

Prejudgment Attachment: A Strategic Alternative to Awaiting Trial

By David J. Barnier

These days, trials are typically being set 12 months after the filing of a lawsuit. For a contractor, equipment rental company, or materials supplier that is owed money, it is an unfortunate reality that the process of suing a customer can be time consuming and expensive. Attorneys' fee provisions and service charge provisions are helpful, but defendants have leverage to further delay paying a debt due to the pace of taking a case through the court system.

While every debtor/defendant has the right to his "day in court," there is an established court procedure that allows a creditor/plaintiff to apply pressure in hopes of forcing the payment of the amounts owed. This procedure is called a prejudgment writ of attachment.

FREEZING A DEBTOR'S ASSETS

California law allows a creditor within a lawsuit to seek a "prejudgment writ of attachment" by which it can freeze certain assets of a debtor/defendant. Any property of the debtor that is attached is not immediately transferred to the creditor. Rather, the local Sheriff's or Marshal's office holds the attached assets pending the outcome at trial or any settlement between the parties. As discussed below, this procedure often results in the defendant immediately settling the lawsuit.

Certain criteria must be met by the creditor for it to succeed in obtaining a prejudgment writ of attachment as set forth under the California Code of Civil Procedure:

- The underlying claim by the creditor must be based upon a contract (it may not be based on injuries suffered in an automobile accident, for example);
- The creditor must show the "probable validity" of the claim against the debtor; and
- The debtor must be a corporation, or if the debtor is a person, the claim must be based upon a contract that was related to the person's business activities and unrelated to the person's personal life

These are powerful rights for a creditor that has a valid claim against a debtor that refuses to pay amounts clearly owed. For example, if the creditor has a \$50,000.00 claim and is able to transfer \$50,000.00 out of a debtor's bank account to be held by the local Sheriff pending the resolution of the lawsuit, the debtor will face the decision of settling the lawsuit or continuing to pay its attorney to defend a lawsuit that it likely will not win. Because the debtor's \$50,000.00 has already been taken from the debtor, there really is no reason for the debtor to continue to pay its attorney to defend the lawsuit. The settlement can involve the transfer of the attached assets from the Sheriff to the creditor.

SURPRISE! THE AMOUNT YOU OWE HAS BEEN DEDUCTED FROM YOUR BANK ACCOUNT!

California law also allows a creditor/plaintiff to freeze the assets of a debtor/defendant quickly, and in some cases **without notice to the debtor**. All of the requirements described above are still required. In addition, the creditor must show to the court that if the debtor learns that the creditor is attempting to obtain a prejudgment writ of attachment, the debtor is likely to hide or otherwise cause its assets to be made unsusceptible to attachment. Innocent statements by a debtor to a creditor that it hopes to pay the creditor as soon as its cash flow improves will provide evidence that will establish not only the probable validity of the creditor's claim, but also that the debtor should be deemed likely to hide its assets upon learning that the creditor is seeking a prejudgment writ of attachment.

The most strategic way for a creditor to seek a prejudgment writ of attachment without notice to the debtor is to set a hearing on its application within a day or two after it files its lawsuit and prior to serving its lawsuit on the debtor. If the creditor succeeds with its ex parte application without notice to the debtor, the debtor may wake up one day to learn that the full amount it owes to creditor has been removed from its bank account.

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Mr. Barnier is an attorney practicing general business litigation with an emphasis on construction law and a particular emphasis on litigation involving breach of contract claims, mechanic's liens, stop notices and payment bond claims. He frequently presents seminars to the construction industry by which he explains the complex laws affecting the industry, and how companies can avoid litigation or, as a last resort, be best prepared for litigation.

His articles on construction law topics have been published in numerous trade journals and magazines. In addition to construction law, Mr. Barnier represents businesses of all sizes on both litigation and non-litigation matters. In addition, Mr. Barnier is an active member in construction trade organizations including the Engineering General Contractor's Association (EGCA).