

RESOLUTION 03-03-2014

DIGEST

Prejudgment Attachment Applications: Notice of Hearing

Amends Code of Civil Procedure sections 484.040, 484.060, and 1005 to lengthen the time for notice of hearing on an application for writ of attachment, opposition, and reply by five days.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure sections 484.040, 484.060, and 1005 to lengthen the time for notice of hearing on an application for writ of attachment, opposition, and reply by five days. This resolution should be approved in principle because it gives the court an additional five days to review the documents prior to the hearing, which would improve the court's ability to prepare and reduce the likelihood of continuances under section 484.080.

This resolution returns the articulation of the initial notice period to section 484.040, which had provided for a 20 day notice period prior to 1989, and increases that notice period to 21 court days, as opposed to the 16 court day time frame of section 1005, and strikes the reference to the notice period from section 1005. The last change to this section was in 1989, when the 20 day notice time frame from section 484.040 was replaced with the reference to section 1005.

This resolution should be approved in principle, as it gives the court an additional five days to review the documents prior to the hearing, thereby improving the court's ability to prepare and reducing the likelihood that the parties would need continuances under Code of Civil Procedure section 484.080. In addition, it would resolve a potential conflict between section 484.060, which recites five court days for opposition and two for reply, and section 1005, which provides for nine court days for opposition and five for reply.

This resolution seeks to address the tension between the utility of attachment as a tool in collection matters and the due process rights of defendants subject to attachment, by increasing the time frame for the court to meaningfully prepare for hearing. These cases are frequently high stakes, complex matters that can be evidence intensive, with significant immediate financial implications for the parties, on both sides, such that more time for review is appropriate. While it may be true there are other significant, if not dispositive, motions that are heard within shorter time frames, at least as to this procedure, this would be a step in the right direction.

Code of Civil Procedure sections 485.010, et seq., which authorize ex parte writs of attachment under exigent circumstances, would not be affected by this change in the noticed application procedure.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure sections 484.040, 484.060 and 1005 to read as follows:

§ 484.040

No order or writ shall be issued under this article except after a hearing. At least 21 court days before the hearing, subject to the requirements for additional notice where service is effected by means other than personal delivery, as specified ~~At the times prescribed by~~ subdivision (b) of Section 1005, the defendant shall be served with all of the following:

- (a) A copy of the summons and complaint.
- (b) A notice of application and hearing.
- (c) A copy of the application and of any affidavit in support of the application.

§484.060

(a) If the defendant desires to oppose the issuance of the right to attach order sought by plaintiff or objects to the amount sought to be secured by the attachment, the defendant shall file and serve upon the plaintiff no later than ~~ten~~ five court days prior to the date set for the hearing a notice of opposition. The notice shall state the grounds on which the defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment and shall be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised. If the defendant fails to file a notice of opposition within the time prescribed, the defendant shall not be permitted to oppose the issuance of the order.

(b) If a defendant filing a notice of opposition desires to make any claim of exemption as provided in Section 484.070, the defendant may include that claim in the notice of opposition filed pursuant to this section.

(c) The plaintiff may file and serve upon the opposing party a reply ~~seven~~ two court days prior to the date set for the hearing.

§1005

(a) Written notice shall be given, as prescribed in subdivisions (b) and (c), for the following motions:

- ~~(1) Notice of Application and Hearing for Writ of Attachment under Section 484.040.~~
- ~~(2) (1) Notice of Application and Hearing for Claim and Delivery under Section 512.030.~~
- ~~(3) (2) Notice of Hearing for Claim of Exemption under Section 706.105.~~
- ~~(4) (3) Motion to Quash Summons pursuant to subdivision (b) of Section 418.10.~~
- ~~(5) (4) Motion for Determination of Good Faith Settlement pursuant to Section 877.6.~~
- ~~(6) (5) Hearing for Discovery of Peace Officer Personnel Records pursuant to Section 1043 of the Evidence Code.~~
- ~~(7) (6) Notice of Hearing of Third-Party Claim pursuant to Section 720.320.~~
- ~~(8) (7) Motion for an Order to Attend Deposition more than 150 miles from deponent's residence pursuant to Section 2025.260.~~
- ~~(9) (8) Notice of Hearing of Application for Relief pursuant to Section 946.6 of the Government Code.~~
- ~~(10) (9) Motion to Set Aside Default or Default Judgment and for Leave to Defend Actions pursuant to Section 473.5.~~
- ~~(11) (10) Motion to Expunge Notice of Pendency of Action pursuant to Section 405.30.~~
- ~~(12) (11) Motion to Set Aside Default and for Leave to Amend pursuant to Section 585.5.~~
- ~~(13) (12) Any other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge.~~

