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CHAPTER VI - Provisional Remedies

Witkin Summary of California Law

I. INTRODUCTION

A. Nature of Provisional Remedies.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 1

[§ 1] In General.

(1) *Purpose of Remedies.* The remedies described in Titles 6.5 and 7 of Part 2 of the Code of Civil Procedure, entitled "Attachment" and "Other Provisional Remedies in Civil Actions," respectively, are designed to enable the plaintiff in a civil action to protect against dissipation of property by the defendant during the pendency of the action, with consequent loss of the benefits of a judgment.

(2) *Available Remedies.* Part 2 of the Code of Civil Procedure covers the following provisional remedies:

(a) *Attachment.* (*C.C.P.* 481.010 et seq.; *infra*, §46 et seq.)

(b) *Claim and Delivery.* (*C.C.P.* 511.010 et seq.; *infra*, §245 et seq.)

(c) *Injunction.* (*C.C.P.* 525 et seq.; *infra*, §274 et seq.)

(d) *Receivers.* (*C.C.P.* 564 et seq.; *infra*, §419 et seq.)

(e) *Deposit in Court.* (*C.C.P.* 572 et seq.; *infra*, §461 et seq.)

The provisional remedy of arrest and bail was abolished in California in 1973. (See *infra*, §5.)

(3) *Limitations on Remedies.* A provisional remedy is a temporary one. It is neither an action nor a special proceeding (see 3 *Cal. Proc.* (5th), *Actions*, §§62, 64), but an ancillary or collateral proceeding available only in connection with a main action. (See *In re Marriage of Fithian* (1977) 74 C.A.3d 397, 401, 141 C.R. 506, citing the text [provisional remedies are designed to preserve assets pending resolution of litigation].) (On purpose of pretrial writs and their abuse, see 9 *San Diego L. Rev.* 312; 30 *U.C.L.A. L. Rev.* 1218 [attachment]; for discussion of constitutional challenges and legislative reforms in the area of creditors' summary remedies, see 88 *Harv. L. Rev.* 71; 10 *San Diego L. Rev.* 292; 47 *So. Cal. L. Rev.* 1, 58, 82, 116, 151; 9 *Southwestern U. L. Rev.* 785; 20 *U.C.L.A. L. Rev.* 1015; *infra*, §§50 et seq., 246 et seq.; on proposed judicial reform, see 31 *U.C. Davis L. Rev.* 1091 [urging adoption of injunction to cover gap in prejudgment protection]; on creditors' remedy of wage garnishment, see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §241 et seq.)

(4) *Prerequisites to Obtaining Remedies.* Provisional remedies are usually obtained on an affidavit or declaration (infra, §§2, 3), and a bond or undertaking is an almost invariable condition for granting relief (infra, §9 et seq.).

West's Key Number Digest, Bonds 1, 31; Undertakings 1

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A. Nature of Provisional Remedies.

2. Use of Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 2

[§ 2] Use of Affidavit.

(1) *Nature of Affidavit.* An affidavit is a written declaration under oath, taken before a notary or other officer authorized to administer oaths. (*C.C.P.* 2003, 2012; see 3 *Am.Jur.2d* (2002 ed.), *Affidavits* §1 et seq.; Cal. Civil Practice, 2 Procedure, §§11:4 et seq. [technical requirements], 11:26 [procedural checklist].) (For form of affidavit, see Cal. Civil Practice, 2 Procedure, §11:29; 1B *Am.Jur. P.P. Forms* (2003 ed.) *Affidavits*, §1 et seq.; 1 *Cal. Evidence* (4th), *Hearsay*, §297; on use of declaration in lieu of affidavit, see *infra*, §3.)

(2) *Use To Obtain Remedy.* An affidavit may be used to obtain a provisional remedy (*C.C.P.* 2009), and the provisional remedy statutes usually require an affidavit as evidentiary support for a proceeding to obtain the remedy. (See, e.g., *C.C.P.* 484.030 [issuance of writ of attachment], *infra*, §96; *C.C.P.* 512.050 [issuance of writ of possession], *infra*, §258; *C.C.P.* 527 [grounds for preliminary injunction], *infra*, §§370, 378; see also 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §41 [use of affidavit in support of motion].)

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3. Use of Declaration.

6 *Witkin Cal. Proc. Prov Rem* § 3

[§ 3] Use of Declaration.

(1) *In General.* As an alternative to the burdensome procedure of a sworn statement before an authorized officer (supra, §2), any matter (with specific exceptions) required or permitted to be supported or established by a sworn statement may be supported or established "with like force and effect" by an unsworn statement (declaration) executed under penalty of perjury. The declaration must be in writing, must be signed, and must recite that it is under penalty of perjury. (*C.C.P. 2015.5*; see Cal. Civil Practice, 2 Procedure, §11:10 [technical requirements], §11:27 [procedural checklist].)

(2) *Form of Declaration.* The declaration may be "substantially" in one of the following forms:

(a) If executed in California: "I certify (or declare) under penalty of perjury that the foregoing is true and correct," including date, place, and signature. (*C.C.P. 2015.5(a)*.)

(b) If executed at any place in or outside of California: "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," including date and signature. (*C.C.P. 2015.5(b)*); see *Kulshrestha v. First Union Commercial Corp. (2004) 33 C.4th 601, 612, 15 C.R.3d 793, 93 P.3d 386* [out-of-state declaration signed under penalty of perjury but not certified as true "under the laws of the State of California" was defective and was not admissible into evidence to oppose motion for summary judgment]; for declaration forms, see Cal. Civil Practice, 2 Procedure, §11:30 et seq.)

(3) *Judicial Council Forms.* The Judicial Council has approved two optional forms for declarations under penalty of perjury:

(a) A general form including the language required by *C.C.P. 2015.5*. (See Judicial Council Form No. MC-030 [Declaration].)

(b) A form that may be attached to any form or paper filed with the court. (See Judicial Council Form No. MC-031 [Attached Declaration].)

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4. Fees.

6 Witkin Cal. Proc. Prov Rem § 4

[§ 4] Fees.

The fees charged by officers for services performed in connection with proceedings for provisional remedies are set by statute. (See *Govt.C. 26720* et seq. [sheriff's fees]; *Govt.C. 71266* [marshal's fees are same as sheriff's fees].) Generally, fees must be paid in advance. (*Govt.C. 6100*.)

Illustrative of the services for which charges are made are:

- (1) Serving process or notice. (*Govt.C. 26720.9, 26721*.)
- (2) Executing process on real property. (*Govt.C. 26720.9, 26725*.)
- (3) Keeping and maintaining property under writ. (*Govt.C. 26726*.)
- (4) Making a "not found" return. (*Govt.C. 26738*.)

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A. Nature of Provisional Remedies.

5. Abolition of Civil Arrest.

6 *Witkin Cal. Proc. Prov Rem* § 5

[§ 5] Abolition of Civil Arrest.

(1) *Nature of Remedy.* The provisional remedy of arrest and bail (former C.C.P. 478 et seq.) was intended to insure the presence of the defendant for trial and judgment; i.e., it was an auxiliary remedy designed to keep the defendant within reach of the court's final process. Like other provisional remedies, it was ancillary to an action; i.e., a complaint had to be filed before the remedy could be invoked. (See *In re Mulford* (1946) 73 C.A.2d 453, 456, 166 P.2d 890; *Carradine v. Carradine* (1946) 75 C.A.2d 775, 777, 171 P.2d 911.)

(2) *Invalidation and 1969 Revision.* *In re Harris* (1968) 69 C.2d 486, 490, 72 C.R. 340, 446 P.2d 148, invalidated the former arrest and bail procedure. The case found the arrest and bail procedure defective in that (a) it did not require the defendant to be given notice of his or her right to apply to the court at any time before trial or judgment to vacate the arrest order or reduce bail; and (b) it did not provide an indigent defendant with assistance of counsel.

Following *Harris*, the 1969 Legislature revised the statutes to provide the following safeguards for arrested defendants: (a) notification of rights; (b) service of a copy of the arrest order; (c) right to counsel, including appointed counsel; (d) right to an immediate hearing and to have bail set; (e) discharge following a hearing on the validity of the arrest, formerly allowed only after bail or deposit.

(3) *Repeal of Statutes.* The California Law Revision Commission, after a careful study of the civil arrest statutes in the light of *Harris* and law review articles, concluded that arrest had proved ineffective as a collection remedy and was subject to abuse. It recommended that California follow the trend of other jurisdictions, nearly all of which had abolished the remedy or confined it to extreme cases. The recommendation was followed by the 1973 Legislature, which repealed C.C.P. 478 et seq., C.C.P. 1143 et seq., C.C.P. 1168, and Govt.C. 26681 et seq. (See 11 Cal. Law Rev. Com. Reports, p. 7; 5 *Pacific L. J.* 268.) C.C.P. 501 provides that a person may not be imprisoned in a civil action for debt or tort either before or after judgment. This provision does not affect the power of the court to imprison a person who violates a court order. (C.C.P. 501.)

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B. Bond or Undertaking.

1. Evolution of Law.

a. Former Law.

6 Witkin Cal. Proc. Prov Rem § 6

[§ 6] Former Law.

(1) *Requirement and Exemptions.* In nearly all cases where provisional relief was provided, the plaintiff had to provide a bond or undertaking (or equivalent security) to protect the defendant against loss incurred if the defendant prevailed in the main action. The state, the United States, public entities, and federal and state officers were, however, exempt from bond requirements. (Former C.C.P. 1058.)

(2) *Form and Content.* The statutes authorizing each provisional remedy specified the terms and conditions of the particular undertaking required. Earlier forms followed the detailed specifications, but the more modern practice was to use a simplified statutory form. The particular statute specified the amount of the undertaking or required that the amount be fixed by the judge.

(3) *Motion for New Undertaking.* If, after approval of the undertaking, it was shown to the satisfaction of the court that any surety "is or has become insufficient," the court could, on motion after notice, order a new undertaking with sufficient sureties. (Former C.C.P. 1057.) If the new undertaking was not given within the time required by the order, or if the sureties failed to justify when required, all rights obtained by the filing of the original undertaking immediately ceased. (Former C.C.P. 1057.)

(4) *Deposit in Lieu of Bond.* Whenever an undertaking was required in a civil case the party could, in lieu of furnishing the undertaking, deposit (a) money or (b) federal or state bearer bonds or bearer notes. The deposit was made with the sheriff, constable, marshal, clerk of the court, or the judge, where there was no clerk. (Former C.C.P. 1054a.) A personal check was not sufficient (*Rowe v. Stoddard* (1936) 15 C.A.2d 440, 442, 59 P.2d 423), but the subsequent cashing of the check by the officer made the check, in effect, a valid deposit. (*Stewart v. Justice's Court* (1935) 7 C.A.2d 61, 64, 45 P.2d 424.)

(5) *Beneficiary's Remedy Against Surety.* The beneficiary of a bond or undertaking (other than that of a public officer or fiduciary) had a summary remedy against the surety by motion in the main action, in lieu of an independent action. (Former C.C.P. 1058a.)

(6) *Personal Sureties*. Most statutes called for an undertaking "with two or more sufficient sureties." (See, e.g., former C.C.P. 482, 512, 539.) These sureties could be any persons except the plaintiff (*Alexander v. Superior Court* (1928) 91 C.A. 312, 315, 266 P. 993), an officer of the court, or a member of the State Bar (former C.R.C., Rules 242(b), 530(b)). Each surety was required to accompany the undertaking or bond with an affidavit or declaration stating the surety's qualifications. (Former C.C.P. 1057.)

The defendant could except to the sureties and require them to justify, pursuant to the procedure prescribed by the particular statute requiring the undertaking. (See C.C.P. 529 [injunction], former C.C.P. 513 [claim and delivery], and former C.C.P. 539 [attachment].)

(7) *Corporate Sureties*. The use of personal sureties for large amounts was undesirable, and corporate sureties were more common and practical. A corporate surety, with a certificate of authority from the Insurance Commissioner, was acceptable on any undertaking or bond required by statute. (Former C.C.P. 1056.) A party could except to a corporate surety, but the surety could justify by proof of its certification and the authority of the person who executed the undertaking. (Former C.C.P. 1057a.) And no justification was required unless the party who excepted served and filed either (a) a certificate from the county clerk stating that the surety was not a certificated surety, or (b) an affidavit stating facts establishing insufficiency of the bond or the surety. (Former C.C.P. 1057b.)

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1. Evolution of Law.

b. Law Revision Commission Recommendation.

6 Witkin Cal. Proc. Prov Rem § 7

[§ 7] Law Revision Commission Recommendation.

In its 1981 recommendation relating to Statutory Bonds and Undertakings (16 Cal. Law Rev. Com. Reports, p. 501), the California Law Revision Commission pointed out that the existing codes provided for more than *500 different bonds and undertakings*, each governed by similar but not identical procedural statutes.

"The proliferation of procedural statutes to govern bonds and undertakings is unnecessary. The rules applicable to such matters as the manner of execution of a bond or undertaking, the number and qualifications of sureties, the giving of a new or additional bond or undertaking if the original bond or undertaking becomes insufficient, the limitation on liability of a surety to the amount of the bond or undertaking, and the ability to give a cash or equivalent deposit in lieu of a bond or undertaking, are the same for all bonds and undertakings. Repetition of such procedural rules in every statute that provides for a bond or undertaking is not only wasteful and adds to the complexity and length of the statutes, but also creates the likelihood of inconsistent wording and interpretation where the rules should be the same." (16 Cal. Law Rev. Com. Reports, p. 507.)

The commission recommended that the procedural bond and undertaking provisions be compiled into one uniform statute. The consolidation involved many changes in wording, a few variations from existing procedures, and an occasional minor substantive change. (16 Cal. Law Rev. Com. Reports, p. 508.)

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c. Enactment of Revised Statute.

6 Witkin Cal. Proc. Prov Rem § 8

[§ 8] Enactment of Revised Statute.

(1) *Title and Effective Date.* The 1982 Legislature followed the Law Revision Commission recommendation (*supra*, §7) in enacting *C.C.P. 995.010 et seq.*, effective January 1, 1983. (See *14 Pacific L. J. 466.*) The short title is the Bond and Undertaking Law. (*C.C.P. 995.010.*)

(2) *Repeals and Conforming Amendments.* The 1982 Legislature also followed the Commission's recommendation in repealing and amending existing code provisions to conform them to the new law. (Stats. 1982, Chap. 517; see 16 Cal. Law Rev. Com. Reports, p. 555 et seq., listing all statutes affected and noting the changes made.) Additional conforming changes were made in 1983. (Stats. 1983, Chap. 18.)

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2. Overview of Current Law.

a. Scope of Bond and Undertaking Law.

6 Witkin Cal. Proc. Prov Rem § 9

[§ 9] Scope of Bond and Undertaking Law.

(1) *Statutory Framework.* The Bond and Undertaking Law contains the following articles:

Article 1: Preliminary Provisions and Definitions. (*C.C.P. 995.010* et seq.; see supra, §8, infra, §§11, 12.)

Article 2: General Provisions. (*C.C.P. 995.210* et seq.; see infra, §§11, 13, 15.)

Article 3: Execution and Filing. (*C.C.P. 995.310* et seq.; see infra, §§16, 18, 35.)

Article 4: Approval and Effect. (*C.C.P. 995.410* et seq.; see infra, §§17, 19.)

Article 5: Personal Sureties. (*C.C.P. 995.510* et seq.; see infra, §§20, 21.)

Article 6: Admitted Surety Insurers. (*C.C.P. 995.610* et seq.; infra, §22 et seq.)

Article 7: Deposit in Lieu of Bond. (*C.C.P. 995.710* et seq.; see infra, §§44, 45.)

Article 8: Bonds to the State of California. (*C.C.P. 995.810* et seq.; see infra, §§14, 17, 43.)

Article 9: Objections to Bonds. (*C.C.P. 995.910* et seq.; see infra, §§27, 28.)

Article 10: Insufficient and Excessive Bonds. (*C.C.P. 996.010* et seq.; see infra, §29 et seq.)

Article 11: Release or Substitution of Sureties on Bond Given in Action or Proceeding. (*C.C.P. 996.110* et seq.; see infra, §33.)

Article 12: New, Additional, and Supplemental Bonds. (*C.C.P. 996.210* et seq.; see infra, §32.)

Article 13: Cancellation of Bond or Withdrawal of Sureties. (*C.C.P. 996.310* et seq.; see infra, §34.)

Article 14: Liability of Principal and Sureties. (*C.C.P.* 996.410 et seq.; see *infra*, §35 et seq.)

Article 15: Enforcement Lien. (*C.C.P.* 996.510 et seq.; see *infra*, §43.)

(2) *Effective Date.* The law applies to bonds and undertakings given (a) on or after January 1, 1983, or (b) before January 1, 1983, to the extent that another surety is substituted for the original surety or the principal gives a new, additional, or supplemental bond or undertaking on or after that date. (*C.C.P.* 995.020(b).) Except to the extent provided in *C.C.P.* 995.020, the law governing bonds and undertakings given before January 1, 1983, is that applicable to the bond or undertaking immediately before that date. (*C.C.P.* 995.020(b); see Stats. 1982, Chap. 517, §414.)

(3) *Applicability of Law.* The law applies to bonds and undertakings that are given as security under any California statute, "except to the extent the statute prescribes a different rule or is inconsistent." (*C.C.P.* 995.020(a); see *Milo Equipment Corp. v. Elsinore Valley Mun. Water Dist.* (1988) 205 C.A.3d 1282, 1285, 1287, 253 C.R. 126 [Bond and Undertaking Law is not limited to bonds filed ancillary to court proceedings]; *Markley v. Superior Court* (1992) 5 C.A.4th 738, 745, 7 C.R.2d 328, 3 Cal. Proc. (5th), Actions, §406 [former C.C.P. 409.1 (see now C.C.P. 405.33, 405.34) did not create exception to C.C.P. 995.020(a) to allow filing of deed of trust in lieu of undertaking]; *Walt Rankin & Associates v. Murrieta* (2000) 84 C.A.4th 605, 616, 101 C.R.2d 48 [requirements of Bond and Undertaking Law apply to payment bond required as condition of award of contract by public entity under C.C. 3247 and 3248].) Thus, the law is supplemented by the general provisions governing both common law and statutory bonds and undertakings. (Law Rev. Com. Comment to C.C.P. 995.020.) (See *Moore v. Ohio Cas. Ins. Co.* (1983) 140 C.A.3d 988, 994, 189 C.R. 829 [nothing in Bond and Undertaking Law requires abandonment of contractual common law bond].)

(4) *Bail Excluded.* The law does not apply to bail bonds or undertakings of bail. (*C.C.P.* 995.020(c).)

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b. Purpose of Bond or Undertaking.

6 *Witkin Cal. Proc. Prov Rem § 10*

[§ 10] Purpose of Bond or Undertaking.

The main purpose of the bond or undertaking required by law of a party seeking a provisional remedy is to protect the defendant or another person from financial loss. (*Associates Capital Services Corp. v. Security Pac. Nat. Bank* (1979) 91 C.A.3d 819, 824, 154 C.R. 392.) Thus, in nearly all cases, the plaintiff must provide a bond or undertaking (or equivalent security) to protect the defendant against loss incurred if the defendant prevails in the main action. (See *Rest.3d, Suretyship and Guaranty* §71; *infra*, ***old§§115, 116 [attachment], §254 [claim and delivery], §382 et seq. [preliminary injunction], §§444, 447[receivership]; but see *infra*, §366 [valid temporary restraining order may be issued without undertaking].) (For general discussion of Bond and Undertaking Law, see Cal. Civil Practice, 2A Procedure, §16:200 et seq.)

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c. Definitions of Bond and Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 11

[§ 11] Definitions of Bond and Undertaking.

(1) *In General.* A bond under the Bond and Undertaking Law includes both (a) a "surety, indemnity, fiduciary, or like bond executed by both the principal and sureties" and (b) a "surety, indemnity, fiduciary, or like undertaking executed by the sureties alone." (*C.C.P. 995.140(a)*.) An undertaking means a "surety, indemnity, fiduciary, or like undertaking executed by the sureties alone." (*C.C.P. 995.190*.) Thus, the only difference between a bond and an undertaking is that the bond is executed by the principal as well as the sureties, while the undertaking is executed by the sureties alone. (Law Rev. Com. Comment to *C.C.P. 995.190*.) The signature of the principal gives the beneficiary no additional security. (Law Rev. Com. Comment to *C.C.P. 995.210*.) These definitions govern unless the provision or context otherwise requires. (*C.C.P. 995.110*.)

(2) *Interchangeability of Bond and Undertaking.* The terms "bond" and "undertaking" have been used interchangeably in both statutes and cases. *C.C.P. 995.210* codifies this interchangeability. (See Law Rev. Com. Comment.) Except where the provision or context otherwise requires, if a statute provides for a bond, an undertaking that otherwise satisfies the bond requirements may be given instead, and references in the statute to the bond are deemed to be references to the undertaking. (*C.C.P. 995.210(a)*.) This same interchangeability applies where a statute provides for an undertaking. (*C.C.P. 995.210(b)*.)

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d. Other Definitions.

6 *Witkin Cal. Proc. Prov Rem* § 12

[§ 12] Other Definitions.

In addition to defining "bond" and "undertaking" (see *supra*, §11), the Bond and Undertaking Law defines the following essential terms, which govern unless the provision or context otherwise requires (*C.C.P.* 995.110):

(1) "Principal" and "obligor" mean "the person who gives a bond." (*C.C.P.* 995.170.)

(2) "Beneficiary" and "obligee" mean "the person for whose benefit a bond is given, whether executed to, in favor of, in the name of, or payable to the person as an obligee." (*C.C.P.* 995.130(a), (c).) If the bond is given for the benefit of the state or the people of California, "beneficiary" and "obligee" mean the person required (a) to determine the sufficiency of the sureties, or (b) to approve the bond. (*C.C.P.* 995.130(b), (c).)

(3) *C.C.* 2787 defines a surety as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security" for that purpose. *C.C.P.* 995.185(a) adopts this definition for purposes of the Bond and Undertaking Law, and further provides that the term "surety" includes a personal surety and an admitted surety insurer. For purposes of applying the law to a bond given under any California statute, "bail," "guarantor," "bondsman," and comparable terms have the same meaning as "surety." (*C.C.P.* 995.185(b).) (On incidents of suretyship status, see *Rest.3d, Suretyship and Guaranty* §17 et seq.; on suretyship generally, see *Rest.3d, Suretyship and Guaranty*; 34 *Loyola L.A. L. Rev.* 231 [*Rest.3d, Suretyship and Guaranty*--California commentary].)

(4) "Admitted surety insurer" means "a corporate insurer or a reciprocal or interinsurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance" in California. (*C.C.P.* 995.120(a).) For purposes of applying the law to a bond given under any California statute, "authorized surety company," "bonding company," "corporate surety" and comparable phrases have the same meaning as "admitted surety insurer." (*C.C.P.* 995.120(b).)

(5) If a bond is given in an action or proceeding, "court" means "the court in which the action or proceeding is pending." (*C.C.P.* 995.150.)

(6) "Officer" means "the sheriff, marshal, clerk of court, judge or magistrate (if there is no clerk), board, commission, department, or other public official or entity to whom the bond is given or with whom a copy of the bond is filed or who is required to determine the sufficiency of the sureties or to approve the bond." (*C.C.P. 995.160.*)

(7) "Statute" includes any administrative regulation promulgated pursuant to a statute. (*C.C.P. 995.180.*)

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e. Reduction, Waiver, or Exemption.

6 *Witkin Cal. Proc. Prov Rem* § 13

[§ 13] Reduction, Waiver, or Exemption.

(1) *In General.* The *beneficiary* may consent in writing to a reduction in the amount required by statute, or may waive the bond. (C.C.P. 995.230.) The *court* may waive provision for a bond and make other appropriate orders on determining that the principal is indigent and unable to obtain sufficient sureties. (C.C.P. 995.240; see *Markley v. Superior Court* (1992) 5 C.A.4th 738, 745, 7 C.R.2d 328, 3 Cal. Proc. (5th), Actions, §406 [court could not waive bond under C.C.P. 995.240, or under common law, even though it would be extremely difficult for plaintiff to obtain bond, where plaintiff was not indigent, and bond requirement would not compel him to abandon action]; *Williams v. FreedomCard* (2004) 123 C.A.4th 609, 612, 615, 20 C.R.3d 220 [where officer of employer did not, and employer could not, claim indigency, and neither showed unsuccessful attempt to obtain bond, as required by C.C.P. 995.240 to obtain relief from bond requirement, trial judge properly denied employer's appeal for failure to post undertaking].) C.C.P. 995.240 codifies the common law authority of the courts. (See Law Rev. Com. Comment to C.C.P. 995.240, citing *Conover v. Hall* (1974) 11 C.3d 842, 114 C.R. 642, 523 P.2d 682.) In exercising its discretion, the court must consider all relevant factors, including, but not limited to, (a) the character of the proceeding, (b) the nature of the beneficiary (whether public or private), and (c) the potential harm to the beneficiary if the bond is waived. (C.C.P. 995.240.)

(2) *Governmental Entities.* The United States, the state and its political subdivision, public entities, and federal, state, and local officers are exempt from bond requirements. (C.C.P. 995.220.)

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f. Bonds to State of California.

6 *Witkin Cal. Proc. Prov Rem* § 14

[§ 14] Bonds to State of California.

The law makes special provision for bonds "executed to, in favor of, in the name of, or payable to the State of California or the people of the state, including but not limited to an official bond." (*C.C.P.* 995.810.) Unless otherwise provided by statute, a bond given by an officer of the court for the faithful performance of his or her duties is to the state. (*C.C.P.* 995.820.) And if a statute or court order providing for a bond fails to specify the beneficiary, that bond is also to the state. (*C.C.P.* 995.830.) (On approval of bonds to the state, see *infra*, §17; on enforcement of bonds to the state, see *infra*, §43.)

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g. Practice and Procedure.

6 *Witkin Cal. Proc. Prov Rem* § 15

[§ 15] Practice and Procedure.

(1) *Manner of Service*. Service of any notice, paper, or other document required under the Bond and Undertaking Law must be made "in the same manner as service of process in civil actions generally." (*C.C.P.* 995.030.) (On manner of service generally, see 3 *Cal. Proc. (5th), Actions*, §1000 et seq.)

(2) *Affidavits*. Affidavits made under the Bond and Undertaking Law must conform to the standards prescribed for summary judgment affidavits made under *C.C.P.* 437c (see 6 *Cal. Proc. (5th), Proceedings Without Trial*, §224 et seq.). (*C.C.P.* 995.040.)

(3) *Extensions of Time*. Times provided in the Bond and Undertaking Law or in any other statute relating to bonds may be extended under *C.C.P.* 1054 and 1054.1 (see 4 *Cal. Proc. (5th), Pleading*, §10 et seq.). (*C.C.P.* 995.050.)

(4) *Costs*. If a statute allows costs to a party in an action or proceeding, costs must include the premiums on (a) a statutory litigation bond and (b) a nonlitigation bond procured in connection with the litigation unless the court determines that the bond is unnecessary. (*C.C.P.* 995.250.)

(5) *Evidence of Bond*. A certified copy of the record of a bond recorded pursuant to statute, with all affidavits, acknowledgments, endorsements, and attachments, "may be admitted in evidence in an action or proceeding with the same effect as the original, without further proof." (*C.C.P.* 995.260.)

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a. Content, Form, and Execution.

6 *Witkin Cal. Proc. Prov Rem* § 16

[§ 16] Content, Form, and Execution.

(1) *Content.* A bond must be in writing, signed by the sureties under oath. It must include all of the following:

- (a) A statement that the sureties are jointly and severally liable on the statutory obligations. (*C.C.P.* 995.320(a)(1).)
- (b) The addresses of the principal and the sureties for purpose of service. (*C.C.P.* 995.320(a)(2).)
- (c) If the amount of the bond is based on the value of property or a property interest, a description of the property or interest and an estimate of its value. (*C.C.P.* 995.320(a)(3).)

(2) *Form.* A suggested form of bond is given in *C.C.P.* 995.330. (See *Cal. Civil Practice*, 2A Procedure, §16:215; *C.E.B.*, Civil Lit. Forms §21.5 [Preliminary Injunction and Order for Undertaking], §21.7 [Undertaking by Surety on Preliminary Injunction], §21.8 [Declaration of Personal Surety's Qualifications].)

The Judicial Council has also prescribed forms relating to bonds given in particular actions or proceedings:

- (a) Judicial Council Form Nos. AT-160, CD-140 [Undertaking by Personal Sureties].
- (b) Judicial Council Form No. AT-175 [Order to Set Aside Attachment, to Substitute Undertaking, Etc.].

(3) *Execution by Sureties.* Except where execution by an admitted surety insurer is required by statute, a bond must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers. (*C.C.P.* 995.310.) (On sureties generally, see *infra*, §20 et seq.; on multiple sureties, see *Rest.3d, Suretyship and Guaranty* §52 et seq.)

C.C.P. 995.310 imposes a mandatory duty on public entities to require that a contractor's payment bond, which must be provided as a condition of being awarded a contract by a public entity, be executed by sufficient sureties. *C.C.P.* 995.310 does not per se impose a duty on a public entity. However, because the public entity is the one required to approve the payment bond, it must be the one to require compliance with the statute. (*Walt Rankin & Associates v.*

Murrieta (2000) 84 C.A.4th 605, 621, 101 C.R.2d 48.)

A bond required on a public works contract must be executed by an admitted surety insurer, and the public agency approving the bond must verify that the bond is so executed. The public agency may fulfill this obligation by attaching to the bond one of the following documents confirming that the surety is an admitted surety insurer: (a) information from the Department of Insurance website or (b) a certificate from the county clerk. (*C.C.P.* 995.311.)

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b. Approval.

6 *Witkin Cal. Proc. Prov Rem § 17*

[§ 17] Approval.

(1) *In General.* Unless court approval is otherwise required by statute, a bond becomes effective without court approval. (*C.C.P. 995.410(a).*) If statutory approval of the bond is required, the court or officer may either (a) approve or disapprove the bond based on the sureties' affidavit or certificate, or (b) require the attendance of witnesses and production of evidence and examine the sureties under oath as to their qualifications. (*C.C.P. 995.410(b).*) The bond may be approved in an amount greater than that required by statute. (*C.C.P. 995.410(c).*)

(2) *Bonds to State of California.* The court must approve bonds given *in actions or proceedings* executed or payable to the state, and any party for whose benefit the bond is given may object to it. (*C.C.P. 995.840.*)

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c. Filing and Service.

6 Witkin Cal. Proc. Prov Rem § 18

[§ 18] Filing and Service.

A bond given in an action or proceeding must be filed with the court unless a statute specifies that it be given to another person. (*C.C.P. 995.340(a)*.) If the statute requires that the bond be given to an officer, the officer must file it with the court unless the statute provides otherwise. (*C.C.P. 995.340(b)*.) Bonds filed with the court must be preserved in the court clerk's office. (*C.C.P. 995.340(c)*.)

At the time the bond is given, the principal must serve a copy on the beneficiary, and an *affidavit of service* must be given and filed with the bond. (*C.C.P. 995.370*.)

On filing the bond, the clerk must enter in the register of actions (1) the date and amount, and (2) the sureties' names. (*C.C.P. 995.350(a)*.) If the bond is lost, the clerk's entries are *prima facie* evidence that the bond was given in the manner required. (*C.C.P. 995.350(b)*.)

A bond may be withdrawn from the file and returned to the principal on court order only if (1) the beneficiary so stipulates, or (2) the bond is no longer in force and the time for enforcing liability has expired. (*C.C.P. 995.360*; see *C.R.C.*, Rule 3.1130(c) [bond may be withdrawn and returned on court order if (1) all interested parties so stipulate, or (2) purpose for which it was filed has been abandoned without liability having been incurred].)

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d. Effective Date and Duration.

6 Witkin Cal. Proc. Prov Rem § 19

[§ 19] Effective Date and Duration.

(1) *Effective Date*. Unless otherwise provided by statute, a bond becomes effective when given or, if approval is required, when approved. (*C.C.P.* 995.420(a); on requirement of approval see *supra*, §17.) If a statute provides a different effective date, the bond is effective on that date unless an objection to the bond is made before that date; the bond then becomes effective "when the court makes an order determining the sufficiency of the bond." (*C.C.P.* 995.420(b); on objections to bonds, see *infra*, §§27, 28.) (See *Lewin v. Anselmo* (1997) 56 C.A.4th 694, 700, 65 C.R.2d 682 [under *C.C.P.* 995.420, appeal bond was effective when given; sureties' notation on bond that they understood they could rescind or cancel bond within specified period after that date was surplusage].)

(2) *Term of Bond*. A bond remains in effect until the earliest of the following:

(a) The sureties withdraw or cancel the bond or a new bond is given in place of the original. (*C.C.P.* 995.430(a).)

(b) The purpose for which the bond was given is satisfied or abandoned without liability having been incurred. (*C.C.P.* 995.430(b).)

(c) A judgment of liability on the bond exhausting the amount of the bond is satisfied. (*C.C.P.* 995.430(c).)

(d) The bond's term expires. A bond is continuous unless the statute providing for the bond prescribes a fixed term. (*C.C.P.* 995.430(d).) (On extensions of time, see *supra*, §15.)

A bond provided as a condition of a license or permit must be "continuous in form, remain in full force and effect, and run concurrently with the license or permit period and any and all renewals, or until cancellation or withdrawal of the surety from the bond." (*C.C.P.* 995.440.)

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a. Personal Sureties.

1. Qualification.

6 *Witkin Cal. Proc. Prov Rem* § 20

[§ 20] Qualification.

(1) *In General.* A personal surety is sufficient if the surety is:

(a) A person other than the principal, and not an officer of the court or a member of the State Bar. (*C.C.P.* 995.510(a)(1); see *C.R.C.*, Rule 3.1130(b).)

(b) A resident and either a real property owner or a householder in California. (*C.C.P.* 995.510(a)(2).)

(c) Worth the amount of the bond in real or personal property, or both, located in California, over and above debts and liabilities, exclusive of property exempt from enforcement of a money judgment. (*C.C.P.* 995.510(a)(3).)

(2) *Exception to Worth Requirement.* The worth of a personal surety on a bond that exceeds \$ 10,000 and that is executed by more than two personal sureties may be less than the amount of the bond, so long as the aggregate worth of all the sureties executing the bond is twice the amount of the bond. (*C.C.P.* 995.510(b).) (See *C.E.B.*, Civil Lit. Forms §21.8 [Declaration of Personal Surety's Qualifications].)

In *Buzgheia v. Leasco Sierra Grove* (1994) 30 *C.A.4th* 766, 36 *C.R.2d* 144, the trial judge overruled plaintiff's objection to the sufficiency of the sureties on defendant's undertaking, which was given to stay enforcement of judgment pending appeal. One of the sureties was the wife of a defendant. This defendant had transferred a large amount of his separate property to his wife as her separate property, so that her stated net worth was more than twice the amount of the judgment (over \$ 3 million). The combined net worth of the other two sureties was \$ 155,931. *Held*, order affirmed.

(a) In California a wife may use her separate property to act as surety for her husband's debts. (30 *C.A.4th* 770, citing *McDonald v. Randall* (1903) 139 *C.* 246, 72 *P.* 997.) The transfer to defendant's wife was not fraudulent, and she was not a party to the litigation where the bond was required. Thus, she could act as a surety for her husband. (30 *C.A.4th* 770.)

(b) Generally, a personal surety under a bond must be "sufficient" (*C.C.P. 995.510*), i.e., the personal surety's net worth must be equal to the amount of the bond (*C.C.P. 995.510(a)(3)*). However, the exception to this requirement provided by *C.C.P. 995.510(b)* applied in this case. (*30 C.A.4th 772.*)

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2. Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 21

[§ 21] Affidavit.

(1) *Requirement.* An affidavit of each of the surety's qualifications must accompany a bond executed by personal sureties. (*C.C.P.* 995.520(a).)

(2) *Content.* The affidavit must contain all of the following:

(a) The surety's name, occupation, and residence and business addresses. (*C.C.P.* 995.520(b)(1).)

(b) A statement that the surety is a resident and either a real property owner or a householder in California. (*C.C.P.* 995.520(b)(2).)

(c) A statement that the surety is worth the sum specified in the bond in property located in California, over and above the surety's debts and liabilities, excluding property exempt from enforcement of money judgments. (*C.C.P.* 995.520(b)(3).)

(d) If the amount of the bond exceeds \$ 5,000, the affidavit must also contain the following:

(1) A description of the surety's real and personal property situated in California and the nature of the surety's interest in it that qualifies the surety on the bond. (*C.C.P.* 995.520(c)(1).)

(2) The surety's best estimate of the fair market value of each item of property. (*C.C.P.* 995.520(c)(2).)

(3) A statement of any known charge or lien on the property and its amount. (*C.C.P.* 995.520(c)(3).)

(4) A statement of any other known impediment or cloud on the free right of possession, use, benefit, or enjoyment of the property. (*C.C.P.* 995.520(c)(4).)

If the amount of the bond exceeds \$ 10,000 and the bond is executed by more than two sureties, the affidavit may

state that a surety's worth is less than the amount of the bond, and may stipulate that the surety's liability is limited to the surety's worth as stated in the affidavit, if the sureties' combined worth is twice the amount of the bond. (*C.C.P.* 995.520(d).)

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1. In Lieu of Personal Sureties.

6 *Witkin Cal. Proc. Prov Rem* § 22

[§ 22] In Lieu of Personal Sureties.

If a statute provides for a bond with any number of sureties, one sufficient admitted surety insurer may become, and must be accepted as, sole surety, and this surety is subject to all the rights and liabilities of personal sureties. (*C.C.P.* 995.610.) However, two or more admitted surety insurers may be sureties on the same bond, or on separate bonds for amounts aggregating the required amount of the bond, and each is jointly and severally liable for the amount assumed by it. (*C.C.P.* 995.620.) (For definition of "admitted surety insurer," see *supra*, §12.)

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2. Authentication of Bond.

6 *Witkin Cal. Proc. Prov Rem* § 23

[§ 23] Authentication of Bond.

The court or officer must accept or approve the admitted surety insurer as surety on the bond without further acknowledgment if (1) the bond is executed in the insurer's name under penalty of perjury, or the fact of execution is duly acknowledged before an officer authorized to take and certify acknowledgments, and (2) either of the following conditions, at the insurer's option, is satisfied:

(a) A duly certified copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, attested by the seal of the insurer authorizing the person who executed the bond to do so for the insurer, is filed in the county clerk's office where the certifying court or officer is located. (*C.C.P. 995.630(a)*.)

(b) A copy of a power of attorney is attached to the bond. (*C.C.P. 995.630(b)*); see C.R.C., Rule 3.1130(a) [prerequisites to acceptance of corporate sureties].) (On objection to sufficiency of surety, see *infra*, §25; on objection to bonds, see *infra*, §§27, 28.)

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3. Certificate of Authority.

6 Witkin Cal. Proc. Prov Rem § 24

[§ 24] Certificate of Authority.

On request of any person, the county clerk of any county must issue a certificate stating the following:

(1) Whether an admitted surety insurer's certificate of authority to transact surety insurance has been surrendered, revoked, cancelled, annulled, or suspended and, if so, whether renewed authority has been given. In issuing this certificate, the clerk must rely solely on information furnished by the Insurance Commissioner under *Ins.C. 12070* et seq. (*C.C.P. 995.640(a)*.)

(2) Whether a duly certified copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, attested by the seal of an admitted surety insurer authorizing the person who executed a bond to do so for the insurer, is filed in the clerk's office. (*C.C.P. 995.640(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

C.C.P. 995.640 was amended in 2008 to provide that *on the review of the Internet website of the Department of Insurance*, the county clerk must, on the request of any person, issue a certificate stating the following:

(1) *Authority of surety insurer:* *C.C.P. 995.640(a)* was amended in 2008 to provide that the certificate alternatively must state whether a surety is admitted.



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4. Objection to Sufficiency of Surety.

6 *Witkin Cal. Proc. Prov Rem § 25*

[§ 25] Objection to Sufficiency of Surety.

A person objecting to an admitted surety insurer's sufficiency must attach to the objection, and incorporate in it, one or both of the following:

(1) The county clerk's certificate stating that the Insurance Commissioner has not certified the insurer to the county clerk as an admitted surety insurer or that the insurer's certificate of authority has been surrendered, revoked, cancelled, annulled, or suspended and has not been renewed. (*C.C.P. 995.650(a)*.)

(2) An affidavit stating facts establishing the insurer's insufficiency. (*C.C.P. 995.650(b)*); on determination of surety's sufficiency, see *infra*, §26.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *County clerk's certificate:* *C.C.P. 995.650(a)* was amended in 2008 to provide that a person objecting must attach the county clerk's certificate stating that the insurer is not listed as an admitted surety insurer on the website of the Department of Insurance or that the certificate of authority has been surrendered, etc.



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5. Determination of Sufficiency.

6 Witkin Cal. Proc. Prov Rem § 26

[§ 26] Determination of Sufficiency.

(1) *Submission of Documents.* If an objection is made to an admitted surety insurer's sufficiency or if a bond is required to be approved, the insurer must submit to the court or officer the following documents at the following times:

(a) The original, or a certified copy, of the unrevoked appointment, power of attorney, bylaws, or other instrument authorizing the person who executed the bond to do so, within 10 calendar days of the insurer's receipt of a request to submit the instrument. (*C.C.P. 995.660(a)(1).*)

(b) A certified copy of the insurer's certificate of authority issued by the Insurance Commissioner, within 10 calendar days of the insurer's receipt of a request to submit the copy. (*C.C.P. 995.660(a)(2).*)

(c) A certificate from the clerk of the county in which the court or officer is located that the insurer's certificate of authority has not been surrendered, revoked, cancelled, annulled, or suspended, or, if it has, that renewed authority has been granted, within 10 calendar days of the insurer's receipt of the certificate. (*C.C.P. 995.660(a)(3).*)

(d) Copies of the insurer's most recent annual and quarterly statements filed with the Department of Insurance under *Ins.C. 900* et seq., within 10 calendar days of the insurer's receipt of a request to submit the statements. (*C.C.P. 995.660(a)(4).*)

If the insurer submits the required documents, and if it appears that (a) the bond was duly executed, (b) the insurer is authorized to transact surety insurance in California, and (c) its assets exceed its liabilities in an amount equal to or greater than the amount of the bond, the insurer is sufficient and *must be accepted or approved* as the surety on the bond, subject to *Ins.C. 12090* (setting limit on single undertaking). (*C.C.P. 995.660(b).*)

(2) *Duty of Public Entity.* *C.C.P. 995.660* imposes a mandatory duty on a public entity to investigate the sufficiency of a surety before approving a payment bond under *C.C. 3247* and *3248* (requiring payment bond as condition of being awarded contract by public entity). However, the public entity is not ordinarily required to request all the documents set

forth in *C.C.P.* 995.660 in order to determine the sufficiency of the surety. *C.C.P.* 995.660 requires the insurer to submit the documents listed only on request, with the exception of the county clerk's certificate. The plain implication of these provisions is that the clerk's certificate is sufficient unless the exercise of reasonable diligence requires the submission of further documentation. (*Walt Rankin & Associates v. Murrieta* (2000) 84 C.A.4th 605, 622, 101 C.R.2d 48.)

(3) *Bond Given as Security Under State Statute or Law or Ordinance of Public Agency.* With respect to a bond given as security under (a) a state statute or (b) a law or ordinance of a public agency, no public agency may require an admitted surety insurer to comply with any requirements other than those set forth in *C.C.P.* 995.660 when objection is made to the insurer's sufficiency or when a bond is required to be approved. (*C.C.P.* 995.670(a); for definition of "public agency," see *C.C.P.* 995.670(b).)

(4) *Compliance with Federal Resource Conservation and Recovery Act.* Despite *C.C.P.* 995.660 and 995.670, the California Integrated Waste Management Board, the State Water Resources Control Board, and the Department of Toxic Substances Control may, to comply with Subtitle C or D of the federal Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C., §6901 et seq.), require an admitted surety insurer to be listed in Circular 570 issued by the United States Treasury. (*C.C.P.* 995.675.)

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5. Objection to Bond.

a. Basis for Objection.

6 *Witkin Cal. Proc. Prov Rem* § 27

[§ 27] Basis for Objection.

(1) *Governing Law.* *C.C.P.* 995.910 et seq. govern objections to bonds given *in actions or proceedings.* (*C.C.P.* 995.910.)

(2) *Grounds.* The beneficiary may object if the amount of the bond or the sureties are insufficient, or if for any other reason the bond is insufficient. (*C.C.P.* 995.920; on objection to sufficiency of admitted surety insurer, see *supra*, §25.)

(3) *Objection Based on Market Value.* If the beneficiary objects on the ground that the value of the property, or property interest, on which the bond is based exceeds the value estimated in the bond, the objection must state the beneficiary's estimate of market value. The principal may accept this estimate and file an increased bond, thereby avoiding a hearing on the objection. (*C.C.P.* 995.940.)

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6 Witkin Cal. Proc. Prov Rem § 28

[§ 28] Procedure.

(1) *Manner of Objecting.* An objection must be in writing, and must be made by noticed motion, which must specify the precise grounds for the objection. If the objection is based on the insufficiency of the bond, the noticed motion must state a reason for the insufficiency and an estimate of a sufficient amount. (C.C.P. 995.930(a).) The objection must be made within 10 days after service of a copy of the bond on the beneficiary or within any other time required by the statute that provides for the bond. (C.C.P. 995.930(b).) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except on a showing of (a) good cause for failure to make the objection within the time required by statute or (b) changed circumstances. (C.C.P. 995.930(c).)

(2) *Hearing.* Except as otherwise agreed, the hearing on an objection must be held not less than 2 or more than 5 days after service of the notice of motion. (C.C.P. 995.950(a).) The hearing is conducted as the court deems proper. (C.C.P. 995.950(b).) If the value of property or a property interest is at issue, the court must estimate the value, and may arrange for an independent appraisal. (C.C.P. 995.950(c).) At the hearing, the court must make an order determining the sufficiency or insufficiency of the bond. (C.C.P. 995.960(a).)

(3) *Effect of Determination.* If the court determines that the bond is *insufficient*, it must order that a sufficient bond with sufficient sureties be given within 5 days; and if a sufficient bond is not given within the time required by the court, all rights obtained by giving the bond immediately cease, and the court must, on an ex parte motion, so order. (C.C.P. 995.960(b)(1).) If a bond is in effect, it remains in effect until a sufficient bond is substituted, or the time in which to give the bond expires, whichever occurs first. And if the time in which to give a sufficient bond expires, the original bond remains in force for all liabilities incurred before expiration. (C.C.P. 995.960(b)(2).) If the court determines that the bond is *sufficient*, no further objection may be made except on a showing of changed circumstances. (C.C.P. 995.960(c).)

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a. Insufficient Bond in Action or Proceeding.

6 *Witkin Cal. Proc. Prov Rem* § 29

[§ 29] Insufficient Bond in Action or Proceeding.

