Study D-331 April 5, 1996

Memorandum 96-22

Attachment Where Claim Is Partially Secured: Further Review

ATTACHMENT BY UNDERSECURED CREDITORS

The Commission needs to devote additional study to the question of whether attachment should be available to an undersecured creditor, which has been permitted on a trial basis. The 1990 amendments to the Attachment Law permit a creditor on a debt secured by personal property or fixtures to obtain a writ of attachment for the unsecured portion of the debt. Further input on policy issues has been requested by the Senate Judiciary Committee, as outlined in the committee consultant's analysis quoted *infra*.

In 1994, the Commission considered the *experience* under the 1990 amendments — as distinct from the underlying policy issue — pursuant to an earlier legislative directive and recommended legislation in the 1995 session to continue the 1990 amendments by removing their sunset provisions. (The relevant part of the Commission's recommendation is set out in Exhibit pp. 1-12.) The attachment portion of the 1995 bill encountered objections from the Chairman of the Senate Judiciary Committee. Rather than jeopardize passage of the more important part of the bill relating to exemptions from enforcement of money judgments and in bankruptcy, the attachment provisions were amended out of the bill.

This created a mini-crisis for those who were depending on the Commission's bill to remove the sunset provisions from the undersecured creditor provisions. If saving legislation were not enacted in 1995, then the law concerning the right to attach would revert to its pre-1991 status. The staff notified the State Bar (the sponsor of the 1990 amendments) that the attachment provision had been stricken from SB 832 so that the bar could find another vehicle. As a consequence, AB 1689 was amended to extend the sunset provisions for another two years, pending further study. See 1995 Cal. Stat. ch. 591, §§ 1-4. As things now stand, unless the Legislature amends Code of Civil Procedure Sections 483.010 and 483.015 in the 1997 session, on January 1, 1998, they will revert to their 1990 form.

Background on Right To Attach

Under the first California civil practice act, attachment was not available if the debt was secured by a mortgage on real or personal property. See 1851 Civil Practice Act §§ 120-121 (Compiled Laws 1850-53, at 539). In 1860, the governing statute was amended to forbid attachment if the contract claim was "secured by a mortgage, lien, or pledge, upon real or personal property," but an exception was added to permit attachment where "such security has been rendered nugatory by the act of the defendant." 1860 Cal. Stat. ch. 314, § 13. This rule was carried forward unchanged in Section 537 of the 1872 Code of Civil Procedure.

Section 537 was amended in 1873-74 to preclude attachment where the claim was not secured by "any mortgage or lien upon real or personal property or any pledge of personal property" except where the security "without any act of the plaintiff, or the person to whom the security was given, becomes valueless." 1873-74 Code Amendments, ch. 383, § 68. The valueless security rule was thus revised to permit attachment as long as the plaintiff was not responsible for the loss, giving plaintiffs the benefit of declines caused by disasters, market forces, or unknown causes, whereas under the prior rule, attachment was permitted only where the defendant made the security nugatory.

The rule as laid down in 1873-74 remained largely unchanged for over 100 years. The rule was retained in the 1972 interim attachment statute enacted to correct constitutional defects following the decision in Randone v. Appellate Department, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971). See Code Civ. Proc. § 537.1, as enacted by 1972 Cal. Stat. ch. 550, § 3. The new Attachment Law, as enacted in 1974 following extensive study by the Commission, continued the essential principle of former Section 537. The staff does not believe that this was a significant issue in formulation of the Attachment Law since the Comment to Section 483.010 does not even mention the rule and the text of the recommendation mentions the secured debt rule only in passing. See, e.g., *Recommendation Relating to Prejudgment Attachment*, 11 Cal. L. Revision Comm'n Reports 701, 721, 762 (1973). The Commission focused its efforts on restricting attachment to commercial debts, avoiding attachment of necessities, modernizing and improving levy procedures and other procedural rules, and codifying and improving the law governing wrongful attachment.

Related Rules

From 1850 until the procedure was struck down by *Randone* in 1971, a writ of attachment was issued by the court clerk on the plaintiff's affidavit. The filing of the complaint and issuance of the writ were secret until after the sheriff filed return of service of the writ. Attachment was available in any contract case, express or implied, where the net amount claimed, exclusive of costs, interest, and attorney's fees, was over $50 (as of 1958). The plaintiff was required to provide an undertaking in an amount specified by the clerk or judge, but not less than $50 or more than the amount of the claim.

