

Provisional Remedies

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Litigation Section
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What We'll Cover

Injunctive Relief

Writs of Attachment, TPOs

Writs of Possession

Receivers

“Freeze-and-Seize”

1. Injunctive Relief

The remedy:

A writ or order requiring a person to refrain from a particular act.

Exemplary settings:

- Where P appears entitled to relief demanded—restraining commission of act
- Where commission of some act during litigation will be wasteful or irrep. harm party
- Where party to litigation is, or will, act violating another party's rights and rendering ineffectual the judgment
- Monetary relief is ineffectual or amount would be difficult to ascertain

Authority:

CAL. CODE CIV. P. § 525-534

FED. R. CIV. P. 65 (“Injunctions and Restraining Orders”)

1. Injunctive Relief

Procedure:

- Prelim. Injunction may be granted anytime before judgment on verified complaint or affidavits showing sufficient grounds. [§ 527(a)]
- Prelim. Injunction always requires notice to other party. [§ 527(a)]
- Temporary Restraining Order (TRO) requires notice to other party, except
 - Where facts shown in affidavit or verified complaint show great or irreparable injury will result to applicant before noticed hearing could be held
 - Applicant, or attorney, certifies under oath that
 - (1) at reasonable time before application, opposing party or counsel were informed of time and location of TRO application,
 - (2) Applicant tried in good faith to so inform, specifying efforts made, or
 - (3) For specific reasons, no notice should be required [§ 527(c)]

1. Injunctive Relief

Mandatory Injunctions:

Injunction requiring an affirmative act that changes the status quo

“A preliminary mandatory injunction is rarely granted, and is subject to stricter review on appeal.” *People ex rel. Herrera v. Stender*, 212 Cal. App. 4th 614 (2012)

Ezer v. Fuchsloch, 99 Cal. App. 3d 849 (1979) (upholding mandatory injunction requiring homeowners to cut down, to roof level, all trees and shrubs on property, pursuant to restrictive covenant)

2. Writs of Attachment, TPOs

Writs of Attachment

The remedy:

Permits unsecured/undersecured plaintiff creditor to become secured and get prejudgment lien on defendant's assets pending trial

P may levy on D's assets until Sheriff holds property in amount equal to P's claims

The settings:

Contract-based suits for money where aggregated claims total at least \$500

If P's claim secured by real property, attachment only if land is valueless or value below security amount, through no action by P

If D is natural person, attachment only if claim is from D's trade, business, profession

The authority:

CAL. CODE CIV. P. § 481.010-493.010

CAL. CODE CIV. P. § 493.030-493.050

CAL. CODE CIV. P. §1281.8(b) (court may issue writ of attachment for arbitrating party)

2. Writs of Attachment, TPOs

Writs of Attachment

Step-by-step procedure:

- a. Lawsuit on file, or arbitration proceedings underway
- b. Procure Right to Attach Order (RTAO)
 1. File Notice of Application and Hearing for Right to Attach Order and Writ of Attachment
 2. File Application for Right to Attach Order and Writ of Attachment
 3. File Declaration in Support of Application for Writ of Attachment, stating specific facts supporting P's claims
 4. File supporting Memo of Points and Authorities
 5. Provide notice of hearing

2. Writs of Attachment, TPOs

Writs of Attachment

Step-by-step procedure:

6. At hearing, Court may receive and consider testimony and additional documentary evidence
7. RTAO must issue if Court finds:
 - a) Claim is one for which attachment is authorized
 - b) Plaintiff has shown probable validity of claim
 - c) Plaintiff seeks attachment only to recover on subsequent judgment, not for any improper purpose
 - d) Attachment will secure an amount greater than \$0
 - e) Property to be attached is not exempt [see §§487.010-030]
- c. Ex parte writ of attachment further requires proof that a noticed hearing would expose P to “great or irreparable injury.” CAL. CODE CIV. P. §§ 485.010-.610

2. Writs of Attachment, TPOs

Writs of Attachment

Wrongful attachment:

CAL. CODE CIV. P. § 490.010-060

P levies on attached property, but doesn't recover judgment

P unreasonably levies on exempt property

P levies, violating § 483.010 (no levy on goods, funds used for D's personal, family, household use), and can't show reasonable belief that goods, funds were not primarily for such use

P's liability: all D's proximately caused damages, and costs, expenses and reasonable attorney's fees

2. Writs of Attachment, TPOs Temporary Protective Orders

The remedy:

An ex parte order commanding Defendant not to transfer, conceal, or alter property before the hearing on P's writ application

The setting:

Plaintiff may apply for TPO at the same time as applying for RTAO and writ of attachment.

