#39.70 5/15/74

Memorandum 74-32

Subject: Study 39.70 - Prejudgment Attachment

Attached to this memorandum is a letter from John D. Bessey, representing the California Association of Collectors (Exhibit I). Mr. Bessey raises two objections to the prejudgment attachment bill. We believe that both points have been rather thoroughly discussed in the past; however, we have invited Mr. Bessey to attend the next meeting on Thursday night, May 23, to present his position in person.

We believe Mr. Bessey's letter is self-explanatory. In response to his objections, we reproduce below excerpts from pages 722-725 of our printed final recommendation. We also note that we do not believe that it will be very difficult for a plaintiff to know (or show) that a claim arises out of the conduct of a business. Moreover, we do not believe that even 20 days is adequate time to present a defense to probable validity and the analogy to Section 690.50 is inappropriate because that section deals with postjudgment claims of exemption where such a defense is not involved.

Cases in Which Attachment Is Authorized

The situations where attachment may be authorized are limited by constitutional requirements. A dominant theme of the recent California and federal court decisions in the area of prejudgment remedies is that assets of an individual which are "necessities of life" are constitutionally entitled to special protection because of the extreme hardship to the individual which results when he is deprived of their use. In its discussion of "necessities," the court in *Randone* referred in part to such consumer goods as "television sets, refrigerators, stoves, sewing machines and furniture of all kinds." Certainly a partially effective, if indirect, way of preventing attachment of such consumer necessities is to deny the use of the remedy in actions based on obligations generally and to authorize attachment only in actions to recover debts arising out of the conduct by the defendant of a trade, business, or profession. The 1972 legislation took just such an approach; it provides for attachment where the action is for an unsecured liquidated sum of money based on money loaned, a negotiable instrument, the sale, lease, or licensed use of real or personal property, or services rendered *and* is against any corporation, partnership, or individual engaged in a trade or business.

In essence, then, the 1972 act tends to restrict the availability of attachment to commercial situations by generally permitting attachment only against persons or organizations engaged in commercial activities. Unfortunately, the 1972 act does not specifically tie the types of alleged debts which may form the basis for attachment to the business activities of the defendant. Hence, for example, the 1972 act would not permit the attachment of the property of an ordinary resident wage earner in an action based on the furnishing of medical services or the sale of consumer goods to such individual. The act would, however, permit the attachment of the property of an individual doing business as a grocer or self-employed plumber on the same type of debt.[16] This inconsistency should be eliminated. The Commission recommends that the policy implicit in the 1972 act be continued by authorizing nonjurisdictional attachment only in those cases where the claim is based on an unsecured contract, whether express or implied, and arises out of the conduct by the defendant of a trade, business, or profession.

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Requirement of Notice and Opportunity for Hearing

Perhaps the primary failing of the California attachment procedure prior to the enactment of the 1972 statute was the failure to provide for notice to the debtor of the threatened attachment of his property and an opportunity to be heard before the attachment—the essence of due process.[16] Under the 1972 act, if the court or a commissioner thereof finds on the plaintiff's ex parte application that the plaintiff has established a prima facie case for attachment, the court is required to issue a notice of hearing on the application for the writ and a temporary restraining order prohibiting the defendant from transferring prior to the hearing any of his property subject to attachment except under limited circumstances.[17] The hearing on the application is held not less than 10 nor more than 30 days after issuance of the notice, and the notice must be served on the defendant not less than 10 days before the date set for hearing.[18] Each party is required to serve upon the other any affidavits intended to be introduced at the hearing at least 24 hours before the hearing. If the defendant does not appear in

[16] There is a possibility that the 1972 statute is void insofar as it authorizes attachment in consumer—as distinguished from commerical—actions. The title to the 1972 enactment provides that it is one "relating to attachment in commercial actions." Section 9 of Article IV of the California Constitution provides in part: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void."

person or by counsel, the statute requires the court to direct the issuance of a writ without taking further evidence. If the defendant does appear, the plaintiff must establish the probable validity of his claim and, if the court so finds, a writ is issued.

The Commission recommends a number of changes in this procedure. First, due process requires judicial review of the plaintiff's application prior to issuance of a notice of hearing only if issuance of a temporary restraining order is also sought. Hence, there could be a substantial saving in the time of court and counsel if issuance of a temporary restraining order is limited to those cases where preliminary restrictions on property transfers are warranted. (As to whether issuance of a temporary restraining order in every case is constitutionally permissible, see discussion *infra*.) The Commission accordingly recommends that the provision for issuance of a temporary restraining order in all cases be eliminated and that the present procedure be replaced by the usual noticed motion procedure which requires only one hearing before the court. Second, it is recommended that 20 days' written notice of the hearing be given the defendant. This allows enough time for the defendant to prepare and serve the plaintiff with notice of his opposition to the application. Third, the defendant should be required to serve written notice of his opposition and any claim of exemption on the plaintiff at least five days before the hearing. If such service is not made, the defendant should be prohibited from appearing in opposition to the application. The plaintiff, in turn, should notify the defendant at least two days before the hearing if he contests the claim of exemption. These procedures should achieve an early framing of the issues, eliminate surprise, and obviate any need for continuances and extended hearings. If no notice of opposition is served by the defendant, the plaintiff should still have to establish a prima facie case as under existing law.

Respectfully submitted,

Jack I. Horton
Assistant Executive Secretary

Memorandum 74-32

Exhibit I

LAW OFFICES OF

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May 9, 1974

Mr. John H. DeMoully
California Law Revision Commission
Stanford University
Palo Alto, California

Re: AB-2948 - McAllister

Dear John:

The Executive Committee of the California Association of Collectors has asked me to bring to your attention several provisions of the above-referenced bill with which they have objection. I make specific reference to Section 483.010 which describes the type of actions in which an attachment is authorized. As you are aware, under the present law the nature of the claim is not limited to one that arises out of conduct by the defendant in a trade, business or profession. You have so limited the nature of the action in your proposed legislation. The problem arises in specifically defining the nature of the debt such that it falls within the criteria of your proposed Section 483.010. Often a direct loan of money is made and it is not known whether it was used in a business activity or used for personal services. In that the type of defendant is limited to one who is engaged in a business or profession and the type of property subject to attachment is severly limited within the ambits of the Randone decision, it is our opinion that this further restriction on the nature of the action is unwarranted. We would hope you would consider seriously deleting this provision.

Our second objection is to Section 484.040 and other related provisions which provide a minimum of twenty days notice to the defendant prior to a hearing on the issuance of the Writ of Attachment. Under the present law, as you are aware, defendant is entitled to only ten days notice. I am aware that you have additional provisions for filing a

response by the defendant if he wishes to oppose the claim, nevertheless it is our opinion that granting defendant twenty days in which to respond to the writ gives him only further opportunity to dispose or secrete the property which the plaintiff seeks to attach. Certainly it was not your intent to encourage this type of activity on behalf of the defendant but lengthening the time in which he has to respond to the writ certainly encourages such activity. You will recall under CCP 690.50 a claim of exemption must be filed within ten days from the date of levy and the opposing response by the creditor must be filed within five days after the claim is filed. We are not aware of any undue hardship caused to either the debtor or creditor under these provisions. We would therefore request that due consideration be given to shortening the time of notice to ten or at the most fifteen days from the date of service. Certainly this will give the defendant more than ample time to formulate his written opposition if indeed he has such opposition.

We would appreciate your comments to our suggested revisions to this proposed legislation.

Very truly yours,

DAHL, HEFNER, STARK, MAROIS & JAMES

By
JOHN D. BESSEY

JDB/jvs