Obviously this type of remedy provided plaintiffs with a great deal of leverage and could easily be abused. Concern over the attachment remedy dating from these earlier procedures should not, however, be permitted to unduly affect our analysis of the current balance between the competing interests of plaintiffs and defendants under the Attachment Law. The revisions made following *Randone* to cure the constitutional defects, along with the additional improvements enacted in the interim attachment statute and through the Commission's recommendations, have dramatically altered the nature of attachment. Dire warnings concerning this "extraordinary" remedy, perhaps drawn from or influenced by old cases or treatises, need to be carefully analyzed in the light of the current statute.

The law no longer gives the plaintiff nearly unfettered freedom to harass the defendant and tie up property at will. Attachment is available only pursuant to a court order obtained on noticed motion or on a showing of extraordinary circumstances, and a judicial determination of the probable validity of the plaintiff's claim. Attachment is available only in commercial transactions. If the defendant is a natural person, the claim must arise out of the defendant's conduct of a trade, business, or profession. The property that may be attached is more limited than in former times, and necessities may not be attached. Levy procedures have been designed to minimize the impact on the defendant within the context of providing effective protections for the plaintiff. The plaintiff is required to give an undertaking of at least $7,500 in superior court or $2,500 in municipal court, which amounts may be increased on objection by the defendant. The court must approve sureties unless the surety is an admitted surety insurer. The wrongful attachment remedy has been significantly expanded to deter overreaching plaintiffs and provide relief to defendants.

These fundamental changes in the nature of the attachment remedy should be kept in mind as you consider the arguments for and against continuing the undersecured creditor attachment statute.

Revisions of the Security Rule

As part of some cleanup amendments in 1976, the Attachment Law was amended on Commission recommendation, and at the urging of the State Bar, to permit attachment where the security had *declined* in value, with the amount of the attachment limited to the difference between the security and the plaintiff's claim or the amount of the decline, whichever is the lesser amount. This rule had the effect of limiting the undersecured creditor to the amount of the decline in the security.

The State Bar has carried the law one step further in sponsoring the 1990 amendments. The purpose, as reported in the Senate Judiciary Committee consultant's analysis of SB 2170 (1990), was to protect *undersecured* creditors and give them the same remedies as *unsecured* creditors:

> According to the proponents: "Undersecured loans are made with regularity by lending institutions. It is a practice which fosters economic activity and provides flexibility for both lenders and loan applicants." In situations of default, however, present law limits the ability of undersecured creditors to obtain a prejudgment attachment of other property of a secured debtor except under narrow circumstances (i.e., diminution of value). Otherwise, an undersecured creditor must first obtain and liquidate the collateral and may then obtain an attachment order for the unsecured balance.
>
> The proponent points out that under present law, unsecured creditors may obtain a writ of attachment for the full amount of unsecured loans, and asserts that there is no apparent justification for not providing the same remedy for secured (including unsecured) creditors without their having to first acquire and liquidate any security interest.

(The 1990 consultant's analysis is set out in full at Exhibit pp. 13-16.)

Of course, secured and unsecured creditors *are* different, and arguably they should be treated differently. Traditional policies favor secured transactions. Secured creditors have priority over general creditors. This principle is supported by the assumption that secured creditors will resort to the security in satisfaction of their debts. In a situation involving competing creditors, principles of marshaling assets raise questions whether a secured creditor should be able to tie up more property of the defendant. See, e.g., Civ. Code § 2899. As noted in the

consultant's analysis of SB 2170, the objection may be made that an undersecured creditor seeks to have the best of both worlds. Having bargained for a partially secured position, now the undersecured creditor wants to have the remedies of an unsecured creditor. It has also been speculated that permitting undersecured creditors to attach might encourage bankruptcy.

The proponents of the 1990 amendments argued that permitting attachment for the deficiency made the Attachment Law consistent with the Commercial Code. Since a secured creditor with collateral consisting of personal property or fixtures could liquidate the collateral and then sue for the deficiency and obtain an attachment, it was anomalous not to permit the secured creditor to do both at the same time, with the attachment limited to the difference between the value of the collateral and the claim (i.e., the amount of the deficiency). (For an example of arguments from proponents of the 1990 amendments, see the memorandum from Alan M. Mirman at Exhibit pp. 17-21.) Once the secured creditor has sold or otherwise liquidated the collateral in a commercially reasonable manner under Commercial Code Section 9501 *et seq.*, any enforceable deficiency is an unsecured claim upon which an attachment may issue. Of course, if the parties have agreed that the debtor is not liable for any deficiency, the matter is ended. But otherwise, the creditor may attach in an action for the deficiency. Since a secured creditor may resort to the security and then attach in sequence, it is inefficient to prohibit the creditor from doing both at the same time, the proponents argue. Proponents also pointed out the distinction between real property security, which involves issues of anti-deficiency and one form of action rules, and personal property security, which are not subject to these limitations. (For additional material in support of the 1990 amendments, see the letter excerpt from Brian L. Holman at Exhibit pp. 22-25.)

