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Fortune Favors the First to Court

How to Obtain Writs of Attachment and Possession

By Mark L. Share and Yona Conzevoy

DON'T LET THIS YEAR END before understanding writs of attachment and possession. Collecting money owed to your client often involves a race for the debtor's assets against competing creditors and debtors who are dissipating their property.

California law provides two prejudgment remedies that enable skilled and fast moving attorneys at the start of a lawsuit to preserve those assets so that they are available to satisfy your client's eventual judgment. A writ of attachment permits a creditor to levy on a defendant's assets until property is held by the Sheriff in an amount equal to your client's claims. A writ of possession permits a creditor to take possession of specific items of personal property like a truck or inventory. Beyond tying up assets pending a judgment, the extraordinary impact on the defendant caused by the court's granting of these applications has the potential of motivating a defendant to settle the creditor's claims right away.

What is a Writ of Attachment?

A plaintiff who wants to be sure that defendant's assets will be available to satisfy a judgment can utilize a writ of attachment to levy on and obtain a lien against defendant's property located in California. A writ of attachment is generally used in collection cases. It can prevent defendant from using its assets that plaintiff has attached during the course of the lawsuit, and it forces defendant to seriously consider the merits of plaintiff's claim.

If defendant is hemorrhaging money, subject to multiple creditors, hiding assets, or planning to leave the state, a writ of attachment can protect plaintiff from losing out on what it is owed. However, obtaining a writ of attachment is a highly technical endeavor that should be undertaken with a clear understanding of the esoteric proceedings and statutes as well as the strategic considerations involved.

A writ of attachment is available in a contractual action involving a claim or claims for money. CCP §483.010(a). The claim must be fixed or ascertainable in an amount not under \$500, exclusive of costs, interest, and attorney fees, but claims can be aggregated. CCP §483.010(a). Attachment is allowed on claims secured by personal property or by fixtures. CCP §483.010(b). The claim cannot be secured by real property unless, through no 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 owed on the claim, in which case the writ of attachment is for the difference between the value of the security and the amount of the claim. CCP §483.010(b).

The plaintiff's procedural hurdles must be unequivocally cleared, including the requirement of competent evidence to support the claims. And then, when a writ of attachment or possession is obtained, the rules for levying are esoteric. The practitioner is well advised to review all the relevant statutes and consulting with experienced counsel before attempting to obtain this extraordinary relief.

Strategic Issues of Obtaining a Writ of Attachment

There can be strategic benefits to obtaining a writ of attachment, subject to the requirement that attachment not be sought for an improper purpose. The writ of attachment prevents defendant from using property, it could force defendant to settle, or if settlement negotiations fail, to file bankruptcy. Bankruptcy would be a negative result for plaintiff if the attachment lien is voidable because it was perfected fewer than 90 days prior to the bankruptcy filing.

However, the cost of obtaining the writ of attachment may exceed the value of defendant's attachable assets. Furthermore, by obtaining a writ of attachment, plaintiff could be waiving tort claims, as attachment lies only on contract claims. Finally, plaintiff might be liable for damages on the writ of attachment if judgment is not obtained in the action, exempt property is attached, or attachment was not proper under the circumstances.

Who is Subject to Attachment?

Natural persons (and corporations) are subject to attachment, but the property of a California resident can only be attached if the underlying claim arose from the conduct of his or her trade, business or profession. CCP §483.010(c). For natural persons, only the 11 categories of items found in CCP §487.010(c) can be attached. An out-of-state defendant's property located in California can be attached in an action to recover money. CCP §492.010(a); *Pacific Decision Sciences Corp. v.*

Superior Court (2004) 121 Cal.App. 4th 1100, 1109.

Plaintiff can only levy on an individually nonexempt property; exempt property that has already been attached must be released on order of the court. CCP §492.040. Exempt property includes: 1) property exempt from enforcement of a money judgment (CCP §487.020(a)); 2) property necessary to support the defendant or the defendant's family (CCP §487.020(b)); 3) all compensation earned by defendant for services (CCP §487.020(c)); and 4) all other property not subject to attachment under CCP §487.010 (CCP §487.020(d)).

