

First Supplement to Memorandum 75-19

Subject: Study 39.70 - Prejudgment Attachment (Amendments)

This supplementary memorandum discusses two subjects which remained incomplete in the staff draft of the Recommendation Relating to Amendments to the Attachment Law which was attached to Memorandum 75-19.

Also attached hereto are a letter from the Legislative Counsel's office (Exhibit I) questioning the constitutionality of proposed Section 482.060 (duties under Attachment Law are subordinate judicial duties), and a copy of Mosler v. Parrington (Exhibit II) cited in the letter. The staff does not believe Mosler is sufficient authority to hold Section 482.060 unconstitutional.

1. Cases in Which an Attachment May Be Issued

At the last meeting, the Commission instructed the staff to consult the Los Angeles County court commissioners on their views concerning the proper standard for issuance of a commercial attachment. Commissioner Bruce Geernaert indicated that he would be willing to comment on the various alternatives presented in Memorandum 75-17 (a copy of this memorandum is attached hereto); however, we have not yet received his response and have decided we should not delay sending this supplementary memorandum to you. Should we receive any response before the March meeting, we will forward it or distribute it at the meeting. We were informed that there is no official policy memorandum on attachment under the Marsh bill.

The following material implements the Commission's tentative decision on the cases in which an attachment may be issued. The following paragraph would be added to the introduction to the recommendation:

As enacted, Section 483.010 of the Attachment Law permits the issuance of attachment against a "defendant engaged in a trade, business, or profession"¹ provided that the subject of the contract upon which the claim is based was not used "primarily for personal, family, or household purposes." Section 483.010 failed to specify the time when the defendant must be engaged in a trade, business, or profession. Accordingly, the Commission recommends that Section 483.010 be amended to provide that the defendant must be so engaged when the claim against him arose. The effect of this amendment would be to make clear that an individual may not avoid attachment by retiring or going out of business after the claim arose but before the attachment is sought.

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1. For an interpretation of the meaning of "trade or business" under existing Section 537.2, see *Advance Transformer Co. v. Superior Court*, 44 Cal. App.3d 127, ___ Cal. Rptr. ___ (1974).

Section 483.010 would be amended as follows:

SEC. ____ . Section 483.010 of the Code of Civil Procedure is amended to read: "

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action against a defendant engaged when the claim arose 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.

(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.

(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 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.

Comment. Section 493.010 is amended to provide that the defendant must be engaged in a trade, business, or profession at the time the claim against him arose. This amendment makes clear that an individual may not avoid attachment by retiring or ceasing to engage in a trade, business, or profession. The question of whether a guarantor is subject to attachment depends upon whether he is engaged in a trade or business. See Advance Transformer Co. v. Superior Court, 44 Cal. App.3d 127, ___ Cal. Rptr. ___ (1974). Where attachment is not precluded by the standard of subdivision (c), the question whether an attachment will properly issue depends upon a determination that the individual is "engaged in a trade, business, or profession." The application of this standard is necessarily left to the courts, but it is not intended to limit attachment to sole proprietors and independent contractors.

2. Defendant's Liability for Wrongful Attachment of Third Person's Property

At the last meeting, the Commission directed the staff to prepare a tentative procedure for requiring the defendant to indicate the property in his possession belonging to third persons. If the defendant fails to provide accurate information, he should be liable for wrongful attachment instead of the plaintiff. The following sections attempt to achieve

this result. At the end of the suggested revisions, there are some additional questions which should be considered.

The introduction to the recommendation would contain the following discussion of this subject:

The attachment Law makes the plaintiff liable for damages, costs, and attorney's fees to a third person whose property is attached except where the plaintiff has relied on registered or recorded ownership.¹ In most cases, however, the defendant is in a much better position to know which property in his possession is the property of a third person.

For example, it is unreasonable to expect the plaintiff to know of the existence and the details of contractual relationships between the defendant and third persons who provide goods for sale on the defendant's premises or who lease

office furniture or machinery to the defendant. Even a plaintiff who attempted diligently to determine the ownership of property in the possession of the defendant would be acting at his peril if he were to levy on equipment or inventory generally; the burden of listing each specific item of property which after an investigation is determined to belong to the defendant would make the attachment remedy too burdensome to be of any use in many cases. Accordingly, the Commission recommends that the Attachment Law as enacted be amended to provide that the defendant is liable for the plaintiff's good faith levy of attachment obtained after a noticed hearing on the property of third persons in the possession of the defendant. The defendant would be able to avoid liability by claiming an exemption for such property described in the application for the writ at the hearing on the issuance of the writ.² Of course, the defendant would not need to claim such an exemption where he has no property of third persons in his possession or where he has such property but it is not described in the copy of the application for the writ of attachment which is sent to the defendant with the notice of the plaintiff's application and hearing.³ The defendant's liability should be limited to \$2,500 if the action is in municipal court and \$7,500 if the action is in superior court.⁴

1. See Code Civ. Proc. §§ 490.010 and 490.020.

2. See Code Civ. Proc. §§ 484.070 (writ and order) and 484.350 (additional writs).

3. See Code Civ. Proc. §§ 484.040, 484.050, 484.330, and 484.340.

4. These amounts are the same as the amounts of the plaintiff's initial undertaking provided by Section 489.220.

* * * * *

The bill would contain the following amendments and additions:

SECTION 2. Section 484.050 of the Code of Civil Procedure is

amended to read:

484.050. The notice of application and hearing shall inform the defendant of all of the following.

(a) A hearing will be held at a place and at a time, to be specified in the notice, on plaintiff's application for a right to attach order and a writ of attachment.

