

Memorandum 72-57

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

At the July 1972 meeting, the Commission directed the staff to analyze the attachment provisions enacted in the current legislative session and to propose necessary or desirable revisions to these provisions. SB 1048 (the "Marsh" bill) was passed by the Legislature in the form attached to this memorandum and sent to the Governor for his signature on July 25, 1972. An analysis of this bill prepared by the consultant to the Assembly Committee on Judiciary is also attached to this memorandum. As the consultant notes on page 4, the major constitutional problem with this bill is that it fails to exempt necessities from levy automatically (the bill does provide for a post-levy claim of exemption). This, the staff believes, will be a fatal defect. In addition, assuming arguendo that it is desirable to provide for attachment of business property to secure recovery for debts arising out of business transactions, this bill neither limits the property subject to attachment to business property nor limits the debts upon which the action is based to business debts.

A much different problem results from the very nature of this bill. The bill is stopgap legislation designed to patch up the existing attachment chapter. No comprehensive revision is attempted. Procedures are simply outlined. Little or nothing is done concerning the areas of the method of levy, prejudgment disposition of property, claims of exemption, third-party claims, undertakings, and liability for wrongful attachment. In short, many of those problems which we have attempted to solve and to which we have devoted considerable time and effort have simply been ignored. These problems still remain. They could be resolved by simply eliminating prejudgment attachment

altogether. However, if this approach is taken, we should--we think--be prepared to justify this recommendation with adequately supported reasons for elimination. If, on the other hand, some form of attachment is retained, we believe that a rather comprehensive statutory revision would be desirable. Before the September meeting, we will prepare a revised draft statute based on the prior staff drafts but which attempts to implement the basic policy decision reflected in SB 1048. We hope this draft will provide a focus for discussion of how to proceed further on this topic.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

AMENDED IN ASSEMBLY JULY 3, 1972
AMENDED IN ASSEMBLY JUNE 29, 1972
AMENDED IN ASSEMBLY JUNE 21, 1972
AMENDED IN SENATE MAY 24, 1972
AMENDED IN SENATE MAY 18, 1972
AMENDED IN SENATE MAY 3, 1972

SENATE BILL

No. 1048

Introduced by Senators Zenovich and Coombs

March 15, 1972

An act to amend Sections 537.5 and 539 of, and to add Sections 537, 537.1, 537.2, 537.3, 538, 538.1, 538.2, 538.3, 538.4, 538.5, 541, 542.1, 542.2, 542.3, 542.4, 542b, and 542c to, and to repeal Sections 537, 538, 541, and 542b of, the Code of Civil Procedure, and to add Sections 126.1, 15006.1, and 15501.1 to the Corporations Code, and to amend Section 7203 of the Government Code, relating to attachment in commercial actions.

LEGISLATIVE COUNSEL'S DIGEST

SB 1048, as amended, Zenovich. Attachment in commercial actions.

Provides for prejudgment attachment for specified defendants and property. Establishes prejudgment procedure.

Operative only until December 31, 1975.

Vote—Majority; Appropriation—No;

Fiscal Committee—No.

The people of the State of California do enact as follows:

1 SECTION 1. Section 537 of the Code of Civil
2 Procedure is repealed.

3 SEC. 2. Section 537 is added to the Code of Civil
4 Procedure, to read:

5 537. The plaintiff, in an action specified in Section
6 537.1, at the time of issuing the summons, or at any time
7 afterward, may have the property specified in Section
8 537.3 of a defendant specified in Section 537.2 attached in
9 accordance with the procedure provided for in this
10 chapter, as security for the satisfaction of any judgment
11 that may be recovered, unless the defendant gives
12 security to pay such judgment, as provided for in this
13 chapter.

14 SEC. 3. Section 537.1 is added to the Code of Civil
15 Procedure, to read:

16 537.1. An action referred to in Section 537 is an action
17 or actions by the same plaintiff in which the total sum
18 claimed, exclusive of interest, attorneys' fees and costs, is
19 five hundred dollars (\$500) or more and which is one or
20 more of the following:

21 (a) An action against a defendant described in
22 subdivision (a), (b) or (c) of Section 537.2 for a liquidated
23 sum of money based upon

24 (1) Money loaned; or

25 (2) A negotiable instrument; or

26 (3) The sale or lease of, or a license to use, real or
27 personal property (including, without limiting the
28 generality of the foregoing, goods sold and delivered on
29 open account); or

30 (4) Services rendered,

31 if the claim is not secured by any mortgage, deed of trust
32 or security interest on real or personal property or, if
33 originally so secured, such security has, without any act of
34 the plaintiff, or the person to whom the security was
35 given, become valueless. The fact that interest, attorneys'
36 fees, costs or any combination thereof are claimed by the
37 plaintiff in addition to the principal amount of the debt
38 shall not make the claim unliquidated within the

1 meaning of this section.

2 (b) An action against a defendant described in
3 subdivision (d) of Section 537.2 for the recovery of
4 money.

5 SEC. 4. Section 537.2 is added to the Code of Civil
6 Procedure, to read:

7 537.2. The defendants referred to in Section 537 are:

8 (a) All corporations organized under the General
9 Corporation Law or under Part 4 (*commencing with*
10 *Section 13400*) of Division 3 of Title 1 of the Corporations
11 Code, or organized under a law of any foreign state or
12 jurisdiction authorizing the formation of business
13 corporations.

