

AGMB Info Brief: Writs of Attachment in California

BY THOMAS H. VIDAL

I. Introduction

One of the most frustrating things a businessperson or entrepreneur faces is trying to recover monies from a party who has breached a contract. The business is already out money and is now confronted with having to pay more money to lawyers to try to recover the sums owed by a party who has proven his or her unwillingness to pay in the first place. The situation is far worse if the business's claim is unsecured.

Fortunately, the law in California provides a mechanism to create security for the claim by operation of something called "the Attachment Law." That body of law allows a court to issue an order—called a writ of attachment—that seizes the defendant's property until the case goes to trial. When the business prevails on its claim in trial (or by motion for summary judgment), the attached property can be used to satisfy the judgment.

Attachment is an important tool that helps prevent the otherwise unsecured creditor from having his or her claim subordinated to other liens imposed on the debtor's property. More importantly, often times the mere granting of a writ of attachment will force a stubborn debtor to settle up with his or her creditor.

The procedure is painstakingly detailed and sometimes costly, but in the right circumstances it can be a powerful tool. This article discusses the background and procedural requirements

applicable to filing a motion for a writ of attachment.

II. Background

According to Black's Law Dictionary, a writ is a "written judicial order to perform a specified act, or giving authority to have it done."¹ Attachment is a provisional remedy issued by a court that allows a creditor to have a lien recorded against real property, the debtor's assets seized and held until final adjudication at trial, or both.²

The attachment remedy is not the basis of a distinct proceeding. It may only be applied as an auxiliary to an action at law.³ In other words, a creditor cannot initiate a lawsuit for attachment, but can file a lawsuit for breach of contract (or some other specified cause of action) and file a motion for a writ of attachment as part of that lawsuit.

The reason is because attachment is a provisional remedy, not an ultimate remedy. A provisional remedy refers to a remedy whose purpose is to preserve the status quo until final disposition of the case. The basic purpose of the remedy of pre-judgment attachment is to aid in the collection of a money demand by seizing property in advance of trial and

¹ Black's Law Dictionary 1608 (6th Ed. 1990).

² *Lorber Industries v. Turbulence, Inc.*, 175 Cal. App. 3d 532, 535 (1985).

³ *J. C. Peacock, Inc. v. Hasko*, 184 Cal. App. 2d 142 (1960).

judgment, as security for eventual satisfaction of the judgment.⁴ If the creditor wins the lawsuit, the court will then allow the creditor to enforce the judgment out of the seized property. Pre-judgment attachment affords an unsecured creditor security for his demand.⁵

When a creditor files a motion for a writ of attachment, the court is required to make a preliminary determination of the merits of the dispute. The order will be granted if the creditor meets two conditions: (1) the creditor follows all of the statutory requirements of the Attachment Law; and (2) the creditor establishes a *prima facie* claim.⁶

The remedy of attachment is strictly governed by the Attachment Law, set forth in California Code of Civil Procedure⁷ § 481.010, *et seq.*⁸ The provisions of the law are construed by very specific statutorily defined terminology.⁹

For example, one of the key terms in the Attachment Law is “probable validity,” which refers to a creditor-claim “where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.”¹⁰ This definition, which is explored later in this article, forms the test for whether the creditor meets the second condition of the Attachment Law.

⁴ *National General Corp. v. Dutch Inns of America, Inc.*, 15 Cal. App. 3d 490 (1971).

⁵ *Utley, v. United States*, 304 F.2d 746 (9th Cir. 1962).

⁶ *Lorber Industries*, at 535.

⁷ All code sections are to the California Code of Civil Procedure (“CCP”) unless otherwise indicated from Deering’s 2011 edition.

⁸ See *Bank of America v. Salinas Nissan, Inc.*, 207 Cal. App. 3d 260, 270 (1989).

⁹ CCP §§ 481.020-481.225.

¹⁰ CCP § 481.190; *Kemp Bros. Construction, Inc. v. Titan Electric Corp.*, 146 Cal. App. 4th 1474, 1481, n.5 (2007).

III. Availability of Attachment Remedy.

A. Claims Subject to Attachment.

Pursuant to the Attachment Law, a writ of attachment may be issued in the following types of actions.

