Study D-331 September 15, 1994

Memorandum 94-41

**Attachment Where Claim Is Partially Secured:
Experience Under 1990 Amendments**

Attached to this memorandum is a draft report to the Legislature on 1990 amendments to the Attachment Law concerning issuance of attachment where a claim is partially secured. The report is in satisfaction of a legislative mandate and is due December 31, 1994.

The draft report concludes that the 1990 amendments should be continued by repealing the sunset provisions that otherwise would operate on January 1, 1996, to terminate the 1990 amendments. The question remains whether the Commission should sponsor legislation to accomplish repeal the sunset provisions or whether this task should be left for affected interest groups, the State Bar, or a judiciary committee omnibus bill. The staff suggests including the necessary amendments with the other debtor-creditor matters in a tentative recommendation to be circulated for comment after the September meeting. Accordingly, the attached report is drafted to include the necessary amendments and also includes some technical revisions and revised Commission comments, as explained in the draft.

Attached to this memorandum is a letter and other materials in support of the 1990 amendments from Brian L. Holman, a Los Angeles attorney who initiated the 1990 amendments as a member of the State Bar Debtor/Creditor Committee. (See Exhibit pp. 1-18.) Another letter in support of continuing the law is from Alan M. Mirman, a Toluca Lake attorney who was active in the 1990 legislative effort. (See Exhibit p. 19.)

One issue arising from Mr. Holman's letter concerns the interplay of the limitations on issuance of an attachment and the "one form of action" rule under Code of Civil Procedure Section 726. This issue is not directly relevant to the Commission's duty to report to the Legislature on the experience under the 1990 amendments of the Attachment Law or in any technical amendments needed at this stage, and the issue is not discussed in the draft report. However, the question is interesting and merits brief consideration. The policies inherent in the one form of action rule and the attachment restrictions overlap but are not

coterminous. The one form of action rule is intended to prevent a multiplicity of actions and require the creditor to exhaust security first. On its face, this policy has nothing to do with attachment, since the law could always have permitted attachment for the deficiency. (In fact, that is the result of the 1990 amendments — since the amount of the attachment is reduced by the amount of the security.) The attachment rule thus serves the same general purpose by an alternate means. It also encourages creditors to obtain adequate security and provides some benefits for competing unsecured creditors.

The one form of action rule as to personal property security was deleted from Code of Civil Procedure Section 726 in 1963 in connection with the enactment of the Uniform Commercial Code. See 1963 Cal. Stat. ch. 819, § 26, operative Jan. 1, 1965.; Walker v. Community Bank, 10 Cal. 3d 729, 734, 518 P.2d 329, 111 Cal. Rptr. 897 (1974). The rule precluding attachment in the face of secured claims was not changed in the 1963 legislation. The staff has not found any discussion of the issue, one way or the other. Retaining the restriction on attachment may have been an oversight or, on the other hand, it may have been a conscious decision.

The one form of action rule as to personal property security, however, was in direct conflict with the UCC and had to be repealed. Commercial Code Section 9501 now governs enforcement of a claim secured by personal property. For example, Section 9501(5) provides that if the secured party reduces the claim to judgment, an execution levy on the collateral relates back to the date of perfection of the security interest on the collateral, and an execution sale is equivalent to a foreclosure sale. In the end, the legal history is murky. But it cannot be said that the elimination of the one form of action rule as to claims secured by personal property *necessarily* requires elimination of the former restriction on attachment to enforce a claim secured by personal property.

Other technical matters are discussed in the Comments and staff notes following the sections in the draft recommendation.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

WHITE & CASE

633 WEST FIFTH STREET
LOS ANGELES, CALIFORNIA 90071-2007

(213) 620-7700
FACSIMILE: (213) 687-0758
TELEX: 277823

UNITED STATES
NEW YORK
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BLH:MRD

June 22, 1994

re 1990 Amendments to the Attachment Law

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palto Alto, CA 94303

Dear Gentlemen:

Pursuant to Section 3 of Stats. 1990, c.943 (S.B. 2170), the California Law Revision Commission is charged with studying the impacts of the changes (the "1990 Amendments") made to Sections 483.010 and 483.015 of the Code of Civil Procedure made by Sections 1 and 2 of Stats. 1990, c.943 (S.B. 2170) during the period from January 1, 1991, to and including December 31, 1993, and reporting the results of its study, together with recommendations concerning continuance or modification of these changes, to the Legislature on or before December 31, 1994.

I was the initiator of the 1990 Amendments. In 1989, as a member of the California State Bar Debtor/Creditor Relations and Bankruptcy Committee, I proposed that the Attachment Law be amended to generally permit an undersecured creditor[1/] holding only personal property collateral to obtain an attachment for the difference between the amount of the creditor's claim and the current value of the creditor's collateral. Under prior law (which will be reinstated automatically effective January 1, 1996 absent further legislative action), an

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1/ An undersecured creditor is a creditor who holds collateral of a value less than the amount of the creditor's claim.

undersecured creditor generally could obtain an attachment only to the extent that the creditor's collateral had declined in value.[2/] Thus, for example, while a creditor holding a claim for $100,000 which was never secured could obtain an attachment for the creditor's entire $100,000 unsecured claim, a creditor holding a claim for $100,000 who originally held $1,000 worth of collateral could obtain an attachment only to the extent the collateral declined in value. The latter creditor was permanently barred from seeking an attachment with respect to the $99,000 unsecured portion of its claim.

I had several reasons for proposing the change. First, I believed that a creditor holding insufficient collateral should have the same opportunity to secure the unsecured portion of its claim by attachment as was given to a creditor which held no collateral at all. I saw no reason why the Attachment Law should favor wholly unsecured creditors over partially unsecured creditors with respect to such creditors' unsecured claims.

Second, I believed that permitting an undersecured creditor to obtain an attachment for the entire amount of its anticipated deficiency claim would avoid the difficulty of having to determine the value of the creditor's collateral at an earlier point in time. Under the prior law, a court had to value an undersecured creditor's collateral when the collateral was granted or the credit extended and at the time of the attachment hearing in order to determine whether the collateral had declined in value so as to entitle the creditor to an attachment.[3/] Under the 1990 Amendments, the court need only determine the value of the undersecured creditor's collateral at the time the attachment is sought.

[2/] Section 483.020, however, permitted a landlord holding a payment or deposit to secure the payment of rent to obtain an attachment notwithstanding the existence of the security deposit.

[3/] This could be an exceptionally difficult task. In the case of crop financing, for example, the crop lender typically makes disbursements at planting and throughout the growing season. At the time of the first advance, when the crops have just been or are about to be planted, the crops have no value at all. The crops increase in value as additional disbursements are made and as the crops grow and mature. If the farmer diverts 50% of the crops when they are harvested, what is the decline in the value of the lender's collateral?

