

Memorandum 78-8

Subject: Study #D-39.165 - Attachment (Unlawful Detainer and
Miscellaneous Matters)

Attached are two copies of a staff draft of a recommendation we proposed be approved for printing and submission to the 1978 Legislature. (It would be printed now so that it could be reproduced and be available for legislative hearings and would be published in our next Annual Report.) We believe that the recommendation does not present policy issues of such great significance that we should delay the submission of the recommendation until the 1979 legislative session.

Please mark your editorial revisions on one copy of the recommendation to turn in to the staff at the meeting so that they can be taken into consideration when the recommendation is prepared for the printer.

The Commission has previously approved the statutory provisions and official Comments relating to:

(1) Definition of "chose in action."

(2) Levy on deposit account or safe deposit box not held solely in name of debtor.

The substance of the statutory provision relating to unlawful detainer actions has been approved in principle, but the statutory provision and official Comment should be reviewed with care.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

#D-39.165

1/20/78

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

STAFF DRAFT

RECOMMENDATION

relating to

TECHNICAL REVISIONS IN THE ATTACHMENT LAW

Unlawful Detainer Actions

Bond for Levy on Joint Deposit Account or Safe Deposit Box

Definition of "Chose in Action"

February 1978

CALIFORNIA LAW REVISION COMMISSION

STANFORD LAW SCHOOL
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LETTER OF TRANSMITTAL

February 10, 1978

To: The Honorable Edmund G. Brown Jr.
Governor of California and
The Legislature of California

The California Law Revision Commission was directed by Resolution Chapter 27 of the Statutes of 1972 to study the subject of creditors' remedies, including prejudgment attachment. Commission recommended legislation relating to prejudgment attachment--the Attachment Law--was enacted in 1974. 1974 Cal. Stats., Ch. 1516.

The Commission has continued to review the experience under the Attachment Law and has concluded that a few technical revisions are needed. Accordingly, the Commission submits this recommendation.

Respectfully submitted,

Howard R. Williams
Chairman

RECOMMENDATION

relating to

TECHNICAL REVISIONS IN THE ATTACHMENT LAW

Introduction

Upon recommendation of the Law Revision Commission,¹ the Attachment Law (Code of Civil Procedure Sections 481.010 to 492.090) was enacted in 1974.² The Commission reviews the judicial decisions under the Attachment Law and studies possible defects in the statute that are brought to its attention. Upon the recommendation of the Commission,³ the statute was substantially amended in 1976.⁴ As a result of its continuing review, the Commission has concluded that a few additional revisions are needed. These revisions are discussed below.

Amount of Attachment in Unlawful Detainer Action

The Attachment Law does not contain a specific provision concerning the amount for which an attachment may be issued in an action for unlawful detainer of business premises⁵ where there is an incidental claim

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1. Recommendation Relating to Prejudgment Attachment, 11 Cal. L. Revision Comm'n Reports 701, 721 (1973). See also Report of Senate Committee on Judiciary on Assembly Bill 2948, Senate J. 13010 (August 31, 1974).
 2. 1974 Cal. Stats., Ch. 1516.
 3. Recommendation Relating to Revision of the Attachment Law, 13 Cal. L. Revision Comm'n Reports 801 (1976).
 4. 1976 Cal. Stats., Ch. 437. See also Report of Senate Committee on Judiciary on Assembly Bill 2864, Senate J. 11113 (April 22, 1976).
 5. Attachment is not available where the defendant is an individual unless the claim arises out of the conduct by the individual of a trade, business, or profession. An attachment may not be issued on a claim against an individual which is based on a lease of property where the property leased was used by the individual primarily for personal, family, or household purposes. See Code Civ. Proc. § 483.010.

for nonpayment of rent.⁶ In an unlawful detainer action, unpaid rent and damages may be awarded up to the date of judgment,⁷ but damages accruing after judgment are not recoverable.⁸ The amount included in the judgment for unpaid rent or damages from the time of filing the complaint until the date of judgment may be substantial since, in a commercial case, there may be a six-month delay from the time of filing the complaint until the entry of judgment if the action is contested.⁹ Yet, it is unclear whether the attachment may include an amount for this portion of the judgment--the unpaid rent or damages for the period

