

First Supplement to Memorandum 75-31

Subject: Study 39.70 - Prejudgment Attachment (Amendments)

This supplementary memorandum discusses two additional problems in the Attachment Law.

Property Subject to Attachment

Section 487.010 provides the property subject to attachment depending on the type of defendant. In May, 1974, subdivision (d) was added to make it clear what property of an individual liable on a claim against a partnership was subject to attachment. Originally, this subdivision merely stated a special situation and was not intended to provide a standard different from that applicable to an individual engaged in a trade, business, or profession which is not a partnership. At that time, the property subject to attachment under subdivision (c) was limited to all real property and the listed personal property "used or held for use in the defendant's trade, business, or profession." The quoted language was amended out in the Legislature in August 1974. However, the parallel language in subdivision (d) -- "all of the defendant's real property and all of his property which is of a type described in subdivision (c) and which is used or held for use in the partnership's trade, business, or profession" -- was not deleted. Consequently, an individual who is subject to attachment because of his liability on a partnership obligation is favored over an individual who is subject to attachment for some other reason because, under subdivision (d), only property used or held for use in the partnership is subject to attachment. The staff believes this is an inequitable and unintentional result.

The staff recommends that subdivision (d) be deleted in its entirety. The provisions of subdivision (c) apply adequately in situations where an

individual is joined in an action against a partnership or in an action against an association. The Attachment Law does not purport to state the rules relating to when an individual is liable. When he is potentially liable, then Section 483.010 must be satisfied--the claim must arise out of the individual's conduct of a trade, business, or profession and the subject of the contract must not have been used for personal, family, or household purposes. If an attachment is properly issued, the property listed in subdivision (c) of Section 487.010 should be subject to attachment regardless of whether the individual is liable for his conduct of a business as a sole proprietor, an individual contractor, a partner, or a member of an association.

A paragraph should be added to the preliminary part of the recommendation reading as follows:

Property of an Individual Subject to Attachment

Subdivision (d) of Section 487.010 provides that, where the defendant is an individual sued for his individual liability as a partner, all of his real property and all of his property which is of a type described by subdivision (c)¹ if "used or held for use in the partnership's trade, business, or profession" is subject to attachment. However, subdivision (c) provides that the listed types of property are subject to attachment where the defendant is an individual without the general requirement that such property be that used in the defendant's trade, business, or profession.² The Commission recommends that subdivision (d) be repealed because

1. Subdivision (c) of Section 487.010 provides that the following types of personal property are subject to attachment where the defendant is an individual: (1) accounts receivable, chattel paper, and choses in action of at least \$150; (2) deposit accounts over \$1,000; (3) equipment; (4) farm products; (5) inventory; (6) judgments arising out of the individual's conduct of a trade, business, or profession; (7) money on the premises where the individual conducts a trade, business, or profession; (8) negotiable documents; (9) negotiable instruments; (10) securities.
2. In the Commission's original recommendation, subdivision (c) of Section 487.010 limited property of an individual subject to attachment to that "used or held for use in the defendant's trade, business, or profession." See 11 Cal. L. Revision Comm'm Reports, Recommendations, and Studies 793 (1973). This language was amended out before final passage of the Attachment Law; however, the parallel language in subdivision (d) remained. See Assembly Bill 2948 (1974 Reg. Sess.), as amended in the Senate, August 22, 1974.

it results in a different standard for determining which property of an individual is subject to attachment depending on whether the trade, business, or profession conducted by the individual is a partnership. If an individual defendant is personally liable in an action against a partnership, his property should not be afforded any greater protection than that of an individual who conducts his business, for example, as an independent contractor or sole proprietor.

The following paragraph should replace the last paragraph of the Comment to the amendment of Section 487.010 on page 21 of the draft recommendation attached to Memorandum 75-31:

Subdivision (d) is repealed. Where an individual is sued for his individual liability as a partner or a member of an association, subdivision (c) provides the property of the individual which may be reached by the attachment. Consequently, all individuals against whom attachment may properly be issued pursuant to Section 483.010 are treated the same regardless of whether their personal liability arises out of their conduct of a trade, business, or profession as a sole proprietor, an independent contractor, a partner, or a member of an association.

Levy on Inventory and Farm Products by Filing Notice

Mr. Bill Holden, Staff Counsel in the Office of the Secretary of State, has raised several questions concerning the procedure for levying of inventory and farm products by filing notice (Section 488.360(c)) and the effect of the lien of attachment obtained by such a levy (Section 488.500(a)). Mr. Holden's letter is attached as Exhibit I. In order to correct these defects, several changes need to be made.

