

Memorandum 72-35

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

Attached to this memorandum (Exhibit I--pink) are the draft provisions dealing with the procedural aspects of the issuance of (1) an order authorizing the issuance of a writ of attachment and (2) the writ itself. (This memorandum supersedes Memorandum 72-25. We will not consider that memorandum and it may be discarded.) At the May meeting, we plan to review all these provisions. However, only Article 5 is entirely new. The other provisions have for the most part been considered earlier and have been revised in accordance with previous Commission decisions. We hope therefore to be able to review these provisions with some dispatch. Article 5 we will consider in some detail.

Attached materials generally. Article 1 contains general provisions. Section 537.010 defines certain terms used. We have defined "levying officer" as indicated. However, Code of Civil Procedure Section 17(10) also provides that the term "sheriff" includes constables and marshals. Does the Commission wish to use the term "sheriff" alone in this chapter? We have retained the term "judicial officer." The term "magistrate" if used here in the manner indicated would conflict with the term "magistrate" as used in Penal Code Sections 807 and 808. Section 537.020 (new) prescribes the form and general requirements of the affidavits referred to in subsequent articles. Section 537.030 (new) makes nonappealable the determinations made pursuant to subsequent articles. This section implements a decision made in March. However, you may wish to compare existing law under Sections 904.1, 904.2, and 904.3. These sections state that there may be an appeal from (1) an order

discharging or refusing to discharge an attachment, (2) an order granting or refusing to grant an injunction, and (3) an order appointing a receiver.

Article 2 (consisting of a single section, Section 538.010) states the types of actions in which an attachment may be issued. Article 4 prescribes the procedure for the issuance of the order (authorizing the issuance of a writ) following a noticed hearing on the probable validity of the plaintiff's claim. This is the procedure which should be used in most situations. Article 4 was reviewed at the March meeting, and the revisions suggested then have been incorporated into this draft. Article 5 prescribes the procedure for the issuance of the order (authorizing the issuance of a writ) upon the plaintiff's ex parte application. This article is new, and we plan to discuss it in detail at the May meeting (see below). Article 6 prescribes the procedure for the issuance of the writ itself upon the plaintiff's ex parte application. Article 6 was also reviewed at the March meeting, and the revisions suggested then have been incorporated into this draft. Article 7 prescribes the procedure for the issuance of the writ after a noticed hearing as to whether the property sought to be levied upon is subject to attachment. Time did not permit extended consideration of this article at the March meeting. We have made some conforming changes in this article but, for the most part, it is the same in substance as before. We hope to also review this article in some detail at the May meeting.

Article 5. This article prescribes the procedure for the ex parte application for an order authorizing the issuance of a writ of attachment. It should be noted that this procedure is a substitute only for the noticed hearing on the probable validity of the plaintiff's claim. In order to get the writ of attachment, the plaintiff must also comply with Article 6 which deals

with the ex parte issuance of the writ itself. It is these provisions which require him to show that the property he seeks to attach is subject to attachment.

To obtain the order authorizing the issuance of a writ, Article 5 requires the plaintiff simply to file an ex parte application (Sections 541.010 and 541.020), supported by affidavit (Section 541.030). A judicial officer is required to review the application and affidavit(s) (Section 541.050) and --if he finds on the basis of this review that the proper grounds exist, that it seems more probable than not that the plaintiff will recover judgment, and that the attachment has no improper purpose (Section 541.050)--then he is required to issue an order authorizing the issuance of a writ of attachment upon application therefor (Section 541.060).

This initial procedure is simple; the heart of this first portion lies in Section 541.040 which restricts the use of the ex parte procedure to circumstances where the plaintiff shows "that great or irreparable injury would result to . . . [him] if the matter were heard on notice." This general requirement is given more content in subdivision (b) of Section 541.040. The substance of paragraphs (2) and (3) of subdivision (b) is taken from Mr. Marsh's early draft.

