

Memorandum 79-7

Subject: Study D-200 - Attachment (Conforming to New Bankruptcy Law)

In 1977 the Commission recommended legislation, which was enacted, that would void liens of attachment and temporary protective orders obtained within four months prior to the time a petition in bankruptcy was filed or a general assignment for the benefit of creditors was made. The four-month preference period was based on the four-month period of the Bankruptcy Act.

The Commission recognized at the time, and stated in its letter of transmittal, that "revision of its recommended legislation will probably be necessary when the United States Congress passes legislation revising the bankruptcy laws of the United States." The Bankruptcy Reform Act of 1978 has been enacted and takes effect on October 1, 1979. As predicted by the Commission, the new bankruptcy law makes a number of changes that affect the attachment legislation. The most important of these changes is a decrease in the preference period from four months to 90 days.

The staff has drafted amendments to the attachment legislation to conform to the new bankruptcy law. The amendments affect not only bankruptcies but general assignments as well. The general assignment preference period must be the same as the bankruptcy preference period or the debtor who attempts to make a general assignment will be forced into bankruptcy by attaching creditors trying to preserve their liens. The Commission has determined to completely review the law relating to assignments for the benefit of creditors, and the staff is actively working on this matter for presentation to the Commission at the next meeting.

If the Commission approves this recommendation, we will send it to knowledgeable people such as our consultant Professor Riesenfeld and Harold Marsh to be reviewed before we seek to have the proposed legislation passed by the Legislature. However, it is essential that a bill be introduced as soon as possible.

Respectfully submitted,

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STAFF DRAFT

RECOMMENDATION

relating to

EFFECT OF NEW BANKRUPTCY LAW ON THE ATTACHMENT LAW

Chapter 13 of The Attachment Law¹ deals with the effect of bankruptcy proceedings and general assignments for the benefit of creditors. The provisions of Chapter 13 are based on the Bankruptcy Act prior to its revision by the Bankruptcy Reform Act of 1978.² The Law Revision Commission, at the time it recommended enactment of Chapter 13 in 1977, recognized that revision would probably be necessary when revision of the bankruptcy laws occurred.³

The new bankruptcy law makes a number of changes that affect The Attachment Law. Among these changes are:

-- a 90 day, rather than four month, preference period for voiding liens;⁴

-- automatic, rather than discretionary, preservation of liens for the benefit of the estate;⁵

-- elimination of receivers in bankruptcy;⁶

-- adoption of new terminology.⁷

The Commission recommends that The Attachment Law be revised to conform to the new bankruptcy law.⁸ Failure to conform will result in confusion concerning the status of temporary protective order and attachment liens under the new law, particularly liens created in the

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1. Code Civ. Proc. §§ 493.010-493.060 (1977 Cal. Stats. ch. 499).
 2. Title 11 of the United States Code (Pub. L. No. 95-598).
 3. Letter of transmittal, 14 Cal. L. Revision Comm'n Reports 63 (1977).
 4. 11 U.S.C. § 547.
 5. 11 U.S.C. § 551.
 6. 11 U.S.C. § 105.
 7. For example, the new law is no longer called the Bankruptcy Act, and filing a petition no longer initiates a proceeding but commences a case.
 8. The provisions relating to general assignments for the benefit of creditors should remain uniform with the bankruptcy provisions. The Commission is actively reviewing the law relating to assignments.

period between four months and 90 days preceding bankruptcy. Such liens would be voided under The Attachment Law but would not be voidable in bankruptcy.

The new bankruptcy law becomes operative on October 1, 1979. Conforming changes in The Attachment Law should be drafted so as to become operative at the same time.

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

An act to amend Sections 493.030, 493.040, 493.050, and 493.060 of the Code of Civil Procedure, relating to attachment, and declaring the urgency thereof, to take effect immediately.

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

SECTION 1. Section 493.030 of the Code of Civil Procedure is amended to read:

493.030. (a) The making of a general assignment for the benefit of creditors terminates a lien of a temporary protective order or of attachment if the lien was created within ~~four months~~ 90 days prior to the making of the general assignment.

(b) The filing of a petition ~~initiating a proceeding under the National Bankruptcy Act by or against the defendant~~ commencing a voluntary or involuntary case under Title 11 of the United States Code (Bankruptcy) terminates a lien of a temporary protective order or of attachment if the lien was created within ~~four months~~ 90 days prior to the filing of the petition ~~unless the bankruptcy court orders the lien preserved for the benefit of the bankrupt estate~~ .

(c) Subdivisions (a) and (b) do not apply unless all liens of attachment on the defendant's property in other states that were created within ~~four months~~ 90 days prior to the making of a general assignment for the benefit of creditors or the filing of a petition ~~initiating a proceeding under the National Bankruptcy Act~~ commencing a case under Title 11 of the United States Code (Bankruptcy) have terminated.

Comment. Section 493.030 is amended to conform to the 90-day preference period prescribed by the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598), 11 U.S.C. § 547. Other changes in this section conform to the terminology of the new act. The provision relating to general assignments is made uniform with the bankruptcy provision. The reference to preservation of liens for the benefit of the estate is superseded by Section 493.060. See Comment to Section 493.060.