Senate Judiciary Committee Analysis of AB 1689 (1995)

The analysis of AB 1689 (as amended on July 3, 1995) prepared by the consultant to the Senate Judiciary Committee presents the following overview, and is the source of the legislative request that the Commission devote further study to the matter:

> Up until 1990, the law generally precluded the use of a pre-judgment attachment in a civil action to recover on an obligation secured by real or personal property. As an exception to the general rule, an attachment order may be issued in cases where the collateral (security given) becomes valueless or, without any act of the creditor, has decreased in value to less

than the amount then owing on the claim. In that event, an attachment order may be obtained for (1) the amount of the decrease or diminution in the value of the security ("diminution test") or (2) the difference between the value of the security and the amount then owing on the claim, whichever is less.

SB 2170 (Doolittle), sponsored by the State Bar of California, revised the law to generally permit the use of pre-judgment attachments in civil actions to recover on a debt secured by personal property or commercial fixtures. An attachment order would be issued for the amount of the secured creditor's claim less the value of any security interest held by the creditor (but not including any diminution in the security's value caused by the creditor).

Because of the uniqueness of the proposed pretrial remedy, a five year sunset was proposed along with a directive to the California Law Revision Commission to study the impact of the measure and to make a recommendation for the measure's continuance, modification, or repeal. That sunset springs on January 1, 1996.

a) Prior committee action

This provision of AB 1689 was previously contained in SB 832 (Kopp), a measure by the California Law Revision Commission to cleanup the Enforcement of Judgments and Attachment laws. The provisions had originally proposed a repeal of the sunset in accordance with the Law Revision Commission's recommendation to retain the statute.

These provisions were amended out of SB 832 in response to concerns that a substantive change in creditor's remedies should not be effected through a Law Revision Commission cleanup bill. Concerns were also expressed about the Law Revision Commission's method of studying the desirability of the law. Their informal survey did not ask whether the law was fair or unfair to debtors, but only whether any problems have surfaced in the enforcement of the provision.

b) Proposed two-year extension of provision to conduct further study

Rather than to lose the provision entirely upon its scheduled sunset, the State Bar proposes a two-year extension of the provision so that a more comprehensive survey may be conducted.

c) Underlying issue raised and addressed by provision

According to SB 2170's proponents: "Undersecured loans are made with regularity by lending institutions. It is a practice which fosters economic activity and provides flexibility for both lenders and loan applicants." In situations of default, however, present law (before SB 2170) limits the ability of undersecured creditors to obtain a pre-judgment attachment of other property of a secured debtor except under narrow circumstances (i.e., diminution of value). Otherwise, an undersecured creditor must first obtain and liquidate the collateral and may then obtain an attachment order for the unsecured balance.

In contrast, unsecured creditors could obtain a writ of attachment for the full amount of unsecured loans. The proponent asserted that there was no justification for not providing the same remedy for secured (including undersecured) creditors without their having to first acquire and liquidate any security interest.

SB 2170 thus provided similar pre-judgment attachment rights for unsecured and secured creditors alike.

d) Effect of SB 2170: more protection for creditors

In principal effect, under SB 2170, a secured creditor would no longer have to show diminution in value in order to obtain an attachment order. This provision could operate to a debtor's disadvantage when the creditor seeks to maximize the value of the property that may be attached by minimizing the value of the security interest held by the creditor. While a court hearing is available for the debtor to challenge the creditor's assessment, a debtor may lack sufficient resources or sophistication to challenge the assessment, thereby allowing a possibly excessive attachment order by default.

Additionally, SB 2170 benefits undersecured creditors by enabling them to obtain a pre-judgment attachment order for the entire unsecured amount and not just the amount of any decrease in the security's value. The counterargument to SB 2170 was that the lender chose at the outset to become a secured creditor, with all its attendant advantages (e.g., priority on claims, less risk of uncollectability). Having elected to be a secured creditor with its stated remedies, the lender should not be given the "best of both worlds" by having attachment rights as broad as those of an unsecured creditor.

In its review, the Law Revision Commission received near-unaminous [sic] endorsement for the continuation of SB 2170. The sole dissenter observed that the number of attachments has increased following SB 2170 and therefore thought that the law should be repealed.

e) No application to consumer, household goods

SB 2170's broader attachment rights applies only on a claim which arises out of the defendant's conduct of a trade, business, or profession. It does not apply to obligations incurred by the defendant primarily for personal, family, or household purposes.