Subdivision (c) of Section 488.360 should be further amended as follows:

(c) Notwithstanding the provisions of subdivision (a), upon the election and the instructions of the plaintiff, the levying officer shall attach farm products or inventory of a going business by filing a notice in the form prescribed by the Secretary of State which indicates that the plaintiff has acquired an attachment lien on the farm products or inventory of the defendant and, where applicable, on after-acquired property and proceeds. The notice shall state the name and mailing address, if known, of both the plaintiff and the defendant, and shall describe the property attached and state whether after-acquired property and proceeds are attached. When the property is crops or timber to be cut, the notice shall be recorded in the office of the county recorder in the county where the real property on which the crops are growing or on which the timber is standing is located. Where, on the date of recording, the real property on which the crops are growing or on which the timber is standing stands upon the records of the county in the name of a person other than the defendant, the recorder shall index such attachment when recorded in the names of both the defendant and such other person identified in the writ. In all other cases, the notice shall be filed in the office of the Secretary of State. 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 a 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 is 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. A lien acquired by filing a notice pursuant to this subdivision shall provide provides the plaintiff with the same rights and priorities in the attached property and proceeds of the attached property as these of a secured party with a perfected security interest in collateral where the filed financing statement covering the original collateral also covers proceeds as would

be obtained by a secured party who perfects a security interest (other than a purchase money security interest) in such property by filing a financing statement at such time and place . Promptly after filing or recording and in no event more than 15 days after the date of filing or recording pursuant to this subdivision, the levying officer shall mail a copy of the writ and the notice of attachment to the defendant and, in the case of crops growing or timber standing on real property, to any other person identified in the writ in whose name the real property stands upon the records of the county at the address of such other person as shown by the records of the office of the tax assessor of the county where the property is located.

The following material would be added to the Comment to Section 488.360:

Subdivision (c) is also amended to provide specifically that the lien obtained by filing the notice pursuant to this subdivision may apply to after-acquired property and proceeds from the sale or exchange of attached inventory or farm products. The second sentence providing for the contents of the notice is added to make clear that the plaintiff who desires to attach after-acquired property or proceeds must so state in the notice filed with the Secretary of State or county recorder. Compare Com. Code §§ 9203(3) and 9204. The next-to-last sentence of subdivision (c) is amended to make clear that a plaintiff who attaches property by filing a notice pursuant to subdivision (c) describing farm products or inventory, including after-acquired property and proceeds, has the same rights and priorities as he would have if he had perfected a security interest (other than a purchase money security interest) in such property by filing a financing statement at the time and place he filed the notice under subdivision (c). See Com. Code § 9312(5), (6)(priority where special rules applicable to purchase money security interests do not apply).

Section 488.500 should be amended as follows:

Sec. ____ . Section 488.500 of the Code of Civil Procedure is amended to read:

488.500. (a) The Except as provided in subdivision (c) of Section 488.360, levy of a writ of attachment creates a lien on the property levied upon which is valid against all subsequent transferees of the property.

(b) The lien of attachment on real property levied upon pursuant to Section 488.320 becomes effective on the date of recording pursuant to that section.

(c) The lien of attachment on property levied upon pursuant to Section 488.330 (tangible personalty in possession of defendant), 488.340(a) (inventory and farm products, alternate method), 488.350(a) (2) (chattel paper in possession of defendant), 488.400(a) (2) (negotiable instruments, documents, or money in possession of defendant), or 488.410(a) (securities in possession of defendant) becomes effective on the date the levying officer takes custody of the property pursuant to such provision.

(d) The lien of attachment on property levied upon pursuant to Section 488.340 (equipment, other than motor vehicles, of a going business), 488.350 (motor vehicles and vessels which are equipment of a going business), or 488.360(c) (farm products and inventory, alternate method) becomes effective on the date of filing pursuant to such provision.

(e) The lien of attachment on property levied upon pursuant to Section 488.330 (tangible personalty in possession of third person), 488.380(a) (1) (chattel paper in possession of third person), 488.390 (deposit accounts), 488.400(a) (1) (negotiable instruments, documents, or money in possession of third person), or 488.410(b) (securities in possession of certain third persons) becomes effective on the date of service on the person in possession of such property.

(f) The lien of attachment on property levied upon pursuant to Section 488.370 (accounts receivable, choses in action) becomes effective on the date of service on the account debtor or insurer.

(g) The lien of attachment on a judgment levied upon pursuant to Section 488.420 becomes effective on the date of service on the judgment debtor.

(h) The lien of attachment on property levied upon pursuant to Section 488.430 becomes effective on the date of filing pursuant to that section.

(i) Notwithstanding subdivisions (b) through (h), inclusive, and except as otherwise provided by Section 486.110, where a temporary protective order has been issued pursuant to Chapter 6 (commencing with Section 486.010), the lien of attachment on property described in such order and subsequently attached is effective from the date of service of such order.

