THE WILD WEST: SHOOTOUT IN THE LAW AND MOTION DEPARTMENT

BEING SUCCESSFUL IN CASES THAT INVOLVE ATTACHMENTS

by David Cook, Cook Collections Attorneys, PLC

This guy was great. Former LA Superior Court Commissioner, spoke softly, nice touch with everyone, and relocated to the Bay Area. Made Gandhi look anxious.

I rolled into court one afternoon with an ex parte writ of attachment, which he reviewed on the bench with great patience and a furrowed brow. After a few moments, he looked over the bench and said: "I used to do this in my prior job, and every day, I swear that I was attaching half of Los Angeles County."

Clients procrastinate. They dump the file, prattle through the details, end the monologue by telling you that the debtor's house is decorated with a realtor's sign, marked "SALE PENDING," punctuate the meeting with the afterthought that the debtor's business is in escrow closing tomorrow, or saw a moving van with the logo of "Global Movers — No Locale Too Distant."

What do you do after regaining your composure? Here is the roadmap. You must hit each stop.

STOP #1: Your big picture remedy is a writ of attachment, which includes the sub remedies of a turnover order, temporary protective order, attachment receiver, writ of attachment, and, occasionally, the super attachment order.

If the debtor committed a fraudulent conveyance, you might proceed with an action to vacate the fraudulent conveyance and lis pendens[1]. Let's go for the writ.

STOP #2: Before charging up San Juan Hill, go through this checklist: (A) Do you have a commercial claim in which the amount is fixed and readily ascertainable; (B) Does your client have records up to evidentiary standards [no shoe boxes here], and the witnesses to prove the case in an organized manner?

(C) Do you have clear evidence that the debtor is going to dispose of property before an attachment hearing on regular time (about 30-plus days); (D) Do you have the resources to mount an attachment, win, post a bond and enforce the attachment [engaging the sheriff or marshal]? Consider this process a math problem — and you cannot miss any steps.

STOP #3: Pick your court carefully. File where you find the debtor; the venue battles stay pre-judgment remedies: You want to file in Federal Court? You might snag the sage of the century, but the marshal's service chases fugitives before deadbeats.[2] Learn to love the USM-285[3], the memory typewriter, and the orders appointing private process servers.[4] Once you embrace the U.S. Marshal, you can paint the town with federal levies.

STOP #4: The call to the debtor. You probably have to call the debtor and tell him that in 24 hours, you intend to clean his clock. If you don't, the judge is going to show you the door. Telegraphing the debtor your prowess in tying up the family fortune might put the debtor into hyper drive in turning everything into cash and wiring it to Luxembourg or the newly opened bank account in the name of the recently minted out-of-state limited liability company.

To get a writ without any notice will take an enormous showing that notice is the detonator on the debtor blow-out. Tough burden, but not impossible. Prove why notice will touch off that capital flight that you fear. If you have got to give notice, insure that you include every remedy you want, and get notice to the debtor by fax, Fed Ex, e-mail, and Pony Express, and proof of delivery to the satisfaction of the judge. (You'll need to demonstrate proof of delivery of the notice.)

STOP #5: When's the last time you uttered the word "flawless?" The engagement ring? The porterhouse steak at Peter Luger's? The Navy Seals knocking off the three pirates? If you want a writ of attachment, your paperwork must be flawless. You will need the following: The verified complaint in simplest form; the debt collection declaration written with great clarity that would mow down Perry Mason; the declaration showing exigency with pictures attached; the notice declaration with proof of notice; the application; a short abbreviated memorandum of points and authorities, the order, the bond and writ of attachment.

1. Another remedy which might be more suitable to reach a fraudulent conveyance.

2. Not quite.

3. The United States Marshal for the Central District of California requires a typed USM-285. If you don't have a typewriter, much less a memory typewriter, you might want to subcontract out this task to firm of "Smith & Corona, LLP." Jacob Marley, partner in charge. Contact C. Dickens, the office manager.

4. The USM 285 is a four-part NCR carbon form which must be typed with a typewriter. An order appointing a process server is founder FRCP 4.1(a).

The memo is key in laying out the facts in the first two paragraphs. Hopefully the judge will grant your relief, and your next stop is the sheriff or marshal.

STOP #6: What do you get at the attachment hearing? The shoot-out at the OK Corral. You expect: (A) A tentative ruling judge: Your judge has read it. Absent courthouse termites eating your papers, that tentative ruling is going to be your final ruling. One law and motion judge has the following admonition; you don't want your situation to play out like this:

Judge: "I read your papers. If there is anything you have to say, first tell me why you didn't put it in your papers. Don't repeat anything that you included in your submissions."

Counsel: "I would like to address a few issues."

Judge: "Why? Didn't you address those issues in your papers?"

Counsel: "No."

Judge: "Why are you telling me now? If you did not include those issues, they were not that important in the first place. I envision here officer Due Process pulling me over for violating the Constitutional speed limits when I consider claims which your adversary lacked adequate notice and an opportunity to respond."

Most attachment applications splatter because you did not show exigency. If you did not make your claim of exigency clear enough, have Wheaties for breakfast because you will have a long and ugly morning.