46 (b) Unless otherwise ordered or specifically provided by law, all moving and supporting
47 papers shall be served and filed at least 16 court days before the hearing. The moving and
48 supporting papers served shall be a copy of the papers filed or to be filed with the court.
49 However, if the notice is served by mail, the required 16-day period of notice before the hearing
50 shall be increased by five calendar days if the place of mailing and the place of address are
51 within the State of California, 10 calendar days if either the place of mailing or the place of
52 address is outside the State of California but within the United States, and 20 calendar days if
53 either the place of mailing or the place of address is outside the United States, and if the notice is
54 served by facsimile transmission, express mail, or another method of delivery providing for
55 overnight delivery, the required 16-day period of notice before the hearing shall be increased by
56 two calendar days. Section 1013, which extends the time within which a right may be exercised
57 or an act may be done, does not apply to a notice of motion, papers opposing a motion, or reply
58 papers governed by this section. All papers opposing a motion so noticed shall be filed with the
59 court and a copy served on each party at least nine court days, and all reply papers at least five
60 court days before the hearing. The court, or a judge thereof, may prescribe a shorter time.

61 (c) Notwithstanding any other provision of this section, all papers opposing a motion and
62 all reply papers shall be served by personal delivery, facsimile transmission, express mail, or
63 other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to
64 ensure delivery to the other party or parties not later than the close of the next business day after
65 the time the opposing papers or reply papers, as applicable, are filed. This subdivision applies to
66 the service of opposition and reply papers regarding motions for summary judgment or summary
67 adjudication, in addition to the motions listed in subdivision (a).
68 The court, or a judge thereof, may prescribe a shorter time.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Pre-judgment attachment proceedings can have serious implications for a defendant whose assets the plaintiff seeks to attach. On the other hand, they provide an important method of ensuring that a losing defendant's assets will be available to satisfy a judgment should the plaintiff ultimately obtain one, and should the law allow for attachment in the particular case. But attachment applications can be complex, often involving the presentation by both sides of detailed and voluminous evidence of agreements made and financial transactions entered into, and requiring careful review of the evidence by the court.

Unfortunately, the existing statutorily-prescribed briefing schedule imposes undue and unnecessary burdens on the court system, providing as it does that opposition papers may be filed a mere five court days before the hearing and reply papers two days before the hearing. This, in many cases, will not allow for meaningful review by the court. Most busy law and motion and writs and receivers departments have tentative ruling systems that require the court to issue tentative rulings either one or two court days before the hearing, meaning that in those courts a reply brief will often go unread, and the same is possibly true of the opposition.

This resolution will result in the attachment application being fully briefed seven court days before the hearing, which will ease the burden on the court. It is neutral as between the interests of plaintiffs and defendants, since it imposes an additional five days of notice on all parties. It will make it more likely that the court will have sufficient time to make the correct decision on this important subject.

Finally many, if not most, applications for writs of attachment are brought on an ex parte basis, and this resolution would have no effect on such applications.

The Solution: This resolution requires that noticed applications for writs of attachment be filed and served sixteen (16) court days before the hearing, papers opposing the application be filed and served five (5) court days before the hearing, and reply papers be filed and served two (2) court days before the hearing, which is often the day on which the court issues its tentative ruling.

It would require the parties to file their application, opposition and reply papers an additional five (5) days before the hearing, to allow for meaningful review by the court and court staff.

LEGISLATIVE HISTORY

Not known.

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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COMMENTS TO RESOLUTION 03-03-2014

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

DISAPPROVE: Why are Writs of Attachment either more or less complicated than any other motion? The same argument advanced here—that attachment motions require “detailed and voluminous evidence”—applies to any other complex motion falling within the 16-9-5 court day filing and service rules of Code of Civil Procedure section 1005. If the problem is that the Court does not have sufficient time to review complex paperwork then Section 1005 should be revised. If the problem is that section 484.060 provides less time for opposing papers than Section 1005 (five court days instead of nine court days for an opposition and two court days instead of five court days for a reply), then only section 484.060 should be revised. Assigning special filing deadlines for Writs of Attachment only adds more confusion to motion filing rules.