

Memorandum 72-16

Subject: Study 39.70 - Attachment, Garnishment, Execution (Prejudgment Attachment Procedure)

It is the purpose of the memorandum to outline--to give you a bird's eye view--of the various aspects of prejudgment attachment that will need to be dealt with in a comprehensive statute. Only the most significant problems involved are mentioned. The headings set out below are only a tentative outline of the way in which a prejudgment attachment chapter might be organized. The chapter would not necessarily be organized in this way, but the outline is useful in indicating the content of the statute. We plan to prepare separate memoranda dealing with the various aspects of attachment identified below. In these memoranda, we will discuss each aspect in detail.

CHAPTER 4. ATTACHMENT

ARTICLE 1. DEFINITIONS

Most of the definitions were considered at the February meeting. We do not believe that they present any difficult policy problems.

ARTICLE 2. GENERAL PROVISIONS

We will determine the content of this article, if one is needed, after we have developed the provisions of other articles. We might want to provide the procedure for applying for a writ of attachment, service, notice, and the like in this article and include references to other articles for details on such matters as determination of the probable validity of the claim.

ARTICLE 3. ACTIONS IN WHICH ATTACHMENT AUTHORIZED

This article will specify the actions in which attachment is authorized. The Commission discussed this matter at the February meeting, and there seemed to be considerable agreement on the substance of this article. The problem of jurisdictional attachment was deferred for consideration

later, and we refer to that problem separately below. In this article or elsewhere, we will need to provide the procedure for determination whether the action is actually one in which attachment is authorized.

ARTICLE 4. DETERMINATION OF PROBABLE VALIDITY OF CLAIM

In this article, we will develop the procedure for the determination of the probable validity of the claim. We will need to indicate the proof of the plaintiff and of the defendant on this issue and the standard which the court is to apply. This article presents, we believe, one of the two most difficult issues in drafting the statute. We plan to prepare a memorandum for the March meeting that details the problems involved.

ARTICLE 5. PROPERTY SUBJECT TO ATTACHMENT

In this article, we will specify the property subject to attachment probably by specifying what property is exempt. We will need to provide the procedure for determining whether specific property is subject to attachment (ex parte hearing, claim for exemption after levy, or some other alternative--must a judicial officer determine that the property sought to be levied on is not exempt before the levy?). Also, this article presents the difficult problem of defining what constitutes "necessities" that must be exempt from attachment. The alternative ways of presenting the issue (depending on the needs of the creditor) will need to be developed (listing property in notice of hearing on probable validity or permitting a separate determination at a subsequent point in the proceeding).

ARTICLE 6. PLAINTIFF'S PROTECTIVE ORDERS

In this article, we will need to provide for the circumstances in which an ex parte temporary restraining order may be obtained, the restrictions that such an order may impose on the defendant's conduct (whether a general or specific standard), the duration of the order, modification of the order, and procedure in connection with obtaining such an order. Moreover, we will need to consider the nature of the order, if any, that may continue after the hearing on probable validity, such order being in lieu of attachment. The means to enforce the order need to be considered, such as whether it should be a crime to violate such an order.

ARTICLE 7. EX PARTE ATTACHMENT IN EXTRAORDINARY CIRCUMSTANCES

The circumstances that constitute "extraordinary circumstances" will need to be identified. Will these be different from the circumstances that will justify a protective order under Article 6? The procedure for obtaining an ex parte writ of attachment, including the type of proof required to obtain the attachment, will need to be developed.

Whether the type of levy permitted under an ex parte writ should be different from that permitted under the ordinary writ will need to be considered.

ARTICLE 8. UNDERTAKING BY PLAINTIFF

This article presents a number of problems. How is the amount of the undertaking to be determined? Should a procedure be provided whereby the initial amount can be increased upon proper showing by defendant? Should a corporate surety be required?

ARTICLE 9. LEVY UNDER WRIT OF ATTACHMENT

We believe that this article presents the other most difficult problem area in drafting the statute. The development of levy procedures that do not involve seizure (and sale) of the property is desirable, especially where these procedures provide adequate protection to the plaintiff. The levy procedure for particular types of property needs to be improved. We will prepare a memorandum for the March meeting on this aspect of the problem.

ARTICLE 10. EXAMINATIONS CONCERNING THIRD PARTY INDEBTEDNESS TO DEFENDANT

Examinations by plaintiff of persons indebted to defendant or possessing or controlling property or credits of defendant, or persons (including the defendant) having knowledge thereof, will be covered in this article.

ARTICLE 11. RELEASE OR DISCHARGE OF ORDER OR WRIT

This article will prescribe the circumstances under which an order or writ is to be released or discharged, the procedure for obtaining a release or discharge, and the manner of releasing the property. The nature of the bond required of a defendant will need to be considered.

ARTICLE 12. LIABILITY FOR WRONGFUL ATTACHMENT

What constitutes a wrongful attachment will need to be specified, the persons liable for a wrongful attachment determined, and the extent of their liability specified. We plan to prepare a memorandum for the March meeting on this aspect of the statute.

CHAPTER 4.5. ATTACHMENT TO OBTAIN JURISDICTION

We do not know whether this should be a separate chapter. Two separate problems are presented: Whether attachment should be permitted to obtain quasi-in-rem jurisdiction. Whether attachment should be permitted

as a means of obtaining jurisdiction to maintain an action on a foreign judgment against the defendant who is not otherwise subject to the jurisdiction of the California courts.

The provisions of the various articles listed above might be tied together with provisions like those set out below. These provisions, which could be included in the General Provisions article, are merely possibilities and are not suggested for approval or discussion at this time.

§ 539.050. Order authorizing issuance of writ

539.050. The plaintiff is entitled to an order authorizing the issuance of a writ of attachment if both of the following are shown:

(a) The court has determined, in the manner specified in Article 3, that the action is one in which a writ of attachment is authorized.

(b) The court has determined, in the manner specified in Article 4, that the plaintiff's claim is probably valid.

§ 539.060. Showing required to obtain issuance of writ

539.060. The plaintiff is entitled to a writ of attachment with respect to specified property if all of the following are shown:

(a) An order authorizing a writ of attachment in the action has been made pursuant to Section 539.050.

(b) The property specified in the writ is subject to attachment under Article 5.

(c) The plaintiff has provided the undertaking required by Article 8.

§ 539.070. Hearing by judicial officer required

539.070. The determinations referred to in Sections 539.050 and 539.060 may be made at the same hearing or may be made at different hearings. The hearings shall be held by a judicial officer.

§ 539.210. Levy

539.210. When a writ of attachment has been issued, the levying officer shall levy on the property specified in the writ in the manner prescribed in Article 9.

Attached as Exhibit I is a flow chart that shows the interrelationship of the various aspects of prejudgment attachment. We do not present this for approval. We will prepare a chart like this when the Commission has made sufficient policy decisions to permit us to develop a tentative scheme. The chart is only one possible scheme.

Hopefully, this memorandum will give you a general overview of the content and problems involved in drafting a comprehensive prejudgment attachment statute. With this general overview in mind, it should be possible to work on drafting the provisions of individual articles. Later, when the significant provisions have been tentatively approved, the staff will attempt to put the material together in a well-organized statute and to fill in the gaps and make the entire statute consistent. This seems to be the most efficient way to proceed with this study.

Respectfully submitted,

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