(b) The order will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decisions at the hearing on the application for the order.

(c) If the right to attach order is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment. However, the order will not be limited to the property described in the application but may later be extended to any nonexempt property of the defendant.

(d) If the defendant desires to oppose the issuance of the order, he shall file with the court a notice of opposition and supporting affidavit as required by Section 484.060 not later than five days prior to the date set for hearing.

(e) If the defendant claims that the property described in the application, or a portion thereof, is exempt from attachment, he shall include such claim in the notice of opposition filed pursuant to Section 484.060 or file a separate claim of exemption with respect to the property as provided in Section 484.070. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(f) The defendant may obtain a determination at the hearing whether property not described in the application is exempt from attachment, but the failure to claim that property not so described is exempt from attachment will not preclude him from making a claim of exemption with respect to such property at a later time.

(g) If the defendant does not claim an exemption for property in his possession belonging to another person which is described in the plaintiff's application, he may be liable to such person for wrongful attachment damages as provided by Section 490.025 should such property be attached.

~~(4)(b)~~ Either the defendant or his attorney or both of them may be present at the hearing.

~~(4)(c)~~ The notice shall contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. Such attorney should be consulted promptly so that he may assist you before the time set for hearing."

Comment. The amendment of Section 484.050 provides that the notice to the defendant shall inform the defendant that, if he wishes to avoid liability for the damages occasioned by the attachment of the property of a third person in his possession which is described in the application, he must claim an exemption for such property. See Sections 484.070, 490.025. Such property is exempt as provided by Section 487.010 and subdivision (d) of Section 489.020.

SEC. 2. Section 484.070 of the Code of Civil Procedure is amended to read:

484.070. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may not later claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

(b) If the defendant desires to claim at the hearing that property not described in the plaintiff's application is exempt from attachment, in whole or in part, the defendant shall claim such exemption as provided in this section. Failure to make such claim does not preclude the defendant from later claiming the exemption. If the claim is made as provided in this section but the defendant fails to prove that the property is exempt from attachment, he may not later claim that the property, or a portion thereof, is exempt unless he shows that the right to the exemption is the result of a change in circumstances occurring after the hearing.

(c) The claim of exemption shall:

(1) Describe the property claimed to be exempt.

(2) Specify the statute section supporting the claim.

If property is claimed to be exempt because it is property of a person other than the defendant in the defendant's possession, the claim of exemption shall so state without specifying a statute section.

(d) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues raised.

(e) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five days before the date set for the hearing.

(f) If the plaintiff desires to oppose the claim of exemption, he shall file and serve on the defendant, not less than two days before the date set for the hearing, a notice of opposition to the claim of exemption, accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the plaintiff does not file and serve a notice of opposition as provided in this subdivision, no writ of attachment shall be issued as to the property claimed to be exempt. If all of the property described in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition as provided in this subdivision, no hearing shall be held and no right to attach order or writ of attachment shall be issued.

(g) If the plaintiff files and serves a notice of opposition to the claim as provided in this section, the defendant has the burden of proving that the property is exempt from attachment.

Comment. Section 484.070 is amended to make clear that the defendant claiming an exemption for property of a third person in his possession need not cite any statutory authority. Of course, subdivision (d) requires the defendant to file an affidavit which contains sufficient factual information to support the claim. See Section 484.050.

330. 3. Section 484.340 of the Code of Civil Procedure is amended to read:

484.340. 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 described in the application.

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

(c) A writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that such property is exempt from attachment.

(d) If the defendant claims that the property described in the application, or a portion thereof, is exempt from attachment, he shall file with the court a claim of exemption with respect to the property as provided in Section 484.350 not later than five days prior to the date set for hearing. If he does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the hearing.

(e) If the defendant does not claim an exemption for property in his possession belonging to another person which is described in the plaintiff's application, he may be liable to such person for wrongful attachment damages as provided by Section 490.025 should such property be attached.

~~(e)(6)~~ Either the defendant or his attorney or both of them may be present at the hearing.

~~(f)(9)~~ The notice shall contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. Such attorney should be consulted promptly so that he may assist you before the time set for hearing."

Comment. See the Comment to the amendment of Section 484.050.

SEC. 4. Section 484.350 of the Code of Civil Procedure is amended to read:

484.350. (a) If the defendant claims that the property described in the plaintiff's application, or a portion of such property, is exempt from attachment, the defendant shall claim such exemption as provided in this section. If he fails to do so, he may no longer claim such exemption unless he shows that he did not have a right to the exemption at the time the plaintiff filed his application and that the right to the exemption is the result of a change in circumstances occurring after that time.