After the writ has been levied, the defendant should have an opportunity to show that the plaintiff was not entitled to its issuance. (The defendant should also, of course, be able to present a claim of exemption, but we have incorporated the Section 690.50 procedure for this purpose. See subdivision (c) of Section 541.080. Compare Section 542.010(b).) We have required the plaintiff to give notice to the defendant of this right. (Sections 541.070 and 541.080.) The defendant may then apply to the court for an order quashing

the writ and setting aside the original order. See Section 541.090. The application is made on noticed motion. No special time limits are set so that at least 10 days' notice must be given unless the defendant obtains an order shortening time. (See Section 1005.) Would you prefer to provide time limits specifically? The defendant must file affidavits in support of his motion, and the judicial officer at the hearing could perhaps be required to make his factual determinations on the basis of these affidavits and the other documents on file alone. See Section 541.100. Alternatively, it would be possible to permit the court to receive additional evidence at the hearing or to continue the matter for the production of further evidence, and this option is included in brackets in Section 541.100. However, if this is permitted, we think fairness would demand that the plaintiff be entitled to continuances and, in such event, what relief could the defendant obtain in the meantime? It is our feeling that, if the matter is heard only on the documentary evidence, the plaintiff should be ready to carry the burden of proof at this point or lose his attachment, i.e., he should not be able to get a continuance. The defendant may have no need for a continuance as such because we assume that he would be permitted to renew his motion on the basis of new evidence. We suspect, however, that some provision may be required for the taking of oral testimony at the hearing. (See Memorandum 72-31 and the Richardson case regarding the need for an oral hearing.) If so, we should then give the plaintiff time to contest new matter raised at the hearing and give the court discretion to grant some temporary relief.

At the conclusion of the hearing, the court will either grant or deny the motion. If the motion is granted, the court will make an order quashing the writ and so on. See Section 541.110. Should we also provide here or at

some other point that, where the motion is granted, the defendant on a proper showing may be awarded damages? including attorney's fees? and punitive damages?

One further problem should be noted. The value of this procedure to the plaintiff often lies in the immediate seizure of property that would otherwise be lost to him. However, our general method of levy procedure may not provide for seizure. See, for example, Section 547.090(?) (equipment levied upon by filing and notice). We may be required to provide exceptions either here or under that article for certain types of assets if exceptions are needed. We have postponed dealing with this problem until decisions have been made dealing with the method of levy generally.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

EXHIBIT I

Sec. . Chapter 4 (commencing with Section 537.010) is added to Title 7 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 4. ATTACHMENT

Article 1. General Provisions

§ 537.010. Definitions

537.010. As used in this chapter:

- (a) "Complaint" means a complaint or cross-complaint.
- (b) "Levying officer" means the sheriff, constable, or marshal to whom a writ or order issued under this chapter is directed.
- (c) "Judicial officer" means any judge or any commissioner or other officer appointed by the trial court to perform the duties required by this chapter.
- (d) "Person" includes an individual, a corporation, a partnership or other unincorporated association, and a public entity.
- (e) "Plaintiff" means a person who files a complaint or cross-complaint.

§ 537.020. Affidavits; general requirements

537.020. The facts stated in each affidavit filed pursuant to this chapter shall be set forth with particularity. Each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated therein. The affiant may be a party to the action or any other person having knowledge of the facts.

Comment. Section 537.020 provides standards for affidavits filed pursuant to this chapter. These standards are comparable to but not as restrictive as those provided for affidavits filed in support of or in opposition to a motion for summary judgment. Compare Section 437c.

§ 537.030. Appeal

537.030. No appeal shall be permitted to be taken from any order made under any of the provisions of this chapter.

§ 537.040. Judicial Council authorized to prescribe practice and procedure;
forms

537.040. The Judicial Council may provide by rule, not inconsistent with this chapter, for practices and procedures in proceedings under this chapter. The Judicial Council shall prescribe the form of the applications, notices, orders, and other documents required by this chapter. Such forms shall require the information prescribed by this chapter and such additional information as the Judicial Council requires.