14 (b) All partnerships organized under the Uniform
15 Partnership Act (Chapter 1 (*commencing with Section*
16 *15001*) of Title 2 of the Corporations Code) or the
17 Uniform Limited Partnership Act (Chapter 2
18 (*commencing with Section 15501*) of Title 2 of the
19 Corporations Code) or a law of any foreign state or
20 jurisdiction authorizing the formation of general or
21 limited partnerships.

22 (c) Individuals engaged in a trade or business.

23 (d) Any person not residing in this state (including
24 any foreign corporation not qualified to do business in
25 this state under the provisions of Chapter 3 (*commencing*
26 *with Section 6403*) of Part 11 of Division 1 of Title 1 of the
27 Corporations Code, and any foreign partnership which
28 has not filed a designation pursuant to Section 15700 of
29 the Corporations Code), or who cannot after due
30 diligence be found within this state, or who conceals
31 himself to avoid service of summons.

32 SEC. 5. Section 537.3 is added to the Code of Civil
33 Procedure, to read:

34 537.3. The property referred to in Section 537 is the
35 following property not exempt from execution (without
36 regard to whether a claim of exemption shall be filed):

37 (a) With respect to corporations and partnerships
38 referred to in subdivisions (a) and (b) of Section 537.2, all
39 corporate property and all partnership property.

40 (b) With respect to individuals referred to in

1 subdivision (c) of Section 537.2 all of the following:

2 (1) Inventory.

3 (2) Accounts, contract rights, chattel paper, and
4 general intangibles consisting of any right to payment
5 of money (exclusive of those referred to in paragraph
6 (3) of this subdivision), except any such individual
7 claim with a principal balance of less than one hundred
8 fifty dollars (\$150).

9 (3) Bank accounts and other deposit accounts,
10 except the first one thousand dollars (\$1,000) balance
11 in any single bank or branch bank (but, if the
12 defendant has accounts in more than one bank or
13 branch bank, the court, upon application of the
14 plaintiff at the hearing provided for in Section 538.4,
15 may direct that the writ be levied on balances of less
16 than one thousand dollars (\$1,000) in a given bank or
17 branch bank if an aggregate of one thousand dollars
18 (\$1,000) in all such accounts remains free of the levy).

19 (4) Securities.

20 (5) Equipment.

21 (6) Real estate, including any leasehold estate with
22 an unexpired term of one year or more.

23 The court, however, upon application of the defendant at
24 the hearing provided for in Section 538.4 or at any time
25 thereafter upon five days' notice to the plaintiff, shall
26 exclude from the effect of the levy or release from the
27 levy, as the case may be, any of the foregoing property
28 which the court finds is necessary for the support of the
29 defendant and his family after taking into consideration
30 all of his other income and assets not subject to levy or not
31 levied upon.

32 The terms used in this subdivision which are defined in
33 the Commercial Code shall have the meanings therein
34 specified.

35 (c) With respect to a defendant referred to in
36 subdivision (d) of Section 537.2, all property of the
37 defendant.

38 SEC. 6. Section 537.5 of the Code of Civil Procedure
39 is amended to read:

40 537.5. In cases of attachment the clerk of the court

1 with whom the complaint is filed, if requested by plaintiff
2 in writing at the time of filing the complaint, shall not
3 make public the fact of the filing of the complaint, or of
4 the issuance of the attachment, until after the filing of the
5 return of service of the notice and temporary restraining
6 order or of the writ of attachment if issued without
7 notice, except that if the return of service of the notice
8 and temporary restraining order or of the writ of
9 attachment is not made within 30 days after the filing of
10 the complaint in the action, the clerk of the court with
11 whom the complaint is filed shall make available to the
12 public the records and documents in such action.
13 However, the clerk of such court shall make the entire
14 file in the action available for inspection at any time to
15 any party named in the complaint, or to his attorney.

16 The request by plaintiff that the fact of filing of a
17 complaint or issuance of an attachment not be made
18 public may take the form of a notation to that effect,
19 made by rubber stamp or other suitable means, at the top
20 of the first page of the complaint filed with the clerk.

21 SEC. 7. Section 538 of the Code of Civil Procedure is
22 repealed.

23 SEC. 8. Section 538 is added to the Code of Civil
24 Procedure, to read:

25 538. A plaintiff desiring the issuance of a writ of
26 attachment shall file with the court an application
27 supported by an affidavit or affidavits based upon the
28 personal knowledge of the persons subscribing thereto
29 and showing all the following:

30 (a) That the action is one in which the issuance of a
31 writ of attachment is proper under the provisions of
32 Sections 537 to 537.3, inclusive.

33 (b) That the indebtedness claimed in the complaint is
34 justly due and presently owing to the plaintiff by the
35 defendant, over and above all legal setoffs or
36 cross-complaints, or, if the action is one against a
37 defendant described only in subdivision (d) of Section
38 537.2, the amount claimed by the plaintiff against the
39 defendant and that the plaintiff believes that he has a
40 valid cause of action for an amount of money equal to that

1 sum.

