

Memorandum 74-29

Subject: Study 39.70 - Prejudgment Attachment

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

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

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

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

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

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

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

However, we do believe that the plaintiff should be protected from liability for wrongful attachment where he acted on a reasonable belief that attachment was authorized. We would therefore revise subdivision (a) of Section 490.010 to provide as follows:

490.010. A wrongful attachment consists of any of the following:

(a) The levy of a writ of attachment or the service of a protective order in an action in which attachment is not authorized except that it is not a wrongful attachment if both of the following are established:

(1) The levy was not authorized solely because the prohibition of subdivision (c) of Section 483.010 was violated.

(2) The person who sold or leased, or licensed for use, the property, furnished the services, or loaned the money reasonably believed that it [would be used at least partly for a commercial or business purpose] [would not be used primarily for personal, family, or household purposes].

As you know, we have had continuing difficulty with the grounds for ex parte relief provided in Section 485.010. Subdivision (b) of that section now provides in part that "great or irreparable injury" is shown where the plaintiff shows:

(1) A danger that the property sought to be attached would be concealed or placed beyond the process of the court or substantially impaired in value if issuance of the order were delayed until the matter could be heard on notice.

A recent United States Supreme Court case (Mitchell v. W. T. Grant Co.) suggests a possible alternative to paragraph (1), and the staff asks that we be authorized to submit the following alternative to the Legislature if it appears that this would help passage of AB 2948. The alternative we propose is:

485.010. . . . (b)(1) The plaintiff has good reason to believe that the property sought to be attached would be concealed, substantially impaired in value, or made otherwise unavailable to levy if issuance of the order were delayed until the matter could be heard on notice.

We have also recently been contacted by Mr. William Holden of the Secretary of State's office regarding this bill. He has suggested some technical revisions which the staff believes that the Commission should consider. These revisions are as follows:

(1) On page 40, line 37 of the printed bill as amended in Senate May 21, 1974, strike out "filed" and insert:

recorded

(2) On page 40, line 40, after the period, insert:
Where, on the date of recording, the land on which the crops are growing or on which the timber is standing stands in the name of a third person, either alone or together with the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such third person.

(3) On page 41, line 1, after the period, insert:
The fee for filing and indexing each notice of attachment, notice of extension, or notice of release in the office of the Secretary of State is three dollars (\$3). Upon the request of any person, the Secretary of

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

(4) On page 47, line 5, after the period, insert:

The fee for filing or recording each notice of extension is three dollars (\$3).

(5) On page 50, line 18, after the period, insert:

The fee for filing or recording each written release is three dollars (\$3).

The first three revisions we have no objection to. Numbers (4) and (5) we think are unnecessary. Fees for the Secretary of State are already provided for by Sections 488.340 and 488.360. Fees for the county recorder are provided for by the Government Code. See Govt. Code § 27361. We are not aware that the DMV has any problems with the duties it has under Section 488.350. However, if fees are to be provided for the DMV in the Attachment Law, we think Section 488.350 is the place to do it--not in Sections 488.510 and 488.560. To forestall any objection, we suggest adding provisions comparable to subdivisions (c) and (d) of Section 488.340 to Section 488.350. Is the following satisfactory?

On page 39, after line 21, insert:

(f) The fee for filing and indexing each notice of attachment, notice of extension, or notice of release with the Department of Motor Vehicles is three dollars (\$3). Upon the request of any person, the Department of Motor Vehicles shall issue its certificate showing whether there is on file, on the date and hour stated therein, any notice of attachment, naming a particular person, and if a notice is on file, giving the date and hour of filing of each notice and the name of the plaintiff. The fee for the certificate issued by the department shall be two dollars (\$2). Upon request, the department shall furnish a copy of any notice of attachment or notice affecting a notice of attachment for a fee of one dollar (\$1) per page.

Mr. Holden also noted that neither Section 488.310 (p.36) nor Section 488.360(c) (p.40) instruct the county recorder how to record the notice of attachment. The staff believes that such detail is unnecessary here; it is not a part of the existing attachment law; its absence has not caused any problems that we are aware of and the matter seems to be covered in Government Code Section 27249(indices for attachments). In short, we think that the first three revisions suggested above are sufficient to cure the ambiguities raised by Mr. Holden.

Respectfully submitted,

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