the action for the purpose of claiming an exemption for such property or supporting the defendant's claim of exemption for such property made pursuant to Section 484.070.

(b) The claim of exemption shall be executed under oath and shall:

(1) Describe the property claimed to be exempt.

(2) State that the property is exempt because it is the property of a person other than the defendant.

(3) Describe the character of such person's title to the property and the manner in which the title was acquired.

(c) The claim of exemption shall be accompanied by an affidavit supporting any additional factual issues raised by the claim and points and authorities supporting any legal issues raised.

(d) Except as provided by subdivision (e), the claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff and the defendant not less than two days prior to the date set for the hearing.

(e) If a continuance has been granted pursuant to subdivision (c) of Section 484.080, the claim of exemption shall be filed and served on the plaintiff and the defendant not less than five days prior to the date set for the continued hearing.

Comment. Section 484.077 permits the third person whose property is in the defendant's possession and is sought to be attached by the plaintiff to intervene in the action to prevent the issuance of an attachment against such property. The third person intervenes either (1) by filing and serving on the plaintiff and the defendant a claim of exemption regarding such property and any supporting papers as provided in subdivisions (b), (c), and (d) not later than two days before the date set for the hearing or (2) by obtaining a continuance pursuant to subdivision (c) of Section 484.080 and filing and serving the claim of exemption as provided in subdivisions (b), (c), and (e) not later than five days before the

date of the continued hearing. Where the defendant has claimed an exemption for such property as provided by Section 484.070, the intervening third person unites with the defendant in the claim of exemption. Where the defendant has failed to claim an exemption, the third person may still intervene in order to prevent the attachment of his property in the defendant's possession.

SEC. 5. Section 484.080 of the Code of Civil Procedure is amended to read:

484.080. (a) At the time set for the hearing provided in this article or Article 2 (commencing with Section 484.310), the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with Section 484.040 or 484.330,

the court may either deny the application for the order or, for good cause shown, grant the plaintiff a continuance for a reasonable period. If such a continuance is granted, the effective period of any protective order issued pursuant to Chapter 6 (commencing with Section 486.010) may be extended by the court for a period ending not more than 10 days after the new hearing date if the plaintiff shows a continuing need for such protective order.

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(b) The court may, in its discretion and for good cause shown, grant the defendant a continuance for a reasonable period to enable him to oppose the issuance of the right to attach order. If such a continuance is granted, the court shall extend the effective period of any protective order issued pursuant to Chapter 6 (commencing with Section 486.010) for a period ending not more than 10 days after the new hearing date unless the defendant shows pursuant to Section 486.100 that the protective order should be modified or vacated.

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(c) The court may, in its discretion and for good cause shown, grant a person, other than the defendant, whose property is in the defendant's possession, a continuance for a reasonable period to enable such person to claim an exemption for such property. The court may, in its discretion, grant the continuance only for the purpose of determining such person's claim and issue the writ of attachment for other property

as provided by Section 484.090 or 484.370. If at the continued hearing the court finds the property not to be the property of such other person, the court shall issue an additional writ describing such property. If such a continuance is granted, the court shall extend the effective period of any temporary protective order issued pursuant to Chapter 6 (commencing with Section 486.010) as to property which is not claimed by such person for a period ending not more than 10 days after the date of the continued hearing unless the defendant shows pursuant to Section 486.100 that the temporary protective order should be modified or vacated. The court may also make an order staying the transfer or other disposition of the property claimed by such person until the claim can be determined.

Comment. The amendment of subdivision (a) makes the provisions of this section applicable to hearings on additional writs under Article 2 (commencing with Section 484.310).

Subdivision (c), added to Section 484.080, permits an intervening third person whose property in the defendant's possession is sought to be attached to seek a continuance. A continuance would be appropriate where, for example, the 10 days' notice of the plaintiff's application for an attachment provided by Section 484.075 or 484.355 does not allow sufficient time to prepare a claim of exemption or where the defendant does not give the third person any notice.

