IS IT STILL APPROPRIATE TO PURSUE A WRIT OF ATTACHMENT IN THESE ECONOMIC TIMES?

A writ of attachment is a game changer; it allows a creditor to secure payment on a debt by seizing a defendant's assets prior to obtaining a judgment. Once property is seized, the creditor obtains a lien on the assets, which are placed in the custody of a sheriff or marshal. It strengthens a creditor's ability to collect on the judgment after trial and even if the defendant does not have much cash. Seizure of the defendant's cash will definitely get the defendant's attention, and will likely result in an early settlement.

Let's assume you represent Company ABC in a breach of contract action against Company XYZ for the total amount of $500,000. You file a complaint for breach of contract and common law counts based on a contract entered into on March 14, 2010. The contract required XYZ to render payment for services rendered no later than Nov. 1, 2011.

At the time of the filing of the complaint, your client suggests that XYZ has the money to pay the amount due on the contract, but refuses to make payment. The client also asks if there is any way to obtain leverage over XYZ to ensure that the litigation is resolved as quickly as possible. You may or may not be thinking that you could obtain a pre-judgment writ of attachment, but perhaps you should be. Pre-judgment attachment liens are a perfect way to secure payment of debt prior to judgment.

Consideration should be paid to the XYZ's financial wherewithal prior to filing a suit for collection of a debt; however, special care should be used in determining where to utilize the writ of attachment procedure. Avoid the untenable position of having to explain to a client that the tens of thousands of dollars spent obtaining the pre-judgment remedy will be chalked up to experience because the act of seizing $100,000 has forced XYZ to for bankruptcy.

It's a powerful tool, but it must be used with caution. If XYZ threatens bankruptcy, perhaps you can suggest a stipulated judgment which would allow additional time for XYZ to pay and possibly stave off bankruptcy.

WHAT CAN I ATTACH?

Attachment works best when the defendant is a corporation, since all property within California held by a corporation, partnership or unincorporated association is subject to attachment. Cal. Civ. Proc. Code § 487. 010; see Cal. Rules of Civ. Pro §§ 488.315 – 488.485 for a description of the method of levy for

different types of property.

This means that as long as there is a specific method for attaching that property mentioned in Cal. Civ. Proc. Code §§ 488.300 – 488.485, everything XYZ owns in California is fair game for attachment. For example, Cal. Civ. Proc § 488.455 sets forth the method for attaching a bank account. Following the steps outlined in Section 488.455 allows the levying officer to seize, on behalf of ABC, all money in XYZ's bank account at the time the writ of attachment and notice of attachment are served on the financial institution – up to the amount on the face of the writ.

OBTAINING A RIGHT TO ATTACH ORDER

The clerk of the court issues a writ of attachment only after a creditor has successfully made an application for a right to attach order. Once the right to attach order is obtained, the court orders the clerk to issue a writ of attachment directed to the sheriff or marshal to seize certain property.

In California, judicial council forms include the basic requirements for the application and assist the attorney in ensuring that the statutory requirements for the application are met. Still, the procedure is complicated and should be approached with attention to retail, because the attachment statutes are strictly construed against the party seeking attachment.

To be eligible for attachment, a claim must be one that is:

- for money based upon a contract, express or implied;
- of a fixed or readily ascertainable amount not less than $500;
- either unsecured or secured by personal property; and
- a commercial claim. Cal. Civ. Proc. Code § 483.010

Additionally, before the court will issue a right to attach order, a creditor must demonstrate the probable validity of the claim in the underlying action. Cal. Civ. Proc. Code § 484.090.

Under California law, 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; it's the same standard necessary for obtaining a judgment in the underlying action. Cal. Civ. Proc. Code § 481.190. For example, if the underlying claim is for breach of contract, the creditor must demonstrate that it is more likely than not that the evidence at trial will prove: (1) the existence of a contract (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages to plaintiff as a result of the breach. Acoustics Inc. v. Trepte Construction Co. 14 Cal.App.3d 887, 913 (1971).

Obtaining a right to attach order on an ex parte basis is often very difficult, but sometimes necessary if there is a risk that assets to satisfy the judgment will be unavailable at the time of a hearing on a noticed attachment application. Additionally, this surprise attack affords the defendant little or no notice and should usually be filed with the complaint or days thereafter.

An ex parte application for right to attach requires that a creditor demonstrate that it will suffer great or irreparable injury if the right to attach order is not issued. Cal. Civ. Proc. Code § 485.010. This standard is often difficult to meet, and it is only in the most precarious of conditions that a right to attach order will be issued ex parte.

Great or irreparable injury will be inferred where there is 1) danger of property loss (i.e. concealment or substantially impaired in value); 2) particular kinds of asset transfers pending; or 3) where the defendant insolvent.

To establish that a defendant is insolvent for the purposes of obtaining a writ of attachment, a creditor must demonstrate that the defendant failed to pay the debt and that the defendant is insolvent in the bankruptcy sense. See Cal. Civ. Proc. Code § 485.010 (a)(2).

Returning to our hypothetical, XYZ has entered into an agreement to sell its property; an escrow agreement has been signed; and money is about to be disbursed from the escrow account. These circumstances warrant an ex parte application for writ of attachment to ensure the money remains available to pay a judgment. Here, the writ of attachment procedure ensures that the escrow funds are not spent while the case travels through the litigation process.