Article 2. Actions in Which Attachment Authorized

§ 538.010. Actions in which attachment is authorized

538.010. (a) A writ of attachment may be issued only in the following cases:

(1) In an action for the recovery of money in a fixed or reasonably ascertainable amount, but not less than one thousand dollars (\$1000) exclusive of interest and attorney's fees, upon a contract, express or implied, including an action pursuant to Section 1692 of the Civil Code, where the contract is not secured by a security interest upon real or personal property or, if originally so secured, such security interest has been lost or the collateral become valueless without act of the plaintiff.

(2) In an action by, or on behalf of, a spouse, relative, or kindred to enforce the liability of the other spouse, or other relative or kindred, for the support, maintenance or care of such plaintiff.

(3) In an action by the State of California, or any other public entity, for the collection of taxes due the state or such public entity or for the collection of any moneys due upon any obligation or penalty imposed by law.

(4) In an action by the State of California, or any other public entity, for the recovery of funds pursuant to Section 11680.5 of the Health and Safety Code, including funds on the defendant's person at the time of his arrest which are retained in official custody.

(b) An action shall be deemed an action for the recovery of money if the relief demanded includes the payment of money even though other forms of relief are demanded.

Article 3.

Sections 539.010 et seq. are unassigned at this time.

Article 4. Order Authorizing Issuance of Writ of

Attachment After Noticed Hearing

§ 540.010. Application for order

540.010. Upon the filing of the complaint or at any time thereafter, the plaintiff may apply for an order authorizing the issuance of a writ of attachment pursuant to this article by filing an application for such order with the court in which the action is brought.

§ 540.020. Contents of application

540.020. The application required by Section 540.010 shall be executed under oath and shall include all of the following:

(a) A statement showing that one or more of the grounds specified in Section 538.010 exist for issuance of a writ of attachment.

(b) A statement that the applicant has no information or belief that the indebtedness for the recovery of which an attachment is sought has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of an action for its recovery has been stayed in a proceeding under the National Bankruptcy Act.

(c) A statement that an attachment is not sought for a purpose other than the recovery of the indebtedness [claim] for which the action is brought.

§ 540.030. Affidavits in support of application

540.030. The application required by Section 540.010 shall be supported by affidavit or affidavits which satisfy the requirements of Section 537.020 and which together provide evidence sufficient to entitle the plaintiff to a judgment in the action.

§ 540.040. Notice to defendant

540.040. No order shall be granted under this article unless service of process has been completed and the plaintiff has served on the defendant at least 10 days prior to the hearing:

- (a) A Notice of Application and Hearing.
- (b) A copy of the application and of the affidavits in support of the application.

§ 540.050. Contents of Notice of Application and Hearing

540.050. The "Notice of Application and Hearing" shall inform the defendant of all of the following:

(a) The plaintiff has applied for an order authorizing the issuance of a writ of attachment and, if such order is granted, any nonexempt property of the defendant may be subject to attachment.

(b) A hearing will be held by the judicial officer at a place and at a time, to be specified in the notice, to determine whether the plaintiff is entitled to the order, and the order will be granted if the officer finds that the plaintiff's claim is probably valid and the other requirements for granting the order are established.

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

(d) If the defendant desires at this time to claim that all, or a portion of, his property is exempt from attachment, he must file with the court and serve on the plaintiff, not later than the date set for the hearing, a claim of exemption and supporting affidavits which satisfy the requirements of subdivisions (b) and (c) of Section 543.050. Failure to make such a claim at this time will not preclude the defendant from making a claim of exemption either after the plaintiff has identified the property he seeks to attach pursuant to Article 7 (commencing with Section 543.010) or after the property has been attached pursuant to Article 6 (commencing with Section 542.010).

(e) If the defendant desires to controvert factual matter or raise an affirmative defense in opposition to the granting of the order, he must file a notice of opposition and supporting affidavits as required by Section 540.060.