SEC. 6. Section 484.090 of the Code of Civil Procedure is amended to read:

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 or any other person 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 state the amount to be secured by the attachment and describe the property to be levied upon.

(c) If the court determines that property of the defendant sought to be attached 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 at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities.

Comment. The amendments of subdivisions (b) and (c) of Section 484.090 reflect the addition of a prelevy third-party claims procedure. See Sections 484.070, 484.077, and 484.080.

SEC. 7. Section 484.100 of the Code of Civil Procedure is amended to read:

484.100. (a) The court's determinations under this chapter shall have no effect on the determination of any issues in the action other than issues relevant to proceedings under this chapter nor shall they affect the rights of the defendant in any other action arising out of the same claim. The court's determinations under this chapter shall not be given in evidence nor referred to at the trial of any such action.

(b) Where a person, other than the defendant, whose property is in the defendant's possession, does not receive notice of intended attachment pursuant to Section 484.075 or 484.355 at least 10 days prior to the hearing on the plaintiff's application for a writ of attachment and does not intervene in the action pursuant to Section 484.077 or 484.357 before levy on such property, the court's determinations under this chapter shall not affect such other person's right to make a third-party claim after levy as provided by Section 488.090.

Comment. Subdivision (b) is added to Section 484.100 to make clear that, where a third person whose property is in the defendant's possession has not had an opportunity to obtain a hearing on the issuance of an attachment against such property, his right to make a postlevy third-party claim is not impaired.

SEC. 8. Section 484.340 of the Code of Civil Procedure is amended to read:

484.340. The notice of application and hearing shall inform the defendant of all of the following:

(a) The plaintiff has applied for a writ of attachment to attach the property described in the application.

(b) A hearing will be held at a place and at a time, to be specified in the notice, to determine whether the plaintiff is entitled to the writ.

(c) A writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment.

(d) If the defendant claims that the property described in the application, or a portion thereof, is exempt from attachment, he shall file with the court a claim of exemption with respect to the property as provided in Section 484.350 not later than five days prior to the date set for hearing. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(e) If the plaintiff's application describes property of a person, other than the defendant, in the defendant's possession, the defendant shall file and serve on the plaintiff a claim of exemption for such property as provided by Section 484.350 not later than five days prior to the date set for the hearing and file and serve a notice of intended attachment on such other person as provided by Section 484.355 not later than 10 days prior to the date set for the hearing. If the defendant does not file and serve a claim of exemption for such property and file and serve on such other person a notice of intended attachment, the defendant may be liable to such other person for wrongful attachment damages as provided by Section 490.025 should such property be attached.

(f) ~~(e)~~ Either the defendant or his attorney or both of them may be present at the hearing.

(g) ~~(f)~~ The notice shall contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. Such attorney should be consulted promptly so that he may assist you before the time set for hearing."

Comment. The amendment of Section 488.340 is analogous to the amendment of Section 484.050.

SEC. 9. Section 484.350 of the Code of Civil Procedure is amended to read:

484.350. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

Where property of a person, other than the defendant, in the defendant's possession, is described in the plaintiff's application, the defendant shall claim an exemption for such property as provided in this section.

(b) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

If property is claimed to be exempt because it is property of a person other than the defendant in the defendant's possession, the claim of exemption shall so state without specifying a statute section.

(3) If property is claimed to be exempt because it is property of a person, other than the defendant, in the defendant's possession, the claim of exemption shall state the name of such other person and an address where he can be served.

(c) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues raised.

(d) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five days before the date set for the hearing.

Comment. The amendments of Section 484.350 are analogous to the amendments of subdivisions (a) and (c) of Section 484.070.

SEC. 10. Section 484.355 is added to the Code of Civil Procedure, to read:

484.355. (a) If the plaintiff's application for a writ of attachment describes property of a person, other than the defendant, in the defendant's possession, the defendant shall file and serve upon such other person not later than 10 days prior to the date set for the hearing a notice of intended

attachment. The notice of intended attachment shall inform such other person of all of the following:

(1) The plaintiff's application for a writ of attachment in his action against the defendant describes property of the person upon whom notice is served which is in the defendant's possession.