As the staff understands it, the Senate Judiciary Committee is looking for further analysis of the competing interests from the standpoint of the fairness of the 1990 amendments, as distinct from experience under the new law. The part of the consultant's analysis referring to the Commission states the sunset dates would be extended "in order for the Law Revision Commission … to study the fairness of the proposals to expand creditor's remedies."

The staff has reviewed the files and earlier memorandums on this subject, including letters submitted by the sponsors of the 1990 amendments. (See Memorandums 94-16 and 94-41; memorandum from Alan M. Mirman at Exhibit pp. 17-21; letter from Brian L. Holman, initiator of the 1990 amendments, at Exhibit pp. 22-25.) We have looked for relevant academic literature, and found nothing. In sum, the issue comes down to a consideration of several arguments, none of them new, on both sides of the issue, as well as the earlier evaluation of experience under the 1990 amendments.

Arguments for Continuing 1990 Amendments

The arguments in favor of the 1990 amendments may be summarized as follows:

(1) Permitting attachment by creditors who do not have security for the full amount of the debt assists business borrowers in obtaining financing on less than full security. This benefits credit-worthy borrowers who otherwise might not be able to get financing.

(2) In commercial transactions, it makes sense generally to permit attachment for any amount that can be enforced after judgment. Since the plaintiff has to show probable validity to obtain a right to attach order, the defendant is protected from overreaching. To permit the debtor to avoid or delay a prejudgment remedy just because the debt is partially secured is arbitrary and inefficient.

(3) Permitting attachment of the unsecured part of the debt avoids the practical problems and artificialities inherent in proving that the value of the security has declined or become valueless without fault of the plaintiff. Determining whether the security has decreased in value requires the court to determine what it was originally worth at some time in the past and then determine its present value, before permitting attachment for the difference. Only the present value of the security need be determined under the 1990 amendments.

(4) Experience under the law has not resulted in any problems, as far as the Commission's study and survey in 1994 were able to determine. If the 1990 amendments resulted in significant unfairness, we would have expected to receive some report from practitioners, courts, or interest groups that were contacted in the course of the study in 1994.

Arguments Against

The arguments in opposition to continuing the 1990 amendments may be summarized as follows:

(1) Historically, attachment was not available in California for secured debts unless the security had become valueless without the act of the plaintiff. This rule recognizes the coercive effect attachment can have on a going business and should be preserved.

(2) If the debt is secured, the parties may be presumed to have entered into the contract with the expectation that the creditor should resort to the security. The terms of the loan, for example, may take into account the additional risk exposure due to the undersecured status of the lender.

(3) If a creditor can fall back on attachment, then there is less of an incentive to make sure that the security is not impaired.

(4) Mixing secured debt enforcement and attachment gives the creditor too much power since typically the creditor may sell the security under UCC provisions through private enforcement, albeit in a "commercially reasonable manner." Permitting attachment for the unsecured part of the liability would further depress the price the creditor pays or accepts at a private sale.

(5) Permitting attachment by undersecured creditors creates an unfair advantage over unsecured creditors who must rely on attachment to secure a debt. The secured creditor is already favored to the extent of the security (which cannot be profitably subjected to attachment by other creditors) and should not also have the opportunity to lock up other property ahead of competing unsecured creditors.

Staff Recommendation

On balance, the arguments against the 1990 amendments appear to be mainly theoretical and historical, rather than practical. The real concern may relate to liability for deficiency in secured transactions, but that is not an issue that the Attachment Law should have to deal with. Ideally, if a debtor is liable for a deficiency in a commercial case, attachment should be available. In other words, the *remedy* of attachment should not be affected by the factor of whether the liability is for the whole amount of a debt, an amount remaining after partial voluntary payment, or an amount remaining after involuntary satisfaction. After more than five years' experience under the new rule we have not been able to

find any evidence of abuse or any opposition from practitioners. We are not hearing of the sort of abuses that led to the due process attack on the old attachment statute and other prejudgment remedies — and we should not hear of such abuses because are not be permissible under the modern Attachment Law. We also suspect it is not an important matter to the vast majority of debtors or competing creditors, perhaps because any increased opportunity for abuse under the 1990 amendments is minimal, if it exists at all.

The staff has limited its consideration of this issue to whether the 1990 amendments should be allowed to expire at the end of 1997 or should be made permanent by deletion of the sunset provisions. We have not seriously considered rethinking the fundamentals of the Attachment Law or tampering with other rules leading to the possibility of unintended consequences. Other possibilities can be imagined, however, such as permitting attachment by secured creditors only if the remedy was specifically bargained for in the underlying contract, requiring a special showing of need, increasing the applicable bonding requirement, requiring the creditor to elect remedies by releasing the collateral if attachment is granted — but these ideas proceed from the conclusion that the 1990 amendments unfairly tip the balance in favor of creditors, and we have been unable to reach that conclusion.