2 (c) That the attachment is not sought and the action
3 is not prosecuted to hinder, delay or defraud any other
4 creditor of the defendant.

5 (d) That the plaintiff has no information or belief that
6 the defendant has filed any proceeding under the
7 National Bankruptcy Act or has made a general
8 assignment for the benefit of creditors, or, if any such
9 proceeding has been terminated, that the claim of the
10 plaintiff was not discharged in such proceeding.

11 SEC. 9. Section 538.1 is added to the Code of Civil
12 Procedure, to read:

13 538.1. The court or a commissioner thereof, if satisfied
14 that the affidavits submitted by the plaintiff pursuant to
15 Section 538 have established a prima facie case and that
16 the action is one in which an attachment is properly
17 issuable under the provisions of this chapter, shall issue
18 without any prior notice to the defendant a notice of
19 hearing and temporary restraining order conforming to
20 the provisions of Sections 538.2 and 538.3 for service upon
21 the defendant.

22 Neither notice of the restraining order issued pursuant
23 to this section nor service of a copy thereof upon any bank
24 shall require any bank to observe the terms of the
25 restraining order.

26 SEC. 10. Section 538.2 is added to the Code of Civil
27 Procedure, to read:

28 538.2. The notice of hearing issued pursuant to
29 Section 538.1 shall provide for a hearing on the question
30 whether a writ of attachment shall issue to be held seven
31 business days (exclusive of Saturdays, Sundays and legal
32 holidays) after the service of the notice upon the
33 defendant or upon the first regular date law and motion
34 matters are heard thereafter, whichever occurs later. The
35 notice and temporary restraining order shall be served
36 and return of service shall be made as provided in this
37 code for the service of a summons and complaint. The
38 notice shall be accompanied by a copy of the complaint
39 and a copy of the affidavit or affidavits filed by the
40 plaintiff under Section 538.

1 SEC. 11. Section 538.3 is added to the Code of Civil
2 Procedure, to read:

3 538.3. The temporary restraining order issued
4 pursuant to Section 538.1 shall prohibit prior to the
5 hearing any transfer by the defendant of any of his
6 property in this state subject to the levy of a writ of
7 attachment, otherwise than in the ordinary course of
8 business, and the issuance by the defendant of any checks
9 in excess of an aggregate of one thousand dollars (\$1,000)
10 against any of his bank accounts in this state to withdraw
11 any sums subject to such levy, which would reduce the
12 aggregate amount remaining on deposit to less than the
13 amount of the plaintiff's claim, and the opening of any
14 new bank accounts by the defendant. Without limiting
15 the generality of the phrase "not in the ordinary course
16 of business", the payment by the defendant of an
17 antecedent debt shall not be considered in the ordinary
18 course of business within the meaning of this section.
19 Notwithstanding the foregoing, checks may be issued by
20 the defendant for any of the following purposes:

21 (a) To cover any payrolls (including all fringe
22 benefits and withholding taxes) falling due in the
23 regular course after the service of the temporary
24 restraining order and prior to the levy of a writ of
25 attachment, but not exceeding the amount of three
26 hundred dollars (\$300) per week for any individual
27 employee.

28 (b) In payment for goods thereafter delivered to the
29 defendant C.O.D. for use in his trade or business.

30 (c) In payment of taxes if penalties will accrue for
31 any delay in payment.

32 (d) In payment of legal fees for the representation
33 of the defendant in the action.

34 The temporary restraining order shall expire by its terms
35 unless a writ of attachment is issued and levied within 30
36 days after the service of the order or if the defendant
37 gives an undertaking as provided in Section 555 in the
38 amount of plaintiff's claim as security for the payment of
39 any judgment recovered by the plaintiff. The restraining
40 order shall be vacated by the court upon ex parte

1 application by the defendant if the court is satisfied that
2 there is no danger that sufficient property of the
3 defendant to secure the plaintiff's claim will not be
4 available and subject to the levy of a writ of attachment,
5 if one is directed to be issued at the hearing provided for
6 in Section 538.4.

7 SEC. 12. Section 538.4 is added to the Code of Civil
8 Procedure, to read:

9 538.4. The hearing shall be held before the court or a
10 commissioner thereof on the day specified and shall take
11 precedence over all other matters not of a similar nature
12 pending on that day. If the defendant does not appear at
13 the hearing, in person or by counsel, the court, without
14 taking further evidence, shall direct the clerk to
15 immediately issue a writ of attachment. Each party shall
16 serve upon the other at least 24 hours before the hearing
17 any affidavits intended to be introduced at the hearing,
18 unless the court at the hearing for good cause shown
19 permits the introduction of affidavits not previously
20 served. Either party may also introduce oral evidence at
21 the hearing and the defendant shall make available for
22 oral examination at the hearing himself or an officer or
23 agent of the defendant with knowledge of the transaction
24 on which the complaint is based, unless the court for good
25 cause shown excuses compliance with this requirement.
26 Upon the basis of the evidence introduced at the hearing,
27 the court shall determine whether the case is one in
28 which an attachment is properly issuable and whether
29 there is any reasonable probability that the defendant
30 can establish a successful defense to the claim asserted by
31 the plaintiff. If the court finds on the basis of a
32 preponderance of the evidence that grounds for the
33 issuance of an attachment exist and that the plaintiff has
34 established the probable validity of his claim and the
35 absence of any reasonable probability that a successful
36 defense can be asserted by the defendant, the court shall
37 direct the clerk to immediately issue a writ of
38 attachment; otherwise, the court shall dissolve the
39 temporary restraining order. The court may direct the
40 order in which the writ shall be levied upon different

1 assets of the defendant, if in the aggregate they exceed in
2 value an amount clearly adequate to secure any
3 judgment which may be recovered by the plaintiff.

