



Prejudgment remedies in tort cases

When and how the plaintiff in a tort action can attach the assets of the defendant

By DAVID J. COOK

You have a case for serious injury against a successful business that turns out to be underinsured. There appears to be a strong business cash flow and hard assets to pay the likely award, but you're afraid they will disappear before you can get a judgment. And so you wonder, what about a writ of attachment?

Under certain circumstances, in a traditional tort action seeking damages based on a personal injury or wrongful death, the plaintiff can seek an attachment prior to judgment. In rare instances, the jury will render a verdict awarding the plaintiff damages, but for some reason, the judge delays the entry of judgment pending post-verdict proceedings. In a bench trial, the court might render a statement of decision that awards damages to the plaintiff but delays entry of judgment based on continued proceedings, including objections to the statement of decision. (For purposes of this article, a statement of decision is the functional equivalent of a verdict.)

The basics

An attachment is a pre-judgment remedy that enables the plaintiff to attach the defendant's assets as security for payment of the probable judgment. The attachment hobbles the operation of the defendant's business and, given its draconian consequences, might initiate settlement.

If an attachment is prosecuted early in the case, and the plaintiff succeeds in encumbering valuable assets, the attachment lien would survive a bankruptcy and

elevate the claim of plaintiff from unsecured to secured.

In order to secure an attachment, the plaintiff must prove up probable validity, which means that the plaintiff is likely to prevail under the California Code of Civil Procedure section 484.090(a)(2). Section 481.190 defines probable validity: "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim."

In response, the defendant must show a viable defense to the claim. Attachment hearings are mini-trials of both fact and law, and unlike a summary judgment, the judge can weigh the evidence. If plaintiff succeeds (or fails) in securing an attachment, the case might have a shorter life. Attachments are very common in financial, commercial, and large scale lease defaults.

California Code of Civil Procedure Section 483.010(a) authorizes writs of attachment into contract cases as follows:

Except as otherwise provided by statute, an attachment may be issued only in an action on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars (\$500) exclusive of costs, interest, and attorney's fees.

The claim must be based on (1) a contract, express or implied, and (2) the debt is fixed or readily ascertainable. A mixed bag of contract and tort claims, such as breach of warranties, construction defects, product liability and employment cases might support an

attachment if the complaint seeks some type of relief under an implied or express contract.

Tort cases, such as personal injury, wrongful death or tort-driven, property-damage cases, such as infringement claims, would not support an attachment given the lack of any contractual underpinning, but moreover the damages are rarely (or never) fixed or readily ascertainable.

The spiteful defendant

Absent a fully solvent or well-insured defendant, plaintiff confronts the risk that the defendant, when facing an uninsured liability, but prior to enforcement, will abscond with valuable assets, move cash and stock accounts out of state, hock every asset to the hilt or render assets difficult or cumbersome to reach. Staring down a \$1 million uninsured loss, even the solvent defendant will render enforcement difficult by re-titling assets in another corporate or LLC name. The defendant might cycle through a legitimate (or corrupt) bulk sale of the business itself and/or convert hard assets into cash that escape the jurisdiction.

Every plaintiff fears that the spiteful defendant would turn its business into a debris field rather than compensate plaintiff one nickel. Counsel frets that the case costs would become unrecoverable. These risks predominate in employment cases given the defendant's perception of unfairness, outrage or denial.

While the plaintiff might be able to recover the assets through a fraudulent conveyance action, plaintiff's own expense and burden factor escalates because counsel's engagement rarely



includes the supplemental proceedings or the enforcement of the judgment.

The fact of the fraudulent conveyance depreciates the value of the judgment given the daunting expense and risk of continuing proceedings. Asset protection strategies hinder, delay and defraud plaintiff in the enforcement of a judgment and therefore compels plaintiff to consider a salvage settlement of pennies on the dollar or nothing at all.