C.C.P. 996.010 governs insufficient bonds given in actions or proceedings. The court may determine on a motion supported by an affidavit or on its own motion that a bond is insufficient. The motion is deemed an objection and is heard in the same manner as an objection to the bond (see *supra*, §§27, 28). (*C.C.P.* 996.010(a), (b).) On a determination of insufficiency, the court must order a sufficient new, additional, or supplemental bond to be given within a reasonable time (not less than 5 days). This order is subject to any limitations in the statute providing for the bond. (*C.C.P.* 996.010(c).) If a sufficient bond is not given within the required time, all rights obtained by giving the original bond immediately cease and the court must so order on an *ex parte* motion. (*C.C.P.* 996.010(d).) (See Judicial Council Form No. AT-175 [Order to Set Aside Attachment, to Substitute Undertaking, Etc.])

The purpose of this statute is to guard against a bond or undertaking failing to serve its original purpose. Thus, *Grant v. Superior Court* (1990) 225 C.A.3d 929, 275 C.R. 564, held that the trial judge properly ordered an increase in a bond posted pursuant to *C.C.P.* 917.1 for 1 1/2 times the amount of a judgment (see 9 *Cal. Proc.* (5th), *Appeal*, §§238, 239) to stay enforcement of the judgment. Nearly 2 years had passed since the bond was posted and because of the passage of time and the postjudgment interest, costs on appeal, and attorneys' fees, the former amount could have been inadequate to cover all the money that would be due plaintiffs if they succeeded on appeal.

(a) *C.C.P.* 917.1(b) clearly states that the undertaking may be used to satisfy not only the amount of the judgment and costs accrued below, but also postjudgment interest and costs awarded on appeal. (225 C.A.3d 935.)

(b) Setting the amount of the bond in money judgment cases under *C.C.P.* 917.1 must be distinguished from a review of the sufficiency of the bond under *C.C.P.* 996.010. "Because money judgments present no problems in computation, it is clear the Legislature felt secure in setting the ratio of the undertaking to the judgment in section 917.1. Logically, this ratio should protect litigants in the typical case. So saying does not, however, preclude the court from determining some time later under section 996.010 that the undertaking--which by the statute may be used to satisfy the judgment, postjudgment interest and appellate costs--has become insufficient." (225 C.A.3d 938.)

(c) "At least in the context here, challenging an undertaking given pursuant to section 917.1, a movant must

demonstrate a real, substantial possibility, not just speculation, that the current bond 'is or has from any cause become insufficient because the sureties were insufficient or because the amount of the bond is insufficient.' " (225 C.A.3d 938.)

(d) "The statute provides the limits of the court's assessment. The trial court determines whether a new bond is necessary and what constitutes a 'sufficient' bond. Because the liabilities of the appellant are not certain until the end of the appeal, the court necessarily must have reasonable latitude in making its assessment." (225 C.A.3d 939.)

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b. Insufficient Bond Not in Action or Proceeding.

6 *Witkin Cal. Proc. Prov Rem § 30*

[§ 30] Insufficient Bond Not in Action or Proceeding.

(1) *In General.* *C.C.P. 996.020* governs insufficient bonds given other than in an action or proceeding. The officer may serve an order on the principal, naming a day not less than 3 and not more than 10 days after service, to appear and show cause why the officer should not determine that the bond is insufficient, if it is shown by affidavit of a credible witness or it otherwise comes to the officer's attention that the bond is insufficient. (*C.C.P. 996.020(a).*)

(2) *Requirement of New, Additional, or Supplemental Bond.* If the principal fails to appear or show good cause as required, the officer may order that a new, additional, or supplemental bond be given. (*C.C.P. 996.020(b).*) If a sufficient bond is not given within 10 days thereafter, the officer must make an order vacating the rights obtained by giving the original bond. Any rights lost for failure to give a new, additional, or supplemental bond may not be reinstated until a new, additional, or supplemental bond is given. (*C.C.P. 996.020(c).*)

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c. Excessive Bond.

6 *Witkin Cal. Proc. Prov Rem* § 31

[§ 31] Excessive Bond.

Subject to any statutory limitations, the court or officer may determine that the bond is excessive and order the amount reduced. (*C.C.P. 996.030(a)*.) This determination is made on motion or affidavit of the principal in the same manner as when a bond is claimed to be insufficient (see *supra*, §29). The beneficiary must be served with the notice of motion or order to show cause made pursuant to affidavit. (*C.C.P. 996.030(b)*.) The principal may give a new bond for the reduced amount, and the sureties may be the same as on the original bond. (*C.C.P. 996.030(c)*.)

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d. New, Additional, or Supplemental Bond.

6 *Witkin Cal. Proc. Prov Rem* § 32

[§ 32] New, Additional, or Supplemental Bond.

(1) *When Given.* The principal must give a new, additional, or supplemental bond on the order of the court or officer, and may give such a bond if a surety withdraws from or cancels the original bond. The principal may also give the bond to obtain the sureties' release from liability on the original bond. (*C.C.P. 996.210.*)

(2) *Contents.* Except for the amount, a new, additional, or supplemental bond must be in the same form, have the same obligation, and be in all other respects the same as the original bond. (*C.C.P. 996.220(a).*) In addition, a supplemental bond must recite the names of the remaining original sureties, the name of the new surety, and the amount of the new surety's liability. The supplemental bond must be for the amount for which the original surety was liable. (*C.C.P. 996.220(b).*)

(3) *Provisions Applicable.* A new, additional, or supplemental bond is subject to the provisions applicable to the original bond. (*C.C.P. 996.230.*)

(4) *Effect.* If a new bond is given, the original bond remains in effect and the original sureties are liable for those acts and omissions occurring or existing before the new bond took effect. (*C.C.P. 996.240.*)

An additional or supplemental bond does not affect the original bond. (*C.C.P. 996.250(a).*) Hence, after the bond is given, the beneficiary may enforce liability on either bond, or may separately enforce the liability on both bonds and recover separate judgments on both. (*C.C.P. 996.250(b).*) However, double recovery is not allowed. (*C.C.P. 996.250(c).*)

Sureties on one bond who have been forced to pay any sum on account of the principal are entitled to recover from sureties on the other bond a distributive part of the sum paid, in the proportion the amounts of the bonds bear to each other and to the sum paid. (*C.C.P. 996.250(d).*)

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e. Release or Substitution of Surety.

6 Witkin Cal. Proc. Prov Rem § 33

[§ 33] Release or Substitution of Surety.

(1) *Application*. The surety on a bond given in an action or proceeding may apply to the court for an order of release from liability at any time. (*C.C.P. 996.110(a)*.) The principal may then apply for an order that another surety be substituted. (*C.C.P. 996.110(b)*.) The applicant must serve a copy of the application and a notice of hearing on the beneficiary and the principal or surety not less than 15 days before the date set for the hearing. (*C.C.P. 996.110(c)*.)

(2) *Hearing and Order*. On hearing the application, the court must determine whether the beneficiary would be injured by substitution or release of the surety. If release would not reduce the amount of the bond or the number of sureties below the required minimum, substitution of a sufficient surety is not necessary and the court must order the surety's release. If no injury would result from the surety's substitution, the court must order the substitution of a sufficient surety within a reasonable time. (*C.C.P. 996.120*.)

Under *C.C.P. 996.110*, a bond can be rescinded only by a court order following a properly noticed hearing. (See *Lewin v. Anselmo* (1997) 56 C.A.4th 694, 700, 65 C.R.2d 682 [notation on appeal bond that sureties understood they could rescind bond within 15 days could not be construed as condition subsequent allowing their unilateral rescission of bond within that time].)

In *Snyder v. United States Fidelity & Guaranty Co.* (1997) 60 C.A.4th 561, 70 C.R.2d 498, plaintiff's father, who, with plaintiff's mother, had been a guardian of plaintiff's account, stole funds from the account after plaintiff had reached age 18 and signed a release of the guardianship surety bond. Plaintiff sued defendant surety company on the bond, arguing that, despite his release, the bond was still in effect because no court order releasing defendant from liability had been obtained as required by *C.C.P. 996.110*. *Held*, summary judgment for defendant reversed.

(a) The statutory provisions governing statutory bonds are mandatory. They are intended to protect not only the beneficiary's rights, but also the integrity of the bonding procedures. One of the parties to these procedures is the court, which must approve the bond and the surety at the outset. And under *C.C.P. 996.110*, the surety may not be released from liability on the bond except by a court order following a properly noticed hearing. (60 C.A.4th 569, citing *Lewin v. Anselmo*.)

(b) Because the efficacy and integrity of the probate court is implicated in the entire guardianship proceeding, "the bilateral or multilateral actions of the parties involved, no matter how 'voluntary' they may be, cannot divest the probate court of its right, indeed its duty, to formally sanction any release of a surety." (60 C.A.4th 569.)

(c) The conclusion that a surety on a statutory bond can be released only by court order is supported by a number of statutes:

(1) The statement in *C.C.P. 996.110* that the surety on a bond "may" apply for a court order releasing the surety from liability does not mean that this procedure is optional. It means that although the surety need not seek its own release, if it elects to do so, a noticed motion is required. (60 C.A.4th 570.)

(2) In *C.C.P. 996.150* (infra, this section), dealing with the effect of the release of a surety on a statutory bond, the phrase "[i]f a surety is ordered released from liability on a bond" clearly implies that a surety is not released without a court order. (60 C.A.4th 570.)

(3) Under *C.C.P. 995.360* (supra, §18), a statutory bond may be withdrawn from the court file and returned to the principal (a procedure tantamount to release of a surety) only on court order, even though the beneficiary has stipulated to the withdrawal and return of the bond. (60 C.A.4th 570.)

(4) Under *Prob. C. 2335* (14 Summary (10th), *Wills and Probate*, §986), the court cannot order a substitution and release of a surety on the guardian's petition unless an account is filed and approved. This requirement allows the court to determine whether the beneficiary has been or may be injured by release of the surety. (60 C.A.4th 571.)

(3) *Substitution and Release*. On substitution of a sufficient surety, the court must order the original surety released from liability. (*C.C.P. 996.130(b)*.) The released surety remains liable, however, for acts and omissions occurring before the release, and the release does not affect the bond as to the remaining sureties. (*C.C.P. 996.150*.)

If the principal does not give a sufficient substitute surety within the required time, all rights obtained by giving the original bond immediately cease and the court must so order on an ex parte motion. (*C.C.P. 996.140*.) (On withdrawal of surety in other than action or proceeding, see infra, §34.)

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f. Cancellation or Withdrawal.

6 Witkin Cal. Proc. Prov Rem § 34

[§ 34] Cancellation or Withdrawal.

(1) *Governing Statutes.* C.C.P. 996.310 et seq. govern cancellation of a bond or withdrawal of a surety other than in an action or proceeding. (C.C.P. 996.310.)

(2) *Notice.* A surety may cancel a bond or withdraw by giving notice to the officer to whom the bond was given, and mailing or delivering a copy of the notice to the principal. (C.C.P. 996.320.)

(3) *Effective Date.* Cancellation or withdrawal is effective at the earliest of the following: (a) 30 days after notice of cancellation or withdrawal is given; (b) the date substitution of a new surety is effective; or (c) the date a new bond is effective. (C.C.P. 996.330.)

(4) *Effect on Principal.* "If the principal does not give a new bond within 30 days after notice of cancellation or withdrawal is given, all rights obtained by giving the original bond immediately cease, any office for which the bond is given is vacant, any commission for which the bond is given is revoked, and any license or registration for which the bond is given is suspended." (C.C.P. 996.340(a).) During the suspension, the principal may not carry on business pursuant to the license. The license or registration may be revived only by giving a new bond. (C.C.P. 996.340(b).) (On principal's liability on bond, see *infra*, §§35, 36.)

(5) *New Bond Not Required.* No new bond is required to maintain the original bond in effect if the surety's withdrawal "does not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond." (C.C.P. 996.350.)

(6) *Surety's Liability.* After cancellation or withdrawal, the surety remains liable for acts and omissions occurring or existing before the cancellation or withdrawal. (C.C.P. 996.360(a).) The cancellation or withdrawal does not affect the remaining sureties' liabilities. (C.C.P. 996.360(c).) (On surety's liability on bond, see *infra*, §§35, 36; on substitution or release of surety in action or proceedings, see *supra*, §33.)

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a. Nature of Liability.

1. Joint and Several Liability.

6 *Witkin Cal. Proc. Prov Rem* § 35

[§ 35] Joint and Several Liability.

The signing sureties are jointly and severally liable on the obligations of the bond, and under the provisions of the Bond and Undertaking Law and the statute requiring the bond. (*C.C.P. 995.320(b)*.) If a bond does not contain the substantial matter or conditions required by the Bond and Undertaking Law or by the statute providing for the bond, or if there are any defects in the giving or filing of the bond, it is not void so as to release the principal and sureties from liability. (*C.C.P. 995.380(a)*.) The beneficiary may, in proceedings to enforce liability on the bond, suggest the defect in the bond, or in its giving or filing, and enforce liability against the principal and the persons who intended to become and were included as sureties on the bond. (*C.C.P. 995.380(b)*); see Law Rev. Com. Comment to *C.C.P. 995.380* [sureties are liable on bond or undertaking to extent provided by statute]; on obligations of sureties to beneficiary, see *Rest.3d, Suretyship and Guaranty* §32 et seq.)

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a. Nature of Liability.

2. Limitation on Liability.

6 *Witkin Cal. Proc. Prov Rem* § 36

[§ 36] Limitation on Liability.

Except as otherwise provided by statute, the principal's liability is not limited to the amount of the bond. But the aggregate liability of a surety to all persons for all breaches of the condition of a bond is limited to that amount, notwithstanding any other statute except *C.C.P. 996.480* (liability for costs; see *infra*, §42). (*C.C.P. 996.470(a)*.) A surety's liability may be limited further by (a) statute or order of the court when the bond is given in an amount greater than that required (*C.C.P. 996.470(b)*), or (b) stipulation (*C.C.P. 996.470(c)*).

Nothing in the Bond and Undertaking Law is intended to limit the liability of a surety under any other statute. (*C.C.P. 996.475*.) In *Harris v. Northwestern Nat. Ins. Co.* (1992) 6 C.A.4th 1061, 1065, 1066, 8 C.R.2d 234, a surety for a notary who was a losing party litigant in an action against the notary and the surety was liable for costs imposed by *C.C.P. 1032(b)* in addition to the amount of the bond, because the liability for costs was imposed under another statute and not for a breach of the condition of the bond.

In *Bookasta v. Hartford Acc. & Indem. Co.* (1975) 46 C.A.3d 237, 120 C.R. 229, E sued B, and obtained a writ of attachment with H furnishing the bond. B prevailed in the main action, and brought this suit against H on its bond. H advanced the new defense that, because the attachment statute then in force had been held unconstitutional in *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 96 C.R. 709, 488 P.2d 13, *infra*, §50, the bond given under that statute was void. The trial judge agreed and gave judgment for defendant. *Held*, reversed. Although it is generally said that a bond given to comply with an unconstitutional statute is not binding, the principle is inapplicable here. The holding in *Randone* was not based on any impairment of the attaching creditor's constitutional right or any privilege of his that existed apart from the invalid statute; the infirmity of the statute was its denial of due process to the debtor. (46 C.A.3d 241.) E, with the aid of H's bond, was able to seize B's assets to insure the collectibility of a judgment he might obtain; if he had personally put up the bond he could not have challenged its validity, and neither can H. (46 C.A.3d 242.)

In *Conservatorship of O'Connor* (1996) 48 C.A.4th 1076, 56 C.R.2d 386, the surety for a successor conservator challenged that conservator's appointment in an effort to avoid liability on the bond after the conservator was surcharged for embezzling conservatorship funds. The trial court found that the appointment was void and that the

surety was entitled to rescind the bond. *Held*, reversed. The surety was estopped by its conduct to challenge its principal's appointment. The surety (a) did not read the successor conservator's petition; (b) placed the unfiled original bond in its file, retained the premium, issued a duplicate original bond without securing an endorsed-filed copy of either edition of the bond (contrary to its usual policy), remained silent until a complaint was filed against the principal; and (c) did not participate in the surcharge proceeding against the principal. (48 C.A.4th 1092.) The order entered in the surcharge proceeding was binding on the surety, and no exceptional circumstances justified the surety's attempted collateral attack on the surcharge order. (48 C.A.4th 1095, 1101, citing *Bookasta*.)

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b. Enforcement by Beneficiary.

1. Enforcement by Civil Action.

6 *Witkin Cal. Proc. Prov Rem* § 37

[§ 37] Enforcement by Civil Action.

The beneficiary may enforce liability on a bond against both the principal and the sureties by a civil action in which both the principal and the sureties must be joined as parties. (*C.C.P.* 996.410(a), 996.430(a).) If the beneficiary is a class of persons, any person in the class may enforce liability in the person's own name, without assignment (*C.C.P.* 996.410(b)), although a cause of action on a bond is transferable and assignable as other causes of action (*C.C.P.* 996.430(c)).

When a bond (except the bond of a public officer or fiduciary) is given in an action or proceeding, the surety submits itself to the court's jurisdiction in all matters affecting its liability on the bond. (*C.C.P.* 996.420.)

If a bond was given in an action or proceeding, the action to enforce liability must be brought in the court in which the action or proceeding was pending. Otherwise, the action may be brought in any court of competent jurisdiction, with the amount of damage claimed in the action determining the jurisdictional classification of the case. (*C.C.P.* 996.430(b).)

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aa. Nature of Motion.

6 *Witkin Cal. Proc. Prov Rem* § 38

[§ 38] Nature of Motion.

C.C.P. 996.440 governs motions to enforce liability on a bond given in an action or proceeding. (See *Wallace v. Miller* (1983) 140 C.A.3d 636, 642, 189 C.R. 637 [enforcement of liability under former statute was available only where plaintiff had actually filed surety bond after obtaining preliminary injunction]; *Mark Briggs & Associates v. Kinestar* (1983) 143 C.A.3d 483, 486, 488, 192 C.R. 21 [discussion of when, under former statute, bond is given in "action or proceeding" based on definition of "action" in *C.C.P.* 22, and allowing beneficiary to proceed directly against valid common law bond]; *Grade-Way Const. Co. v. Golden Eagle Ins. Co.* (1993) 13 C.A.4th 826, 837, 16 C.R.2d 649 [mechanic's lien and stop notice release bonds, issued after filing of action to enforce these liens or stop notices, are bonds "given in an action or proceeding" under *C.C.P.* 996.440]; *National Technical Systems v. Commercial Contractors* (2001) 89 C.A.4th 1000, 1003, 1011, 108 C.R.2d 67 [stop notice release bond issued before lawsuit was filed was not "given in an action or proceeding"; hence, summary enforcement procedure of *C.C.P.* 996.440 was not available, but surety had right to be joined as party and defend action under *C.C.P.* 996.430 (supra, §37)].)

No independent action is necessary. Liability may be enforced on motion made in court after entry of the final judgment in the action or proceeding in which the bond is given and after the time for appeal has expired, or after the appeal is finally determined. (*C.C.P.* 996.440(a), (b); see *Satinover v. Dean* (1988) 202 C.A.3d 1298, 1301, 249 C.R. 277 [order enforcing liability on bond after refusing to grant preliminary injunction and before terminating main action is premature].)

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bb. Procedure.

6 *Witkin Cal. Proc. Prov Rem* § 39

[§ 39] Procedure.

(1) *Notice*. Notice of the motion must be served on the principal and sureties at least 30 days before the time set for hearing the motion. The notice must (a) state the amount of the claim and (b) be supported by affidavits setting forth the facts on which the claim is based. The notice and affidavits must be served in accordance with any procedure authorized by *C.C.P. 1010* et seq. (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§9, 10, 12 et seq.). (*C.C.P. 996.440(c)*.)

(2) *Judgment on Motion*. Judgment must be entered against the principal and sureties in accordance with the motion if they fail to serve and file affidavits in opposition showing facts that the trial judge hearing the motion deems sufficient to present a triable issue of fact. (*C.C.P. 996.440(d)*; see *Simmons v. California Coastal Com.* (1981) 124 *C.A.3d* 790, 796, 177 *C.R.* 608 [construing similar provision in former statute].)

(3) *Trial on Motion*. If a showing sufficient to present a triable issue of fact is made, the issues to be tried must be specified by the court and trial must be by the court. Trial must be set for the earliest date convenient to the court, allowing sufficient time for any discovery proceedings requested. (*C.C.P. 996.440(d)*.)

(4) *Stay*. The principal and sureties may not obtain a stay of the proceedings pending determination of any conflicting claims among beneficiaries. (*C.C.P. 996.440(e)*.)

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3. Statute of Limitations.

6 *Witkin Cal. Proc. Prov Rem* § 40

[§ 40] Statute of Limitations.

Although the 4-year period provided in *C.C.P.* 337 is the general limitations period for an action on a bond or undertaking, specific statutes may provide different limitations periods. The following are illustrative (see *Law Rev. Com. Comment to C.C.P.* 996.450):

(1) *B. & P.C.* 7071.11 (contractor's bond; 2 years).

(2) *Fin.C.* 17205 (escrow agent's bond; 2 years). (See *Royal Thrift & Loan Co. v. County Escrow (2004) 123 C.A.4th 24, 20 C.R.3d 37* [statute of limitations in *Fin.C.* 17205 is subject to delayed discovery rule (see 3 *Cal. Proc.* (5th), *Actions*, §497 et seq.) despite provision in bond incorporating limitations period].)

(3) *Health & Saf.C.* 1376 (health care service plan's bond; 2 years).

A motion to enforce a bond must be made within 1 year of the later of entry of (a) the final judgment in the action or proceeding in which the bond is given and after the time for appeal has expired, or (b) after the appeal is finally determined. (*C.C.P.* 996.440(b).)

A bond provision that attempts by contract to shorten the period prescribed by *C.C.P.* 337 or other statute for the commencement of an action on the bond, or the period prescribed by *C.C.P.* 996.440 for a motion to enforce a bond, is invalid. However, the principal, surety, and beneficiary may all agree to accept a provision for a shorter period in a bond. (*C.C.P.* 996.450.)

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4. Judgment.

6 Witkin Cal. Proc. Prov Rem § 41

[§ 41] Judgment.

(1) *Judgment of Liability*. C.C. 2845 provides that a surety may require a creditor, subject to C.C.P. 996.440 (supra, §§38, 39), to proceed against the principal or to pursue any other remedy that is available to the creditor but not the surety and that would lighten the surety's burden. (See 3 Cal. Proc. (5th), *Actions*, §208.) Notwithstanding C.C. 2845, a judgment of liability on a bond must be in favor of the beneficiary and against the principal and sureties, obligating each of them jointly and severally. (C.C.P. 996.460(a).) The amount of the judgment is determined by the court and must include the costs of obtaining the judgment. (C.C.P. 996.460(b); see Legislative Com. Comment [judgment includes costs to extent provided in C.C.P. 1021 et seq. (see 7 Cal. Proc. (5th), *Judgment*, §83)]; *Moore v. Ohio Cas. Ins. Co.* (1983) 140 C.A.3d 988, 995, footnote 9, 189 C.R. 829 [rather than giving full bond amount on default, judgment amount is determined by court; "California does not recognize the 'sum certain' concept of liability on either common law or statutory bonds and undertakings"].)

The judgment need not exhaust the full amount of the bond, and liability on it may be enforced thereafter until the amount is exhausted. (C.C.P. 996.460(c).)

(2) *Surety's Right Against Principal*. Nothing in C.C.P. 996.460 affects a surety's right of subrogation against the principal or a surety's right to compel the principal to satisfy the judgment. (C.C.P. 996.460(d).) (On surety's recourse against principal, see *Rest.3d, Suretyship and Guaranty* §§18, 21 et seq., 62.)

(3) *Enforcement of Judgment*. A judgment of liability on a bond is enforceable in the same manner and to the same extent as other money judgments. (C.C.P. 996.495.) (On special enforcement provisions for bonds executed to, in favor of, or payable to the state, see *infra*, §43; on enforcement of money judgments generally, see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §53 et seq.) The beneficiary may enforce the judgment directly against the sureties. (C.C.P. 996.460(d).)

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6 *Witkin Cal. Proc. Prov Rem § 42*

[§ 42] Payment by Surety.

Once the nature and extent of the principal's liability has been established, the surety may make payment on the bond without awaiting enforcement proceedings. If the beneficiary makes a claim on a bond given in an action or proceeding and the surety fails to make payment, the surety is liable for costs incurred in obtaining a judgment, including attorneys' fees and interest on the judgment from the date of the claim, notwithstanding the limitations on liability set forth in *C.C.P. 996.470* (supra, §36). (*C.C.P. 996.480(a)*.) A surety's liability for costs under *C.C.P. 996.480* includes costs on appeal. (*Grade-Way Const. Co. v. Golden Eagle Ins. Co. (1993) 13 C.A.4th 826, 837, 16 C.R.2d 649.*) Partial payment does not constitute satisfaction and does not affect a license suspension or revocation. (*C.C.P. 996.480(b)*.)

Payment of the amount of the bond constitutes a full discharge of liability. (*C.C.P. 996.490(a)*.) Each surety is liable for contribution to cosureties who have made payment on the bond in proportion to the amount of each surety's liability. (*C.C.P. 996.490(b)*.)

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6. Bonds to State of California.

6 *Witkin Cal. Proc. Prov Rem* § 43

[§ 43] Bonds to State of California.

(1) *Governing Statutes.* *C.C.P. 996.510* et seq. govern enforcement of liability on bonds executed to, in favor of, or payable to the state or the people of California, including official bonds. (*C.C.P. 996.510.*)

(2) *Enforcement.* Liability may be enforced by or for the benefit of beneficiaries who are damaged by a breach of the condition of a bond to the state. (*C.C.P. 995.850(a).*) The beneficiary may enforce liability on the bond in his or her own name, without assignment of the bond. (*C.C.P. 995.850(b).*)

(3) *Affidavit.* The person enforcing liability may file an affidavit with the court that should state the following (*C.C.P. 996.520*):

(a) The name of the defendant who executed the bond.

(b) That *C.C.P. 996.510* et seq. apply to the bond.

(c) That the defendants have real property or an interest in real property (designating the county or counties where the property is located).

(d) That liability is being enforced for the state's benefit.

(4) *Certification.* On receiving the affidavit, the clerk must *certify* to the county recorder in the county where the real property is located (*C.C.P. 996.530*):

(a) The parties' names.

(b) The court where the proceedings are pending.

(c) The amount claimed.

(d) The commencement date of the proceedings.

The county recorder must endorse the time of receipt on the certificate. (*C.C.P. 996.540(a)*.) The certificate must then be filed and recorded in the same manner as notice of the pendency of an action affecting real property. (*C.C.P. 996.540(b)*); on filing and recordation of lis pendens, see 3 *Cal. Proc.* (5th), *Actions*, §§384, 385.)

(5) *Judgment Lien*. Any judgment recovered under *C.C.P. 996.510* et seq. is a lien on all of defendant's real property situated in any county where the certificate is filed, from the time the certificate is filed. (*C.C.P. 996.550(a)*.) The lien is for the amount for which the real property owner is liable on the judgment. (*C.C.P. 996.550(b)*.) (On specific performance of an agreement to sell real property affected by the lien, see *C.C.P. 996.560*.)

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a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 44

[§ 44] In General.

(1) *Acceptable Deposits.* In lieu of a bond, the principal, except as limited by statute, may deposit the following security, which may be assigned to the officer:

- (a) Money (which must be maintained in an interest-bearing trust account). (*C.C.P. 995.710(a)(1).*)
- (b) State or federal bearer bonds or bearer notes. (*C.C.P. 995.710(a)(2).*)
- (c) Bank or savings associations certificates of deposit. (*C.C.P. 995.710(a)(3).*)
- (d) Bank savings accounts. (*C.C.P. 995.710(a)(4).*)
- (e) Savings and loan investment certificates or share accounts. (*C.C.P. 995.710(a)(5).*)
- (f) Credit union certificates for funds or share accounts. (*C.C.P. 995.710(a)(6).*)

This list of property that may be deposited in lieu of a bond is exclusive. (*Markley v. Superior Court (1992) 5 C.A.4th 738, 745, 7 C.R.2d 328, 3 Cal. Proc. (5th), Actions, §406* [trial judge erred in authorizing deposit of trust deed in lieu of undertaking].)

(2) *Amount of Deposit.* The deposit must be in an amount or have a face value, or, where it consists of bearer bonds or bearer notes, have a market value, equal to or greater than the amount that would be required to be secured by the bond if it were given by an admitted surety insurer. (*C.C.P. 995.710(b)*); on valuation of bearer bonds and notes, see *C.C.P. 995.720.*) However, where the bearer bonds or bearer notes are deposited other than in an action or proceeding, the officer may require that the amount of the deposit be determined by a formula based on the principal amount of the bonds or notes instead of by market value. (*C.C.P. 995.710(b).*)

(3) *Accompanying Agreement.* The deposit must be accompanied by an agreement, executed by the principal, that authorizes the officer to apply the deposit to enforce the principal's liability on the deposit. The agreement must contain

the address where the principal may be served. (*C.C.P. 995.710(c)*.)

(4) *Terms and Conditions.* The officer may prescribe terms and conditions to implement *C.C.P. 995.710*. (*C.C.P. 995.710(d)*.)

(5) *Effect of Deposit.* A deposit given in lieu of a bond has the same force and effect and is subject to the same conditions and liabilities as a bond. (*C.C.P. 995.730*.)

(6) *Interest on Deposit.* If no enforcement proceedings are pending against the principal on the deposit, the officer must, on demand, (a) pay quarterly to the principal any interest on the deposit earned in accordance with the terms of the account or certificate (*C.C.P. 995.740(a)*), and (b) deliver to the principal any interest coupons attached to the bearer bonds or notes as they become due and payable, or pay annually any interest payable on the bonds or notes (*C.C.P. 995.740(b)*).

(7) *Special Rule for Secretary of State.* *C.C.P. 995.710* may not be used for deposits with the Secretary of State. A principal who made a deposit with the Secretary of State under *C.C.P. 995.710* before January 1, 1999, may continue to use the deposit, but the deposit is not renewable. (*C.C.P. 995.710(e)*.)

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b. Enforcement Against Deposit.

6 Witkin Cal. Proc. Prov Rem § 45

[§ 45] Enforcement Against Deposit.

(1) *In General.* The principal must pay the amount of liability on the deposit within 30 days after the judgment becomes final, or if the deposit is given to stay enforcement of a judgment on appeal, within 30 days after the filing of the remittitur. (C.C.P. 995.750.) If the principal does not pay, the deposit must be collected, sold, or otherwise applied to the liability on order of the court that entered the judgment of liability, on 5 days' notice to the parties. (C.C.P. 995.760(a).) Bearer bonds or notes without a prevailing market price must be sold at public auction, and those having a market price may be sold at private sale for no less than that price. (C.C.P. 995.760(b).) (On distribution of deposit, see C.C.P. 995.760(c).)

(2) *Return of Deposit.* A deposit given in lieu of a bond must be returned to the principal at the earliest of the following:

(a) On substitution of a sufficient bond. (C.C.P. 995.770(a).)

(b) The time provided in C.C.P. 995.360 for a return of a bond (see *supra*, §18). (C.C.P. 995.770(b).)

(c) The time provided by statute. (C.C.P. 995.770(c).)

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A. In General.

1. Nature of Attachment.

a. Ancillary Remedy.

6 Witkin Cal. Proc. Prov Rem § 46

[§ 46] Ancillary Remedy.

(1) *Enactment of Law.* "As early as 1851 the second Legislature assembled in California saw fit to enact into law, and to grant to unsecured creditors whose demands arose from contract, the provisional and summary remedy known as 'attachment' proceedings in order to insure that the ends of successful litigation should not be fruitlessly pursued or frustrated." (*Halstead v. Halstead* (1946) 72 C.A.2d 832, 836, 165 P.2d 513.)

(2) *Provisional Nature of Remedy.* Attachment is an ancillary or provisional remedy to aid in the collection of a money demand by seizure of property in advance of trial and judgment. The money or property is held as security for the eventual satisfaction of the judgment, unless released by the giving of other security. (See generally *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 96 C.R. 709, 488 P.2d 13, *infra*, §50; *Nail v. Superior Court* (1909) 11 C.A. 27, 29, 103 P. 902; *Gibbs v. Haight, Dickson, Brown & Bonesteel* (1986) 183 C.A.3d 716, 720, 228 C.R. 398, citing the text; *Doyka v. Superior Court* (1991) 233 C.A.3d 1134, 1137, 285 C.R. 14, *infra*, §298, citing the text; 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §1 et seq.; James 5th, §5.18; Cal. Civil Practice, 2A Procedure, §16:1 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.55 et seq.; C.E.B., 1 Debt Collection Practice 2d, §6.1 et seq.; on advantages and disadvantages of attachment, see Rutter Group, Civil Proc. Before Trial §9:853.1; 2B *Am.Jur. P.P. Forms* (2000 ed.), *Attachment and Garnishment*, §4 et seq.; on strategic considerations, see Cal. Civil Practice, 2A Procedure, §16:2 [plaintiff's strategies], §16:4 [defense strategies]; on garnishment as a form of attachment, see *infra*, §192 et seq.)

(3) *Nonresident Attachment.* In the case of nonresident defendants (or those who cannot be served), attachment has an additional purpose: to obtain jurisdiction quasi in rem. The levy gives security for a possible judgment, and also gives the court jurisdiction to render a personal judgment that may be satisfied out of the property. (See *Root v. Superior Court* (1962) 209 C.A.2d 242, 246, 25 C.R. 784, citing the text; 2 *Cal. Proc.* (5th), *Jurisdiction*, §246 et seq.; on nonresident attachment generally, see *infra*, §235 et seq.)

West's Key Number Digest, Attachment 1

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Provisional Nature of Remedy*. See 6 *Am.Jur.2d* (2008 ed.), *Attachment and Garnishment* §1 et seq.



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1. Nature of Attachment.

b. Main Action.

6 *Witkin Cal. Proc. Prov Rem* § 47

[§ 47] Main Action.

(1) *Main Action Is Required.* Because attachment is an ancillary remedy, it cannot be invoked unless a main action has been properly initiated. (*C.C.P. 484.010*; see 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §18; *infra*, §95.)

(2) *Remedy Is Available to Plaintiff.* The remedy of attachment is available to the plaintiff in the main action. (*C.C.P. 484.010*.) The term "plaintiff" as used in *C.C.P. 484.010* means a person who files a complaint or a cross-complaint. (*C.C.P. 481.180*.)

(3) *Capacity To Sue Is Required.* The main action must be one instituted by a party with capacity to sue. If the purported plaintiff is legally nonexistent, the action is a nullity and the attachment is ineffective and will be discharged. (*J.C. Peacock v. Hasko* (1960) 184 C.A.2d 142, 151, 7 C.R. 490, 4 Cal. Proc. (5th), *Pleading*, §92 [merged corporation had ceased to exist].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Main Action Is Required.* See 6 *Am.Jur.2d* (2008 ed.), *Attachment and Garnishment* §15.



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1. Nature of Attachment.

c. Strict Construction.

6 Witkin Cal. Proc. Prov Rem § 48

[§ 48] Strict Construction.

The remedy of attachment is wholly statutory, its scope and procedure are limited by the statutes, and these statutes are strictly construed. (*Nakasone v. Randall* (1982) 129 C.A.3d 757, 761, 181 C.R. 324; *Arcata Publications Group v. Beverly Hills Publishing Co.* (1984) 154 C.A.3d 276, 279, 201 C.R. 223; *Bank of America v. Salinas Nissan* (1989) 207 C.A.3d 260, 270, 254 C.R. 748.) "[T]he writ of attachment as now employed was unknown to the common law, is a creature of legislative enactment, and has the scope, and only the scope, which the legislature has chosen to accord to it." (*Hallidie v. Enginger* (1917) 175 C. 505, 506, 166 P. 1.) Thus, the utmost caution should be exercised in comparing the provisions of the California attachment laws with those of other states; the state attachment laws differ in so many details that a decision of another state that appears to be on point may actually rest on a different basis. (*Kohler v. Agassiz* (1893) 99 C. 9, 12, 33 P. 741; see *Clyne v. Easton, Eldridge & Co.* (1905) 148 C. 287, 293, 83 P. 36; *Standard Auto Sales Co. v. Lehman* (1919) 43 C.A. 763, 767, 186 P. 178; *Anaheim Nat. Bank v. Kraemer* (1932) 120 C.A. 63, 65, 7 P.2d 765; *Alpha Stores, Ltd. v. You Bet Mining Co.* (1936) 18 C.A.2d 252, 258, 63 P.2d 1139; *Stowe v. Matson* (1949) 94 C.A.2d 678, 683, 211 P.2d 591.) These decisions indicate that to avoid the substantial liability for wrongful attachment, attorneys should exercise caution in using this remedy. (See *Byard v. National Auto. & Cas. Ins. Co.* (1963) 218 C.A.2d 622, 625, 32 C.R. 613, *infra*, §230; *Rutter Group, Civil Proc. Before Trial* §9:853.1; *infra*, §231 et seq.)

There are, however, a few cases that suggest or apply a more liberal construction. (See *Ponsonby v. Sacramento Suburban Fruit Lands Co.* (1930) 210 C. 229, 232, 291 P. 167; *Stewart v. Justice's Court* (1935) 7 C.A.2d 61, 64, 45 P.2d 424; *Walters v. Bank of America* (1937) 9 C.2d 46, 52, 69 P.2d 839; but see *Halstead v. Halstead* (1946) 72 C.A.2d 832, 836, 165 P.2d 513 [where plaintiff complied with statutory conditions "these writs issued, not as precepts emanating from the exercise of judicial favor or discretion, but as writs of right"].)

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1. Nature of Attachment.

d. Nonexclusive Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 49

[§ 49] Nonexclusive Remedy.

The remedies provided by the Attachment Law are not exclusive; in some situations, an injunction may be a more satisfactory remedy. Accordingly, *C.C.P. 482.020* states that nothing in the Attachment Law precludes the granting of injunctive relief; i.e., the court should not refuse the equitable remedy of injunction on the ground that the attachment statute provides an adequate remedy at law. (See Cal. Law Rev. Com. Comment to *C.C.P. 482.020*.) However, an injunction may not be used to obtain what is actually an attachment without meeting the requirements for an attachment. (*Doyka v. Superior Court* (1991) 233 C.A.3d 1134, 1136, 285 C.R. 14, *infra*, §298.)

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A. In General.

2. Former Statute Unconstitutional.

6 *Witkin Cal. Proc. Prov Rem* § 50

[§ 50] Former Statute Unconstitutional.

(1) *Randone Case*. The rule in *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 Summary (10th), *Constitutional Law*, §646, invoked to hold the claim and delivery statutes unconstitutional in *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, *infra*, §246, was also applied to attachment in *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 96 C.R. 709, 488 P.2d 13. A collection agency filed an action as assignee of a law firm against Mr. and Mrs. R on a contract claim for \$ 490 for legal services. Plaintiff attached the R bank account containing \$ 176.20. Defendants moved to dissolve on hardship grounds and on the *Sniadach* doctrine of unconstitutionality of summary prejudgment remedies. The municipal court denied the motion; the appellate department affirmed without written opinion and refused to certify to the Court of Appeal. Defendants R then sought mandamus in the Supreme Court to compel discharge of the attachment. *Held*, writ granted.

(a) As pointed out in *Sniadach*, to authorize deprivation of the property of a debtor before notice and hearing, a state or creditor interest of overriding significance must be shown, and the statute must be restricted to extraordinary situations. (5 C.3d 552.)

(b) As in the claim and delivery decision (*infra*, §246), the court suggested the essentials of a valid attachment statute: "We do not doubt that a constitutionally valid prejudgment attachment statute, which exempts 'necessities' from its operation, can be drafted by the Legislature to permit attachment generally after notice and a hearing on the probable validity of a creditor's claim ... , and even to permit attachment before notice in exceptional cases where, for example, the creditor can additionally demonstrate before a magistrate that an actual risk has arisen that assets will be concealed or that the debtor will abscond." (5 C.3d 563.) Former C.C.P. 537(1), governing attachment in a contract action, is not so narrowly drawn.

(c) In three United States Supreme Court decisions, the countervailing public interest was found sufficient to justify the resort to summary procedures. "First, the seizures were undertaken to benefit the general public rather than to serve the interests of a private individual or a single class of individuals. Second, the procedures could only be initiated by an authorized governmental official, charged with a public responsibility, who might reasonably be expected to proceed only to serve the general welfare and not to secure private advantage. Third, in each case the nature of the risks required immediate action, and any delay occasioned by a prior hearing could potentially have caused serious harm to the public.

Fourth, the property appropriated did not vitally touch an individual's life or livelihood. Finally, the 'takings' were conducted under narrowly drawn statutes that sanction the summary procedure only when great necessity actually arose." (5 C.3d 552.)

(d) The assertion that generally available credit will be endangered by this decision is contradicted by empirical studies, and the *Sniadach* opinion implicitly rejects this as a significant public interest. (5 C.3d 555.)

(e) The broad coverage of the California statute, which allows attachment of the debtor's necessities of life without prior notice, is invalid for that reason particularly. The statute, though exempting wages, does not protect earnings deposited in a bank or household furnishings. This permits the creditor to put undue pressure on the debtor to settle a claim without litigation, despite the existence of a meritorious defense. (5 C.3d 558.) And the post attachment exemption procedure, placing the burden on the debtor of seeking exemption, does not satisfy constitutional requirements: "due process requires that all 'necessities' be exempt from prejudgment attachment as an initial matter." (5 C.3d 563.)

(f) The court summarized the holding by restating the reliance on *Sniadach* and later cases following it: "The particular significance of these decisions lies in their common recognition of the application of this principle to those especially in need of the protection afforded by such process; in the instant case, it includes those whose very necessities of life could be taken from them without a prior opportunity to show the invalidity of the creditor's claim." (5 C.3d 564.) (See 60 Cal. L. Rev. 845; 23 Hastings L. J. 501; 3 Pacific L. J. 1; 26 Stanf. L. Rev. 673.) (On the United States Supreme Court's application of the *Sniadach* rule to attachment, see *Connecticut v. Doe* (1991) 501 U.S. 1, 111 S.Ct. 2105, 2111, 115 L.Ed.2d 1, 12 [state statute permitting ex parte attachment absent showing of extraordinary circumstances violated due process].)

(2) *Later Cases*. Former C.C.P. 537(5), authorizing attachment in an action by the state or a subdivision to collect money due on a statutory obligation or penalty, was held unconstitutional under the *Randone* test in *People v. Allstate Leasing Corp.* (1972) 24 C.A.3d 973, 976, 101 C.R. 470. The section contained no language limiting its effect to extraordinary situations where there is a need for immediate governmental action to protect the public, and it required no showing of an actual risk that the defendant may conceal assets or abscond. It merely classified the state and subdivisions as preferred creditors whenever they sue to collect money on an obligation imposed by law.

In *Damazo v. MacIntyre* (1972) 26 C.A.3d 18, 102 C.R. 609, plaintiffs brought a taxpayers' action against defendants, the marshal and the sheriff of Ventura County, to restrain illegal expenditure of public funds in carrying out their statutory duties in connection with prejudgment attachments. This placed the constitutionality of all subdivisions of former C.C.P. 537 before the court, and resulted in the following decision reversing judgment on demurrer:

(a) Subdivision 1, on attachment in a contract action, had already been held unconstitutional in *Randone*.

(b) Subdivision 2, on attachment in a contract action against a nonresident or absentee, was valid.

(c) Subdivision 3, on attachment in a personal injury or fraud action against a nonresident or absentee, was valid.

(d) Subdivision 4, on attachment in an unlawful detainer proceeding for unsecured rent, was unconstitutional.

(e) Subdivision 5, on attachment by the state or a political subdivision in an action for taxes or on statutory obligations, was unconstitutional under *Allstate Leasing Corp.*

(f) Subdivision 6, on attachment in an action by the state or a political subdivision against the seller of narcotics to recover public money paid for a buy, was valid.

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A. In General.

3. Requisites of Valid Statute.

6 *Witkin Cal. Proc. Prov Rem* § 51

[§ 51] Requisites of Valid Statute.

(1) *Narrowly Drawn Statute Is Required.* The court in *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 96 C.R. 709, 488 P.2d 13, supra, §50, suggested that a narrowly drawn statute could provide for prejudgment attachment within the constitutional limits of *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 Summary (10th), *Constitutional Law*, §646.

(2) *Prerequisites to Validity.* The California Law Revision Commission listed the basic elements of a valid law. "Three major prerequisites established by the California Supreme Court's decision in *Randone* must be satisfied by any attachment procedure. First, in all but 'extraordinary circumstances,' a notice and the opportunity for a hearing must be provided before the defendant's property is attached. Second, the 'extraordinary circumstances' which permit the use of ex parte, summary procedures for the issuance of writs of attachment must be strictly limited. Finally, the statute must provide for the exemption of necessities from attachment." (11 Cal. Law Rev. Com. Reports, p. 724.)

(3) *Satisfaction of Prerequisites.* In enacting the Attachment Law, the Legislative Committee explained how the new provisions satisfy the constitutional requirements: "(1) by providing prior to levy either an opportunity for the defendant to claim his or her exemptions or a requirement that the plaintiff show that the property sought to be attached is not exempt, (2) by generally subjecting only business property to levy, (3) by providing a nonseizure form of levy in many circumstances, and (4) by authorizing the court to issue a temporary protective order in lieu of a writ in the exceptional circumstances where a writ may be issued ex parte." (Legislative Com. Comment to C.C.P. 487.020.)

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4. Revised Statute.

a. Enactment.

6 *Witkin Cal. Proc. Prov Rem* § 52

[§ 52] Enactment.

(1) *Interim Statute of 1972.* The 1972 Legislature enacted interim legislation (former C.C.P. 537 et seq.) to meet the constitutional requirements of *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 96 C.R. 709, 488 P.2d 13, supra, §50, but directed the Law Revision Commission to continue its study. The commission's subsequent recommendations went beyond the emergency corrective legislation, and resulted in a comprehensive revision of the entire attachment procedure. The interim law generally followed the old law except where changes were necessitated by the constitutional directives. (See generally *Great Amer. Ins. Co. v. National Health Services* (1976) 62 C.A.3d 785, 793, 133 C.R. 420; *Johnson v. Alexander* (1976) 63 C.A.3d 806, 812, 134 C.R. 101; *Commercial & Farmers Nat. Bank v. Hetrick* (1976) 64 C.A.3d 158, 163, 134 C.R. 285; *Robinson v. Varela* (1977) 67 C.A.3d 611, 618, 136 C.R. 783; 11 Cal. Law Rev. Com. Reports, p. 721; 4 *Pacific L. J.* 146, 292; 20 *U.C.L.A. L. Rev.* 1026; 23 *U.C.L.A. L. Rev.* 792.)

(2) *Revised Statute of 1977.* The 1977 statute was a comprehensive revision and modernization of the former law and is much more elaborate than the interim statute. (See *C.C.P. 481.010* et seq.; 11 Cal. Law Rev. Com. Reports, p. 705 et seq. [summary of recommendations]; 6 *Pacific L. J.* 195.)

The original enacting measure made the new law effective on January 1, 1976. (Stats. 1974, Chap. 1516; see 6 *Pacific L. J.* 195.) A 1975 amendment extended the effective date to January 1, 1977 (Stats. 1975, Chap. 200), and the 1976 Legislature made further changes. (Stats. 1976, Chap. 437; see 13 Cal. Law Rev. Com. Reports, pp. 1612, 1701; 8 *Pacific L. J.* 214.)