4 SEC. 13. Section 538.5 is added to the Code of Civil
5 Procedure, to read:

6 538.5. Notwithstanding the provisions of Sections 538
7 to 538.4, inclusive, the court shall, upon application by the
8 plaintiff, direct the immediate issuance of a writ of
9 attachment without any notice of hearing (or, under
10 subdivision (c) below, without any hearing) if any one or
11 more of the following conditions exist:

12 (a) A bulk sales notice has been recorded and
13 published with respect to property of the defendant
14 pursuant to the provisions of Division 6 (commencing
15 with Section 6101) of the Commercial Code, such writ to
16 be issued upon the filing of the application provided for
17 in Section 538 but to be limited to the goods covered by
18 the bulk sales notice; or an escrow has been opened
19 pursuant to the provisions of Section 24074 of the Business
20 and Professions Code with respect to the sale by the
21 defendant of a liquor license, such writ to be issued upon
22 the filing of the application provided for in Section 538
23 but to be limited to the attaching creditor's pro rata share
24 of the proceeds of the sale in escrow.

25 (b) The plaintiff establishes to the satisfaction of the
26 court that there is a substantial danger that the defendant
27 will transfer, other than in the ordinary course of
28 business, remove or conceal the property sought to be
29 attached, such writ to be issued upon the filing of the
30 application provided for in Section 538.

31 (c) The notice and order issued pursuant to Section
32 538.1 cannot be served with the use of reasonable
33 diligence upon the defendant within 10 days after its
34 issuance and the court is satisfied that the defendant has
35 departed from this state or conceals himself to avoid
36 service of the notice, such writ to be issued after the
37 expiration of such 10-day period.

38 (d) The defendant is one described in subdivision (d)
39 of Section 537.2, such writ shall be issued upon the filing
40 of the application provided for in Section 538. A writ of

1 attachment (1) which is issued under this subdivision and
2 levied upon property of a defendant described in
3 subdivision (d) of Section 537.2 but who is not described
4 in subdivision (a), (b) or (c) of Section 537.2, or (2)
5 which is issued under this subdivision based upon a claim
6 which is not described in subdivision (a) of Section 537.1,
7 shall be released and discharged by the court upon
8 motion of the defendant if the defendant files a general
9 appearance in the action. If a writ of attachment is issued
10 under this subdivision and levied upon property of a
11 defendant who is described in subdivision (a), (b) or (c)
12 of Section 537.2 based upon a claim described in
13 subdivision (a) of Section 537.1, the defendant may at any
14 time after such levy, upon seven business days' notice to
15 the plaintiff, request a hearing pursuant to Section 538.4.
16 At such hearing, unless the court makes the findings
17 required by that section for the issuance of a writ of
18 attachment, it shall release and discharge the writ.

19 SEC. 14. Section 539 of the Code of Civil Procedure is
20 amended to read:

21 539. (a) Before issuing the notice and order pursuant
22 to Section 538.1 or the writ pursuant to Section 538.5, the
23 plaintiff must file with the clerk or judge a written
24 undertaking with two or more sufficient sureties, to the
25 effect that if the defendant recovers judgment, the
26 plaintiff will pay all costs that may be awarded to the
27 defendant and all damages which he may sustain by
28 reason of the restraining order or the attachment, not
29 exceeding the sum specified in the undertaking, and that
30 if the restraining order or the attachment is discharged
31 on the ground that the plaintiff was not entitled thereto
32 under Sections 537 to 537.2, inclusive the plaintiff will pay
33 all damages which the defendant may have sustained by
34 reason of the restraining order or the attachment, not
35 exceeding the sum specified in the undertaking. The sum
36 specified in the undertaking shall be one-half ($\frac{1}{2}$) of the
37 principal amount of the total indebtedness or damages
38 claimed, excluding attorneys' fees. Nothing herein shall
39 be construed to preclude the acceptance of an
40 undertaking in which a larger sum is specified, if such

1 undertaking be offered. The court on ex parte application
2 of the plaintiff, may by written order, direct the issuance
3 of the restraining order or the writ on the filing of an
4 undertaking in a lesser sum, if the court is satisfied that
5 the defendant will be adequately protected thereby. The
6 damages recoverable by the defendant pursuant to this
7 section shall include all damages proximately caused by
8 the service of the restraining order or the levy of the writ
9 of attachment.