Comment. Subdivision (a) of Section 488.500 is amended to provide an exception to the validity of the attachment lien against subsequent transferees where inventory or farm products are levied upon by filing the notice provided by subdivision (c) of Section 488.360 with the Secretary of State. In this situation, the attaching plaintiff is afforded the rights and priorities of a secured party with a perfected security interest and, under Commercial Code Section 9307, a buyer in the ordinary course of business takes free of a security interest even though he knows of it.

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

First Supplement to
Memorandum 75-31



Office of the Secretary of State
March Fong Eu

EXHIBIT I

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Sacramento, California 95814

Executive Office	(916) 445-6
Certification	(916) 445-1
Corporation Index	(916) 445-2
Corporation Records	(916) 445-1
Election Division	(916) 445-0
Legal Division (Corp.)	(916) 445-0
Notary Public Division	(916) 445-6
State Archives	(916) 445-4
Uniform Commercial Code	(916) 445-8

April 28, 1975

Honorable Alister McAlister
Member of the Assembly
State Capitol
Sacramento, California 95814

RE: ATTACHMENT LAW
AB 919 (1975-76)
AB 2948 (1973-74)

Pursuant to our telephone conversation, enclosed is a copy of a memorandum I prepared for the Secretary of State concerning the Attachment Law which you carried last year for the Law Revision Commission.

In my opinion the assumptions of the Commission as to an attachment lien on inventory of a going business or farm products were not carried into the statute and an amendment is highly desirable in order to avoid uncertainty. The next to last sentence of Section 488.360(c) should be revised to indicate that the attachment lien extends to all inventory or farm products of the defendant including afteracquired property and proceeds and that the priority is the same as for a secured party who has filed a financing statement at the same date and time and in the same office as the notice of attachment lien and excluding from such priority a secured party having priority under subdivisions (3) or (4) of Section 9312 of the Uniform Commercial Code. There should also be an amendment to Section 488.500(a) to provide specific wording as to the buyer in the ordinary course of business taking free of the lien similar to Section 9307 (1) of the Uniform Commercial Code.

Very truly yours,

Bill Holden
BILL HOLDEN
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Memorandum Concerning
The Attachment Law

Statutes of 1974, Chapter 1515 (AB 2948)
Prepared by Bill Holden, Staff Counsel, Office
of the Secretary of State

Section 488.340 of the Code of Civil Procedure provides for the levy of an attachment on the equipment of a going business by filing a notice with the office of the Secretary of State. It further provides that the notice shall be "in the form prescribed by the Secretary of State" and shall contain "a description of the specific property attached."

Section 488.360(c) of the C.C.P. provides for the levy of an attachment on farm products or inventory of a going business by filing a notice with the office of the Secretary of State or, in certain instances, by recording a notice with a county recorder. It further provides that the notice shall be "in the form prescribed by the Secretary of State."

The question arises as to whether, in the case of inventory of a going business, the notice should be required to contain a description of the specific property attached similar to the notice in the case of equipment. There are two aspects of this matter. One aspect is a description of property and the other aspect is the time frame. As to time, there is no specific provision of The Attachment Law for the attachment to apply to afteracquired property, even if it is merely replacement for inventory which is sold, and therefore, in order to avoid confusion, the instructions for the form of notice might well indicate that the description of the inventory must be limited to inventory of the defendant at the date of the levy and excluding afteracquired property.

In the Recommendation of the Law Revision Commission, the Comment to Section 488.360 of the C.C.P. indicates that the Commission assumes that the attachment lien on inventory extends to after-acquired property and that a buyer of such inventory in the ordinary course of business takes free of the lien. Serious question exists whether these assumptions find support in the text of the statute.

Section 9204(1) of the Uniform Commercial Code specifically authorizes the security agreement to include afteracquired property. Section 488.360 of the C.C.P. provides that the lien on inventory by a filed notice of attachment "shall provide the plaintiff the same rights and priorities in the attached property and proceeds of the attached property as those of a secured party with a perfected security interest in collateral where the filed financing statement covering the original collateral also covers proceeds." The difficulty in interpreting the quoted language is that the rights of the secured party with respect to afteracquired property and also with respect to proceeds can only be determined by examination of the security agreement and in an attachment situation there is no security agreement or anything comparable to it. Further, in the case of a secured party, whether the security interest attaches to all the inventory or only to certain described portions also depends on the security agreement.

Section 9307(1) of the U.C.C. provides that a buyer in the ordinary course of business takes free of a security interest created by his seller. Section 488.500 of the C.C.P. provides that the levy of a writ of attachment creates a lien on the property levied upon which is valid against all subsequent transferees of the property.

Other sections of the U.C.C. bearing on the rights of the secured party are 9109, 9201, 9203, 9205, 9302, 9303, 9306 and 9312. References to sections of the U.C.C. are to those sections as they will read on January 1, 1976, the operative date of The Attachment Law.