The authority:

CAL. CODE CIV. P. § 486.010-486.110

2. Writs of Attachment, TPOs Temporary Protective Orders

Step-by-step procedure:

- a. File application for TPO at same time as writ application
- b. State the requested relief, supported by affidavit showing great or irreparable injury if TPO did not issue. [§ 486.010]
- c. Court must issue TPO, stating the amount to be secured by attachment, if:
 1. P's claim is one for which attachment may issue
 2. P has shown probable validity of claim
 3. P is not seeking TPO for purpose other than recovery on the claim for which attachment application is made
 4. P will suffer great or irreparable injury if TPO does not issue
 5. P files undertaking (at least \$10,000) to compensate for wrongful attachment

2. Writs of Attachment, TPOs Temporary Protective Orders

Step-by-step procedure:

6. TPO must be personally served on D along with summons, complaint, notice of hearing and application for writ and supporting declaration
7. Service of TPO on D create lien on attachable property (and proceeds) described in TPO and owned by D at time of service .
8. Lien is perfected by levying against property, under the writ of attachment
9. TPO expires on the earliest of:
 - a. 40 days after issuance, or
 - b. An earlier date set forth in the TPO, or
 - c. As to specific property described in the TPO, when P levies on the property

2. Writs of Attachment, TPOs

Waffer Int'l, 69 Cal. App. 4th 1261 (1999) (discusses history of attachment law)

Merlet v. Rizzo, 64 Cal. App. 4th 53 (1998) (collecting cases allowing malicious prosecution claims premised on wrongful attachment)

Pacific Decision Sciences Corp., 121 Cal. App. 4th 1100 (2004) (turnover orders and writs of attachment; trial court lacked jx for turnover order for property outside Cal.)

Red Head, Inc. v. Fresno Rock Taco, LLC, 2009 WL 37829 (N.D. Cal.) (declining to issue writ because levy on D's property could strangle D's business; both parties had interest in D succeeding as ongoing concern)

Whitehorse v. Six Corp., 40 Cal. App. 4th 527 (1995) (attaching creditor, who resists third-party claim to ownership of attached property, must prove fraudulence of transfer to third party by preponderance of evidence)

Full Throttle Films, 180 Cal. App. 4th 1438 (2009) (evaluating, and rejecting, third-party claimant's efforts to secure release of property levied on per attachment writ)

2. Writs of Attachment, TPOs

Other views:

“Fortune Favors the First to Court: How to Obtain Writs of Attachment and Possession,” Mark L. Share and Yona Conzevoy, VALLEY LAWYER 17-21 (December 2009)

“Enforcement Before Adjudication: The Writ of Attachment,” Stephan E. Mihalovits, VALLEY LAWYER 22-29 (June 2013)

Courts have said:

- Open to granting Temporary Protective Order along with right to attach
- Code treats Writs of Attachment and TPOs as alternatives, but Code also permits courts to use injunctive and other equitable relief as needed to protect orders
- When applying for writ, declarations from company presidents are less helpful than those from front-line employees dealing directly with the other side
- Go beyond merely attaching business docs as exhibits; help the court read them with, e.g., declaration identifying each document and explaining its contents

2. Writs of Attachment, TPOs

Courts have said:

- Assertions in declarations must be supported by attaching the operative documents
- Only the operative documents; counsel should judiciously select them from among all correspondence that passed between the parties
- Declarations should include sufficient background to orient the court as to the parties, their business, the type of transaction(s) the parties engaged in
- Surprisingly often, parties omit supporting documentation from their filings, attend the hearing and promise to get the docs to the court afterwards; courts want them attached to the briefing
- Ex parte writs are seen as unusual. More likely where serious indications of fraud exist, or property is in extreme jeopardy

3. Writs of Possession

The remedy:

Writ transferring possession of personal property to Plaintiff pending trial

Settings:

P seeks to obtain specific property where D has:

- defaulted on a loan or other obligation owed to P and secured by personalty,
- breached lease of P's property,
- embezzled or wrongfully obtained possession of P's property,
- refused to return property loaned or bailed to D by P

The authority:

