

Memorandum 75-82

Subject: Study 39.160 - Revision of Attachment Law

At the October meeting, the Commission approved the Recommendation Relating to Revision of the Attachment Law for printing except for further changes to deal with the problem of excessive attachment. This memorandum suggests amendments to deal with this problem and further discusses the relationship between the lien of the temporary protective order and a general assignment or proceedings for the judicial distribution of assets raised by the letter attached as Exhibit I.

Excessive Attachment

The staff recommends two changes: First, the language in sections providing for the issuance of the writ should be changed to make more clear the duty of the court to determine the amount to be secured by the attachment and the property to be levied upon to satisfy that amount. Hence, Section 484.090 would be amended as follows:

§ 484.090 (amended). Hearing; issuance of order and writ

SEC. ____ . Section 484.090 of the Code of Civil Procedure is amended to read:

484.090. (a) At the hearing, the court shall consider the showing made by the parties appearing and shall issue a right to attach order if it finds all of the following:

(1) The claim upon which the attachment is based is one upon which an attachment may be issued.

(2) The plaintiff has established the probable validity of the claim upon which the attachment is based.

(3) The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

(b) If, in addition to the findings required by subdivision (a) the court finds that the defendant has failed to prove that all the property sought to be attached is exempt from attachment and the plaintiff has provided the undertaking required by Article 2 (commencing with Section 489.210) of Chapter 9, it shall issue order the issuance of a writ of attachment. The court shall determine and the writ of attachment shall state the amount to be secured by the attachment and ~~describe~~ the property to be levied upon to satisfy such amount.

(c) If the court determines that property of the defendant is exempt from attachment, in whole or in part, the right to attach order shall describe such property and prohibit attachment of such property.

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities.

Comment. The first sentence of subdivision (b) of Section 484.090 is amended to make clear that the court orders the clerk to issue the writ. The second sentence of subdivision (b) is amended to make explicit the duty of the court to determine the amount to be secured by the attachment and the property of the defendant to be attached. In fulfilling this duty, the court should seek to avoid the attachment of property of a value greatly in excess of the amount to be secured by the attachment. Compare Section 488.030(b)(levying officer's duty to levy on no more property than is clearly sufficient to satisfy the amount to be secured).

Similar amendments would be made to Sections 484.370, 484.520, 485.220, 485.540, 492.030, and 492.090.

Second, a section should be added which would provide a procedure for the defendant to obtain the release of property of a value in excess of the amount necessary to satisfy the amount to be secured by the attachment. The section, based on Barceloux v. Dow and patterned after other provisions of the Attachment Law, would read as follows:

§ 488.555. (added) Release of excessive attachment; noticed motion

SEC. ____ . Section 488.555 is added to the Code of Civil Procedure, to read:

488.555. (a) The defendant may apply by noticed motion to the court in which the action is pending for an order releasing the attachment of property to the extent that the value of the property exceeds the amount reasonably sufficient to secure the plaintiff's claim.

(b) The notice of motion shall state the grounds on which the motion is based and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised.

(c) At the hearing on the motion, the court shall determine the value of the property and order the release of the attachment of all the property but that reasonably sufficient to satisfy the amount to be secured by the attachment.

(d) The court's determinations shall be made upon the basis of the pleadings and other papers in the record; but, upon good cause shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of such additional evidence or points and authorities.

Comment. Section 488.555 is new. It codifies the rule in Barceloux v. Dow, 174 Cal. App.2d 170, 344 P.2d 41 (1959), permitting the release of an excessive attachment on noticed motion. It is appropriate to use the procedure provided by this section where the defendant seeks relief from the attachment of property with a value greatly in excess of the amount to be secured by the attachment as stated in the right to attach order. The standard of value of the property and the manner of its determination is left to the court. In Barceloux v. Dow, the trial court determined the "minimum value" of the property (shares of stock) to decide whether there was an excessive attachment, and rejected the "forced-sale value" urged by the attaching plaintiff. The procedure provided by this section may not be used to contest either the issuance of the right to attach order or the writ of attachment or to claim an exemption. See Sections 482.100 (postlevy exemption claim based on change in circumstances), 484.060 (procedure for opposing issuance of right to attach order), 484.070 (claim of exemption at initial hearing), 484.350 (claim of exemption at hearing on additional writ), 484.530 (claim of exemption after levy of ex parte additional writ), 485.230 (claim of exemption after levy of ex parte writ), 485.240 (procedure for setting aside ex parte right to attach order and quashing writ), 492.050 (procedure for setting aside ex parte right to attach order and quashing writ issued against non-resident). See also Section 488.030(b) (levying officer duty to levy on only so much property as is clearly sufficient to satisfy amount secured by attachment). An excessive attachment may also make the plaintiff liable for an abuse of process. See White Lighting Co. v. Wolfson, 68 Cal.2d 336, 438 P.2d 345, 66 Cal. Rptr. 697 (1968).