1. The action must have a claim for money that is based upon a contract (express or implied), in a fixed or readily ascertainable amount that is not less than five hundred dollars.¹¹
2. Attachment is not authorized (except in certain defined circumstances) if the claim is secured by real property.¹²
3. Attachment is authorized against a natural person (as opposed to an artificial entity) only if the claim “arises out of conduct by the defendant of a trade, business, or profession.”¹³ In other words, a claim against a natural person must arise out of a commercial obligation.
4. Attachment is available even when there are other claims for relief besides the claim for money.¹⁴

¹¹ CCP § 483.10(a).

¹² CCP § 483.10(b). The claim can be secured by personal property.

¹³ CCP § 483.10(c). Note that “attachment became available on a claim secured by an interest in personal property, including any security interest in fixtures. 6-62 California Forms of Pleading and Practice--Annotated § 62.11.

¹⁴ CCP § 483.10(d).

B. Amount Secured by Attachment.

The Attachment Law provides that the amount of money to be secured by an attachment is the sum of (1) The amount of the defendant's indebtedness claimed by the plaintiff, and (2) any additional amount included by the court under CCP section 482.110.¹⁵ Section 482.110 allows the court, in its discretion, to include the estimated amount for costs and allowable attorney's fees.

The amount subject to attachment shall be reduced by the sum of the following¹⁶:

1. the amount of any unsatisfied and enforceable money judgment held by the debtor against the creditor;
2. the amount of any indebtedness of the creditor that the debtor has claimed in a cross-complaint filed in the action if the debtor's claim is one upon which an attachment could be issued;
3. the amount of any claim that the debtor asserted as a defense in the answer pursuant to CCP 431.70¹⁷, but only if that claim is one upon which an attachment could be issued had an action been brought on the claim; and

¹⁵ CCP § 483.15(a); and CCP § 428.110.

¹⁶ CCP § 483.15(b)(1)-(4).

¹⁷ CCP § 431.70 allows a person to assert a claim, which would otherwise be time-barred, in an action commenced by another person as an offset, where cross-demands for money have existed between the persons at a time when neither demand was time-barred). *See, e.g., Carnation Co. v. Olivet Egg Ranch*, 189 Cal. App. 3d 809 (1986).

4. the value of any security interest in the debtor's that the creditor holds, which secures the debtor's indebtedness claimed by the creditor, plus any amount by which the value of the security interest has decreased because of some act by the creditor or a prior holder of the security interest.

Note that the creditor may attach property of multiple defendants with a value equal to the full amount of the claim as to each debtor named in the lawsuit.

C. Property Subject to Attachment.

Levies under a writ of attachment can only attach property that is within California. Thus, a debtor's property located outside California cannot be attached in a California action. However, it is important to note that the Attachment Law can attach property of resident and non-resident debtors alike.¹⁸

1. Artificial Entities.

Where the defendant is a corporation, limited liability company¹⁹, partnership, or association, all corporate property for which a method of levy is provided is subject to attachment.²⁰ The list of property subject to levy is set forth in CCP sections 488.300-488.485:

1. real property (§ 488.315);
2. growing crops, timber to be cut, minerals to be extracted (§ 488.325);

¹⁸ CCP § 4800.300 *et seq.*

¹⁹ *See, e.g., Deauville Restaurant, Inc. v. Super. Court*, 90 Cal. App. 4th 843, 846 (2001)

²⁰ CCP. § 487.010(a)-(b).

3. tangible personal property in possession of defendant (§ 488.335);
4. tangible personal property in possession of third person (§ 488.345);
5. personal property in custody of levying officer (§ 488.355);
6. bailed goods not covered by negotiable document of title (§ 488.365);
7. equipment of going business (§ 488.375);
8. vehicle, vessel, mobilehome or commercial coach that is equipment of going business (§ 488.385);
9. keeper for farm products, inventory, and cash proceeds of going business (§ 488.395);
10. alternative method of attaching farm products or inventory of going business (§ 488.405);
11. personal property used as dwelling (§ 488.415);
12. vehicle, vessel, mobilehome, or commercial coach for which certificate of ownership issued (§ 488.425);
13. chattel paper (§ 488.435);
14. instruments (§ 488.440);
15. negotiable documents of title (§ 488.445);
16. securities (§ 488.450);
17. deposit accounts (§ 488.455);

18. safe-deposit boxes (§ 488.460);
19. deposit accounts and safe-deposit boxes not exclusively in name of defendant (§ 488.465);
20. accounts receivable and general intangibles (§ 488.470);
21. property that is subject of pending action or proceeding (§ 488.475);
22. final money judgments (§ 488.480); and
23. interests in personal property of estate of decedent (§ 488.485).