CAL. CODE CIV. P. §§ 512.010-.120 (“Writ of Possession”)

3. Writs of Possession

Step-by-step procedure:

- a. File application for writ of possession at same time as complaint
- b. Execute the application under oath, and show:
 1. Basis of claim and that P is entitled to possession of claimed property
 2. D is wrongfully detaining property, how D came to possess property, and why D's detaining it
 3. Particular description of property and statement of its value
 4. Statement of property's location, and if within a private place, showing of probable cause that the property is located there
 5. Statement that property has not been taken for tax, assessment or fine, or seized under execution against P's property (or if so, that it's exempt)

3. Writs of Possession

Step-by-step procedure:

- c. Serve on defendant a copy of the summons and complaint, Notice of Application and Hearing, copy of application and any supporting affidavits
- d. At hearing, Court may receive and consider testimony and additional documentary evidence
- e. Court must issue writ of possession if it finds:
 - 1. P has shown probable validity of its claim to possession of property
 - 2. P files undertaking to compensate Defendant
 - 1. Undertaking will be at least twice D's interest in the property (determined by market value less amount due to P), unless court finds D has no interest in the property. [§ 515.010]

3. Writs of Possession

Step-by-step procedure:

- f. Turnover order may issue. [§ 512.070]
- g. Requirements of the writ of possession are specified [§ 512.080]
- h. If P fails to recover judgment:
 - 1. Redeliver property to D
 - 2. Be liable for D's proximately-caused damages [§ 512.120]

3. Writs of Possession

4Wall Las Vegas, Inc. v. Triebwasser, 2013 WL 930620 (E.D. Cal. 2013) (good example of thorough analysis of decision whether to issue writ of possession)

Other views:

“Fortune Favors the First to Court: How to Obtain Writs of Attachment and Possession,” Mark L. Share and Yona Conzevoy, VALLEY LAWYER 17-21 (December 2009)

4. Receivers

The remedy:

The “Hand of the Court”

Performing various and sundry tasks as the Court may authorize

E.g., possessing, preserving, managing property, collecting rents, making transfers

Exemplary Settings:

Preserving disputed, endangered common fund or property ... Enforcing judgments

Winding up dissolved corporations ... Unlawful detainer ... Rents, issues, profits

Facilitating restitution in criminal “freeze and seize” actions ... Substandard housing cases

Operating long-term health care facilities ... Enforcing spousal or child support orders

Preserving property pending appeal ... SEC, FTC cases ... Insolvent, endangered corporation

Entry on land to detect hazardous substances ... preserving real property during foreclosure

4. Receivers

Exemplary Authority:

CAL. CODE CIV. P. §564-570 (“Receivers”)

CAL. CODE CIV. P. §708.510 (receiver for judgment debtor’s rights to future payments)

CAL. CODE CIV. P. §708.620 (receiver to aid in enforcement of judgment)

CAL. CODE CIV. P. §904.1(a)(7) (court order appointing receiver is appealable)

CAL. CODE CIV. P. §1281.8 (court may appoint receiver to aid party in arbitration)

CAL. FAMILY CODE §290

CAL. HEALTH AND SAFETY CODE §§ 1325-34; §17980.1 *et seq.*

CAL. PENAL CODE §186.11

FED. R. CIV. P. 66 (“Receivers”)

4. Receivers

Marsch v. Williams, 23 Cal. App. 4th 238, 245 (1994) (arbitrator cannot appoint receiver)

Stark, 131 Cal. App. 4th 184 (2005) and Semaan, 42 Cal. 4th 79 (2007) (Freeze/Seize context)

Canada Life Assur. Co. v. LaPeter, 563 F.3d 837 (9th Cir. 2009):

- Appointment of receiver is “extraordinary equitable remedy” to be applied with caution
- Federal law governs appointment of receiver in diversity cases
- District court has broad discretion, may consider many factors, no one factor dispositive
- Typical factors: (1) validity of claim of party asking for receiver, (2) D’s fraudulent conduct, (3) danger to property, (4) adequacy of legal remedies, (5) harm to P in denying motion vs harm to party opposing motion, (6) likelihood of P’s success and irreparable harm to P’s interest in property, and (7) whether receivership serves P’s interests

Concorde Equity II, LLC, 2010 WL 2354189 (N.D. Cal.) (denying motion for receiver where P sought legal remedies from Ds who were in good financial standing)

