



Prejudgment Remedies - In General

Provisional or prejudgment remedies enable creditors to preserve the value of potential judgments after a court action is filed but before it has been concluded by preventing debtors from transferring, encumbering, dissipating or concealing assets available to satisfy the judgments. These remedies are temporary, and can only be pursued in connection with actions on the underlying claims.

Provisional remedies include:

- Attachment;
- Claim and Delivery; and
- Receivership.

Attachment - General Concepts

The attachment remedy allows commercial creditors holding unsecured claims (or claims secured only by personal property) to create judicial liens on debtors' property before final adjudication of the claims sued upon. Creditors must follow statutory guidelines in applying for attachments and establish prima facie claims.

The main purpose of attachment is to create a judicial lien on the debtor's attachable property. This protects plaintiff's priority so that a judgment ultimately obtained will be enforceable against the attached property. Without an attachment lien, an unsecured creditor risks being subordinated to other consensual or judicial liens imposed on the debtor's property before the creditor obtains a judgment. Such other priority liens could render the creditor's subsequent judgment effectively worthless.

California Attachment Statutes

Attachment is a purely statutory remedy. The attachment statutes are subject to strict construction--i.e., unless specifically provided for by the attachment law, no attachment procedure may be ordered by the court.

Note: Prejudgment attachment is not an available remedy in small claims court proceedings . . . an important factor to consider when advising clients on whether to file a small claims action. [Ca Civ Pro § 116.140(b)]
When Attachment Is Authorized

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Generally, an attachment may issue only if the claim sued upon is:

- A "claim for money . . . based upon a contract, express or implied";
- Of a "fixed or readily ascertainable amount not less than \$500";
- That is either unsecured or secured by personal property (including fixtures); AND
- That is a commercial claim. [Ca Civ Pro § 483.010]

Parties subject to a contractual agreement to arbitrate their disputes may apply for attachment, provided they can show the arbitration award might be rendered ineffective without such provisional relief. [See Ca Civ Pro § 1281.8(b)]

Express Or Implied Contract Requirement: An attachment may issue only upon a claim for money based upon an express or implied contract (such as a "common count"). [Ca Civ Pro § 483.010(a)]. Attachment may not issue when no contract claim is involved--e.g., where an equitable action is not based upon a contractual obligation. However, attachment may issue upon a proper "contract" claim "whether or not other forms of relief are demanded." [Ca Civ Pro § 483.010(d)]

"Implied contract" includes restitutionary obligations--e.g., where defendant acquired plaintiff's property through fraud, conversion or mistake and refuses to return it. A money judgment is "contractual" or "quasi-contractual" for collection purposes, whether rendered on a tort or contract claim because Judgment debtors have an implied contractual obligation to pay judgments.

"Contract" also includes leases of real or personal property.

"Fixed Or Readily Ascertainable Amount" Requirement: The money claim must be for a "fixed or readily ascertainable amount" of at least \$500 (excluding costs, interest and attorney fees). [Ca Civ Pro § 483.010(a)] The damages must be measurable by reference to the contract itself.

"Either Unsecured Or Secured By Personal Property" Requirement: Attachment may issue on unsecured claims or claims secured by personal property (including fixtures). [Ca Civ Pro § 483.010(b)] On the other hand, attachment ordinarily cannot issue on claims secured by:

- Real property mortgages or trust deeds; or
- Statutory, common law or equitable liens on real property. [Ca Civ Pro § 483.010(b)]

Commercial Claims Against Individuals: Plaintiff's claim against a natural person must arise out of the defendant's conduct of a trade, business or profession. [Ca Civ Pro § 483.010(c)]

Thus, attachment may not issue on a claim against an individual for (a) the sale, lease or license to use property, or (b) the furnishing of services, or (c) the loan of money, if the individual used the property, services or money "primarily for personal, family or household purposes." [Ca Civ Pro § 483.010(c)] These requirements do not apply to partnerships, corporations, or unincorporated associations (even if they are nonprofit entities).