10 At any time after the issuing of the restraining order or
11 the attachment, but not later than five days after actual
12 notice of the levy of the writ of attachment, the
13 defendant may except to the sufficiency of the sureties.
14 If he fails to do so, he is deemed to have waived all
15 objection to them. When excepted to, the plaintiff's
16 sureties, within five days from service of written notice of
17 exception, upon notice to the defendant of not less than
18 two nor more than five days, must justify before the judge
19 or clerk of the court in which the action is pending, in the
20 same manner as upon bail on arrest; and upon failure to
21 justify, or if others in their place fail to justify, at the time
22 and place appointed, the writ of attachment must be
23 vacated.

24 The court, at any time after issuance of the restraining
25 order or the writ, on motion of the defendant, after notice
26 to the plaintiff, or at the hearing pursuant to Section
27 538.4, may order the amount of the undertaking
28 increased.

29 (b) The liability of any surety furnishing a bond
30 pursuant to this section, if any, may be enforced on
31 motion in the trial court without the necessity of an
32 independent action. Notice of the motion shall be served
33 on the persons whose liability is sought to be enforced at
34 least 30 days prior to the time set for hearing of the
35 motion. The notice shall state the amount of the claim
36 and shall be supported by an affidavit or affidavits setting
37 forth the facts on which the claim is based. Such notice
38 and affidavit may be served in accordance with any
39 procedure authorized by Chapter 5 (commencing with
40 Section 1010), Title 14, Part 2. Judgment may be entered

1 in accordance with the notice against the person or
2 persons served therewith, unless such person or persons
3 shall serve and file an affidavit or affidavits in opposition
4 to the motion showing such facts as may be deemed by
5 the judge hearing the motion sufficient to present a
6 triable issue of fact. If such showing is made, the issues to
7 be tried shall be specified by the court and trial thereof
8 shall be set for the earliest date convenient to the court,
9 allowing sufficient time for discovery. The surety shall
10 not obtain a stay of the proceedings pending the
11 determination of any third-party claims. Affidavits filed
12 pursuant to this section shall conform to the
13 requirements prescribed for affidavits filed pursuant to
14 Section 437c.

15 SEC. 15. Section 541 of the Code of Civil Procedure is
16 repealed.

17 SEC. 16. Section 541 is added to the Code of Civil
18 Procedure, to read:

19 541. Securities, as defined in the Commercial Code,
20 shall be levied upon as provided by Division 8
21 (commencing with Section 8101) of the Commercial
22 Code.

23 SEC. 17. Section 542.1 is added to the Code of Civil
24 Procedure, to read:

25 542.1. Notwithstanding the provisions of Section 542,
26 a writ of attachment shall be levied upon any equipment
27 (as defined in the Commercial Code), other than a motor
28 vehicle or boat required to be registered, belonging to
29 the defendant by the filing of a notice with the Secretary
30 of State, which shall be signed by the sheriff, constable or
31 marshal and shall contain the name of the plaintiff as
32 lienor, the name of the defendant as debtor and shall
33 indicate that the plaintiff has acquired an attachment lien
34 in the equipment of the defendant. The form of such
35 notice shall be prescribed by the Secretary of State and
36 shall be filed and indexed by him in accordance with the
37 provisions applicable to financing statements in Division
38 9 (commencing with Section 9101) of the Commercial
39 Code.

40 SEC. 17.1. Section 542.2 is added to the Code of Civil

1 Procedure, to read:

2 542.2. (a) The fee for filing and indexing each notice
3 of attachment lien or notice affecting a notice of
4 attachment lien in the office of the Secretary of State is
5 three dollars (\$3).

6 (b) When a notice of attachment lien has been filed
7 and the plaintiff, for whatever reason, no longer has an
8 attachment lien in the equipment of the defendant, the
9 sheriff, marshal or constable shall sign a notice to that
10 effect for filing with the Secretary of State.

11 (c) A filed notice of attachment lien is effective for a
12 period of five years from the date of filing. The
13 effectiveness of the filed notice of attachment lien lapses
14 on the expiration of such five-year period unless sooner
15 terminated pursuant to subdivision (b) or unless a notice
16 of continuation is filed pursuant to Section 542.4 prior to
17 such lapse.

18 SEC. 17.2. Section 542.3 is added to the Code of Civil
19 Procedure, to read:

20 542.3. Upon the request of any person, the Secretary
21 of State shall issue his certificate showing whether there
22 is on file, on the date and hour stated therein, any notice
23 of attachment lien, naming a particular person, and if a
24 notice is on file, giving the date and hour of filing of each
25 notice and the name of the plaintiff-lienor. The fee for the
26 certificate issued by the Secretary of State is two dollars
27 (\$2). A combined certificate may be issued pursuant to
28 Section 7203 of the Government Code. Upon request, the
29 Secretary of State shall furnish a copy of any notice of
30 attachment lien or notice affecting a notice of attachment
31 lien for a fee of one dollar (\$1) per page.

32 SEC. 17.3. Section 542.4 is added to the Code of Civil
33 Procedure, to read:

34 542.4. When more than four years and six months has
35 elapsed after the filing of the notice of attachment lien
36 and there is no final judgment in the action, the plaintiff
37 may, upon notice to the defendant, apply to the court for
38 an order directing the sheriff, marshal or constable to sign
39 a notice of continuation of notice of attachment lien for
40 filing with the Secretary of State if the lien is still in effect

1 under Section 542c.