SEC v. ABS Manager, LLC, 2013 WL 1164413 (S.D. Cal.) (enumerating factors for appointment of receiver in securities fraud cases, denying motion for receiver on facts of case)

4. Receivers

Other views:

“Wise Receivers,” Peter A. Davidson, 31 LOS ANGELES LAWYER 24-29 (March 2008)

Courts have said:

- A receiver is a part of the court, responsible to the court, an independent agent to preserve property for all sides, not merely for bank or creditor
- Party seeking appointment of receiver must *persuade* court to grant remedy
- Receivership is an equitable remedy; courts always have discretion whether to appoint
- Memo. of points and authorities is an absolute necessity, but surprisingly often is not filed
- Contract provision for appointment of receiver (often without notice) are not dispositive
- They closely scrutinize the papers showing affected parties were served with notice

5. Freeze-and-Seize

The remedy:

Preservation/freezing of white-collar criminal D's assets for future restitution

Post-charging, pre-trial

The setting: Defendant charged with:

- more than 2 felonies involving fraud/embezzlement
- pattern of related felony conduct
- theft of more than \$100,000
- aggravated white collar crime enhancement

The authority: Cal. Penal Code §186.11

5. Freeze-and-Seize

Step-by-step procedure:

- a. D charged w/ triggering felonies & agg. white collar crime enhancement
- b. Prosecutor petitions for relief needed to preserve property/assets [§e2]
- c. Petition begins a pendent criminal proceeding
- d. Notice to “every person who may have an interest in” the frozen property [§e3]
- e. Notice also published for at least 3 weeks in gen’l circ. paper in county of affected property [§e3]
- f. Ex parte TRO may issue if needed [§g1]
- g. On prosecutor’s motion, and after hearing held to decide need for order pendente lite [§g1], Court may issue:
 - a. Injunction against transferring, encumbering, disposing of property
 - b. Order appointing receiver [§f]

5. Freeze-and-Seize

Step-by-step procedure:

- h. Injunction shall issue if (1) prosecutor likely to prevail on merits and (2) risk of dissipation outweighs harm to defendant and those with interest in property [§g3]
- i. Court may order interlocutory sale of property, on noticed motion, if property likely to perish, waste, be significantly reduced in value, or where maintenance cost is disproportionate to value [§g7]
- j. Persons claiming interest in property may file verified claim [§e6]
- k. Timely verified claim gives right to show cause hearing, within 10 days of serving prosecutor with hearing request, to determine whether Court's order should be revised [§g2]

5. Freeze-and-Seize

Effectuates victims' right to restitution under Cal. Const. art. I, §28, subd. (b)

Property frozen needs no nexus to underlying criminal activity

Unlike, e.g., drug forfeiture laws

Obligation to pay restitution is general oblig., not limited to value of assets/property connected w/ crime (*Seeman* (Cal. 2007))

“Any asset or property in the control” of D may be frozen, pretrial—even assets/property outside court's jx

“Assets or property become subject to the court's jurisdiction on a showing that the defendant controls them.” (*Seeman*)

Gov't's procedural responsibilities (e.g., notice, app't receiver, record *lis pendens*) unusual for criminal cases

Affected parties benefit from scrutinizing gov't compliance with procedure

5. Freeze-and-Seize

People v. Green, 125 Cal. App. 4th 360 (2004) (insufficient to merely assert restitution right to property seized under search warrant; §186.11 held N/A) (“No petition, no PI; no PI, no levy.”)

Stark, 131 Cal. App. 4th 184 (2005) (good example of receivership in §186.11 context)

Semaan, 42 Cal. 4th 79 (2007) (claimant, not People, has burden to show ownership interest)

Q-Soft, Inc. v. Super. Court, 157 Cal. App. 4th 441 (2007) (restitutionary right trumps innocent spouse exception, on these facts; innocent spouse can't profit from fraud)

Mozes, 192 Cal. App. 4th 1124 (2011) (restitutionary right trumps child support order)

Other views:

“Wise Receivers,” Peter A. Davidson, 31 LOS ANGELES LAWYER 24-29 (March 2008) (short discussion of use of receivers in freeze-and-seize proceedings)

“Just Taking,” Kelly C. Quinn, 34 LOS ANGELES LAWYER 19-23 (July-Aug. 2011) (highlights frequency of due process violations under §186.11)