(2) The defendant is required to file a claim of exemption for such property pursuant to Section 484.350 not less than five days prior to the date set for the hearing on the plaintiff's application.

(3) The claim of exemption will be considered at the hearing on the plaintiff's application which will be held at a place and at a time to be specified in the notice.

(4) The person upon whom notice is served may intervene in the action for the purpose of claiming an exemption for property described in the plaintiff's application or supporting the claim of exemption as provided by Section 484.357 and may request a continuance as provided by subdivision (c) of Section 484.080.

(5) If the person upon whom notice is served receives notice not later than 10 days prior to the hearing on the plaintiff's application or intervenes in the action pursuant to Section 484.357, such person may not make a postlevy third-party claim pursuant to Section 488.090.

(6) If the defendant files and serves a notice of intended attachment as provided by this section and files and serves upon the plaintiff a claim of exemption as provided by Section 484.350, the defendant is not liable to the person upon whom notice is served for a wrongful attachment if the property is attached. If the plaintiff in good faith and in reliance on the description in the writ of attachment of property to be levied upon causes such property to be attached, the plaintiff is not liable to such other person for the attachment of such property.

(b) The plaintiff may file and serve the notice provided by subdivision (a).

Comment. Section 484.355 is comparable to Section 484.075.

SEC. 11. Section 484.357 is added to the Code of Civil Procedure, to read:

484.357. (a) Regardless of whether he has received the notice provided by Section 484.355, a person, other than the defendant, whose property in the defendant's possession is sought to be attached may intervene in the action for the purpose of claiming an exemption for such property or supporting the defendant's claim of exemption for such property made pursuant to Section 484.350.

(b) The claim of exemption shall be executed under oath and shall:

(1) Describe the property claimed to be exempt.

(2) State that the property is exempt because it is the property of a person other than the defendant.

(3) Describe the character of such person's title to the property and the manner in which title was acquired.

(c) The claim of exemption shall be accompanied by an affidavit supporting any additional factual issues raised by the claim and points and authorities supporting any legal issues raised.

(d) Except as provided by subdivision (e), the claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff and the defendant not less than two days before the date set for the hearing.

(e) If a continuance has been granted pursuant to subdivision (c) of Section 484.080, the claim of exemption shall be filed and served on the

plaintiff and the defendant not less than five days before the date set for the continued hearing.

Comment. Section 484.357 is comparable to Section 484.077.

SEC. 12. Section 484.360 of the Code of Civil Procedure is amended to read:

484.360. (a) If the defendant files and serves a claim of exemption and the plaintiff desires to oppose the claim, he shall file and serve on the defendant and on any other person for whose property the defendant claims an exemption pursuant to Section 484.350 , not less than two

days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised.

(b) If the defendant files and serves a claim of exemption and supporting affidavit as provided in Section 484.350 and the plaintiff does not file and serve a notice of opposition as provided in this section, no writ of attachment shall be issued as to the property claimed to be exempt. If all of the property described in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition as provided in this section, no hearing shall be held and no writ of attachment shall be issued.

(c) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant or any other person who intervenes pursuant to Section 484.357 has the burden of proving that the property is exempt from attachment.

Comment. The amendments of Section 484.360 are analogous to the amendments of subdivisions (f) and (g) of Section 484.070.

SEC. 13. Section 484.370 of the Code of Civil Procedure is amended to read:

484.370. The hearing shall be conducted in the manner prescribed in Section 484.090 and the court shall issue a writ of attachment, which shall state the amount to be secured by the attachment and describe the property to be levied upon, if it finds all of the following:

(a) A right to attach order has been issued in the action pursuant to Article 1 (commencing with Section 484.010) or the court has found pursuant to Section 485.240 that the plaintiff is entitled to a right to attach order.