(3) *Later Amendments.* The 1982 Legislature amended the Attachment Law, effective July 1, 1983, principally to conform it to the new Enforcement of Judgments Law (8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §18 et seq.). (See Stats. 1982, Chap. 1198; 16 Cal. Law Rev. Com. Reports, pp. 701, 1603; 14 *Pacific L. J.* 441.) Further changes were made in 1983 (see Stats. 1983, Chap. 155; 16 Cal. Law Rev. Com. Reports, p. 2175; 15 *Pacific L. J.* 509) and 1984 (see Stats. 1984, Chap. 538; 16 *Pacific L. J.* 523).

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4. Revised Statute.

b. Nature and Scope.

6 *Witkin Cal. Proc. Prov Rem* § 53

[§ 53] Nature and Scope.

California's current law is called the Attachment Law. (*C.C.P. 482.010*.) (For general description of procedures, see C.E.B., 1 Debt Collection Practice 2d, §6.1 et seq.; Cal. Civ. Practice, 2A Procedure §16:1 et seq.; Rutter Group, Civ. Proc. Before Trial, §9:853 et seq.) It consists of the following chapters:

Chapter 1: Definitions. (*C.C.P. 481.010* et seq.; see *infra*, §§55, 56.)

Chapter 2: General Provisions. (*C.C.P. 482.010* et seq.; see *supra*, §49 and *infra*, §§88, 89, 92 et seq., 99, 113, 114, 117, 222.)

Chapter 3: Actions in Which Attachment Is Authorized. (*C.C.P. 483.010* et seq.; see *infra*, §57 et seq.)

Chapter 4: Noticed Hearing Procedure for Obtaining Writ. (*C.C.P. 484.010* et seq.; see *infra*, §95 et seq.)

Chapter 5: Ex Parte Hearing Procedure for Obtaining Writ. (*C.C.P. 485.010* et seq.; see *infra*, §128 et seq.)

Chapter 6: Temporary Protective Order. (*C.C.P. 486.010* et seq.; see *infra*, §141 et seq.)

Chapter 7: Property Subject to Attachment. (*C.C.P. 487.010* et seq.; see *infra*, §75 et seq.)

Chapter 8: Levy Procedure; Lien; Management and Disposition of Property. (*C.C.P. 488.010* et seq.; see *infra*, §149 et seq.)

Chapter 9: Undertakings. (*C.C.P. 489.010* et seq.; see *infra*, §91.)

Chapter 10: Liability for Wrongful Attachment. (*C.C.P. 490.010* et seq.; see *infra*, §231 et seq.)

Chapter 11: Attaching Plaintiff's Miscellaneous Remedies. (*C.C.P. 491.110* et seq.; see *infra*, §195 et seq.)

Chapter 12: Nonresident Attachment. (*C.C.P. 492.010* et seq.; see *infra*, §235 et seq.)

Chapter 13: Bankruptcy or General Assignments. (*C.C.P. 493.010* et seq.; see *infra*, §§188, 189.)

The federal courts follow the local state law governing attachment and garnishment. (*F.R. Civ. P., Rule 64*; 11A Federal Practice & Procedure (Wright & Miller) §2932; 8 Federal Procedure, L.Ed. §21:17 et seq.)

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4. Revised Statute.

c. Constitutionality.

6 *Witkin Cal. Proc. Prov Rem* § 54

[§ 54] Constitutionality.

In *Western Steel & Ship Repair v. RMI* (1986) 176 C.A.3d 1108, 222 C.R. 556, the court held that the attachment procedure satisfies the constitutional requirements set forth in *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 96 C.R. 709, 488 P.2d 13, supra, §50. *Randone* was primarily concerned with two evils: (1) attachment of property consisting of the debtor's necessities of life, and (2) deprivation of assets during a protracted period of possibly meritless litigation. The attachment statutes reflect these considerations:

(1) The attachment remedy is narrowly limited to liquidated, unsecured, nonfrivolous claims, which, if against individual debtors, must relate to business matters.

(2) The writ may not issue on necessities of life.

(3) The writ may be issued only after a noticed hearing unless a magistrate determines that great and irreparable injury will result from delay.

(4) The creditor must demonstrate the validity of the attachment.

By these safeguards, "the Legislature has done all that it can to comply with *Randone* and still provide an ex parte attachment remedy in limited circumstances." (176 C.A.3d 1115.)

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d. General Definitions.

6 *Witkin Cal. Proc. Prov Rem* § 55

[§ 55] General Definitions.

The Attachment Law contains the usual standard definition section: "Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this title." (*C.C.P. 481.010.*) And common terms are given their typical inclusive meanings:

- (1) "Complaint" includes a cross-complaint. (*C.C.P. 481.060.*)
- (2) "Plaintiff" includes a person who files a complaint or cross-complaint. (*C.C.P. 481.180.*)
- (3) "Defendant" includes a cross-defendant. (*C.C.P. 481.070.*)
- (4) "Levying officer" means a sheriff or marshal. (*C.C.P. 481.140.*)
- (5) "Person" includes a natural person, corporation, partnership or other unincorporated association, a limited liability company, and a public entity. (*C.C.P. 481.170.*)
- (6) "Public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and "any other political subdivision or public corporation in the state." (*C.C.P. 481.200.*)
- (7) "Property" includes real and personal property and any interest in property. (*C.C.P. 481.195.*)
- (8) "Personal property" includes tangible and intangible personal property. (*C.C.P. 481.175.*)
- (9) "Real property" includes any right in real property (including a leasehold interest). (*C.C.P. 481.203.*)
- (10) "Tangible personal property" includes chattel paper, documents of title, instruments, securities, and money. (*C.C.P. 481.225.*)

Other terms defined by the Attachment Law include the following:

- (1) Costs. (*C.C.P. 481.055*, see *infra*, §99.)
 - (2) Equipment. (*C.C.P. 481.100*, see *infra*, §161.)
 - (3) Farm products. (*C.C.P. 481.110*, see *infra*, §168.)
 - (4) Financial institution. (*C.C.P. 481.113*, see *infra*, §175.)
 - (5) Inventory. (*C.C.P. 481.120*, see *infra*, §168.)
 - (6) Probable validity. (*C.C.P. 481.190*, see *infra*, §108.)
 - (7) Registered process server. (*C.C.P. 481.205*, see *infra*, §152.)
- For Commercial Code definitions, see *infra*, §56.

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e. Commercial Code Definitions.

6 *Witkin Cal. Proc. Prov Rem* § 56

[§ 56] Commercial Code Definitions.

Many definitional sections conform the Attachment Law to the Uniform Commercial Code and incorporate the definitions by reference. (See 16 Cal. Law Rev. Com. Reports, pp. 1174, 1175.)

(1) *Account Debtor*. This means "account debtor" as the term is defined in U.C.C. 9102(a)(3) [person obligated on account, chattel paper, or general intangible, but not person obligated to pay negotiable instrument, even if instrument constitutes part of chattel paper]. (*C.C.P. 481.020*.)

(2) *Account Receivable*. "Account receivable" means "account" as defined by U.C.C. 9102(a)(2) (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §42). (*C.C.P. 481.030*.)

(3) *Chattel Paper*. This means "chattel paper" as the term is defined in U.C.C. 9102(a)(11) (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §42). (*C.C.P. 481.040*.)

(4) *Deposit Account*. This means "deposit account" as the term is defined in U.C.C. 9102(a)(29) (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §44). (*C.C.P. 481.080*.)

(5) *Document and Document of Title*. "Document of title" means "document" as defined in U.C.C. 9102(a)(30); a document of title is negotiable if it is negotiable within the meaning of U.C.C. 7104. (*C.C.P. 481.090*.) U.C.C. 9102(a)(30) defines "document" as a document of title or a receipt described in U.C.C. 7201(b) [receipts for specified goods that may be issued by owner that is not warehouse].

(6) *General Intangibles*. This means "general intangibles" as defined in U.C.C. 9102(a)(42) (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §42), consisting of rights to payment. (*C.C.P. 481.115*.)

(7) *Instrument*. This means "instrument" as defined in U.C.C. 9102(a)(47) (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §42). (*C.C.P. 481.117*.)

(8) *Secured Party*. This means "secured party" as defined in U.C.C. 9102(a)(72) (see 4 *Summary* (10th), *Secured*

Transactions in Personal Property, §47). (C.C.P. 481.207.)

(9) *Security*. This means "security" as defined by U.C.C. 8102 (see 9 *Summary* (10th), *Corporations*, §134). (C.C.P. 481.210.)

(10) *Security Agreement*. This means "security agreement" as defined by U.C.C. 9102(a)(73) (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §39). (C.C.P. 481.220.)

(11) *Security Interest*. This means "security interest" as defined in U.C.C. 1201 (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §36 et seq.). (C.C.P. 481.223.)

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B. Conditions Required for Attachment.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 57

[§ 57] In General.

(1) *General Conditions for Attachment.* Generally, attachment is authorized only where the following conditions apply:

- (a) The claim is a contract claim for money. (See *C.C.P. 483.010(a)*, *infra*, §58 et seq.)
- (b) Not less than a specified amount is claimed. (See *C.C.P. 483.010(a)*, *infra*, §65.)
- (c) The claim is not secured or the security is valueless or has decreased in value to less than the amount owing on the claim. (See *C.C.P. 483.010(b)*, *infra*, §§67, 68.)
- (d) The claim arises out of a commercial transaction. (See *C.C.P. 483.010(c)*, *infra*, §§70, 71.)

(2) *Attachment Under Specialized Statutes.* The foregoing conditions apply in the usual case, but the right to attachment exists under other statutes expressly authorizing attachment. (*C.C.P. 483.010(a)*.) The following statutes are illustrative (see Legislative Com. Comment to *C.C.P. 483.010*):

- (a) *C.C. 3065a* (manufactured timber products).
- (b) *Food & Ag.C. 281* (action by Director of Food and Agriculture to recover fees).
- (c) *Harb. & Nav.C. 495.1* (vessel).
- (d) *Health & Saf.C. 11501* (action for recovery of public funds paid to person engaged in unlawful sale of controlled substances).
- (e) *Rev.C. 6713* (action to collect sales and use tax).

(3) *Nonresident Attachment.* Nonresident attachment is permitted in "any action for the recovery of money." (*C.C.P. 492.010*; *infra*, §237.)

West's Key Number Digest, Attachment 3 et seq.

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2. Contract Claim for Money.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 58

[§ 58] In General.

(1) *Former Law.* Former C.C.P. 537(1) originally stated that an attachment could be had in an action on a contract, express or implied, for the direct payment of money, made or payable in this state, and not secured.

In applying the restriction to contracts made or payable in this state, the place of making was determined by familiar principles of conflicts of law. But the "payable in this state" element presented special difficulty: where the contract was not made in California, some evidence of agreement for payment here had to be offered. The earlier cases took the position that the contract itself had to provide, either expressly or by necessary implication, that it was payable in this state. But this strict view was later disapproved. (See *American Industrial Sales Corp. v. Airscope* (1955) 44 C.2d 393, 400, 282 P.2d 504; *O'Steen v. Craig* (1956) 145 C.A.2d 268, 274, 302 P.2d 435.)

The condition that the contract be "for the direct payment of money" resulted in the rule excluding an action on a contract to do something other than pay money, e.g., to deliver goods. (See *Willett & Burr v. Alpert* (1919) 181 C. 652, 662, 185 P. 976; *Allen v. Merchants Elec. Co.* (1960) 54 C.2d 67, 69, 4 C.R. 527, 351 P.2d 799.) However, the action could be brought not only on the principal obligation, but on a bond or guaranty of payment. (See *Karn v. Wills* (1942) 50 C.A.2d 604, 609, 123 P.2d 640; *Rose v. Pearman* (1958) 163 C.A.2d 480, 483, 329 P.2d 501.) And a claim that met the statutory requirement would support an attachment despite the joinder of another cause of action on which attachment could not be had. (*Redwood Fibre Products Co. v. Miller Mfg. Co.* (1943) 61 C.A.2d 505, 510, 143 P.2d 389; *Stotland v. Mobile Homes Engineering Corp.* (1961) 197 C.A.2d 815, 819, 17 C.R. 591.)

Other decisions, broadly interpreting former C.C.P. 537(1), practically eliminated the word "direct," so that it was sufficient that the contract furnish the measure of liability. Hence, attachment could be had in an action for damages for breach of contract, if the damages were ascertainable with such certainty that the plaintiff, in the affidavit for attachment, could state the amount due. (See *Force v. Hart* (1928) 205 C. 670, 673, 272 P. 583; *Peninsula Properties Co. v. Santa Cruz* (1950) 34 C.2d 626, 631, 213 P.2d 489; *Eaton v. Queen* (1947) 78 C.A.2d 571, 574, 177 P.2d 997 [damages for breach of express warranty in sale of goods]; *Lewis v. Steifel* (1950) 98 C.A.2d 648, 649, 220 P.2d 769 [damages for wrongful termination of personal service contract]; *Walker v. Phillips* (1962) 205 C.A.2d 26, 31, 22 C.R. 727.)

(2) *Current Attachment Law.* *C.C.P. 483.010(a)* eliminates the original conditions that the contract be for the direct payment of money and that it be payable in this state. It provides that the action must be "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." (See Legislative Com. Comment to *C.C.P. 483.010(a)* [pointing out that "contract" includes a lease of real or personal property].) (See *CIT Group/Equipment Financing v. Super DVD (2004) 115 C.A.4th 537, 539, 541, 8 C.R.3d 927* [lease of business equipment was for fixed or readily ascertainable amount; damages were computed by multiplying monthly rent set forth in lease schedules by unexpired term; citing *Lewis and Walker*]; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.56; *C.E.B.*, 1 Debt Collection Practice 2d, §6.3; 23 *U.C.L.A. L. Rev.* 799.)

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2. Contract Claim for Money.

b. Express and Implied in Fact Contracts.

6 *Witkin Cal. Proc. Prov Rem* § 59

[§ 59] Express and Implied in Fact Contracts.

Express contracts and contracts implied in fact are true contracts. (See 1 *Summary* (10th), *Contracts*, §§102, 103.) Thus, the right to attach in actions for recovery or money due under these contracts or for damages for breach of them raises no problem except that of certainty of damages. (See *supra*, §58.) Nor is it an objection that the plaintiff creditor is in a fiduciary relationship with the defendant debtor. (*Mayer v. Northwood Textile Mills* (1951) 105 C.A.2d 406, 410, 233 P.2d 657.)

Where the complaint is in several counts and one is a contract count, attachment may issue on that count. (*Samuels v. Superior Court* (1969) 276 C.A.2d 264, 267, 81 C.R. 216.) (See C.C.P. 483.010(d), *infra*, §64 [attachment may issue even though other forms of relief are demanded].)

An action for unlawful detainer is one for the recovery of possession of property, not a contract action. (See 5 *Cal. Proc.* (5th), *Pleading*, §638.) But former C.C.P. 537(4) allowed attachment where a verified complaint showed that rent was due. (See *Lori, Ltd. v. Wolfe* (1947) 80 C.A.2d 557, 561, 180 P.2d 21; *Garfinkle v. Montgomery* (1952) 113 C.A.2d 149, 156, 248 P.2d 52.) Under the present law, attachment is allowed to the extent of rent due. (C.C.P. 483.020, *infra*, §100.)

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2. Contract Claim for Money.

c. Quasi-Contractual Obligations.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 60

[§ 60] In General.

The references to "implied" contracts in both the former and present statutes (see *supra*, §58) cover contracts "implied in law," or quasi-contracts. Hence, an attachment may issue in an action properly classified as quasi-contractual, no matter what the nature of the defendant's breach may be. (See *Samuels v. Superior Court* (1969) 276 C.A.2d 264, 267, 81 C.R. 216.)

Thus, the plaintiff, after notice of rescission of a contract for fraud, failure of consideration, or other ground, may sue to recover the money paid. On rescission the law implies an obligation to return the money paid, and this implied contract justifies attachment. (*Bennett v. Superior Court* (1933) 218 C. 153, 161, 21 P.2d 946; *McCall v. Superior Court* (1934) 1 C.2d 527, 531, 538, 36 P.2d 642; *Filipan v. Television Mart* (1951) 105 C.A.2d 404, 405, 233 P.2d 926; *Landry v. Marshall* (1966) 243 C.A.2d 170, 176, 52 C.R. 119, citing the text; 3 *Cal. Proc.* (5th), *Actions*, §156.)

The same is true of an action to recover money paid under a contract, without rescission, on total failure of consideration. (*S.C.V. Peat Fuel Co. v. Tuck* (1878) 53 C. 304, 305; see *Bennett v. Superior Court*, *supra*, 218 C. 161; *Landry v. Marshall*, *supra*, 243 C.A.2d 176; but see *Powers v. Freeland* (1931) 114 C.A. 146, 151, 299 P. 736 [rule was inapplicable where consideration had not wholly failed].)

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2. Waiver of Tort.

6 Witkin Cal. Proc. Prov Rem § 61

[§ 61] Waiver of Tort.

In certain situations, an injured party has a cause of action normally in tort but may elect to "waive the tort" and sue in quasi-contract for restitution rather than damages. The quasi-contract action or count will support an attachment. (See *De Leonis v. Etchepare* (1898) 120 C. 407, 409, 52 P. 718 [agent's failure to remit money to principal]; *Los Angeles Drug Co. v. Superior Court* (1936) 8 C.2d 71, 74, 63 P.2d 1124 [conversion]; *Bank of America v. Hill* (1937) 9 C.2d 495, 499, 71 P.2d 258 [same]; *Hill v. Superior Court* (1940) 16 C.2d 527, 530, 106 P.2d 876 [executor's embezzlement]; *Oil Well Core Drilling Co. v. Barnhart* (1937) 20 C.A.2d 677, 679, 67 P.2d 696 [agent's failure to remit money to principal]; *Nutzel v. Kozdron* (1944) 64 C.A.2d 908, 910, 149 P.2d 411 [money obtained by robbery]; *Arcturus Mfg. Corp. v. Rork* (1961) 198 C.A.2d 208, 213, 17 C.R. 758, citing the text [action against agent alleging fraudulent kickbacks and other secret profits, and seeking their recovery]; *Klein v. Benaron* (1967) 247 C.A.2d 607, 610, 56 C.R. 5 [money obtained by fraud]; *Samuels v. Superior Court* (1969) 276 C.A.2d 264, 268, 81 C.R. 216 [action to recover rents unlawfully collected]; 3 Cal. Proc. (5th), Actions, §164; 1 Summary (10th), Contracts, §§1040, 1041; cf. *Hallidie v. Enginger* (1917) 175 C. 505, 508, 166 P. 1 [attachment denied where complaint showed election of damage action].)

A plaintiff who has two inconsistent remedies, one in contract with the right of attachment, and one in tort without that right, and obtains a writ of attachment, thereby elects the contract remedy. (See *Roam v. Koop* (1974) 41 C.A.3d 1035, 1040, 116 C.R. 539; Rutter Group, Civil Proc. Before Trial §9:861 et seq.; cf. 3 Cal. Proc. (5th), Actions, §193 et seq. [no election where remedies are not actually inconsistent].)

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d. Judgments.

6 *Witkin Cal. Proc. Prov Rem* § 62

[§ 62] Judgments.

A judgment is, for some purposes, regarded as contractual or quasi-contractual; and an action on a judgment is on "implied contract" within the meaning of the attachment statute, even though the judgment was rendered on a tort claim. (*Grotheer v. Meyer Rosenberg* (1936) 11 C.A.2d 268, 272, 53 P.2d 996; *Minor v. Minor* (1959) 175 C.A.2d 277, 279, 345 P.2d 954 [action to recover defaulted installments on divorce decree]; see 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §52; 3 *Cal. Proc.* (5th), *Actions*, §141.)

SUPPLEMENT: [This section is current through the latest supplement]
See 6 *Am.Jur.2d* (2008 ed.), *Attachment and Garnishment* §44.



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2. Contract Claim for Money.

e. Statutory Obligations.

6 *Witkin Cal. Proc. Prov Rem* § 63

[§ 63] Statutory Obligations.

Some statutory obligations are treated as contractual in nature, and attachment is allowed. (See *Anderson v. Doolittle* (1950) 97 C.A.2d 836, 838, 218 P.2d 848 [action to recover treble damages for usury]; 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §60; 3 *Cal. Proc.* (5th), *Actions*, §143.) Others are a basis for attachment by reason of an express statutory provision, e.g., in an action by an injured employee against the employee's uninsured employer (*Lab.C.* 3707), or an action to recover fees imposed by the Food and Agricultural Code (*Food & Ag.C.* 281).

In the absence of express statutory provision, attachment is not permissible in an action on a statutory penalty that is not contractual in nature. (See *Talcott Land Co. v. Hershiser* (1921) 184 C. 748, 763, 195 P. 653.)

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f. Where Other Relief Is Also Sought.

6 *Witkin Cal. Proc. Prov Rem* § 64

[§ 64] Where Other Relief Is Also Sought.

So long as the action is based on a contractual or quasi-contractual obligation, it is immaterial whether it is legal or equitable. Hence, the fact that equitable relief is sought in addition to the recovery of money on the contract is not an objection to attachment. (*Stanford Hotel Co. v. M. Schwind Co.* (1919) 180 C. 348, 352, 181 P. 780; *McCall v. Superior Court* (1934) 1 C.2d 527, 533, 36 P.2d 642; *Weintraub v. Superior Court* (1928) 91 C.A. 763, 768, 267 P. 733 [action for goods sold and on promissory notes; additional prayer to disregard corporate entity]; *Grotheer v. Meyer Rosenberg* (1936) 11 C.A.2d 268, 272, 53 P.2d 996; *Karn v. Wills* (1942) 50 C.A.2d 604, 607, 123 P.2d 640; *Paul v. Palm Springs Homes* (1961) 192 C.A.2d 858, 863, 13 C.R. 860 [disregard of corporate entity; following *Weintraub*]; 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §17.)

Under *C.C.P. 483.010(d)*, attachment may be issued even though other forms of relief are demanded. But attachment is not authorized in an equitable action that is not based on a contract or quasi-contractual obligation. (*Stowe v. Matson* (1949) 94 C.A.2d 678, 682, 211 P.2d 591 [action for dissolution of partnership and accounting with spurious common count added].)

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See 6 *Am.Jur.2d* (2008 ed.), *Attachment and Garnishment* §14.



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3. Minimum Amount Claimed.

6 *Witkin Cal. Proc. Prov Rem* § 65

[§ 65] Minimum Amount Claimed.

The minimum amount, originally \$ 15, was progressively raised by successive amendments. *C.C.P. 483.010(a)* now provides that claims may be aggregated, but the total must be not less than \$ 500, exclusive of costs, interest, and attorneys' fees. (See Legislative Com. Comment to *C.C.P. 483.010*, noting that small claims court proceedings offer an expeditious remedy for the recovery of smaller claims.) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.56; C.E.B., 1 Debt Collection Practice 2d, §6.3; on calculation of amount to be secured, see *infra*, §98 et seq.)

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4. Claim Not Secured.

a. What Constitutes Secured Claim.

1. Former Statute and Decisions.

6 Witkin Cal. Proc. Prov Rem § 66

[§ 66] Former Statute and Decisions.

(1) *Nature and Purpose of Restriction.* A creditor whose claim is already secured should resort to the existing security before seeking attachment. Accordingly, former C.C.P. 537(1) stated that the plaintiff could not attach if the plaintiff's claim was "secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property." (See *Kreider v. California Thorn Cordage* (1932) 128 C.A. 262, 264, 16 P.2d 1002 [pledge of note as collateral security]; *Giandeini v. Ramirez* (1936) 11 C.A.2d 469, 471, 54 P.2d 91; *Bowles v. Pacific Commissary Co.* (1962) 199 C.A.2d 438, 443, 18 C.R. 838.)

(2) *Only Enumerated Types of Obligations Were Restricted.* The statute did not exclude all secured obligations, and, under the rule of strict construction, it was held that only the specifically mentioned types (mortgage, deed of trust, lien, and pledge) prevented attachment. (See *E.I. Noxon Const. Co. v. Wallace Process Piping Co. of Calif.* (1961) 191 C.A.2d 651, 657, 13 C.R. 26.) Thus, a provision in a lease authorizing the lessor to remove personal property installed by him was not a lien within the meaning of the statute. (*D'Alessandro v. Pickford* (1937) 22 C.A.2d 239, 241, 70 P.2d 646.) And a lessee's deposit as security for performance did not prevent attachment by the lessor in an action for rent. (*Garfinkle v. Montgomery* (1952) 113 C.A.2d 149, 156, 248 P.2d 52.)

(3) *Sale of Property.* A conditional seller of personal property was held entitled to attach in an action for the price, despite his or her reserved title. (*Standard Auto Sales Co. v. Lehman* (1919) 43 C.A. 763, 767, 186 P. 178; *Hougham v. Rowland* (1939) 33 C.A.2d 11, 17, 90 P.2d 860.) An installment sale of real property was treated differently: The vendor in theory retained title rather than a lien, but the vendor's interest has been called a "vendor's lien" or "equitable mortgage," and, in view of its strength as security for the vendor's claim, the courts refused to permit attachment. (*Gessner v. Palmateer* (1891) 89 C. 89, 94, 26 P. 789; *Lencioni v. Dan* (1954) 128 C.A.2d 105, 109, 275 P.2d 101.)

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4. Claim Not Secured.

a. What Constitutes Secured Claim.

2. Current Attachment Law.

6 Witkin Cal. Proc. Prov Rem § 67

[§ 67] Current Attachment Law.

(1) *Security Interests Covered*. Attachment is not allowed on a claim secured by "any interest in real property arising from agreement, statute, or other rule of law," including a mortgage or deed of trust of realty, and a statutory, common law, or equitable lien on real property, but excluding a security interest in fixtures under U.C.C. 9101 et seq. (*C.C.P.* 483.010(b).) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.57; C.E.B., 1 Debt Collection Practice 2d, §6.3; for exceptions, see *infra*, §§68, 69.)

(2) *Waiver of Security*. Cases decided under the former statute prohibited waiver to pursue attachment (*Lencioni v. Dan* (1954) 128 C.A.2d 105, 111, 275 P.2d 101 [policy calling for exhaustion of security would be violated if secured creditor were permitted at will to waive security and then seek further security by means of attachment]), but approved attachment after advance waiver by contract (*American Guaranty Corp. of Calif. v. Stooddy* (1964) 230 C.A.2d 390, 394, 396, 41 C.R. 69 [obligation was unsecured where guarantee expressly provided that guarantor waived "any right to participate in any security"]; *Engelman v. Bookasta* (1968) 264 C.A.2d 915, 917, 71 C.R. 120 [following *Stooddy*]). The Legislative Committee Comment to *C.C.P.* 483.010 states that "the security cannot simply be waived." (On express waiver of security creating lien on real property, see 4 *Summary* (10th), *Security Transactions in Real Property*, §131.)

(3) *Secured and Unsecured Promises*. Where one of several promises in an agreement is unsecured, attachment is proper. (*FNB Financial Co. v. Superior Court* (1978) 80 C.A.3d 927, 930, 144 C.R. 496.)

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4. Claim Not Secured.

b. Exceptions.

1. Security Without Value or Decreased in Value.

6 Witkin Cal. Proc. Prov Rem § 68

[§ 68] Security Without Value or Decreased in Value.

(1) *Former Law.* Former C.C.P. 537(1) authorized attachment where the contract was originally secured if "such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." (See *Bennett v. Superior Court* (1933) 218 C. 153, 163, 21 P.2d 946; *Bowles v. Pacific Commissary Co.* (1962) 199 C.A.2d 438, 442, 18 C.R. 838.) The statute applied even though the property had value, if it had no value as security; e.g., where a mortgage was void for lack of proper execution, or the mortgagor had no interest in the property mortgaged. (See *McPhee v. Townsend* (1903) 139 C. 638, 640, 73 P. 584; *Williams v. Hahn* (1896) 113 C. 475, 477, 45 P. 815.)

(2) *Current Attachment Law.* C.C.P. 483.010(b) continues the exception for valueless property but also allows attachment where the security has decreased in value to less than the amount owing on the claim. The amount of the attachment is limited to "the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim." (On burden of proof that security has diminished in value without plaintiff's fault, see *infra*, §108.)

Subject to the prohibition against deficiency judgments in C.C.P. 580b and 580d, the pursuit of remedies under the Attachment Law in an action to foreclose a mortgage or deed of trust on real property does not constitute an action to recover a debt under the one-action rule (see 4 *Summary* (10th), *Security Transactions in Real Property*, §124 et seq.) or a failure to comply with any other statutory or judicial requirement to proceed first against security. (C.C.P. 483.012; see *Rutter Group*, Civil Proc. Before Trial §9:867.2.)

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b. Exceptions.

2. Mechanic's Lien.

6 *Witkin Cal. Proc. Prov Rem* § 69

[§ 69] Mechanic's Lien.

The existence of a mechanic's lien does not affect a claimant's right to issuance of a writ of attachment. (C.C. 3152; see *Wm. J. Bettingen Lumber Co. v. Kerrin* (1929) 99 C.A. 686, 691, 279 P. 163; *San Diego Wholesale Credit Men's Assn. v. Superior Court* (1973) 35 C.A.3d 458, 464, 110 C.R. 657.) In applying for the writ, the claimant must refer to C.C. 3152. (C.C. 3152.)

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5. Claim Arising Out of Commercial Transaction.

a. Statutory Development.

6 *Witkin Cal. Proc. Prov Rem § 70*

[§ 70] Statutory Development.

The original provision allowing attachment on contract claims (former C.C.P. 537(1)) was not limited to commercial transactions. Because the provision thus allowed prehearing attachment against "those whose very necessities of life could be taken from them," it did not satisfy the constitutional requirements mandated by *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 564, 96 C.R. 709, 488 P.2d 13, supra, §50. The interim statute and the Law Revision Commission recommendation met the constitutional objections by generally restricting attachment against individuals to commercial transactions. (See *Advance Transformer Co. v. Superior Court* (1974) 44 C.A.3d 127, 139, 118 C.R. 350; 11 Cal. Law Rev. Com. Reports, pp. 722, 723; 23 U.C.L.A. L. Rev. 796.)

C.C.P. 483.010(c) limits the use of attachments to commercial transactions and prohibits them in consumer transactions. (See *Kadison, Pfaelzer, Woodard, Quinn & Rossi v. Wilson* (1987) 197 C.A.3d 1, 4, 242 C.R. 595 [trust that managed valuable real property and retained attorney to protect trust assets was engaged in commercial transaction]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.58; C.E.B., 1 Debt Collection Practice 2d, §6.5.)

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5. Claim Arising Out of Commercial Transaction.

b. Persons and Entities Subject to Attachment.

6 Witkin Cal. Proc. Prov Rem § 71

[§ 71] Persons and Entities Subject to Attachment.

(1) *Attachment Against Natural Person.* Attachment against a defendant who is a natural person is limited as follows:

(a) Attachment may be issued "only on a claim which arises out of the conduct by the defendant of a trade, business, or profession." (*C.C.P. 483.010(c)*; see *Nakasone v. Randall* (1982) 129 C.A.3d 757, 763, 181 C.R. 324 [defendant who sold personally held property on her own account was not engaged in business of selling real estate].)

(b) Attachment may not be issued with respect to a claim based on (1) a sale or lease of property, (2) a license to use property, (3) the furnishing of services, or (4) the loan of money, where the property, services, or money are "used by the defendant primarily for personal, family, or household purposes." (*C.C.P. 483.010(c)*.)

(2) *Attachment Against Partner.* *C.C.P. 483.010(c)* makes no distinction between persons sued individually as partners and those sued as sole proprietors. Hence, the subdivision applied to allow prejudgment attachment against a general partner who was sued as an individual to recover money he borrowed on behalf of the partnership. (*Security Pac. Nat. Bank v. Matek* (1985) 175 C.A.3d 1071, 1077, 223 C.R. 288.)

(3) *Attachment Against Corporation, Partnership, or Other Unincorporated Association.* Attachment may be issued against a corporation, partnership, or other unincorporated association without a showing that (a) the defendant was engaged in a trade, business, or profession; (b) the defendant was organized for or engaged in activity for profit; or (c) the goods, services, or money were not used primarily for personal, family, or household purposes. (Legislative Com. Comment to *C.C.P. 483.010*.)

(4) *Attachment Against Trust.* For purposes of *C.C.P. 483.010(c)*, a trust is not a "natural person," even though the trustees may be natural persons. Thus, a trust is subject to prejudgment attachment whether its activities arise out of the conduct by the trust of a trade, business, or profession. (*Kadison, Pfaelzer, Woodard, Quinn & Rossi v. Wilson* (1987) 197 C.A.3d 1, 4, 242 C.R. 595.)

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6. Action Against Surety, Guarantor, or Accommodation Maker.

a. Exhaustion of Security.

6 *Witkin Cal. Proc. Prov Rem* § 72

[§ 72] Exhaustion of Security.

A guaranty has traditionally been regarded as an independent obligation. On this theory, although the principal debtor may have given security and thus have precluded attachment against him or her, attachment would be permissible in an action against the guarantor. But the 1939 legislation abolishing the distinction between guarantors and sureties (C.C. 2787; see 1 *Summary* (10th), *Contracts*, §372) made the suretyship sections applicable to a guaranty; and, under C.C. 2849, a surety or guarantor is entitled to the benefit of every security held by the creditor. Accordingly, a strong dictum in *American Guaranty Corp. of Calif. v. Stoodly* (1964) 230 C.A.2d 390, 393, 41 C.R. 69, suggests that attachment may not be had in an action against a guarantor whose principal debtor gave security until the security is exhausted.

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6. Action Against Surety, Guarantor, or Accommodation Maker.

b. Trade or Business Requirement.

6 *Witkin Cal. Proc. Prov Rem* § 73

[§ 73] Trade or Business Requirement.

The interim statute (former C.C.P. 537.2(c); see *supra*, §52) allowed attachment against individuals "engaged in a trade or business." The current law applies to a claim against a natural person that "arises out of the conduct by the defendant of a trade, business or profession." (*C.C.P. 483.010(c)*; see *supra*, §71.)

In *Advance Transformer Co. v. Superior Court* (1974) 44 C.A.3d 127, 118 C.R. 350, a case arising under the interim statute, the court examined the question whether attachment could be had in an action against an individual guarantor of corporate obligations or the accommodation maker of notes given for business debts. The opinion held that: (a) the statute, properly construed, limited attachment to situations in which the claim arose out of the defendant's conduct of a business (44 C.A.3d 142); (b) the claim need not have been based on a transaction in which the defendant is the primary obligor (44 C.A.3d 143).

The test is whether a defendant guarantor is engaged in business. "If the defendant is engaged generally in the business of guaranteeing for a consideration of the debts of others, that is, lending credit, any liability incurred as a result is a debt arising out of the conduct of his business." Attachment is proper where the guarantor's activity "is such as to justify the conclusion that the guarantee of the primary obligor's debt sued upon is part and parcel of an activity which occupies the time, attention and effort of the guarantor for the purpose of livelihood or profit on a continuing basis." (44 C.A.3d 144.)

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7. Attachment Despite Arbitration Provision.

6 *Witkin Cal. Proc. Prov Rem § 74*

[§ 74] Attachment Despite Arbitration Provision.

Under some arbitration statutes, provisional remedies are specifically reserved to the parties. The Uniform Arbitration Act (7 U.L.A. (Master Ed.), p. 1 et seq.) is silent on the question of attachment in an action in which arbitration is sought or ordered. The California statute (*C.C.P. 1280* et seq.) was also silent on this issue until 1990.

In *Ross v. Blanchard* (1967) 251 C.A.2d 739, 59 C.R. 783, the court decided the issue in favor of the right to attach. Plaintiff contractors sued owners and attached. Defendant owners answered, setting up the affirmative defense of a demand for arbitration as provided in the agreement. On a trial of that defense, the judge found in their favor and ordered arbitration with a stay of further proceedings in the action. The arbitration award was in favor of plaintiffs, and they petitioned for confirmation. The judge confirmed the award, but also discharged their attachment. Plaintiffs appealed. *Held*, that part of the judgment of confirmation discharging the attachment reversed.

(a) Assuming that a provisional remedy cannot be had when arbitration is actually ordered, defendants at that time could have moved to discharge the attachment, but did not. (251 C.A.2d 743.)

(b) After the arbitration award to plaintiffs, they were in the same position as a litigant seeking a judgment on a written contract who can attach. Hence, even if the provisional remedy is disfavored during pendency of the arbitration, after filing their petition for confirmation, plaintiffs were entitled to use any provisional remedies to secure satisfaction of any judgment that might be entered on the award. (251 C.A.2d 743, 744.)

In 1990 the California statute was amended to provide a right to apply for attachment in or before an arbitration proceeding where the potential arbitration award "may be rendered ineffectual without provisional relief." (*C.C.P. 1281.8*; see *Loeb & Loeb v. Beverly Glen Music* (1985) 166 C.A.3d 1110, 1118, 212 C.R. 830 [motion for right to attach may be considered by trial court where judicial proceedings have been stayed to allow mandatory arbitration].)

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C. Property Subject to Attachment.

1. Attachable Property.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 75

[§ 75] In General.

(1) *Classification of Property.* Attachable property consists of "property of the defendant," classified in terms of three kinds of defendants: (a) corporations (*infra*, §76); (b) partnerships or other unincorporated associations (*infra*, §77); and (c) natural persons (*infra*, §78 et seq.). (*C.C.P.* 487.010; see Law Rev. Com. Comment; 23 *U.C.L.A. L. Rev.* 814; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.61 et seq.; 40 *A.L.R.4th* 927 [attachment of liquor license]; on property subject to attachment under the nonresident attachment procedure, see *C.C.P.* 492.040, *infra*, §238; C.E.B., 1 Debt Collection Practice 2d, §§6.6, 6.36.)

(2) *Plaintiff's Own Debt.* The objection that there can be no attachment of one's own debt was raised and rejected in *Hecht v. Smith* (1960) 183 *C.A.2d* 723, 7 *C.R.* 209. Plaintiffs gave a note and deed of trust as part of the price of real property purchased from defendant, then sued for damages for defendant vendor's fraud. They attached their own note and deed of trust in the possession of an escrow holder. *Held*, the attachment was proper. The negotiable note was an asset of defendant in the custody of a third person and was more than a mere evidence of indebtedness. (183 *C.A.2d* 727.)

West's Key Number Digest, Attachment 49 et seq.

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1. Attachable Property.

b. Property of Corporation.

6 *Witkin Cal. Proc. Prov Rem* § 76

[§ 76] Property of Corporation.

Where the defendant is a corporation, "all corporate property for which a method of levy is provided" by *C.C.P. 488.300* et seq. (see *infra*, §158 et seq.) is attachable. (*C.C.P. 487.010(a)*.) Thus, property interests for which no method of levy is provided by *C.C.P. 488.300* et seq., such as copyrights and patents, are not subject to attachment. (Legislative Com. Comment to *C.C.P. 487.010*.) Moreover, an attachment may not be issued against the property of a bank or trust company. (*Fin.C. 3105*.) (See *Studwell v. Korean Exchange Bank* (1997) 55 *C.A.4th* 1185, 1190, 64 *C.R.2d* 538 [corporate beneficiary's interest in executory negotiable letter of credit is not property of corporation subject to attachment].)

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1. Attachable Property.

c. Property of Partnership or Other Unincorporated Association.

6 *Witkin Cal. Proc. Prov Rem* § 77

[§ 77] Property of Partnership or Other Unincorporated Association.

Where the defendant is a partnership or other unincorporated association, "all partnership or association property for which a method of levy is provided" by *C.C.P. 488.300* et seq. (see *infra*, §158 et seq.) is attachable. (*C.C.P. 487.010(b).*)

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1. Attachable Property.

d. Property of Natural Person.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 78

[§ 78] In General.

C.C.P. 487.010(c) lists the following property of a natural person that is subject to attachment:

- (1) Interests in real property, except leasehold estates with unexpired terms of less than 1 year.
- (2) Equipment.
- (3) Farm products.
- (4) Inventory.
- (5) Negotiable documents of title.
- (6) Instruments.
- (7) Securities.
- (8) Unextracted minerals, oil, and gas.
- (9) Money on the premises of the defendant's trade, business, or profession and money and deposit accounts over \$ 1,000 located elsewhere. (On method of levy on money and deposit accounts, see *infra*, §175.)
- (10) The following property related to the conduct of the defendant's trade, business, or profession:
 - (a) Accounts receivable, chattel paper, and general intangibles, except individual claims with a principal balance of less than \$ 150.
 - (b) Final money judgments.

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1. Attachable Property.

d. Property of Natural Person.

2. Community Property.

6 *Witkin Cal. Proc. Prov Rem* § 79

[§ 79] Community Property.

Community property of a type described in *C.C. P. 487.010(c)* (supra, §78) is subject to attachment if it would be subject to enforcement of the judgment in the action in which the attachment is sought. Unless the provision or context requires otherwise, any provision of the Attachment Law that applies to (1) property of the defendant, (2) obligations owed to the defendant, or (3) property in the possession or under the control of the defendant also applies respectively to (1) the community property interest of the defendant's spouse, (2) obligations owed to either spouse that are community property, and (3) community property in the possession or under the control of the defendant's spouse. (*C.C.P. 487.010(d)*.) (See *14 Pacific L. J. 443*.) (For an analogous provision in the Enforcement of Judgments Law, see *C.C.P. 695.020*, *8 Cal. Proc. (5th), Enforcement of Judgment*, §58.)

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1. Attachable Property.

d. Property of Natural Person.

3. Individual Liability as Partner or Member of Association.

6 Witkin Cal. Proc. Prov Rem § 80

[§ 80] Individual Liability as Partner or Member of Association.

All individuals against whom attachment may be issued "are treated the same regardless of whether their personal liability arises out of their conduct of a trade, business, or profession as a sole proprietor, a partner, or a member of an association." (Law Rev. Com. Comment to *C.C.P. 487.010*.) Thus, the property listed in *C.C.P. 487.010(c)* (*supra*, §78) is subject to attachment on a claim based on a partner's or association member's individual liability, and the exemption of all other property provided by *C.C.P. 487.020(d)* (*infra*, §85) is available to such a defendant. (Law Rev. Com. Comments to *C.C.P. 487.010* and *C.C.P. 487.020*.)

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1. Attachable Property.

e. Fraudulently Transferred Property.

6 *Witkin Cal. Proc. Prov Rem* § 81

[§ 81] Fraudulently Transferred Property.

In an action for relief against a transfer or obligation under the Uniform Fraudulent Transfer Act (C.C. 3439 et seq.), and subject to C.C. 3439.08 (defenses, liability, and protection of transferee; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §499 et seq.), where a conveyance of an asset is fraudulent, a creditor may attach the transferred asset or its proceeds. (C.C. 3439.07(a)(2); see *Kuzmicki v. Nelson* (1950) 101 C.A.2d 278, 280, 255 P.2d 233; 7A (Part II) U.L.A. (Master Ed.), p. 155 [Uniform Fraudulent Transfer Act §7]; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §488 et seq.) Thus, property that is otherwise exempt from attachment may be subject to attachment under the Uniform Fraudulent Transfer Act. (C.C.P. 487.020; on exempt property, see *infra*, §82 et seq.) And under the Act, if the creditor has commenced an action on a claim against a debtor, the creditor may attach the transferred asset or its proceeds if, under applicable law, the remedy of attachment is available in the action and the property is subject to attachment in the hands of the transferee. (C.C. 3439.07(b); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §498.)

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2. Exempt Property.

a. Property Exempt From Enforcement of Money Judgment.

6 *Witkin Cal. Proc. Prov Rem* § 82

[§ 82] Property Exempt From Enforcement of Money Judgment.

All property that is exempt from enforcement of a money judgment is also exempt from attachment. (*C.C.P.* 487.020(a).) However, property exempt from enforcement of a money judgment may be subject to attachment under the Uniform Fraudulent Transfer Act. (*C.C.P.* 487.020; see *supra*, §81.)

The exemption includes not only the exemptions provided by the Enforcement of Judgments Law (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §60), but also property in spendthrift trusts, property *in custodia legis*, and property otherwise exempt by statute. (See Legislative Com. Comment to *C.C.P.* 487.020.) (See *Studwell v. Korean Exchange Bank* (1997) 55 *C.A.4th* 1185, 1190, 64 *C.R.2d* 538 [property exempt from enforcement of money judgment includes beneficiary's interest in executory negotiable letter of credit].)

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2. Exempt Property.

b. Property Necessary for Support.

6 *Witkin Cal. Proc. Prov Rem* § 83

[§ 83] Property Necessary for Support.

Property necessary for the support of a natural person defendant, or for family members supported by the defendant in whole or in part, is exempt from attachment. (*C.C.P. 487.020(b)*.) The exemption applies to family members supported by the defendant, whether or not they are living in the defendant's household. (Law Rev. Com. Comment to *C.C.P. 487.020*.) However, property necessary for support may be subject to attachment under the Uniform Fraudulent Transfer Act. (*C.C.P. 487.020*; see *supra*, §81.)

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2. Exempt Property.

c. Earnings.

6 *Witkin Cal. Proc. Prov Rem* § 84

[§ 84] Earnings.

Earnings are exempt from attachment. (*C.C.P. 487.020(c)*.) For this purpose, *C.C.P. 487.020* incorporates the definition of "earnings" used in the Wage Garnishment Law (8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §241 et seq.): an employee's compensation for personal services whether termed "wages, salary, commission, bonus or otherwise." (*C.C.P. 706.011(a)*.) However, earnings that are otherwise exempt may be subject to attachment under the Uniform Fraudulent Transfer Act. (*C.C.P. 487.020*; see *supra*, §81.)

An employer may not use the equitable right of setoff to circumvent the *C.C.P. 487.020* prohibition against attachment of employee's wages. (*Phillips v. Gemini Moving Specialists* (1998) 63 *C.A.4th* 563, 572, 74 *C.R.2d* 29 [citing *Barnhill v. Robert Saunders & Co.* (1981) 125 *C.A.3d* 1, 177 *C.R.* 803, 3 *Summary* (10th), *Agency and Employment*, §399].) (See *California State Employees' Assn. v. California* (1988) 198 *C.A.3d* 374, 378, 243 *C.R.* 602 [*Govt.C. 17051*, authorizing state to make deductions from employees' salaries to recoup overpayments, has been superseded by attachment law sections protecting wages].)

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2. Exempt Property.

d. Property Not Made Subject to Attachment.

6 *Witkin Cal. Proc. Prov Rem* § 85

[§ 85] Property Not Made Subject to Attachment.

Property not subject to attachment under *C.C.P. 487.010* (see *supra*, §76 et seq.) is exempt from attachment. (*C.C.P. 487.020(d)*.) It may be claimed as exempt under *C.C.P. 485.610* (*infra*, §140). (Legislative Com. Comment to *C.C.P. 487.020*.) However, property that is otherwise exempt under this provision may be subject to attachment under the Uniform Fraudulent Transfer Act. (*C.C.P. 487.020*; see *supra*, §81.)

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3. Homestead.

6 *Witkin Cal. Proc. Prov Rem* § 86

[§ 86] Homestead.