DEFENDANT FILED FOR BANKRUPTCY – AVOIDING THE TRUSTEE'S AVOIDANCE POWERS?

Over the last few years, there has been a significant increase in bankruptcy filings and subsequently a bleeding over of bankruptcy law into other fields of practices. Pursuant to the United States Trustee's Feb. 14, 2011, FY 2012 Budget Request there were 1,534,202 bankruptcy filings in the 2010 fiscal year.

The Budget Request estimates that over 2011 and 2012 the filings will remain constant at approximately 1.5 million filings per year. Therefore, it would behoove creditors in these economic times to develop an understanding of how the automatic stay protection afforded to bankruptcy debtors will affect their ability to collect payment. The writ of attachment procedure is particularly vulnerable because of the time and effort involved in securing the writ.

Once a bankruptcy petition has been filed, the automatic stay protects the bankruptcy estate from creditors and prevents creditors from taking any action against the estate to secure payment of a debt. Bankruptcy Code Section 541(a) defines the bankruptcy estate as all legal and equitable interests in the property. Certainly, then, all property, money and assets seized as a result of a writ of attachment are part of the bankruptcy estate and thus subject to the automatic stay. Bankruptcy provides a hurdle to securing money prior to the entry of judgment.

At the time a bankruptcy is filed, a perfected lien is a secured claim and thus entitled to greater protection under bankruptcy law. Whether a lien is perfected under bankruptcy law is determined by reference to state law. As a consequence, there is no uniformity regarding how attachment liens are treated because each state treats pre-judgment attachment differently.

In California, a writ of attachment lien is not perfected until a judgment has been entered. Bankruptcy Code Section 362 (a)(4) precludes any act to create, perfect, or enforce a lien against property of the estate once a petition has been filed. Thus, a creditor is prevented from obtaining a judgment to perfect an attachment lien once upon the filing of a bankruptcy petition.

Upon receiving notice that a party has filed for bankruptcy protection, a creditor that has seized property pursuant to a writ of attachment, but that has not yet reduced its claim to judgment, must determine whether a motion to terminate the automatic stay is appropriate.

WILL THE COURT ISSUE AN ORDER TERMINATING THE AUTOMATIC STAY?

InIn re Aquarias Disk Services Inc.,254 B.R. 253 (9th Cir., 2000), the 9th Circuit considered whether it was appropriate to grant a creditor relief from stay pursuant to 11 USC § 362(d) in order to permit the creditor to resolve a state court action and obtain judgment, thereby perfecting the lien. The court based its decision, in part, on the strong public policy in favor of allowing an attachment creditor to proceed to judgment on its claim. Id. at 260. Also, the court considered several other factors in determining whether to grant relief from the automatic stay, including the fact that the attachment levy was obtained outside the 90 day preference period, whether judicial economy was served by allowing litigation to continue in the original forum, and the Bankruptcy Code's policy of rewarding diligence. Id. at 259-260.

Based on the reasoning of In re Aquarias Disk Servs., seizure of a writ of attachment issued within 90 days of the bankruptcy filing would not receive the same treatment. Since the goal of the bankruptcy court is to protect unsecured creditors and to ensure that each unsecured creditor is treated equally, it makes sense that any amounts seized during the preference period would be subject to the trustee's avoidance powers.

The bankruptcy laws are set up to ensure that creditors do not profit from any mad dash to the court house steps which allows maneuvering for a better position at the expense of other similarly-situated creditors. As a result using its avoidance powers, a trustee has the ability to recall all money paid out (subject to some exclusions and defenses) while the bankruptcy debtor was presumed insolvent.

Such actions threaten the ability of the bankruptcy to accomplish the desired goal of allowing the debtor to effectively reorganize. The policy of ensuring that all creditors in the same class are treated equally, therefore, weighs heavily against rewarding a creditor who obtains a pre-judgment lien within the 90-day preference period.

Thus, using the example of XYZ, if the bankruptcy petition is filed on April 2, 2011, the preference period will be defined as the 90 days prior to April 2, 2011. Thus, any writ issued between April 2, 2011, and Jan. 1, 2011, will be subject to the trustee's avoidance powers.

Beating the preference period may be a bit like attempting to use a magic eight ball to look into the future, but there are a few factors to consider in determining whether a writ of attachment is an appropriate pre-judgment remedy. If bankruptcy is imminent, i.e., bankruptcy counsel has been retained, operations have ceased and/or the defendant has a complete inability to pay debts as they become due, a writ of attachment may not be an appropriate remedy.

A writ of attachment is reserved for those instances when the property a creditor seeks to attach is clearly identifiable and the risk of bankruptcy is low. Although the probability of bankruptcy is not easily identifiable, a bit of homework at the outset can be used to prevent a situation where a writ of attachment pushes a defendant into filing bankruptcy.

Additionally, managing the client's expectations regarding what a writ of attachment can accomplish and its inherent risks are important steps for the lawyer to take prior to pursuing the pre-judgment remedy.

Special care must be taken to avoid a situation where the writ pushes the defendant into bankruptcy or a writ is obtained during the preference period and all sums levied upon must be returned to the trustee, thereby placing the client in a worse position than if the lawyer had not elected to pursue a writ of attachment.

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