§ 540.050

(f) The hearing is not held for the purpose of determining whether the plaintiff's claim is actually valid. The determination of that matter at the trial of the action brought by the plaintiff will not be affected by the decision of the judicial officer at the hearing on the application for the order.

§ 540.060. Notice of opposition by defendant; defendant's affidavits

540.060. (a) If the defendant desires to controvert factual matters or raise an affirmative defense in opposition to the granting of the order, he shall file a notice of opposition to issuance of the order. Subject to subdivision (b) of Section 540.070, the notice shall be filed not later than the time the matter is set for hearing. The notice shall state the ground or grounds on which the defendant opposes the granting of the order. The notice shall be accompanied by affidavit or affidavits which satisfy the requirements of Section 537.020 and which together provide evidence sufficient to defeat the plaintiff's right to the order.

(b) No notice or affidavit shall be required if the defendant desires to oppose the granting of the order on the ground that the plaintiff's application and materials in support thereof are insufficient on their face to entitle the plaintiff to the order sought.

§ 540.070. Readiness for hearing; continuances

540.070. (a) At the time set for the hearing, the plaintiff shall be ready to proceed. If the plaintiff is not ready, or if he has failed to comply with Section 540.040, the judicial officer shall deny the application for the order.

(b) The defendant is entitled as a matter of course to one continuance for a reasonable period if he desires it to enable him to meet the application for the order.

(c) If the defendant has filed and served on the plaintiff at least two days prior to the hearing, the notice and affidavits referred to in subdivision (e) of Section 540.050, or the claim and affidavits referred to in subdivision (d) of Section 540.050, the plaintiff shall not be entitled to any continuance on account of the defendant's opposition to the granting of the order or the defendant's claim of execution. If the defendant has not filed and served the documents referred to at least two days prior to the hearing, the court may, in its discretion, grant a continuance to the plaintiff to enable him to meet such opposition or claim.

§ 540.080. Hearing

540.080. At the hearing, the judicial officer shall examine the application and affidavits in support of the application, the notice and affidavits, if any, filed in opposition to the issuance of the order and the claim and affidavits, if any, filed in support of a claim of exemption. If he finds there is a triable issue of fact as to whether the plaintiff is entitled to the order or as to whether certain property should be exempt, he shall hear and determine such issue. Such determination shall be made on the basis of the application, the notice of opposition, the claim, the affidavits, and any additional evidence produced at the hearing. If he finds that it would be inequitable to determine the issue on the basis of such evidence, the judicial officer shall continue the hearing for the production of additional evidence, oral or documentary, or the filing of other affidavits or counteraffidavits. In such case, the judicial officer shall hear and determine the issue at the earliest possible time, allowing sufficient time to the parties for such discovery proceedings, if any, as he deems necessary.

Comment. Cf. Code Civ. Proc. § 690.050.

§ 540.090. Issuance of order

540.090. (a) Except as provided in subdivision (b), the judicial officer shall grant an order authorizing the issuance of a writ of attachment if he finds all of the following:

(1) One or more of the grounds specified in Section 538.010 exist for the issuance of a writ of attachment.

(2) It is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim upon which the action is brought.

(3) The attachment is not sought for a purpose other than the recovery of the indebtedness for which the action is brought.

(b) If the defendant has shown that all, or a portion of, his property is exempt from attachment, the order authorizing the issuance of a writ of attachment shall be denied or limited accordingly.

§ 540.100. Effect of order

540.100. An order authorizing the issuance of a writ of attachment permits the issuance of the writ if the requirements of Article 6 (commencing with Section 542.010) or Article 7 (commencing with Section 543.010) are satisfied.

§ 540.110. Effect of determinations of judicial officer

540.110. The determinations of the judicial officer under this article shall have no effect on the determination of any issues in the action brought by the plaintiff against the defendant. The determinations of the judicial officer under this article shall not be given in evidence nor referred to in the trial of the action.