Whatever the outcome of this investigation, there are a number of technical revisions in the Attachment Law that were proposed in the Commission's 1995 recommendation that need to be implemented. These technical revisions need to be made regardless of the disposition of the undersecured creditor issue.

Closing Observations

This subject has come to the Commission in an unusual context. Because of the sunset provisions in Sections 483.010 and 483.015, the technical burden is still on the proponents of the 1990 amendments to sponsor legislation to make them permanent — but the Commission did not sponsor the 1990 amendments. In light of the experience under the statute, the burden of persuasion should be on any opponents of rule. However, we have not been able to find anyone who opposes the 1990 amendments to show how the new rules have operated undesirably.

In 1994, based on its investigation of experience under the 1990 amendments, the Commission decided to recommend repeal of the sunset provisions. It was felt that simply reporting the Commissions conclusions to the Legislature

without implementing legislation would not be doing a complete job. However, since that initiative was rebuffed, the staff is not certain what to suggest as the appropriate approach this time around. The Commission may decide to make the same recommendation, this time having fully considered the policy arguments. Or, having fully considered the *fairness* of the 1990 amendments and not just the *experience* during the last five years, the Commission may conclude that the sunset provisions should be allowed to operate at the end of 1997 and return the law back to its earlier status. This approach does not require any new legislation, but it puts the Commission in the unusual role of providing anticipatory opposition to what is likely to be a State Bar bill in 1997 to remove or defer the sunset provisions on the 1990 amendments.

ATTACHMENT AND THE ONE FORM OF ACTION RULE

Also attached to this memorandum is a letter from Margaret M. Mann concerning a troublesome problem arising because of an apparent conflict between Code of Civil Procedure Section 726 — the "one form of action rule" governing enforcement of debts secured by real property — and the availability of attachment where the security has declined in value or become worthless without act of the plaintiff under Section 483.010. (See Exhibit pp. 26-28.) Ms. Mann is a member of the State Bar Debtor-Creditor and Bankruptcy Committee (Business Law Section) and is working on this issue through that committee as well as seeking the input of other interested bar committees.

This issue is in a formative stage. The staff has only briefly considered the cases cited in Ms. Mann's letter and done some preliminary reading. It appears that the statutes are confusing some courts and practitioners and that some clarification would be appropriate. Perhaps a simple line added to the statutes would resolve the issue. It is unknown whether it would be controversial. On the other hand, a recent treatise states:

> Some practitioners now fear that, under *Shin*, such an attachment might result in a one-action sanction. These fears seem unwarranted, however, because the foreclosing-attaching creditor would be proceeding under the required *one action* (i.e., the foreclosure action) in which the attachment is being sought. Because the legislature intended that this provision of CCP § 483.010(b)(1) apply exclusively to foreclosure actions, the legislature surely did not intend that such an attachment would eliminate the lien the creditor is foreclosing.

(J. Judge, R. Livsy & E. Weiner, California Mortgage and Deed of Trust Practice § 4.5, at 49 (Cal. Cont. Ed. Bar, 2d ed. Update, Feb. 1996).)

The staff is bringing this issue to the Commission's attention to get a preliminary reading on whether it is something you would like to consider for inclusion in an attachment bill in the 1997 legislative session. Of course, if the Commission decides against recommending any attachment revisions, then the issue is resolved, unless you want to investigate this issue as an independent matter.

Given these uncertainties, the staff suggested to Ms. Mann that she would be best advised to pursue the clarification as a State Bar project at this stage, but that it would be an appropriate addition to an attachment bill if the Commission decided to pursue these matters.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Exhibit

Note: The following material is taken from the Commission's recommendation on *Debtor-Creditor Relations: Attachment Where Claim Is Partially Secured — Report on 1990 Amendments,* 25 Cal. L. Revision Comm'n Reports 1, 7-11, 25-40 (1995).

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

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, unless otherwise noted.) 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 Prejudgment Attachment,* 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.

*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 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 opinions of relevant State Bar sections were requested.

The Commission received comments from four superior courts, the Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section of the State Bar, and the Commercial Law League.[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.

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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, on file with California Law Revision Commission); letter from Brian L. Holman (June 22, 1994) (attached to Memorandum 94-41, on file with California Law Revision Commission).

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, on file with California Law Revision Commission).