(B) Spring the whole package on the judge. Some courts (Santa Clara) treat ex parte hearings like a surprise party, sans cake. "Surprise, Surprise, Judge, I'd like to attach Kern County." [Judge's response: "Yeah, right. Sure. Let's dial this down. Counsel, you got some authority for this before I attach my name to something which runs this person off his 4th Amendment rails."]

Remember that point about being flawless and organized? Be clear, be concise and be alert — judges abhor seeing their name on a writ gone bad. Remember Dirty Harry's "Make my day?" Think of your judge's motto: "Give me a good and appeal proof reason why." or (C) The trial. No typos here.

Absent big metropolitan courts, you can expect that the judge might want to hear from the witnesses. Bring the client, the witness to the exigency, records and a free morning. Judges eschew ex parte relief, but conversely with adequate proof of the debt, compliance with the statutory requirements, and Technicolor proof of exigency, the judge will give you the keys to the attachment car.

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STOP# 7: Be quick on your feet. Got a favorite lawyer movie — "My Cousin Vinny," "To Kill a Mockingbird," "The Verdict," "Inherit the Wind" or "A Few Good Men"? Mine is "Chicago" — watching Richard Gere softshoe in the last 10 minutes should be part of any MCLE. You might not get the writ, but you can softshoe your way to a temporary protective order, order shortening time on the hearing for the writ, informal restraining order, order impounding funds, or special setting.

Don't walk way with hat in hand. Bring a new set of papers to file seeking an attachment hearing on a regular notice and time. Do something and maintain the initiative at all times, even in the fact of a tactical defeat. File something of value.

STOP # 8: Congratulations, you have an order in hand. Now what? File the bond, issue and issue the writ. Craft an execution plan. Levy on the known bank accounts, file the AT-1 with the secretary of state, levy on the real property (the attachment equivalent of a financing statement) levy on the known accounts receivable, levy on the adverse attorney's probable retainer and install a keeper in the place of business. Serve everyone with an attachment ORAP,[5] and toss in a couple SDT's [6] to compel turnover of records at the ORAP hearing to insure that you collected. Draft sheriff's instructions, hire an experienced process server, and confirm what you've done by getting a litigation guaranty for a real property levy, UCC search for the filing of the AT-1[7] and contacting the garnishees to insure service.[8] Submit to the sheriff or marshal the instructions, notices, writ, order, bond, memorandum of garnishee, description of real property, checks. If a U.S. Marshal include the USM-285, certified copy of the order, and probably the copy of the complaint. You, the lawyer, should show up with the process server to facilitate the opening of the enforcement file. (Shakespeare hits this mark: "King Richard: A horse, a horse! My kingdom for a horse! Catesby: Withdraw, my lord; I'll help you to a horse. King Richard: Slave! I have set my life upon a cast, and I will stand the hazard of the die. "Richard III," act 5, scene 4.)

STOP # 9: Are we there yet? Almost. Bankruptcy will ruin your day if filed within 90 days of your triumph. Attachment liens are good for three years, so stock up on the fancy calendar books.

STOP #10: The counter attack. An ex parte writ gets you the property, but the debtor can counterattack with a motion to vacate the writ and challenge the validity of the claim. Not so much. Like Stop #6, be prepared and don't assume victory because you prevailed ex parte. You have to prove your case in chief, which harks back to the admonition that the client must have a winnable case. In fact, assume the worst. Did you like Yoda?[9] He had a great line: "Be afraid."

So should you. The debtor mounts a serious attack on your ex parte writ, and wins because the debtor beats you on probable validity of the claim. That's bad, because the debtor has a claim on the attachment bond or the plaintiff for costs, damages and worse, big ugly fees, which can even exceed the bond. The client has a claim against you for losing the motion to quash or failing to advise that a quashed attachment hands the defendant the plaintiff's treasury.

Here is the punch line you must deliver to the client in that original meeting: "You are betting the ranch on this ex parte writ. I am telling you, in writing, and you must sign here, here and initial there so I can prove later, if I have to, that I warned you that nobody emerges alive from a botched attachment. Consider the attachment gone bad your never-ending nuclear winter."

In Hollywood, aggrieved actors whine about the "T"s: Too tall, too short, too ethnic, too thin, too old and too young. In attachments, you have the "B"s: Be cautious, be prepared, be resourceful and be clear with the client — and, when you get an ex parte writ of attachment, be sure to win. Otherwise, you will be gone.

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5. Order compelling debtor to disclose assets.

6. California Code of Civil Procedure Section 491.110 authorizes the creditor to compel the appearance and testimony of a third person owing money or holding property due the attachment defendant. At this hearing, Section 491.120 authorizes the creditor to subpoena (hence: subpoena **duces** tecum) witnesses to appear and produce documents that might reveal the attachment defendant's assets and identify any person holding, or owing, the assets. The third-party OEX creates "tent pole" jurisdiction permitting broad based pre-judgment asset discovery.

7. California Code of Civil Procedure Sections 488.375 [equipment] and 488.395 (inventory) authorize the attachment plaintiff to file a lien notice with the secretary of state, which closely replicates a filed UCC financing statement under Division 9 of the Commercial Code.

8. Lien with Secretary of State

9. Yoda is Miss Piggy. Frank Oz is the voice of both.