Comment. Section 540.110 makes clear that the determinations of the judicial officer under this article have no effect on the determination of the validity of the plaintiff's claim in the action he has brought against the defendant. The section does not, however, make inadmissible any affidavits filed under this article. The admissibility of such affidavits is determined by the rules of evidence otherwise applicable.

§ 540.120. Defendant's rights at trial of action not affected

540.120. Neither the failure of the defendant to oppose the granting of an order under this article nor the defendant's failure to rebut any evidence produced by the plaintiff in proceedings under this article shall constitute a waiver of any defense to the action or have any effect on the right of the defendant to produce or exclude evidence at the trial of the action.

Article 5. Order Authorizing Issuance of Writ of Attachment
(in Exceptional Circumstances) on Ex Parte Application

§ 541.010. Application for order

541.010. Upon the filing of the complaint or at any time thereafter, the plaintiff may apply for an order authorizing the issuance of a writ of attachment pursuant to this article by filing an application for such order with the court in which the action is brought.

§ 541.020. Contents of application

541.020. The application required by Section 541.010 shall be executed under oath and shall include all of the following:

(a) A statement showing that one or more of the grounds specified in Section 538.010 exist for issuance of a writ of attachment.

(b) A statement that the applicant has no information or belief that the indebtedness for the recovery of which an attachment is sought has been discharged in a proceeding under the National Bankruptcy Act or that the prosecution of an action for its recovery has been stayed in a proceeding under the National Bankruptcy Act.

(c) A statement that an attachment is not sought for a purpose other than the recovery of the indebtedness [claim] for which the action is brought.

(d) A statement showing that the requirement of Section 541.040 has been satisfied.

§ 541.030. Affidavits in support of application

541.030. The application required by Section 541.010 shall be supported by affidavit or affidavits which satisfy the requirements of Section 537.020 and which together provide evidence (a) sufficient to entitle the plaintiff to a judgment in the action and (b) which show that the plaintiff would suffer great or irreparable injury (as defined in Section 541.040) if the matter were heard on notice.

§ 541.040. Prerequisite of great or irreparable injury

541.040. (a) No order authorizing the issuance of a writ of attachment shall be made pursuant to this article unless it shall appear [beyond a reasonable doubt] from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the plaintiff if the matter were heard on notice.

(b) The requirement of subdivision (a) shall be satisfied if the plaintiff makes:

(1) A showing of an immediate danger that property otherwise subject to attachment would be lost, removed from the state, or substantially impaired in value if the matter were heard on notice.

(2) A showing that a bulk sales notice has been recorded and published by the defendant pursuant to the provisions of Division 6 (commencing with Section 6101) of the Commercial Code; provided, however, that the order authorizing a writ of attachment to be issued on such a showing shall be limited to the goods covered by the bulk sales notice.

(3) A showing that an escrow has been opened pursuant to the provisions of Section 24074 of the Business and Professions Code with respect to the sale by the defendant of a liquor license; provided, however, that the order authorizing a writ of attachment to be issued on such a showing shall be limited to the proceeds of the sale in escrow.

§ 541.050. Review of application; issuance of order

541.050. (a) The judicial officer shall examine the application and affidavits of the plaintiff and shall grant the plaintiff an order authorizing the issuance of a writ of attachment if he finds all of the following:

(1) One or more of the grounds specified in Section 538.010 exist for the issuance of a writ of attachment.

(2) It is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim upon which the action is brought.

(3) The attachment is not sought for a purpose other than the recovery of the indebtedness for which the action is brought.

(4) The plaintiff would suffer great or irreparable injury (as defined in Section 541.040) if the matter were heard on notice.

[(b) If the judicial officer finds that the application and affidavits do not satisfy the requirements of Section 541.040, he shall so state and denial on this ground shall not preclude the plaintiff from making application pursuant to Article 4 (commencing with Section 540.010).]