Third, I believed that permitting undersecured creditors to obtain writs of attachment for the unsecured portion of their claims would facilitate the collection process. For example, if an undersecured creditor holds a security interest only in certain items of inventory (such as that purchased from the creditor), by simultaneously obtaining a writ of possession for the debtor's inventory subject to the security interest and a writ of attachment for the balance of the inventory, the creditor could cause the sheriff or marshal to levy upon all the debtor's inventory and avoid having to make a potentially difficult determination as to which items of inventory were subject to the consensual inventory lien and which were not.

The Debtor/Creditor Relations and Bankruptcy Committee unanimously endorsed my proposal and, largely through the efforts of Alan Mirman, Esq., the proposal was approved by the California State Bar, introduced in the Senate (with minor amendments), approved by the legislature and signed by the Governor. I enclose for your convenience copies of the materials provided to me by Mr. Mirman concerning the legislative history of the 1990 Amendments.

While I am aware of no reported cases discussing the 1990 Amendments, based on anecdotal evidence only I believe the amendments are serving their purpose. For example, before the 1990 Amendments, the Central District of the Los Angeles Superior Court required that hearings on applications for writs of attachment be heard in Department 66 and that hearings on applications for writs of possession be heard in either Department 85 or 86. After the 1990 Amendments, the Court ordered that hearings on applications for writs of attachment and applications for writs of possession both be heard in Department 66. An undersecured creditor now may appear in Department 66 and simultaneously obtain a writ of possession for the creditor's existing collateral and a writ of attachment to secure the unsecured portion of the creditor's claim. A single judge will determine the current value of the creditor's collateral for purposes of determining both the amount of the bond necessary to obtain the writ of possession[1/] and the amount to be secured by the attachment.

[1/] Under Section 515.010 of the Code of Civil Procedure, a creditor seeking a writ of possession must post a bond equal to at least twice the value of the defendant's interest in the collateral.

While the 1990 Amendments appear to be working well, the Attachment Law could be improved in order to better effectuate the purposes of the amendments. The Attachment Law could profit from three additional amendments.

Section 483.010(b).

Current Section 483.010(b) of the Code of Civil Procedure permits attachment on a claim which is secured by an interest in real property, among other circumstances, "(2) where the claim was secured by a non-consensual possessory lien but the lien has been relinquished by the surrender of the possession of the property."

The language quoted above was carried over from former Section 483.010(b) (which generally prohibited attachment on claims secured by any kind of property, subject to certain exceptions) and makes no sense in the current law. California law does not permit a creditor to hold a non-consensual possessory lien on real property.[5/] The quoted language therefore now has no legal effect.

A creditor, however, may obtain a non-consensual non-possessory lien on real property. For example, under the mechanic's lien law, a contractor on a real property construction project may obtain a non-possessory mechanic's lien on the project.[6/] The purpose of the language quoted above was to permit attachment by a creditor who had relinquished a non-consensual lien on personal property. A creditor holding a non-consensual lien on real property similarly should be able to relinquish the lien and thereafter obtain an attachment.[7/] To better effectuate the purposes of the Attachment Law, clause (2) of Section

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[5/] Non-consensual possessory liens on personal property arise in a variety of situations. For example, under Section 3068 of the Civil Code, a person making repairs to a motor vehicle has a lien, dependent upon possession, in the motor vehicle to secure the costs of the repair.

[6/] See Section 3110 of the Civil Code.

[7/] A mechanic's lien claimant may prefer to waive the mechanics lien and seek an attachment against other assets because of the costs and delay of a mechanic's lien foreclosure proceeding. Alternatively, the mechanic's lien claimant may relinquish its lien by simply failing to enforce the lien in a timely fashion.

483.010(b) should be amended (as I originally proposed)[8/] to read as follows:

> (2) where the claim was secured by a non-consensual lien but the lien has been relinquished.

Should the Commission determine not to recommend the substantive change represented by the foregoing language, then the Commission should recommend that the second sentence of Section 483.010(b) be revised to delete clause (2).

Section 483.015(b)(4).

The 1990 Amendments added subdivision (4) to Section 483.015(b) of the Code of Civil Procedure in order to deduct from the amount to be secured by an attachment the value of any security held by the plaintiff. Thus, while an undersecured creditor holding only personal property collateral now may seek an attachment even through the collateral has not declined in value, the attachment can be obtained only for the unsecured portion of the creditor's claim.

Section 483.015(b)(4) provides that the amount to be secured by an attachment also shall be reduced by "the amount by which the value of the [plaintiff's] security interest has decreased due to the act of the plaintiff or any person to whom the security interest was transferred."

The apparent purpose of this language (which was not in my draft of Section 483.015(b)(4)) is to preclude a creditor from seeking an attachment for the portion of the creditor's claim which is unsecured due to the waiver or impairment of a security interest held by the creditor or the creditor's predecessors. The Attachment Law thus now contains its own form of "security first" rule: prior to the entry of judgment, an undersecured creditor holding collateral under a security agreement must look only to that collateral as security for the portion of the claim secured by the collateral. The creditor cannot waive (or impair) consensually granted collateral and seek an attachment for the full amount of the creditor's claim.

[8/] I believe that the failure to include my proposed amendment to clause (2) of Section 483.010(b) was a legislative oversight, not a rejection of the underlying concept.

The phrase "any person to whom the security interest was transferred," however, seems awkward. I believe that the phrase could be more simply stated as "any prior holder of the security interest."

Section 483.020.

In drafting my proposed amendments to the Attachment Law, I did not consider the effect of the amendments upon Section 483.020 of the Code of Civil Procedure. Section 483.020 contains special rules for attachment in unlawful detainer proceedings. Among other things, section 483.020(d) permits a landlord who "has received a payment or holds a deposit to secure the payment of rent or the performance of other obligations under the lease" to seek an attachment for unpaid rent, "[n]otwithstanding subdivision (b) of Section 483.010." The "[n]otwithstanding subdivision (b) of Section 483.010" language of Section 483.020 was necessary prior to the 1990 Amendments because, under former Section 483.010(b), a landlord who had received a payment or held a deposit for the payment of rent or the performance of other obligations under the lease would have been considered a creditor holding collateral who could seek an attachment only for the amount of the decline in the value of the collateral.

Consistent with the purpose of current Section 483.015(b)(4), Section 483.020(d) requires that the amount to be secured by the attachment be reduced by the amount of any security deposit held by the landlord solely to secure the payment of rent.

Section 483.020(e), however, requires that the amount to be secured by the attachment also be reduced by the amounts described in subdivision (b) of Section 483.015 (which, prior to the 1990 Amendments, did not include the amount of any security held by the plaintiff).

An unintended effect of the 1990 Amendments is to require that the amount to be secured by an attachment in an unlawful detainer proceeding be reduced by twice the value of any security deposit held by the landlord solely to secure the payment of rent. First, the amount of the security deposit must be subtracted pursuant to the provisions of Section 483.020(d). Second, the value of the security deposit must be subtracted pursuant to the provisions of Section 483.015(b)(4), as incorporated by Section 483.020(e). This error should be corrected.