2. Property of a Natural Person.

If the defendant is a natural person, the following property is subject to attachment²¹:

1. interests in real property except leasehold estates with unexpired terms of less than one year;
2. accounts receivable, chattel paper, and general intangibles arising out of the conduct by the defendant of a trade, business, or profession, except any such individual claim with a principal balance of less than one hundred fifty dollars (\$150);
3. equipment;
4. farm products;
5. inventory;
6. final money judgments arising out of the conduct by the defendant of a trade, business, or profession;

²¹ CCP §487.10(c)(1)-(11).

7. money on the premises where a trade, business, or profession is conducted by the defendant and, except for the first one thousand dollars (\$1,000), money located elsewhere than on such premises and deposit accounts, but, if the defendant has more than one deposit account or has at least one deposit account and money located elsewhere than on the premises where a trade, business, or profession is conducted by the defendant, the court, upon application of the plaintiff, may order that the writ of attachment be levied so that an aggregate amount of one thousand dollars (\$1,000) in the form of such money and in such accounts remains free of levy;
8. negotiable documents of title;
9. instruments;
10. securities; and
11. minerals or the like (including oil and gas) to be extracted.

Community property of a natural person is also subject to attachment provided that the property is within the categories described above and if the community property would be subject to enforcement of a judgment against the debtor.²²

3. Property Subject to Pending Action.

Under the Attachment Law, a creditor can even attach certain property that is subject to

²² CCP § 487.010(d).

another pending lawsuit.²³ Only the following types of property can be attached if it is subject to another action: real property; growing crops, timber to be cut, or minerals or the like, including oil and gas, to be extracted or accounts receivable resulting from sales at the wellhead or minehead; tangible personal property in the possession or control of the creditor or in the custody of a levying officer; and the creditor's interest in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession.²⁴

4. Property Exempt from Attachment.

Except in the case of fraudulent transfers²⁵, the following property is exempt from attachment.

1. All property exempt from enforcement of a money judgment.²⁶
2. "Property that is necessary for the support of a defendant who is a natural person or the defendant's family supported in whole or in part by the defendant."²⁷
3. "'Earnings' as defined by Code Civ. Proc. § 706.011, that is, compensation payable by an employer to an employee for personal services performed by the employee, whether denominated as wages, salary, commission, bonus, or otherwise."²⁸

²³ CCP § 488.475.

²⁴ *Id.*

²⁵ See CCP § 3439.07(a)(2).

²⁶ CCP §§ 487.020(a) and 704.010 *et seq.*

²⁷ CCP § 487.020(b).

²⁸ CCP §§ 487.020(c), and 706.011(a).

4. All property not subject to attachment pursuant to Code Civ. Proc. § 487.010.²⁹

Homestead property is not exempt from attachment.³⁰ An attachment lien attaches to a homestead in the amount of any surplus over the total of (a) all liens and encumbrances on the homestead at the time the attachment lien is created, and (b) the amount of the homestead (dwelling exception).³¹

IV. Procedure to Obtain Writ of Attachment.

There are several procedures by which a creditor can obtain a writ of attachment. The creditor can file a noticed motion or use an *ex parte* procedure, and after the initial right-to-attach order (“RTAO”) is granted, the creditor can file a noticed motion or *ex parte* application for additional writs.³² In either case, the creditor files the application in the court in which the action is brought.³³

The *ex parte* application method requires that the plaintiff-creditor show that great or irreparable injury would result if issuance of the order were delayed until the matter could be heard on notice.³⁴ This article does not address the *ex parte* or additional writ procedures.

Under the noticed motion procedure, any time after filing a complaint, the plaintiff/creditor may apply for a right-to-attach order (“RTAO”) and writ of attachment by filing an application

with the court.³⁵ A separate application should (or in some cases it may be required) be filed for each defendant in the lawsuit.