Attachment is available against corporations for any property owned by the corporation as long as there is a way to levy on the property under CCP Chapter 8 Article 2, §488.300 et seq. CCP §487.010 (a)-(b). Foreign corporations not qualified to do business in California are subject to attachment in California. CCP §492.010(b)-(c).

Process of Obtaining a Writ of Attachment

Plaintiff may apply for a writ of attachment as soon as the complaint is filed. The clerk issues the writ of attachment after the court enters a "right to attach order" ("RTAO") by which the court determines that a writ of attachment can issue for plaintiff's claim.

To obtain a right to attach order and writ, the following documents must be filed: 1) Summons and Complaint; 2) Notice of Application and Hearing for Right To Attach Order and Writ of Attachment (Judicial Council Form AT-115); 3) Application for Right To Attach Order and Writ of Attachment (Judicial Council Form AT-105); 4) Declaration in Support of Application for Writ of Attachment (this must show with particularity the facts giving rise to plaintiff's claim (CCP §484.030), and for matters based on information and belief must state the facts on which they are based and show the nature of declarant's information and reliability of the informant (CCP §482.040); and 5) memorandum in support of motion for Application for Writ of Attachment (the memo of P's and A's). Cal Rules of Ct 3.1113.

The relevant Code of Civil Procedure sections should be reviewed before filling out the Judicial Council forms to make sure that they are being completed correctly. Judges will generally deny applications for Writs of Attachment if there is any defect in the application or evidence.

There will be a hearing date set for the writ of attachment. Plaintiff must provide 16 court days notice. CCP §484.040. If the defendant has not yet appeared, service must be made in the same manner as for a summons. CCP §§413.10-417.40, §482.070(d). Defendant must file its opposition at least 5 court days before the hearing. CCP §484.060(a). If the defendant files its opposition, plaintiff must file its reply at least 2 court days before the hearing. CCP §484.060(c). CCP §484.090(d) permits the judge at the hearing to "receive and consider at the hearing additional evidence, oral or documentary."

The court must issue a right to attach order setting forth the amount to be secured by the attachment if it finds: 1) the claim is one for which attachment may be issued; 2) plaintiff has established the probable validity of the claim (more likely than not); 3) attachment is not sought for purposes other than to recover on any subsequent judgment; 4) the amount to be secured by the attachment is greater than zero; and 5) the property is not exempt from attachment. CCP §484.090.

Plaintiff can obtain a writ of attachment ex parte by basically making the same showing required for a noticed hearing. In addition, plaintiff must demonstrate by declaration that it will suffer "great or irreparable injury" if required to proceed with a noticed hearing. CCP §485.010(a). More likely, the court will decline to grant an ex parte RTAO, and instead will issue a temporary protective order and set a noticed hearing for the RTAO.

What is a Temporary Protective Order?

Pending the hearing on the right to attach order, an ex parte temporary protective order ("TPO") is used to prevent defendant from transferring, concealing, or otherwise alienating

property before the hearing on plaintiff's application for writ of attachment.

By means of the TPO, the court can keep the defendant from transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of or encumbering the property; concealing or otherwise removing the property in a manner making it less available to seizure by the levying officer; or impairing the property's value either by destructive acts or by failure to take reasonable care of the property.

The procedures for obtaining a TPO set forth in CCP §486.010 through 486.110 apply. Before the court issues a TPO, plaintiff must post an undertaking, which is a form of insurance policy which satisfies any amounts the defendant might recover if the attachment is later found to be wrongful. CCP §489.210. The required undertaking for a plaintiff is \$10,000 unless the court determines that the "probable recovery for wrongful attachment" exceeds that amount. CCP §489.220. The service of the TPO creates a lien on defendant's property that is perfected by levying under the writ of attachment. CCP §486.110.

What is a Writ of Possession?