Accordingly, Section 483.020(e) should be deleted and Section 483.020(d) should be amended to read as follows:

> The amount to be secured by the attachment as otherwise determined under this section shall be reduced by the amounts described in subdivision (b) of Section 483.015, except that if the plaintiff has received a payment or holds a deposit to secure the payment of rent and the performance of other obligations under the lease, the amount of the payment or deposit shall not be subtracted in determining the amount to be secured by the attachment.

I urge the Commission to report that the 1990 Amendments should be made permanent with the changes set forth above.

I would be happy to answer any questions you may have.

Sincerely,

Brian L. Holman

Brian L. Holman

Enclosures

cc: Alan Mirman, Esq. (w/o encls.)

LAW OFFICES
MICHEL, CERNY & MIRMAN
2001 WILSHIRE BOULEVARD, SUITE 520
SANTA MONICA, CALIFORNIA 90403
TELEPHONE (213) 828-7737

ALLEN L. MICHEL*
ROSS CERNY
ALAN M. MIRMAN*
TERI M. PRIMACK
KATHLEEN J. ROGERS
ROBERT EISELMAN
DENISE A. TAHAN
SUSAN J. VEIS
*PROFESSIONAL CORPORATION

AVI S. PERETZ
OF COUNSEL
TELECOPIER
(213) 828-4937

M E M O R A N D U M

To: Bonnie Vail
Director of Sections and Committees

From: State Bar Business Law Section
Debtor/Creditor Relations
and Bankruptcy Committee

Date: May 26, 1989

Re: Report on Proposed Amendment to
California Writ of Attachment Law
(C.C.P. § 483.010 and § 483.015

A. BACKGROUND: Under existing law, a prejudgment writ of attachment may not be issued on a claim secured by any interest in real or personal property, as set forth in C.C.P. § 483.010. Two exceptions are as follows: (1) where the security has become valueless or decreased in value without any act of the plaintiff or other person to whom the security was given; or (2) where the claim was secured by a non-consensual possessory lien which has been relinquished by the surrender of the possession of the property.

The proposal made by this Committee would retain the existing limitations on eligibility for a writ of attachment as to claims secured by real property. The proposal would, however, except personal property secured creditors from those limitations. An undersecured personal property creditor would not be required to show diminution in value in order to obtain a writ of attachment. There are also certain additional wording changes which would seem to fall into the category of statutory clean up, rather than effectuation of the desired amendment.

B. RECOMMENDATION: By vote of the Debtor/Creditor Relations and Bankruptcy Committee on May 26, 1989, adoption of this proposal was recommended.

C. DISCUSSION: The Committee feels that there is no reason why an undersecured personal property creditor should not be entitled to seek a writ of attachment for the amount by which the claim exceeds existing security. Existing California law provides that

there is no "security first" rule governing personal property secured creditors. There is such a rule governing real property secured creditors. One action rule legislation and anti-deficiency legislation do not apply to creditors secured solely by personal property, and this proposal would not in any way affect the rights and protections currently afforded debtors who have pledged real property to secure their obligations. If this distinction is made clear, it is not anticipated that the proposed amendment will be highly controversial.

The administration of justice will be aided by this proposal, in that it will further the uniformity of the law in dealing with personal property security. It will not affect the statutorily enacted procedures for obtaining writs of attachment, or be likely to cause confusion. It will not cause any need to revise the Judicial Council forms presently in use for obtaining writs of attachment.

Alan M. Mirman of Michel, Cerny & Mirman is the Committee member who will respond to inquiries. His address is 2001 Wilshire Boulevard, Suite 520, Santa Monica, California, 90403 and his telephone number is (213) 828-7737.

Attached hereto is a copy of the proposed legislation in a form for introduction in the legislature.

Marked to Show Changes From Current Statute
Proposed Additions shown by Underline
Proposed Deletions shown by ~~Strikeout~~

Proposed Changes to C.C.P. § 483.010

§ 483.010. When Attachment May or May Not Be Issued.

(a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees.

(b) An attachment may not be issued on a claim which 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 on real property, but excluding any security interest in fixtures subject to Division 9 (commencing with Section 9101) of the Commercial Code). 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, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount for which the attachment may issue shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim, or (2) where the claim was secured by a nonconsensual ~~possessory~~ lien but the lien has been relinquished ~~by the surrender of the possession of the property~~.

(c) If the action is against a defendant who is a natural person, an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession. An attachment may not be issued on a claim against a defendant who is a natural person if the claim is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the defendant primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

Marked to Show Changes From Current Statute
Proposed Additions shown by Underline
Proposed Deletions shown by ~~Strikeout~~

§ 483.015. Amount Secured by Attachment.

(a) Subject to subdivision (b) and to Sections 483.010 and 483.020, the amount to be secured by an attachment is the sum of the following:

1. The amount of the defendant's indebtedness claimed by the plaintiff.

2. Any additional amount included by the court under Section 482.110.

(b) The amount described in subdivision (a) shall be reduced by the sum of the following:

1. The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

2. The amount of any indebtedness of the plaintiff that the defendant has claimed in cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.

3. The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

4. The value of any security interest in property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff.

35748

LAW OFFICES
MICHEL, CERNY & MIRMAN
2001 WILSHIRE BOULEVARD, SUITE 520
SANTA MONICA, CALIFORNIA 90403
TELEPHONE (213) 828-7737

ALLEN L. MICHEL*
ROSS CERNY
ALAN M. MIRMAN*
TERI M. PRIMACK

KATHLEEN J. ROGERS
ROBERT EISELMAN
DENISE A. TAHAN
SUSAN J. VEIS
STACIE E. CHROMAN
KIMELA B. WRIGHT†
STEVEN M. BERLINER

*PROFESSIONAL CORPORATION
†ADMITTED IN MARYLAND ONLY

AVI S. PERETZ
OF COUNSEL

TELECOPIER
(213) 828-4937

April 10, 1990

Brian Holman, Esq.
SHEPPARD, MULLIN, RICHTER & HAMPTON
333 S. Hope St., 48th Floor
Los Angeles, CA 90071

Re: Senate Bill 2170 - Prejudgment Writs of Attachment

Dear Brian:

Enclosed are memoranda updating you on the latest developments with regard to Senate Bill 2170. Although scheduled to be presented to the Senate Judiciary Committee on April 3, 1990, that presentation has been delayed, presumably to a date in May. I will keep you posted.