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6. Under former Code of Civil Procedure Section 537, subd. 4 (held unconstitutional in *Damazo v. MacIntyre*, 26 Cal. App.3d 18, 102 Cal. Rptr. 609 (1972), on the basis of *Randone v. Appellate Dep't*, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971)), a writ of attachment could be issued in an unlawful detainer action by the clerk based upon an affidavit. The amount for which the writ was issued was the amount of "rent actually due and payable . . . for the premises sought to be recovered" as shown in the verified complaint. This provision was superseded by Code of Civil Procedure Section 483.010, which authorizes attachment in an action "based upon a contract." The official Comment to Section 483.010 states in part: "it should be noted that the term 'contract' . . . includes a lease of either real or personal property." In drafting the Attachment Law, it was the intent of the Law Revision Commission to permit an attachment for unpaid rent in an unlawful detainer action. See Commission's February 1972 Minutes. For additional authority that attachment is available in an unlawful detainer proceeding, see *Johnson & Moskovitz*, 7 California Real Estate Law & Practice § 210.51 (____); Ops. Cal. Legis. Counsel, #16229 (Oct. 14, 1977).
 7. *Garfinkle v. Montgomery*, 113 Cal. App.2d 149, 153, 248 P.2d 52, 54 (1952); *M. Moskovitz, P. Honigsberg, & D. Finkelstein*, California Eviction Defense Manual § 13.33, at 125 (1971).
 8. E.g., *Cavanaugh v. High*, 182 Cal. App.2d 714, 722-23, 6 Cal. Rptr. 525, 530-31 (1960); *Roberts v. Redlich*, 111 Cal. App.2d 566, 569-70, 244 P.2d 933, 935 (1952). However, if the lessor brings an unlawful detainer action and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action in which the lessor may recover all the damages to which he is entitled if the lessor complies with Civil Code Section 1952.3.
 9. The time, of course, varies, depending on the particular area of the state. However, the Commission is advised that there is a delay of approximately six months in bringing contested unlawful detainer cases to trial in Los Angeles County where commercial premises are involved.

between the time of filing of the complaint and entry of judgment--or must be restricted to the amount of the unpaid rent due at the time of the filing of the complaint.

The lessor in an unlawful detainer action involving commercial premises is in a far different position than other creditors. Other creditors can cut off the credit they have been providing the debtor and obtain an attachment for the full amount of the unpaid debt. The lessor, however, cannot avoid continuing to extend credit for the occupancy of the premises by the lessee until such time as the lessee voluntarily gives up possession to the lessor or possession is restored to the lessor after the unlawful detainer trial. To provide a limited remedy to the lessor in this situation, the Commission recommends that the court, in its discretion,¹⁰ be permitted to include an additional amount in an attachment in an unlawful detainer action to cover the use and occupancy of the premises by the lessee during the period from the time the complaint is filed until the time of judgment or such earlier time as possession is delivered to the lessor. This additional amount should be equal to the estimated rent for this period computed at the rate provided in the lease. Computation of the amount on this basis would satisfy the requirement of Code of Civil Procedure Section 483.010 that the amount of the claim be in a "fixed or readily ascertainable amount."

Undertaking for Levy on Joint Bank Account or Safe Deposit Box

Where a creditor seeks to attach a deposit account or safe deposit box not standing solely in the name of the debtor, Section 489.240 of the Code of Civil Procedure requires that the creditor furnish an undertaking in twice the amount of the claim. Determining the amount of the undertaking by reference to the "amount of the claim" may result in requiring an undertaking that bears no relationship to the possible harm against which the undertaking is intended to protect. For example, if a plaintiff with a \$500,000 claim wishes to attach a \$2,000 deposit account, Section 489.240 requires that an undertaking for \$1 million be furnished.

10. One factor the court should consider in determining whether to permit attachment is whether the unlawful detainer proceeding is likely to be contested.

Chapter 42 of the 1977 Statutes amended Code of Civil Procedure Section 682a to correct this situation in case of a levy of execution on a deposit account or safe deposit box not standing solely in the name of the debtor. Under the 1977 amendment, the creditor is required to furnish a bond in the lesser of twice the amount of the judgment or twice the amount sought to be levied upon. The Legislature failed to make a comparable amendment to Section 489.240 to correct the same situation in case of an attachment. The Commission recommends that Section 489.240 be amended to conform to the 1977 amendment to Section 682a.

Definition of "Chose in Action"

Section 481.050 of the Code of Civil Procedure, defining "chose in action," should be amended to delete the reference to an interest in or claim under an insurance policy. This deletion would be consistent with the deletion in 1974¹¹ of comparable language from the definition of "general intangibles" in Commercial Code Section 9106. More important, the deletion would eliminate language that may cause confusion and would conform the section to the case law.¹²

Proposed Legislation

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 481.050 and 489.240 of, and to add Section 482.115 to, the Code of Civil Procedure, relating to attachment.

The people of the State of California do enact as follows:

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11. 1974 Cal. Stats., Ch. 997, § 11 (operative January 1, 1976).
 12. Elimination of this language will conform to the holding in *Hoteles Camino Real, S.A. v. Superior Court*, 70 Cal. App.3d 367, ___ Cal. Rptr. ___ (1977) (contingent obligation of an insurer to indemnify and defend not a basis for quasi in rem jurisdiction). See also *Javorek v. Superior Court*, 17 Cal.3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976) (consistent decision interpreting interim attachment statute). The deleted language is unnecessary to cover, for example, a right to payment under an insurance policy when the other requirements of Section 481.050 are met.