In this narrow window, post verdict but prior to the final judgment, the tort claim folds into the verdict which becomes a contract, implied at law, under section 483.010(a). The verdict asks: "Was the defendant negligent?" "Answer: Yes." "Was the negligence an actual and proximate cause of the damages to the plaintiff?" "Answer: Yes." "What do you find to be plaintiff's damages?" "Answer: \$1,000,000." In a jury trial, the judge enters judgment based on the verdict. ("Based on the special verdict, it is hereby ordered, adjudged and decreed as follows . . .") In a bench trial, the court enters judgment based on the statement of decision.

Verdict as a contract

A verdict constitutes a contract implied at law which compels the defendant to pay plaintiff the damages which is fixed by the jury. The authority for this statement is found in *Goldman v. Simpson* (2008) 160 Cal.App.4th 255 that represents the quest by Fred Goldman in seeking justice for the wrongful death of his son at the hands of O.J. Simpson. *Goldman vs. Simpson* is an appeal from a failed quest to vacate the renewal of the civil judgment. The issue in the case was whether the court has continuing personal jurisdiction over the judgment debtor post judgment, whether the judgment creditor would have to prove up personal jurisdiction as a condition of a renewal or whether a new action to renew the judgment would be required. The court framed the new action as follows:

In contrast, "[a]n action based on a judgment is an action based on contract.

The judgment becomes a debt which the judgment debtor is obligated to pay and the law implies a contract on his part to pay it. [Citations omitted] Thus, when successful, an action on a judgment results in the entry of a new judgment.

(*Goldman v. Simpson* (2008) 160 Cal.App.4th 255, 262 [Emphasis added].)

In *United States Capital Corp. v. Nickelberry* (1981) 120 Cal.App.3d 864, 867, the court stated as follows:

An action based on a judgment is an action based on contract. The judgment becomes a debt which the judgment debtor is obligated to pay and the law implies a contract on his part to pay it. (*Minor v. Minor*, 175 Cal.App.2d 277, 279 . . . [Emphasis added].)

In *Erickson v. Erickson* (1920) 47 Cal.App. 319, 320, the court stated:

A diversity of opinion is to be found in the decisions on the question. ***However, the Supreme Court of this state has affirmed the position that a suit upon a judgment is an action upon contract.*** (Citation) Moreover, appellant here necessarily confirmed that view, and respondent concedes that the law is so established. A contract is presumed to be payable where made, in the absence of terms providing otherwise.

(*Tuller v. Arnold*, 93 Cal. 168 [Emphasis added].)

The verdict represents the decision of the jury that defendant is indebted to the plaintiff. The verdict is a contract, implied at law, that the defendant will pay plaintiff and constitute a "contract, express or implied" under section 483.010(a). If the defendant is a corporation or LLC, the claim is necessarily commercial in nature. If the defendant is an individual, the plaintiff must satisfy section 483.010(c) and demonstrate that the claim arose from a "trade, business, or profession."

Is the claim fixed or readily ascertainable? The answer is obvious. The jury fixed the amount in the jury verdict or the judge fixed the amount in the statement of decision. The last hurdle is self evident. Plaintiff must demonstrate

probable validity under section 484.090(a) (2). The proof is in the jury verdict itself or statement of decision. The jury or judge ruled for plaintiff and renders absolute, much less "probable," that plaintiff in fact prevailed.

Given the gap between the verdict and judgment, the plaintiff can seek an ex parte writ of attachment, or temporary restraining order, on the basis that plaintiff confronts exigent circumstances given a large judgment against an uninsured (or underinsured) defendant who ostensibly declines to pay. The non-payment of the verdict by the defendant intimates insolvency under Civil Code section 3439.02 (c) as follows: "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." The debt is the unpaid verdict or statement of decision.

The post-verdict and pre-judgment attachment hearing enables the court to review the evidence because an attachment hearing is a mini-trial (e.g., exigent circumstances). The court considers the risks facing the plaintiff in collection of the pending judgment. If the court concludes that the defendant is dishonest, vengeful, intransigent or unable, or unwilling, to pay the judgment, the court is likely to find an inference that the defendant will engage in asset protection, and grant the attachment, or more likely a temporary protection order (a statutory form of an "asset freeze.")