Very truly yours,

Alan Mirman (tg)

Alan M. Mirman

AMM/tag
Enclosure

LAW OFFICES
MICHEL, CERNY & MIRMAN
2001 WILSHIRE BOULEVARD, SUITE 520
SANTA MONICA, CALIFORNIA 90403
TELEPHONE (213) 828-7737

ALLEN L. MICHEL*
ROSS CERNY
ALAN M. MIRMAN*
TERI M. PRIMACK

KATHLEEN J. ROGERS
ROBERT EISELMAN
DENISE A. TAHAN
SUSAN J. VEIS
STACIE E. CHROMAN
KIMELA B. WRIGHT†
STEVEN M. BERLINER

*PROFESSIONAL CORPORATION
†ADMITTED IN MARYLAND ONLY

AVI S. PERETZ
OF COUNSEL

TELECOPIER
(213) 828-4937

April 5, 1990

M E M O R A N D U M

TO: INTERESTED PARTIES

FROM: Alan M. Mirman
MICHEL, CERNY & MIRMAN
2001 Wilshire Blvd., Suite 520
Santa Monica, CA 90403
Telephone: (213) 838-7737

DATE: April 5, 1990

RE: RESPONSE TO ANALYSIS OF THE SENATE JUDICIARY COMMITTEE'S CHIEF CONSULTANT REGARDING SENATE BILL 2170 (PRE-JUDGMENT ATTACHMENT)

The analysis prepared by the Chief Consultant to the Senate Judiciary Committee (hereinafter "Analysis") suggests that enactment of SB 2170 would reverse the general policy behind writ of attachment law. Such is not the case. In fact, SB 2170 would remove an inconsistency in the writ of attachment law, so that the law would be both internally consistent and consistent with other laws, such as the California Commercial Code. Attached hereto are copies of my 12/14/89 and 3/16/90 write-ups of the Bill, together with a copy of the Analysis. In response to the Analysis, the fol-

lowing points should be noted:

1. Under existing law, a writ of attachment may issue (a) on an unsecured loan; (b) on a secured loan to the extent of any diminution in collateral value; and (c) on an under-secured loan if the creditor has liquidated the collateral and is thus unsecured as to the balance. The third of these examples demonstrates the inconsistency and anomaly of the current prohibition on writs of attachment on under-secured loans. If a creditor makes a $100,000.00 loan secured by $40,000.00 worth of collateral, and then liquidates that collateral, the creditor is entitled to seek a writ of attachment for the $60,000.00 balance. Under current law, however, the creditor is barred from seeking a writ of attachment if he/she is unable to recover possession of the collateral and liquidate it! Thus, very often, the eligibility of the creditor for a writ of attachment is based upon the debtor's ability to withhold possession of the collateral. This makes no sense, and serves no public purpose.

2. It is important to realize that the "election of remedies" argument only applies to real property loans. The Analysis raises the point that the creditor has chosen to make an under-secured loan, and therefore be bound to that election. Under California law, such an election only takes place with regard to real property loans, because of the one-action rule embodied in CCP

§ 726. SB 2170 would not change that time-honored real property rule which requires resort to the collateral. However, California law does not recognize any such election with regard to personal property. The California Commercial Code, and the cases construing that code, uniformly hold that a creditor with personal property collateral need not resort to that collateral first. It should also be noted that a creditor who has elected to make an unsecured loan is entitled to a writ of attachment, so why bar a creditor who has made a partially secured loan, especially when, as noted in paragraph 1 above, that creditor would be entitled to a writ of attachment for the under-secured balance once the collateral is sold.

3. The Analysis correctly notes that this Bill has no effect on real property secured loans or contracts, or consumer loans or contracts. This Bill also does not affect the requirement that a writ of attachment cannot issue until a court finds the creditor's claim has probable validity.

4. The Analysis seems to view SB 2170 as beneficial solely to lenders. We disagree. First, writs of attachment are available as a remedy on any contract claim, whether express or implied. Numerous individuals and small businesses sue on contracts, and are eventually frustrated by the fact that after obtaining judgment, the defendant no longer has assets to satisfy the judgment. The

end result is that the recipient of the money or credit escapes repayment, the creditor suffers the loss, and to the extent of any bad debt write-off, the taxpayers suffer the loss. Second, there are many start-up businesses and others desirous of obtaining credit, but they have insufficient credit to obtain an unsecured loan, and insufficient collateral to obtain a fully secured loan. Allowing writs of attachment for partially secured loans can only improve the ability of these start-up businesses to obtain credit. Lenders would be more willing to make such loans, and the existence of the writ of attachment remedy would increase the likelihood that if there is a default in payment, that the lender will be able to recover on the debt. Given the current concern over bank and savings and loan failures, it would seem that our system should encourage, rather than discourage, existing legal procedures which enhance repayment of just debts.

5. The Analysis raises a concern that lenders may charge more for under-secured loans, and therefore, would receive some unjust benefit by being eligible for a writ of attachment. First, I'm informed by bankers that their rates are based upon the strength of the customer, rather than upon the extent to which they are collateralized. A customer who is allowed to borrow on less than a fully secured basis is usually the strongest customer, and therefore entitled to the best rate. The customers who are required to collateralize their loans may be charged a higher rate,

and additional fees will apply, such as those for appraisal, and other aspects of collateral evaluation and maintenance. Second, even if the lenders charge higher rates for under-secured or unsecured loans, existing law provides that not only are such creditors entitled to judgment in that full amount, but also, unsecured creditors are entitled to a writ of attachment in that full amount. Again, there is no sense in singling out the partially secured creditor for this prohibition.

6. The Analysis takes the position that a lender should not be able to "improve its position" except to the extent that the collateral has diminished in value. This is simply contrary to writ of attachment law and theory. The purpose of a writ of attachment is to allow a court approved procedure whereby assets will be preserved pending trial. Conceptually, the writ does not "collateralize" an under-collateralized loan. It merely preserves assets pending trial. Under SB 2170, the amount of assets to be preserved is the difference between the debt and the collateral value. Why should that preservation be allowed for unsecured creditors and under-secured creditors who have managed to obtain possession of their collateral, but denied to under-secured creditors who do not have possession of the collateral?

The State Bar Board of Governors endorses SB 2170. It is a

Bill designed to overcome current inequity, and is deserving of enactment.

AMM/tag

LAW OFFICES

HORGAN, ROSEN, BECKHAM & COREN

S. ALAN ROSEN*
ROBERT P. BECKHAM
ARTHUR A. COREN
GARY M. HORGAN
DONALD P. JOHNSON
ALAN M. MIRMAN
DONALD KURT HELMICK
MEL ARANOFF*
DENISE A. MACRAE
STEVEN M. BERLINER

*A LAW CORPORATION

SUITE 2000
3900 WEST ALAMEDA
TOLUCA LAKE, CALIFORNIA 91505
(310) 552-2010 (818) 955-7300
FAX (818) 955-7330

SAN DIEGO
SUITE 400
402 W. BROADWAY
SAN DIEGO, CALIFORNIA 92101
(619) 295-3160

ALBIN C. KOCH
OF COUNSEL

September 7, 1994

California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, California 94303

Re: 1990 Amendments to Attachment Law

Dear Commission Members:

I received a copy of Brian Holman's letter to you dated June 22, 1994, a copy of which is attached (without enclosures) for your convenience. The purpose of this letter is to support Mr. Holman in his request that the changes adopted to the law concerning Writ of Attachments be made permanent. As indicated in Mr. Holman's June 22 letter, the prior law becomes reinstated automatically effective January 1, 1996 absent further legislative action.

Because the California Law Revision Commission is required to evaluate the impact of the 1990 Amendments, and report the its recommendations to the Legislature on or before December 31, 1994, I would like to take whatever action I can, and provide whatever information is available, in order to support the goal of making the 1990 Amendments permanent.