Amount of The Attachment

A prejudgment attachment may secure the amount of defendant's indebtedness as claimed by plaintiff, plus estimated costs and allowable attorney fees (below), as reduced by the total amount of:

- Any unsatisfied and enforceable money judgment in defendant's favor against plaintiff; plus
- Any indebtedness of plaintiff claimed by defendant in a cross-complaint filed in the action if a writ of attachment could issue on the claim;
- Any claim asserted as a defense in the answer upon which a writ of attachment could issue (tort claims cannot be used to reduce the attachment amount; plus
- Any security interest held by plaintiff in defendant's property, together with any decrease in the value of the underlying security caused by plaintiff (or a prior security holder). [Ca Civ Pro § 483.015]

Property Which May Be Attached

California Property Only: Levies under a writ of attachment can only reach property within California. Thus, defendant's property located outside California cannot be attached in a California action.

Property Owned By Business Entities: All property within California held by a corporation, partnership or unincorporated association is subject to attachment if there is a statutory method of levy for the property [Ca Civ Pro § 487.010(a),(b)] The attachment law does not provide a method of levy for copyrights, trademarks, patents and debtors' partnership and limited liability company interests. Accordingly, these assets apparently are not subject to attachment.

In addition, attachment may not issue against property of banks or trust companies (Ca Fin § 3105, 12 USCA § 91) or thrift and loan companies (Ca Fin § 18415.23).

Property Owned By Natural Persons: If the defendant is a natural person, only the following forms of property are subject to attachment.

Real Property: All the defendant's real property interests are subject to attachment, except leasehold interests with unexpired terms of less than one year. [Ca Civ Pro § 487.010(c)(1)]

Accounts Receivable, Chattel Paper, General Intangibles: Plaintiff may also attach an individual defendant's accounts receivable, chattel paper and general intangibles arising out of defendant's trade, business or profession.

Equipment and Inventory: An individual's equipment, farm products and inventory are also subject to attachment. [Ca Civ Pro § 487.010(c)(3)-(5)]

Final Money Judgments: Plaintiff may attach final money judgments arising out of the defendant's conduct of a trade, business or profession. [Ca Civ Pro § 487.010(c)(6)] A final money judgment obtained in a personal injury action

probably is not subject to attachment.

Money On Business Premises: All money located on the premises where a trade, business or profession is conducted by the defendant may be attached. [Ca Civ Pro § 487.010(c)(7)]

Deposit Accounts: In addition, plaintiff may attach all but the first \$1,000 of the individual's deposit accounts or money located elsewhere than at the defendant's place of business. An aggregate total of \$1,000 of the money or accounts must remain free from attachment. [Ca Civ Pro § 487.010(c)(7)]

Negotiable Instruments and Securities: Negotiable documents of title, instruments and securities held by individuals are subject to attachment. [Ca Civ Pro § 487.010(c)(8)-(10)]

Minerals: Plaintiff may attach minerals or the like (including oil and gas) to be extracted. [Ca Civ Pro § 487.010(c)(11)]

Community Property: Property listed above that is community property is subject to attachment if it would be subject to enforcement under the Enforcement of Judgments Law pursuant to a judgment obtained in the action. This includes:

- The community property interest of the defendant's spouse/domestic partner;
- Community property in the possession or control of the defendant's spouse/domestic partner; and
- Community property obligations owed to either spouse/domestic partner. [Ca Civ Pro § 487.010(d) (1),(2); Ca Fam § 297.5]

Exemptions From Attachment

Certain items of property are exempt from attachment (below). But these exemptions are available only to individual defendants. The attachment exemptions do not apply to corporations, partnerships and other entities. [See Ca Civ Pro §§ 487.010, 487.020, 703.020(a)]

Property exempt from attachment should not be levied upon. An authorized levy might result in liability for "wrongful attachment"

The following property of individual defendants is exempt from attachment:

Property Not Subject To Attachment: Property described above (i.e. property outside California, etc. is, in essence, exempt.