§ 541.060. Effect of order

541.060. An order authorizing the issuance of a writ of attachment permits the issuance of the writ if the requirements of Article 6 (commencing with Section 542.010) are satisfied.

Comment. Section 541.060 makes clear that the order obtained upon an ex parte application under this article (authorizing the issuance of a writ of attachment) permits the plaintiff also to obtain the writ itself upon an ex parte application. Presumably, the plaintiff will apply for both the order and the writ at the same time, and the provisions of this article and Article 6 could be combined in one article except that the Article 6 procedure can also be used in conjunction with a noticed hearing.

§ 541.070. Notice to defendant

541.070. Any order issued pursuant to this article shall [expire] [shall be set aside] and writ of attachment issued pursuant thereto shall be quashed and property levied upon released if, not later than [] days after the issuance of such order, the plaintiff has not filed with the court issuing the order proof of service upon the defendant of the following documents:

- (a) A copy of the application and any affidavits in support thereof filed pursuant to this article;
- (b) A copy of the order granted pursuant to Section 541.050; and
- (c) A "Notice of Issuance of Order."

§ 541.080. Contents of Notice of Issuance of Order

541.080. The "Notice of Issuance of Order" shall inform the defendant of all of the following:

(a) The court upon the plaintiff's ex parte application has granted an order authorizing the issuance of a writ of attachment.

(b) The defendant may apply to the court on motion and upon reasonable notice to the plaintiff for an order setting aside the order authorizing the issuance of a writ, quashing the writ, and releasing any property levied upon thereunder. Such application must satisfy the requirements of Section 541.090.

(c) If the defendant desires to make a claim that all, or a portion of, his property is exempt from attachment, he shall follow the procedure set forth in Section [690.50]. Such claim may be heard together with the motion to set aside the order granting the issuance of the writ.

(d) The plaintiff's address within this state for the purpose of permitting service by mail upon him of the application and supporting affidavits referred to in Section 541.090.

§ 541.090. Defendant's application for order to quash

541.090. (a) Any defendant whose property has been attached pursuant to a writ issued pursuant to an order granted under this article may apply for an order quashing the writ and releasing any property levied thereunder and setting aside the order authorizing the issuance of such writ.

(b) Such application shall be made by filing with the court and serving on the plaintiff a notice of motion. The notice shall state the ground or grounds on which the motion is based. The notice shall be accompanied by affidavit or affidavits which satisfy the requirements of Section 537.020 and which together provide evidence sufficient to defeat the plaintiff's right to an order authorizing the issuance of a writ.

§ 541.100. Hearing on defendant's motion to quash

541.100. At the hearing, the judicial officer shall examine the plaintiff's original application for the order authorizing the issuance of the writ and the affidavits in support of such application and the defendant's notice and affidavits filed in support of his motion to quash the writ and set aside the order authorizing the issuance of such writ. If he finds there is a triable issue of fact as to whether the plaintiff is entitled to the order, he shall determine such issue on the basis of the documents filed [and any additional evidence produced at the hearing. If he finds that it would be inequitable to determine the issue on the basis of such evidence, the judicial officer shall continue the hearing for the production of additional evidence, oral or documentary, or the filing of other affidavits or counteraffidavits. In such case, the judicial officer shall hear and determine the issue at the earliest possible time, allowing sufficient time to the parties for such discovery proceedings, if any, as he deems necessary.]

§ 541.110. Issuance of order

541.110. If the judicial officer finds that the plaintiff is not entitled to the order, he shall set aside the order authorizing the issuance of the writ, and order the writ to be quashed, and any property levied upon thereunder released [in the manner provided in Section _____].

§ 541.120. Preference for hearing

541.120. If an order has been issued under Section _____
[preliminary protective order] and is currently in effect, any hearing
under this article shall take precedence over all other civil matters
on the calendar of that day except older matters of the same character.

Note: This section is included at this point pending a determination of
what, if any, provisions relating to a preliminary protective order will be
provided in the Commission's tentative recommendation.