Since the 1990 Amendments have been effective, the Courts that consider and grant Writs of Attachment have apparently accommodated easily to the changes. I know of no problems, concerns, or drawbacks created by the 1990 Amendments. As a matter of practice, creditors secured by personal property valued at less than the amount owed, will normally present evidence as to the value of the collateral, and the Writ of Attachment will then issue for the difference.

I would appreciate it very much if you would let me know with whom Mr. Holman or I can communicate regarding the Law Revision Commission's progress and anticipated report.

Very truly yours,

Alan M. Mirman

AMM:lc
Enclosure
cc: Brian Holman (w/o encl.)

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

REPORT AND TENTATIVE RECOMMENDATION

Attachment Where Claim Is Partially Secured

September 1994

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **October 31, 1994.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739
(415) 494-1335 FAX: (415) 494-1827

ATTACHMENT WHERE CLAIM IS PARTIALLY SECURED: REPORT ON CHAPTER 943 OF THE STATUTES OF 1990

This report has been prepared in satisfaction of a legislative direction to evaluate the experience under 1990 amendments to the Attachment Law that relaxed the rules concerning issuance of attachment where the plaintiff's claim is partially secured by personal property.[1]

Background

The Attachment Law[2] was enacted in 1974 on recommendation of the Commission and has been amended on Commission recommendation several times since then.[3] In 1990, a bill sponsored by the California State Bar amended the Attachment Law to permit attachment where the plaintiff's claim is secured by personal property or fixtures.[4] The amendments eliminated the former rule that limited attachment in claims secured by personal property to cases where the plaintiff could show that the security had decreased in value or become valueless without fault of the plaintiff. Under the new rule, the existence of personal property security is irrelevant to the right to attach, but the amount of the attachment is reduced by the present value of the security plus the amount of any decrease in value caused by the plaintiff or prior holders of the security interest. The 1990 amendments were designed to give an *under*secured creditor the same attachment remedy as an *un*secured creditor, to the extent that the debt is not secured.[5]

The new rule will expire on January 1, 1996, by operation of statutory sunset clauses, unless the Legislature takes action before that date. If there is no

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1. See 1990 Cal. Stat. ch. 943 (SB 2170), amending Code of Civil Procedure Sections 483.010 and 483.015. (Hereinafter, all code citations are to the Code of Civil Procedure.) In an uncodified provision of this 1990 legislation, the Commission is directed to

> study the impacts of the changes in Sections 483.010 and 483.015 of the Code of Civil Procedure made by … this act during the period from January 1, 1991, to and including December 31, 1993, and shall report the results of its study, together with recommendations concerning continuance or modification of these changes, to the Legislature on or before December 31, 1994.

[1990 Cal. Stat. ch. 943, § 3.]

2. Section 481.010 *et seq.*; see *Recommendation Relating to Attachment Law,* 11 Cal. L. Revision Comm'n Reports 701 (1973).

3. See recommendations cited in *1982 Creditors' Remedies Legislation,* 16 Cal. L. Revision Comm'n Reports 1001, 1608 (1982).

4. See 1990 Cal. Stat. ch. 943.

5. For background on the 1990 legislation, see Senate Committee on Judiciary, Consultant's Analysis of SB 2170, as amended May 1, 1990, 1989-90 Regular Session (attached to Memorandum 94-16, April 27, 1994, on file with California Law Revision Commission); letter from Brian L. Holman (June 22, 1994) (attached to Memorandum 94-41, Sept. 15, 1994, on file with California Law Revision Commission).

legislative action to preserve the 1990 amendments, the former rule would come back into force.[6]

Experience Under 1990 Amendments

The Law Revision Commission was directed to study the impact of the 1990 amendments on the attachment process during 1991-1993 and to report to the Legislature any recommendations concerning continuation or modification of the 1990 changes.

The Commission solicited comments on the experience under the new rule from superior courts in ten of the most populous counties. In addition, letters were sent to all persons on the Commission's mailing list who have expressed an interest in debtor-creditor relations and to about 30 other potentially interested organizations that maintain registered lobbyists. The State Bar liaisons were notified of the study and the opinion of relevant State Bar sections was requested.

The Commission received comments from four superior courts and the Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section of the State Bar.[7] Opinion was nearly unanimous in support of continuing the 1990 amendments:

• Judge Joe S. Gray of the Sacramento County Superior Court reported that he and Judge Morrison, who handle almost all attachments in that county, have not perceived any difficulties with or any effect from the new rule.

• Judge Ronald L. Bauer of the Orange County Superior Court reported no observable impact of the 1990 amendments in over 700 cases considered since enactment of the new rule.

• Judge Arthur W. Jones of the San Diego County Superior Court reported that the new rule appears to be working well, that it has had no unusual or adverse affect on the number or dollar amount of attachments. Judge Jones concluded that evaluation of security is generally an easy task and saw no reason not to extend the new rule.

• The Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section of the State Bar wrote that, based on anecdotal history available to the members of the committee, the new rule "works effectively and should remain in operation."

The dissenting note came from Commissioner Arnold Levin of the Los Angeles County Superior Court, who reported that the number of attachments has increased

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6. See Sections 483.010 (as added by 1990 Cal. Stat. ch. 943, § 1.5), 483.015 (as added by 1990 Cal. Stat. ch. 943, § 2.5). Although these sections appear to be new enactments operative in the future, they are actually prior law as it existed on December 31, 1990, before the new rule became operative. It has been reported to the Commission that the appearance of two sets of two sections with the same numbers in the code has caused practitioners some confusion. See letter from Commissioner Arnold Levin to Stan Ulrich (March 31, 1994) (attached to Memorandum 94-16, April 27, 1994, on file with California Law Revision Commission).

7. See letters attached to Memorandum 94-16, April 27, 1994 (on file with California Law Revision Commission).

under the amended statute and concluded with the suggestion that the law be restored to its pre-1991 form.[8]

Commission Recommendation

In view of the reports received on experience under the new rule, the Commission concludes that the substance of the 1990 amendments should be made permanent. Based on the information at hand, the new rule does not appear to be causing any problems and the Commission has not found any grounds for modifying the policy of the 1990 amendments. Consequently, the Commission recommends removal of the sunset clauses and the final repeal of the earlier rule.

Technical Issues

The Commission also recommends a number of technical revisions to improve the coordination of the 1990 amendments with other provisions in the Attachment Law. For example, the rules relating to attachment in unlawful detainer actions were not adjusted for conformity with the 1990 amendments,[9] and obsolete language qualifying the former limitation applicable to claims secured by personal property still remain in the code.[10]

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8. Commissioner Levin expresses the concern that an attachment can be issued even though the amount of the claim is fully secured. See letter from Commissioner Arnold Levin to Stan Ulrich (March 31, 1994) (attached to Memorandum 94-16, April 27, 1994, on file with California Law Revision Commission). This is theoretically possible, but the amount of the attachment would be $0, since Section 483.015(b)(4) requires the deduction of the value of the security. This points to an inconsistency between Section 483.015(b) (amount to be secured by attachment) and Section 484.050(c) (notice of attachment, which omits the reduction required by the 1990 amendment to Section 483.015(b)(4)). The Commission recommends that this inconsistency be resolved and that the Attachment Law be amended to make clear that the application for a right to attach order and writ of attachment should be dismissed if the value of the security exceeds the plaintiff's claim.