A. Contents of Application.

The application, which is executed under oath, must include the following statements:

1. “[a] statement showing that the attachment is sought to secure recovery on a claim on which an attachment may be issued”;³⁶
2. “[a] statement of the amount to be secured by the attachment”;³⁷
3. “[a] statement that the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based”;³⁸
4. “[a] statement that the applicant has no information or belief that the claim is discharged under [the Bankruptcy Code] or that prosecution of the action is stayed in a proceeding under [the Bankruptcy Code]”;³⁹ and
5. “[a] description of the property to be attached.... [A]nd a statement that the plaintiff is informed and believes that such property is subject to attachment.”⁴⁰

²⁹ CCP § 487.020(d).

³⁰ CCP § 487.025. The recording of a homestead declaration has no effect on the right to record an attachment lien.

³¹ CCP §§ 487.025(b)(2), and 704.730.

³² CCP §§ 484.010, 485.010, 484.310, and 484.510.

³³ CCP § 485.210(a).

³⁴ CCP § 485.010(a).

³⁵ CCP § 488.010.

³⁶ CCP § 484.020(a).

³⁷ CCP § 484.020(b).

³⁸ CCP § 484.020(c).

³⁹ CCP § 484.020(d).

⁴⁰ CCP § 484.020(e).

B. Supporting Affidavits.

The application must be supported by an affidavit showing that the creditor “on the facts presented would be entitled to a judgment on the claim on which the attachment is based.”⁴¹

Affidavits⁴² filed under the Attachment Law must contain facts set forth with particularity.⁴³ “Except when matters are specifically permitted to be shown by information and belief each affidavit must show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated.”⁴⁴ With respect to matters stated on information and belief, “the affidavit must state the facts on which the affiant’s belief is based, showing the nature of his or her information and the reliability of his or her informant.”⁴⁵ The affiant or declarant may be “any person, whether or not a party to the action, who has knowledge of the facts.”⁴⁶

Affidavits and declarations should “[r]ecite in clear language, with a foundation for each fact, each element..., and the basis for alleging execution of the contractual agreements and existence of default(s). Even if there is no opposition, admissible evidence is required.”⁴⁷

C. Service on Defendants.

The debtors must be served with all of the following documents: a copy of the summons and complaint; a notice of application and

⁴¹ CCP § 484.030.

⁴² Or declarations under CCP § 2015.5.

⁴³ CCP § 482.040.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 6-62 California Forms of Pleading and Practice--Annotated § 62.13.

hearing; and a copy of the application and any affidavits in support of the application.⁴⁸ The notice must provide certain statutorily defined information specified by the Attachment Law.⁴⁹

D. Defendants’ Opposition.

As with other motions, a defendant is permitted to oppose the plaintiff-creditor’s motion.⁵⁰ The opposition is due five court days before the hearing.⁵¹ The notice must state the grounds on which the defendant opposes issuance of the RTAO or objects to the amount sought.⁵² The debtor also must include any claim of exemption in the opposition.⁵³ If the defendant-debtor fails to timely file a notice of opposition, the defendant-debtor will not be permitted to oppose the issuance of the RTAO.⁵⁴

If one or more defendants file a notice of opposition, the plaintiff-creditor may file a reply.⁵⁵ The reply must be filed two court days before the hearing.⁵⁶

E. Hearing.

The court cannot grant a RTAO or writ except after a hearing.⁵⁷ At the hearing, the court shall issue the RTAO, which shall state the amount to be secured by the attachment determined by the court, if it finds all of the following.

⁴⁸ CCP § 484.040.

⁴⁹ CCP § 484.050.

⁵⁰ CCP § 484.060(a).

⁵¹ *Id.*

⁵² *Id.*

⁵³ CCP § 484.060(b).

⁵⁴ CCP § 484.060(a).

⁵⁵ CCP § 484.060(c).

⁵⁶ *Id.*

⁵⁷ CCP § 484.040.

1. “The claim upon which the attachment is based is one upon which an attachment may be issued.”⁵⁸
2. “The [creditor] has established the probable validity of the claim upon which the attachment is based.”⁵⁹ Probable validity means that “it is more likely than not that the plaintiff will obtain a judgment against the defendant on the claim.”⁶⁰
3. “The attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.”⁶¹
4. “The amount to be secured by the attachment is greater than zero.”⁶²

If the court determines that any of the debtor’s property is exempt from attachment, the RTAO “shall describe the exempt property and prohibit attachment” thereof.⁶³

What effect do these determinations have on the creditor’s case? In a nutshell, they have none. The determinations only bear on the issue of attachment: “The court’s determinations... shall have no effect on the determination of any issues in the action... nor shall they affect the rights of the plaintiff or defendant in any other action arising out of the same claim....”⁶⁴

⁵⁸ CCP § 484.090(a)(1).