Property Exempt From Enforcement Of Judgment: Property exempt from enforcement of a money judgment is also exempt from attachment. This includes the exemptions under the Enforcement of Judgments Law, as well as any other exemptions provided by state or federal law. [Ca Civ Pro § 487.020(a)]

Property Necessary For Individual's Support: Also exempt is property necessary for the support of a natural person defendant, or such person's family if defendant supports the family in whole or in part. [Ca Civ Pro § 487.020(b)]

Earnings: Earnings (as defined by the Wage Garnishment Law) are exempt from attachment. [Ca Civ Pro § 487.020(c)]

Homestead Exemption: An individual's principal dwelling may be attached, but only to the extent of the surplus over the total amount of:

- All liens and encumbrances on the homestead at the time the attachment lien is created; plus
- The amount of the dwelling exemption. [See Ca Civ Pro § 487.025(b)]

Procedure

Complaint Prerequisite: A complaint must be filed before plaintiff may apply for an attachment. [Ca Civ Pro §§ 484.010, 485.210, 492.020]

Attachment Is An Ancillary Proceeding: Attachment proceedings are "ancillary" to the underlying lawsuit--i.e., the issue of whether the provisional remedy of attachment shall be granted is separate and distinct from the issues in the main action. Thus, the court's findings and determinations in the attachment proceedings (e.g., existence of a contract, amount of the claim, etc.) have no affect at the trial of the action and may not be received as evidence on any issue. Nor do these determinations affect plaintiff's or defendant's rights in any other action arising out of the same claim. [Ca Civ Pro § 484.100 Furthermore, defendant's failure to oppose issuance of an attachment or to rebut evidence produced by plaintiff in the attachment proceedings does not waive any defense to plaintiff's claim in the main action . [Ca Civ Pro § 484.110(a)]

Service Of Process Requirements: The provisions of the Enforcement of Judgments Law regarding service also apply to attachments. [Ca Civ Pro § 482.070(b)] Unless personal service is specifically required by statute, any document required to be served under the attachment law may be served personally or by mail. [Ca Civ Pro § 482.070(a)] Pursuant to the E JL, service by mail extends the time for defendant to answer. [Ca Civ Pro 482.070(b)]

Copies of the "opposition papers" and "reply papers" must be served by personal delivery, fax, express mail or other means consistent with Ca Civ Pro § 1010 et seq. and reasonably calculated to ensure delivery not later than the close of the next business day after the time the opposing or reply papers are filed. The court, however, may prescribe a shorter time. [Ca Civ Pro § 1005(c)]

Limitation Where Defendant Has Not Appeared: Service must be made in the same manner as a summons where personal service is required and the defendant has not yet appeared in the action. [Ca Civ Pro § 482.070(d)]

Noticed Motion: Ordinarily, a hearing on noticed motion is required before an Right To Attach Order may issue. At the hearing, defendant may oppose plaintiff's application and/or make a claim of exemption from attachment This initial noticed hearing is designed to resolve all the issues involved, including:

- Whether plaintiff has a right to attach, in general;
- Whether plaintiff may attach particular property;
- Whether plaintiff will probably prevail in the action;
- Whether an individual defendant has a right to an exemption as to certain property.

Plaintiff's Burden Of Proof: The Plaintiff has the burden of proving:

- That the claim is one on which an attachment may issue;
- The probable validity of such claim;
- That the attachment is not sought for any purpose other than to secure recovery on the claim; and
- The amount to be secured by attachment is greater than zero. [Ca Civ Pro § 484.090(a)]

Probable Validity: A claim has "probable validity" where "it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim." [Ca Civ Pro § 481.190]

Supporting Declarations: Plaintiffs and defendants must support their applications and oppositions by one or more detailed evidentiary affidavits or declarations. Plaintiff's declarations must, at the very least, show plaintiff would prevail on the claim for which attachment is sought. The defendant must likewise present declarations to support its claims--e.g., that an RTAO should not issue or that certain property is exempt.

Competence To Testify: Unless the Code specifically authorizes facts to be shown by information and belief, the declarant must affirmatively show that if sworn as a witness he or she could competently testify to the facts stated in the declaration. [Ca Civ Pro § 482.040] At a minimum, this means the declarant must show actual personal knowledge of the relevant facts. [See Ca Evid § 700 et seq.]

Admissable Evidence: Moreover, in a much broader sense, evidence is "competent" only if it is admissible and nonobjectionable.

Factual Particularity: All facts in the declarations must be stated "with particularity." [Ca Civ Pro § 482.040] This means that attachment declarations must contain evidentiary facts, rather than the ultimate facts commonly found in pleadings. Mere conclusions of law or fact are not sufficient.

