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Strategy in right to attach orders

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Among the provisional remedies available to a party seeking to enforce a contractual obligation is attachment. Attachment is an important and effective remedy, yet relatively unknown among many business litigators, and even less known to their clients. A writ of attachment is available under certain circumstances on an

unsecured contract claim for money, and essentially acts as a "placeholder" for any future judgment. It is a powerful tool for a number of reasons.

An application for issuance of a right to attach order can be sought right at the outset of a lawsuit. In fact, the application is often filed simultaneously with the commencement of a case, and may be served on the defendant with the summons and complaint. This can have the effect of forcing the defendant to introduce evidence supporting his defenses in opposition to the application much earlier than he otherwise would have to. Sworn testimony contained in a defendant's declaration effectively "locks in" his story at the outset of the case, and can often be used to the plaintiff's advantage later.

In addition, a writ of attachment can be used to ensure the priority of the future judgment to be obtained by plaintiff/creditor in the litigation. This is especially important when the defendant has assets with equity, such as real property. A writ of attachment can also be levied on a defendant's bank accounts. Levying a writ of attachment on liquid assets can effectively bring about an early resolution of the lawsuit, as attaching a debtor's bank accounts is certain to get his attention.

Attachment is only available on unsecured contract claims, most frequently in collection actions. Because of the requirement that the amount of the claim be "fixed and readily ascertainable," attachment often arises on claims by construction lenders

against guarantors or by banks on other types of loans, but it can apply in other contractual settings as well.

The clerk issues a writ of attachment after the entry of a right to attach order by the court. There are a number of steps that must be followed in order for a right to attach order to be granted. First, the applicant must submit a form application and notice of application (Judicial Council Forms AT-105 and AT-115). A supporting declaration must also be submitted, along with a memorandum of points and authorities. Like a regular motion, the applicant must serve his papers at least 16 court days prior to the hearing date. Unlike a regular motion, however, the opposition is due five court days before the hearing, and the reply is due two court days before the hearing. CCP Section 484.060.

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A right to attach order will issue if the plaintiff can demonstrate that his or her claim is one on which an attachment may issue, and that the attachment is not sought for any purpose other than the recovery of a subsequent judgment. While plaintiffs need not prove their case, they must convince the judge of the "probable validity" of its claim. CCP Section 484.090.

In certain very limited circumstances, a right to attach order may be issued by the court on an ex parte basis. If, for example, the plaintiff can prove that the defendant is insolvent (unable to pay his debts as they become due) or if it will suffer great or irreparable harm if ex parte relief is not granted, the court may grant such relief. Many courts, however, view attachment as a drastic remedy and are reluctant to grant a right to attach order on an ex parte basis. Instead, the court may issue a temporary restraining order precluding the defendant from encumbering or transferring his assets, and set a noticed hearing on the application.

Attachment may be sought against both individuals and corporations. However, there are different rules governing the attachability of property belonging to individuals and corporations. These differences are discussed at CCP Section 487.010. If the defendant is a natural person, a writ of attachment may only issue if the claim arose out of the conduct of his trade, business, or profession. CCP Section 483.010(c). If the defendant is a trust, there is no such requirement. See *Kadison, Phaelzer, Woodard, Quinn & Rossi v. Wilson*, 197 Cal. App. 3d 1 (1987).

Seeking an attachment is not without its potential drawbacks, however. One possible disadvantage is that it can trigger a bankruptcy filing by the defendant. Even this disadvantage can have a silver lining however, as there are instances when a plaintiff may prefer the finality of a defendant's discharge or reorganization in bankruptcy to protracted litigation.

Moreover, a plaintiff can face liability for damages for wrongful attachment. The defendant may have recourse if the attachment was not proper under the

circumstances. Wrongful attachment includes levy of a writ of attachment in a case in which attachment is not authorized or in which the plaintiff does not obtain a judgment. CCP Section 490.010. Levy of a writ of attachment on plaintiff's exempt property is also wrongful. Damages for wrongful attachment include those proximately caused to the defendant by the wrongful attachment, as well as all reasonable costs and expenses, including attorney fees, incurred in fighting the wrongful attachment. CCP Section 490.020(a).

Notwithstanding its potential drawbacks, attachment can play an important role in many business-related litigation matters. More attorneys - and their clients - should be aware of the availability of attachment as a provisional remedy, as its use in the right situation can be an important tool in vindicating a party's contractual rights and in helping to ensure an eventual recovery.