A writ of possession is a prejudgment remedy that allows plaintiff to obtain possession of personal property that was wrongfully obtained or retained by the defendant, such as including property securing an obligation of the defendant. This remedy is commonly sought by a plaintiff to obtain specific property when the defendant has: 1) defaulted on a loan or other obligation owed to the plaintiff that is secured by personal property; 2) breached a lease of the plaintiff's property; 3) embezzled or otherwise wrongfully obtained possession of the plaintiff's property; or 4) refused to return property lent or bailed to it by the plaintiff.

The Writ of Possession is useful because it enables plaintiff to quickly obtain possession of the claimed property, preventing the defendant from using, transferring, encumbering, dissipating, or concealing the property while the action is pending.

There are three main disadvantages to a Writ of Possession:

1. Plaintiff's right to possession depends on the outcome of the lawsuit, and if plaintiff fails to obtain a judgment, it must redeliver the property to defendant and will be liable for defendant's actual damages caused by the wrongful possession.
2. If the property is essential to defendant's business, defendant may file a bankruptcy petition (after the writ issues but before the levying officer takes possession) that would automatically stay the state court action and require plaintiff to obtain relief from the stay in the bankruptcy court.
3. The procedure has the potential to be costly. The expenses may include a bond in the amount of twice the value of the defendant's interest in the property, fees charged by the sheriff for costs of taking possession, storage charges, and further law and motion such as a court order allowing the creditor to sell the property.

Process of Obtaining a Writ of Possession

Individuals, corporations, partnerships or other unincorporated associations, limited liability companies, and public entities are subject to writs of possession. CCP §511.070.

Application for a writ of possession may be filed any time after filing an action to recover specific property. Plaintiff may request, at the application stage, that a turnover order be issued requiring defendant to transfer possession of the described property to the plaintiff. The effect of the turnover order would be to avoid the hassles of a levy. The order must notify defendant that failure to comply with the turnover provisions of the order may subject defendant to being held in contempt of court. CCP §512.070.

Judicial Council Forms are mandatory for obtaining the writ of possession. Cal. Rules of Ct. 1.31(a). The Forms include: 1) Application for Writ of Possession (CD-100); 2) Notice of Application for Writ of Possession and Hearing (CD-110); 3) Order for Writ of Possession (CD-120); 4) Writ of

Possession (CD-130); 5) Undertaking by Personal Sureties (CD-140); 6) (Optional) Declaration for Ex Parte Writ of Possession (CD-180); and 7) (Optional) Application for Temporary Restraining Order (CD-190).

A hearing date will be set for the writ of possession. Written notice of the application for writ of possession must be served by plaintiff at least 16 court days before the scheduled hearing. Defendant may file and serve an opposition within 9 court days before the hearing. Plaintiff may file and serve a reply memorandum at least 5 court days before the hearing. CCP §1005(b). At the hearing, the court will rule on the writ application based on the pleadings and other papers in the record. Before the court issues a writ of possession, plaintiff must post an undertaking. CCP §515.010(a).

Obtaining an Ex Parte Writ of Possession or Ex Parte Temporary Restraining Order

Plaintiff may obtain an ex parte writ of possession by showing probable cause that any of the following conditions exist: 1) the defendant obtained possession of the property by feloniously taking it from plaintiff (but not if the defendant obtained possession by false representations, pretense, or embezzlement (CCP §512.020(b)(1))); 2) the property is a credit card; or 3) defendant acquired the property in the ordinary course of defendant's trade or business for commercial purposes; and a) the property is not necessary for the support of the defendant or defendant's family; b) an immediate danger exists that the property will become unavailable to levy by transfer, concealment or removal from the state, or will be substantially impaired in value by acts of destruction or by failure to take reasonable care of the property; and c) ex parte issuance of the writ is necessary to protect the property.

Plaintiff may also obtain an ex parte temporary restraining order ("TRO") to prevent defendant from transferring, concealing, encumbering, or impairing the value of property until the court holds a noticed hearing on plaintiff's application for writ of possession.