2 The court shall issue the order if it finds that the lien
3 has been extended or the court concurrently extends the
4 lien under Section 542c for a period beyond the
5 expiration of the five years specified in Section 542.2.
6 Upon issuance of the order, the sheriff, marshal or
7 constable shall sign a notice of continuation of notice of
8 attachment lien for filing with the Secretary of State prior
9 to the lapse of the notice of attachment lien. Upon timely
10 filing of the notice of continuation, the effectiveness of
11 the original notice of attachment lien is continued for five
12 years from the time when it would otherwise have lapsed,
13 whereupon it shall lapse thereafter in the same manner
14 as provided in subdivision (c) of Section 542.2.

15 SEC. 18. Section 542b of the Code of Civil Procedure
16 is repealed.

17 SEC. 19. Section 542b is added to the Code of Civil
18 Procedure, to read:

19 542b. The service upon the defendant of a notice and
20 order pursuant to Section 538.2 creates a lien upon all of
21 his personal property subject to the levy of a writ of
22 attachment pursuant to this chapter and owned by him
23 at the time of such service or the proceeds thereof. Such
24 lien, however, shall not be valid as against a bona fide
25 purchaser or encumbrancer for present value or a
26 transferee in the ordinary course of business. Such lien
27 shall terminate 30 days after the service of the notice and
28 order upon the defendant; except with respect to
29 property upon which a writ of attachment has been
30 levied during that period and upon the filing by the
31 defendant of a proceeding under the National
32 Bankruptcy Act or the making by the defendant of a
33 general assignment for the benefit of creditors, such lien
34 shall terminate with respect to all property upon which
35 a writ of attachment has not been levied prior to such
36 event. The levy of a writ of attachment shall perfect the
37 lien created by the service of the notice and order against
38 a bona fide purchaser and a transferee in the ordinary
39 course of business and the levy of a writ of attachment in
40 those cases where it is not preceded by the service of a

1 notice and order shall create a lien upon the property
2 levied upon which is valid against all third persons.

3 SEC. 20. Section 542c is added to the Code of Civil
4 Procedure, to read:

5 542c. An attachment of personal property shall,
6 unless sooner released or discharged, cease to be of any
7 force or effect and the property levied on shall be
8 released from the operation of the attachment at the
9 expiration of one year from the date of the levy of the
10 writ unless a notice of readiness for trial is filed or a
11 judgment is entered against the defendant in the action
12 in which the attachment was issued within that period, in
13 which case the attachment shall continue in effect until
14 released or vacated after judgment as provided in this
15 chapter. However, upon motion of the plaintiff, made not
16 less than 10 nor more than 60 days before the expiration
17 of such period of one year, and upon notice of not less
18 than five days to the defendant, the court in which the
19 action is pending may, by order filed prior to the
20 expiration of the period, extend the duration of the
21 attachment for an additional period or periods as the
22 court may direct, if the court is satisfied that the failure
23 to file the notice of readiness is due to the dilatoriness of
24 the defendant and was not caused by any action of the
25 plaintiff. The attachment may be extended from time to
26 time in the manner herein prescribed.

27 SEC. 21. Section 126.1 is added to the Corporations
28 Code, to read:

29 126.1. Any corporation heretofore or hereafter
30 formed under this division shall, as a condition of its
31 existence as a corporation, be subject to the provisions of
32 the Code of Civil Procedure authorizing the attachment
33 of corporate property.

34 SEC. 22. Section 15006.1 is added to the Corporations
35 Code, to read:

36 15006.1. Any partnership heretofore or hereafter
37 formed under this chapter shall, as a condition of its
38 existence as a partnership, be subject to the provisions of
39 the Code of Civil Procedure authorizing the attachment
40 of partnership property.

1 SEC. 23. Section 15501.1 is added to the Corporations
2 Code, to read:

3 15501.1. Any limited partnership heretofore or
4 hereafter formed under this chapter shall, as a condition
5 of its existence as a partnership, be subject to the
6 provisions of the Code of Civil Procedure authorizing the
7 attachment of partnership property.

8 SEC. 24. If any provision of this act or the application
9 thereof to any person or circumstances is held invalid,
10 such invalidity shall not affect other provisions or
11 applications of the act which can be given effect without
12 the invalid provision or application, and to this end the
13 provisions of this act are severable.

14 SEC. 25. This act shall not apply to any writ of
15 attachment issued prior to its effective date, which shall
16 continue to be governed in all respects by prior law, and
17 shall not affect the validity of any levy of such a writ of
18 attachment heretofore or hereafter made in accordance
19 with prior law.

20 SEC. 26. Section 7203 of the Government Code is
21 amended to read:

22 7203. Upon request of any person, the Secretary of
23 State shall issue a combined certificate showing the
24 information as to financing statements as specified in
25 Section 9407 of the Commercial Code, the information as
26 to federal tax liens as specified in subdivision (d) of
27 Section 7202 of this code, the information as to state tax
28 liens as specified in Section 7226 and the information as
29 to attachment liens specified in Section 542.3 of the Code
30 of Civil Procedure. The fee for such a combined
31 certificate is five dollars (\$5).