Article 6. Ex Parte Issuance of Writ of Attachment

§ 542.010. Writ of attachment may be issued ex parte; effect on defendant's right to claim exemption

542.010. (a) A writ of attachment may be issued ex parte as provided in this article by a judicial officer of the court in which the action is brought.

(b) If a writ of attachment is issued under this article, the defendant may claim an exemption as to the property levied by following the procedure set forth in Section 690.50. For this purpose, references in Section 690.50 to "the debtor" shall be deemed references to the defendant, and references in Section 690.50 to "the creditor" shall be deemed references to the plaintiff.

(c) A claim of exemption shall be denied if such claim has been denied earlier in the action and the defendant can show no substantial change in circumstances affecting such claim.

§ 542.020. Application for writ

542.020. Upon the filing of the complaint or at any time thereafter, the plaintiff may apply for a writ of attachment under this article by filing an application with the court in which the action is brought. Such application may be filed at the same time as and together with an application for an order authorizing the issuance of a writ of attachment pursuant to either Article 4 (commencing with Section 540.010) or Article 5 (commencing with Section 541.010).

§ 542.030. Contents of application

542.030. The application shall be executed under oath and shall include all of the following:

(a) A statement that the plaintiff has been granted, or is applying for, an order authorizing the issuance of the writ.

(b) A statement of the amount of the defendant's indebtedness over and above all claims which would diminish the amount of the plaintiff's recovery or, if an attachment is sought for only a part thereof, such partial amount.

(c) A description of the property sought to be attached [including the plaintiff's estimate of its fair market value][and a statement that the plaintiff is informed and believes that such property is not exempt from attachment under Article __ (commencing with Section _____)].

§ 542.040. Affidavits in support of application

542.040. The application shall be accompanied by affidavit or affidavits which satisfy the requirements of Section 537.020 and which together provide evidence sufficient to establish that the property sought to be attached is subject to attachment.

§ 542.050. Time of hearing on application

542.050. The hearing on the application for the writ of attachment may be held:

(a) At any time after the plaintiff has been granted an order under either Article 4 (commencing with Section 540.010) or Article 5 (commencing with Section 541.010) authorizing the issuance of the writ; or

(b) If the plaintiff so requests, at the same time the judicial officer hears the plaintiff's application under either Article 4 (commencing with Section 540.010) or Article 5 (commencing with Section 541.010) for an order authorizing the issuance of the writ.

§ 542.060. Issuance of writ

542.060. At the hearing, the judicial officer shall review the application and the accompanying affidavit or affidavits and shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) An order authorizing the issuance of a writ of attachment has been granted to the plaintiff pursuant to either Article 4 (commencing with Section 540.010) or Article 5 (commencing with Section 541.010).

(b) The affidavits accompanying the application provide evidence sufficient to establish that the property sought to be attached is subject to attachment.

(c) The plaintiff has provided the undertaking required by Article _____ (commencing with Section _____).

Article 7. Issuance of Writ of Attachment

After Noticed Hearing

§ 543.010. Issuance of writ of attachment after noticed hearing; effect on defendant's right to claim exemption

543.010. (a) A writ of attachment may be issued after the defendant has had notice and an opportunity to be heard as provided in this article by a judicial officer of the court in which the action is brought.

(b) If the plaintiff complies with the provisions of this article, the defendant's right to claim an exemption as to the property specified in the application for the writ is waived if such exemption is not claimed in the manner provided in this article.

§ 543.020. Application for writ

543.020. Upon the filing of the complaint or at any time thereafter, the plaintiff may apply for a writ of attachment under this article by filing an application that meets the requirements of Section 542.030 with the court in which the action is brought.

§ 543.030. Notice to defendant

543.030. No writ of attachment shall be issued under this article unless the plaintiff has served on the defendant at least 20 days prior to the hearing:

- (a) A Notice of Application and Hearing.
- (b) A copy of the application.