§ 481.050 (amended). "Chose in action" defined

SECTION 1. Section 481.050 of the Code of Civil Procedure is amended to read:

481.050. "Chose in action" means any right to payment which arises out of the conduct of any trade, business, or profession and which (a) is not conditioned upon further performance by the defendant or upon any event other than the passage of time, (b) is not an account receivable, (c) is not a deposit account, and (d) is not evidenced by a negotiable instrument, security, chattel paper, or judgment. The term includes ~~an interest in or a claim under an insurance policy and~~ a right to payment on a nonnegotiable instrument which is otherwise negotiable within Division 3 (commencing with Section 3101) of the Commercial Code but which is not payable to order or to bearer.

Comment. Section 481.050 is amended to delete the reference to an interest in or claim under an insurance policy. This deletion is consistent with the deletion of comparable language from the definition of "general intangibles" in Commercial Code Section 9106 by 1974 Cal. Stats., Ch. 997, § 11 (operative January 1, 1976).

The language deleted from Section 481.050 is unnecessary to cover, for example, a right to payment under an insurance policy where the other requirements of Section 481.050 are satisfied. The elimination of this language will, however, eliminate possible confusion and will conform to the holding in *Hoteles Camino Real, S.A. v. Superior Court*, 70 Cal. App.3d 367, ___ Cal. Rptr. ___ (1977) (contingent obligation of an insurer to indemnify and defend not a basis for quasi in rem jurisdiction). Cf. *Javorek v. Superior Court*, 17 Cal.3d 629, 552 P.2d 728, 131 Cal. Rptr. 768 (1976) (consistent decision interpreting interim attachment statute).

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§ 482.115 (added). Attachment in unlawful detainer action may include amount for rental loss until estimated date of judgment

SEC. 2. Section 482.115 is added to the Code of Civil Procedure, to read:

482.115. (a) In an unlawful detainer action, the plaintiff's application for a right to attach order and a writ of attachment pursuant to this title may include (in addition to the rent due and unpaid as of the date of the filing of the complaint and any additional estimated amount authorized by Section 482.110) an amount equal to the amount of

rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession is or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the rental agreement under which the premises were held immediately prior to the commencement of the unlawful detainer action.

(b) In the discretion of the court, the amount to be secured by the attachment may include (in addition to the rent due and unpaid as of the date of the filing of the complaint and any additional estimated amount authorized by Section 482.110) an amount equal to the amount of rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession is or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the rental agreement under which the premises were held immediately prior to the commencement of the unlawful detainer action.

Comment. Section 482.115 makes clear that, upon the plaintiff's application therefor, the "amount to be secured by the attachment" may include, in the court's discretion, an amount for the use and occupation of the premises by the defendant during the period from the time the complaint is filed until the time of judgment or such earlier time as possession is or is likely to be delivered to the plaintiff. One factor for the court to consider in exercising its discretion whether to allow the additional amount is whether the unlawful detainer action is likely to be contested. There may be a considerable delay in bringing the unlawful detainer action to trial if it is contested; and, in such case, there is a greater need for an additional amount to cover the period after the complaint is filed.

The amount authorized under Section 482.115 is in addition to (1) the amount in which the attachment would otherwise issue (unpaid rent due and owing at the time of the filing of the complaint) and (2) the additional amount for costs and attorney's fees that the court may authorize under Section 482.110.

3855

§ 489.240 (amended). Deposit account, or contents of safe deposit box, not wholly in name of defendant

SEC. 3. Section 489.240 of the Code of Civil Procedure is amended to read:

489.240. (a) In addition to any other provision of law, the provisions of this section shall be complied with where any of the following personal property is sought to be attached:

(1) A deposit account, or interest therein, not standing in the name of the defendant alone.

(2) Property in a safe deposit vault or box maintained by a bank, trust company, savings and loan association, or other corporation authorized and empowered to conduct a safe deposit business and rented by it to a person other than a defendant.

(b) The amount of an undertaking filed to obtain a writ of attachment of property described in subdivision (a) shall be an amount not less than twice the amount sought to be recovered by the plaintiff in the action in which the writ is sought or, if a lesser amount is sought to be levied upon, not less than twice such amount . The undertaking shall secure the payment of any recovery for wrongful attachment by any person, other than the defendant whose interest is sought to be attached, rightfully entitled to such property (which person need not be named specifically in the undertaking but may be referred to generally in the same manner as in this sentence).

(c) Objections to the undertaking may be made by any person claiming to be the rightful owner of the property sought to be levied upon.

Comment. Subdivision (b) of Section 489.240 is amended to permit the plaintiff to furnish an undertaking in twice the amount sought to be levied upon rather than twice the amount of the claim. This provision is consistent with Section 682a, as amended by 1977 Cal. Stats., Ch. 42, § 1, applicable to levies of execution.