32 When a certificate is requested from the Secretary of
33 State as to a name which appears to be other than the
34 name of an individual, the Secretary of State shall
35 construe the request as one for a combined certificate
36 pursuant to this section unless the request is specifically
37 limited to a request for a certificate as to federal tax liens,
38 state tax liens, or attachment liens.

39 When a certificate is requested from the Secretary of
40 State as to a name which appears to be the name of an

1 individual, the Secretary of State shall construe the
2 request as one for a combined certificate pursuant to this
3 section but omitting information as to federal tax liens,
4 unless the request is specifically limited to a request for
5 a certificate as to federal tax liens, state tax liens or
6 attachment liens.

7 SEC. 27. This act shall be operative until December
8 31, 1975, and after that date shall have no force or effect.

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CHARLES WARREN, CHAIRMAN

SB 1048 (Zenovich) - as amended 6/21/72

Attachment in Commercial Transactions.

BACKGROUND

Randone, 5 C.3d 536 (1971), held that prejudgment attachment unconstitutionally deprives a debtor of notice and opportunity to be heard before deprivation of the use of his property. California's attachment procedure was declared invalid insofar as it fails to confine the summary relief to those extraordinary circumstances where the state or creditor's interests override those of the alleged debtor. Furthermore, the California Supreme Court in the unanimous decision found the procedure unconstitutional as permitting attachment of the debtor's "necessities of life" prior to any hearing on the validity of the creditor's claim.

As a result, creditors have been compelled to petition courts for temporary restraining orders or preliminary injunctions to secure alleged debts in the face of absconding or liquidating debtors. The problem according to proponents of the measure has reached acute proportions in the area of commercial transactions.

PROPOSAL

SB 1048, as amended, establishes a procedure to attach certain property of designated debtors. While characterized as being limited to commercial transactions, the measure does reach some "necessities of life" and some non-commercial debts.

SB 1048 permits the plaintiff-creditor of a corporation, partnership or individual engaged in a trade or business to tie up the defendant-debtor's property if the total unsecured liquidated claim or claims are \$500 or more and the debt is based on: (1) money loaned; (2) a negotiable instrument; (3) sale, lease or license to use real or personal property; or (4) services rendered. (537.1(a).)

If the defendant-debtor is a non-resident, an unqualified foreign corporation or partnership, or a Californian who cannot be found after due diligence in the state or who conceals himself from service, then attachment will be available in an action for recovery of money. (537.1(b).)

Property which may be attached (if not otherwise exempt from execution):

(1) All property of corporations, partnerships (California or foreign), non-resident individuals, or persons who conceal themselves from service or cannot after due diligence be found within the state; (537.3(a), (c).)

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(2) The following property of persons engaged in a trade or business:

- (a) inventory;
- (b) accounts, contracts rights, chattel paper, rights to, payment of money valued at \$150 or more;
- (c) bank and deposit accounts in an aggregate excess of \$1,000;
- (d) securities;
- (e) equipment;
- (f) land including leases with an unexpired term in excess of one year. (537.3(b).)

Given five days' prior notice to the plaintiff, a person engaged in a trade or business may release or exempt from attachment any of the property described in (a) to (f) above if the court finds that the property "is necessary for the support of the defendant and his family after taking into consideration all" his unexempt or unreleased other income or assets. (537.3(b).)

Requires the plaintiff-creditor desiring to attach to file an application supported by an affidavit based on personal knowledge showing:

- (1) Attachment is proper in the specific action;
- (2) The net debt is due and presently owing;
- (3) Attachment is not sought to delay, hinder or defraud creditors; and
- (4) Affiant is informed and believes that the debtor hasn't filed a bankruptcy petition nor made an assignment to creditors, or that if so the debt hasn't been discharged or assigned. (538.)

Requires the court to issue a TRO and set time and place for hearing on issuance of a writ of attachment without notice to the debtor if the affidavit is in order. The restraining order does not bind a bank. (538.1.)

The hearing is set for not less than seven "business days" after service of complaint, affidavit and notice upon the defendant-debtor. "Business days" do not include Saturday, Sunday and legal holidays. (538.2.)

As noted above, the court is required to issue a TRO if the affidavit is in order without providing notice or hearing to the defendant-debtor. The TRO restrains transfers of the following property by the debtor:

- (1) Transfers not in the ordinary course of business;
- (2) Issuance of checks in excess of \$1,000 which would reduce the aggregate balance to less than the creditor's claim;
- (3) Opening new bank accounts; and
- (4) Payment of antecedent debts.

Notwithstanding these limitations, however, the following transfers are expressly permitted:

- (1) Regular payrolls (including fringe benefits and withholding) not exceeding \$300 per week per employee;
- (2) C.O.D. payments for trade or business goods;
- (3) Due taxes if penalties will accrue upon delay in payment;
- (4) Attorney's fees in connection with the subject action.

The TRO expires in 30 days unless earlier terminated by: (1) the debtor posting security, (2) the issuance of a writ of attachment, or (3) vacation by the court upon an ex parte showing by the debtor that sufficient property will be available to satisfy the creditor's claim. (538.3.)