P (b) The defendant or any other person has failed to prove that the property sought to be attached, or the portion thereof described in the writ, is exempt from attachment.

(c) The plaintiff has provided the undertaking required by Article 2 (commencing with Section 489.210) of Chapter 9.

Comment. The amendment of Section 484.370 is analogous to the amendment of subdivision (b) of Section 484.090.

SEC. 14. Section 486.100 of the Code of Civil Procedure is amended to read:

486.100. Upon ex parte application of the defendant or of a person, other than the defendant, who has intervened pursuant to Section 484.077 or 484.357

or, if the court so orders, after a noticed hearing, the court may modify or vacate the temporary protective order if it determines that such action would be in the interest of justice and equity to the parties or any other

person, taking into account the effect on the defendant of the continuance of the original order, the effect on the plaintiff of modifying or vacating the order, and any other factors.

Comment. Section 486.100 is amended to reflect the enactment of a prelevy third-party claims procedure. See, e.g., Section 484.070.

SEC. 15. Section 488.090 of the Code of Civil Procedure is amended to read:

488.090. A Except where prohibited by subdivision (b) of Section 484.100, a third person shall claim an interest in

personal property attached in the manner provided for third-party claims after levy under execution.

Comment. Section 488.090 is amended to make clear that, where the third person has received 10 days' notice pursuant to Section 484.075 or 484.355 or has intervened pursuant to Section 484.077 or 484.357, he may not utilize the postlevy third-party claims procedure.

SEC. 16. Section 489.310 of the Code of Civil Procedure is amended to read:

489.310. ~~(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, 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, for an order permitting him to substitute an undertaking in lieu of any property which has been or is subject to being attached.~~

All in
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(a) Whenever a writ is issued, a defendant who has appeared in the action or a person, other than the defendant, who has intervened in the action, may apply on noticed motion to the court in which the action is pending for an order permitting the substitution of an undertaking for

any of his property in the state which has been or is subject to being attached. Where a writ is issued to a county other than the county where the action is pending, a defendant who has appeared in the action or a person, other than the defendant, who has intervened in the action, may apply on noticed motion to a court in such county having jurisdiction in cases involving the amount specified in the writ issued to such county for an order permitting the substitution of an undertaking for any of his property in that county which has been or is subject to being attached.

(b) The application shall include a statement, executed under oath, describing the character of the ~~defendant's~~ applicant's title to the property and the manner in which he acquired such title.

(c) Before making such order, the court shall require the ~~defendant~~ applicant to file with the court in which the application is made an undertaking to pay the plaintiff the value of the property released not exceeding the amount of any judgment recovered by the plaintiff in the action against ~~such~~ the defendant. The amount of the undertaking filed pursuant to this section shall be equal to the lesser of (1) the value of the property attached or prevented from being attached or (2) the amount specified by the writ to be secured by the attachment. The court shall issue such order upon being satisfied that a sufficient undertaking has been filed.

(d) Where an action is against more than one defendant, any defendant may make such application. The filing of an undertaking by such defendant shall not subject him to any demand against any other defendant; however, the levying officer shall not be prevented thereby from attaching, or be obliged to release from attachment, any property of any other defendant. Where two or more defendants or other persons have an interest in the same property, a joint application and undertaking shall be filed to secure the release of such property.

Comment. Section 484.310 is amended to permit a third person who has intervened in the action to use the release procedure. See Sections 484.077 and 484.357. Subdivision (a) of Section 489.310 is also amended to make clear that, where a writ is issued to a county other than the county where the action is pending, the defendant or other person may apply to either the court where the action is pending or the court in the other county for an order allowing him to substitute an undertaking for property which has been or is subject to being attached. The order of the court in

the other county may allow the release only of the property in that county whereas the order of the court where the action is pending may release property throughout the state. The amendment also provides that the applicant applies on noticed motion rather than "upon reasonable notice to the plaintiff."