The recording of a homestead declaration, as defined in *C.C.P. 704.910*, does not limit or affect the plaintiff's right to attach the homestead, whether the declaration is recorded before or after the declared homestead is attached. (*C.C.P. 487.025(a)*.) The attachment lien attaches to the homestead in the amount of any surplus over the total of the following:

(1) All liens and encumbrances on the homestead at the time the attachment lien is created. (*C.C.P. 487.025(b)(1)*.)

(2) The homestead exemption. (*C.C.P. 487.025(b)(2)*; see *C.C.P. 704.730*, 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §218; *Martin v. Aboyan* (1983) 148 *C.A.3d* 826, 831, 196 *C.R.* 266.)

However, nothing in *C.C.P. 487.025(a)* or (b) limits the defendant's right to the exemption for property necessary for support under *C.C.P. 487.020(b)* (see *supra*, §83). (*C.C.P. 487.025(c)*.)

Notwithstanding *C.C.P. 487.025(b)*, a homestead is exempt from sale to the extent provided in *C.C.P. 704.800* where it is sought to be sold to enforce the judgment obtained in the same action as the attachment. (*C.C.P. 487.025(d)*.) (See 14 *Pacific L. J.* 443.)

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4. Claim of Real Property Exemption.

6 Witkin Cal. Proc. Prov Rem § 87

[§ 87] Claim of Real Property Exemption.

(1) *Relevant Statutes.* *C.C.P. 487.030* provides a means of claiming an exemption for real property, supplementing other sections that permit but do not require the defendant to make such a claim. (See *C.C.P. 484.070*, *infra*, §104 [where plaintiff seeks writ of attachment by noticed hearing]; *C.C.P. 484.350*, *infra*, §121 [where plaintiff seeks additional writ by noticed hearing]; *C.C.P. 484.530*, *infra*, §127 [where plaintiff seeks additional writ ex parte]; *C.C.P. 485.610*, *infra*, §140 [where plaintiff seeks writ of attachment ex parte].)

(2) *Property Exempt From Enforcement of Money Judgment.* Before entry of judgment in the action, the defendant may claim an exemption provided by *C.C.P. 487.020(a)* (see *supra*, §82) with respect to real property by following the procedure outlined in *C.C.P. 703.510* et seq. (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §180 et seq.). However, a claim of exemption under this subdivision must be denied if the claim has already been denied in the action. (*C.C.P. 487.030(a)*.)

(3) *Property Necessary for Support.* Prior to the entry of judgment, the defendant may claim the exemption for property necessary for support under *C.C.P. 487.020(b)* (see *supra*, §83) with respect to real property either (a) by following the procedure outlined in *C.C.P. 703.510* et seq. (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §180 et seq.), or (b) by following the procedure outlined in *C.C.P. 482.100(c)* (see *infra*, §222), except that the requirement of showing changed circumstances under *C.C.P. 482.100(a)* is not applicable. A claim of exemption under this subdivision must be denied if the claim has already been denied in the action and there is no change in circumstances affecting it. (*C.C.P. 487.030(b)*.)

(4) *Homestead Exemption.* *C.C.P. 487.030* does not limit the right to claim, after entry of judgment, a homestead exemption for real property under *C.C.P. 704.710* et seq. (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §216 et seq.) unless, prior to entry of judgment, the defendant has claimed the exemption provided by *C.C.P. 487.020(a)* (see *supra*, §82) with respect to the property and the claim has been denied. (*C.C.P. 487.030(d)*.)

(5) *References in Enforcement of Judgments Law.* For purposes of *C.C.P. 487.030*, references in *C.C.P. 703.510* et seq. to the "judgment debtor" must be deemed references to the defendant; references to the "judgment creditor" must be deemed references to the plaintiff. (*C.C.P. 487.030(c)*.)

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D. General Procedural Provisions.

1. Service.

6 *Witkin Cal. Proc. Prov Rem* § 88

[§ 88] Service.

(1) *Methods of Service.* A writ, notice, order, or other paper required or permitted under the Attachment Law may be served personally or by mail, except as otherwise required. (*C.C.P. 482.070(a)*.) A writ, notice, order, or other paper required to be personally served under the Attachment Law on a defendant who has not appeared in the action must be served like a summons under *C.C.P. 413.10* (see 3 *Cal. Proc. (5th), Actions*, §1001 et seq.). (*C.C.P. 482.070(d)*.)

(2) *Enforcement Statutes Are Applicable.* Generally, service is governed by the relevant provisions of the Enforcement of Judgments Law (*C.C.P. 684.010* et seq. and *684.110* et seq.). (*C.C.P. 482.070(b)*); see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §26 et seq.) However, references in the enforcement statutes to "judgment debtor," "judgment creditor," "writ," and "notice of levy" are deemed to be references, for purposes of attachment, to the defendant, the plaintiff, a writ of attachment, and a notice of attachment, respectively. (*C.C.P. 482.070(c)*); see 14 *Pacific L. J. 455*.) (See *C.C.P. 482.070(f)* [proof of service governed by *C.C.P. 684.210* et seq.].)

(3) *Service on Attorney.* If the defendant has an attorney of record, service must be made on the attorney, except service of a subpoena or other process requiring the defendant's attendance or service of a paper to bring the defendant into contempt. (*C.C.P. 482.070(e)*.)

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2. Affidavits.

6 *Witkin Cal. Proc. Prov Rem* § 89

[§ 89] Affidavits.

C.C.P. 482.040 sets forth standards for affidavits in attachment proceedings:

(1) The facts must be set forth with particularity.

(2) Except where statements on information and belief are permitted (see *infra*, §§125, 130, 138, 142, 196, 241), the affidavit must show affirmatively that the affiant, if sworn as a witness, will be able to testify competently to the facts stated in the affidavit. For matters shown by information and belief, the affidavit must state the facts on which the belief is based, showing the nature of the information and the informant's reliability. (See 23 *U.C.L.A. L. Rev.* 810.)

(3) The affiant may be any person who has knowledge of the facts.

A verified complaint that satisfies these requirements may be used instead of, or in addition to, an affidavit. (*C.C.P. 482.040*.)

These requirements are comparable to but not as restrictive as those provided for affidavits in summary judgment proceedings. (Legislative Com. Comment to *C.C.P. 482.040*; for same provision in claim and delivery law, see *C.C.P. 516.030*, *infra*, §253.)

West's Key Number Digest, Attachment 77 et seq.

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3. Discovery.

6 *Witkin Cal. Proc. Prov Rem* § 90

[§ 90] Discovery.

Where a right to attach order has been issued, the plaintiff may discover the identity, location, and value of property in which the defendant has an interest. The discovery is subject to the provisions of the Civil Discovery Act (*C.C.P. 2016.010* et seq.; see *2 Cal. Evidence (4th), Discovery*, §5 et seq.), both as to the means employed by the plaintiff and the protections available to the defendant. (*C.C.P. 485.230.*)

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4. Undertakings.

6 *Witkin Cal. Proc. Prov Rem* § 91

[§ 91] Undertakings.

The Bond and Undertaking Law, *C.C.P.* 995.010 et seq. (see *supra*, §8 et seq.), applies to bonds under the Attachment Law except to the extent that the Attachment Law prescribes a different rule or is inconsistent. (*C.C.P.* 489.010.) The Attachment Law applies to undertakings as follows:

(1) *Undertaking to obtain writ of attachment or protective order.* (See *C.C.P.* 489.210, 489.220 [original writ or order], *infra*, §§115, 116; *C.C.P.* 484.370, 484.520, 485.540 [additional writs], *infra*, §§123, 126, 139; *C.C.P.* 486.020 [protective order], *infra*, §143.)

(2) *Undertaking to obtain release of attached property or to terminate protective order.* (See *C.C.P.* 489.310 [attached property], *infra*, §213; *C.C.P.* 489.320 [protective order], *infra*, §148; *C.C.P.* 493.040(d) [property subject to bankruptcy or general assignment], *infra*, §189.)

(3) *Undertaking to protect third persons.* (See *C.C.P.* 491.170(c), 491.170(d), 491.340(a) [prevention of disposition of property or payment of debt to defendant], *infra*, §§199, 202.)

(4) *Undertaking after judgment.* (See *C.C.P.* 489.410(a), *C.C.P.* 921 [plaintiff's appeal], *infra*, §216; *C.C.P.* 489.410(c) [plaintiff's postjudgment motions], *infra*, §217; *C.C.P.* 489.420 [defendant's appeal], *infra*, §219.)

(5) *Filing and approval.* Unless the surety on an attachment undertaking is an admitted surety insurer (see *C.C.P.* 995.120; *supra*, §12), the undertaking must be presented to a proper court for approval and filed with the court in which the action is pending. (*C.C.P.* 489.060; see Law Rev. Com. Comment, noting that in some instances an undertaking may be approved by a court other than the court in which the action is pending.) The court will approve the undertaking if it determines that the undertaking is sufficient on its face and the affidavits of the sureties are sufficient. This approval has no effect on the beneficiary's right to object to the sufficiency of the undertaking. (Law Rev. Com. Comment to *C.C.P.* 489.060; on objections to undertakings, see *supra*, §§27, 28.)

West's Key Number Digest, Attachment 128 et seq.

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5. Judicial Council Forms.

6 *Witkin Cal. Proc. Prov Rem* § 92

[§ 92] Judicial Council Forms.

The Judicial Council is required to prescribe the form of the documents required by the Attachment Law. (*C.C.P.* 482.030(b).) The following forms have been approved:

Form No. AT-105 Application for Right to Attach Order, Temporary Protective Order, Etc.

Form No. AT-115 Notice of Application and Hearing for Right to Attach Order and Writ of Attachment.

Form No. AT-120 Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment.

Form No. AT-125 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Resident).

Form No. AT-130 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Nonresident).

Form No. AT-135 Writ of Attachment.

Form No. AT-138 Application and Order for Appearance and Examination.

Form No. AT-140 Temporary Protective Order.

Form No. AT-145 Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order.

Form No. AT-150 Order to Terminate, Modify, or Vacate Temporary Protective Order.

Form No. AT-155 Notice of Opposition to Right to Attach Order and Claim of Exemption.

Form No. AT-160 Undertaking by Personal Sureties.

Form No. AT-165 Notice of Attachment.

Form No. AT-167 Memorandum of Garnishee.

Form No. AT-170 Application to Set Aside Right to Attach Order and Release Attached Property, Etc.

Form No. AT-175 Order to Set Aside Attachment, to Substitute Undertaking, Etc.

Form No. AT-180 Notice of Lien.

With the exception of mandatory forms AT-138 and AT-160, use of these forms is optional. The forms are reproduced in West's California Judicial Council Forms, Volume I, and C.E.B., 1 Debt Collection Practice 2d, §6.96 et seq. (On use of forms, see Rutter Group, Civil Proc. Before Trial §9:895.)

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6. Courts and Court Commissioners.

6 *Witkin Cal. Proc. Prov Rem* § 93

[§ 93] Courts and Court Commissioners.

(1) *Authority of Court Commissioners.* Most of the judicial duties in attachment proceedings are defined as "subordinate judicial duties" under Cal. Const., Art. VI, §22, and may be performed by a court commissioner. (*C.C.P. 482.060(a)*; see *Loeb & Loeb v. Beverly Glen Music* (1985) 166 C.A.3d 1110, 1121, 212 C.R. 830 [court commissioner was authorized to hear and determine application for prejudgment attachment of corporate property and opposition].)

(2) *Exceptions.* The following exceptions are recognized:

(a) Contested claims of exemption (*infra*, §106). (*C.C.P. 482.060(b)(1)*.)

(b) Contested motions for determination of liability and damages for wrongful attachment (*infra*, §232). (*C.C.P. 482.060(b)(2)*.)

(c) Contested third-party claims (*infra*, §156). (*C.C.P. 482.060(b)(3)*.)

(d) Contested proceedings to enforce a third person's liability (*infra*, §201). (*C.C.P. 482.060(b)(4)*.)

The specification of exceptions in *C.C.P. 482.060(b)* does not limit the power of a court to appoint a temporary judge. (*C.C.P. 482.060(c)*.) (See *10 Pacific L. J. 361*.) (On temporary judges, see 2 *Cal. Proc.* (5th), *Courts*, §348 et seq.)

(3) *Small Claims Court.* Prejudgment attachment may not issue from the small claims court. (*C.C.P. 116.140(b)*.)

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7. Request for Secrecy.

6 *Witkin Cal. Proc. Prov Rem* § 94

[§ 94] Request for Secrecy.

A plaintiff may make a written request for secrecy at the time the complaint is filed. The request may be in the form of a notation by rubber stamp or "other suitable means" at the top of the first page of the complaint filed with the clerk. (*C.C.P. 482.050.*)

A plaintiff requesting secrecy under *C.C.P. 482.050* must file a declaration stating one of the following:

(1) The action is on an unsecured claim for money based on contract against a defendant who is not a natural person. (*C.R.C., Rule 2.580(1).*)

(2) The action is on an unsecured claim for money based on contract against a defendant who is a natural person; it arises out of the defendant's conduct of a trade, business, or profession; and the money, property, or services were not used by the defendant primarily for personal, family, or household purposes. (*C.R.C., Rule 2.580(1).*)

If a request is made, the clerk must not make the records and documents in the action available to the public before either (1) 30 days after the complaint is filed or (2) the date return of service of a notice of hearing or an ex parte writ of attachment is filed, whichever occurs first. However, the clerk must make the entire file available for inspection at any time to a party named in the complaint or to the party's attorney. (*C.C.P. 482.050.*)

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E. Noticed Hearing To Obtain Writ.

1. Application for Order and Writ.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 95

[§ 95] In General.

(1) *Requirement.* On filing the complaint or thereafter, the plaintiff may file an application for a right to attach order (see *infra*, §111) and a writ of attachment (see *infra*, §112) in the court in which the action is brought. (*C.C.P. 484.010.*) This application commences the noticed hearing procedure and is necessary in all but the exceptional circumstances permitting ex parte issuance of the writ (*infra*, §128). (Law Rev. Com. Comment to *C.C.P. 484.010*; for procedural checklist, see C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.77 et seq.; C.E.B., 1 Debt Collection Practice 2d, §6.17 et seq.; Cal. Civil Practice, 2A Procedure, §16:49 et seq.) (On noticed hearing procedure generally, see Cal. Civil Practice, 2A Procedure, §16:12 et seq.; Rutter Group, Civil Proc. Before Trial, §9:914 et seq.; for form of application, see Judicial Council Form No. AT-105 [Application for Right to Attach Order, Temporary Protective Order, Etc.]; for instructions and practice pointers on completing application, see Rutter Group, Civil Proc. Before Trial §9:898 et seq.) The application must be executed under oath. (*C.C.P. 484.020.*)

(2) *Content.* The application must include the following:

(a) A statement showing that the attachment is sought to secure recovery on a claim on which an attachment may be issued. (*C.C.P. 484.020(a).*)

(b) A statement of the amount to be secured by the attachment. (*C.C.P. 484.020(b).*)

(c) A statement that the attachment is not sought for a purpose other than recovery on the claim on which it is based. (*C.C.P. 484.020(c).*)

(d) A statement that the applicant has no information or belief that the claim is discharged or that the prosecution of the action is stayed in a proceeding under the Bankruptcy Act (*11 U.S.C., §101 et seq.*). (*C.C.P. 484.020(d).*)

(e) A description of the property to be attached and a statement that the plaintiff is informed and believes that the property is subject to attachment. (*C.C.P. 484.020(e)*; see *infra*, §97.)

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1. Application for Order and Writ.

b. Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 96

[§ 96] Affidavit.

The application must be supported by an affidavit showing that the plaintiff "would be entitled to a judgment on the claim." (*C.C.P. 484.030*; on general requirements for affidavits, see *C.C.P. 482.040*, *supra*, §89.) However, if the sworn application contains the necessary supporting evidence, it may constitute a sufficient affidavit. (Law Rev. Com. Comment to *C.C.P. 484.030*.)

Where the plaintiff is seeking to attach on an originally secured contract, averments that the security has diminished in value and that the plaintiff was not responsible for this diminution (see *supra*, §68) are no longer required to be included in the plaintiff's affidavit as a condition precedent to attachment. However, the inclusion of these averments is prudent, because the court need not consider additional evidence at the hearing on the attachment application without good cause (see *infra*, §107). (*Bank of America v. Salinas Nissan (1989) 207 C.A.3d 260, 273, 254 C.R. 748.*)

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1. Application for Order and Writ.

c. Specific Description of Property.

6 Witkin Cal. Proc. Prov Rem § 97

[§ 97] Specific Description of Property.

(1) *Corporation, Partnership, or Association.* Where the defendant is a corporation or a partnership or other unincorporated association it is unlikely to have exempt property, and the statute does not require a specific description. It is sufficient to refer to all corporate property that is subject to attachment under *C.C.P. 487.010(a)* (supra, §76) or all property of the partnership or other unincorporated association that is subject to attachment under *C.C.P. 487.010(b)* (supra, §77). (*C.C.P. 484.020(e)*.)

(2) *Natural Person.* The requirement of a specific description of the property is designed for the protection of individuals. Where the defendant is a natural person, the description must be "reasonably adequate to permit the defendant to identify the specific property sought to be attached." (*C.C.P. 484.020(e)*.) This enables the defendant to determine whether to claim exemption of the property. (Law Rev. Com. Comment to *C.C.P. 484.020*.) The specificity requirement may also avoid unnecessary hearings where the defendant is willing to concede that certain specified property is subject to attachment. (*Bank of America v. Salinas Nissan* (1989) 207 C.A.3d 260, 268, 254 C.R. 748.)

Although the writ issued is limited to property described in the application (see *infra*, §102), the plaintiff may apply *ex parte* for additional writs (see *infra*, §124 et seq.). A specific description helps the defendant to protect against those claims by seeking exemption for property not described in the application. (Law Rev. Com. Comment to *C.C.P. 484.020*.)

The requirement of a specific description does not prohibit the plaintiff from targeting for attachment all of the property of an individual defendant. (*Bank of America v. Salinas Nissan*, *supra*, 207 C.A.3d 268.)

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d. Amount To Be Secured.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 98

[§ 98] In General.

(1) *Indebtedness and Costs.* Subject to a reduction for claims against the plaintiff and to a special provision for unlawful detainer proceedings (*infra*, §100), the amount to be secured by an attachment is the sum of (a) the defendant's indebtedness claimed by the plaintiff and (b) costs and attorneys' fees allowed under *C.C.P. 482.110* (*infra*, §99). (*C.C.P. 483.015(a).*)

(2) *Reduction for Claims Against Plaintiff.* The amount to be secured by an attachment under *C.C.P. 483.015(a)* must be reduced by the sum of the following:

(a) Any enforceable and unsatisfied money judgment against the plaintiff. (*C.C.P. 483.015(b)(1).*)

(b) Any indebtedness claimed in a cross-complaint in the action, if attachment could be issued on such a claim. (*C.C.P. 483.015(b)(2).*)

(c) Any claim based on a defense of payment under *C.C.P. 431.70*, if attachment could have been issued on the claim had an action been brought on it when it was not barred by the statute of limitations. (*C.C.P. 483.015(b)(3).*)

(d) The value of any security interest held by the plaintiff in the defendant's property to secure the defendant's alleged debt to the plaintiff, together with any decrease in the value of the security interest resulting from the plaintiff's act or that of a prior holder of the interest. (*C.C.P. 483.015(b)(4).*)

The amount may not be reduced by a tort claim that has not resulted in a judgment. (Law Rev. Com. Comment to *C.C.P. 483.015.*) (For procedure in seeking reduction, see *C.C.P. 484.060*, *infra*, §103, and *C.C.P. 485.240*, *infra*, §135.)

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2. Costs and Attorneys' Fees.

6 *Witkin Cal. Proc. Prov Rem* § 99

[§ 99] Costs and Attorneys' Fees.

"Costs" means costs and disbursements. The term includes, but is not limited to, statutory fees, charges, commissions, and expenses. (*C.C.P. 481.055.*) Where costs or attorneys' fees are "allowable" (i.e., made recoverable by contract or statute), the plaintiff's application for a right to attach order and a writ of attachment (see *supra*, §95 et seq.) may include an estimate of costs and allowable fees. (*C.C.P. 482.110(a).*) The court may then, in its discretion, include the estimated amount in the amount to be secured by the attachment. (*C.C.P. 482.110(b).*) (On registered process server's fee as recoverable cost, see *C.C.P. 488.080(f)*, *infra*, §152.)

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d. Amount To Be Secured.

3. Unlawful Detainer.

6 *Witkin Cal. Proc. Prov Rem* § 100

[§ 100] Unlawful Detainer.

(1) *In General.* The amount to be secured by the attachment in an unlawful detainer proceeding includes the sum of the following:

(a) Rent due and unpaid on the date the complaint is filed. (*C.C.P. 483.020(a)(1).*)

(b) Any additional amount included at the court's discretion under *C.C.P. 483.020(c)* (*infra*, this section). (*C.C.P. 483.020(a)(2).*)

(c) Costs and attorneys' fees allowed under *C.C.P. 482.110* (*supra*, §99). (*C.C.P. 483.020(a)(3).*)

(2) *Anticipated Future Rent.* There may be a period of several months between the time a complaint for unlawful detainer is filed and judgment is obtained, during which the commercial lessor remains an involuntary but continuing creditor of the lessee. *C.C.P. 483.020* remedies this situation by providing that the plaintiff's application may include "an amount equal to the rent for the period from the date the complaint is filed until the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff ... computed at the rate provided in the lease." (*C.C.P. 483.020(b).*) The court has discretion to include that amount in the amount to be secured. (*C.C.P. 483.020(c).*) One factor the court may consider is the likelihood that the unlawful detainer proceeding will be contested, thereby causing considerable delay in bringing the action to trial. However, attachment will be allowed only where the premises were leased for trade, business, or professional purposes (see *C.C.P. 483.010*). (Law Rev. Com. Comment to *C.C.P. 483.020*.)

(3) *Reduction for Claims Against Plaintiff.* The amount to be secured is reduced for claims against the plaintiff under *C.C.P. 483.015(b)* (*supra*, §98). Thus, the amount of the attachment is reduced by the value of any security interest that is applicable exclusively to the rental obligation. (*C.C.P. 483.020(d)* Law Rev. Com. Comment.) But where the plaintiff has received a payment or holds a deposit to secure (1) the payment of rent and performance of other obligations under the lease or (2) only the performance of other obligations, the amount of the payment or deposit is not

subtracted from the amount to be secured by the attachment. (*C.C.P. 483.020(e)*; see *10 Pacific L. J. 363.*)

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2. Service of Notice on Defendant.

a. Statutory Requirement.

6 *Witkin Cal. Proc. Prov Rem § 101*

[§ 101] Statutory Requirement.

At the times prescribed in *C.C.P. 1005(b)* (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §15 et seq.), the defendant must be served with a notice of application and hearing. (*C.C.P. 484.040*; on contents of notice, see *infra*, §102; for form of notice, see Judicial Council Form No. AT-115 [Notice of Application and Hearing for Right to Attach Order and Writ of Attachment]; for instructions on preparing notice, see Rutter Group, *Civil Proc. Before Trial* §9:914 et seq.; on service generally, see *supra*, §88.) A copy of the summons and complaint and the application and any supporting affidavit must also be served. (*C.C.P. 484.040*.)

In *Loeb & Loeb v. Beverly Glen Music* (1985) 166 C.A.3d 1110, 212 C.R. 830, a 20-day notice period then required by *C.C.P. 484.040* was increased by 5 days under *C.C.P. 684.120*, extending the time for service by mail, but only 21 days' notice was given. *Held*, although it was error to hold a hearing on the defective notice, the error was harmless. Appellant had ample time to prepare and failed to appear because of his own change of counsel. Thus, the 4-day defect in notice had no impact on his failure to appear. (166 C.A.3d 1115, 1116.)

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2. Service of Notice on Defendant.

b. Contents of Notice.

6 *Witkin Cal. Proc. Prov Rem § 102*

[§ 102] Contents of Notice.

The notice of application and hearing must inform the defendant of the following:

(1) *Time and place of hearing.* A hearing on the plaintiff's application will be held at a specified time and place. (*C.C.P. 484.050(a).*)

(2) *Basis for order.* The order will be issued if the claim is probably valid and other requirements are met. The actual validity of the claim will not be determined at the hearing, but in subsequent proceedings, and will not be affected by the determination at the hearing. (*C.C.P. 484.050(b)*; see *C.C.P. 484.100*, *infra*, §109 [effect of determinations].)

(3) *Amount to be secured.* The amount to be secured is determined under *C.C.P. 482.110* (*supra*, §99), *C.C.P. 483.010* (*supra*, §57), *C.C.P. 483.015* (*supra*, §98), and *C.C.P. 483.020* (*supra*, §100). These statutes must be summarized in the notice. (*C.C.P. 484.050(c).*)

(4) *Issuance of writ.* If the order is issued, a writ to attach the property described in the application will be issued unless the property is exempt from attachment or its value clearly exceeds the amount to be secured. Additional writs may be issued on the basis of the order to attach other nonexempt property. (*C.C.P. 484.050(d)*; see *C.C.P. 482.120*, *infra*, §113 [writ restricting amount of levy] and *C.C.P. 484.310*, *infra*, §119 [application for additional writ].)

(5) *Opposition to order.* To oppose the order, the defendant must file with the court, and serve on the plaintiff, a notice of opposition and supporting affidavit as required by *C.C.P. 484.060* (*infra*, §103) not later than 5 court days before the hearing date. (*C.C.P. 484.050(e).*)

(6) *Claim of exemption.* As part of a notice of opposition or separately, the defendant may file and serve a claim of exemption of real or personal property whether or not the property is described in the application. If the defendant fails to do so, a later claim of exemption of personal property described in the application is barred in the absence of changed circumstances. But a later claim of exemption of property not described in the application or of real property described in the application is not barred. (*C.C.P. 484.050(f)*, (g); see *C.C.P. 484.060*, *infra*, §103 [notice of opposition] and

C.C.P. 484.070, *infra*, §104 [defendant's prelevy claim of exemption].)

(7) *Attendance at hearing*. The defendant, the defendant's attorney, or both may be present. (*C.C.P. 484.050(h)*.)

(8) *Advice of counsel*. The notice must contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing." (*C.C.P. 484.050(i)*.)

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3. Defendant's Response.

a. Notice of Opposition.

6 *Witkin Cal. Proc. Prov Rem § 103*

[§ 103] Notice of Opposition.

(1) *Requirement.* A defendant who opposes a right to attach order or objects to the amount sought to be secured must file and serve on the plaintiff a notice of opposition not later than 5 court days before the hearing. A defendant who fails to do so within the prescribed time may not oppose issuance of the order. (*C.C.P. 484.060(a)*.) However, where the plaintiff fails to object to the late filing, the court may consider the defendant's opposition papers. (*Lorber Industries v. Turbulence* (1985) 175 C.A.3d 532, 536, 221 C.R. 233.)

(2) *Content and Showing in Support.* The notice must state the grounds on which the defendant opposes the order or objects to the amount to be secured, and must be accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (*C.C.P. 484.060(a)*.) Although the Attachment Law permits a verified complaint to be used in lieu of an affidavit (*C.C.P. 482.040*, supra, §89), a pleading verified by a corporate officer on behalf of a corporation may not be considered as a declaration or affidavit establishing the facts it alleges (*C.C.P. 446*; see 4 *Cal. Proc.* (5th), *Pleading*, §465). Thus, such a pleading cannot support opposition to an application for a right to attach order. (*Lorber Industries v. Turbulence* (1985) 175 C.A.3d 532, 536, 221 C.R. 233 [verified cross-complaint made on behalf of corporation by corporate officer could not support opposition to application for right to attach order].)

(3) *Claim of Exemption.* The defendant may include a claim of exemption in the notice. (*C.C.P. 484.060(b)*); on claim of exemption, see *infra*, §104.) (For form of opposition, see Judicial Council Form No. AT-155 [Notice of Opposition to Right to Attach Order and Claim of Exemption].)

(4) *Plaintiff's Reply.* The plaintiff may file and serve a reply to the notice of opposition 2 court days before the date set for the hearing. (*C.C.P. 484.060(c)*.)

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3. Defendant's Response.

b. Defendant's Claim of Exemption.

6 Witkin Cal. Proc. Prov Rem § 104

[§ 104] Defendant's Claim of Exemption.

(1) *In General.* *C.C.P. 484.070* provides a prelevy procedure for claiming exemption of property from attachment. (On postlevy procedure, see *infra*, §222.) The procedure applies to both property described in the plaintiff's application (*supra*, §97) and property not described. (*C.C.P. 484.070(a), (b).*)

(2) *Content and Showing in Support.* The claim must (a) describe the exempt property and (b) specify the statutory section supporting the claim. (*C.C.P. 484.070(c).*) It must be accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (*C.C.P. 484.070(d).*) (On showing required to establish that property is necessary for support, see Rutter Group, Civil Proc. Before Trial §9:884; on form of claim, see Judicial Council Form No. AT-155 [Notice of Opposition to Right to Attach Order and Claim of Exemption].)

(3) *Filing and Service.* The claim and any supporting affidavit and points and authorities must be filed and served on the plaintiff not less than 5 court days before the date set for the hearing. (*C.C.P. 484.070(e).*)

(4) *Effect of Failure To Make or Support Claim.* Failure to claim exemption for any real property or undescribed personal property does not preclude a later claim, but failure to claim exemption of personal property described in the plaintiff's application precludes a later claim in the absence of changed circumstances under *C.C.P. 482.100* (*infra*, §222). If the defendant makes a claim, failure to prove that the property is exempt also precludes a later claim in the absence of changed circumstances. (*C.C.P. 484.070(a), (b).*)

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3. Defendant's Response.

c. Plaintiff's Opposition to Claim.

6 Witkin Cal. Proc. Prov Rem § 105

[§ 105] Plaintiff's Opposition to Claim.

(1) *In General.* A plaintiff may oppose a defendant's claim of exemption (supra, §104) by filing and serving on the defendant a notice of opposition to the claim not less than 2 days before the date set for the hearing, accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (C.C.P. 484.070(f); see Rutter Group, Civil Proc. Before Trial §9:942.)

(2) *Burden of Proof.* If the plaintiff files a notice of opposition, the defendant has the burden of proving that the property is exempt. (C.C.P. 484.070(g).)

(3) *Effect of Failure To Oppose Claim.* If a claimed exemption is not opposed, no writ of attachment may be issued on property claimed to be exempt. If all the property described in the application is claimed to be exempt, no hearing is held, no right to attach order or writ of attachment is issued, and any protective order (see infra, §141 et seq.) expires immediately. (C.C.P. 484.070(f); see *Bank of America v. Salinas Nissan* (1989) 207 C.A.3d 260, 270, 254 C.R. 748 [where plaintiff did not oppose guarantors' claims of exemption, guarantors were not required to prove claims, and failure to grant them was error].)

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4. Hearing.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 106

[§ 106] In General.

(1) *Nature and Scope of Requirement.* Neither a right to attach order nor a writ of attachment may be issued under the noticed hearing procedure "except after a hearing." (*C.C.P. 484.040*.) The term "hearing" in *C.C.P. 484.040* requires an oral hearing at which the court may take evidence, entertain and rule on evidentiary objections, and determine the merits based on written and oral presentations. (*Hobbs v. Weiss* (1999) 73 *C.A.4th* 76, 78, 82, 86 *C.R.2d* 146 [court lacked discretion to issue attachment order without oral hearing, especially where plaintiff brought up new cases and new facts in his reply papers, to which defendants had no formal opportunity to respond].)

(2) *Claim of Exemption.* Where a claim of exemption is contested, an appointed officer such as a court commissioner may not preside. (*C.C.P. 482.060(b)(1)*; see *supra*, §93.)

(3) *Denial of Application or Continuance for Plaintiff.* If the plaintiff is not ready to proceed or has failed to comply with the notice requirement of *C.C.P. 484.040* (*supra*, §101), the court may either deny the application or, for good cause, grant a continuance. If a continuance is granted, the effective period of a protective order (see *infra*, §§144, 145) may be extended on a showing of need for not more than 10 days after the new hearing date. (*C.C.P. 484.080(a)*.)

(4) *Continuance for Defendant.* The court may, in its discretion and for good cause, grant a continuance to the defendant for a reasonable period to enable him or her to oppose the issuance of a right to attach order. If a continuance is granted, the effective period of a protective order (see *infra*, §§144, 145) must be extended for not more than 10 days after the new hearing date, unless the defendant shows that the order should be modified or vacated under *C.C.P. 486.100* (*infra*, §145). (*C.C.P. 484.080(b)*.)

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4. Hearing.

b. Evidence.

6 *Witkin Cal. Proc. Prov Rem § 107*

[§ 107] Evidence.

(1) *Nature of Evidence.* The court must consider the showing made by the parties who appear. (*C.C.P. 484.090(a)*.) Its determinations must be made on the basis of the pleadings and other papers in the record. However, for good cause, the court may receive and consider additional oral or documentary evidence and additional points and authorities, or it may continue the hearing for the production of additional evidence or points and authorities. (*C.C.P. 484.090(d)*); on court's determination of disputed facts see Rutter Group, Civil Proc. Before Trial §§9:948, 9:948.1.)

(2) *Additional Evidence Only on Good Cause.* The court will ordinarily evaluate the attachment application solely on the basis of the pleadings and supporting affidavits without taking additional evidence. (*Bank of America v. Salinas Nissan (1989) 207 C.A.3d 260, 273, 254 C.R. 748.*) The Legislative Committee Comment to *C.C.P. 484.090* states: "[I]n the usual case, the court's determinations will be made on the basis of the pleadings, affidavits, and points and authorities filed prior to the hearing and ... any additional evidentiary showing at the hearing will be allowed only upon good cause. This procedure should result in a conservation of judicial time without prejudicing the rights of the parties and should avoid converting the hearing on a preliminary matter into a full-dress trial on the merits of the action."

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4. Hearing.

c. Burden of Proof.

6 *Witkin Cal. Proc. Prov Rem* § 108

[§ 108] Burden of Proof.

(1) *Effect of Opposition.* Whether or not the defendant appears in opposition, the plaintiff has the burden of proving (a) that the claim is one on which an attachment may be issued, and (b) the probable validity of the claim. (Legislative Com. Comment to *C.C.P.* 484.090.) "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." (*C.C.P.* 481.190.) If the defendant appears at the hearing, the court must consider the relative merits of the parties' positions and must determine the probable outcome of the case. (Law Rev. Com. Comment to *C.C.P.* 481.190; see *Loeb & Loeb v. Beverly Glen Music* (1985) 166 *C.A.3d* 1110, 1120, 212 *C.R.* 830; *Lorber Industries v. Turbulence* (1985) 175 *C.A.3d* 532, 535, 221 *C.R.* 233 [prejudgment remedy of attachment requires court to make preliminary determination of merits of dispute]; *Kemp Bros. Const. v. Titan Elec. Corp.* (2007) 146 *C.A.4th* 1474, 1478, 53 *C.R.3d* 673 [in breach of contract action against subcontractor, attachment was improperly granted and remand was required; trial court, believing that previous determination by hearing officer had preclusive effect, failed to weigh evidence relating to breach of contract; citing *Loeb & Loeb*].)

(2) *Effect of Lack of Opposition.* A defendant who fails to file a notice of opposition loses the right to oppose the issuance of a right to attach order. (*C.C.P.* 484.060, *supra*, §103.) This does not mean that issuance of the writ is automatic. "The court must still review the application to determine whether or not the plaintiff has made a *prima facie* showing for the issuance of the writ." (Legislative Com. Comment to *C.C.P.* 484.090.)

(3) *Claim of Exemption.* The plaintiff has the burden of opposing the defendant's claim of exemption. (*C.C.P.* 484.070(f).) If the plaintiff fails to do so, the court may not issue a valid right to attach order. (*Bank of America v. Salinas Nissan* (1989) 207 *C.A.3d* 260, 270, 254 *C.R.* 748.)

(4) *Where Contract Was Originally Secured.* In seeking an attachment on a contract that was originally secured, the plaintiff has the burden of proving that the security has diminished in value and that the plaintiff was not responsible for this diminution (see *supra*, §68). (*Bank of America v. Salinas Nissan*, *supra*, 207 *C.A.3d* 273.)

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4. Hearing.

d. Effect of Determinations.

6 Witkin Cal. Proc. Prov Rem § 109

[§ 109] Effect of Determinations.

(1) *Binding on Issues Relevant to Attachment.* The court's determinations in the hearing have a limited effect in subsequent proceedings (*C.C.P. 484.100*; Law Rev. Com. Comment):

(a) A determination that the plaintiff is not entitled to an attachment because the plaintiff has failed to establish the probable validity of the claim is binding on the plaintiff in a later action on the same claim. (On renewal of application after denial, see *infra*, §110.)

(b) A determination that certain property of the defendant is exempt is binding in a subsequent action unless changed circumstances deprive the defendant of the exemption.

(2) *Not Binding on Other Issues.* The court's determinations in the hearing are not binding on the following issues (*C.C.P. 484.100*; Law Rev. Com. Comment):

(a) Issues in the main action, such as the ultimate validity of the plaintiff's claim.

(b) Rights of the parties in another action arising on the same claim; i.e., in a later action the defendant may oppose attachment, claim that property is exempt, or seek to reduce the amount to be attached by an offsetting claim against the plaintiff.

(3) *Inadmissible in Evidence.* The court's determinations may not be given in evidence or referred to at the trial of the main action. (*C.C.P. 484.100*.) However, an affidavit filed in the proceeding may be admissible under the general rules of evidence. (Law Rev. Com. Comment to *C.C.P. 484.100*.)

(4) *No Waiver From Failure To Oppose or Rebut.* The defendant's failure to oppose the issuance of a right to attach order or to rebut any of the plaintiff's evidence does not constitute waiver of any defense to the plaintiff's claim or affect the defendant's right to produce or exclude evidence at the trial of the action. (*C.C.P. 484.110(a)*.)

The plaintiff's failure to oppose an order reducing the amount to be attached or to rebut any of the defendant's

evidence does not constitute waiver of any defense to the defendant's claim in the action or any other action or affect the plaintiff's right to produce or exclude evidence at the trial of any such action. (*C.C.P. 484.110(b)*.)

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5. Renewed Application.

6 *Witkin Cal. Proc. Prov Rem* § 110

[§ 110] Renewed Application.

After an application for a right to attach order has been denied, the court may properly consider and grant a renewed application. Information obtained during discovery may suffice to cause the trial judge to grant the renewed application. This was the case in *Film Packages v. Brandywine Film Productions, Ltd.* (1987) 193 C.A.3d 824, 238 C.R. 623, in which plaintiff's second application for a right to attach order was granted 7 months after denial of the original application. *Held*, neither C.C.P. 484.100 (supra, §109) nor failure to supply new facts justifying the application as required by C.C.P. 1008(b) (6 Cal. Proc. (5th), *Proceedings Without Trial*, §46) precluded the exercise of the court's inherent power to reconsider the application.

(a) The primary intent of C.C.P. 484.100 is to preclude the adoption of initial determinations made in connection with the issuance of an attachment in determining issues in the principal action. (193 C.A.3d 828, citing *North Hollywood Marble Co. v. Superior Court* (1984) 157 C.A.3d 683, 204 C.R. 55.) The rather vague language of that section does not sufficiently indicate a legislative intent to abrogate the plaintiff's right to renew the application under C.C.P. 1008(b). (193 C.A.3d 827.)

(b) The trial courts have inherent jurisdiction to increase the amount of an undertaking where the court, in its discretion, thinks an increase is appropriate. (193 C.A.3d 829, citing *North Hollywood Marble Co.*, supra.) Given this authority, it would be anomalous for the court to be unable to reconsider whether an attachment should be allowed at all. (193 C.A.3d 829.)

(c) Although new facts were not shown as required to justify a subsequent application under C.C.P. 1008(b), depositions taken after the first application made significant new information available to the court. Moreover, considering that plaintiff usually seeks to attach defendant's property early on in the proceedings, it did not appear that the depositions from which this new information derived could have been obtained earlier. (193 C.A.3d 829.)

(d) Notwithstanding C.C.P. 1008(b), a trial court has jurisdiction to hear a renewed motion on a fuller statement of facts previously furnished after having previously denied the same motion. (193 C.A.3d 830, citing *Strick v. Superior Court* (1983) 143 C.A.3d 916, 192 C.R. 314.)

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6. Right To Attach Order.

6 *Witkin Cal. Proc. Prov Rem* § 111

[§ 111] Right To Attach Order.

(1) *Basis for Order.* The court must issue a right to attach order if it finds the following:

(a) The claim on which the attachment is based is one on which an attachment may be issued. (*C.C.P. 484.090(a)(1).*)

(b) The plaintiff has established the probable validity of the claim on which the attachment is based. (*C.C.P. 484.090(a)(2)*; for meaning of "probable validity," see *C.C.P. 481.190*, *supra*, §108.)

(c) The attachment is sought solely for recovery on the claim on which the attachment is based. (*C.C.P. 484.090(a)(3).*)

(d) The amount to be secured by the attachment is greater than zero. (*C.C.P. 484.090(a)(4).*)

However, no order will be issued if the defendant shows that the order would violate the Bankruptcy Act (11 U.S.C., §101 et seq.). (See *C.C.P. 484.020(d)*, *supra*, §95; Legislative Com. Comment to *C.C.P. 484.090*.)

(2) *Content.* The order must state the amount to be secured by the attachment, determined under *C.C.P. 483.015* (*supra*, §98) or *C.C.P. 483.020* (*supra*, §100). (*C.C.P. 484.090(a).*) In addition, if the court determines that some or all of the defendant's property is exempt, the order must describe and prohibit attachment of that property. (*C.C.P. 484.090(c).*)

(3) *Judicial Council Form.* The Judicial Council has adopted a form for the order. (See Judicial Council Form No. AT-120 [Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment]; for instructions on preparing form, see Rutter Group, *Civil Proc. Before Trial* §9:951.)

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7. Writ of Attachment.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 112

[§ 112] In General.

(1) *Basis for Writ.* The plaintiff must first obtain a right to attach order, based on findings of a right to attach. (See *supra*, §111.) The court must then order a writ of attachment to be issued by the clerk (a) if it finds that the defendant has failed to prove that all the property sought to be attached is exempt (see *supra*, §104), and (b) on the filing of an undertaking (see *infra*, §§115, 116). (*C.C.P. 484.090(b)*; see Law Rev. Com. Comment.)

(2) *Content.* The writ must include the following information:

(a) The date of issuance of the writ. (*C.C.P. 488.010(a)*.)

(b) The title of the court and the cause and number of the action. (*C.C.P. 488.010(b)*.)

(c) The name and address of the plaintiff and the name and last known address of the defendant. (*C.C.P. 488.010(c)*.)

(d) The amount to be secured by the attachment (see *supra*, §98 et seq.). (*C.C.P. 488.010(d)*.)

(e) A description of the property to be levied on. (*C.C.P. 488.010(e)*.)

(3) *Judicial Council Form.* The Judicial Council has adopted a form for the writ. (See Judicial Council Form No. AT-135 [Writ of Attachment].)

(4) *Multiple and Additional Writs.* The Attachment Law provides for several writs in the same form (see *infra*, §117), for additional writs in a new form (see *infra*, §§118 et seq., 138, 139), and for alias writs where the original writ has been lost (see *infra*, §117).

West's Key Number Digest, Attachment 140 et seq.

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7. Writ of Attachment.

b. Writ Restricting Amount of Levy.

6 *Witkin Cal. Proc. Prov Rem* § 113

[§ 113] Writ Restricting Amount of Levy.

If the court determines at the hearing on issuance of a writ "that the value of the defendant's interest in the property described in the plaintiff's application clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment," the court may (1) "direct the order of levy on the property described in the writ" or (2) "restrict the amount of the property to be levied upon." (*C.C.P. 482.120.*) This provision "recognizes the court's discretion to examine the plaintiff's application and to seek to avoid the attachment of an excessive amount of the defendant's property by ordering issuance of a writ describing a lesser amount of the defendant's property than is described in the plaintiff's application for the writ." (Law Rev. Com. Comment to *C.C.P. 482.120.*) (See Judicial Council Form No. AT-170 [Application to Set Aside Right to Attach Order and Release Attached Property, Etc.]; Judicial Council Form No. AT-175 [Order to Set Aside Attachment, to Substitute Undertaking, Etc.].) (For attack on excessive attachment after levy, see *infra*, §§220, 221.)

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8. Turnover Order.

6 *Witkin Cal. Proc. Prov Rem* § 114

[§ 114] Turnover Order.

(1) *In General.* As in claim and delivery (see *infra*, §263), the court may issue a turnover order, in addition to or in aid of a writ of attachment, requiring the defendant to cooperate in transferring possession. (Law Rev. Com. Comment to *C.C.P.* 482.080.) The order directs the defendant to transfer either or both the following to the levying officer:

(a) "Possession of the property to be attached if the property is sought to be attached by taking it into custody." (*C.C.P.* 482.080(a)(1).)

(b) "Possession of documentary evidence of title to property of or a debt owed to the defendant that is sought to be attached." (*C.C.P.* 482.080(a)(2).) This is appropriate, e.g., where a motor vehicle is attached and the certificate of ownership is sought. (Law Rev. Com. Comment to *C.C.P.* 482.080.)

(2) *Service.* The order may be served when the property or debt is levied on or thereafter. (*C.C.P.* 482.080(a)(2).) It must be personally served on the defendant and must contain a notice that failure to comply may subject the defendant to arrest and punishment for contempt. (*C.C.P.* 482.080(b).)

(3) *Location of Property Subject to Order.* Under *C.C.P.* 482.080(a), a turnover order is conditioned on the issuance of a writ of attachment. The writ of attachment must be directed to a levying officer in the county in which property described in the writ may be located, and the turnover order in aid of the writ must direct the defendant to transfer possession of the property to that same officer, i.e., the officer in the county where the property is located. (*Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 C.A.4th 1100, 1106, 18 C.R.3d 104 [property to be levied on was not located in California; court exceeded its authority in ordering sheriff of Orange County to levy on writ of attachment, and court therefore lacked authority under *C.C.P.* 482.080 to issue turnover order in aid of that writ].)

(4) *Nature of Property Subject to Order.* *C.C.P.* 482.080 does not authorize a turnover order in aid of a writ levied against an account receivable or a deposit account. The types of property that may be attached by the levying officer taking the property into custody are tangible personal property in the possession or under the control of the defendant under *C.C.P.* 488.335, chattel paper under *C.C.P.* 488.435(a) or 700.100(a)(1), instruments under *C.C.P.* 488.440 or 700.110(a)(1), negotiable documents of title under *C.C.P.* 488.445 or 700.120(a), and certain types of securities under

C.C.P. 488.450 or U.C.C. 8112(a). "Unlike these tangible assets and documentary evidence of tangible and intangible assets, deposit accounts and accounts receivable are attached by service of the writ on the financial institution or the account debtor, *not* by taking any property into custody." (*Pacific Decision Sciences Corp. v. Superior Court, supra*, 121 C.A.4th 1109.)

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9. Undertaking.

a. Necessity.

6 *Witkin Cal. Proc. Prov Rem § 115*

[§ 115] Necessity.