9. Section 483.020, read literally, appears to require that the amount of any security for rent be deducted twice from the amount of the attachment, once under subdivision (d) and once under subdivision (e) (incorporating Section 483.015(b)(4)).

10. E.g., the reference to claims secured by nonconsensual possessory liens in Section 483.010(b).

RECOMMENDED LEGISLATION

Code Civ. Proc. § 483.010 (amended). Cases in which attachment authorized

SEC. ____. Section 483.010 of the Code of Civil Procedure, as amended by Section 26 of Chapter 589 of the Statutes of 1993, is amended to read:

483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees.

(b) An attachment may not be issued on a claim which is secured by any interest in real property arising from agreement, statute, or other rule of law (including any mortgage or deed of trust of realty and any statutory, common law, or equitable lien on real property, but excluding any security interest subject to Division 9 (commencing with Section 9101) of the Commercial Code). 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, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount to be secured by the attachment shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim~~, or (2) where the claim was secured by a nonconsensual possessory lien but the lien has been relinquished by the surrender of the possession of the property~~.

(c) If the action is against a defendant who is a natural person, an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession. An attachment may not be issued on a claim against a defendant who is a natural person if the claim is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the defendant primarily for personal, family, or household purposes.

(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

~~(e) This section shall remain in effect only until January 1, 1996, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1996, deletes or extends that date.~~

Comment. The last clause of subdivision (b) of Section 483.010 is omitted as obsolete. This exception was applicable to personal property formerly covered by the general rule against attachment on a claim secured by personal property.

Subdivision (e) is deleted to remove the sunset provision that was enacted in 1990. See 1990 Cal. Stat. ch. 943, § 1.

Background Comment (1974-90 revised). Section 483.010 is based on subdivision (a) of former Section 537.1. Subdivision (a) of former Section 537.1 was designed to limit attachment

to cases arising out of commercial transactions. (The title to the 1972 enactment provides that it is one "relating to attachment in commercial actions.") Section 483.010 continues this purpose. Subdivision (a) limits the claims on which an attachment may be issued to those based on a contract, express or implied, where the total amount claimed is $500 or more, exclusive of costs, interest, and attorney's fees. Subdivision (c) further carries out this purpose by providing that, if the defendant is an individual, an attachment may be issued only if the contract claim "arises out of the conduct by the individual of a trade, business, or profession" and only if the goods, services, or money furnished were not used primarily for the defendant's personal, family, or household purposes. *Cf.* Advance Transformer Co. v. Superior Court, 44 Cal. App. 3d 127, 142, 118 Cal. Rptr 350, 360 (1974) (construing former Sections 537.1 and 537.2 as "limiting the attachment to situations in which the claim arises out of defendant's conduct of his business"). Compare Civil Code Section 1802.1 (retail sales). However, Section 483.010 is intended to encompass each of the situations described in paragraphs (1) through (4) of subdivision (a) of former Section 537.1. In this respect, it should be noted that the term "contract" used in subdivision (a) includes a lease of either real or personal property. See Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P 780 (1919) (realty); Walker v. Phillips, 205 Cal. App. 2d 26, 22 Cal. Rptr 727 (1962) (personalty). In addition, unlike former Section 537.2, Section 483.010 permits attachment on such claims against corporations and partnerships and other unincorporated associations which are not organized for profit or engaged in an activity for profit. Under Section 483.010, the court is not faced with the potentially difficult and complex problem of determining whether a corporation, partnership, or association is engaged in a trade, business, or profession.

Claims may be aggregated, but the total amount claimed in the action must be not less than $500. Generally an expeditious remedy will be available for lesser amounts under the small claims procedure. See Section 116.110 *et seq*. The claim must be for a "fixed or readily ascertainable" amount. This provision continues former law. E.g., Lewis v. Steifel, 98 Cal. App. 2d 648, 220 P.2d 769 (1950).

The introductory clause of Section 483.010 recognizes the authority to attach granted by other miscellaneous statutory provisions. See, e.g., Civ. Code §§ 3065a, 3152; Fin. Code § 3144; Food & Agric. Code § 281; Harb. & Nav. Code § 495.1; Health & Safety Code § 11501; Lab. Code § 5600; Rev. & Tax. Code §§ 6713, 7864, 8972, 11472, 12680, 18833, 26251, 30302, 32352. See also Section 492.010 (nonresident attachment).

The attachment remedy is not available where the plaintiff's claim is secured by real property unless the security has become valueless or has decreased in value to less than the amount then owing on the claim without the act of the plaintiff. See subdivision (b). Moreover, the security cannot simply be waived. As to a claim secured by personal property, see Section 483.015(b)(4). Special rules also apply in unlawful detainer cases. See Section 483.020.

Staff Note. The language in clause (2) of the second sentence of subdivision (b) was originally amended into the attachment bill to satisfy an objection of the State Bar Ad Hoc Committee on Attachments. (See AB 2948, as amended in Senate May 21, 1974; Minutes May 3-4, 1974; Memorandum 74-16, at 2.) The State Bar Committee wrote:

> This committee assumes that the "valueless" provision is not intended to cover the situation where a person with a possessory lien (see, e.g., Civil Code §§ 3046 et seq) has permitted the defendant to take the goods in question with him. If that were the law, then every person with a possible lien of this type would be induced to keep physical possession of the goods rather than allowing removal upon the defendant's promises to pay, etc.… This would not be in the best interest of the vast majority of people, who pay their bills regularly, but not necessarily on a C.O.D. basis. It is assumed that relinquishment of such a lien will not be deemed to be an act of the plaintiff that caused the security to become valueless.

As pointed out by Mr. Holman, the language in clause (2) is not needed once the personal property security limitation on attachments is removed, as was done in the 1990 amendments. (See Memorandum 94-41, Exhibit pp. 4-5.) The staff concurs with his alternate suggestion to eliminate the old language, since its purpose was been subsumed in the 1990 amendments.

Mr. Holman's first suggestion is to modify clause (2) so that it applies to relinquishment of nonconsensual *nonpossessory* liens in real property (as opposed to nonconsensual *possessory* liens on personal property). (See Exhibit pp. 4-5.) He cites the mechanic's lien as an example of a lien that would properly be covered by his suggested language. However, the original purpose of the language revolved around possession issues. The proposal would change the focus to the nonconsensual nature of the lien on real property. The staff is unclear on the desirability of this proposal — it is more than a mere technical change and goes beyond what is needed to satisfy the legislative mandate. Moreover, in the case of mechanics' liens, the right to attachment already exists. See Civ. Code § 3152; San Diego Wholesale Credit Men's Ass'n v. Superior Court, 35 Cal. App. 3d 458, 110 Cal. Rptr. 657 (1973).