SEC. 17. Section 489.320 of the Code of Civil Procedure is amended to read:

489.320. (a) ~~Upon reasonable notice to the plaintiff, a~~ A defendant who has been served with a temporary protective order and who has appeared in the action or a person, other than the defendant, whose property is sought to be affected by the temporary protective order and who has intervened in the action may apply on noticed motion to the court in which the action is pending for an order terminating the temporary protective order.

(b) Before making an order terminating the temporary protective order, the court shall require the ~~defendant~~ applicant to file an undertaking to pay the plaintiff the amount of any judgment recovered by the plaintiff in the the action against ~~such~~ defendant. The amount of the undertaking filed pursuant to this section shall be equal to the amount of the plaintiff's claim. The court shall issue the order terminating the temporary protective order upon being satisfied that a sufficient undertaking has been filed.

(c) Where an action is against more than one defendant, any defendant may make such application. The filing of an undertaking by such defendant shall not subject him to any demand against any other defendant; however, the levying officer shall not be prevented thereby from attaching, or be obliged to release from attachment, any property of any other defendant. Where two or more defendants or other persons have an interest in the same property, a joint application and undertaking shall be filed to secure the release of such property.

Comment. Section 489.320 is amended to permit a third person whose property is described in the temporary protective order and who has intervened pursuant to Section 484.077 or 484.357 to apply for an order terminating the temporary protective order. Subdivision (a) is also amended to provide that the application is on noticed motion rather than "upon reasonable notice to the plaintiff."

SEC. 18. Section 490.020 of the Code of Civil Procedure is amended to read:

490.020. (a) The Except as provided in Section 490.025, 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.

(2) All costs and expenses, including attorney's fees, reasonably expended in defeating the attachment.

(b) The liability of a plaintiff for wrongful attachment pursuant to Section 490.010 is limited by the amount of the undertaking.

Comment. Section 490.020 is amended to reflect the exception to the plaintiff's liability for wrongful attachment provided by Section 490.025.

SEC. 19. Section 490.025 is added to the Code of Civil Procedure, to read:

490.025. (a) If the plaintiff in good faith and in reliance on the description in the writ of attachment of property to be levied upon causes a writ of attachment obtained pursuant to Article 1 (commencing with Section 484.010) or Article 2 (commencing with Section 484.310) of Chapter 4 to be levied upon the property of a person other than the defendant in the defendant's possession, the defendant and not the plaintiff or the plaintiff's sureties is liable for a wrongful attachment described in subdivision (d) of Section 490.010.

(b) Notwithstanding subdivision (a), if the defendant files and serves upon such other person the notice provided by Section 484.075 or 484.355 not less than 10 days prior to the hearing on the issuance of the writ and files and serves on the plaintiff a claim of exemption for such property as provided by Section 484.070 or 484.350 not less than five days prior to the hearing on the issuance of the writ or if such other person

has intervened pursuant to Section 484.077 or 484.357, the defendant is not liable to such other person for a wrongful attachment.

(c) The liability of a defendant pursuant to this section includes both of the following:

(1) All damages proximately caused to the person other than the defendant by the wrongful attachment.

(2) All costs and expenses, including attorney's fees, reasonably expended by the person other than the defendant in defeating the attachment.

(d) The liability of a defendant for wrongful attachment pursuant to this section may not exceed two thousand five hundred dollars (\$2,500) in an action in the municipal court and seven thousand five hundred dollars (\$7,500) in an action in the superior court.

Comment. Subdivision (a) of Section 490.025 makes the defendant liable for wrongful attachment of property in his possession belonging to a third person where the plaintiff in good faith causes a writ of attachment issued after a noticed hearing to be levied upon the third person's property. Section 490.025 recognizes that a plaintiff should not be liable in such situations where he has relied in good faith on the defendant's opportunity to claim exemptions and the court's determination of property which may be attached. If the defendant wishes to avoid the liability provided by this section, subdivision (b) makes clear that the defendant must give notice to the third person and claim an exemption for property of the third person in his possession. See Sections 484.070, 484.075, 484.350, and 484.355. See also Sections 484.050 and 484.340. In addition, the defendant is not liable, regardless of whether he has properly given notice or filed a claim of exemption, if the third person intervenes in the action before levy. See Sections 484.077 and 484.357.