SEC. 2. Section 493.040 of the Code of Civil Procedure is amended to read:

493.040. (a) Where a lien of attachment terminates pursuant to Section 493.030, the assignee under a general assignment for the benefit of creditors or, in the case of a bankruptcy, the trustee, ~~receiver~~, or the debtor in possession if there is no trustee ~~or receiver~~, may secure the release of the attachment by filing with the levying officer a request for release of attachment stating the grounds for release and describing the property to be released, executed under oath, together with a copy thereof.

(b) In the case of an assignee, the request shall include two copies of the general assignment for the benefit of creditors.

(c) In the case of a trustee ~~or receiver~~, or debtor in possession, the request shall include a certified copy of the petition in bankruptcy, together with a copy thereof.

(d) If immediate release of the attachment is sought, the request shall be accompanied by an undertaking to pay the plaintiff any damages resulting from an improper release of the attachment, in the amount of the plaintiff's claim to be secured by the attachment, executed by a corporate surety possessing a certificate of authority from the Insurance Commissioner as provided by Section 1056.

(e) Within five days after the filing of the request for release of attachment, the levying officer shall mail to the plaintiff:

(1) A copy of the request for release of the attachment, including the copy of the document filed pursuant to subdivision (b) or (c).

(2) If an undertaking has not been given, a notice that the attachment will be released pursuant to the request for release of attachment unless otherwise ordered by a court within 10 days after the date of mailing the notice.

(3) If an undertaking has been given, a notice that the attachment has been released.

(f) Unless otherwise ordered by a court, if an undertaking has not been given, the levying officer shall release the attachment pursuant to the request for release of attachment after the expiration of 10 days from the date of mailing the papers referred to in subdivision (e) to the plaintiff. If an undertaking has been given, the levying officer shall immediately release the attachment pursuant to the request for release of attachment.

(g) Where the attached property has been taken into custody, it shall be released to the person making the request for release of attachment or some other person designated in the request. Where the attached property has not been taken into custody, it shall be released as provided in subdivision (c) of Section 488.560.

(h) The levying officer is not liable for releasing an attachment in accordance with this section nor is any other person liable for acting in conformity with the release.

Comment. Section 493.040 is amended to conform to the elimination of receivers by the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598), 11 U.S.C. § 105.

SEC. 3. Section 493.050 of the Code of Civil Procedure is amended to read:

493.050. (a) The lien of a temporary protective order or of attachment, which has terminated pursuant to Section 493.030, is reinstated with the same effect as if it had not been terminated in the following cases:

(1) Where the termination is the result of the making of a general assignment for the benefit of creditors and the general assignment for the benefit of creditors is set aside otherwise than by the filing of a proceeding under the National Bankruptcy Act petition commencing a case under Title 11 of the United States Code (Bankruptcy) .

(2) Where the termination is the result of the filing of a petition initiating a proceeding under the National Bankruptcy Act and the defendant is not finally adjudged a bankrupt and no arrangement or plan is proposed and confirmed under the National Bankruptcy Act commencing a case under Title 11 of the United States Code (Bankruptcy) and the petition is dismissed .

(3) Where the termination is the result of the filing of a petition initiating a proceeding under the National Bankruptcy Act commencing a case under Title 11 of the United States Code (Bankruptcy) and the trustee abandons property which had been subject to the lien of the temporary protective order or of attachment.

(b) The period from the making of a general assignment for the benefit of creditors until reinstatement of the lien of the temporary protective order or of attachment is not counted in determining the duration of the temporary protective order or the lien of attachment.

Comment. Section 493.050 is amended to conform to the terminology of the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598), 11 U.S.C. § 303.

SEC. 4. Section 493.060 of the Code of Civil Procedure is amended to read:

493.060. (a) Upon the making of a general assignment for the benefit of creditors that terminates a lien under this chapter , the assignee is subrogated to the rights of the plaintiff under the temporary protective order or attachment.

(b) Upon the filing of a petition commencing a case under Title 11 of the United States Code (Bankruptcy), a lien terminated pursuant to this chapter is preserved for the benefit of the estate.

Comment. Subdivision (b) is added to Section 493.060 for consistency with the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598), 11 U.S.C. § 551. This subdivision supersedes the provision formerly found in Section 493.030(b) relating to a court order preserving the lien for the benefit of the bankrupt estate.

SEC. 5. (a) The operative date of this act is October 1, 1979.

(b) This act does not apply to a case commenced under the Bankruptcy Act prior to October 1, 1979, and such a case is governed by the law applicable immediately prior to the operative date of this act.

Comment. This section recognizes that the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598) does not govern cases commenced under the Bankruptcy Act prior to October 1, 1979. Pub. L. No. 95-598 § 403(a).

SEC. 6. This is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598) becomes operative on October 1, 1979. The new bankruptcy law totally revises the manner of dealing with liens of attachment and temporary protective orders on property in the debtor's estate. This act makes conforming revisions in The Attachment Law; however, confusion and problems in treatment of liens under the two laws will arise unless both become operative at the same time. It is therefore necessary that this act take immediate effect so that it may become operative on October 1, 1979.