⁵⁹ CCP § 484.090(a)(2) (underscore supplied).

⁶⁰ CCP § 481.190.

⁶¹ CCP § 484.090(a)(3).

⁶² CCP § 484.090(a)(4).

⁶³ CCP § 484.090(c).

⁶⁴ CCP § 484.100.

F. Plaintiff’s Undertaking

Unless the debtor-defendant can prove that all the property sought to be attached is exempt from attachment, the court shall order the writ of attachment to be issued. But issuance of the writ is conditioned upon the filing of an undertaking.⁶⁵ An “undertaking” is a formal pledge or promise to do something. In the case of a writ of attachment, the purpose of the undertaking is to pay the defendant any amount that the defendant may recover for wrongful attachment.⁶⁶ (A creditor may be liable to the debtor for wrongful attachment under certain circumstances defined by the Attachment Law.⁶⁷)

The amount of the undertaking is set by statute at \$10,000. Nevertheless, the amount can be increased by the court if it finds that the probable recovery for wrongful attachment exceeds that amount.⁶⁸

V. Conclusion

As one can readily see, the tool of attachment is complicated but powerful. Seeking a writ of attachment may be the best way to protect a business that is attempting to collect money on a breach of contract claim by (1) establishing security for the claim, (2) providing a source of funds to satisfy a judgment, and (3) creating an incentive for the defendant to settle the case before trial. The reason obtaining a right-to-attach order is an inducement for settlement is because it locks up the defendant’s property

⁶⁵ CCP §§ 484.090(b) and 489.210.

⁶⁶ CCP § 491.15

⁶⁷ CCP §§ 490.010 – 490.060

⁶⁸ CCP § 489.220.

and it demonstrates that the business's claim has "probable validity."

While the finding of probable validity applies only the writ of attachment procedure and cannot be used in later court proceedings to prove the claim, it is still valuable for psychological reasons. For, it shows the defendant that the court is persuaded that the business has a valid claim. Certainly, the defendant could ultimately prevail at trial, but in most cases the likelihood is small and the potential risk is too great.

VI. How Can AGMB Help You?

If you or your business is owed money by a party who has breached a contract with you or who refuses to pay for goods or services that you have provided under contract, please contact an attorney right away. Our office has experience handling all manner of breach of contract claims and applications for writs of attachment. We would be willing to discuss your case with you.

For a consultation, please contact Thomas H. Vidal at tvidal@agmblaw.com or call the number below.

Learn more by visiting us on the web:
www.agmblaw.com.

Abrams Garfinkel Margolis Bergson, LLP
5900 Wilshire Boulevard, Suite 2250
Los Angeles, California 90036
(310) 300-2900 (tel.) / (310) 300-2001 (fax.)

VII. About Thomas Vidal



Mr. Vidal handles civil litigation and trials in five broad areas of law: intellectual property rights; licensing & contract disputes; business torts; antitrust & unfair competition; and corporate/commercial

disputes. He represents clients in the technology sector—software developers, hardware designers, web developers, and end users; the entertainment industry—recording artists, labels, publishers, film production companies, distributors, screenwriters, actors, and directors; the toy and game industry; and the food and fashion industries. Clients also include consumer products and lifestyle brands. Mr. Vidal is a competitive runner at 5k, 10k, half-marathon, and marathon distances, and a United States Masters swimmer. Mr. Vidal can be reached by email at tvidal@agmblaw.com.

For more information visit the following links in your browser:

- You can read his blog by visiting:
<http://yellowpadlawyer.wordpress.com/>
- Follow Mr. Vidal on twitter:
<http://twitter.com/#!/thomasvidal>
- Find him on LinkedIn:
<http://www.linkedin.com/in/thomashvidal>

DISCLAIMER: This article is not legal advice. Please consult an attorney if you have legal questions that relate to a lawsuit threatened or actually filed against you. Feel free to contact our office for a consultation or a referral.