A paragraph should be added to the introduction to the recommendation reading:

Release of Excessive Attachment

Neither the interim statute or the Attachment Law provide explicitly for the release of attached property to the extent that its value exceeds the amount sufficient to satisfy the plaintiff's claim. The courts, however, have permitted the defendant to seek the release of an excessive attachment by noticed motion.¹ The Commission recommends that this procedure for releasing an excessive attachment be codified in the Attachment Law.

1. Barceloux v. Dow, 174 Cal. App.2d 170, 344 P.2d 41 (1959).

We believe the matter of counterclaiming for abuse of process for an excessive attachment is best left to general procedural law and case law. In White Lighting Co. v. Wolfson, 68 Cal.2d 336, 350, 438 P.2d 345, 66 Cal. Rptr. 697 (1968), the court held that "the attachment defendant should be able to assert the damages caused by the excessive attachment in the attaching creditor's primary action."

Temporary Protective Order Lien v. General Assignment

In the letter attached as Exhibit I, Mr. Hal Coskey urges the Commission to reconsider the addition of a provision to the effect that the temporary protective order expires upon the making of a general assignment for the benefit of creditors or the commencement of judicial proceedings for the distribution of assets.

Section 486.090 would read as follows:

SEC. __. Section 486.090 of the Code of Civil Procedure is amended to read:

486.090. Except as otherwise provided in ~~Sections 484.080, 486.110, and 489.320 in this title~~, the temporary protective order shall expire at the earliest of the following times:

(a) Forty days after the issuance of the order or, if an earlier date is prescribed by the court in the order, on such earlier date.

(b) As to specific property described in the order, when a levy of attachment upon that property is made by the plaintiff.

(c) When the defendant makes a general assignment for the benefit of creditors or proceedings for the liquidation or rehabilitation of an insolvent defendant's estate are commenced before the lien of the temporary protective order is perfected.

The following would be added to the Comment.

Subdivision (c) is added to make clear that the unperfected lien of the temporary protective order is ineffective where there has been a general assignment for the benefit of creditors or where an insolvent defendant is involved in proceedings for the purpose of liquidation or rehabilitation of his estate. This continues the substance of a portion of former Section 542b but is more general in its terminology so as to include all insolvency proceedings, e.g., proceedings under the Bankruptcy Act, 11 U.S.C. § 1 et seq. (1970), the National Bank Act, 12 U.S.C. § 21 et seq. (1970), Fin. Code § 3100 et seq. (liquidation, conservatorship, reorganization and dissolution of banks), and Ins. Code § 1010 et seq. (insolvency and delinquency of insurance companies).

The staff still believes that as a general principle procedures contemplating the distribution of the debtor's assets among all or several creditors should have priority over a general lien of the sort represented by the temporary protective order. That is the thinking represented in Section 542b of the interim statute. The staff does not understand Mr. Coskey's comment that "under the present law, if the debtor chooses to make an assignment for the benefit of creditors after receiving notice of an attachment hearing, the attaching creditor has some say as to whom the assignee will be, or if a bankruptcy would be preferable to an assignment," since the proposed amendment to Section 486.090 is intended to continue the substance of the omitted portion of Section 542b.

The last sentence of the letter also misstates the effect of the proposed amendment and existing law where it says "an assignee could accept an assignment, thus releasing an attachment, and thereafter reconvey to the debtor." If the plaintiff has levied an attachment, it is not released; only the temporary protective order is extinguished by the assignment.

Respectfully submitted,

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EXHIBIT I

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October 14, 1975

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Re: Revision of Attachment Law

Gentlemen:

We would strongly urge you to reconsider the addition of subparagraph (c) in §486.090.

Assignments for the benefit of creditors are common law procedures in the State of California. Unlike some of the eastern states, the assignee is chosen by the debtor. The sole remedy of a dissenting creditor is to attempt to find two other creditors to cause a bankruptcy proceeding to be filed.

By providing that an assignment for the benefit of creditors will terminate the lien of a temporary protective order, one of the last vestiges of protection of a creditor is being removed. At least under the present law, if the debtor chooses to make an assignment for the benefit of creditors after receiving notice of an attachment hearing, the attaching creditor has some say as to whom the assignee will be, or if a bankruptcy would be preferable to an assignment. Further complication is going to arise as to what constitutes an assignment for the benefit of creditors. There are cases where an assignee has reconveyed title after accepting an assignment. As the law is drafted, an assignee could accept an assignment, thus releasing an attachment, and thereafter reconvey to the debtor.

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We would suggest to you that there is no affirmative purposes to be served in adding subparagraph (c) to §486.090. It may well be possible also that a debtor filing a bankruptcy proceeding could be solvent so that the attachment lien obtained would be non-dischargeable in the bankruptcy proceeding. Why should that creditor be denied the benefit of his prompt action by the State of California?

Very truly yours,


HAL L. COSKEY
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HLC/bh