7. See letters attached to Memorandum 94-16 (on file with California Law Revision Commission); letter from Leo G. O'Biecunas, Jr., on behalf of the Creditor Rights Section of the Commercial Law League of America, to Stan Ulrich (Sept. 22, 1994) (on file with California Law Revision Commission). The Commission also received comments from Brian L. Holman and Alan M. Mirman, who were instrumental in sponsoring the 1990 amendments. Mr. Holman and Mr. Mirman believe respectively that the amendments are "serving their purpose" and that the amendments have created "no problems, concerns, or drawbacks." See letter and background materials from Brian L. Holman to the Commission (June 22, 1994) and letter from Alan M. Mirman to the Commission (Sept. 7, 1994) (attached to Memorandum 94-41, on file with California Law Revision Commission).

- Judge Arthur W. Jones of the San Diego County Superior Court reported that the new rule appears to be working well and 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 Commercial Law League of America believes that the attachment provisions "should be allowed to remain in effect."

The dissenting note came from Commissioner Arnold Levin of the Los Angeles County Superior Court, who reported that the number of attachments has increased under the amended statute and concluded with the suggestion that the law be restored to its earlier 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.[9]

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.[10] For example, the rules relating to attachment in unlawful detainer actions were not adjusted for conformity with the 1990 amendments,[11] and obsolete language qualifying the former limitation applicable to claims secured by personal property still remains in the code.[12]

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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, 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. For the implementation of this recommendation, see *infra*, Sections 483.010 (amended), 483.010 (repealed), 483.015 (amended), 483.015 (repealed).

10. For the implementation of this technical revision, see *infra*, Sections 483.020, 484.050, 484.090, 485.220, 492.030.

11. 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)).

12. 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

SECTION 1. 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 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 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, without act of the plaintiff, the security has become valueless or has decreased in value to less than the amount then owing on the claim. 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.

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

SEC. 2. 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.~~

~~(e) This section shall become operative on January 1, 1996.~~

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. 3. 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.

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

SEC. 4. 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.~~

~~(c) This section shall become operative on January 1, 1996.~~

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. 5. 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 secures~~ *(1)* the payment of rent and the performance of other obligations under the lease or ~~secures~~ *(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). See Garfinkle v. Montgomery, 113 Cal. App. 2d 149, 155-57, 248 P.2d 52, 56-57 (1952).

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

SEC. 6. 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 court 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, 483.010, 483.015, and 483.020. See Section 482.030(b) (Judicial Council to prescribe form of notices).

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

SEC. 7. 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).

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

SEC. 8. 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.

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

SEC. 9. 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.

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1989-90 Regular session

SB 2170 (Doolittle)
As amendment May 1, 1990
Hearing date: May 8, 1990
Code of Civil Procedure
GWW/ps

CREDITORS' REMEDIES
-PREJUDGMENT ATTACHMENT-

HISTORY

Source: State Bar of California

Prior Legislation: AB 2864 (1976) - Chapter 437

Support: Unknown

Opposition: No known

KEY ISSUE

SHOULD THE GENERAL RULE PRECLUDING THE USE OF PREJUDGMENT ATTACHMENTS IN CIVIL ACTIONS TO ENFORCE A SECURED DEBT BE REVISED TO INSTEAD PERMIT A CREDITOR OF A DEBT SECURED BY PERSONAL PROPERTY TO OBTAIN A PREJUDGMENT ATTACHMENT OF OTHER ASSETS OF THE DEBTOR, AS SPECIFIED?

PURPOSE

Existing law generally precludes the use of a prejudgment attachment in a civil action to recover on an obligation that is secured by real or personal property. As an exception to the general rule, an attachment order may be issued in cases where the collateral (security given) becomes valueless or, without any act of the creditor, has decreased in value to less than the amount then owing on the claim. In that event, an attachment order may be obtained for (1) the amount of the decrease or diminution in the

(More)

value of the security ("diminution test") or (2) the difference between the value of the security and the amount then owing on the claim, whichever is less.

The bill would instead generally permit the use of prejudgment attachments in civil actions to recover on a debt secured by personal property or commercial fixtures. An attachment order would be issued for the amount of the secured creditor's claim less the value of any security interest held by the creditor (including any diminution in the security's value caused by the creditor).

The bill would sunset on January 1, 1996. In the intervening period, the California Law Revision Commission would be directed to study the impact of the measure and to make a recommendation for the measure's continuance, modification, or repeal.

The purpose of this bill is to enhance the ability of secured creditors to obtain prejudgment attachment orders on a debtor's property.

COMMENT

1. Stated problem to be addressed

According to the proponents: "Undersecured loans are made with regularity by lending institutions. It is a practice which fosters economic activity and provides flexibility for both lenders and loan applicants." In situations of default, however, present law limits the ability of undersecured creditors to obtain a prejudgment attachment of other property of a secured debtor except under narrow circumstances (i.e., diminution of value). Otherwise, an undersecured creditor must first obtain and liquidate the collateral and may then obtain an attachment order for the unsecured balance.

