

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Attachment by Undersecured Creditors

November 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Attachment by Undersecured Creditors*, 26 Cal. L. Revision Comm'n Reports 307 (1996).

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
(415) 494-1335

ALLAN L. FINK, Chairperson
CHRISTINE W.S. BYRD, Vice Chairperson
ASSEMBLYMAN DICK ACKERMAN
ROBERT E. COOPER
BION M. GREGORY
SENATOR QUENTIN L. KOPP
ARTHUR K. MARSHALL
EDWIN K. MARZEC
SANFORD M. SKAGGS
COLIN W. WIED

November 14, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

The Commission recommends continuation of the 1990 amendments permitting attachment by undersecured creditors, specifically, creditors whose claims are partially secured by personal property security. This recommendation would be implemented by repealing the sunset clauses applicable to the 1990 amendments. The Commission has not found any evidence that the 1990 rules have caused any problems nor has the Commission found any grounds for modifying the policy of the existing rules. The Commission also recommends a number of technical revisions.

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

ATTACHMENT BY UNDERSECURED CREDITORS

This recommendation proposes repealing the sunset clauses applicable to 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 The effect of this recommendation would be to make the 1990 changes permanent. In addition, this recommendation proposes a number of technical revisions in the Attachment Law.

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 was 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.

The Commission submitted its report as part of a recommendation on *Debtor-Creditor Relations*, 25 Cal. L. Revision Comm'n Reports 1 (1995). See *id.* at 7-11, 25-40. The Commission recommended continuation of the 1990 attachment provisions based on experience under the modified law and implementing amendments were included in Senate Bill 832 (Kopp) in the 1995 legislative session. However, the attachment provisions were removed from the bill in the Senate Judiciary Committee, apparently because the Committee wanted the Commission to evaluate the policy underlying the 1990 amendments. See Senate Committee on Judiciary. Consultant's Analysis of AB 1689, as amended July 3, 1995 (1995-96 Regular Session). Consequently, the attachment sunset provisions were extended for two years "in order for the Law Revision Commission ... to study the fairness of the proposals to expand creditor's remedies." *Id.* The sunset extension was enacted as 1995 Cal. Stat. ch. 591, §§ 1-4 (amending Code Civ. Proc. §§ 483.010-483.015).

Background

The Attachment Law² 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 limiting 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 1990 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 *undersecured* creditor the same attachment remedy as an *unsecured* creditor, to the extent that the debt is not secured.⁵

The 1990 rule will expire on January 1, 1998, 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 will come back into force.⁶

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.

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

Experience Under 1990 Amendments

The 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.⁷

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.⁸ Opinion was nearly unanimous in support of continuing the 1990 amendments:

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 note 1 *supra*.

8. See letters attached to Memorandum 94-16 (on file with California Law Revision Commission); letter from Leo G. O'Bieunas, 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 Commis-

- Judge Joe S. Gray of the Sacramento County Superior Court reported that he and Judge Morrison, who handle almost all attachments in that county, have not perceived any difficulties with or any effect from the new rule.
- Judge Ronald L. Bauer of the Orange County Superior Court reported no observable impact of the 1990 amendments in over 700 cases considered since enactment of the new rule.
- Judge Arthur W. Jones of the San Diego County Superior Court reported that the new rule appears to be working well 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.⁹

sion (Sept. 7, 1994) (attached to Memorandum 94-41, on file with California Law Revision Commission).

9. 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

Policy Issues

The arguments in favor of permitting limited attachment by undersecured creditors 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 obtain financing.

(2) In commercial transactions, it makes sense generally to permit attachment for any amount that can be enforced after judgment. Since the plaintiff must show probable validity of the claim 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 its original value 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 shown any problems, as far as the Commission's study and survey in 1994 were able to determine, nor have any problems come to light since the survey was conducted. If the 1990 amendments resulted in significant unfairness, the Commission would have expected to receive some report from practitioners, courts, or interest

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.

groups that have been contacted in the course of the Commission's study.

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 portion of the liability could further depress the price the creditor bids or accepts at a private sale.

(5) Permitting attachment by undersecured creditors gives them 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.

Commission Recommendation

Having reviewed the reports received on experience under the new rule and considered the policy arguments for and against permitting attachment by undersecured creditors, the Commission concludes that the substance of the 1990 amendments should be made permanent. There is no evidence that the 1990 rules have caused any problems nor has the Commission found any grounds for modifying the policy of the 1990 amendments. While individuals may evaluate the policy arguments differently, on balance there is no clear need to revise rules that appear to be operating as designed and without any reports of negative consequences. The Commission recommends removal of the sunset clauses and the final repeal of the earlier rules.¹⁰

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.¹¹ For example, the rules relating to attachment in unlawful detainer actions were not adjusted for conformity with the 1990 amendments,¹² and obsolete language qualifying the former limitation applicable to claims secured by personal property still remains in the code.¹³

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

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

12. 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)).

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

PROPOSED 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 1 of Chapter 591 of the Statutes of 1995, 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, 1998, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1998, 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 and extended in 1995. See 1990 Cal. Stat. ch. 943, § 1; 1995 Cal. Stat. ch. 591, § 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 amended by Section 2 of Chapter 591 of the Statutes of 1995, 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, 1998.~~

Comment. Former Section 483.010 (as amended by 1995 Cal. Stat. ch. 591, § 2) 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 3 of Chapter 591 of the Statutes of 1995, 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, 1998, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1998, deletes or extends that date.~~

Comment. Subdivision (c) of Section 483.015 is deleted to remove the sunset provision that was enacted in 1990 and amended in 1995. See 1990 Cal. Stat. ch. 943, § 2; 1995 Cal. Stat. ch. 591, § 3. 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 amended by Section 4 of Chapter 591 of the Statutes of 1995, 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, 1998.~~

Comment. Former Section 483.015 (as amended by 1995 Cal. Stat. ch. 591, § 4) 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.