Subdivision (c) provides that the defendant is liable for the same types of damages as is the plaintiff pursuant to Section 490.020. Subdivision (d) limits the defendant's liability to an amount equivalent to the amount of the plaintiff's initial undertaking as provided in Section 489.220.

SEC. 20. Section 490.050 of the Code of Civil Procedure is amended to read:

490.050. A (a) Except as provided by subdivision (b), a person not originally a party to an action,

whose property is attached is entitled to intervene in the action and 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.

(b) A person seeking to recover damages for wrongful attachment against a defendant liable pursuant to Section 490.025 is entitled to intervene in the action for that purpose.

Comment. Section 490.050 is amended to provide for the intervention of a third person whose property is attached and to whom the defendant is liable under Section 490.025 for the purpose of seeking damages.

EXHIBIT II

SEC. . Article 4 (commencing with Section 484.710) is added to Chapter 4 of Title 6.5 of Part 2 of the Code of Civil Procedure, to read:

Article 4. Prelevy Third-Party Claims

§ 484.710. Prelevy third-party claims

484.710. The provisions of this article apply only to third-party claims made prior to levy of a writ of attachment on property of a third person in the defendant's possession.

Comment. Article 4 provides a prelevy third-party claims procedure. See Section 488.090 (postlevy third-party claims).

§ 484.720. Service of notice of intended attachment

484.720. Where the plaintiff's application for a writ of attachment made pursuant to Article 1 (commencing with Section 484.010) or Article 2 (commencing with Section 484.310) of this chapter describes property of a third person [in the defendant's possession], the defendant shall serve on the third person the notice of intended attachment provided by Section 484.730 not less than 10 days prior to the date set for the hearing on the issuance of the writ and file and serve on the plaintiff a copy of such notice not less than five days prior to the date set for the hearing on the issuance of the writ.

§ 484.730. Contents of notice of intended attachment

484.730. The notice of intended attachment shall inform the third person of all of the following:

(a) The plaintiff's application for a writ of attachment in his action against the defendant describes property of the third person in the defendant's possession.

(b) A hearing will be held at a place and at a time, to be specified in the notice, on the plaintiff's application for a writ of attachment.

(c) Unless the third person files in the court where the action is pending and serves on the plaintiff a prelevy third-party claim as provided by Section 484.740 not less than two days prior to the date set for the hearing on the issuance of a writ of attachment, a writ of attachment permitting the attachment of such property may be issued.

(d) If the third person has received the notice of intended attachment not less than 10 days prior to the date set for the hearing on the issuance of the writ of attachment and fails to make a prelevy third-party claim for such property, the third person is precluded from making a postlevy third-party claim as provided by Section 488.090, and neither the plaintiff nor the defendant is liable to the third person for the attachment of such property.

101-190

§ 484.740. Contents of prelevy third-party claim

484.740. (a) Whether or not he has received a notice of intended attachment, a third person whose property in the defendant's possession is described in the plaintiff's application for a writ of attachment, made pursuant to Article 1 (commencing with Section 484.010) or Article 2 (commencing with Section 484.310) of this chapter, may prevent the issuance of a writ of attachment permitting the attachment of such property by filing in the court where the action is pending and serving on the plaintiff a prelevy third-party claim.

(b) The third-party claim shall be executed under oath and shall:

(1) Describe the property claimed by the third person.

(2) Describe the character of the third person's title to the property and the manner in which title was acquired.

(c) The third-party claim shall be accompanied by an affidavit supporting any additional factual issues raised by the claim and points and authorities supporting any legal issues raised.