§ 543.040. Contents of Notice of Application and Hearing

543.040. 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 specified in the application.

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

(c) If the defendant desires to make a claim that the property specified in the application, or a portion thereof, is exempt from attachment, he must file with the court and serve on the plaintiff, [not less than 10 days before the date set for the hearing,] a claim of exemption and supporting affidavits as required by Section 543.050. Any claim that the property sought to be attached is exempt from attachment must be made as provided in Section 543.050 or it shall be deemed to be waived.

(d) The plaintiff's address within this state for the purpose of permitting service by mail upon him of any claim of exemption and supporting affidavits referred to in subdivision (c).

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

§ 543.050. Claim of exemption and supporting affidavit

543.050. (a) If the defendant opposes the issuance of the writ on the ground that the property specified in the application for the writ, or a portion of such property, is exempt from attachment, he shall file with the court and serve on the plaintiff, not less than 10 days before the day set for the hearing, a claim of exemption and supporting affidavits.

(b) The claim of exemption shall:

(1) Specify the property claimed to be exempt from attachment.

(2) Specify the statute section or sections on which the defendant relies for his claim of exemption.

(3) State the defendant's address within this state for the purpose of permitting service by mail upon him of the counteraffidavit referred to in Section 543.060.

(c) The claim of exemption shall be supported by affidavit or affidavits which satisfy the requirements of Section 537.020 and which together provide evidence sufficient to establish that the property specified in the application, or a portion thereof, is exempt from attachment.

§ 543.060. Plaintiff's counteraffidavit

543.060. (a) If the defendant files a claim of exemption as provided in Section 543.050 and the plaintiff desires to contest the claim of exemption, he shall file with the court and serve on the defendant, not less than five days before the day set for the hearing, a counteraffidavit alleging that the property is not exempt from attachment.

(b) If the defendant files a claim of exemption as provided in Section 543.050 and the plaintiff does not file a counteraffidavit as provided in subdivision (a), no writ of attachment shall be issued as to the property claimed to be exempt.

§ 543.070. Time of hearing on application

543.070. Subject to Section 543.030, the hearing on the application for the writ of attachment may be held:

(a) At any time after the plaintiff has been granted an order under Article 4 (commencing with Section 540.010) authorizing the issuance of the writ; or

(b) If the plaintiff so requests, at the same time the judicial officer hears the plaintiff's application under Article 4 (commencing with Section 540.010) for an order authorizing the issuance of the writ.

§ 543.080. Hearing

543.080. At the hearing, the judicial officer shall examine the claim of exemption, the affidavits in support of the claim, and the counteraffidavits filed in opposition to the claim. If he finds there is a triable issue of fact as to whether certain property should be exempt, he shall hear and determine such issue. The defendant shall have the burden of proof whether such property is exempt from attachment. Such determination shall be made on the basis of the claim, the affidavits and counteraffidavits, and any additional evidence produced at the hearing. If he finds that it would be inequitable to determine the issue on the basis of such evidence, the judicial officer shall continue the hearing for the production of additional evidence, oral or documentary, or the filing of other affidavits or counteraffidavits. In such case, the judicial officer shall hear and determine the issue at the earliest possible time [allowing sufficient time to the parties for such discovery proceedings, if any, as he deems necessary]. [At the conclusion of the hearing, the judicial officer shall give judgment determining whether the claim of exemption shall be allowed or not, in whole or in part, which judgment shall be determinative as to whether such property is or is not exempt from attachment.]

§ 543.090. Issuance of writ

543.090. The judicial officer shall issue the writ of attachment, which shall specify the amount to be secured by the attachment and the property to be levied on, if he finds all of the following:

(a) An order authorizing the issuance of a writ of attachment has been granted to the plaintiff pursuant to Article 4 (commencing with Section 540.010).

(b) The property sought to be attached, or the portion thereof specified in the writ, is subject to attachment.

(c) The plaintiff has provided the undertaking required by Article __ (commencing with Section _____).