The court can issue a TRO ex parte if it finds the usual showing required for a TRO under CCP §527; and that

plaintiff has established the probable validity of the claim to possession of the property, has provided the bond required by CCP §515.010, and has established probability of immediate danger that the property may become either substantially impaired in value or unavailable to levy as a result of being transferred, concealed or removed. CCP §513.010(b)(1)-(3). The procedures for obtaining a TRO are set forth in CCP §§525-527. The difference between a TRO and an ex parte writ of possession is that under an ex parte writ of possession the property is actually seized.

Writ of Attachment or Possession in Arbitration

A party to an arbitration agreement may obtain Writs of Attachment or Possession from a court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not commenced, in any proper court. CCP §1281.8(b). To obtain a writ of attachment or writ of possession in an arbitration matter, the requirements are the same as obtaining the writs in any court action, but the plaintiff must prove that the assets are unlikely to be available at the time the arbitrator renders his award. CCP §1281.8(b).

Bearing the foregoing in mind, the potential benefits to your client in an appropriate case of obtaining a writ are so overwhelming, and the potential disappointment if assets are unavailable to your client, mean the writ procedures are an integral litigation involving contract claims with calculable damages. ⚡

Focused on real estate and commercial litigation, Mark L. Share is a shareholder at De Castro, Glickfeld & Nass and Yona Conzevoy is an Associate specializing in civil litigation. Mark and Yona have spoken at the SFVBA on prejudgment remedies and will moderate the Breakfast with the Experts program with the Writs and Receivers Judges on January 28, 2010.

They can be contacted via the internet at www.dwclaw.com.



MCLE Test No. 17

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. In California, a writ of attachment can be used to levy on and obtain a lien against defendant's out-of-state property.
True
False
2. A plaintiff may attach defendant's assets if plaintiff has a claim against defendant for money lent for general household purposes.
True
False
3. The property of a non-California resident cannot be attached.
True
False
4. When applying for a writ of attachment, the Judicial Council forms are mandatory.
True
False
5. Property necessary to support a California defendant or his family is exempt from attachment.
True
False
6. Before the court issues a temporary protective order against defendant transferring property before the hearing on plaintiff's application for writ of attachment, plaintiff must post an undertaking.
True
False
7. If plaintiff obtains a writ of possession but fails to obtain a judgment in the underlying action, it will not be liable for defendant's actual damages caused by the wrongful possession.
True
False
8. Partnerships are not subject to writs of possession.
True
False
9. Judicial Council Forms must be utilized when applying for a writ of possession.
True
False
10. Defendant must file its opposition to the writ of possession at least nine court days before the hearing.
True
False
11. Defendant must file its opposition to the writ of attachment at least nine court days before the hearing.
True
False
12. Temporary restraining orders are not available for writs of possession.
True
False
13. Plaintiff does not have to post an undertaking before the court will issue a writ of possession.
True
False
14. The requirements for obtaining a writ of attachment from a court ancillary to a court ordered arbitration are the same as obtaining a writ of attachment in any court action.
True
False
15. Plaintiff may apply for a writ of attachment as soon as the complaint is filed.
True
False
16. Plaintiff can always attach an out-of-state defendant's California property, whether the property is exempt or not.
True
False
17. Foreign corporations not qualified to do business in California are not subject to attachment in California.
True
False
18. Plaintiff may enforce a writ of possession by a second "attachment" order requiring defendant to deliver property to plaintiff without involving a levy by the sheriff.
True
False
19. Plaintiff can obtain an ex parte writ of possession by showing probable cause that the defendant obtained possession through embezzlement.
True
False
20. Plaintiff may seek a writ of attachment to bring defendant to his knees.
True
False

MCLE Answer Sheet No. 17

INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$15 testing fee for SFVBA members (or \$25 for non-SFVBA members) to:

San Fernando Valley Bar Association
21250 Califa Street, Suite 113
Woodland Hills, CA 91367

METHOD OF PAYMENT:

- Check or money order payable to "SFVBA"
 Please charge my credit card for \$_____.

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Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

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ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

- | | | |
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| 1. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 2. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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