Before issuance of a writ of attachment (*supra*, §112, *infra*, §131), a temporary protective order (*infra*, §143), or an order permitting a lien in a pending action or proceeding (*infra*, §204), the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for any wrongful attachment by the plaintiff in the action. (*C.C.P.* 489.210.) (On liability for wrongful attachment, see *infra*, §231 *et seq.*; on undertaking generally, see *Cal. Civil Practice*, 2A Procedure, §16:38; for form of undertaking, see Judicial Council Form No. AT-160 [Undertaking by Personal Sureties (Attachment and Claim of Delivery)].)

In *Vershbow v. Reiner* (1991) 231 *C.A.3d* 879, 282 *C.R.* 684, the court directed the clerk to issue the writ on filing of an undertaking; but plaintiff ignored the order and the clerk issued the writ without having a bond on file. On plaintiff's later request for a sale of the attached property, the trial judge found the attachment invalid. *Held*, absent the prerequisite undertaking, the writ of attachment issued by the clerk was void for failure to comply with *C.C.P.* 489.210, and the trial judge correctly refused to allow plaintiff to execute on the writ. (231 *C.A.3d* 883.)

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9. Undertaking.

b. Amount.

6 *Witkin Cal. Proc. Prov Rem* § 116

[§ 116] Amount.

Ordinarily, the amount of the undertaking is \$ 10,000. (*C.C.P. 489.220(a)*.) However, on objection, if the court determines that the "probable recovery for wrongful attachment" exceeds the amount of the undertaking, it must order an increase to the amount of probable recovery. (*C.C.P. 489.220(b)*.) (See Judicial Council Form No. AT-170 [Application to Set Aside Right to Attach Order and Release Attached Property, Etc.]; Judicial Council Form No. AT-175 [Order to Set Aside Attachment, to Substitute Undertaking, Etc.])

The term "probable recovery for wrongful attachment" in *C.C.P. 489.220(b)* does not mean "probable loss" in the sense of "the total damages defendant will probably sustain presuming that the attachment issued on a meritless action." Rather, the court has discretion "to consider the probability that the plaintiff will prevail in the action and to adjust the amount of the total expected damages to defendant according to that probability factor." In addition, the threat of excessive attachment does not justify an increase in the undertaking; the defendant is adequately protected by the motion procedure for releasing excessive attachment provided by *C.C.P. 488.720* (see *infra*, §221). (*North Hollywood Marble Co. v. Superior Court* (1984) 157 C.A.3d 683, 686, 688, 692, 204 C.R. 55.)

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10. Multiple Writs.

6 *Witkin Cal. Proc. Prov Rem* § 117

[§ 117] Multiple Writs.

Two types of multiple writs are authorized:

(1) *Writs in same form*. Several writs "in the same form" may be issued "simultaneously or from time to time" on the same undertaking, whether or not a previously issued writ has been returned. (*C.C.P. 482.090(a)*.) This makes it possible, e.g., to levy on property located in different counties. (See Law Rev. Com. Comment to *C.C.P. 482.090*.) However, for purposes of expiration of an attachment lien (see *infra*, §187), the date of issuance is the date the writ is first issued. (*C.C.P. 482.090(c)*.)

(2) *Alias writs*. Where the writ has been returned or the plaintiff makes a showing by affidavit that it has been lost, the clerk, on demand before judgment, may issue an alias writ in the same form without a new undertaking. (*C.C.P. 482.090(b)*.)

The procedure for obtaining additional writs in a new form is distinct. (See *infra*, §§118 et seq., 138, 139.)

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11. Additional Writs.

a. Nature and Purpose.

6 *Witkin Cal. Proc. Prov Rem § 118*

[§ 118] Nature and Purpose.

(1) *Former Law.* Former C.C.P. 540 authorized the issuance of additional writs on the same affidavit and undertaking. These writs were designed to permit the plaintiff to reach all of the defendant's attachable assets at the same time even though they were in widely separated areas. (See *Martinovich v. Marsicano* (1907) 150 C. 597, 600, 89 P. 333.)

(2) *Current Law.* The current law authorizes additional writs in a new form to reach other property by either a noticed hearing or an ex parte hearing. The noticed hearing procedure allows the defendant to claim that the property is exempt. Under the ex parte procedure, a claim of exemption of property not previously claimed to be exempt can only be made after the levy. (Law Rev. Com. Comment to C.C.P. 484.310.) (On noticed hearing procedure, see *infra*, §119 et seq.; on ex parte procedure, see *infra*, §124 et seq.)

Where the defendant is a corporation or partnership, the writ will normally refer to all corporate or partnership property subject to attachment (see *supra*, §§76, 77); hence, additional writs will be in the same form. (Law Rev. Com. Comment to C.C.P. 484.310; see C.C.P. 482.090(a), *supra*, §117.)

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11. Additional Writs.

b. Noticed Hearing Procedure.

1. Application.

6 *Witkin Cal. Proc. Prov Rem* § 119

[§ 119] Application.

The application provisions for additional writs are similar to those governing the original application for a right to attach order and writ. (See *C.C.P. 484.010, 484.020*, supra, §§95, 97.)

An application for an additional writ of attachment may be made after (1) a right to attach order has been issued under *C.C.P. 484.010* et seq., or (2) the court finds that the plaintiff is entitled to an order under *C.C.P. 485.240* (motion to set aside order or reduce amount secured; infra, §135). (*C.C.P. 484.310*.) (For form of application, see Judicial Council Form No. AT-105 [Application for Right to Attach Order, Temporary Protective Order, Etc.]) The application must be executed under oath and must include the following:

(1) A statement that the plaintiff has been issued a right to attach order under *C.C.P. 484.010* et seq. or that the court has found that the plaintiff is entitled to such an order under *C.C.P. 485.240*. (*C.C.P. 484.320(a)*.)

(2) A statement of the amount to be secured (supra, §98 et seq.). (*C.C.P. 484.320(b)*.)

(3) A description of the property to be attached sufficient to satisfy the requirements of *C.C.P. 484.020* (supra, §97), and a statement that the plaintiff is informed and believes that the property is subject to attachment. (*C.C.P. 484.320(c)*.)

(4) A statement that the applicant has no information or belief that the claim is discharged or that the prosecution is stayed in a proceeding under the Bankruptcy Act (*11 U.S.C., §101* et seq.) (see supra, §95). (*C.C.P. 484.320(d)*.)

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b. Noticed Hearing Procedure.

2. Notice to Defendant.

6 *Witkin Cal. Proc. Prov Rem* § 120

[§ 120] Notice to Defendant.

(1) *In General.* The notice provisions for additional writs are similar to those governing notice with respect to the original application for a right to attach order and writ. (See *C.C.P. 484.040*, *supra*, §101 and *C.C.P. 484.050*, *supra*, §102.)

(2) *Service.* A copy of the application (*supra*, §119) and a notice of application and hearing must be served on the defendant at least 15 days before the hearing (*infra*, §123). (*C.C.P. 484.330.*)

(3) *Content.* The notice of application and hearing must provide the following information to the defendant:

(a) *Filing of application.* The plaintiff has applied for a writ of attachment to attach the property described in the application. (*C.C.P. 484.340(a).*)

(b) *Time and place of hearing.* A hearing to determine whether the plaintiff is entitled to the writ will be held at a specified time and place. (*C.C.P. 484.340(b).*)

(c) *Issuance of writ.* A writ will be issued to attach the property described in the application unless the property is exempt from attachment or "its value clearly exceeds the amount necessary to satisfy the amount to be secured." (*C.C.P. 484.340(c).*)

(d) *Claim of exemption.* The defendant may file and serve a claim of exemption under *C.C.P. 484.350* (*infra*, §121) not later than 5 days before the hearing date. If the defendant fails to make a claim with respect to personal property, the defendant may not later claim the exemption in the absence of "a change in circumstances occurring after the expiration of the time for claiming exemptions." (*C.C.P. 484.340(d).*)

(e) *Attendance at hearing.* The defendant or the defendant's attorney, or both may be present. (*C.C.P. 484.340(e).*)

(f) *Advice of counsel.* The notice must also contain the following statement: "You may seek the advice of an

attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing." (*C.C.P. 484.340(f)*.)

(4) *Judicial Council Form*. The form of the notice is provided by Judicial Council Form No. AT-115 [Notice of Application and Hearing for Right to Attach Order and Writ of Attachment].

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b. Noticed Hearing Procedure.

3. Defendant's Claim of Exemption.

6 *Witkin Cal. Proc. Prov Rem § 121*

[§ 121] Defendant's Claim of Exemption.

(1) *In General.* The exemption provisions for additional writs are similar to those governing exemption with respect to the original right to attach order and writ. (See *C.C.P. 484.070*, *supra*, §104.)

(2) *Defendant's Right To Claim Exemption.* The defendant may seek exemption from attachment of property described in the plaintiff's application by a claim of exemption. (*C.C.P. 484.350(a)*.)

(3) *Content, Filing, and Service of Claim.* The claim must describe the property claimed to be exempt and must specify the statutory section supporting the claim. (*C.C.P. 484.350(b)*.) It must be accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (*C.C.P. 484.350(c)*.) The claim and any supporting affidavit and points and authorities must be filed and served on the plaintiff not less than 5 court days before the date set for the hearing. (*C.C.P. 484.350(d)*.)

(4) *Effect of Defendant's Failure To Make or Support Claim.* Failure to claim exemption for personal property precludes a later claim in the absence of changed circumstances under *C.C.P. 482.100* (*infra*, §222). If the defendant makes a claim with respect to real or personal property, failure to prove that the property is exempt also precludes a later claim in the absence of changed circumstances. (*C.C.P. 484.350(a)*.)

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b. Noticed Hearing Procedure.

4. Plaintiff's Opposition to Claim.

6 *Witkin Cal. Proc. Prov Rem* § 122

[§ 122] Plaintiff's Opposition to Claim.

(1) *In General.* The opposition provisions for additional writs are similar to those governing opposition with respect to the original right to attach order and writ. (See *C.C.P. 484.070*, *supra*, §105.)

(2) *Plaintiff's Notice of Opposition.* To oppose a defendant's claim of exemption, the plaintiff must file and serve on the defendant, not less than 2 days before the date of the hearing, a notice of opposition to the claim, an affidavit supporting factual issues, and points and authorities supporting legal issues. (*C.C.P. 484.360(a)*.)

(3) *Burden of Proof.* If the plaintiff files a notice of opposition to the defendant's claim, the defendant has the burden of proving that the property is exempt. (*C.C.P. 484.360(c)*.)

(4) *Effect of Plaintiff's Failure To Oppose Claim.* If a claimed exemption is not opposed, no writ of attachment may be issued on property claimed to be exempt. If all the property described in the application is claimed to be exempt and the exemption is not opposed, no hearing is held and no writ of attachment may be issued. (*C.C.P. 484.360(b)*.)

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b. Noticed Hearing Procedure.

5. Hearing and Issuance of Writ.

6 *Witkin Cal. Proc. Prov Rem* § 123

[§ 123] Hearing and Issuance of Writ.

(1) *In General.* An additional writ may not be issued under the noticed hearing procedure "except after a hearing." (*C.C.P. 484.330.*) The hearing is conducted following the procedures governing the hearing on the original writ (see *C.C.P. 484.090*, *supra*, §§107, 108). (*C.C.P. 484.370.*)

(2) *Prerequisites to Issuance.* The court must order a writ of attachment to be issued, on the filing of an undertaking (see *supra*, §115), if it finds the following:

(a) A right to attach order has been issued under *C.C.P. 484.010* et seq. (*supra*, §95 et seq.) or the plaintiff is entitled to an order under *C.C.P. 485.240* (*infra*, §135). (*C.C.P. 484.370(a).*)

(b) The defendant has failed to prove that the property sought to be attached, or that portion of it described in the writ, is exempt from attachment (see *supra*, §§121, 122). (*C.C.P. 484.370(b).*)

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c. Ex Parte Procedure.

1. In General.

6 Witkin Cal. Proc. Prov Rem § 124

[§ 124] In General.

C.C.P. 484.510 et seq. provide an ex parte procedure for issuance of an additional writ after a right to attach order has been issued following a noticed hearing. (See Law Rev. Com. Comment to *C.C.P. 484.510*.) (On ex parte procedure for obtaining additional writ after issuance of right to attach order following ex parte hearing, see *C.C.P. 485.510* et seq., *infra*, §§138, 139.)

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c. Ex Parte Procedure.

2. Application and Supporting Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 125

[§ 125] Application and Supporting Affidavit.

(1) *Application*. After a right to attach order has been issued under *C.C.P. 484.010* et seq. (supra, §95 et seq.) or the court has found that the plaintiff is entitled to a right to attach order under *C.C.P. 485.240* (infra, §135 et seq.), the plaintiff may apply for an additional writ without notice to the defendant. The application must meet the requirements of *C.C.P. 484.320* (supra, §119). (*C.C.P. 484.510(a)*.) (For form of application, see Judicial Council Form No. AT-105 [Application for Right to Attach Order, Temporary Protective Order, Etc.])

(2) *Supporting Affidavit*. The application must be supported by an affidavit, which may be based on information and belief, showing that the property is not exempt from attachment. (*C.C.P. 484.510(b)*); on general requirements for affidavits, see *C.C.P. 482.040*, supra, §89.)

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c. Ex Parte Procedure.

3. Ex Parte Hearing and Issuance of Writ.

6 Witkin Cal. Proc. Prov Rem § 126

[§ 126] Ex Parte Hearing and Issuance of Writ.

The court, after examining the application and affidavit, must, on the filing of an undertaking (see *supra*, §115), order a writ of attachment to be issued if it finds the following:

(1) A right to attach order has been issued under *C.C.P. 484.010* et seq. (*supra*, §95 et seq.) or the plaintiff is entitled to a right to attach order under *C.C.P. 485.240* (*infra*, §135 et seq.). (*C.C.P. 484.520(a)*.)

(2) The affidavit shows that the property sought to be attached, or the portion described in the writ, is not exempt from attachment (*supra*, §§121, 122). (*C.C.P. 484.520(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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6 *Witkin Cal. Proc. Prov Rem* § 127

[§ 127] Defendant's Claim of Exemption.

Under the ex parte procedure, the defendant has not had an opportunity to claim exemption, and the determination that the property is not exempt has been made on the plaintiff's affidavit. However, the notice of attachment served at the time of levy (see *infra*, §153) will advise the defendant of the defendant's right to make a claim where the writ has been issued ex parte. The defendant may then claim the exemption. (Law Rev. Com. Comment to *C.C.P.* 484.530.)

The defendant may claim an exemption of real or personal property levied on, following the procedure for claiming exemption to levy with respect to a money judgment under *C.C.P.* 703.510 et seq. (see 8 *Cal. Proc.*, (5th) *Enforcement of Judgment*, §180 et seq.). For this purpose, references in the Enforcement of Judgments Law to "judgment debtor" and "judgment creditor" are deemed to be references to the defendant and the plaintiff, respectively. A claim of exemption as to personal property must be made not later than 30 days after the levying officer serves the defendant with a notice of attachment. (*C.C.P.* 484.530(a).)

Not later than 30 days after the notice of attachment is served, the defendant may claim exemption for property necessary for support under *C.C.P.* 487.020(b) (*supra*, §83), following either of two procedures: (1) the procedure for exemption with respect to levy of a money judgment or (2) the procedure set forth in *C.C.P.* 482.100(c) (*infra*, §222), except that no showing of changed circumstances is required. (*C.C.P.* 484.530(b).)

Notwithstanding *C.C.P.* 484.530(a) and (b), a claim of exemption must be denied if the claim was denied earlier and there is no change in circumstances. (*C.C.P.* 484.530(c).) This provision applies where the defendant has claimed exemption for (1) personal property not described in the plaintiff's application or (2) real property, but has failed to prove the right to an exemption. (Law Rev. Com. Comment to *C.C.P.* 484.530.)

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F. Ex Parte Procedure To Obtain Writ.

1. Great or Irreparable Injury.

a. Requirement.

6 *Witkin Cal. Proc. Prov Rem § 128*

[§ 128] Requirement.

(1) *In General.* Except as otherwise provided by statute, a right to attach order or writ of attachment may not be issued ex parte unless the plaintiff presents an affidavit containing facts that demonstrate that great or irreparable injury would result to the plaintiff if issuance of the order were delayed pending a hearing on notice. (*C.C.P. 485.010(a)*; see 23 *U.C.L.A. L. Rev.* 806; on ex parte procedure generally, see Cal. Civil Practice, 2A Procedure, §16:24 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.70 et seq.; on alternative request for ex parte temporary protective order, see *infra*, §143; 9:887; on practice considerations, see C.E.B., 1 Debt Collection Practice 2d, §6.33 et seq.; Rutter Group, Civil Proc. Before Trial §§9:880; on ex parte issuance in nonresident attachment, see *infra*, §235 et seq.)

(2) *Special Statutes.* The exemption recognizes the specific authorization in other statutes to issue an ex parte attachment. The following statutes are illustrative:

(a) *Harb. & Nav.C. 495.1* (attachment of vessel).

(b) *Health & Saf.C. 11501* (action for recovery of public funds paid to person engaged in unlawful sale of controlled substances).

(c) *Rev.C. 6713* (action to collect sales and use tax).

(d) *Rev.C. 7864* (action to collect vehicle fuel license tax).

(e) *Rev.C. 8972* (action to collect use fuel tax).

The showing of great and irreparable injury may be dispensed with where a statute so provides. For example, a showing of great or irreparable injury is not required for ex parte attachment by state agricultural products marketing commissions to collect unpaid assessments. (See *Food & Ag.C. 66641, 67112.5, 68113, 69093, 72112.5, 75153, 76163.*)

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1. Great or Irreparable Injury.

b. Sufficient Showing.

6 *Witkin Cal. Proc. Prov Rem* § 129

[§ 129] Sufficient Showing.

The required showing for the issuance of a writ of attachment ex parte (see *supra*, §128) is made by showing any of the following:

(1) It may be inferred from the circumstances that there is a danger that the property sought to be attached would be concealed or otherwise made unavailable to levy or that its value would be substantially impaired if the order's issuance were delayed pending a noticed hearing. (*C.C.P. 485.010(b)(1).*)

(2) It may be inferred from the circumstances that the defendant has not paid the debt underlying the requested attachment and is insolvent in the sense of not paying debts as they become due, unless the debts are subject to a bona fide dispute. The plaintiff's affidavit must state the defendant's known undisputed debts, that the debts are not subject to a bona fide dispute, and the basis for the determination that the debts are undisputed. (*C.C.P. 485.010(b)(2).*) If a writ is issued solely on a showing of insolvency and the defendant requests the court to review the issuance of the writ, a hearing is required within 5 court days after the plaintiff is served with notice of the defendant's request. (*C.C.P. 485.010(c).*)

(3) A bulk sales notice has been recorded and published (see 4 *Summary* (10th), *Sales*, §224) with respect to a bulk transfer by the defendant. (*C.C.P. 485.010(b)(3).*) The writ must be limited to the property covered by the bulk sales notice or the proceeds of the sale. In addition to any other required service, the writ must be served by the levying officer on the transferee or auctioneer no more than 5 days after the levy. (*C.C.P. 485.010(c).*)

(4) An escrow has been opened under *B. & P.C. 24074* with respect to the sale of a liquor license by the defendant. (*C.C.P. 485.010(b)(4).*) The writ must be limited to the plaintiff's pro rata share of the proceeds of the sale of the license in escrow. (*C.C.P. 485.010(c).*)

(5) Any other circumstance where great or irreparable injury would result to the plaintiff if issuance of the order were delayed pending a noticed hearing. (*C.C.P. 485.010(b)(5).*)

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2. Application and Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 130

[§ 130] Application and Affidavit.

(1) *Application*. The plaintiff may file an ex parte application for a right to attach order and a writ of attachment when the complaint is filed or thereafter. (*C.C.P. 485.210(a)*.) The application must satisfy the requirements of an application under the noticed hearing procedure (*C.C.P. 484.020*, supra, §§95, 97), and must include a statement showing that the requirement of *C.C.P. 485.010* (great or irreparable injury; supra, §§128, 129) is satisfied. (*C.C.P. 485.210(b)*.) (For form of application, see Judicial Council Form No. AT-105 [Application for Right to Attach Order, Temporary Protective Order, Etc.])

(2) *Affidavit*. The application must be supported by an affidavit showing all of the following:

(a) The facts presented indicate that the plaintiff is entitled to judgment on the claim on which the attachment is based. (*C.C.P. 485.210(c)(1)*.)

(b) The plaintiff would suffer great or irreparable injury within the meaning of *C.C.P. 485.010* (supra, §§128, 129) if issuance of the order were delayed pending a noticed hearing. (*C.C.P. 485.210(c)(2)*.)

(c) The property sought to be attached is not exempt from attachment. (*C.C.P. 485.210(c)(3)*.) This showing may be based on information and belief. (*C.C.P. 485.210(d)*.) (On general requirements for affidavits, see *C.C.P. 482.040*, supra, §89.)

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3. Order and Writ.

6 Witkin Cal. Proc. Prov Rem § 131

[§ 131] Order and Writ.

(1) *Necessary Findings*. Except where it exercises its discretion to issue a protective order instead of a writ (*C.C.P.* 486.030, *infra*, §141), the court must issue a right to attach order, stating the amount to be secured by the attachment, and order the issuance of a writ of attachment if an undertaking is filed (see *supra*, §115) and the court finds all of the following:

- (a) The claim on which the attachment is based is one on which attachment may be issued. (*C.C.P.* 485.220(a)(1).)
- (b) The plaintiff has established the probable validity of the claim. (*C.C.P.* 485.220(a)(2).) (For meaning of "probable validity," see *C.C.P.* 481.190, *supra*, §108.)
- (c) The attachment is not sought for a purpose other than recovery on the claim. (*C.C.P.* 485.220(a)(3).)
- (d) The affidavit shows that the property sought to be attached, or the portion specified in the writ, is not exempt from attachment. (*C.C.P.* 485.220(a)(4).)
- (e) The plaintiff will suffer great or irreparable injury within the meaning of *C.C.P.* 485.010 (*supra*, §§128, 129) if issuance of the order is delayed until the matter can be heard on notice. (*C.C.P.* 485.220(a)(5).)
- (f) The amount to be secured by the attachment is greater than zero. (*C.C.P.* 485.220(a)(6).)

(2) *Denial of Writ for Insufficient Showing*. If the writ is denied because the application and supporting affidavit do not satisfy the great or irreparable injury requirement of *C.C.P.* 485.010 (*supra*, §§128, 129), the court must so state. A denial does not preclude the plaintiff from applying under the noticed hearing procedure (*supra*, §95 *et seq.*) with the same affidavits and supporting papers. (*C.C.P.* 485.220(b).)

(3) *Judicial Council Forms*. The Judicial Council has adopted forms for the order and writ. (See Judicial Council Form No. AT-125 [Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Resident)]; Judicial Council Form No. AT-135 [Writ of Attachment].)

West's Key Number Digest, Attachment 140 et seq.

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4. Motion To Set Aside and Quash.

a. Former Law.

1. Motion To Discharge or Dissolve.

6 *Witkin Cal. Proc. Prov Rem* § 132

[§ 132] Motion To Discharge or Dissolve.

Former C.C.P. 556 et seq. provided for prevention or release of an attachment "improperly or irregularly issued," by motion to discharge or dissolve. The motion could be made at any time, either before levy, or before or after release of the attached property. (See *Sparks v. Bell* (1902) 137 C. 415, 418, 70 P. 281.) Any defendant could make the motion on the defendant's own behalf, without regard to the others. (*Willett & Burr v. Alpert* (1919) 181 C. 652, 662, 185 P. 976.) The grounds were stated in the notice of motion. (See *Republic Truck Sales Corp. v. Peak* (1924) 194 C. 492, 504, 229 P. 331; *Lencioni v. Dan* (1954) 128 C.A.2d 105, 108, 275 P.2d 101.) Affidavits were not essential; the plaintiff's verified complaint could be treated as an affidavit. (See *Willett & Burr v. Alpert*, supra; *San Francisco Iron & Metal Co. v. Abraham* (1931) 211 C. 552, 554, 296 P. 82.) The defendant could appear specially for the purpose of the motion. (*Willett & Burr v. Alpert*, supra, 181 C. 663; 2 *Cal. Proc.* (5th), *Jurisdiction*, §230.)

There were two basic grounds for the motion:

(1) Cause of action not within the class of cases in which attachment would issue; dissolve. (See *Beltaire v. George Rosenberg & Son* (1900) 129 C. 164, 168, 61 P. 916; *Allen v. Merchants Elec. Co.* (1960) 54 C.2d 67, 69, 4 C.R. 527, 351 P.2d 799.)

(2) Defects in affidavit, undertaking, or writ, or issuance of writ for a greater amount than stated in the affidavit; discharge. (See *Baldwin v. Napa & Sonoma Wine Co.* (1902) 137 C. 646, 650, 70 P. 732; *Alexander v. Superior Court* (1928) 91 C.A. 312, 315, 266 P. 993.)

A defective pleading was not a ground:

(1) The merits of the main case could not be determined on a motion to discharge an attachment. (*Republic Truck Sales Corp. v. Peak* (1924) 194 C. 492, 504, 229 P. 331; *Rose v. Pearman* (1958) 163 C.A.2d 480, 484, 329 P.2d 501, citing the text; *Minor v. Minor* (1959) 175 C.A.2d 277, 280, 345 P.2d 954, citing the text.)

(2) The motion could not be made to operate as a demurrer, i.e., to raise defects of pleading that were capable of cure by amendment. (*Kohler v. Agassiz* (1893) 99 C. 9, 15, 33 P. 741; *Hale Bros. v. Milliken* (1904) 142 C. 134, 138, 75 P. 653; *Peninsula Properties Co. v. Santa Cruz* (1950) 34 C.2d 626, 629, 213 P.2d 489.)

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a. Former Law.

2. Amendment of Writ, Affidavit, or Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 133

[§ 133] Amendment of Writ, Affidavit, or Undertaking.

Former C.C.P. 558 contained a proviso that the attachment should not be discharged if, at or before the hearing, amendments were made to cure the defects. This statute was construed to apply only to defects of form; if the defect was of substance, the original document was deemed void and not curable. (See *Fairbanks, Morse & Co. v. Getchell* (1910) 13 C.A. 458, 463, 110 P. 331 [affidavit; notary who took oath had no authority in county]; *Corum v. Superior Court* (1931) 114 C.A. 741, 745, 300 P. 837; but see *Poswa v. Brittain* (1935) 4 C.A.2d 554, 556, 41 P.2d 345 [despite false affidavits of sureties on original undertaking, good substitute undertaking must be accepted].)

Where the original document was not a nullity, the right to amend was clear:

(1) Affidavit. (See *Nichols v. Davis* (1914) 168 C. 570, 572, 143 P. 758 [original affidavit by plaintiff, amended affidavit by attorney]; *Bennett v. Superior Court* (1933) 218 C. 153, 163, 21 P.2d 946 [amended averment as to security]; *Peninsula Properties Co. v. Santa Cruz* (1950) 34 C.2d 626, 631, 213 P.2d 489 [change from contract claim to statutory obligation].)

(2) Undertaking. (See *Bone v. Trafton* (1916) 31 C.A. 30, 32, 159 P. 819; cf. *Stewart v. Justice's Court* (1935) 7 C.A.2d 61, 64, 45 P.2d 424 [deposit of check, cured by cashing].)

(3) Writ. (See *Tyson v. Reinecke* (1914) 25 C.A. 696, 701, 145 P. 153 [originally in greater sum than affidavit, amended to conform].)

Although the statute did not mention the complaint, the same rule was applied; i.e., a complaint that was fundamentally defective and did not justify attachment could nevertheless be amended at the hearing. (*Hale Bros. v. Milliken* (1904) 142 C. 134, 138, 75 P. 653.) But the amendment had to be made before decision on the motion or it would be ineffective to continue the attachment in force. (*Wolford v. Neustadter* (1937) 21 C.A.2d 417, 420, 69 P.2d 909.)

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a. Former Law.

3. Motion To Quash Improper Levy.

6 *Witkin Cal. Proc. Prov Rem* § 134

[§ 134] Motion To Quash Improper Levy.

If the writ was properly issued, but the levy was bad, e.g., if exempt property was attached, the remedy was not to discharge the valid writ under former C.C.P. 556 et seq., but to quash or vacate the invalid levy under the court's inherent power over its process. (See *Holmes v. Marshall* (1905) 145 C. 777, 783, 79 P. 534; *Javorek v. Superior Court* (1976) 17 C.3d 629, 646, 131 C.R. 768, 552 P.2d 728, citing the text.)

The motion to quash could also be made where the levy was defective for noncompliance with the statutory procedure, e.g., failure to serve notice of attachment on the occupant of real property or to post the papers. (See *Alpha Stores, Ltd. v. You Bet Mining Co.* (1936) 18 C.A.2d 252, 258, 259, 63 P.2d 1139 [doubting whether going to trial on merits without objection would constitute waiver of defect].) (On current procedure where exempt property is attached, see *infra*, §140.)

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4. Motion To Set Aside and Quash.

b. Current Law.

1. Noticed Motion.

6 *Witkin Cal. Proc. Prov Rem* § 135

[§ 135] Noticed Motion.

A defendant whose property has been attached under an ex parte writ may move (1) to set aside the right to attach order, quash the writ of attachment, and release property levied on, or (2) to reduce the amount to be secured under *C.C.P. 483.015* (supra, §98). A notice of motion must be filed with the court and served on the plaintiff, stating the grounds on which the motion is based and accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (*C.C.P. 485.240(a), (b).*) (For form of application and notice to set aside order, quash writ, and release attached property, see Judicial Council Form No. AT-170 [Application to Set Aside Right to Attach Order and Release Attached Property, Etc.])

In *Western Steel & Ship Repair v. RMI* (1986) 176 C.A.3d 1108, 222 C.R. 556, plaintiff subcontractor obtained an ex parte writ of attachment against defendant general contractor. The trial judge treated defendant's ex parte motion to quash the writ as a motion to shorten the time for notice, which he granted. At the subsequent noticed hearing, the motion to quash was denied. *Held*, affirmed. Although Judicial Council Form No. AT-170 permits an ex parte attack on a writ of attachment, the attachment statutes require a noticed motion. Nevertheless, the trial court has the power to shorten the time on the debtor's noticed motion. Moreover, the superior court has the power, in a proper case, to vacate an improvidently issued ex parte attachment on an ex parte, but clear and convincing, showing by the debtor. This power is part of the superior court's inherent power to control litigation before it, prevent abuse of process, and create a remedy for every wrong. (176 C.A.3d 1116, citing the text; see 2 *Cal. Proc.* (5th), *Courts*, §§173 et seq., 248; 3 *Cal. Proc.* (5th), *Actions*, §§5 et seq., 10.)

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b. Current Law.

2. No Review of Finding of Great or Irreparable Injury.

6 *Witkin Cal. Proc. Prov Rem* § 136

[§ 136] No Review of Finding of Great or Irreparable Injury.

C.C.P. 485.240(b) expressly rules out the ground that the plaintiff would not have suffered great or irreparable injury within the meaning of *C.C.P. 485.010* (supra, §§128, 129) if issuance had been delayed until a hearing on notice. The purpose of this provision was explained in *Western Steel & Ship Repair v. RMI* (1986) 176 C.A.3d 1108, 222 C.R. 556, supra, §135, as follows: "Once having occurred, the levy without notice cannot be undone, and no remedy remains to the debtor other than to challenge the validity of the attachment, if he can." (176 C.A.3d 1113.) At the hearing on the motion to quash, the plaintiff has the burden of proving that the attachment was proper. (See infra, §137.) "If he does so, there is no practical reason to quash the writ. The damage of ex parte issuance, even if incorrect, has already been done. It would serve little purpose, and would waste time and judicial resources, to quash an otherwise properly issued writ because it should not have been issued ex parte." (176 C.A.3d 1113, 1114.)

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b. Current Law.

3. Hearing and Determination.

6 *Witkin Cal. Proc. Prov Rem* § 137

[§ 137] Hearing and Determination.

(1) *Hearing*. The hearing on the defendant's motion (supra, §135) takes precedence over other civil matters on the calendar, except older matters of the same character. (*C.C.P. 485.240(e)*.) The court normally makes its determination on the basis of the pleadings and other papers in the record; but, for good cause, it may receive and consider additional oral or documentary evidence and additional points and authorities or may continue the hearing for their production. (*C.C.P. 485.240(d)*.)

(2) *Burden of Proof*. Although the defendant is the moving party, the plaintiff continues to have the burden of proving (a) that the claim is one on which an attachment may be issued and (b) that the claim is probably valid. (Legislative Com. Comment to *C.C.P. 485.240*; see *C.C.P. 484.090*, supra, §108.)

(3) *Determination*. The court must determine whether the plaintiff is entitled to a right to attach order and whether the amount to be secured should be reduced. If the court finds that the plaintiff is not entitled to the order, it must order the right to attach order set aside, the writ of attachment quashed, and any property levied on released. If it finds that the plaintiff is entitled to the order, the plaintiff may thereafter apply for additional writs under *C.C.P. 484.310* et seq. (noticed hearing procedure; see supra, §119 et seq.) or *C.C.P. 484.510* et seq. (ex parte procedure; see supra, §124 et seq.). (*C.C.P. 485.240(c)*.) (For form of order, see Judicial Council Form No. AT-175 [Order to Set Aside Attachment, to Substitute Undertaking, Etc.].)

The Attachment Law omits the provision of former C.C.P. 558 authorizing amendment to prevent discharge of an improper or irregular writ (see supra, §133). The Legislative Committee Comment to *C.C.P. 485.240* explains that this provision is unnecessary because the court has the inherent power to permit a plaintiff to amend the application or supplement the showing in support of the attachment at or before the hearing.

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5. Additional Writs.

a. Application and Affidavit.

6 Witkin Cal. Proc. Prov Rem § 138

[§ 138] Application and Affidavit.

(1) *In General.* A plaintiff who has obtained a right to attach order by the noticed hearing procedure may obtain additional writs in an ex parte proceeding (*C.C.P. 484.510*, supra, §124 et seq.). *C.C.P. 485.510* authorizes issuance of additional writs in an ex parte proceeding on a showing of exceptional circumstances. (See Law Rev. Com. Comment to *C.C.P. 485.510*.)

(2) *Application.* After a right to attach order and writ of attachment has been issued under the ex parte procedure (supra, §131), the plaintiff may apply for an additional writ ex parte by filing an application. (*C.C.P. 485.510*.) The application must be executed under oath and must include the following:

(a) A statement that the plaintiff has been issued a right to attach order and a writ of attachment under the ex parte procedure. (*C.C.P. 485.520(a)*.)

(b) A statement of the amount to be secured by the attachment. (*C.C.P. 485.520(b)*.)

(c) A description of the property to be attached sufficient to satisfy the requirements of *C.C.P. 484.020* (supra, §97) and a statement that the plaintiff is informed and believes that the property is not exempt from attachment. (*C.C.P. 485.520(c)*.)

(d) A statement showing that the great or irreparable injury requirement of *C.C.P. 485.010* (supra, §§128, 129) has been satisfied. (*C.C.P. 485.520(d)*.)

(3) *Affidavit.* The application must be supported by an affidavit showing the following:

(a) The plaintiff would suffer great or irreparable injury within the meaning of *C.C.P. 485.010* (supra, §§128, 129) if issuance of the writ were delayed until the matter could be heard on notice. (*C.C.P. 485.530(a)(1)*.)

(b) The property sought to be attached is not exempt from attachment. (*C.C.P. 485.530(a)(2)*.) This showing may be based on information and belief. (*C.C.P. 485.530(b)*.) (On general requirements for affidavits, see *C.C.P. 482.040*,

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5. Additional Writs.

b. Issuance of Writ.

6 *Witkin Cal. Proc. Prov Rem § 139*

[§ 139] Issuance of Writ.

The court must examine the application and affidavit and must order a writ of attachment to be issued on the filing of an undertaking (see *supra*, §115) if it finds the following:

- (1) A right to attach order has been issued under the ex parte procedure (see *supra*, §131). (*C.C.P. 485.540(a).*)
- (2) The affidavit shows that the property sought to be attached, or the portion specified in the writ, is not exempt from attachment. (*C.C.P. 485.540(b).*)
- (3) The plaintiff will suffer great or irreparable injury within the meaning of *C.C.P. 485.010* (*supra*, §§128, 129) if issuance of the writ of attachment is delayed until the matter can be heard on notice. (*C.C.P. 485.540(c).*)

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6. Defendant's Claim of Exemption.

6 Witkin Cal. Proc. Prov Rem § 140

[§ 140] Defendant's Claim of Exemption.

(1) *In General.* The ex parte procedure does not give the defendant the opportunity to claim exemptions at a hearing. Generally, the defendant may claim an exemption of real or personal property levied on under an ex parte writ by following the procedure for claiming exemptions to levy of a money judgment under *C.C.P. 703.510* et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §180 et seq.). For this purpose, references in the Enforcement of Judgments Law to "judgment debtor" and "judgment creditor" are deemed to be references to the defendant and the plaintiff, respectively. An exemption of personal property under this procedure must be claimed within 30 days after the levying officer serves the defendant with the notice of attachment, and an exemption of real property must be claimed within the time provided by *C.C.P. 487.030* (supra, §87). (*C.C.P. 485.610(a).*)

(2) *Property Necessary for Support.* Within the time provided by *C.C.P. 485.610(a)*, the defendant may claim exemption of property necessary for support under *C.C.P. 487.020(b)* (supra, §83) following either of two procedures: (a) the procedure for exemption to levy of a money judgment or (b) the procedure set forth in *C.C.P. 482.100(c)* (infra, §222), except that no showing of changed circumstances is required. (*C.C.P. 485.610(b).*)

(3) *Effect of Failure To Make Claim.* Failure to claim exemption for personal property precludes a later claim in the absence of changed circumstances under *C.C.P. 482.100* (infra, §222). (Law Rev. Com. Comment to *C.C.P. 485.610.*)

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1. Nature and Purpose.

6 *Witkin Cal. Proc. Prov Rem* § 141

[§ 141] Nature and Purpose.

In a case in which the plaintiff makes a sufficient showing of great or irreparable injury for a right to attach order and a writ of attachment under the ex parte procedure (*C.C.P. 485.010* et seq., supra, §128 et seq.), the court may nevertheless, in its discretion, deny the application and instead issue a temporary protective order. It will do so on a determination "that the issuance of the temporary protective order instead of the right to attach order and writ would be in the interest of justice and equity to the parties." (*C.C.P. 486.030(a)*.) (See *C.J.E.R.*, California Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.86 et seq.; *C.E.B.*, 1 Debt Collection Practice 2d, §6.37 et seq.; Rutter Group, Civil Proc. Before Trial §9:925 et seq.; *Cal. Civil Practice*, 2A Procedure, §16:30 et seq.)

If the court issues a temporary protective order pursuant to this discretionary power, the plaintiff's application under the ex parte procedure is treated as an application under the noticed hearing procedure and the plaintiff must serve the papers required by *C.C.P. 484.040* (supra, §101) and in other respects comply with that procedure. (*C.C.P. 486.030(b)*; see *Law Rev. Com. Comment.*)

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2. Application and Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 142

[§ 142] Application and Affidavit.

(1) *Application*. At the time of applying for a right to attach order under the noticed hearing procedure (see *supra*, §95 et seq.), the plaintiff may apply for a temporary protective order by filing an application stating the relief requested. (*C.C.P. 486.010*.)

(2) *Affidavit*. The application must be supported by an affidavit showing that the plaintiff would suffer great or irreparable injury within the meaning of *C.C.P. 485.010* (*supra*, §§128, 129) if the order were not issued. The affidavit may be based on information and belief. (*C.C.P. 486.010(b)*.) (For form of application, see Judicial Council Form No. AT-105 [Application for Right to Attach Order, Temporary Protective Order, Etc.]; on general requirements for affidavits, see *C.C.P. 482.040*, *supra*, §89.)

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3. Ex Parte Hearing and Determination.

6 *Witkin Cal. Proc. Prov Rem* § 143

[§ 143] Ex Parte Hearing and Determination.

The court must examine the application, affidavit, and other papers on record and must issue a temporary protective order, stating the amount sought to be secured by the attachment, on the filing of an undertaking (see *supra*, §115) if it finds the following:

(1) The claim on which the application for attachment is based is one on which attachment may be issued. (*C.C.P.* 486.020(a).)

(2) The plaintiff has established the probable validity of the claim on which the application is based. (*C.C.P.* 486.020(b).) (For meaning of "probable validity," see *C.C.P.* 481.190, *supra*, §108.)

(3) The order is not sought for a purpose other than recovery on the claim. (*C.C.P.* 486.020(c).)

(4) The plaintiff will suffer great or irreparable injury within the meaning of *C.C.P.* 485.010 (*supra*, §§128, 129) if the temporary protective order is not issued. (*C.C.P.* 486.020(d).)

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4. Order.

a. In General.

6 *Witkin Cal. Proc. Prov Rem § 144*

[§ 144] In General.

(1) *Contents.* The order must contain "such provisions as the court determines would be in the interest of justice and equity to the parties, taking into account the effects on both the defendant and the plaintiff under the circumstances of the particular case." (*C.C.P. 486.040.*) It must describe the property in a manner adequate to permit the defendant to identify that property. (*C.C.P. 486.050(a)*; see *Profile Structures v. Long Beach Bldg. Material Co. (1986) 181 C.A.3d 437, 443, 226 C.R. 192* [purpose of *C.C.P. 486.050(a)* is to enable defendant to comply with prohibition against transfer of property described in order].) The order must also include a statement, comparable to the notice of levy of a writ of attachment, advising the defendant that an undertaking has been filed and informing the defendant of the right to object to it. (*C.C.P. 489.230(b).*) (For form of order, see Judicial Council Form No. AT-140 [Temporary Protective Order]; on order where defendant has deposit accounts and money not located on premises where he or she conducts trade, business, or profession, see *infra*, §175.)

(2) *Service on Defendant.* The temporary protective order must be personally served on the defendant with the documents referred to in *C.C.P. 484.040* (copy of summons and complaint, notice of application and hearing, copy of application and supporting affidavit; *supra*, §101). (*C.C.P. 486.080.*) (On service generally, see *supra*, §88.) Personal service is required so that the order may be enforced by contempt proceedings. (Law Rev. Com. Comment to *C.C.P. 486.080.*)

(3) *Defendant Alone Is Bound.* Except as to a lien created by a temporary protective order (*C.C.P. 486.110*, *infra*, §147), the order binds only the defendant, "whether or not any other person knows of or is served with a copy" of the order. (*C.C.P. 486.070*; see Law Rev. Com. Comment, pointing out that this does not affect other provisions of law, e.g., C.C. 3439 et seq. on fraudulent conveyances.)

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4. Order.

b. Expiration, Modification, and Vacation.

6 Witkin Cal. Proc. Prov Rem § 145

[§ 145] Expiration, Modification, and Vacation.

(1) *Expiration.* Except as otherwise provided in the statute, the order expires at the earlier of the following times:

(a) Forty days after issuance or on an earlier date prescribed by the court. (*C.C.P. 486.090(a).*)

(b) As to property described in the order, when levy of attachment is made on that property. (*C.C.P. 486.090(b).*)

A temporary protective order expires immediately when the defendant claims exemption for all property described in the application and the plaintiff does not oppose the claim. (*C.C.P. 484.070(f)*; see *supra*, §105.) A protective order may, or under some circumstances must, be extended if a continuance is granted. (*C.C.P. 484.080*; see *supra*, §106.) The court must order termination of a protective order on the filing of a sufficient undertaking. (*C.C.P. 489.320*; see *infra*, §148.)

(2) *Modification or Vacation.* On the defendant's *ex parte* application or after a noticed hearing under the court's order, the court may modify or vacate a temporary protective order if it determines that "such action would be in the interest of justice and equity to the parties, taking into account the effect on the defendant of the continuance of the original order, the effect on the plaintiff of modifying or vacating the order, and any other factors." (*C.C.P. 486.100.*) (See Judicial Council Form No. AT-145 [Application and Notice of Hearing for Order to Terminate, Modify, or Vacate Temporary Protective Order]; Judicial Council Form No. AT-150 [Order to Terminate, Modify, or Vacate Temporary Protective Order].)

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4. Order.

c. Effect.

6 Witkin Cal. Proc. Prov Rem § 146

[§ 146] Effect.

(1) *General Rule.* Subject to certain exceptions, the temporary protective order may prohibit "any transfer by the defendant of any of the defendant's property in this state subject to the levy of a writ of attachment." (*C.C.P. 486.050(a)*.) The order should restrain the transfer of only so much of the defendant's property as is reasonably necessary to protect the plaintiff's interest until a writ of attachment can be issued. The plaintiff may be liable for abuse of process if an excessive amount of property is subject to the order. (Law Rev. Com. Comment to *C.C.P. 486.050*.)

(2) *Exceptions.* Exceptions to the restriction on property transfer set forth in *C.C.P. 486.050(a)* include the following:

(a) *Discretionary exceptions.* *C.C.P. 486.050(a)* applies "[e]xcept as otherwise provided in" *C.C.P. 486.040*, under which the court may include in the order any provisions that are just and equitable. (See *supra*, §144.)

(b) *Transfers in the ordinary course of business.* If the property consists of inventory or farm products held for sale, the order may not prohibit the defendant from transferring the property in the ordinary course of business but may impose appropriate restrictions on the disposition of the proceeds from the transfer. (*C.C.P. 486.050(b)*.) (For definitions of "farm products" and "inventory," see *C.C.P. 481.110* and *481.120*, respectively, *infra*, §168.)

(c) *Deposit accounts.* A defendant may issue checks against accounts in financial institutions in California to the extent permitted by *C.C.P. 486.060*. (*C.C.P. 486.060(a)*); for definition of "financial institution," see *C.C.P. 481.113*, *infra*, §175.) The following restrictions apply:

(1) *Unlimited amount for specific purposes.* The defendant may issue "checks in any amount" for the following purposes:

(a) Payroll expenses (including fringe benefits, taxes and premiums for workers' compensation and unemployment insurance) falling due in the ordinary course of business before the levy of the writ of attachment. (*C.C.P. 486.060(b)(1)*.)

(b) Payment for goods delivered C.O.D. for use in the defendant's trade, business, or profession. (*C.C.P. 486.060(b)(2).*)

(c) Payment of taxes if necessary to avoid penalties that will accrue if payment is further delayed. (*C.C.P. 486.060(b)(3).*)

(d) Payment of reasonable legal fees, costs, and expenses required for the representation of the defendant in the action. (*C.C.P. 486.060(b)(4).*)

(2) *Limited amount for any purpose.* The defendant may issue checks for any purpose so long as the total amount does not exceed the greater of \$ 1,000 or the amount by which the total amount on deposit exceeds the amount sought to be secured by the attachment plus amounts permitted to be paid under *C.C.P. 486.060(b)*. (*C.C.P. 486.060(c)*; see Law Rev. Com. Comment to *C.C.P. 486.060*, illustrating permissible payments under these restrictions.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* *C.C.P. 486.050(a)* was amended in 2008 to substitute "a transfer" for "any transfer" in the language quoted in the text.



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G. Temporary Protective Order.

5. Lien.

6 *Witkin Cal. Proc. Prov Rem § 147*

[§ 147] Lien.