A calendar preference is created for the hearing on issuance of the writ. If the debtor fails to show, the writ immediately issues. At least 24 hours before the hearing, unless good cause is shown, the parties must exchange affidavits to be presented at the hearing. The debtor or an informed and authorized agent must attend the hearing, absent a showing of good cause for not appearing. At the hearing the court must determine if the action is proper for attachment, the probable validity of the plaintiff's claim and the absence of any reasonable probability that a successful defense can be asserted. If affirmatively so found, the writ is immediately issued. The court may direct the writ to apply to certain assets provided the creditor's interest are not impaired. (538.4.)

No hearing is required before issuance of the writ in the following cases:

- (1) A bulk sale notice or liquor license escrow is noticed by publication, in which case the writ reaches only the subject property of the bulk sale or escrow.
- (2) The creditor establishes to the court's "satisfaction" that the debtor will transfer, remove or conceal the property sought to be attached.
- (3) The notice of hearing cannot be served on the debtor after using due diligence within 10 days and the court "is satisfied" that the debtor has left the state or is concealing himself.

(4) The debtor is a non-resident, or unqualified foreign corporation or foreign partnership or a person who cannot be found within the state with due diligence or conceals himself. In such case, the writ is discharged upon general appearance of the debtor in the action.

When an ex parte writ is issued, the debtor can demand a hearing on the propriety of the issuance within seven business days after notice to the creditor. (538.5.)

The present security floor of \$50 debt before attachment issues is removed but the court must be satisfied that the debtor will be adequately protected by the undertaking. Damages suffered by the debtor on account of the TRO of writ are recoverable by him. (539.)

Specifies procedure to levy on securities (541) and equipment (542.1 - 542.4.)

Service of notice of hearing and TRO creates a 30-day lien upon the debtor's property subject to attachment. The lien is subordinate to rights of certain bona fide purchasers or encumbrancers, the trustee in bankruptcy, and creditors upon a general assignment. (542b.)

Unless released or discharged, an attachment of personal property ceases and the writ expires one year after issuance unless notice of readiness for trial is filed or judgment is entered against the debtor. Extensions of duration are specifically provided, however. (542c.)

COMMENT

1. When the Randone court invalidated attachment it recognized that "in certain limited circumstances a creditor's interest in a summary attachment procedure may generally justify such attachment...." But, "the hardship imposed on a debtor by the attachment of his 'necessities of life' is so severe that we do not believe that a creditor's private interest is ever sufficient to permit the imposition of such deprivation before notice and a hearing on the validity of the creditor's claim." 5 C.3d 558; emphasis added.

Yet, SB 1048 assumes that (1) inability to serve after due diligence, or (2) the status of the debtor as a non-resident or foreign and unqualified corporation or partnership raises the "extraordinary circumstances" the Supreme Court demands. Furthermore, SB 1048 assumes that "necessities of life" do not apply to business entities or persons engaged in trade or business. While 537.3 provides an individual post-TRO and post-levy relief for property "necessary for the support of the defendant and his family after taking into consideration all of his other income and assets not subject to levy or not levied upon" that may be too little too late.

In short, can a business entity, business man or non-resident have a "necessity of life" which is constitutionally protected by Randone?

2. The measure is touted as providing commercial prejudgment attachment. Yet, the property reachable by the TRO and writ includes all the property of the business entity or individual engaged in a trade or business. Shouldn't the property definitions of 537.3 be limited to the business, not personal, assets of the debtor?
3. The Law Revision Commission will produce a study and remedial legislation for introduction at the 1974 Session on prejudgment attachment. Should this measure be given a termination date? [SB 1048 was subsequently amended to provide a termination date of December 31, 1975.]
4. The measure does not reach all qualified California corporations. Professional corporations, i.e., attorneys' corporations, are omitted. Why? [SB 1048 was subsequently amended to reach professional corporations.]
5. Use of "judicial days" as opposed to "business days" is in conformity with other statutory measurements of time.
6. Banks need not heed the TRO. Why? What about S&Ls?
7. The measure refers to "a commissioner" in 538.1 and 538.4. Commissioners' duties are designated in the Government Code and presently cover the functions proposed in SB 1048.
8. Under present law, an attachment lasts 3 years but may be extended to 5. SB 1048 provides for expiration at the end of one year with indefinite extensions. May the writ extend beyond the prosecutable life of a cause of action?
9. Filing the affidavit, posting the bond and subjecting himself to liability may deter many creditors from abusing the ex parte TRO and writ of attachment process. See 538.5.

"But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides--and does not generally take even tentative action until it has itself examined the support for the plaintiff's position." Fuentes v. Shevin, U.S.S.C. 70-5039; (6/12/72).

On this point AB 1623 commends itself:

By reason of specific, competent evidence shown, by testimony within the personal knowledge of the affiant or witness, the property is in immediate danger of

destruction, serious harm, concealment, or removal from this state, or of sale to an innocent purchaser, and that the (defendant) threatens to destroy, harm, conceal, remove it from the state, or sell it to an innocent purchaser. (proposed CCP 510(c).)

10. The measure should provide for relief against the bond or undertaking in a corollary proceeding in the same action. This avoids the delay and costs associated with independent actions against sureties. See CCP 535. [SB 1048 was subsequently amended to accomplish this suggestion.]