The proponent points out that under present law, unsecured creditors may obtain a writ of attachment for the full amount of unsecured loans, and asserts that there is no apparent justification for not providing the same remedy for secured (including undersecured) creditors without their having to first acquire and liquidate any security interest.

This bill, originally proposed by the Debtor/Creditor Relations and Bankruptcy Committee of the Business Law Section of the State Bar, would provide similar prejudgment attachment rights for unsecured and secured creditors alike.

2. Possible adverse impacts on debtors

In principal effect, a secured creditor would no longer have to show diminution in value in order to obtain an attachment order. This provision could operate to a debtor's disadvantage

when the creditor seeks to maximize the attachment order by minimizing the value of the security interest held by the creditor. While a court hearing is available for the debtor to challenge the creditor's assessment, a debtor may lack sufficient resources or sophistication to challenge the assessment, thereby allowing a possibly excessive attachment order by default.

Additiionally, the change may be particularly beneficial for an undersecured creditor as it would be able to obtain a prejudgment attachment order for an amount covering the entire claimed debt and not just the amount of any decrease in the security's value. The following example might best illustrate this impact of SB 2170:

B, borrower, obtains a $100,000 business loan from L, lender. L takes a secured interest in the fixtures purchased for $80,000 with the loan proceeds. L is knowingly undercollateralized and is by contract an undersecured creditor. After 6 months, B defaults with a remaining loan balance of $95,000. The fixtures, through depreciation, are worth only $50,000.

Under existing law, L would be able to obtain an attachment order for $30,000, the diminishment of his security interest ($80,000 less $50,000), which essentially preserves his status quo -- he is again protected up to $80,000. As to the remaining $15,000 difference, L had undercollateralized the note; L took the risk. (L in this instance may possibly have charged additional loan points and/or higher interest rates for being an undersecured creditor. The proponent asserts, though, that many lenders base their rates on the strength of the customer rather than the extent of collateralization of the note, and therefore charge the same rate and points for unsecured and secured notes.)

Under SB 2170, L would be able to obtain a prejudgment attachment order for $45,000, the full amount of the loan less the value of the security interest. Under this bill, L's security position would be improved -- the $45,000 attachment order and the $50,000 remaining security interest would exceed L's initial security interest of $80,000.

The proponent asserts that since B owes the money to L, L should be able to obtain an attachment of property to cover the eventual judgment. Noting that the purpose of the attachment law is to allow a court approved procedure whereby assets will be preserved pending trial, the sponsor contends that the failure to obtain an attachment on the full undersecured amount could leave L in the position of having an uncollectable judgment. As frequently asserted by the proponent, an

undersecured creditor should have the same ability as a unsecured creditor to obtain a writ of attachment for the full amount of a claimed debt.

The flip side to proponent's arguments is that the lender chose at the outset to become a secured creditor, with all its attendant advantages (e.g., priority on claims, less risk of uncollectability). Having elected to be a secured creditor with its stated remedies, the lender should not be given the "best of both worlds" by having attachment rights as broad as those of an unsecured creditor. The attachment of additional property above that amount necessary to make whole the creditor's security interest could leave a business without the liquidity and flexibility needed to survive. Commented one state consumer lawyer, the bill would "hurt small businesses, place many debtors over a barrel and drive them into bankruptcy."

3. Law Revision Commission to review revision

The Attachment Law, including C.C.P. Section 483.010, is the product of recommendations of the California Law Revision Commission and was first adopted in 1974. Under the initial law the attachment remedy was generally not available where the plaintiff's claim was secured. The only exceptions were where the security became a valueless or where a nonconsensual possessory lien was relinquished. Pursuant to AB 2864 of 1976, Chapter 437, Section 483.010 was amended to also permit an attachment where through no act of the creditor, the security has decreased in value to less than the amount owing on the claim.

SB 2170 would all but reverse the early general policy and make attachment orders available to enforce obligations secured by personal property.

To address concerns that the measure may unduly hamper debtor's rights, the sponsor has agreed to a 5 year sunset of its provisions. In the interim period, California Law Revision Commission would study the legislation and make a recommendation for its continuance, modification, or repeal.

4. No application to consumer, household goods

The broader attachment rights would apply only on a claim which arises out of the defendant's conduct of a trade, business, or profession. It would not apply to obligations incurred by the defendant primarily for personal, family, or household purposes.

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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 <u>is</u> 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?

WHITE & CASE

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MIDDLE EAST
JEDDAH
RIYADH

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.