Code Civ. Proc. § 483.010 (repealed). Cases in which attachment authorized

SEC. ____. Section 483.010 of the Code of Civil Procedure, as added by Section 1.5 of Chapter 943 of the Statutes of 1990, is repealed.

~~483.010. (a) Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars ($500) exclusive of costs, interest, and attorney's fees.~~

~~(b) An attachment may not be issued on a claim which 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, the security has become valueless or has decreased in value to less than the amount then owing on the claim, in which event the amount for which the attachment may issue shall not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim, or (2) where the claim was secured by a nonconsensual possessory lien but the lien has been relinquished by the surrender of the possession of the property.~~

~~(c) If the action is against a defendant who is a natural person, an attachment may be issued only on a claim which arises out of the conduct by the defendant of a trade, business, or profession. An attachment may not be issued on a claim against a defendant who is a natural person if the claim is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased, or licensed for use, the services furnished, or the money loaned was used by the defendant primarily for personal, family, or household purposes.~~

~~(d) An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.~~

Comment. Former Section 483.010 (as added by 1990 Cal. Stat. ch. 943, § 1.5) is repealed in light of continuation of the alternative rule in Section 483.010, as amended to delete the sunset provision.

Code Civ. Proc. § 483.015 (amended). Amount to be secured by attachment

SEC. ____. Section 483.015 of the Code of Civil Procedure, as amended by Section 27 of Chapter 589 of the Statutes of 1993, is amended to read:

483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:

(1) The amount of the defendant's indebtedness claimed by the plaintiff.

(2) Any additional amount included by the court under Section 482.110.

(b) The amount described in subdivision (a) shall be reduced by the sum of the following:

(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.

(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.

(4) The value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or ~~any person to whom~~ a prior holder of the security interest ~~was transferred~~.

~~(c) This section shall remain in effect only until January 1, 1996, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1996, deletes or extends that date.~~

Comment. Subdivision (c) of Section 483.015 is deleted to remove the sunset provision that was enacted in 1990. See 1990 Cal. Stat. ch. 943, § 2. For a special limitation on the reduction factor in subdivision (b)(4), see Section 483.020(e) (unlawful detainer). Subdivision (b)(4) is amended for clarity. This is a technical, nonsubstantive change.

Background Comment (1982-83 revised). Section 483.015 governs the amount for which an attachment may issue. Subdivision (b) clarifies the nature of claims that will reduce the amount to be secured by attachment. This subdivision makes clear, for example, that the amount to be secured by the attachment is not reduced by a tort claim that has not been reduced to judgment. The defendant may seek to have the amount secured by the attachment reduced as provided in Sections 484.060 and 485.240. Under subdivision (b), if a claim may be offset only if it is "one upon which an attachment could be issued," the claim must meet the requirements of Section 483.010 as to amount and nature of the claim.

Staff Note. The language change in subdivision (b)(4) is suggested by Mr. Holman. (See Memorandum 94-41, Exhibit p. 6.)

Code Civ. Proc. § 483.015 (repealed). Amount to be secured by attachment

SEC. ____. Section 483.015 of the Code of Civil Procedure, as added by Section 2.5 of Chapter 943 of the Statutes of 1990, is repealed.

~~483.015. (a) Subject to subdivision (b) and to Section 483.020, the amount to be secured by an attachment is the sum of the following:~~

~~(1) The amount of the defendant's indebtedness claimed by the plaintiff.~~

~~(2) Any additional amount included by the court under Section 482.110.~~

~~(b) The amount described in subdivision (a) shall be reduced by the sum of the following:~~

~~(1) The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.~~

~~(2) The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued.~~

~~(3) The amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations.~~

Comment. Former Section 483.015 (as added by 1990 Cal. Stat. ch. 943, § 2.5) is repealed in light of continuation of the alternative rule in Section 483.015, as amended to delete the sunset provision.

Code Civ. Proc. § 483.020 (technical amendment). Amount secured by attachment in unlawful detainer proceeding

SEC. ____. Section 483.020 of the Code of Civil Procedure is amended to read:

483.020. (a) Subject to subdivisions (d) and (e), the amount to be secured by the attachment in an unlawful detainer proceeding is the sum of the following:

(1) The amount of the rent due and unpaid as of the date of filing the complaint in the unlawful detainer proceeding.

(2) Any additional amount included by the court under subdivision (c).

(3) Any additional amount included by the court under Section 482.110.

(b) In an unlawful detainer proceeding, 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 rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(c) The amount to be secured by the attachment in the unlawful detainer proceeding may, in the discretion of the court, include an additional 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 has been or is likely to be delivered to the plaintiff, such amount to be computed at the rate provided in the lease.

(d) ~~Notwithstanding subdivision (b) of Section 483.010, an attachment may be issued in an unlawful detainer proceeding where~~ Except as provided in subdivision

(e), the amount to be secured by the attachment as otherwise determined under this section shall be reduced by the amounts described in subdivision (b) of Section 483.015.

(e) Where the plaintiff has received a payment or holds a deposit to secure ~~the payment of rent or the performance of other obligations under the lease. If the payment or deposit secures only the payment of rent, the amount of the payment or deposit shall be subtracted in determining the amount to be secured by the attachment. If the payment or deposit secure~~s (1) the payment of rent and the performance of other obligations under the lease or ~~secure~~s (2) only the performance of other obligations under the lease, the amount of the payment or deposit shall not be subtracted in determining the amount to be secured by the attachment.

~~(e) The amount to be secured by the attachment as otherwise determined under this section shall be reduced by the amounts described in subdivision (b) of Section 483.015.~~

Comment. Section 483.020 is amended to conform this section to Sections 483.010 and 483.015, as amended in 1990. The "notwithstanding" clause formerly in subdivision (d) is unnecessary, since Section 483.010 has been amended to eliminate the categorical restriction on attachment where a claim is secured by personal property. See 1990 Cal. Stat. ch. 943, § 1. Former subdivision (e) is deleted as surplus, since the appropriate reduction in the amount of the attachment is covered by subdivision (d), which incorporates the reduction factors in Section 483.015. See 1990 Cal. Stat. ch. 943, § 2, which added paragraph (4) to Section 483.015(b).

As revised, this section is consistent with the rule that an attachment is available where a claim is partially secured by personal property (Section 483.010(b)), with the amount of the attachment reduced by the value of any security interest (Section 483.015(b)(4)) that is applicable exclusively to the rental obligation. If the security may be applied to any obligation other than rent, subdivision (e) makes clear that the amount of the attachment is not reduced by the amount of the security.

Background Comment (1978 revised). Section 483.020 makes clear that, on the plaintiff's application, the "amount to be secured by the attachment" in an unlawful detainer proceeding 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 either the time of judgment or such earlier time as possession has been or is likely to be delivered to the plaintiff. One factor the court should consider in deciding whether to allow the additional amount is the likelihood that the unlawful detainer proceeding will be contested. There may be a considerable delay in bringing the unlawful detainer proceeding to trial if it is contested. In this case, there may be a greater need for attachment to include an additional amount to cover rent accruing after the complaint is filed. It should be noted that, in the case of a defendant who is a natural person, attachment is permitted only where the premises were leased for trade, business, or professional purposes. See Section 483.010.