Basis For Statements Made On Information And Belief: If matters are set forth on information and belief, the declarant must state the nature and reliability of the information. [Ca Civ Pro § 482.040]

Supporting Documents: All documentary evidence (e.g., contracts, correspondence, etc.) must be presented in admissible form. Basically, this means that the evidence must be:

- Properly identified and authenticated;
- Admissible under the best evidence rule;
- Admissible as an original (Ca Evid § 1250) or under the secondary evidence rule;
- Nonhearsay, or admissible under a hearsay rule exception

Authentication: The parties must present declarations or other evidence showing that the document is what it is purported to be. Authentication may require evidence proving the genuineness of signatures or handwriting; or a declaration from the documents custodian laying a foundation for admissibility. [See Ca Evid § 1410 et seq.]

Secondary Evidence Rule: Copies of documents are admissible under the "secondary evidence rule." [Ca Evid § 1521] Copies are admissible unless:

- "A genuine dispute exists concerning material terms of the writing and justice requires the exclusion"; or
- "Admission of the secondary evidence would be unfair." [See Ca Evid § 1521(a) and Law Rev. Comm'n Comment thereto]

The Hearing: The hearing is conducted in much the same manner as any motion matter, although an oral hearing at which the debtor has an opportunity to present argument and evidence must be held [Ca Civ Pro § 484.090(d)].

The Order: The court must order issuance of a W/A if it finds that plaintiff has met its burden of proof on the required issues. This order is known as a "right to attach order" ("RTAO"). [Ca Civ Pro § 484.090(b)] If the court determines that property of the defendant is exempt from attachment, the RTAO must describe such property and prohibit its attachment. [Ca Civ Pro § 484.090(c)]

Required Undertaking (Bond): Whether or not a claim of exemption is granted, the W/A cannot issue until plaintiff files an undertaking. Thus, unless the undertaking is filed when the RTAO issues (plaintiff's option), issuance of the W/A will be conditioned upon filing of the undertaking. [Ca Civ Pro §§ 484.090(b), 489.210] The purpose is to secure the damages defendant may obtain should the attachment later be found to have been wrongful. [Ca Civ Pro § 489.210]

Attachment bonds or undertakings must comply with the Bond and Undertaking Law (Ca Civ Pro § 995.010 et seq.). The opposing party may object by motion to the amount of the undertaking or to the sureties.

Undertakings may be furnished by personal sureties (i.e., individuals) or by admitted surety insurers (i.e., a "bonding company" or corporate insurer), or by a combination of both.

The flat amount for undertakings to obtain Attachment orders is \$10,000. [Ca Civ Pro § 489.220(a)] However, a defendant whose damages would be larger than the statutory amount may object to the statutory amount within 10 days after service of a copy of the bond or undertaking on defendant. [Ca Civ Pro §§ 489.010, 995.020, 995.930] The objection must be supported by declarations showing why the statutory amount is insufficient. If the court is convinced, it may order the undertaking increased to the amount of the "probable recovery for wrongful attachment if it is ultimately determined that the attachment was wrongful." [Ca Civ Pro § 489.220(b)]

Orders In Aid Of Attachment

Turnover Orders: Once an attachment order issues, the court may order defendant to transfer to the levying officer property the officer must take into custody to perfect the lien. [Ca Civ Pro § 482.080(a)(1)] Only tangible assets in the debtor's possession or control and documentary evidence of tangible and intangible assets may be subject to a turnover order in aid of a W/A .

Seizure Orders: The levying officer cannot seize property kept in the defendant's home or on his or her person without a court order authorizing the seizure. A seizure order may be obtained any time after the attachment order issues. The same procedures are used as when a seizure order is obtained to take custody of property after judgment. [Ca Civ Pro § 488.070; and see Ca Civ Pro § 699.030]

Methods of Levy

The officer levies upon the property described in the attachment order by taking it into custody or otherwise subjecting it to an attachment lien. Subject to the exceptions and modifications noted below, an attachment order is levied in the same manner as a writ of execution after judgment under the Enforcement of Judgments Law (Ca Civ Pro § 700.015 et seq.) [See Ca Civ Pro § 488.300] Only property for which a method of levy is provided below may be attached. [Ca Civ Pro § 487.010]

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