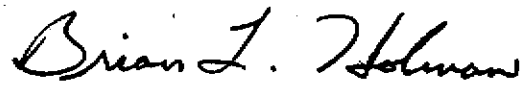
[1/] Under Section 515.010 of the Code of Civil Procedure, a creditor seeking a writ of possession must post a bond equal to at least twice the value of the defendant's interest in the collateral.

* * * * *

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

Enclosures

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

LUCE, FORWARD, HAMILTON & SCRIPPS

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MARGARET M. MANN, PARTNER
DIRECT DIAL NUMBER (619) 699-2427

January 23, 1996

78050-10

Mr. Stan Ulrich
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, California 94303

Re: Writ of Attachment Statute

Dear Stan:

Enclosed is the letter I wrote to Bob Matteson, of the State Bar Business Law Executive Committee. This letter describes an issue which the State Bar Debtor-Creditor & Bankruptcy Committee, of which I am a member, believe should be addressed in regard to the Law Review Commission's review of the writ of attachment statute.

Our committee is happy to assist the Law Review Commission in any way or to pursue this matter independently. Please call me after you have received and reviewed this letter so that you can advise us how we can be of assistance.

Thank you for your courtesy and cooperation.

Very truly yours,

Margaret M. Mann
of
LUCE, FORWARD, HAMILTON & SCRIPPS

MMM/rlr
Enclosure

1044494.01\MMM

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MARGARET M. MANN PARTNER
DIRECT DIAL NUMBER (619) 699-2427

December 21, 1995

Robert M. Mattson, Jr.
Morrison & Forester
19900 MacArthur Blvd.
Irvine, CA 92715

Re: Writ of Attachment Statute

Dear Mr. Mattson:

I am a member of the Debtor-Creditor and Bankruptcy Committee of the Business Law Section of the State Bar. After discussion at the October 27, 1995 meeting of the Committee, we decided to support the California Law Revision Commission's review of California Code of Civil Procedure ("CCP") section 483.010 commended pursuant to AB 1689. Section 483.010 authorizes the attachment remedy for real estate secured creditors who become undersecured. In its review, we believe the Commission should address an issue raised by section 483.010 which, if not resolved, could create unintended catastrophic consequences for the financial and business community. I was asked to advise you of the Committee's position and offer our assistance.

The issue which we believe should be addressed is whether the "security first" aspect of the one action rule codified in CCP section 726, is violated when a real estate secured creditor pursues a writ of attachment against a borrower's unpledged assets to secure the deficiency. We believe that resolution of this issue is necessary because it would be anomalous for the legislature to provide a remedy to real estate secured creditors in the attachment statute if pursuing that remedy would violate another statute, particularly because the sanction for violating the "security first" aspect of section 726 is so extreme. If the "security first" aspect is violated, the secured creditor could potentially lose its collateral. Security Pacific National Bank v. Wozab, 51 Cal.3d 991, 1003-1004 (1990).

Two lower court decisions, the second of which was depublished, have considered this issue without resolving it. Shin v. Superior Court, 26 Cal.App. 4th 542, 552 (1994), and First Interstate Bank of California v. Anderson, 3 Cal. Rptr. 2d 337, 339 (1992). Shin held that pursuing a writ of attachment outside of a judicial foreclosure action would violate the "security

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first" aspect of section 726. However, Shin contains dicta which may indicate that an attachment of the borrower's unpledged assets in compliance with the procedural safeguards of the attachment remedy would not violate section 726. Shin at 552.

The Anderson case is even less helpful in resolving the issue. Of course, as a result of it being depublished, it is of no precedential value. Additionally, Anderson was decided on waiver grounds given the borrower's failure to appeal the writ of attachment. Anderson also stated in dicta that the writ of attachment should not have been issued, but suggested again in dicta that section 726 had not been violated by its issuance. Anderson at 339-340.

We believe the Commission should resolve this conflict because the lack of clarity in the law unnecessarily affects countless transactions and creates a pitfall for the unwary. Also, because the sanction imposed by violating the "one action" rule is so severe, many undersecured real property lenders have not pursued the writ of attachment remedy. A more severe problem would result if a real property lender, relying on the dicta in Shin and Anderson cases, obtained a writ of attachment and inadvertently lost its collateral while pursuing a remedy provided by the legislature.

Members of the Committee may hold differing views on whether the "security first" aspect of the one action rule should be applicable to pursuit of a writ of attachment and we intend to continue to discuss and consider the issue. Nonetheless, the Committee uniformly believes that seeking an attachment should not be a trap for the unwary, and supports the study and resolution of this issue.

Please call me if our Committee can be of assistance or if you have any questions.

Sincerely,

Margaret M. Mann
Committee Member

MMM:ma
cc: Committee Members