The amount authorized under subdivision (c) 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.

Subdivision (d) makes clear that the amount of a deposit (such as a deposit described in Civil Code Section 1950.7) held by the plaintiff solely to secure the payment of rent is to be subtracted in determining the amount to be secured by the attachment. However, the amount of the deposit is not subtracted in determining the amount to be secured by the attachment where, for example, the deposit is to secure both the payment of rent and the repair and cleaning of the premises on

termination of the tenancy. Under former law, it was held that a deposit in connection with a lease of real property was not "security" such as to preclude an attachment under former Section 537(4), superseded by Section 483.010(b).

Staff Note. This revision takes care of a technical problem created by the 1990 amendments. This matter was brought to the Commission's attention by Mr. Holman. (See Memorandum 94-41. Exhibit pp. 6-7.)

Code Civ. Proc. § 484.050 (technical amendment). Contents of notice of application and hearing

SEC. ____. 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) The amount to be secured by the attachment is ~~the amount of the defendant's indebtedness claimed by the plaintiff over and above the sum of (1) the amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable, (2) the amount of any indebtedness of the plaintiff claimed by the defendant in a cross-complaint filed in the action if the defendant's claim is one upon which an attachment could be issued, and (3) the amount of any claim of the defendant asserted as a defense in the answer pursuant to Section 431.70 if the defendant's claim is one upon which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations~~ determined pursuant to Sections 482.110, 483.010, 483.015, and 483.020, which statutes shall be summarized in the notice.

(d) 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~~ the property is exempt from attachment or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, additional writs of attachment may be issued to attach other nonexempt property of the defendant on the basis of the right to attach order.

(e) If the defendant desires to oppose the issuance of the order, the defendant shall file with the court and serve on the plaintiff 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.

(f) If the defendant claims that the personal property described in the application, or a portion thereof, is exempt from attachment, the defendant shall include that claim in the notice of opposition filed and served pursuant to Section 484.060 or

file and serve a separate claim of exemption with respect to the property as provided in Section 484.070. If the defendant 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 expiration of the time for claiming exemptions.

(g) The defendant may obtain a determination at the hearing whether real or personal property not described in the application or real property described in the application is exempt from attachment by including the claim in the notice of opposition filed and served pursuant to Section 484.060 or by filing and serving a separate claim of exemption with respect to the property as provided in Section 484.070, but the failure to so claim that the property is exempt from attachment will not preclude the defendant from making a claim of exemption with respect to the property at a later time.

(h) Either the defendant or the defendant's attorney or both of them may be present at the hearing.

(i) 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. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

Comment. Subdivision (c) of Section 484.050 is amended for conformity with the substantive rules governing the amount of an attachment. The notice is required to set out the substance of the rules in Sections 482.110, 483.015, and 483.020. See Section 482.030(b) (Judicial Council to prescribe form of notices).

Staff Note. Since 1991, this section has been inaccurate since it omitted the reduction of the amount secured by the attachment based on the value of personal property security under Section 483.015(b)(4). This illustrates the folly of trying to summarize a changeable statute in a notice provision.

Code Civ. Proc. § 484.090 (amended). Issuance of order and writ on notice

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, which shall state the amount to be secured by the attachment determined by the court in accordance with Section 483.015 or 483.020, 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.

(4) The amount to be secured by the attachment is greater than zero.

(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, it shall order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220.

(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 the exempt property and prohibit attachment of the 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 the additional evidence or points and authorities.

Comment. Paragraph (4) is added to subdivision (a) of Section 484.090 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment establishes the principle that a right to attach order cannot be issued if there is no amount for which a writ of attachment can be issued and avoids the theoretical possibility of the court's making a right to attach order with no amount to be secured by the attachment. Prior to the 1990 amendments to Section 483.015, this was not likely to occur even in theory, but with the change in the rules concerning issuance of attachment where the plaintiff's claim is secured by personal property, the statutes read literally would permit issuance of a right to attach order under Section 484.090 even though the value of the security exceeded the amount of the claim. See Section 483.015(b)(4); see also Section 485.240 (application to set aside right to attach order).

Staff Note. This amendment is in response to Commissioner Levin's letter attached to Memorandum 94-16 in which he indicated that attachments were being issued even though the security was more than adequate to satisfy the claim.

Code Civ. Proc. § 485.220 (technical amendment). Issuance of ex parte order and writ

SEC. ____. Section 485.220 of the Code of Civil Procedure is amended to read:

485.220. (a) The court shall examine the application and supporting affidavit and, except as provided in Section 486.030, shall issue a right to attach order, which shall state the amount to be secured by the attachment, and order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, 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 upon the claim upon which the attachment is based.

(4) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof to be specified in the writ, is not exempt from attachment.

(5) The plaintiff will suffer great or irreparable injury (within the meaning of Section 485.010) if issuance of the order is delayed until the matter can be heard on notice.

(6) The amount to be secured by the attachment is greater than zero.

(b) If the court finds that the application and supporting affidavit do not satisfy the requirements of Section 485.010, it shall so state and deny the order. If denial

is solely on the ground that Section 485.010 is not satisfied, the court shall so state and such denial does not preclude the plaintiff from applying for a right to attach order and writ of attachment under Chapter 4 (commencing with Section 484.010) with the same affidavits and supporting papers.

Comment. Paragraph (6) is added to subdivision (a) of Section 485.220 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment is consistent with Section 484.090. See Section 484.090 Comment.

Staff Note. See Staff Note to Section 484.090, *supra*.

Code Civ. Proc. § 492.030 (technical amendment). Issuance of foreign attachment order

SEC. ____. Section 492.030 of the Code of Civil Procedure is amended to read:

492.030. (a) The court shall examine the application and supporting affidavit and shall issue a right to attach order, which shall state the amount to be secured by the attachment, and order a writ of attachment to be issued upon the filing of an undertaking as provided by Sections 489.210 and 489.220, 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 defendant is one described in Section 492.010.

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

(5) The affidavit accompanying the application shows that the property sought to be attached, or the portion thereof to be specified in the writ, is subject to attachment pursuant to Section 492.040.

(6) The amount to be secured by the attachment is greater than zero.

(b) If the court finds that the application and supporting affidavit do not satisfy the requirements of this chapter, it shall so state and deny the order. If denial is solely on the ground that the defendant is not one described in Section 492.010, the judicial officer shall so state and such denial does not preclude the plaintiff from applying for a right to attach order and writ of attachment under Chapter 4 (commencing with Section 484.010) with the same affidavits and supporting papers.

Comment. Paragraph (6) is added to subdivision (a) of Section 492.030 to make clear that the court is not to issue a right to attach order and writ of attachment if there is no amount to be secured by the attachment. This amendment is consistent with Section 484.090. See Section 484.090 Comment.

Staff Note. See Staff Note to Section 484.090, *supra*.