(d) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff [and the defendant] not less than two days prior to the date set for the hearing on the issuance of the writ.

§ 484.750. Effect of filing third-party claim

484.750. (a) If a third-party claim has been filed and served as provided by Section 484.740, a writ of attachment permitting the attachment of the property claimed by the third person may not be issued pursuant to Article 1 (commencing with Section 484.010) or Article 2 (commencing with Section 484.310) of this chapter unless, at the hearing provided by Section 484.780, the third-party claim regarding such property is denied.

(b) Notwithstanding subdivision (a), the court shall issue a writ of attachment as provided in Section 484.090 or 484.370 which permits the attachment of property for which a third-party claim has not been filed.

404-204

§ 484.760. Temporary protective order

484.760. (a) At any time after the plaintiff is served with the third-party claim, the plaintiff may apply pursuant to this section for a temporary protective order directed to the third person and the defendant by filing an application for the order with the court in which the action is pending.

(b) The application shall state what relief is requested and shall be supported by an affidavit which may be based on information and belief showing that the plaintiff would suffer great or irreparable injury if the temporary protective order were not issued.

(c) The temporary protective order shall be issued if the court makes the findings required by Section 486.020.

(d) The temporary protective 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 the third person, the defendant, and the plaintiff under the circumstances of the particular case, and shall be subject to the limitations provided by Sections 486.050 and 486.060.

(e) The temporary protective order shall be promptly served on the third person and the defendant.

(f) The temporary protective order shall expire at the earliest of the following times:

(1) Forty days after the issuance of the order or, if an earlier date is prescribed by the court in the order, on such earlier date.

(2) The date the court makes an order for the release of attachment pursuant to Section 489.310.

(3) Fifteen days after the third-party claim is filed unless the plaintiff files a petition for a hearing on the third-party claim and serves the third person as provided in Section 484.770.

(4) The date a writ of attachment is levied upon the property by the plaintiff.

(g) Upon ex parte application of the third person or the defendant or, if the court so orders, after a noticed hearing, the court may modify or vacate the temporary protective order if it determines that such action would be in the interest of justice and equity to the parties, taking into account the effect on the third person of the continuance of the original order, the effect on the plaintiff of modifying or vacating the order, and any other factors.

(h) The service upon the third person and the defendant of a temporary protective order pursuant to this section creates a lien upon any property, or the proceeds thereof, which is described in the order. The lien is not valid as against a bona fide purchaser or encumbrancer for present value or a transferee in the ordinary course of business. The lien terminates upon the date of expiration of the temporary protective order except with respect to property upon which a writ of attachment issued upon application of the plaintiff has been levied during that period. The levy of a writ of attachment perfects the lien created by the service of the temporary protective order.

404-205

§ 484.770. Petition for hearing

484.770. (a) If the plaintiff desires to oppose the third-party claim, he shall file a petition for a hearing on the third-party claim not less than 15 days after the third-party claim is filed.

(b) The petition for a hearing on the third-party claim shall describe the property claimed by the third person for which a hearing is desired and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised.

(c) If the plaintiff files a petition describing only a portion of the property for which a third-party claim has been filed, the portion of the property which is not described may not be attached in the action.

(d) If the plaintiff does not file a petition as provided by subdivision (a), the property described in the third-party claim may not be attached in the action.

§ 484.780. Hearing

484.780. (a) The hearing on the third-party claim shall be held within 20 days after the filing of the petition for a hearing. The plaintiff shall serve on the third person and the defendant a notice of the hearing and a copy of the petition for the hearing and of the affidavit and points and authorities not less than 10 days prior to the date set for the hearing.

(b) At the hearing for the purpose of determining title, the third person shall have the burden of proof.

(c) The court's determinations shall be made upon the basis of the third-party claim and the plaintiff's petition; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities.

(d) At the conclusion of the hearing, the court shall give judgment determining the title to the property. If any property is determined to be property of the third person, it may not be attached in the action.