(1) *Creation.* Service of a temporary protective order on the defendant creates a lien on "any property, or the proceeds thereof," that is described in the order, owned by the defendant at the time of service, and subject to attachment. (*C.C.P.* 486.110(a).)

(2) *Termination.* The lien terminates on the expiration date of the temporary protective order except with respect to property levied on while the order is in effect under a writ of attachment issued on the plaintiff's application. (*C.C.P.* 486.110(b).) In addition, a lien created within 90 days before (a) a general assignment for the benefit of creditors or (b) the filing of a bankruptcy petition is terminated by the assignment or the filing of the petition, respectively. (*C.C.P.* 493.030, *infra*, §188.)

(3) *Effect of Transfer or Encumbrance of Property.* The lien continues on property subject to the lien "notwithstanding the transfer or encumbrance of the property subject to the lien" unless the person receiving the property is a person listed in *C.C.P.* 697.740 (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §96). (*C.C.P.* 486.110(a).)

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6. Undertaking To Terminate Order.

6 Witkin Cal. Proc. Prov Rem § 148

[§ 148] Undertaking To Terminate Order.

A defendant who has been served with a temporary protective order and has appeared in the action may apply by noticed motion for an order terminating the temporary protective order. (*C.C.P. 489.320(a).*)

The defendant must file an undertaking, equal to the amount sought to be secured by the attachment, to pay the plaintiff the amount of any judgment recovered against the defendant. If a sufficient undertaking is filed, the court must terminate the temporary protective order. (*C.C.P. 489.320(b).*) (For form of undertaking, see Judicial Council Form No. AT-160 [Undertaking by Personal Sureties (Attachment and Claim and Delivery)].)

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H. Levy of Attachment.

1. In General.

a. Instructions to Levying Officer.

6 *Witkin Cal. Proc. Prov Rem* § 149

[§ 149] Instructions to Levying Officer.

The plaintiff must give the levying officer written instructions, signed by the attorney of record or, if there is no attorney, by the plaintiff. The instructions must contain information needed or requested by the levying officer including (1) an adequate description of the property to be levied on, and (2) a statement whether the property is a dwelling and, if so, whether it is real or personal property. (*C.C.P. 488.030(a)*; see 14 *Pacific L. J.* 445; 2B Am.Jur. P.P. Forms (2000 ed.), Attachment and Garnishment, §§145, 146.)

If the levying officer is required to serve any paper on any person, the plaintiff must use reasonable diligence to ascertain the correct name and address of that person and must include this information in the instructions to the levying officer. (*C.C.P. 488.040(a)*.)

If the summons and complaint have not been served on the defendant, the instructions must direct the levying officer to serve them with the writ of attachment. (*C.C.P. 488.020(c)*.) (On levy procedure generally, see C.E.B., 1 Debt Collection Practice 2d, §6.52 et seq.)

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1. In General.

b. Deposit To Cover Expenses.

6 Witkin Cal. Proc. Prov Rem § 150

[§ 150] Deposit To Cover Expenses.

Before a levying officer performs a duty under the Attachment Law, the plaintiff must deposit with the officer a sum sufficient to pay the costs of performing that duty. (*C.C.P. 488.050(a)(1)*; see *Govt.C. 6100* [officers of state, county, or judicial districts may not perform official services until fees have been paid].)

Before a levying officer takes property into custody, the plaintiff must deposit with the officer a sum sufficient to pay the costs of taking the property and keeping it for no more than 15 days. If continued custody is required, the officer may demand, orally or in writing, additional deposits sufficient to cover costs for additional periods of not more than 30 days each. The plaintiff has at least 3 business days after receipt of the demand to pay the amount demanded; if the plaintiff fails to do so within the time specified in the demand, the levying officer must release the property. (*C.C.P. 488.050(a)(2)*.)

The levying officer is not liable for failing to take or hold property unless the plaintiff has satisfied these requirements. (*C.C.P. 488.050(b)*.)

The levying officer has a special lien, dependent on possession, on personal property levied on in the amount of the levying officer's costs for which no advance has been made. (*C.C.P. 488.100*, based on former C.C. 3057.) Cases decided under the former statute permitted the levying officer to refuse to surrender the property without payment of the officer's fees and expenses of storage (*Newell v. McDonald* (1922) 60 C.A. 202, 205, 212 P. 389; *Ross v. O'Brien* (1934) 1 C.A.2d 496, 502, 36 P.2d 1108), but denied the officer authority to sell the property or allow it to be sold for storage charges without a court order (*Aigeltinger v. Whelan* (1901) 133 C. 110, 112, 65 P. 125).

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1. In General.

c. Levy by Levying Officer.

6 *Witkin Cal. Proc. Prov Rem § 151*

[§ 151] Levy by Levying Officer.

A writ of attachment is directed to (1) a levying officer in the county in which property described in the writ may be located and (2) any registered process server. (*C.C.P. 488.020(a)*.) (For levy by registered process server, see *infra*, §152.)

On receipt of written instructions (*supra*, §149), the levying officer to whom the writ is directed and delivered must levy the writ without delay on so much of the property described in the writ "as is clearly sufficient to satisfy the amount to be secured by the attachment." The officer is not liable for a good faith determination of sufficiency. (*C.C.P. 488.020(b)*.)

The levying officer may rely on the instructions unless the officer has actual knowledge that information contained in the instructions is incorrect. (*C.C.P. 488.030(c), 488.040(b)*.) The officer must act in accordance with the instructions "to the extent the actions are taken in conformance with" the Attachment Law. (*C.C.P. 488.030(b)*.)

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1. In General.

d. Levy by Registered Process Server.

6 *Witkin Cal. Proc. Prov Rem* § 152

[§ 152] Levy by Registered Process Server.

(1) *Definition.* A registered process server is a person registered as a process server under *B. & P.C. 22350* et seq. (*C.C.P. 481.205.*) (On registered process servers generally, see 3 *Cal. Proc.* (5th), *Actions*, §998.)

(2) *Property Subject to Levy.* A registered process server may levy under a writ of attachment on the following types of property:

(a) Real property under *C.C.P. 488.315* (see *infra*, §158). (*C.C.P. 488.080(a)(1).*)

(b) Growing crops, timber to be cut, or minerals to be extracted, or accounts receivable from the sale at the wellhead or minehead under *C.C.P. 488.325* (see *infra*, §173). (*C.C.P. 488.080(a)(2).*)

(c) Personal property in the custody of a levying officer under *C.C.P. 488.355* (see *infra*, §158). (*C.C.P. 488.080(a)(3).*)

(d) Equipment of a going business under *C.C.P. 488.375* (see *infra*, §161 et seq.). (*C.C.P. 488.080(a)(4).*)

(e) Motor vehicles, vessels, mobilehomes, or commercial coaches used as equipment of a going business under *C.C.P. 488.385* (see *infra*, §164 et seq.). (*C.C.P. 488.080(a)(5).*)

(f) Farm products or business inventory under *C.C.P. 488.405* (see *infra*, §168 et seq.). (*C.C.P. 488.080(a)(6).*)

(g) Personal property used as a dwelling under *C.C.P. 700.080(a)* (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §127). (*C.C.P. 488.080(a)(7).*)

(h) Deposit accounts under *C.C.P. 488.455* (see *infra*, §175). (*C.C.P. 488.080(a)(8).*)

(i) Property in safe deposit boxes under *C.C.P. 488.460* (see *infra*, §177). (*C.C.P. 488.080(a)(9).*)

(j) Accounts receivable and general intangibles under *C.C.P. 488.470* (see *infra*, §174). (*C.C.P. 488.080(a)(10).*)

(k) Final money judgments under *C.C.P. 488.480* (see *infra*, §180). (*C.C.P. 488.080(a)(11).*)

(l) Interest in estate personal property under *C.C.P. 488.485* (see *infra*, §181). (*C.C.P. 488.080(a)(12).*) (See *14 Pacific L. J. 446.*)

(3) *Manner of Levy.* Before levying under a writ of attachment, a registered process server must deposit a copy of the writ with the levying officer and pay the fee provided by *Govt.C. 26721* (fee for serving or executing process or notice). (*C.C.P. 488.080(b).*) The filing requirement gives the levying officer an early opportunity to establish a file to facilitate handling exemption and third-party claims, garnishees' memoranda, and payments by garnishees or the defendant. (Law Rev. Com. Comment to *C.C.P. 488.080.*) Recoverable costs include the registered process server's fee, in an amount determined under *C.C.P. 1033.5* (see *3 Cal. Proc. (5th), Actions*, §999). (*C.C.P. 488.080(f).*)

(4) *Information Provided to Levying Officer.* Within 5 court days after the levy, the following must be filed with the levying officer: (a) the writ of attachment, (b) a proof of service by the registered process server stating the manner of levy, (c) proof of service on third persons as required by *C.C.P. 488.300* et seq. (*infra*, §158 et seq.), and (d) written instructions under *C.C.P. 488.030* (*supra*, §149). (*C.C.P. 488.080(d).*)

(5) *Ancillary Duties.* A registered process server must also (a) comply with the applicable levy, posting, and service provisions of *C.C.P. 488.300* et seq. (*infra*, §158 et seq.), and (b) request a garnishee's memorandum (on a form provided by the registered process server) under *C.C.P. 488.610* (*infra*, §§193, 194) from any third person served. (*C.C.P. 488.080(c).*)

(6) *Liability of Plaintiff and Registered Process Server.* Nothing in *C.C.P. 488.080(e)* limits any liability of the plaintiff or the process server if the levying officer acts on the basis of incorrect information provided under *C.C.P. 488.080(d)*. (*C.C.P. 488.080(e).*) The registered process server is not liable for actions taken in conformance with the Attachment Law, including actions taken in reliance on written instructions (*supra*, §149), except when he or she has actual knowledge that the information is incorrect. This provision does not limit any liability of the plaintiff if the registered process server acts on incorrect information in written instructions. (*C.C.P. 488.140(a).*)

(7) *Duties and Liability of Levying Officer.* If the fee is paid, the levying officer must return the writ to the court and "perform all other duties under the writ as if the levying officer had levied under the writ." If the registered process server does not comply with *C.C.P. 488.080(b)* and (d) "the levy is ineffective and the levying officer is not required to perform any duties under the writ and may issue a release for any property sought to be attached." (*C.C.P. 488.080(e).*)

Except to the extent that the levying officer has actual knowledge that information is incorrect, the levying officer may rely without liability on information provided under *C.C.P. 488.080(d)*. (*C.C.P. 488.080(e).*)

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H. Levy of Attachment.

1. In General.

e. Notice and Service.

6 *Witkin Cal. Proc. Prov Rem* § 153

[§ 153] Notice and Service.

(1) *Contents of Notice.* The notice of attachment must inform the notified person of all of the following:

(a) The capacity in which the person is notified. (*C.C.P. 488.060(a).*)

(b) The specific property sought to be attached. (*C.C.P. 488.060(b).*)

(c) The person's rights and duties under the attachment, including the right to make a third-party claim (*infra*, §156). (*C.C.P. 488.060(c), (d).*)

The notice must identify any person other than the defendant in whose name real property, crops, timber, or minerals stand in county records. (*Law Rev. Com. Comment to C.C.P. 488.060.*)

The notice must also advise the defendant that an undertaking has been filed and inform the defendant of the right to object. (*C.C.P. 489.230(a).*) (For form of notice, see Judicial Council Form No. AT-165 [Notice of Attachment].)

(2) *Service of Writ and Notice.* At the time of levy or "promptly thereafter," the levying officer must serve a copy of the writ of attachment and the notice of attachment on the defendant. (*C.C.P. 488.305.*) (On method of service, see *C.C.P. 482.070*, *supra*, §88.) Where the original notice of attachment has been served on a third party holding the property sought to be attached, a copy of that notice served on the defendant or any other person is sufficient notice of attachment to that person. (*C.C.P. 488.065.*)

(3) *Effect of Failure To Give Notice.* Where property has been levied on and a copy of the writ and notice of attachment are required to be posted or served on or mailed to the defendant or another person, failure to post, serve, or mail does not affect the attachment lien created by the levy. (*C.C.P. 488.120*; on creation of lien, see *infra*, §184.)

West's Key Number Digest, Attachment 170, 171

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1. In General.

f. Custody.

6 Witkin Cal. Proc. Prov Rem § 154

[§ 154] Custody.

(1) *Former Law.* Under former law, where it appeared necessary for safekeeping and was economical, the officer could, without the defendant's consent, place a keeper in charge of the property instead of removing it for storage. (See *Callahan v. Danziger* (1916) 172 C. 738, 742, 158 P. 760 [appointment of keeper for removable fixtures was proper despite defendant's objection that fee was excessive]; *Noland v. Noland* (1941) 44 C.A.2d 780, 783, 113 P.2d 11 [levy of execution on automobile in garage].)

(2) *Means of Taking Custody.* The Attachment Law states that, except as otherwise provided, a levying officer may take custody of property by (a) removing it to a place of safekeeping, (b) installing a keeper, or (c) otherwise obtaining possession or control of it. (C.C.P. 488.090.)

(3) *Taking Custody of Personal Property Located in Private Place.* If a writ of attachment has been issued with respect to personal property located in a private place of the defendant, the Attachment Law incorporates C.C.P. 699.030 (see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §100). (C.C.P. 488.070.) Under C.C.P. 699.030, if the debtor fails to deliver property after a demand by the levying officer, the officer notifies the creditor of the officer's failure to obtain custody. The judgment creditor may apply for a court order directing seizure of the property; the order may only be issued if "the judgment creditor establishes that there is probable cause to believe that the property sought to be levied upon is located in the place described" in the creditor's application. If the property is not voluntarily delivered, the levying officer may then have any enclosure where the property is believed to be located broken open in a manner the officer reasonably believes will cause the least damage, but must refrain from entering if the officer "reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person."

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1. In General.

g. Return and Inventory.

6 *Witkin Cal. Proc. Prov Rem* § 155

[§ 155] Return and Inventory.

(1) *Return*. The levying officer must return the writ to the court from which the writ issued with a report of the levying officer's actions. The return must be made "promptly" in accordance with the instructions (see *supra*, §149), but, in any case, within 60 days after the officer receives the writ. (*C.C.P. 488.130(a)*.)

(2) *Inventory*. The levying officer must make a full inventory of the attached property and return the inventory with the writ. (*C.C.P. 488.130(b)*.) (See *Glidden v. Wills* (1955) 136 C.A.2d 596, 598, 289 P.2d 55 [decided under former law; officer was liable to owner of property in another's possession for loss caused by failure to file an inventory]; 2B Am.Jur. P.P. Forms (2000 ed.), Attachment and Garnishment, Form 168 et seq.)

West's Key Number Digest, Attachment 318 et seq.

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h. Third-Party Claims.

6 Witkin Cal. Proc. Prov Rem § 156

[§ 156] Third-Party Claims.

(1) *Former Law.* If the plaintiff levied an attachment on property in which a third party had title or an interest, a number of remedies were available to the third party:

(a) *Ordinary third-party claim: personal property.* The rules and proceedings applicable in cases of third-party claims after levy of execution applied. (Former C.C.P. 549; see *Tuman v. Brown* (1943) 59 C.A.2d 16, 22, 138 P.2d 363.)

(b) *Special third-party claim: chattel mortgage or conditional sale.* Where personal property was in the possession of a buyer under an executory agreement of sale, or was subject to a chattel mortgage, and attachment or execution was levied by a creditor of the buyer or mortgagee, the seller or mortgagee could file a claim. (Former C.C.P. 689a et seq.; see *Imperial Metal Finishing Co. v. Luminous Ceilings West* (1969) 270 C.A.2d 390, 401, 75 C.R. 661.)

(c) *Intervention in main action.* Because the third-party claim statute did not apply to real property, intervention was the normal remedy of a third person seeking protection against the cloud on his or her title resulting from the attachment. (See *Carter v. Garetson* (1922) 56 C.A. 238, 241, 204 P. 1090.) The third party could also intervene where personal property was attached or garnished. (See *Berghauser v. Golden State Orchards* (1929) 208 C. 550, 552, 282 P. 950 [money and credits].) And a subsequent attachment or execution creditor who levied on the same property had a sufficient interest to intervene for the purpose of showing the invalidity of the prior attachment. (*McEldowney v. Madden* (1899) 124 C. 108, 109, 56 P. 783; *Kimball v. Richardson-Kimball Co.* (1896) 111 C. 386, 393, 43 P. 1111 [subsequent garnishment].)

(d) *Action against attaching officer.* An owner or person entitled to immediate possession of personal property could sue the attaching officer for specific recovery, and obtain possession by means of the provisional remedy of claim and delivery. (See *Taylor v. Bernheim* (1922) 58 C.A. 404, 408, 209 P. 55.)

(2) *Current Law.* A third person's claim of an interest in attached property is governed by the provisions of the Enforcement of Judgments Law providing for third-party claims (C.C.P. 720.010 et seq.; see 8 Cal. Proc. (5th),

Enforcement of Judgment, §364 et seq.). (*C.C.P. 488.110.*) A court commissioner may not act on contested third-party claims. (*C.C.P. 482.060(b)(3)*, *supra*, §93.)

West's Key Number Digest, Attachment 280 et seq.

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1. In General.

i. Limited Liability of Officer.

6 *Witkin Cal. Proc. Prov Rem* § 157

[§ 157] Limited Liability of Officer.

(1) *General Rule.* A levying officer is not liable for actions taken in conformance with the Attachment Law, including actions taken in reliance on written instructions (*supra*, §149) except to the extent the officer has actual knowledge that the information is incorrect. This provision does not limit any liability of the plaintiff if the officer acts on incorrect information in written instructions. (*C.C.P. 488.140(a)*; see *C.C.P. 262.1* [general statute protecting ministerial officers executing process and orders]; 5 *Summary* (10th), *Torts*, §161.)

(2) *Particular Provisions.* A levying officer is not liable for the following:

(a) Determining in good faith the amount of property described in the writ that is sufficient to satisfy the amount to be secured by the attachment. (*C.C.P. 488.020(b)*, *supra*, §151.)

(b) Failing to take or hold property if the plaintiff has not deposited funds sufficient to cover the officer's costs. (*C.C.P. 488.050(b)*, *supra*, §150.)

(c) Relying on information provided under *C.C.P. 488.080(d)* by a registered process server, except to the extent the officer has actual knowledge that the information is incorrect. (*C.C.P. 488.080(e)*, *supra*, §152.)

(d) Loss by fire, theft, injury, or damage to personal property in storage, transit, or the custody of a keeper, in the absence of negligence. (*C.C.P. 488.140(b)*.) (On negligent failure to attach property, see 17 *Proof of Facts* 2d 715.)

(e) Accepting a cash equivalent as payment for the sale of attached property by a business that is continuing to operate. (*C.C.P. 488.395(a)*, *infra*, §169.)

(f) Determining in good faith that property is extremely perishable or subject to great deterioration or depreciation. (*C.C.P. 488.700(b)*, *infra*, §191.)

(g) Indorsing, presenting, and obtaining payment of an instrument payable to the defendant or properly delaying payment. (*C.C.P. 488.710(c)*, (d), *infra*, §190.)

(h) Properly releasing an attachment. (*C.C.P. 488.730(e)*, *infra*, §210; *C.C.P. 493.040(h)*, *infra*, §189; see *Hayward Lumber & Inv. Co. v. Biscailuz* (1957) 47 C.2d 716, 722, 306 P.2d 6, 2 Cal. Proc. (5th), Courts, §389 [officer is protected in releasing property on court order or clerk's certificate].)

(3) *Unauthorized Release or Sale*. The levying officer is liable to the attaching creditor if the officer disposes of the property or releases it without consent except in the manner provided by statute. (See *Aigeltinger v. Whelan* (1901) 133 C. 110, 112, 65 P. 125; *Hesser v. Rowley* (1903) 139 C. 410, 413, 73 P. 156; *Callahan v. Danziger* (1916) 172 C. 738, 742, 158 P. 760; *Holm v. Overholt* (1931) 214 C. 431, 434, 6 P.2d 76 [mandamus issued to compel officer to retain possession after threat to sell under subsequent execution]; *Reynolds v. Lerman* (1956) 138 C.A.2d 586, 592, 292 P.2d 559 [sheriff was liable for sale by keeper].)

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a. Property Governed by Enforcement of Judgments Law.

6 *Witkin Cal. Proc. Prov Rem* § 158

[§ 158] Property Governed by Enforcement of Judgments Law.

As originally enacted, the Attachment Law contained detailed provisions governing levy of attachment with respect to particular types of property. In 1982, these provisions were repealed. *C.C.P. 488.010* et seq. retain detailed requirements for attachment of some forms of property (see *infra*, §159 et seq.) but, with respect to other forms, the statutes incorporate provisions of the Enforcement of Judgments Law governing the execution of money judgments (*C.C.P. 700.010* et seq.; see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §117 et seq.; 14 *Pacific L. J.* 444).

For purposes of the incorporation, references in the Enforcement of Judgments Law to "judgment creditor," "judgment debtor," "notice of levy" and "writ" are deemed to be references to the plaintiff, the defendant, the notice of attachment, and the writ of attachment, respectively. (*C.C.P. 488.300.*)

The Attachment Law incorporates provisions of the Enforcement of Judgments Law with respect to the following property:

(1) *Real property.* *C.C.P. 488.315* incorporates *C.C.P. 700.015* (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §118 et seq.). (For definition of "real property," see *C.C.P. 481.203*, *supra*, §55.)

(2) *Certain vehicles, vessels, mobilehomes, and coaches.* *C.C.P. 488.425* incorporates *C.C.P. 700.090* (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §128). (See *infra*, §164.)

(3) *Tangible personal property in possession of third person.* *C.C.P. 488.345* incorporates *C.C.P. 700.040* (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §124).

(4) *Personal property in custody of levying officer.* *C.C.P. 488.355(a)* incorporates *C.C.P. 700.050(a)* (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §125). The levying officer having custody of the property must comply with the writs in the order received and is not subject to *C.C.P. 488.600* et seq. (duties of third persons; *infra*, §192 et seq.). (*C.C.P. 488.355(b).*)

(5) *Bailed goods not covered by negotiable document of title.* *C.C.P. 488.365* incorporates *C.C.P. 700.060* (see 8

Cal. Proc. (5th), Enforcement of Judgment, §124).

(6) *Personal property used as dwelling.* *C.C.P. 488.415* incorporates *C.C.P. 700.080* (see 8 *Cal. Proc. (5th), Enforcement of Judgment, §127).*

(7) *Chattel paper.* *C.C.P. 488.435(a)* incorporates *C.C.P. 700.100* (see 8 *Cal. Proc. (5th), Enforcement of Judgment, §129).* (For definition of "chattel paper," see *C.C.P. 481.040*, *supra*, §56.) "In addition to any other rights created by a levy on chattel paper, the levy creates a lien on the defendant's rights in specific goods subject to the chattel paper." (*C.C.P. 488.435(b).*)

(8) *Instruments.* *C.C.P. 488.440* incorporates *C.C.P. 700.110* (see 8 *Cal. Proc. (5th), Enforcement of Judgment, §130).* (For definition of "instrument," see *C.C.P. 481.117*, *supra*, §56.)

(9) *Negotiable documents of title.* *C.C.P. 488.445* incorporates *C.C.P. 700.120* (see 8 *Cal. Proc. (5th), Enforcement of Judgment, §131).* (For definition of "document of title," see *C.C.P. 481.090*, *supra*, §56.)

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b. Personal Property: In General.

1. Former Law of Attachment and Garnishment.

6 *Witkin Cal. Proc. Prov Rem* § 159

[§ 159] Former Law of Attachment and Garnishment.

(1) *Taking Tangible Property into Custody.* Personal property capable of manual delivery, in the possession of the defendant, was attached by taking it into custody. The two alternative methods were (a) taking it away for storage, or (b) leaving it in charge of a keeper. (Former C.C.P. 542(3), (4); see *Callahan v. Danziger* (1916) 172 C. 738, 742, 158 P. 760; *Jubelt v. Sketers* (1948) 84 C.A.2d 653, 655, 191 P.2d 460 [promissory note].)

Where it was impracticable to take physical possession, constructive taking was held sufficient. (*Colver v. W.B. Scarborough Co.* (1925) 73 C.A. 441, 448, 238 P. 1104; see *Noland v. Noland* (1941) 44 C.A.2d 780, 783, 113 P.2d 11 [execution].)

(2) *Stock Certificates.* Prior to the adoption of the Uniform Commercial Code, the garnishment procedure was used. (See *Reynolds v. Reynolds* (1960) 54 C.2d 669, 7 C.R. 737, 355 P.2d 481.) On the adoption of the Code, attachment was governed by former U.C.C. 8317(1)(a), providing for seizure of the security by the officer. (See 9 *Summary* (10th), *Corporations*, §141.)

(3) *Checks and Other Money.* To avoid delay in presentment for payment, former C.C.P. 542(6) established a special procedure for levy on checks and other orders for money: the officer, on taking possession, indorsed the instrument and had it presented for payment, holding the resulting funds or credit subject to the levy.

(4) *Property Not Capable of Manual Delivery.* Former C.C.P. 542(5) prescribed the garnishment procedure for debts and credits. The section was also applied to articles so bulky or heavy as to be unmanageable; service of the writ on the defendant was sufficient. (See *Gilbank v. Benton* (1935) 9 C.A.2d 517, 522, 50 P.2d 815 [machinery].)

(5) *Property Not in Defendant's Possession.* If the property was not capable of manual delivery, the garnishment process was applied. The writ was left with the person in possession or control of the property. (Former C.C.P. 542(5).) If the property was capable of manual delivery, former C.C.P. 542(3) originally provided for taking it into custody. (See *Haulman v. Crumal* (1936) 13 C.A.2d 612, 617, 57 P.2d 179.)

(6) *Nature of Garnishment.* Garnishment is a procedure used to attach property that is not in possession of the defendant, i.e., debts, credits, or other property of the defendant in the possession or control of a third person (the garnishee). It is a form of attachment, although the attachment provisions of the Code of Civil Procedure do not use the term "garnishment." (See generally 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §15 et seq.) Garnishment is also used to enforce some types of judgments. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §139 et seq.)

Garnishment serves the same purpose as attachment and may be used either for security or to obtain quasi in rem jurisdiction against a nonresident. (See *Root v. Superior Court* (1962) 209 C.A.2d 242, 246, 25 C.R. 784, citing the text; 14 *A.L.R.2d* 420 [availability in actions between nonresidents]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §248.)

(7) *Former Garnishment Law.* Under former C.C.P. 543, garnishment was available against a third person owing a debt to the defendant or having possession or control of credits or personal property of the defendant. The general test was whether the defendant had an enforceable claim against the garnishee. (*Walker v. Doak* (1930) 210 C. 30, 36, 290 P. 290; *Samuels v. Superior Court* (1969) 276 C.A.2d 264, 270, 81 C.R. 216 [garnishment by owner of rental property of rents collected by defendant].)

A "debt" included an existing obligation, whether matured or unmatured, that was certain to become due. A present right of the defendant to sue the garnishee was not essential. (*Brainard v. Rogers* (1925) 74 C.A. 247, 248, 239 P. 1095; *Houghton v. Pacific Southwest Trust & Savings Bank* (1931) 111 C.A. 509, 514, 295 P. 1079; cf. *Steineck v. Haas-Baruch Co.* (1930) 106 C.A. 228, 231, 288 P. 1104.)

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(6) *Nature of Garnishment.* See 6 *Am.Jur.2d* (2008 ed.), *Attachment and Garnishment* §12 et seq.



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b. Personal Property: In General.

2. Current Attachment Law.

6 *Witkin Cal. Proc. Prov Rem* § 160

[§ 160] Current Attachment Law.

For many types of personal property, the Attachment Law provides detailed procedures for attachment (see *infra*, §161 et seq.) or incorporates procedures specified in the Enforcement of Judgments Law (see *supra*, §158). (For definition of "personal property," see *C.C.P.* 481.175, *supra*, §55.) Unless another method of attachment is provided, tangible personal property in the defendant's possession or control is attached by the levying officer taking the property into custody. (*C.C.P.* 488.335.) (See 12 *A.L.R.2d* 787 [what is action for "debt"]; 22 *A.L.R.2d* 1276 [validity of attachment of chattels within store or building without removing goods]; 82 *A.L.R.2d* 858 [sharecropper's share in crops wholly or partially unharvested]; 35 *A.L.R.3d* 1094 [garnishment by client's creditor of funds in hands of attorney]; on manner of custody, see *C.C.P.* 488.090, *supra*, §154.)

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c. Equipment of Going Business.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 161

[§ 161] In General.

(1) *Definition.* "Equipment" is defined as "tangible personal property in the possession of the defendant and used or bought for use primarily in the defendant's trade, business, or profession if it is not included in the definitions of inventory or farm products." (*C.C.P. 481.100*, based on U.C.C. 9102(a)(33); see Law Rev. Com. Comment; for definitions of "inventory" and "farm products," see *infra*, §168.)

(2) *Notice Filed With Secretary of State.* Equipment of a going business in a defendant's possession or control is attached by the levying officer filing a notice with the Secretary of State, in a form prescribed by the Secretary, containing the following:

- (a) The name and mailing address of the plaintiff. (*C.C.P. 488.375(a)(1).*)
- (b) The name and last known mailing address of the defendant. (*C.C.P. 488.375(a)(2).*)
- (c) The title of the court, the cause, and the number of the action. (*C.C.P. 488.375(a)(3).*)
- (d) A description of the specific property attached. (*C.C.P. 488.375(a)(4).*)
- (e) A statement that the plaintiff has acquired an attachment lien on the specified property of the defendant. (*C.C.P. 488.375(a)(5).*)

On presentation of the notice and payment of a filing fee (*infra*, §163), the Secretary files, marks, and indexes the notice "in the same manner as a financing statement." (*C.C.P. 488.375(b).*)

(3) *Scope of Statute.* Vehicles, vessels, mobilehomes, and commercial coaches that are equipment of a going business are attached following a different procedure. (*C.C.P. 488.375(a)*; see *C.C.P. 488.385*, *infra*, §164 et seq.) Where a business has failed or ceased to operate, the appropriate method of levy for tangible personal property in the defendant's possession is the procedure under *C.C.P. 488.335* (*supra*, §160). If there is doubt whether the property is

equipment or a fixture, the plaintiff may attach under both *C.C.P. 488.375* and *C.C.P. 488.315*, governing attachment of real property (see *supra*, §158). (Law Rev. Com. Comment to *C.C.P. 488.375*.)

(4) *Certificate*. On request of any person, the Secretary of State must issue a certificate showing (a) whether there is a notice of attachment on file against the equipment of a particular person named in the request, and (b) if there is, the date and hour of filing of each notice of attachment, and any notice affecting a notice of attachment, and the plaintiff's name and address. The Secretary of State must also furnish a copy of any notice of attachment or notice affecting a notice of attachment on request. The certificate must be issued as part of a combined certificate under U.C.C. 9528. (*C.C.P. 488.375(c)*.)

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2. Lien.

6 *Witkin Cal. Proc. Prov Rem* § 162

[§ 162] Lien.

Levy on the property creates an attachment lien. (*C.C.P. 488.500*, *infra*, §184.) Except as otherwise provided by the Attachment Law, a lien under *C.C.P. 488.375* (*supra*, §161) has the same force and effect as a judgment lien on personal property under *C.C.P. 697.590* et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§87, 88). (*C.C.P. 488.500(c)*.) A lien under *C.C.P. 488.375* is extinguished if property subject to the lien becomes a fixture within the meaning of U.C.C. 9313 (now U.C.C. 9102(a)(41)). (*C.C.P. 488.375(e)*.) U.C.C. 9102(a)(41) defines "fixtures" as goods that have become so related to particular real property that an interest in them arises under real property law.

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3. Fees.

6 *Witkin Cal. Proc. Prov Rem* § 163

[§ 163] Fees.

(1) *Attachment Law*. With respect to the equipment of a going business, the Attachment Law incorporates the fee provisions of the Commercial Code:

(a) The fee for filing a notice of attachment is the same as the fee for filing a financing statement in the standard form. (*C.C.P. 488.375(b).*)

(b) The fee for issuance of a combined certificate under U.C.C. 9528 is set forth in U.C.C. 9525. (*C.C.P. 488.375(c).*)

(c) The fee for a copy of the notice of attachment or notice affecting notice of attachment is in accordance with U.C.C. 9528. (*C.C.P. 488.375(c).*)

(d) The fee for filing, indexing, and furnishing data for a notice of extension is the same as that prescribed for continuation statements under U.C.C. 9525. (*C.C.P. 488.375(d).*)

(e) The fee for filing, indexing, and furnishing data for a notice of release of attachment is the same as the fee for a statement of relief under U.C.C. 9525. (*C.C.P. 488.375(d).*)

(2) *Commercial Code*. The relevant fee schedule is governed by U.C.C. 9525(a), which provides that the fee for filing and indexing records under U.C.C. 9501 et seq. is set forth in *Govt.C. 12194* (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §88) as follows:

(a) Ten dollars for a record that is communicated in writing and consists of one or two pages. (*Govt.C. 12194(a).*)

(b) Twenty dollars for a record that is communicated in writing and consists of more than two pages. (*Govt.C. 12194(b).*)

(c) Five dollars for a record that is communicated by another authorized medium. (*Govt.C. 12194(c).*)

The number of names required to be indexed does not affect the amount of the fee. (U.C.C. 9525(b).)

The fee for responding to a request for information from the filing office is \$ 10 if the request is communicated in writing and \$ 5 if the request is communicated by another authorized medium. (U.C.C. 9525(c).)

Information on filing fees for Commercial Code filings is available at the website of the California Secretary of State: www.sos.ca.gov.

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2. Particular Types of Property.

d. Motor Vehicles, Vessels, Mobilehomes, and Coaches.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 164

[§ 164] In General.

(1) *Scope of Statutory Provisions.* *C.C.P. 488.385* provides for attachment of a vehicle, vessel, mobilehome, or commercial coach that is equipment of a going business in the possession or control of the defendant. The statute applies only to motor vehicles that are equipment of a going business. Other motor vehicles are attached under other provisions. Inventory, for example, is attached under *C.C.P. 488.395* and *488.405* (*infra*, §168 et seq.). (*C.C.P. 488.385(a)*; Law Rev. Com. Comment.)

(2) *Filing of Notice.* The property is attached by the levying officer filing a notice of attachment containing the following information:

- (a) The name and mailing address of the plaintiff. (*C.C.P. 488.385(a)(1)*.)
- (b) The name and last known mailing address of the defendant. (*C.C.P. 488.385(a)(2)*.)
- (c) The title of the court and the cause and number of the action. (*C.C.P. 488.385(a)(3)*.)
- (d) A description of the specific property attached. (*C.C.P. 488.385(a)(4)*.)
- (e) A statement that the plaintiff has acquired an attachment lien on the specific property of the defendant. (*C.C.P. 488.385(a)(5)*.)

The notice for a vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles is filed there. The notice for a mobilehome or commercial coach for which a certificate of ownership has been issued by the Department of Housing and Community Development is filed there. The form of the notice is prescribed by the appropriate department. (*C.C.P. 488.385(a)*.) (See Judicial Council Form No. AT-165 [Notice of Attachment].)

On presentation of a notice of attachment, a notice of extension, or a notice of release and payment of a filing fee, the appropriate department files and indexes the notice. (*C.C.P. 488.385(b)*; on amount of fee, see *infra*, §166.)

(3) *Notice to Record Owner and Junior Lienholders.* If a vehicle or vessel is attached with a certificate of ownership from the Department of Motor Vehicles still in effect, or if a mobilehome or commercial coach is attached with a certificate of title from the Department of Housing and Community Development still in effect, the levying officer must comply with *C.C.P. 700.090* (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §128), requiring service of the writ and notice on the legal owner and junior lienholders who are neither the judgment debtor nor in possession of the property. (*C.C.P. 488.425.*)

(4) *Certificate.* On request of any person, the department must issue a certificate showing (a) whether there is a notice of attachment on file against the property of a particular person named in the request, and (b) if there is, the date and hour of filing of each notice and the plaintiff's name and address. The department must also furnish a copy of any notice of attachment or notice affecting a notice of attachment. (*C.C.P. 488.385(c).*)

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2. Lien.

6 Witkin Cal. Proc. Prov Rem § 165

[§ 165] Lien.

Levy on the property creates an attachment lien. (*C.C.P. 488.500*, *infra*, §184.) A lien under *C.C.P. 488.385* (*supra*, §164) is extinguished if property subject to the lien becomes a fixture within the meaning of U.C.C. 9102(a)(41) (see *supra*, §162). (*C.C.P. 488.385(d)*.)

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3. Fees.

6 *Witkin Cal. Proc. Prov Rem* § 166

[§ 166] Fees.

C.C.P. 488.385 provides for the following fees:

(1) The fee for filing and indexing each notice of attachment, notice of extension, or notice of release is \$ 15.
(*C.C.P. 488.385(b)*.)

(2) The fee for issuing a certificate is \$ 15. (*C.C.P. 488.385(c)*.)

(3) The fee for furnishing a copy of a notice of attachment or notice affecting a notice of attachment is \$ 1 per page.
(*C.C.P. 488.385(c)*.)

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4. Rights of Bona Fide Purchaser.

6 *Witkin Cal. Proc. Prov Rem* § 167

[§ 167] Rights of Bona Fide Purchaser.

The perfection of a security interest in a registered vehicle requires deposit of an indorsed certificate of ownership. (*Veh.C.* 6300; see 4 *Summary* (10th), *Sales*, §236.) No such requirement is made for attachment. Thus, the defendant may be able to sell the vehicle to a purchaser without knowledge of the attachment. *C.C.P.* 488.500(d) protects the purchaser by providing that an attachment lien under *C.C.P.* 488.385 does not affect the rights of a bona fide purchaser or encumbrancer who obtains possession of the property and a certificate of ownership issued by the Department of Motor Vehicles or a certificate of title or registration card issued by the Department of Housing and Community Development.

If the levying officer obtains possession of the certificate of ownership or title or registration card, the attachment lien has the priority of the lien of a lien creditor under U.C.C. 9317 and 9323 (see 4 *Summary* (10th), *Secured Transactions in Personal Property*, §§105 et seq., 140 et seq.) as of the time the officer obtains possession. If the officer does not obtain possession of the certificate of ownership or title or registration card, the attachment lien has the same force and effect as an unperfected security interest that attached at the time notice of the attachment was filed. (*C.C.P.* 488.500(d).) Possession of the certificate may be obtained by a turnover order under *C.C.P.* 482.080 (*supra*, §114). (Law Rev. Com. Comment to *C.C.P.* 488.500.)

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e. Farm Products and Business Inventory.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 168

[§ 168] In General.

(1) *Farm Products*. "Farms products" is defined as "crops or livestock or supplies used or produced in farming operations or products of crops or livestock in their unmanufactured states (such as ginned cotton, wool clip, maple syrup, milk, and eggs), while in the possession of a defendant engaged in raising, fattening, grazing, or other farming operations. If tangible personal property is a farm product, it is neither equipment nor inventory." (*C.C.P.* 481.110; see U.C.C. 9102(a)(34).)

(2) *Business Inventory*. "Inventory" is defined as "tangible personal property in the possession of a defendant that (a) is held by the defendant for sale or lease or to be furnished under contracts of service or (b) is raw materials, work in process, or materials used or consumed in his trade, business, or profession. Inventory of a person is not to be classified as his equipment." (*C.C.P.* 481.120; see U.C.C. 9102(a)(48).)

(3) *Alternative Procedures*. The Attachment Law provides two alternative procedures for the attachment of farm products and inventory of a going business: (a) control by a keeper (*infra*, §169), and (b) filing a notice of attachment with the Secretary of State (*infra*, §170 et seq.). Neither procedure is applicable to growing crops, timber to be cut, or minerals to be extracted (see *infra*, §173). (*C.C.P.* 488.395, 488.405(a).) (See 14 *Pacific L. J.* 451.)

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2. Custody of Keeper or Levying Officer.

6 *Witkin Cal. Proc. Prov Rem* § 169

[§ 169] Custody of Keeper or Levying Officer.

(1) *Authorization for Keeper.* To attach farm products or business inventory in the possession or control of the defendant, the levying officer places the keeper in charge of the property. The business may continue to operate provided that all sales are final and for cash or a cash equivalent (including checks). The levying officer is not liable for accepting payment in the form of a cash equivalent. Unless otherwise directed by the plaintiff, the keeper takes custody of the proceeds of sales. (*C.C.P. 488.395(a).*)

(2) *Duration of Custody.* The business may continue to operate under the keeper (a) for 10 days, if the defendant is a natural person and the writ was issued ex parte (see supra, §128 et seq.), or (b) for 2 days, in all other cases. (*C.C.P. 488.395(b).*) However, unless the parties agree to some other disposition, the levying officer must take the property into exclusive custody at the end of the 2-day or 10-day period or at any earlier time at which the defendant objects to a keeper. (*C.C.P. 488.395(c).*)

(3) *Release of Property Needed for Support.* Where the writ of attachment has been issued ex parte against a natural person, the defendant may claim an exemption for property necessary for support under *C.C.P. 487.020(b)* (supra, §83) by following the procedure set forth in *C.C.P. 482.100* (infra, §222), except that no showing of changed circumstances is required. If the claim is allowed, the court must release the property but may make an appropriate order to protect the plaintiff's claim, including "reasonable restrictions on the disposition of the property previously attached" and authority for the plaintiff to file under *C.C.P. 488.405* (infra, §170 et seq.). (*C.C.P. 488.395(d).*)

(4) *Exception for Keeper of Money.* *C.C.P. 488.395* does not apply to placement of a keeper in a business for purposes of attaching tangible personal property consisting only of money or equivalent sales proceeds, which must be conducted as provided in *C.C.P. 700.070* (8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §126). (*C.C.P. 488.395(e).*)

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3. Filing Notice With Secretary of State.

aa. In General.

6 *Witkin Cal. Proc. Prov Rem* § 170

[§ 170] In General.

(1) *Alternative Procedure.* As an alternative to the custody procedure (*supra*, §169), the plaintiff may instruct the levying officer to attach farm products or inventory of a going business in the defendant's possession or control as provided by *C.C.P. 488.405*. (*C.C.P. 488.405(a)*.)

(2) *Filing of Notice.* The levying officer files a notice of attachment with the Secretary of State (*C.C.P. 488.405(b)*) containing the following:

(a) The name and mailing address of the plaintiff. (*C.C.P. 488.405(f)(1)*.)

(b) The name and last known mailing address of the defendant. (*C.C.P. 488.405(f)(2)*.)

(c) The title of the court and the cause and number of the action. (*C.C.P. 488.405(f)(3)*.)

(d) A description of the farm products and inventory attached. (*C.C.P. 488.405(f)(4)*.)

(e) A statement that the plaintiff has acquired an attachment lien on the described property, on identifiable cash proceeds and, if permitted by the writ or court order, on after-acquired property. (*C.C.P. 488.405(f)(5)*.) (See Judicial Council Form No. AT-165 [Notice of Attachment].)

The notice must be in a form specified by the Secretary. (*C.C.P. 488.405(f)*.)

Once the notice of attachment is filed and a fee paid (*infra*, §172), the Secretary files, marks, and indexes the notice "in the same manner as a financing statement." (*C.C.P. 488.405(g)*.)

(3) *Certificate.* On the request of any person, the Secretary of State must issue a certificate showing (a) whether there is a notice of attachment on file against the property of a particular person named in the request, and (b) if there is,

the date and hour of filing of each notice and any notice affecting the notice and the plaintiff's name and address. On request, the Secretary must also furnish a copy of any notice of attachment or notice affecting a notice of attachment. The certificate must be issued as part of a combined certificate under U.C.C. 9528. (*C.C.P. 488.405(h).*)

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bb. Lien.

6 *Witkin Cal. Proc. Prov Rem* § 171

[§ 171] Lien.

(1) *In General.* The filing of the notice of attachment gives the plaintiff an attachment lien on farm products and inventory described in the notice, identifiable cash proceeds and, if permitted by the writ or the court, after-acquired property. (*C.C.P. 488.405(c)*.) Except as otherwise provided by the Attachment Law, the lien has the same force and effect as a judgment lien on personal property under *C.C.P. 697.590* through *697.620* (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§87, 88). (*C.C.P. 488.500(c)*.)

(2) *Property Excluded.* The lien does not extend to (a) vehicles, vessels, mobilehomes, or commercial coaches required to be registered (see *C.C.P. 488.385*, *supra*, §164 et seq.), or (b) inventory of a retail merchant (as defined in the statute) held for sale, excluding durable goods with a retail value of at least \$ 500. (*C.C.P. 488.405(d)*.) A lien under *C.C.P. 488.405* is extinguished if property subject to the lien becomes a fixture within the meaning of U.C.C. 9102(a)(41) (see *supra*, §162). (*C.C.P. 488.405(e)*.)

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cc. Fees.

6 *Witkin Cal. Proc. Prov Rem* § 172

[§ 172] Fees.

C.C.P. 488.405 provides for the following fees:

(1) The fee for filing a notice of attachment is the same as the fee for filing a financing statement in the standard form. (*C.C.P. 488.405(g)*.)

(2) The fee for a combined certificate under U.C.C. 9528 showing attachment liens, financing statements, and state tax liens is set forth in U.C.C. 9525 (see *supra*, §163). (*C.C.P. 488.405(h)*.)

(3) The fee for a copy of the notice of attachment or notice affecting notice of attachment is the same as that prescribed for a copy under U.C.C. 9528. (*C.C.P. 488.405(h)*.) The fee schedule is set forth in U.C.C. 9525. (See *supra*, §163.)

(4) The fee for filing, indexing, and furnishing data for notice of extension is the same as that prescribed for continuation statements under U.C.C. 9525 (see *supra*, §163). (*C.C.P. 488.405(i)*.)

(5) The fee for filing, indexing, and furnishing data for a notice of release of attachment is the same as the fee for a statement of relief under the Uniform Commercial Code. (*C.C.P. 488.405(i)*.) The fee schedule is set forth in U.C.C. 9525. (See *supra*, §163.)

Information on filing fees for financing statements and other Uniform Commercial Code filings is available at the website of the California Secretary of State: www.sos.ca.gov.

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f. Crops, Timber, and Minerals.

6 *Witkin Cal. Proc. Prov Rem* § 173

[§ 173] Crops, Timber, and Minerals.

C.C.P. 488.325 incorporates the procedure used for execution on a money judgment (*C.C.P. 700.020*; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §121 et seq.) for the following property:

- (1) Growing crops.
- (2) Timber to be cut.
- (3) Minerals (including oil and gas) to be extracted or amounts received from their sale.

Once the crops are harvested, the timber is cut, or the minerals are extracted, the property may be attached under *C.C.P. 488.335* et seq. (tangible personal property; see *supra*, §160), *C.C.P. 488.395* (keeper for farm products; see *supra*, §169), or *C.C.P. 488.405* (lien on farm products; see *supra*, §171). If necessary, the levying officer or a receiver may cultivate, harvest, pack, and sell the attached property pursuant to a court order under *C.C.P. 488.700* (*infra*, §191). (Law Rev. Com. Comment to *C.C.P. 488.325*; see 14 *Pacific L. J.* 449.)

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g. Accounts Receivable and General Intangibles.

6 *Witkin Cal. Proc. Prov Rem § 174*

[§ 174] Accounts Receivable and General Intangibles.