(b) The claim of exemption shall:

- (1) Describe the property claimed to be exempt.
- (2) Specify the statute section supporting the claim.

If property is claimed to be exempt because it is property of a person other than the defendant in the defendant's possession, the claim of exemption shall so state without specifying a statute section.

(c) The claim of exemption shall be accompanied by an affidavit supporting any factual issues raised by the claim and points and authorities supporting any legal issues raised.

(d) The claim of exemption, together with any supporting affidavit and points and authorities, shall be filed and served on the plaintiff not less than five days before the date set for the hearing.

Comment. See the Comment to the amendment of Section 484.070.

SEC. 5. Section 490.020 of the Code of Civil Procedure is amended to read:

490.020. (a) Except as provided in Section 490.025, the liability of a plaintiff for causing a wrongful attachment includes both of the following:

- (1) All damages proximately caused to the defendant or any other person by the wrongful attachment.
- (2) All costs and expenses, including attorney's fees, reasonably expended in defeating the attachment.

(b) The liability of a plaintiff for wrongful attachment pursuant to Section 490.010 is limited by the amount of the undertaking.

Comment. Section 490.020 is amended to reflect the exception to the plaintiff's liability for wrongful attachment provided by Section 490.025.

SEC. 6. Section 490.025 is added to the Code of Civil Procedure, to read:

490.025. (a) If the plaintiff in good faith causes a writ of attachment obtained pursuant to Article 1 (commencing with Section 484.010) or Article 2 (commencing with Section 484.310) of Chapter 4 to be levied on the property of a person other than the defendant in the defendant's possession in reliance on the defendant's claim of exemption made pursuant to Section 484.070 or 484.350 or on the lack thereof, the defendant and not the plaintiff or the plaintiff's sureties is liable for a wrongful attachment described in subdivision (d) of Section 490.010.

(b) The liability of a defendant pursuant to subdivision (a) includes both of the following:

(1) All damages proximately caused to the person other than the defendant by the wrongful attachment.

(2) All costs and expenses, including attorney's fees, reasonably expended by the person other than the defendant in defeating the attachment.

(c) The liability of a defendant for wrongful attachment pursuant to this section may not exceed two thousand five hundred dollars (\$2,500) in an action in the municipal court and seven thousand five hundred dollars (\$7,500) in an action in the superior court.

Comment. Section 490.025 makes the defendant liable for wrongful attachment of property in his possession belonging to a third person where the plaintiff in good faith causes a writ of attachment issued after a noticed hearing to be levied on the third person's property. Section 490.025 recognizes that a plaintiff should not be liable in such situations where he has relied in good faith on the defendant's claim of exemption. If the defendant wishes to avoid the liability provided by this section, he may claim an exemption for property of a third person in his possession. See Sections 484.050, 484.070, 484.340, and 484.350.

Subdivision (b) provides that the defendant is liable for the same types of damages as is the plaintiff pursuant to Section 490.020. Subdivision (c) limits the defendant's liability to an amount equivalent to the amount of the plaintiff's initial undertaking as provided in Section 489.220.

SEC. 7. Section 490.050 of the Code of Civil Procedure is amended to read:

490.050. A (a) Except as provided by subdivision (b), a person not originally a party to an action whose property is attached is entitled to intervene in the action and to recover damages for wrongful attachment to the same extent and in the same manner as a defendant in the action. For this purpose, the person whose property is attached shall be deemed to be the beneficiary of the undertaking for the attachment of such property and shall have all rights of the beneficiary, including the right to recover such damages by using the procedure provided by Section 490.030.

(b) A person seeking to recover damages for wrongful attachment against a defendant liable pursuant to Section 490.025 may intervene in

the action.

Comment. Section 490.050 is amended to provide for the intervention of a third person whose property is attached and to whom the defendant is liable under Section 490.025.

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This procedure puts the duty on the defendant to come forward. Is the notice contained in the notice of application sufficient? Should the plaintiff be required to state in his application for the writ that he has reason to believe that the defendant has property of a third person in his possession? Should the plaintiff have to ask specifically in his application for a direction to the defendant that he indicate property of third persons? Should this information be obtainable only in an examination procedure such as is available after judgment pursuant to Sections 714-723? The third person may enforce the defendant's liability under the above draft by intervening in the action; should the third person be required to file a separate action against the defendant?

Respectfully submitted,

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Sacramento, California
February 20, 1975

Mr. John H. De Mouilly, Executive Secretary
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Attachment Law - #4386

Dear Mr. De Mouilly:

Pursuant to your request, we have prepared the enclosed draft, relating to attachment.

The draft would provide that the judicial duties to be performed under the Attachment Law (Ch. 1516, Stats. 1974) are "subordinate judicial duties" within the meaning of Section 22 of Article VI of the California Constitution and may be performed by appointed officers such as court commissioners.

While we have not had an opportunity to consider the matter fully, we think a constitutional question could be raised under Section 22 of Article VI of the California Constitution with respect to whether the judicial duties to be performed under the Attachment Law are in reality "subordinate judicial duties" (see Mosler v. Parrington (1972), 25 Cal. App. 3d 354).

Very truly yours,

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