These hearings focus on the defendant's state of mind in confronting the case itself, the verdict and pending judgment. The quickest way to divine the defendant's state of mind is to call defense counsel. "Is the defendant going to pay the judgment when entered? If the defendant is going to appeal, is the defendant going to post a bond?"

Responses such as "No," "Never," "Not in million years," "Come and get me," "Go enforce your rights and remedies," or "you'll never collect" are relevant in arguing that pre-judgment relief is a necessity to protect the plaintiff from a massive campaign of asset protection.



Defense counsel's responses are important, including any profanity or arrogant or disrespectful statements.

The attachment hearing

In the attachment hearing, the plaintiff would offer evidence of defendant's hostile, mean-spirited, vicious or taunting statements ("You'll never see a dime.") While settlement offers are rarely admissible, absurd settlement offers predicated upon the difficulty of collection are relevant: "Take the \$1,000 because you'll never find the rest." Pre-suit responses to settlement demands, personal conduct or mannerisms, profanity, tardiness during the trial, lack of respect, bizarre attire during the trial, the tortuous conduct itself, the refusal to accept responsibility or apologize, and even facial expressions of the defendant or the defendant's counsel become part of the judicial mix in granting (or denying) an ex parte writ of attachment.

Coming to court in inappropriate apparel or footwear is an act of disrespect and arrogance. Any actions in the course of litigation such as suspicious liens, transfers, deeds, change of name or entity or new entities bearing the defendant's trade name, may support an attachment. Employment cases, including class actions, and in particular cases based upon sexual misconduct, share many of these attributes.

If the defendant is fully insured, the settled expectation is that the defendant will pay the judgment and render an attachment proceeding superfluous. If the defendant is under or uninsured, the settled expectation is a campaign of asset protection that degrades the judgment

Call this the settled expectation of risk. This risk of asset protection wildly metastasizes if the defendant fervently perceives that the judgment is "unfair," "technical," that he "got stuck holding the bag," or blames the jury for bias. For this reason, during the pre-trial discovery plaintiff's counsel should ask the defendant about his perceptions of the case, e.g., "unfair," "technical," that he is being sued "unjustly," or was left "holding the bag" for others. These answers are later used in building the case for attachment.

The judgment will be entered and, regardless of whether an appeal is actually taken, the defendant can move for an unbonded stay under section 918(b) for 70 days. Stays are common, and sometimes subject to the recording of abstracts of the filing of a personal property lien with the Secretary of State. Whether before the stay, or in response to the stay motion, or a condition of the stay, nothing stops the plaintiff from seeking, or retaining, the writ of attachment. The amount is *fixed* by the jury, the claim (now a judgment) is *probably valid* as found by the jury, the judgment is a *contract implied in law*, and presumptively the claim arises from the defendant "*trade, business or profession.*" Stays are worrisome as the plaintiff suspects that the defendant will hide and conceal assets under the protection of the stay. This risk is pervasive assuming the defendant is underinsured, or even if solvent but bears unmitigated malice toward the plaintiff.

Conclusion

Attachments are statutory remedies that are available to the plaintiff's bar in seeking to secure the large dollar verdict

given a delay in rendering judgment, or even the enforcement of the judgment itself in the face of the discretionary stay. Post-verdict or judgment attachment proceedings are unique. Expect defense counsel to play catch-up. Attachments snare the defendant's assets and seriously impact the defendant's business. The attachment reduces the risk factor of the assets taking flight as the attachment encumbers these assets and makes them available when the stay expires or judgment is finally entered. Embrace the settled expectation of risk with the remedy of an attachment at hand.

There is also one more benefit: Attachments make defense counsel pick up the phone and talk serious settlement. Why? Nothing gets the defendant's attention better than cleaning out the bank account on payday, causing 100 payroll checks to bounce, and sending 100 angry employees to the labor commissioner who is empowered to file criminal charges.



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