"Account receivable" and "general intangibles" are defined by *C.C.P. 481.030* and *C.C.P. 481.115*, respectively. (See *supra*, §56.) Unless *C.C.P. 488.300* et seq. provide another method of attachment, accounts receivable and general intangibles are attached by the levying officer personally serving a copy of the writ and the notice of attachment on the account debtor. (*C.C.P. 488.470(a)*.) (For definition of "account debtor," see *C.C.P. 481.020*, *supra*, §56.)

If payments on the receivable or intangible are made to a person other than the defendant, and if the plaintiff so instructs, the levying officer must personally serve the notice and writ on that person. This service is an attachment of any amounts owed to the defendant by the third person. (*C.C.P. 488.470(b)*.)

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h. Deposit Accounts.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 175

[§ 175] In General.

(1) *Service on Financial Institution.* "Deposit account" is defined in *C.C.P. 481.080*. (See *supra*, §56.) Subject to the restrictions imposed by *C.C.P. 488.465* (see *infra*, §178), to attach a deposit account, the levying officer must personally serve a copy of the writ of attachment and the notice of attachment on the financial institution maintaining the account. (*C.C.P. 488.455(a)*.) A "financial institution" is "a state or national bank, state or federal savings and loan association or credit union, or like organization, and includes a corporation engaged in a safe deposit business." (*C.C.P. 481.113*.)

In lieu of personally serving the financial institution maintaining the account, the levying officer may personally serve the writ and notice of attachment on a central location designated by the financial institution in the county. If the writ of attachment is received at this location, it will apply to all deposit accounts held by the institution regardless of the location of that property. This provision does not require a financial institution to designate a central location for personal service. (*C.C.P. 488.455(a)*; see *12 A.L.R.3d 1088* [attachment and garnishment of funds in branch bank or in main office of bank with branches].)

A deposit account evidenced by a negotiable certificate of deposit is a negotiable instrument and is attached under *C.C.P. 488.440* (*supra*, §158). (Law Rev. Com. Comment to *C.C.P. 488.455*.) (See *14 Pacific L. J. 449*.)

Where attachment is levied on a savings account at a state or federal savings and loan association, a copy of the writ and notice of attachment must be served on the manager or an officer at the branch where the account is maintained or, if the branch is no longer in operation, at the home office of the association. Writs and notices not so served are ineffective. (*Fin.C. 6663*; see *17 Pacific L. J. 622*.)

(2) *Restriction on Payment.* The financial institution may not, while the attachment lien is in effect, honor a check or payment order or pay a withdrawal that would reduce the account to less than the amount attached. Items in collection are not considered in determining the amount in the account. (*C.C.P. 488.455(c)*.)

(3) *Nonliability of Institution.* While the lien is in effect, the institution is not liable to any person for refusing,

pursuant to the payment restrictions of *C.C.P. 488.455(c)*, to honor a payment order or to pay a withdrawal, or for performing the duties of a garnishee. (*C.C.P. 488.455(d)*.)

(4) *Lien*. A levy under a writ of attachment creates an attachment lien. (See *C.C.P. 488.500(a)*, *infra*, §184.) An attachment lien with respect to a deposit account reaches only amounts in the account at the time of service on the financial institution, including any item in collection, unless the item is returned unpaid to the financial institution. (*C.C.P. 488.455(a)*.) The lien terminates when the amount attached is paid to the levying officer. (*C.C.P. 488.455(e)*.)

(5) *Restriction on Levy*. Where an individual defendant has more than one deposit account or one or more deposit accounts and money not on the premises where he or she conducts a trade, business, or profession, the plaintiff must apply to the court to levy on the money or deposit accounts so that the total remaining free from attachment is \$ 1,000. The plaintiff may apply for the order either at the hearing on the issuance of the writ or thereafter. (*C.C.P. 487.010(c)(7)*; Legislative Com. Comment.)

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h. Deposit Accounts.

2. Retention of Account by Financial Institution.

6 Witkin Cal. Proc. Prov Rem § 176

[§ 176] Retention of Account by Financial Institution.

As an alternative to paying the attached amount to the levying officer as required by *C.C.P. 488.600* (see *infra*, §192), "the financial institution may continue to hold the deposit account until the deposit account is levied upon after judgment in the action or is earlier released," as follows:

(1) The institution may hold the account in any manner agreed on by the plaintiff, the defendant, and any third person in whose name the account stands. (*C.C.P. 488.455(g)(3)*.)

(2) If the entire account is attached, the institution may hold the account on the terms applicable before the attachment, subject to the payment restrictions of *C.C.P. 488.455(c)* (*supra*, §175). (*C.C.P. 488.455(g)(1)*.)

(3) If less than the entire account is attached, and the defendant and any third person in whose name the account stands consent, the institution "may hold in the deposit account on the same terms an amount larger than the attached amount as necessary to avoid a penalty or a reduction of the rate of interest." If the defendant and any third person do not consent, the institution "may hold the attached amount on the same terms affecting the deposit account before the attachment," subject to the payment restrictions of *C.C.P. 488.455(c)*. (*C.C.P. 488.455(g)(2)*.)

C.C.P. 488.455(g) does not prevent a financial institution holding an attached deposit account from paying the attached amount to the levying officer before the time the financial institution is otherwise required to pay the amount under *C.C.P. 488.455(g)*. (*C.C.P. 488.455(h)*.) "Hence, a financial institution may hold a time deposit until maturity and then pay over the attached amount even though not yet required to do so." (Legislative Com. Comment to *C.C.P. 488.455*.)

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i. Safe Deposit Boxes.

6 Witkin Cal. Proc. Prov Rem § 177

[§ 177] Safe Deposit Boxes.

(1) *Service on Financial Institution.* To attach property in a safe deposit box, the levying officer must personally serve a copy of the writ of attachment and notice of attachment on the financial institution where the box is maintained. This authority is subject to the restrictions imposed by *C.C.P. 488.465* (see *infra*, §178). (*C.C.P. 488.460(a)*.) (For definition of "financial institution," see *C.C.P. 481.113*, *supra*, §175.) (See *14 Pacific L. J. 449*.)

Where attachment is levied on property maintained with a state or federal savings and loan association, the writ and notice of attachment must be served on the manager or an officer at the branch where the property is maintained or, if the branch is no longer in operation, at the home office of the association. Writs and notices not so served are ineffective. (*Fin.C. 6663*; see *17 Pacific L. J. 622*.)

(2) *Removal of Contents.* During the time the attachment lien is in effect, the financial institution may not permit the contents of the safe deposit box to be removed except as directed by the levying officer. (*C.C.P. 488.460(c)*.) The levying officer may give the holder of the box an opportunity to open it to permit the removal of attached property, and the financial institution may refuse to permit forcible opening unless the plaintiff pays in advance the cost of forcibly opening the box and of repairing any damage. (*C.C.P. 488.460(e)*.)

(3) *Nonliability of Institution.* While the attachment is in force, the financial institution is not liable for (a) performing the duties of a garnishee under the attachment, or (b) refusing to permit access to the safe deposit box by the person in whose name it stands, or (c) removal of any of the contents pursuant to the attachment. (*C.C.P. 488.460(f)*.)

(4) *Fee.* The fee for opening a safety deposit box under *C.C.P. 488.460* is \$ 125. (*Govt.C. 26723*.)

(5) *Duty on Receipt of Garnishee's Memorandum.* On receipt of a garnishee's memorandum under *C.C.P. 488.610* (*infra*, §§193, 194) indicating that a safe deposit box is under levy, the levying officer must promptly mail a written notice to the judgment creditor demanding payment of the fee set forth in *Govt.C. 26723* and the cost to open the box and remove and store the contents. If the plaintiff does not pay the required fee and costs within 3 business days (plus the extended period under *C.C.P. 1013(a)* for service by mail by the levying officer), the officer must release the levy. (

C.C.P. 488.460(d).)

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j. Deposit Accounts and Boxes in Third Person's Name.

6 Witkin Cal. Proc. Prov Rem § 178

[§ 178] Deposit Accounts and Boxes in Third Person's Name.

(1) *Court Order Is Required.* Subject to specified exceptions (see *infra*, this section), a deposit account or safe deposit box in the name of a third person, either alone or with others, is subject to levy only by court order. (*C.C.P.* 488.465; see 16 *Pacific L. J.* 529.) "This requirement is designed to protect the rights of persons who are not parties to the action and who may not have any relationship to the defendant." (Law Rev. Com. Comment to *C.C.P.* 488.465.) The Law Revision Commission Comment gives examples of proceedings in which a court order may be obtained:

(a) Examination of third person. (*C.C.P.* 491.110, *infra*, §195 et seq.)

(b) Determination of third person's adverse claim. (*C.C.P.* 491.170, *infra*, §199.)

(c) Creditor's suit. (*C.C.P.* 491.310 et seq., *infra*, §201.)

(d) Action under Uniform Fraudulent Transfer Act. (*C.C.* 3439.07(a)(2); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §488 et seq.)

(2) *Exceptions.* A court order is not required for levy on a deposit account or safe deposit box held in the names of any of the following:

(a) The defendant, whether alone or with others. (*C.C.P.* 488.465(b)(1).)

(b) The defendant's spouse, whether alone or with others. An affidavit showing that the account holder is the defendant's spouse must be delivered to the financial institution at the time of levy. (*C.C.P.* 488.465(b)(2).)

(c) A fictitious business name, if an unexpired fictitious business name statement filed under *B. & P.C.* 17900 et seq., lists as the persons doing business either the defendant or the defendant's spouse, or both, but not any other person. A certified copy of the fictitious business name statement must be delivered to the financial institution at the time of levy and if a person other than the defendant is listed in the statement, an accompanying affidavit must show that the other person is the defendant's spouse. (*C.C.P.* 488.465(b)(3).)

(3) *Service on Third Person.* At the time of levy or "promptly thereafter," the levying officer must serve a copy of the writ and notice of attachment on the third person. (*C.C.P. 488.455(b), 488.460(b).*) A copy of the court order must be served at the same time. (*C.C.P. 488.465(a).*) Neither a beneficiary of a Totten trust nor a designated payee in a pay-on-death provision is a third person in this context. (*C.C.P. 488.455(f).*)

(4) *Holding Period.* In the case of levy on a deposit account in the name of a third person, whether alone or with the defendant, the levying officer must notify the financial institution to pay the amount levied on and may not require the financial institution to do so until 15 days after service of notice of attachment on the third person. (*C.C.P. 488.465(c).*) The holding period is intended to provide the third person with an opportunity to file a third-party claim (see *C.C.P. 488.110*, *supra*, §156) before the amount is paid to the levying officer. (Law Rev. Com. Comment to *C.C.P. 488.465.*)

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k. Securities.

6 *Witkin Cal. Proc. Prov Rem* § 179

[§ 179] Securities.

To attach a security, the levying officer must comply with U.C.C. 8112 (see 9 *Summary* (10th), *Corporations*, §141), requiring, with specified exceptions, actual seizure of the security or, where the security is uncertificated, the certificate has been surrendered, or the debtor's interest is in a security entitlement, service of legal process on the issuer. (*C.C.P.* 488.450.) (For definition of "security," see *C.C.P.* 481.210, *supra*, §56.)

The legal process referred to in U.C.C. 8112 means that process required by the state where the chief executive office of the security's issuer is located. In California, this legal process means personal service of a copy of the writ of attachment and notice of attachment by the levying officer on the person to be served. (*C.C.P.* 488.450.)

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6 *Witkin Cal. Proc. Prov Rem* § 180

[§ 180] (l) Final Money Judgments.

(1) *Definition.* A "final money judgment" is a money judgment after the time for appeal has expired or after an appeal has been finally determined. (*C.C.P. 488.480(a).*)

(2) *Service on Clerk of Court.* To attach a final money judgment, the levying officer files a copy of the writ and notice of attachment with the clerk of the court that entered the final money judgment. The clerk endorses the judgment with a statement of the existence and time of creation of the attachment lien. If an abstract of judgment is issued, it must include a statement of the attachment lien. (*C.C.P. 488.480(b).*)

(3) *Service on Judgment Debtor.* At the time of levy or "promptly thereafter," the levying officer must serve a copy of the writ and notice of attachment on the judgment debtor obligated to pay the judgment. (*C.C.P. 488.480(c).*)

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m. Interest in Estate Personal Property.

6 Witkin Cal. Proc. Prov Rem § 181

[§ 181] Interest in Estate Personal Property.

(1) *Service on Personal Representative.* To attach the defendant's testate or intestate interest in personal property in the estate of a decedent, the levying officer must personally serve a copy of the writ and notice of attachment on the personal representative. The attachment does not impair the representative's powers for purposes of administration. (*C.C.P. 488.485(a).*)

(2) *Delivery of Property.* When a petition for distribution is filed, the personal representative must report the attachment. If a decree orders distribution to the defendant, the court must order the attached property to be delivered to the levying officer when the decree of distribution becomes final. Property delivered to the levying officer that is not necessary to satisfy the attachment must be released to the defendant. (*C.C.P. 488.485(b).*)

(3) *Notice to Defendant and Claim.* Promptly after the property is delivered to the levying officer, the officer must serve on the defendant a notice describing the property. Notwithstanding *C.C.P. 484.070* (claim of exemption where plaintiff seeks writ of attachment by noticed hearing; supra, §104), *C.C.P. 484.350* (claim of exemption where plaintiff seeks additional writ by noticed hearing; supra, §121), *C.C.P. 484.530* (claim of exemption where plaintiff seeks additional writ ex parte; supra, §127), and *C.C.P. 485.610* (claim of exemption where plaintiff seeks writ of attachment ex parte; supra, §140), a claim of exemption for the property described in the notice may be made within 10 days after the notice is served. (*C.C.P. 488.485(c).*)

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n. Property Subject of Pending Action.

6 *Witkin Cal. Proc. Prov Rem* § 182

[§ 182] Property Subject of Pending Action.

(1) *When Action Is Pending.* An action or proceeding is pending from the time it is commenced until judgment has been entered and the time for appeal has expired or an appeal has been finally determined. (*C.C.P. 488.475(d).*)

(2) *General Rule of Nonattachment.* Except as provided by *C.C.P. 488.475(a)*, attachment is not effective with respect to property that is the subject of an action or special proceeding pending at the time of attachment. (*C.C.P. 488.475(b).*) However, this prohibition does not limit a plaintiff's right to obtain a lien in a pending action or proceeding under *C.C.P. 491.410* et seq. (*infra*, §203 et seq.). (*C.C.P. 488.475(e).*)

(3) *Exceptions.* The following property may be attached even though it is the subject of a pending action or proceeding:

(a) Real property. (*C.C.P. 488.475(a)(1).*)

(b) Growing crops, timber to be cut, or minerals (including oil and gas) to be extracted, or accounts receivable resulting from their sale. (*C.C.P. 488.475(a)(2).*)

(c) Tangible personal property in the defendant's possession or control or in the custody of a levying officer. (*C.C.P. 488.475(a)(3).*)

(d) The defendant's testate or intestate interest in personal property in a decedent's estate. (*C.C.P. 488.475(a)(4).*)

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3. Lien of Attachment.

a. Former Law.

6 Witkin Cal. Proc. Prov Rem § 183

[§ 183] Former Law.

(1) *Nature of Lien.* The levy by the officer in accordance with the statute created a specific lien on the property attached, dating from the time of levy. (See *People v. Biscailuz* (1950) 95 C.A.2d 635, 640, 213 P.2d 753; but see *Puissegur v. Yarbrough* (1946) 29 C.2d 409, 412, 175 P.2d 830 [garnishment of note; "attaching creditor obtains only a potential right or a contingent lien"]; *United States v. Security Trust & Savings Bank of San Diego* (1950) 340 U.S. 47, 71 S.Ct. 111, 113, 95 L.Ed. 53, 56 [approving *Puissegur*].)

However, the attaching creditor, who gave no new value, had none of the characteristics of a bona fide purchaser. This creditor "stands in the shoes of the debtor" and the lien attached only to the debtor's interest at the time of levy. (*Burns v. Peters* (1936) 5 C.2d 619, 625, 55 P.2d 1182; *Pintel v. K.N.H. Mohamed & Bros.* (1951) 107 C.A.2d 328, 330, 237 P.2d 315.)

(2) *Duration and Extensions of Lien on Real Property.* The lien on real property commenced on recording of a copy of the writ, description, and notice of attachment in the county where the land was located, and normally lasted for 3 years, provided the writ and notice were served on the occupant or posted. But on motion the court in which the action was pending could extend the time for not more than 2 years. (Former C.C.P. 542a; see *Palmer v. Fix* (1928) 205 C. 472, 474, 271 P. 749 [trial court alone can extend; appellate court cannot, even though appeal is pending].) Further 2-year extensions could also be had; but no extension could be given where the lien had already expired or otherwise terminated. (*Whitney v. Superior Court* (1926) 199 C. 569, 575, 250 P. 666 [lien previously released by court's order discharging attachment].)

(3) *Duration and Extensions of Lien on Personal Property.* An attachment or garnishment on personal property normally expired 3 years after issuance of the writ. (Former C.C.P. 542b; see *Puissegur v. Yarbrough*, *supra*; *United States Liab. Ins. Co. v. Superior Court* (1967) 252 C.A.2d 557, 563, 60 C.R. 723.) The statute authorized extension on motion for successive periods of up to 1 year, except that the aggregate of all extensions could not exceed 2 years. (See *Boloodian v. Ohanesian* (1970) 13 C.A.3d 635, 640, 91 C.R. 923.)

(4) *Discharge by Defendant's Death.* The lien was formerly discharged by the death of the debtor, for the property

fell into the estate for ratable distribution, and the attaching creditor had no special lien or preference. (See *Turner v. Fidelity & Deposit Co. of Maryland* (1921) 187 C. 76, 84, 200 P. 959; *Clary v. Rupert* (1949) 93 C.A.2d 844, 210 P.2d 44.)

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b. Nature and Effect of Lien.

6 *Witkin Cal. Proc. Prov Rem* § 184

[§ 184] Nature and Effect of Lien.

(1) *Nature and Effective Date.* From the time of levy on property under a writ of attachment until the expiration of the time provided in *C.C.P. 488.510* (infra, §187), the levy creates an attachment lien on the property. (*C.C.P. 488.500(a).*)

If an attachment lien is created on property subject to a lien under a temporary protective order (*C.C.P. 486.110*, see supra, §147) or a lien on the defendant's interest in property held by a third person (see *C.C.P. 491.110*, infra, §197), the priority of the attachment lien relates back to the date the earlier lien was created but does not affect priorities or rights of third persons established while the earlier lien was in effect under the law governing the effect of the earlier lien. (*C.C.P. 488.500(e).*)

(2) *Effect of Lien.* Generally, if property subject to an attachment lien is transferred or encumbered, the property remains subject to the lien to the extent that it would remain subject to an execution lien. (*C.C.P. 488.500(b).*) (On execution liens, see *C.C.P. 697.710* et seq.; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §92 et seq.) However, the Attachment Law provides specific rules for the effect of an attachment lien on the following kinds of property:

(a) Equipment (see supra, §162).

(b) Farm products and inventory (see supra, §171).

(c) Vehicles, vessels, mobilehomes, and commercial coaches (see supra, §165).

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c. Priority.

1. Priority in Time.

6 *Witkin Cal. Proc. Prov Rem* § 185

[§ 185] Priority in Time.

The general rule of C.C. 2897 governs priority of attachment liens: other things being equal, the lien prior in time prevails. This rule applies between attaching creditors and also between an attaching creditor and any other lien claimant or encumbrancer. (See *Haupt v. Charlie's Kosher Market* (1941) 17 C.2d 843, 846, 112 P.2d 627 [attorney's lien by contract prevails over subsequent attachment]; *Bank of South San Francisco v. Pike* (1921) 53 C.A. 524, 528, 200 P. 752.) And a subsequent claimant cannot obtain priority by attacking such irregularities as a defective statement in the affidavit for the first attachment; the debtor alone can raise this kind of objection. (*Shea v. Johnson* (1894) 101 C. 455, 457, 35 P. 1023; cf. *Title Ins. & Trust Co. v. California Dev. Co.* (1915) 171 C. 173, 215, 152 P. 542 [this rule does not apply where objection is fraud in creation of attachment lien directly affecting rights of complaining party].)

An attaching creditor does not lose priority by levying the attachment with knowledge of the debtor's insolvency. "Indeed, attachments are generally sought because the creditor fears that the debtor will be unable to pay all claims against him and because he desires to obtain security for his own demand by means of the attachment. The preference thus obtained is one that is contemplated by the law which authorizes the attachment. It is the reward obtained by superior diligence. The attachment law and the rights given under it would be seriously impaired, if not destroyed, by a holding that an attaching creditor may have his lien defeated by proof that he knew the debtor was insolvent and that he levied his attachment for the purpose of securing a lien prior to the claims of less diligent creditors. The fraud which will destroy the right of attachment must be something in the nature of a want of merit in the claim, or of collusion between the attaching creditor and his debtor." (*Title Ins. & Trust Co. v. California Dev. Co.*, supra, 171 C. 216.)

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c. Priority.

2. Other Rules of Priority.

6 Witkin Cal. Proc. Prov Rem § 186

[§ 186] Other Rules of Priority.

Several additional rules of priority are established by special statutes:

(1) *Personal Property Subject to Security Interest*. Where personal property is subject to a security interest, priority depends on which was first in time: the attachment lien or the perfection (not the creation) of the security interest. (See U.C.C. 9322; 4 *Summary* (10th), *Secured Transactions in Personal Property*, §114 et seq.)

(2) *Real Property Subject to Deed or Mortgage*. A writ of attachment is not an "instrument" under C.C. 1107, and the attaching creditor, who gives no new value, is not a bona fide purchaser. Hence, a valid deed or real mortgage, prior in time, prevails, even though unrecorded. (*Bank of Ukiah v. Petaluma Savings Bank* (1893) 100 C. 590, 591, 35 P. 170 [mortgage]; *Overton v. Schmitt* (1936) 7 C.2d 163, 167, 59 P.2d 1017 [deed]; *Finnie v. Smith* (1927) 83 C.A. 707, 711, 257 P. 866 [conveyance in trust]; *Boye v. Boerner* (1940) 38 C.A.2d 567, 570, 101 P.2d 757 [deed]; see 12 *Summary* (10th), *Real Property*, §327 et seq.) And the same is true where a prior mortgage or trust deed is defective in any other way, but valid between the parties as an equitable lien or mortgage. (*Burns v. Peters* (1936) 5 C.2d 619, 625, 55 P.2d 1182, 4 *Summary* (10th), *Security Transactions in Real Property*, §15.)

(3) *Tax Liens*. Federal tax liens have priority over earlier attachment liens that have not been superseded by judgment liens. (26 U.S.C., §6323; *United States v. Security Trust & Savings Bank of San Diego* (1950) 340 U.S. 47, 71 S.Ct. 111, 114, 95 L.Ed. 53, 57; *United States v. Acri* (1955) 348 U.S. 211, 75 S.Ct. 239, 241, 99 L.Ed. 264, 267; 41 Cal. L. Rev. 256, 262.) But priority of a state government claim depends on whether a statute expressly or by reasonable implication gives the claim precedence over an existing attachment lien. (See *People v. Biscailuz* (1950) 95 C.A.2d 635, 640, 213 P.2d 753 [state's claim against insolvent employer for delinquent contributions under Unemployment Insurance Act was not entitled to priority]; *People v. Biscailuz* (1951) 107 C.A.2d 71, 73, 236 P.2d 591 [same].)

(4) *Labor Claims*. Where the plaintiff attaches, persons who have claims against the defendant for work or personal services performed within 90 days before the levy are entitled to priority to the extent of \$ 900 for each claim. (C.C.P. 1206; see Lab.C. 4908 [workers' compensation claim has same preference as claim for wages and preference is for

entire amount of compensation[.]) The statute provides for filing a verified statement of the claim and for payment by the officer. (See *C.C.P. 1206* et seq.) However, the priority exists only where the plaintiff's attachment is "not founded upon a claim for labor." If the plaintiff and a claimant both have labor claims, the attachment prevails. (*Levitt v. Faber (1937) 20 C.A.2d Supp. 758, 763, 64 P.2d 498* [plaintiff was salesman working on commission].)

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d. Duration and Extension.

6 Witkin Cal. Proc. Prov Rem § 187

[§ 187] Duration and Extension.

(1) *Initial 3-Year Period.* Unless sooner released, discharged, or extended, an attachment ceases to be of any force or effect and the property levied on is released from the attachment 3 years from the date of issuance of the writ of attachment under which the levy was made. (*C.C.P. 488.510(a)*.) The lien expires notwithstanding an appeal and undertaking (see *infra*, §§216, 219). (*Palmer v. Fix* (1928) 205 C. 472, 475, 271 P. 749; *United States Liab. Ins. Co. v. Superior Court* (1967) 252 C.A.2d 557, 564, 60 C.R. 723.) (On termination of lien by release or discharge, see *infra*, §210 et seq.; on effect of bankruptcy or general assignment, see *infra*, §§188, 189.)

(2) *Successive 1-Year Extensions.* For good cause, the court may order the period of an attachment lien extended for 1 year from the date on which the attachment would otherwise expire, but the maximum period of an attachment, including extensions, may not exceed 8 years from the date of issuance of the writ of attachment. (*C.C.P. 488.510(b)*, (d).)

(3) *Extension Procedure.* The procedure for obtaining an extension is as follows:

(a) The plaintiff makes a motion for extension not less than 10 nor more than 60 days before expiration and gives notice to the defendant not less than 5 days before expiration. (*C.C.P. 488.510(b)*.)

(b) The levying officer serves notice of the order on the person holding the property and records or files the notice in any office where the writ and notice of attachment were recorded or filed before expiration. Where the attached property is real property, the plaintiff or the plaintiff's attorney, rather than the levying officer, may record the notice. (*C.C.P. 488.510(c)*.)

To extend a lien on real property, the notice must be timely recorded with the county recorder. (*Arcata Publications Group v. Beverly Hills Publishing Co.* (1984) 154 C.A.3d 276, 279, 201 C.R. 223 [filing notice with superior court clerk is insufficient].)

(4) *Effect of Defendant's Death.* The death of the owner of attached property does not terminate the attachment. (

C.C.P. 488.510(e).) (On conversion of attachment lien into judgment lien on estate property subject to lien, see *Prob.C. 9304.*)

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e. Effect of Bankruptcy or General Assignment.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 188

[§ 188] In General.

(1) *Federal Law*. An adjudication in bankruptcy, occurring within 90 days of an attachment, does not render the attachment void unless the debtor was insolvent at the time the lien was acquired. (See *11 U.S.C.*, §547(b).) The burden of proving insolvency is on the trustee in bankruptcy seeking to avoid the attachment lien. (*Travis v. Bixler Vapor Dry Cleaning Co.* (1937) 20 C.A.2d 279, 281, 66 P.2d 1263; *Peterson v. Groesbeck* (1937) 20 C.A.2d Supp. 753, 757, 64 P.2d 495.)

(2) *Termination of Lien*. Under the Attachment Law, a lien under an attachment or a temporary protective order is terminated by (a) a general assignment for the benefit of creditors, or (b) a bankruptcy petition, if the assignment is made or the petition is filed within 90 days after the lien is created. (*C.C.P.* 493.030(a), (b).) There is no termination, however, where similar liens in other states have not terminated. (*C.C.P.* 493.030(c); see Law Rev. Com. Comment.) (For definition of "general assignment for benefit of creditors," see *C.C.P.* 493.010; see *C.C.P.* 493.020 [defendant may make general assignment for benefit of creditors notwithstanding any other provision of the Attachment Law]; *C.C.P.* 1802 [notice required for general assignment for benefit of creditors]; *11 Pacific L. J.* 344.)

The California statute, unlike the federal statute, does not require proof of insolvency to void the lien, probably because of the difficulty of proving insolvency on a given date. (See *9 Pacific L. J.* 377.)

(3) *Reinstatement of Lien*. The lien is reinstated: (a) when, in the case of a general assignment, the assignment is set aside other than by filing a bankruptcy petition; or (b) when, in the case of a petition in bankruptcy, the petition is dismissed or the trustee abandons the property released. (*C.C.P.* 493.050(a).) The period from the making of the general assignment to the reinstatement of the lien is not counted in determining the duration of the lien. (*C.C.P.* 493.050(b).)

(4) *Preservation of Lien*. On the filing of a petition in bankruptcy, a lien that is terminated under *C.C.P.* 493.030 is preserved for the benefit of the estate. (*C.C.P.* 493.060(b).) Also, on the making of a general assignment, the general assignee is subrogated to the rights of the plaintiff. (*C.C.P.* 493.060(a).) These provisions prevent another secured party from obtaining paramount rights over the bankrupt's estate or the creditors under a general assignment. (See Law Rev.

Com. Comment to *C.C.P.* 493.060.)

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e. Effect of Bankruptcy or General Assignment.

2. Release of Attached Property.

6 *Witkin Cal. Proc. Prov Rem § 189*

[§ 189] Release of Attached Property.

(1) *Request for Release.* The trustee, interim trustee (or debtor in possession if there is no trustee), or general assignee may secure the release of the attached property by filing the original and a copy of a request for release, executed under oath, with the levying officer, setting forth the grounds for release and describing the property, together with two copies of the general assignment, or a certified copy and additional copy of the petition in bankruptcy. (*C.C.P. 493.040(a), (b), (c).*)

(2) *Undertaking.* If immediate release of the attachment is sought, an undertaking (see *supra*, §115) in the amount secured by the attachment, executed by an admitted surety insurer, must also be filed. (*C.C.P. 493.040(d).*)

(3) *Notice.* Within 5 days, the levying officer must mail the plaintiff a copy of all documents filed and a notice informing the plaintiff either that the attachment has been released pursuant to an undertaking or that it will be released, unless otherwise ordered, within 10 days of mailing of the notice. (*C.C.P. 493.040(e).*) In the latter case, the attached property must be released after 10 days unless otherwise ordered. (*C.C.P. 493.040(f).*)

(4) *Manner of Release.* When property has been taken into custody, it must be released to the applicant or another person named in the request for release. When it has not been taken into custody, it is released as provided in *C.C.P. 488.730(c)* and (d) (*infra*, §212). (*C.C.P. 493.040(g).*)

(5) *Nonliability of Levying Officer.* No personal liability may be imposed on the levying officer or any other person for acting in conformity with these release provisions. (*C.C.P. 493.040(h).*)

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4. Management and Disposition of Property.

a. Commercial Paper.

6 Witkin Cal. Proc. Prov Rem § 190

[§ 190] Commercial Paper.

(1) *Instruments Included.* C.C.P. 488.710 authorizes the levying officer to collect instruments payable to the defendant, including "a check, draft, money order, or other order for the withdrawal of money from a financial institution, the United States, any state, or any public entity within any state." (C.C.P. 488.710(a).)

(2) *Ordinary Instrument.* If an instrument is payable to the defendant on demand, the levying officer must promptly indorse and present it for payment. (C.C.P. 488.710(b); on form of indorsement, see C.C.P. 488.710(c).) Funds or credit resulting from the payment are held by the officer subject to the lien. (C.C.P. 488.710(c).)

(3) *Instrument Tendered in Satisfaction of Claim.* Where the instrument on its face appears to have been tendered to the defendant in satisfaction of a claim or demand, so that indorsement would be considered a release and satisfaction, the officer must not indorse the instrument unless the defendant has first indorsed it to the officer. If the defendant does not so indorse, the officer must hold the instrument for 30 days and then return it to the maker. (C.C.P. 488.710(d).)

(4) *Nonliability of Institution and Officer.* (a) No financial institution or public entity drawee is liable to any person for paying the instrument to the officer on the officer's proper indorsement. (C.C.P. 488.710(c).) (b) The levying officer is not liable by reason of indorsing, presenting and obtaining payment of the instrument (C.C.P. 488.710(c)), or for delay in presenting the instrument for payment where the delay results from the defendant's failure to indorse an instrument tendered in satisfaction of a claim. (C.C.P. 488.710(d).)

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4. Management and Disposition of Property.

b. Depreciating Property.

6 *Witkin Cal. Proc. Prov Rem* § 191

[§ 191] Depreciating Property.

(1) *Conditions.* Under *C.C.P. 488.700(a)*, the court is authorized to take action "necessary to preserve the value of the property," including appointment of a receiver or sale of the property, if the court determines any of the following:

- (a) The property is perishable.
- (b) The property will greatly deteriorate or greatly depreciate in value.
- (c) The interests of the parties will be best served by the order.

(2) *Application.* The order is made on application of either party or a person who has filed a third-party claim under *C.C.P. 720.010* et seq. (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §364 et seq.). The application may be ex parte unless the court or a court rule requires a noticed motion. (*C.C.P. 488.700(a)*.)

(3) *When Officer May Act Without Order.* If the levying officer determines "that property is extremely perishable or will greatly deteriorate or greatly depreciate in value" before a court order could be obtained, the officer may "take any action necessary to preserve the value of the property or may sell the property." The officer is not liable for a good faith determination that action without a court order is necessary. (*C.C.P. 488.700(b)*.)

(4) *Sale.* Unless otherwise provided by court order, the sale is made in the manner of an execution sale under *C.C.P. 701.510* et seq. (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §144 et seq.), except that notice of the sale must be "posted and served at a reasonable time before sale, considering the character and condition of the property." The proceeds of the sale are deposited in court pending final judgment. (*C.C.P. 488.700(c)*.) (See 2C Am.Jur. P.P. Forms (2000 ed.), Attachment and Garnishment, §414 et seq.)

(5) *Receiver.* If a receiver is appointed, the court fixes the receiver's daily fee and may order the plaintiff to pay the receiver's fees and expenses in advance or may direct that any or all of the fees and expenses be paid from the proceeds of any sale of the property. In other respects, the statutes governing receivers (*C.C.P. 564* et seq.; *infra*, §423 et seq.) and undertakings of referees or commissioners handling private property or funds (*C.C.P. 571*; 2 *Cal. Proc. (5th)*,

Courts, §343) apply. (*C.C.P.* 488.700(d).)

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5. Duties and Liabilities of Third Person.

a. Enforcement of Judgments Law Is Applicable.

6 Witkin Cal. Proc. Prov Rem § 192

[§ 192] Enforcement of Judgments Law Is Applicable.

The duties and liabilities of a third person in possession or control of property subject to attachment are governed generally by the provisions of the Enforcement of Judgments Law applicable to enforcement of a money judgment (*C.C.P. 701.010, 701.020, 701.040, 701.050, 701.060, 701.070*; see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §139 et seq.). (*C.C.P. 488.600*; for definitions of terms used under Enforcement of Judgments Law for purposes of *C.C.P. 488.600*, see *C.C.P. 488.600(b), (c)*.) (See 36 *A.L.R.4th* 824 [garnishee's duty to give debtor notice of garnishment]; 20 *A.L.R.5th* 229 [sufficiency of notice of garnishment].)

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5. Duties and Liabilities of Third Person.

b. Garnishee's Memorandum.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 193

[§ 193] In General.

(1) *Execution and Delivery.* Where a copy of the writ and notice of attachment are served on a third person, the levying officer must request the third person to execute a garnishee's memorandum under oath. Whether the levy is effective, the third person must mail or deliver the memorandum to the levying officer within 10 days. (*C.C.P. 488.610(a), (b).*) The levying officer mails or delivers a copy of the memorandum to the plaintiff and attaches the original to the writ to be returned to the court. If the officer does not receive a memorandum, the officer so states in the return. (*C.C.P. 488.610(c).*)

(2) *Effect of Failure To Give Memorandum.* The court, in its discretion, may require a person who fails to give a timely or complete memorandum to pay the costs and reasonable attorneys' fees incurred in a proceeding to obtain the information required in the memorandum. (*C.C.P. 488.610(d).*)

(3) *Nonliability for Disclosure.* A person giving a memorandum is not liable to any person for the disclosure of any information in the memorandum. (*C.C.P. 488.620.*) This is so even though the information relates to a person other than the defendant. (Legislative Com. Comment to *C.C.P. 488.620.*)

(4) *Exception: Delivery or Payment.* A memorandum is not required if the third person has (a) delivered to the officer all the property sought to be attached, and (b) paid the officer the amount due to the defendant on any attached obligation with respect to which no additional amount will become payable. (*C.C.P. 488.610(f).*)

(5) *Exception: Financial Institution.* Where a deposit account or property in a safe deposit box is attached (see *supra*, §175 et seq.), no memorandum is required if the financial institution fully complies with the levy. If a memorandum is required, it must provide information only regarding "property which is carried on the records available at the office or branch where the levy is made." (*C.C.P. 488.610(e).*)

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b. Garnishee's Memorandum.

2. Content and Form.

6 *Witkin Cal. Proc. Prov Rem* § 194

[§ 194] Content and Form.

(1) *Content.* The memorandum must contain the following information:

(a) A description of property sought to be attached that is not delivered to the levying officer and the reason for nondelivery. (*C.C.P. 488.610(b)(1).*)

(b) A statement of the amount and terms of any obligation sought to be attached that is due and payable but not paid to the levying officer and the reason for nonpayment. (*C.C.P. 488.610(b)(2).*)

(c) A statement of the amount and terms of any obligation sought to be attached that is not due and payable. (*C.C.P. 488.610(b)(3).*)

(d) A description of claims and rights of others to the attached property or obligation known to the third person and the names and addresses of those persons. (*C.C.P. 488.610(b)(4).*)

If an attachment is ineffective because the property sought to be attached is the subject of a pending action or proceeding (see *infra*, §203 et seq.), the memorandum must also include the following information:

(a) A statement that the attachment is not effective because the property is subject to a pending action or proceeding. (*C.C.P. 488.475(c)(1).*)

(b) The title of the court and cause and number of the action. (*C.C.P. 488.475(c)(2).*)

(2) *Judicial Council Form.* An optional form for the garnishee's memorandum has been adopted. (See Judicial Council Form No. AT-167 [Memorandum of Garnishee].)

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a. Examination of Garnishee.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 195

[§ 195] In General.

(1) *Nature of Proceeding.* *C.C.P. 491.110* et seq. govern the examination of third persons for purposes of attachment under provisions similar to those applicable to examination under the enforcement of a money judgment (*C.C.P. 708.120* et seq.; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §279 et seq.). (See C.J.E.R., *Judges Benchbook*, Civil Proceedings: Before Trial 2d, §14.102 et seq.; 14 *Pacific L. J.* 457.)

(2) *Proper Court.* The proper court for examination of a third person is the court that issued the writ of attachment, except that the third person may not be required to attend a court outside the county of his or her residence or place of business, unless the distance from that residence or place of business to the place of examination is less than 150 miles. (*C.C.P. 491.150(a)*, (b).) If the county of the court that issued the writ is too distant, the proper court for examination is the superior court in the county of residence or place of business. (*C.C.P. 491.150(c)*.)

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a. Examination of Garnishee.

2. Application.

6 *Witkin Cal. Proc. Prov Rem* § 196

[§ 196] Application.

The plaintiff may apply ex parte for an examination order. The plaintiff must prove, by an affidavit on information and belief, "or otherwise to the satisfaction of the proper court," that (1) the plaintiff has a right to attach order, and (2) a third person has possession or control of property in which the defendant has an interest or is indebted to the defendant in an amount exceeding \$ 250. On this proof, the court must order the third person to appear to answer concerning the property or debt. (*C.C.P. 491.110(a)*.) (See 2C Am.Jur. P.P. Forms (2000 ed.), Attachment and Garnishment, §304 et seq.; for mandatory form of application, see Judicial Council Form No. AT-138 [Application and Order for Appearance and Examination].)

If seeking an examination in a court other than the one that issued the writ, the plaintiff must file a certified copy of the complaint and an affidavit supporting the application, make any affidavit or showing required by *C.C.P. 491.110* (infra, §197), and pay the filing fee of \$ 40 required by *Govt.C. 70617(a)*. (*C.C.P. 491.150(d)*.)

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3. Order To Appear.

6 Witkin Cal. Proc. Prov Rem § 197

[§ 197] Order To Appear.

(1) *Service of Order*. Not less than 10 days before the examination, a copy of the order to appear must be served personally on the third person and personally or by mail on the defendant. (*C.C.P. 491.110(b)*; for mandatory form of order, see Judicial Council Form No. AT-138 [Application and Order for Appearance and Examination].)

(2) *Notice*. The order must contain the following notice: "NOTICE TO PERSONS SERVED. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fees incurred by the plaintiff in this proceeding." (*C.C.P. 491.110(d)*.)

(3) *Fees*. The order is not effective unless, at the time it is served on the third person, the person serving the order tenders mileage fees in the amount generally provided for witnesses required to attend civil proceedings. (*C.C.P. 491.110(e)*; see 2 *Cal. Evidence (4th)*, *Witnesses*, §16.)

(4) *Lien*. If the property or debt is adequately described, service of the order on the third person creates a lien on the defendant's interest in the property or on the debt. The lien continues for 1 year from the date of the order unless extended or terminated by the court. (*C.C.P. 491.110(c)*.) The lien continues on the property subject to the lien notwithstanding the transfer or encumbrance of the property, unless the transfer or encumbrance is made to a person designated in *C.C.P. 697.740* (see 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §96). (*C.C.P. 491.200*.)

(5) *Failure To Appear*. If the person sought to be examined fails to appear, the court may issue a warrant to have the person brought to court to explain the failure and may punish the person for contempt or the court may issue an arrest warrant under *C.C.P. 1993* (arrest of disobedient witness; see 2 *Cal. Evidence (4th)*, *Witnesses*, §31). If the failure to appear is without good cause, the plaintiff must be awarded reasonable attorneys' fees. (*C.C.P. 491.160(a)*.) Wilfully making improper service that results in an arrest is a misdemeanor. (*C.C.P. 491.160(b)*.)

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4. Examination.

6 Witkin Cal. Proc. Prov Rem § 198

[§ 198] Examination.

(1) *Witnesses.* Witnesses, including the defendant, may be required to appear and testify "in the same manner as upon the trial of an issue" (*C.C.P. 491.120*); however, the defendant may not be generally examined regarding his or her property. (*Law Rev. Com. Comment to C.C.P. 491.110.*)

(2) *Appearance by Representative of Organization.* If a corporation, partnership, association, trust, or other organization is ordered to appear, it must designate one or more persons familiar with its property and debts to appear. If a particular individual is specified, that person must appear but may be accompanied by others familiar with the organization's property and debts. The person appearing on behalf of the organization need not be an attorney. (*C.C.P. 491.140.*)

(3) *When Referee May Act.* The examination may be conducted by a referee who must be a member of the State Bar and may be a temporary judge. (*C.C.P. 491.130.*) Under *C.C.P. 491.130(a)*, the referee may do any of the following:

- (a) Issue, modify, or vacate an order authorized by *C.C.P. 491.190* (*infra*, §199).
- (b) Make a protective order under *C.C.P. 491.180* (*infra*, §199).
- (c) Issue a warrant under *C.C.P. 491.160* (*supra*, §197).
- (d) To the same extent as a court, grant an adjournment, preserve order, and subpoena witnesses.

(4) *When Court Must Act.* Only the court may do any of the following:

- (a) Punish for contempt for disobeying a referee's order. (*C.C.P. 491.130(a)(1).*)
- (b) Award attorneys' fees under *C.C.P. 491.160* (*supra*, §197). (*C.C.P. 491.130(a)(2).*)

(c) Determine a third-party claim under *C.C.P. 491.170* (infra, §199). (*C.C.P. 491.130(a)(3)*.)

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5. Determination and Order.

6 *Witkin Cal. Proc. Prov Rem* § 199

[§ 199] Determination and Order.

(1) *General Rule.* If the third person claims an adverse interest in the property or denies the debt, the court may, on the plaintiff's request, determine the interest in the property or the existence of the debt. The court may grant a reasonable continuance for discovery or other preparation. The determination is conclusive as to the plaintiff, the defendant, and the third person, but an appeal may be taken. (*C.C.P. 491.170(a).*)

(2) *When Determination May Not Be Made.* The determination may not be made if the third person's claim is made in good faith and any of the following conditions is satisfied:

(a) The court would not be a proper court for an independent civil action (including a creditor's suit) determining the interests in the property or the existence of the debt, and the third person objects to the determination. (*C.C.P. 491.170(b)(1).*)

(b) At the time the order for examination is served on the third person, a civil action (including a creditor's suit) is pending with respect to the interests in the property or the existence of the debt. (*C.C.P. 491.170(b)(2).*)

(c) The court determines that the interests in the property or the existence of the debt should be determined in a creditor's suit. (*C.C.P. 491.170(b)(3).*)

(3) *Restrictions on Transfer or Payment.* The plaintiff may apply ex parte for an order forbidding transfer of the property or payment of the debt to the defendant until the adverse claim is determined or a creditor's suit is commenced. An undertaking may be required (see *supra*, §115) and the order may be vacated or modified with or without a hearing. (*C.C.P. 491.170(c).*)

The plaintiff may apply on a noticed motion for an order forbidding disposition of the property or payment of the debt until the adverse claim is determined or a creditor's suit is filed and an order obtained under *C.C.P. 491.340* (see *infra*, §202). The order must be based on a determination "that the defendant probably owns an interest in the property

or that the debt probably is owed to the defendant." An undertaking (see *supra*, §115) is required and the order may be vacated or modified after a noticed hearing. (*C.C.P.* 491.170(d).)

(4) *Order Where Adverse Claim Is Determined.* At the conclusion of the examination proceeding, the court may order the defendant's interest in the property or debt to be attached or to be delivered or paid to the levying officer if the officer has a writ permitting the attachment. The order creates a lien on the property or debt that continues for 1 year unless the court extends or reduces that time. If the property or debt has previously been attached, the court may make an order determining the third person's liability. In either case, the order may be enforced as provided in *C.C.P.* 491.360 (judgment in creditor's suit; see *infra*, §202). (*C.C.P.* 491.190(a).)

(5) *Order Where Adverse Claim Is Not Determined.* If the third person claims an interest in the property adverse to the defendant or denies the debt and the court does not determine the adverse claim, the court may not make an order under *C.C.P.* 491.190(a), but may make an order restricting transfer or payment under *C.C.P.* 491.170(c) or (d). (*C.C.P.* 491.190(b).)

(6) *Protective Order.* On motion of the person to be examined or its own motion, the court may "make such protective orders as justice may require." (*C.C.P.* 491.180.)

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b. Creditor's Suit.

1. Former Law.

6 *Witkin Cal. Proc. Prov Rem* § 200

[§ 200] Former Law.

(1) *Garnishee's Liability*. Unless the garnishment was released, the garnishee, on proper service, was required to deliver the property or pay the debt to the officer. If the garnishee failed to do so, he or she became personally liable to the plaintiff for the amount of the credits, property, or debts until the attachment was discharged or judgment was satisfied. This personal liability was enforced in an independent action against the garnishee. (See former C.C.P. 544; *Boyle v. Hawkins* (1969) 71 C.2d 229, 238, 78 C.R. 161, 455 P.2d 97.)

(2) *Garnishee's Right of Setoff*. The position and rights of the plaintiff in the action against the garnishee were the same as if the defendant had sued the garnishee. Hence, the garnishee could offset against the plaintiff any claim that the garnishee had against the defendant at the time of the garnishment. (See *Bear Creek Co. v. James* (1953) 115 C.A.2d 725, 733, 252 P.2d 723; cf. *Nordstrom v. Corona City Water Co.* (1909) 155 C. 206, 213, 100 P. 242 [claim obtained after garnishment was unavailable as setoff].)

