

PREJUDGMENT WRITS OF ATTACHMENT AND C&C

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September 2007

C&C has two meanings. "Creditors and Collections" and "Command and Conquer".

Aggressive counsel for creditors, whether institutional or non-institutional lenders, or others who are owed money, will successfully resolve collection problems, by a well conceived command and conquer strategy. In some instances, this will mean a quick judicial strike with shock and awe force against a borrower or debtor, by obtaining a prejudgment writ of attachment.

This article outlines when the remedy of a prejudgment writ of attachment may be utilized, and why in some instances it will be a creditor's single-most effective C&C strategy.

A prejudgment writ of attachment may be filed immediately upon the filing of a lawsuit and literally months, if not years, before a judgment would actually be rendered in the lawsuit. The "writ of attachment" means that assets of the debtor may be attached by the creditor once the prejudgment writ of attachment is obtained. The result: immediate freezing or sequestering of assets and protection that the debtor will not liquidate and hide assets once the creditor has attached its lien. In more simple terms, the result is a judicially sanctioned tight noose.

What are the requirements for issuance of a right to attach order and writ of attachment?

The procedures and grounds for obtaining orders permitting prejudgment writs of attachment are governed by California Code of Civil Procedure Sections 481.010 et seq.

An order of attachment may be issued (i) in an action for a claim of money; (ii) which is based upon an express or implied contract; (iii) where the total amount of such claim is a "fixed or readily ascertainable" amount; and (iv) the claim is not less than \$500.00.

When the claim is against a corporation, partnership, limited liability company, or association, all property within California is subject to attachment, as long as a method of levy is provided for under applicable California statutes. There is no exempt property for corporations or other legal entities meaning any real property (e.g. office building), personal property (e.g. vehicles), tangible property (e.g. receivables), or intangible property (e.g. patents) may be attached. Individual debtors are entitled by statute to a few exemptions, including their salaries.

To obtain a prejudgment writ of attachment a lawsuit must be filed by the creditor against the debtor for the amount owed. Following the filing of the lawsuit, the C&C prejudgment writ of attachment is implemented by either seeking an ex parte order or by having a noticed hearing. Essential to both is the filing of an application for a right to attach order. The right to attach order must be supported by a declaration showing that the applicant, on the facts presented, would be entitled to a judgment on the claim which the attachment is based.

Obtaining an ex-parte order for prejudgment writ of attachment is the most explosive C&C strategy, but it is not available in all circumstances. To obtain an ex parte order for a prejudgment writ of attachment, an argument must be successfully made that if an order for a prejudgment writ of attachment is not immediately made, the debtor's assets may not be available at a future time to lien against as the debtor may have the ability to hide assets or move its assets beyond the easy reach of creditors (e.g. moving money to foreign bank accounts). An ex parte prejudgment writ of attachment hearing is held in the judge's chambers on short notice (pursuant to local court rules which may require notice of less than three (3) days to borrower). If an order is granted, the creditor may proceed to lien assets by having the Marshal's office exercise on the writ of attachment.

Whether or not a creditor proceeds to obtain an ex parte order for a prejudgment writ of attachment or for an order following a noticed hearing, the court will be guided by California Code of Civil Procedure Sections 484.090 et seq. A court shall issue a right to attach order setting forth the amount to be secured by the attachment if it finds that:

- The claim is one for which attachment may be issued;
- The plaintiff has established "the probable validity" of the claim (i.e., probable validity does not require that plaintiff prove that it will in fact win on its claim; rather, plaintiff must show that it is "more likely than not" that plaintiff will obtain a judgment against the defendant on the claim);
- Attachment is not sought for a purpose other than the recovery on the claim upon which the request for attachment is based;
- The amount to be secured by the attachment is greater than zero; and
- The property is not exempt from attachment.

Consider whether or not the requirements for a prejudgment writ of attachment would be satisfied under California law in cases in which (i) a bank provided a \$2,500,000 line of credit (the "Bank Loan") to a manufacturer of airplane parts, and after the line of credit has been completely drawn upon, the loan is in default, or (ii) an individual loaned a "good friend" \$50,000 (the "Good Friend Loan") for two (2) years and when the money is due and owing, yesterday's friend has become today's candidate for one of yesteryear's debtor jails. Obtaining a prejudgment writ of attachment for the Bank Loan or the Good Friend Loan requires the same analysis and would result in the same finding by the courts:

1. The creditor's claim was a claim for money which was based upon an expressed or implied contract (as required by the statute); and

2. The money claim is for a "fixed or readily ascertainable amount" (as required by statute).

Thus, should either the holder of the Bank Loan or the Good Friend Loan bring an order to show cause after filing a lawsuit for an order for a prejudgment writ of attachment, it should prevail. Once it obtained its order, it would be entitled to attach or lien property of the debtor, including but not limited to bank accounts, real property and any type of personal property in which borrower may have an interest.

A prejudgment attachment may secure the amount of a debtor's indebtedness as claimed by the creditor, plus estimated costs and allowable attorney's fees. However, the amount to be secured by an attachment will be reduced or offset by (i) any unsatisfied and enforceable money judgment in defendant's favor against plaintiff; plus (ii) any indebtedness of the creditor plaintiff claimed by a creditor in a cross-complaint filed in the action *if a writ of attachment could issue on the claim*; (iii) 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 since the amount of the writ will only be reduced if the debtor has attachable ("contract") claims against the creditor); plus (iv) any security interest held by plaintiff in defendant's property, together with any decrease in the value of the underlying security caused by the creditor (or a prior security holder).

At the time of obtaining the prejudgment writ of attachment, the court will also require that an undertaking or bond be obtained by the creditor.

While a prejudgment writ of attachment may not be a remedy available in all collection actions requiring a C&C, an early determination should be made with counsel as to its availability as a remedy, and if available, its implementation as an effective C&C strategy.

DISCLAIMER: This article is intended to provide a general overview of lending issues. It is not intended nor should it be relied upon as legal advice. Each loan is fact specific and as such different principles of law may apply, and counsel should be consulted. For additional information contact Gordon L. Gerson at GERSON LAW FIRM APC, ggerson@gersonlaw.com or call (858) 452-5400.