Collusion between the defendant and the garnishee could cause the loss of the garnishee's right of setoff. (See *Walters v. Bank of America* (1937) 9 C.2d 46, 57, 69 P.2d 839.) But an innocent misrepresentation by the garnishee in a report to the levying officer did not estop the garnishee from claiming a valid offset. (See *Bear Creek Co. v. James*, *supra*.) And the garnishee's right to offset a valid claim was not affected by subsequent bona fide transactions with the debtor. (See *Smith v. Crocker First Nat. Bank of San Francisco* (1957) 152 C.A.2d 832, 834, 314 P.2d 237.)

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b. Creditor's Suit.

2. Nature of Action.

6 *Witkin Cal. Proc. Prov Rem* § 201

[§ 201] Nature of Action.

(1) *When Available.* If property or a debt in which the defendant has an interest has been subjected to an attachment lien, the plaintiff may bring an action against a third person in possession or control of the property or debt to enforce the third person's liability. (*C.C.P.* 491.310.) This procedure is available only to enforce attachment liens. If the plaintiff has only a lien in an examination proceeding (see *supra*, §199), the plaintiff may not bring a creditor's suit until the property or debt is levied on under a writ of attachment. (Law Rev. Com. Comment to *C.C.P.* 491.310.) (See generally *C.J.E.R.*, Judges Benchbook; Civil Proceedings--Before Trial 2d, §14.106; 14 *Pacific L. J.* 459.)

(2) *Joinder of Defendant.* The defendant must be joined but is not an indispensable party. The defendant's residence may not be considered in determining proper venue unless the contract between the defendant and the third person provides otherwise. (*C.C.P.* 491.320.)

(3) *Time for Bringing Action.* A creditor's suit may only be commenced if an attachment lien is in effect. (*C.C.P.* 491.330(b).) The action must be commenced before the expiration of the later of the following:

(a) The time the defendant may bring an action against the third person on the property or debt. (*C.C.P.* 491.330(a)(1).)

(b) One year after creation of an attachment lien on the property or debt, if the lien is created at a time when the defendant may bring an action against the third person concerning the property or debt. (*C.C.P.* 491.330(a)(2).)

A timely action may be prosecuted to judgment so long as the attachment lien or a judgment lien on the same property is in effect. (*C.C.P.* 491.330(c).)

(4) *Commissioner May Not Act.* A court commissioner may not act in a contested action to enforce a third person's liability. (*C.C.P.* 482.060(b)(4), *supra*, §93.)

(5) *No Jury Trial.* There is no right to a jury trial in a creditor's suit. (*C.C.P.* 491.350.)

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b. Creditor's Suit.

3. Order and Judgment.

6 *Witkin Cal. Proc. Prov Rem* § 202

[§ 202] Order and Judgment.

(1) *Order Forbidding Transfer or Payment.* The plaintiff may apply to the court for either or both of the following:

(a) An order restraining the third person from transferring the property or paying the debt to the defendant. The order may be made on an ex parte application unless the court directs or a court rule requires otherwise. The order remains in effect until judgment is entered or until an earlier time provided in the order. An undertaking may be required in the court's discretion and the court may modify or vacate the order at any time with or without a hearing. (*C.C.P. 491.340(a).*)

(b) A temporary restraining order, preliminary injunction, or both, restraining the third person from transferring the attached property to any person or otherwise disposing of it. The order and injunction are governed by *C.C.P. 525* et seq. (see *infra*, §274 et seq.). (*C.C.P. 491.340(b).*)

(2) *Judgment.* If the plaintiff establishes the third person's liability, the court must render judgment accordingly. The judgment may be enforced just as it could be enforced if the defendant had obtained it against the third person. However, money or property obtained in enforcing the judgment against the third party must be paid or delivered into court pending judgment in the plaintiff's action against the defendant, must be held by a levying officer, or must be held as otherwise ordered by the court. (*C.C.P. 491.360.*)

(3) *Costs.* Costs incurred by or taxed against the plaintiff in the creditor's suit may not be recovered from the defendant. (*C.C.P. 491.370.*)

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7. Lien in Pending Action or Proceeding.

a. Nature of Lien.

6 Witkin Cal. Proc. Prov Rem § 203

[§ 203] Nature of Lien.

(1) *In General.* If the defendant is a party to a pending action or special proceeding, the plaintiff may acquire a lien on both of the following to the extent necessary to secure the amount of the attachment:

(a) Any cause of action of the defendant for money or property that is the subject of the pending action, if the money or property would be subject to attachment if the defendant prevailed in the pending action. (*C.C.P. 491.410(a)(1).*)

(b) The rights of the defendant to money or property under any judgment subsequently procured in the pending action, if the money or property would be subject to attachment. (*C.C.P. 491.410(a)(2).*)

For purposes of *C.C.P. 491.410* et seq., an action or proceeding is pending until the time for appeal from the judgment has expired or an appeal has been finally determined. (*C.C.P. 491.410(d).*) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.107.)

(2) *Lien Is Not Available in Contractual Arbitration.* In *Jordan-Lyon Productions, Ltd. v. Cineplex-Odeon Corp.* (1994) 29 *C.A.4th* 1459, 35 *C.R.2d* 200, the trial judge determined that the plaintiff could not obtain and enforce a lien under *C.C.P. 490.410* et seq. on a controversy subject to pending contractual arbitration between defendant and a third party. *Held*, affirmed.

(a) *C.C.P. 490.410* et seq. allow a plaintiff to acquire a lien against a defendant involved in an "action" or "special proceeding." These terms must be defined by reference to the general definitions in *C.C.P. 20* et seq., because they are not specifically defined in the Attachment Law. *C.C.P. 20* et seq. make it clear that a special proceeding is a judicial remedy. Moreover, *C.C.P. 490.410* et seq. expressly contemplate that the pending action or special proceeding will be in a court. A contractual arbitration, on the other hand, is outside the judicial system, and is therefore neither an action nor a special proceeding within the meaning of *C.C.P. 490.410* et seq. (29 *C.A.4th* 1466, 1468.)

(b) In *Brock v. Kaiser Foundation Hosp.* (1992) 10 *C.A.4th* 1790, 13 *C.R.2d* 678, the court stressed the "general

principle that the contractual arbitration has a life of its own outside the judicial system," in determining that the superior court lacks authority to order and enforce discovery in arbitration proceedings. This rationale militates against including contractual arbitration within the term "special proceeding" as used in C.C.P. 490.410. To determine otherwise would allow subversion of the limits on judicial review afforded arbitration awards. If a lien could be created under these circumstances, the Attachment Law would allow a nonparty to the arbitration to control the arbitration proceedings or mount a collateral attack on an arbitration award, when the parties to the arbitration are allowed only limited judicial review of these awards. (29 C.A.4th 1469, 1470.)

(c) To the extent that the arbitration provisions allow provisional remedies in connection with arbitration, these remedies apply only to a party to the arbitration agreement. (29 C.A.4th 1470.)

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7. Lien in Pending Action or Proceeding.

b. Plaintiff's Application.

6 Witkin Cal. Proc. Prov Rem § 204

[§ 204] Plaintiff's Application.

(1) *Right To Attach Order.* A lien in a pending action requires a right to attach order (see supra, §111), a copy of which must be filed in the pending action. (*C.C.P. 491.410(b)(2)*.) For purposes of applying for the order, "the defendant's cause of action that is the subject of the pending action or proceeding and the defendant's rights to money or property under a judgment procured in the action or proceeding shall be treated as property subject to attachment." (*C.C.P. 491.415(a)*; see 16 *Pacific L. J.* 525.)

(2) *Order Permitting Creation of Lien.* A lien in a pending action requires a court order permitting the lien, a copy of which must be filed in the pending action. (*C.C.P. 491.410(b)(3)*.) The plaintiff may apply for the order at the time the plaintiff applies for the right to attach order or, if a right to attach order has already been obtained, at a subsequent time. In that case, the order is applied for in the same manner as a writ of attachment. (*C.C.P. 491.415(b)*.)

(3) *Undertaking.* To obtain an order permitting a lien in a pending action, the plaintiff must file an undertaking as provided by *C.C.P. 489.210* and *489.220* (supra, §§115, 116). (*C.C.P. 491.415(b)*.) If an undertaking has already been given to obtain a writ of attachment, an additional undertaking is not required. (Law Rev. Com. Comment to *C.C.P. 491.415*.)

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c. Notice.

6 Witkin Cal. Proc. Prov Rem § 205

[§ 205] Notice.

(1) *Filing and Service.* The plaintiff must file a notice of lien in the pending action or proceeding. (*C.C.P. 491.410(b)(1).*) At the time of filing the documents required under *C.C.P. 491.410(b)* (see supra, §204) or "promptly thereafter," the plaintiff must serve a copy of the notice of lien and a statement of the date when the notice of lien was filed in the pending action on all parties who have appeared in that action. Failure to serve the other parties does not invalidate the lien, but a party's rights are not affected by the lien until that party has notice of the lien. (*C.C.P. 491.410(c).*)

(2) *Contents.* The notice must contain the following:

(a) A statement that the lien has been created under *C.C.P. 491.410* et seq. and the title of the court and cause and number of the pending action or proceeding in which the notice is filed. (*C.C.P. 491.420(a).*)

(b) The defendant's name and last known address. (*C.C.P. 491.420(b).*)

(c) The plaintiff's name and address. (*C.C.P. 491.420(c).*)

(d) The cause and number of the plaintiff's action against the defendant and the title of the court where that action is pending. (*C.C.P. 491.420(d).*)

(e) The amount needed to secure the amount to be secured by the attachment at the time the notice of lien is filed in the action or proceeding. (*C.C.P. 491.420(e).*)

(f) A statement that the lien attaches to any cause of action of the defendant that is the subject of the action or proceeding as well as to any rights of the defendant to money or property under any judgment subsequently procured in the action or proceeding. (*C.C.P. 491.420(f).*)

(g) A statement that no compromise, dismissal, settlement, or satisfaction of the pending action or any of the defendant's rights to money or property under any judgment in the action may be entered and that the defendant may not

enforce his or her right to money or property under any judgment in the action unless (1) the plaintiff has released the lien, (2) the plaintiff has consented in writing, or (3) the court in which the action is pending has given prior approval. (*C.C.P.* 491.420(*g*)). (For optional form of notice, see Judicial Council Form No. AT-180 [Notice of Lien].)

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d. Defendant's Claim of Exemption.

1. Before Creation of Lien.

6 Witkin Cal. Proc. Prov Rem § 206

[§ 206] Before Creation of Lien.

If money or property sought by the defendant in a pending action would be exempt from attachment should the defendant prevail, the defendant may claim an exemption in the proceeding initiated by the plaintiff to obtain an order permitting a lien on the money or property. The exemption is claimed and determined in the same way an exemption is claimed and determined on application for a writ of attachment (see *supra*, §104). (*C.C.P. 491.415(c)*.) Proceedings under *C.C.P. 491.415* are in the court in which the plaintiff's action against the defendant is pending. (Law Rev. Com. Comment to *C.C.P. 491.415*.)

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2. After Creation of Lien.

6 *Witkin Cal. Proc. Prov Rem § 207*

[§ 207] After Creation of Lien.

If a lien in a pending action or proceeding has been created, the defendant may claim that any or all of the money or property that the defendant might recover is exempt from attachment. The claim is made on noticed motion to the court in which the action is pending, filed and served on the plaintiff within 30 days after the defendant has received notice of the lien. The claim must be supported by an affidavit including the matters set forth in *C.C.P. 484.070(c)* (*supra*, §104) and failure to make the claim constitutes a waiver of the exemption. Notice of opposition to the claim is not required. (*C.C.P. 491.470(a)*.)

A proceeding under *C.C.P. 491.470* is in the court in which the action involving the defendant's right to money or property is pending. (Law Rev. Com. Comment to *C.C.P. 491.415*.) For purposes of *C.C.P. 491.470*, the plaintiff is deemed to be a party in the pending action or proceeding even though the plaintiff has not become a party by intervention. (*C.C.P. 491.430(b)*.) (On right to intervene, see *C.C.P. 491.430(a)*.)

The court may determine the exemption claim before entry of the judgment or may consolidate the exemption hearing with a hearing on an enforcement motion under *C.C.P. 491.460* (*infra*, §209). (*C.C.P. 491.470(b)*.) If the defendant establishes an exemption, the court must order termination of the lien on the exempt portion of the money or property subject to the pending action. (*C.C.P. 491.470(c)*.)

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e. Effect on Judgment in Action.

6 *Witkin Cal. Proc. Prov Rem § 208*

[§ 208] Effect on Judgment in Action.

(1) *Necessity of Consent, Release, or Order.* Except as provided in *C.C.P. 491.410(c)* (supra, §205), a judgment in the action or proceeding in the defendant's favor may not be enforced and a compromise, dismissal, settlement, or satisfaction of the action or its judgment may not be entered into by or on behalf of the defendant unless (a) the lien is released, (b) the plaintiff consents in writing, or (c) a court order so authorizes. (*C.C.P. 491.440(a).*)

The defendant may apply for the order on noticed motion and notice must be served on the plaintiff. In its discretion and after a hearing, the court may make an order including "such terms and conditions as the court deems necessary." (*C.C.P. 491.440(b).*) (See *Epstein v. Abrams* (1997) 57 *C.A.4th* 1159, 1167, 67 *C.R.2d* 555 [trial court did not have jurisdiction to approve settlement under *C.C.P. 491.440* where judgment for one of three defendants was already final when defendant's attorney obtained lien; *C.C.P. 491.410(a)* and (b) (supra, §203 et seq.) limit remedy provided in *C.C.P. 491.410* et seq. to pending actions].)

(2) *Endorsement on Judgment or Abstract.* If a lien is created, the court clerk must endorse a statement of the existence of the lien and the time of its creation on the judgment recovered in the action or proceeding. Any abstract issued on the judgment must include a statement of the lien in favor of the plaintiff. (*C.C.P. 491.450.*)

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f. Enforcement of Lien.

6 *Witkin Cal. Proc. Prov Rem § 209*

[§ 209] Enforcement of Lien.

(1) *Order for Satisfaction of Lien.* If the defendant is entitled to money or property under the judgment in the action or proceeding and a lien exists, the court may order the defendant's right under the judgment attached or applied to satisfy the lien. Any party to the pending action may apply for the order on noticed motion and notice must be served on all other parties. (*C.C.P. 491.460(a).*) For purposes of this provision, the plaintiff is deemed to be a party to the action even though he or she has not intervened in the action. (*C.C.P. 491.430(b).*) (On right to intervene, see *C.C.P. 491.430(a).*)

(2) *Order Forbidding Transfer of Property.* If the judgment determines that the defendant has an interest in property, the court may order the party having custody or control not to transfer the property until it can be attached or applied to satisfaction of the lien. (*C.C.P. 491.460(b).*)

(3) *Judgment Against Party Improperly Transferring Property.* If the court determines that a party other than the defendant with notice of the lien has transferred property or paid an amount subject to the lien, the court must render judgment against the party equal to the lesser of (a) the value of the defendant's interest or the amount paid to the defendant, or (b) the amount of the plaintiff's lien. (*C.C.P. 491.460(c).*)

(4) *Enforcement of Judgment or Order.* A judgment or order under *C.C.P. 491.460* may be enforced in the same way as it could be enforced if the defendant had obtained it against the third party, but money or property obtained in enforcing the judgment or order against the third party must be paid or delivered into court pending judgment of the plaintiff's action against the defendant, or must be held by a levying officer, or must be held as otherwise ordered by the court. (*C.C.P. 491.460(d).*)

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1. Right to Release.

6 *Witkin Cal. Proc. Prov Rem* § 210

[§ 210] Right to Release.

(1) *Conditions*. A levying officer must release attached property (a) on receipt of a written direction to release the property from the plaintiff's attorney of record, or from the plaintiff if there is no attorney, (b) on receipt of a certified copy of a court order for release, or (c) when otherwise required to release the property. (*C.C.P. 488.730(a)*.)

(2) *Effect of Release*. The release extinguishes any attachment lien in the plaintiff's favor on the released property. (*C.C.P. 488.730(a)*.)

(3) *Nonliability for Release*. The levying officer is not liable for properly releasing an attachment and no other person is liable for acting in conformity with the release. (*C.C.P. 488.730(e)*.)

(4) *Action Against Military Personnel*. A court has authority to "vacate or stay an attachment or garnishment of property, money, or debts in the possession of the servicemember or a third party, whether before or after judgment" in an action against a servicemember commenced before or during the service or within 90 days after the service. The court has discretion to do so on its own motion and must do so on application of the servicemember if his or her ability to comply with a court judgment or order is materially affected by reason of the military service. (*50 U.S.C. Appx., §524*; see 35 Proof of Facts 3d 323 [entitlement to stay of attachment or garnishment under Soldiers' and Sailors' Civil Relief Act].)

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2. Redelivery or Sale of Property in Custody.

6 *Witkin Cal. Proc. Prov Rem* § 211

[§ 211] Redelivery or Sale of Property in Custody.

Under *C.C.P. 488.730(b)*, property in custody may be disposed of as follows:

- (1) It is released to the person from whom it was taken unless the court orders otherwise.
- (2) If the person doesn't claim the property, the levying officer retains custody and serves the person with notice where possession of the property may be obtained.
- (3) If the property is not claimed within 30 days after the notice, the levying officer sells the property (other than cash that does not have a value greater than its face value) as provided by *C.C.P. 701.510* et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §144 et seq.). The proceeds, less the officer's costs, are deposited with the county treasurer.
- (4) If the amount deposited is not claimed within 5 years, it is paid into the county general fund.

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3. Written Release of Property Not in Custody.

6 *Witkin Cal. Proc. Prov Rem* § 212

[§ 212] Written Release of Property Not in Custody.

If the property to be released was not taken into custody, the levying officer must release the attachment "by issuing a written notice of release and serving it on the person who was served with a copy of the writ and a notice of attachment to create the lien." (*C.C.P. 488.730(c)*.) If the property was levied on by recording or filing a copy of the writ and notice of attachment, the officer must record or file a written notice of release in the same office. (*C.C.P. 488.730(d)*.) If the notice of attachment has been filed with the Secretary of State, any release will have the effect prescribed by *C.C.P. 697.650* relating to the release or subordination of judgment liens in personal property (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §90). (*C.C.P. 488.730(d)*.)

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b. By Defendant's Undertaking.

1. Application and Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 213

[§ 213] Application and Undertaking.

(1) *In General.* When a writ is issued, a defendant who has appeared in the action may obtain an order permitting him or her to substitute an undertaking for property in this state attached or subject to attachment. (*C.C.P. 489.310(a).*)

(2) *Application.* The application is made by noticed motion to the court in which the action is pending. Where the defendant applies (a) for an order to release a portion of the property, or (b) for an order preventing the attachment, and the amount of the undertaking to be given is less than the amount to be secured, the application must include a statement, under oath, describing the property to be released or protected from attachment. (*C.C.P. 489.310(a), (b).*)

(3) *Undertaking.* The defendant must file an undertaking to pay the plaintiff the value of the property released, but not more than the amount of any judgment that the plaintiff may recover in the action against the defendant. The amount of the undertaking must be the lesser of (a) the value of the property attached or prevented from being attached, or (b) the amount to be secured by the attachment. If a sufficient undertaking is filed, the court must issue a release order. (*C.C.P. 489.310(c).*) (See *First v. Armes* (1983) 146 C.A.3d 633, 637, 194 C.R. 171 [surety was estopped to complain that liability on undertaking was less than amount to be secured where ambiguity over what property was attached and released was result of defendant's failure to follow statutory procedure]; for form of undertaking, see Judicial Council Form No. AT-160 [Undertaking by Personal Sureties (Attachment and Claim and Delivery)]; for form of application and order substituting defendant's undertaking, see Judicial Council Form No. AT-170 [Application to Set Aside Right to Attach Order and Release Attached Property, Etc.], Judicial Council Form No. AT-175 [Order to Set Aside Attachment, to Substitute Undertaking, Etc.].)

(4) *Action Against More Than One Defendant.* Where two or more defendants have an interest in the same property, a joint application and undertaking must be filed, but any defendant may make an application with respect to that defendant's own property. The filing of an undertaking by one defendant does not subject that defendant to any demand against any other defendant and does not prevent the levying officer from attaching, or being obligated to release from attachment, property of any other defendant. (*C.C.P. 489.310(d).*)

If all the defendants do not join in an application, the application must include a statement, under oath, (a) describing the defendant's title to the property and the manner in which the defendant acquired title, and (b) stating whether any defendant who has not joined in the application has an interest in the property. (*C.C.P. 489.310(d).*)

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2. Action Against Sureties.

6 Witkin Cal. Proc. Prov Rem § 214

[§ 214] Action Against Sureties.

(1) *Scope of Attachment Law.* The Attachment Law does not deal with an action against the sureties on the defendant's undertaking. Thus, to the extent that the Bond and Undertaking Law does not provide otherwise (see *C.C.P.* 996.410 et seq., supra, §35 et seq.), case law predating the Attachment Law (infra, this section) governing the rights and liabilities of sureties with respect to defenses and collateral attack should remain applicable.

(2) *Measure of Liability and Defenses of Sureties.* The liability of the sureties on bonds was measured by the attachment statute and the terms of the bond. Hence:

(a) Under general principles of suretyship, alteration of the principal obligation without the surety's consent released him or her from liability. (*Michelin Tire Co. v. Bentel* (1920) 184 C. 315, 321, 193 P. 770.)

(b) If the complaint was amended to state an entirely new cause of action, the surety, who agreed to pay a judgment rendered in a different action, was discharged. (*Michelin Tire Co. v. Bentel*, supra, 184 C. 322.) But if the amendments did not change the cause of action, the surety remained liable. (*Turner v. Fidelity & Deposit Co. of Maryland* (1921) 187 C. 76, 82, 200 P. 959.)

Where two defendants were sued in the main action, and judgment was obtained against only one, the sureties were liable; i.e., unless expressly so stated, there was no condition that the plaintiff recover against all defendants or against any particular defendant. (*McCormick v. National Surety Co.* (1901) 134 C. 510, 512, 66 P. 741.)

Subsequent bankruptcy of the debtor was not a defense to a surety on a bond (*Higgins v. Brainard* (1932) 214 C. 647, 651, 8 P.2d 135), nor was death of the debtor a defense (*Turner v. Fidelity & Deposit Co. of Maryland*, supra, 187 C. 84).

(3) *Surety's Collateral Attack on Invalid Attachment.* If the defendant made no direct attack on an invalid writ or levy (by motion to discharge), but instead, treating it as valid, gave an undertaking to prevent or release the attachment,

and thereafter the plaintiff received judgment and sued the sureties on the undertaking, the sureties could not set up the irregularities as a defense. This would have been a collateral attack on the attachment proceedings ancillary to the prior main action. (See *Koehler v. Serr* (1932) 216 C. 143, 148, 13 P.2d 673 [defense that main action was in tort].) Collateral attack was permitted, however, where the attachment was considered wholly void. (*Stowe v. Matson* (1949) 94 C.A.2d 678, 683, 211 P.2d 591.)

(4) *No Fraud Action Against Surety*. Where the plaintiff prevailed in the main action and was unable to execute, his or her action against the sureties was for the amount of the judgment only. The plaintiff could not recover punitive damages against the sureties for fraud based on the theory that they had never intended to perform, because he or she could not show reliance or change of position based on their promise to pay provided by the undertaking. (*Bezaire v. Fidelity & Deposit Co.* (1970) 12 C.A.3d 888, 893, 91 C.R. 142.)

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c. By Judgment for Defendant.

1. Final Judgment for Defendant.

6 *Witkin Cal. Proc. Prov Rem* § 215

[§ 215] Final Judgment for Defendant.

An attachment is discharged where (1) the defendant recovers judgment against the plaintiff, (2) no timely motion for vacation of judgment, for judgment notwithstanding the verdict, or for a new trial is pending, and (3) no appeal supported by an undertaking under *C.C.P.* 921 (infra, §216) is perfected. The court must order any attachment discharged and any property held under the attachment released. (*C.C.P.* 488.740.)

Unless otherwise ordered, (1) an undertaking received from the defendant, (2) the proceeds of sales and money collected by the levying officer, and (3) attached property remaining in the levying officer's custody must be delivered to the person from whom it was collected or taken. (*C.C.P.* 488.740.)

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2. Plaintiff's Appeal Without Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 216

[§ 216] Plaintiff's Appeal Without Undertaking.

An appeal by the plaintiff does not continue the attachment in force unless (1) the appeal is perfected within 5 days after written notice of entry of the order appealed from, and (2) the plaintiff executes and files an undertaking to pay all costs and damages the defendant sustains because of the attachment, if the court order below is sustained in the defendant's favor. (*C.C.P.* 921.)

The amount of the undertaking on appeal is the amount ordered by the trial court on the defendant's motion under *C.C.P.* 489.410, or, if no order is made, twice the amount of the debt claimed by the plaintiff. (*C.C.P.* 489.410(b), 921.) After entry of the judgment and before perfection of the appeal, the defendant may move for an increase in the undertaking in an amount "justified by the detriment reasonably to be anticipated by continuing the attachment." If an increase is ordered, the undertaking must be filed within 10 days or the attachment will be set aside and the property released. (*C.C.P.* 489.410(a).)

Within 60 days after the appeal is perfected, the defendant, if not satisfied with the amount of the undertaking in double the amount of the debt or the amount fixed under *C.C.P.* 489.410, may move for an increase in an amount "justified by the detriment reasonably to be anticipated by continuing the attachment." If the order is made, the attachment must be discharged and the property released unless the undertaking is executed and filed within 10 days. (*C.C.P.* 921.)

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c. By Judgment for Defendant.

3. Plaintiff's Motion Without Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 217

[§ 217] Plaintiff's Motion Without Undertaking.

(1) *Former Law.* The original attachment statutes were silent on the continuance of an attachment lien where the defendant's judgment was attacked by a method other than appeal (see *supra*, §216). Where the judgment was set aside by a motion for a new trial, for example, the result was as though the judgment had not been rendered, and the attachment lien should have remained. Nevertheless, under earlier law, the lien was discharged by the judgment and did not revive when the judgment was set aside. (See *Henderson v. Drake* (1953) 42 C.2d 1, 4, 264 P.2d 921; *Henderson v. Drake* (1955) 134 C.A.2d 145, 148, 285 P.2d 79.) California's statute was amended in 1959 to continue the attachment in effect after a timely motion for vacation of judgment, judgment notwithstanding the verdict, or for a new trial.

(2) *Current Law.* C.C.P. 489.410(c) now provides that neither the pendency nor granting of a timely motion by the plaintiff for (a) vacation of judgment, (b) judgment notwithstanding the verdict, or (c) a new trial continues an attachment in force unless the plaintiff gives an undertaking to pay all costs and damages sustained by continuing the attachment. The procedure specified in C.C.P. 921 (*supra*, §216) applies.

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d. By Judgment for Plaintiff.

1. No Appeal by Defendant.

6 *Witkin Cal. Proc. Prov Rem* § 218

[§ 218] No Appeal by Defendant.

Where judgment is for the plaintiff and no appeal is taken, it has been said that the attachment lien is merged in a judgment lien. But this is an overstatement. With respect to real property, the identity of the attachment lien is preserved to maintain its priority; hence, it is not completely merged. (*Brun v. Evans* (1925) 197 C. 439, 441, 442, 241 P. 86; see *Everett v. Hayes* (1928) 94 C.A. 31, 34, 270 P. 458 [defendant conveyed attached property to third person prior to judgment; no merger]; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §69 et seq.)

With respect to personal property, the lien is not merged and remains. (*Balzano v. Traeger* (1928) 93 C.A. 640, 643, 270 P. 249.) It does merge, however, with the lien of a levy of execution. (See *Durkin v. Durkin* (1955) 133 C.A.2d 283, 294, 284 P.2d 185.)

Where the plaintiff appeals from a judgment in his or her favor to seek a larger amount (see 9 *Cal. Proc.* (5th), *Appeal*, §42), C.C.P. 921 (supra, §216) applies. (See *Stockton Theatres v. Palermo* (1956) 47 C.2d 469, 474, 304 P.2d 7 [on predecessor statute].)

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6 *Witkin Cal. Proc. Prov Rem* § 219

[§ 219] Defendant's Appeal With Undertaking.

If the defendant appeals and the trial court requires an undertaking to stay enforcement of the judgment (see *C.C.P.* 917.9; 9 *Cal. Proc.* (5th), *Appeal*, §273), enforcement is stayed on the filing of a sufficient undertaking. Thereafter, all attached property is released from the attachment on (1) the plaintiff's failure to timely object to the undertaking, or (2) if an objection is made, on a determination that the undertaking is sufficient. (*C.C.P.* 489.420.)

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e. Motion To Release Excessive Attachment.

1. Nature of Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 220

[§ 220] Nature of Remedy.

Barceloux v. Dow (1959) 174 C.A.2d 170, 344 P.2d 41, held that, despite the absence of a statutory proceeding to release attached property where the value was in excess of the amount claimed, that remedy was necessary to prevent attachment from becoming an instrument of coercion. The court in part relied on the language of former C.C.P. 540, referring to attachment of "so much" of the defendant's property "as may be sufficient to satisfy the plaintiff's demand." Hence, a motion to dissolve the attachment as to excess property was held proper. (174 C.A.2d 173.)

The current Attachment Law adopts this rule. Where the defendant's interest in property clearly exceeds the amount necessary to satisfy an attachment, property may be released under *C.C.P. 488.720* (infra, §221) or the amount of property subject to levy may be restricted under *C.C.P. 482.120* (supra, §113).

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1. Release of Attachment.

e. Motion To Release Excessive Attachment.

2. Procedure.

6 Witkin Cal. Proc. Prov Rem § 221

[§ 221] Procedure.

(1) *Motion*. The defendant, by a noticed motion, may apply "for an order releasing the attachment of property to the extent that the value of the defendant's interest in the property clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment." (*C.C.P. 488.720(a)*.) The notice of motion must state the grounds on which the motion is based and must be accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (*C.C.P. 488.720(b)*.)

(2) *Hearing*. At the hearing, the court must determine the value of the defendant's interest in the property. (*C.C.P. 488.720(c)*.) The court's determination is based on the pleadings and other papers in the record, but, on good cause, the court may receive additional oral or documentary evidence and points and authorities or may continue the hearing for the production of additional evidence or points and authorities. (*C.C.P. 488.720(d)*.) After entry of judgment in the action in which the property was attached, the court must also consider the value of property not attached in the action that has been levied on or otherwise sought to be applied to satisfy the judgment in the action. (*C.C.P. 488.720(c)*.)

(3) *Order*. The court must order the release of the attachment of the defendant's property "to the extent that the value of the defendant's interest in the property attached clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment." (*C.C.P. 488.720(c)*.)

The defendant is adequately protected against the threat of excessive attachment by this procedure; such a threat does not justify an increase in the plaintiff's undertaking under *C.C.P. 489.220* to protect the defendant from "wrongful attachment" (see *supra*, §§115, 116). (*North Hollywood Marble Co. v. Superior Court (1984) 157 C.A.3d 683, 693, 204 C.R. 55.*)

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I. Postlevy Procedure.

2. Claim of Exemption.

6 Witkin Cal. Proc. Prov Rem § 222

[§ 222] Claim of Exemption.

(1) *Basis for Claim.* The defendant may claim an exemption under *C.C.P. 487.020* (supra, §82 et seq.) for property levied on under a writ of attachment if the right to the exemption results from a change in circumstances occurring after (a) denial of a claim of exemption for the property earlier in the action, or (b) expiration of the time for claiming the exemption earlier in the action. (*C.C.P. 482.100(a)*.) (On claim of exemption after ex parte attachment, see supra, §140.)

(2) *Incorporation of Procedure for Enforcing Judgments.* The claim follows the procedure for claiming an exemption after levy to enforce a money judgment (*C.C.P. 703.510* et seq.; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §180 et seq.), except that, subject to *C.C.P. 482.100(a)*, the exemption may be claimed at any time. For this purpose, references in *C.C.P. 703.510* et seq. to the "judgment debtor" and "judgment creditor" are deemed to be references to the defendant and the plaintiff, respectively. (*C.C.P. 482.100(b)*.)

(3) *Alternative Procedure for Exemption of Support Property.* The defendant may claim an exemption for property necessary for support under *C.C.P. 487.020(b)* (supra, §83) using either the procedure in *C.C.P. 482.100(b)*, or the following procedure in *C.C.P. 482.100(c)*:

(a) The defendant files with the court a notice of motion stating the relief requested and serves the plaintiff with the notice not less than 3 days before the date set for the hearing. The notice is accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (For form of notice of motion, see Judicial Council Form No. AT-155.)

(b) The hearing is held not less than 5 days after the notice is filed, unless the court orders otherwise for good cause.

(c) The defendant has the burden of showing that the property is exempt.

(d) On this showing and the showing required by *C.C.P. 482.100(a)*, the court orders the property released.

(4) *Claim Where Owner of Property Is Deceased.* Family members or the personal representative of a decedent

may claim the support exemption following the procedure outlined in *C.C.P. 482.100. (Prob.C. 9304(c).)*

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3. Review of Orders.

6 *Witkin Cal. Proc. Prov Rem* § 223

[§ 223] Review of Orders.

(1) *Appeal*. An order granting a right to attach or discharging or refusing to discharge an attachment is appealable. In cases other than limited civil cases, appeal is to the Court of Appeal. (*C.C.P.* 904.1(a)(5).) In limited civil cases, appeal of a ruling by a superior court judge or other judicial officer is to the appellate division of the superior court. (*C.C.P.* 904.2(f).) (See *Hallam Cooley Agency v. Superior Court* (1938) 30 C.A.2d 20, 22, 85 P.2d 457; 9 Cal. Proc. (5th), *Appeal*, §173.) An order discharging or refusing to discharge an attachment is appealable whether the motion to discharge is based on a claim that the attachment was improperly or irregularly issued or on a claim that the attachment has terminated by operation of law. (*Peck v. Hagen* (1989) 215 C.A.3d 602, 608, 609, 263 C.R. 198.)

Because the statutory right to appeal is limited to orders discharging or refusing to discharge an attachment that has been executed, an order denying an application for a writ of attachment is not appealable. (*International Typographical Union Negotiated Pension Plan v. Ad Compositors* (1983) 142 C.A.3d 733, 734, 191 C.R. 227.)

(2) *Mandamus*. Where a plainly void attachment ties up property and causes serious injury, the remedy by appeal is inadequate and mandamus may be granted to compel the trial court to discharge the attachment. (See *Alexander v. Superior Court* (1928) 91 C.A. 312, 316, 266 P. 993; *Samuels v. Superior Court* (1969) 276 C.A.2d 264, 266, footnote 1, 81 C.R. 216; cf. *Lohr v. Superior Court* (1952) 111 C.A.2d 231, 234, 244 P.2d 5 [writ denied; inadequacy of remedy by appeal was alleged in general terms with no showing of special circumstances]; see 8 Cal. Proc. (5th), *Extraordinary Writs*, §127 et seq.)

(3) *Prohibition*. An unwarranted order discharging a valid attachment is in excess of the court's jurisdiction, and several decisions uphold the use of prohibition to prevent a threatened discharge. (See *Hill v. Superior Court* (1940) 16 C.2d 527, 529, 106 P.2d 876; *Weintraub v. Superior Court* (1928) 91 C.A. 763, 768, 267 P. 733; 8 Cal. Proc. (5th), *Extraordinary Writs*, §58 et seq.)

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4. Proceedings Against Sureties After Judgment.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 224

[§ 224] In General.

(1) *Statutory Development.* Former C.C.P. 539(b) provided a motion procedure for enforcing a surety's liability, without the necessity of an independent action. The Bond and Undertaking Law contains a similar procedure. (See *C.C.P.* 996.440, *supra*, §§38, 39.) Because of the similarity of the old and new procedures, cases decided under former C.C.P. 539 remain relevant.

(2) *Basis for Liability.* The sureties on a bond undertake to indemnify the defendant for costs and damages the defendant may suffer by reason of the attachment if the plaintiff fails to establish his or her claim. Hence, although the attachment is regularly issued and the levy is properly made, the sureties may be held on the simple showing that the plaintiff lost the main action. "The remedy on the attachment undertaking is sustained by allegation and proof that the writ was wrongfully procured--that there was no debt due from the attachment defendant when it was issued and levied. It is not there necessary to aver malice and want of probable cause for the issuance of the attachment, but simply that the attachment was wrongfully procured and levied." (*Vesper v. Crane Co.* (1913) 165 C. 36, 41, 130 P. 876; see *Heine v. Wright* (1926) 76 C.A. 338, 344, 244 P. 955 [in absence of fraud, etc., sureties were estopped to set up defense that defendant consented to attachment]; *Woodruff v. Maryland Cas. Co.* (1934) 140 C.A. 642, 644, 35 P.2d 623 [prior attachment was already levied, but later attachment in larger sum held proximate cause of damages]; 6 *Am.Jur.2d* (1999 ed.), *Attachment and Garnishment* §618 et seq.)

(3) *Demand for Payment Not Required.* The sureties become liable because the plaintiff, after losing, fails to pay the defendant's costs and damages. Earlier cases held that the defendant, in an action against the sureties, should allege (a) the breach, and (b) a demand on the plaintiff for payment. (See *Dunlop v. Farmer* (1923) 64 C.A. 691, 692, 222 P. 640; *Atlas Dev. Co. v. National Surety Co.* (1923) 190 C. 329, 334, 212 P. 196.) But a later decision, overlooking the earlier cases and relying on C.C. 2807, states that the sureties become liable on default, without demand or notice. (*Finn v. Witherbee* (1954) 126 C.A.2d 45, 49, 271 P.2d 606.)

(4) *Surety's Defenses.* It is a defense to an action on a surety bond that ownership of the attached property was in a third person. Thus, in *Ramirez v. Hartford Acc. & Indem. Co.* (1938) 29 C.A.2d 193, 84 P.2d 172, the defendant was denied recovery, even though the attachment was wrongful, where he had lost all interest in the attached property before

the levy. His fraudulent transfer of the property, while not effective with respect to the attaching creditor, was binding on himself. (29 C.A.2d 197.)

West's Key Number Digest, Attachment 330 et seq.

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(2) *Basis for Liability*. See 6 *Am.Jur.2d* (2008 ed.), *Attachment and Garnishment* §575.



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b. Amount of Recovery.

6 *Witkin Cal. Proc. Prov Rem* § 225

[§ 225] Amount of Recovery.

(1) *Maximum Liability.* Under *C.C.P.* 996.470 (*supra*, §36), the liability of a surety on an undertaking is limited to the lesser of (a) the amount of the bond, or (b) the amount of the undertaking required by statute or court order.

(2) *Statutory Amount: Former Law.* Former *C.C.P.* 539(a) required the plaintiff to file an undertaking with two or more sufficient sureties to pay all costs awarded to the defendant and all damages that he or she sustained due to attachment, but not more than the sum specified in the undertaking, if the defendant received judgment or the attachment was discharged on the ground that the plaintiff was not entitled to it.

(3) *Statutory Amount: Current Law.*

(a) An undertaking to obtain a writ of attachment, a temporary protective order, or an order permitting a lien in a pending action or proceeding must guarantee to pay the defendant any amount he or she might recover for any wrongful attachment by the plaintiff in the action. (*C.C.P.* 489.210; *supra*, §115.) The plaintiff's liability for wrongful attachment includes damages proximately caused the defendant by the wrongful attachment as well as costs and expenses, including attorneys' fees, reasonably spent to defeat the attachment but is limited to the amount of the undertaking. (*C.C.P.* 490.020; *infra*, §234.)

(b) An undertaking to obtain release of a writ of attachment or temporary protective order must guarantee to pay to the plaintiff the value of the property released but not more than the amount of any judgment recovered by the plaintiff in the action against the defendant. (*C.C.P.* 489.310(c), *supra*, §213.)

(c) Where judgment is for the defendant, the plaintiff's undertaking to continue the attachment pending appeal must guarantee to pay the defendant the costs and damages the defendant may suffer because of the attachment if the judgment is sustained (*C.C.P.* 921, *supra*, §216) and may be increased by court order, on the defendant's request, to an amount "justified by the detriment reasonably to be anticipated by continuing the attachment." (*C.C.P.* 489.410(a); *supra*, §216.) The plaintiff's undertaking to continue the attachment pending postjudgment motions must guarantee to pay the costs and damages suffered because the attachment is continued. (*C.C.P.* 489.410(c); *supra*, §217.)

Because the present statutory language governing the amount required for an undertaking is similar to the language of former C.C.P. 539(a), cases decided under the original attachment law should be useful in determining the components of a surety's liability.

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c. Damages.

1. Particular Property.

6 *Witkin Cal. Proc. Prov Rem* § 226

[§ 226] Particular Property.

The cases have recognized particular measures of damages where particular kinds of property are involved.

(1) *Personal property held for use*: reasonable value of the use of which the owner is deprived. (*Atlas Dev. Co. v. National Surety Co.* (1923) 190 C. 329, 332, 212 P. 196 [oil drilling machinery]; *Morneault v. National Surety Co.* (1918) 37 C.A. 285, 287, 174 P. 81 [automobile; if value of use is given, further award for depreciation is unwarranted]; *Dunlop v. Farmer* (1923) 64 C.A. 691, 693, 222 P. 640 [automobile].)

(2) *Personal property held for sale*: depreciation in market value. (*Witherspoon v. Cross* (1901) 135 C. 96, 98, 67 P. 18 [sureties were not liable for additional damage caused by neglect of levying officer]; *McCarthy Co. v. Boothe* (1905) 2 C.A. 170, 172, 83 P. 175 [depreciation in value of shares of stock].)

(3) *Money*: legal rate of interest for period of detention. (*Gray v. American Surety Co. of New York* (1954) 129 C.A.2d 471, 475, 277 P.2d 436; *Schneider v. Zoeller* (1959) 175 C.A.2d 354, 362, 346 P.2d 515.)

(4) *Real property*: depreciation in value during period of attachment where sale has been prevented. (*Clark v. Andrews* (1952) 109 C.A.2d 193, 197, 240 P.2d 330.)

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2. Punitive Damages.

6 *Witkin Cal. Proc. Prov Rem* § 227

[§ 227] Punitive Damages.

Authority is divided on the liability of a surety for punitive damages where an attachment is wrongful and malicious. (See 6 *Am. Jur.2d* (1999 ed.), *Attachment and Garnishment* §635.) Two California cases, without discussion, assume that the award would be proper. (See *Barlin v. Barlin* (1957) 156 C.A.2d 143, 145, 319 P.2d 87; *Klinell v. Shirey* (1963) 223 C.A.2d 239, 245, 35 C.R. 901.) The *Restatement of Security*, §198 (later superseded by the Third Restatement of Suretyship and Guaranty) was contra: The Comment suggests that no responsible surety can be expected to assume an undertaking unless he or she can estimate the risk with some accuracy, and should not be required to judge the plaintiff's motives or to guess the amount a jury might award if it found malice.

Carter v. Agricultural Ins. Co. (1968) 266 C.A.2d 805, 72 C.R. 462, follows the Restatement view, but grounds its repudiation of the earlier decisions on statutory construction. Former C.C.P. 539, then in effect, referred to "all damages which he [defendant] may sustain by reason of the attachment." The court says: "The attachee does not sustain punitive or exemplary damages. Those are imposed on the attachor as punishment for his malice. We believe damages sustained by the attachee mean those suffered by him, his actual damages, to compensate him for the losses he has endured. By definition, punitive damages are in addition to actual damages." (266 C.A.2d 807.)

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d. Attorneys' Fees.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 228

[§ 228] In General.

(1) *In Disposing of Attachment.* Attorneys' fees incurred in disposing of the attachment are recoverable as damages. (*Ideal Heating Corp. v. Royal Indem. Co.* (1951) 107 C.A.2d 662, 664, 237 P.2d 521 [\$ 10,000 award sustained for preparing and presenting motions to discharge, petition for mandamus, and successful appeal]; see 65 A.L.R.2d 1426, 1429 [right to recover attorneys' fees for obtaining dissolution of attachment].)

The arbitrary rule that the complaint must allege actual payment (see *Elder v. Kutner* (1893) 97 C. 490, 495, 32 P. 563) has been repudiated; the allegation that the fees have been "incurred" is sufficient. (*Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles* (1951) 37 C.2d 808, 814, 236 P.2d 151, *infra*, §§230, 418.)

(2) *In Defense of Main Action.* Fees incurred solely in defense of the main action are not damages sustained by reason of the attachment, and the sureties are not liable for them. (*Soule v. United States Fidelity & Guaranty Co.* (1927) 82 C.A. 572, 575, 255 P. 886; *Miramonte & Louedestel Co. v. National Surety Co.* (1928) 91 C.A. 64, 65, 266 P. 576; see 65 A.L.R.2d 1426, 1433 [right to recover attorneys' fees for defending main action].)

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d. Attorneys' Fees.

2. Segregation of Allowable Fees.

6 *Witkin Cal. Proc. Prov Rem* § 229

[§ 229] Segregation of Allowable Fees.

Usually the defendant will have paid or incurred fees both in disposing of the attachment and in defense of the main action (see *supra*, §228), and the jury (or the court sitting without a jury) must, on the evidence presented, segregate the services and fees and award damages only for the allowable services in connection with discharge of the attachment. (*Albertsworth v. Glen Falls Indem. Co. (1948) 84 C.A.2d 816, 824, 192 P.2d 66*; *Ideal Heating Corp. v. Royal Indem. Co. (1951) 107 C.A.2d 662, 664, 666, 237 P.2d 521* [instructions to jury].)

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3. Segregation of Fees Is Not Required.

6 Witkin Cal. Proc. Prov Rem § 230

[§ 230] Segregation of Fees Is Not Required.

The fees incurred in defense of the main action need not be eliminated where the attachment is valid and regular on its face and a motion to discharge would be futile. In that case, the only way the defendant can establish the wrongfulness of the attachment is to win the main action after a trial on the merits. Accordingly, in *Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles* (1951) 37 C.2d 808, 236 P.2d 151, a complaint that alleged such items of damage as travel expenses of the nonresident whose real property was attached, the expense of a surveyor employed for purposes of the trial, and attorneys' fees for the trial was upheld. (37 C.2d 812.)

Reachi was followed in several cases. (See *Burke v. Superior Court* (1969) 71 C.2d 276, 279, footnote 3, 78 C.R. 481, 455 P.2d 409; *Schneider v. Zoeller* (1959) 175 C.A.2d 354, 363, 346 P.2d 515; *Stiner v. Travelers Indem. Co.* (1964) 226 C.A.2d 128, 134, 37 C.R. 813; 25 So. Cal. L. Rev. 452 [commenting on hazards of attachment in action against nonresident under *Reachi* rule]; for application of *Reachi* rule to actions on injunction bonds, see *infra*, §418.)

In *Byard v. National Auto. & Cas. Ins. Co.* (1963) 218 C.A.2d 622, 32 C.R. 613, plaintiffs, defendants in a prior action, won the action, and in this action sought recovery of their attorneys' fees in defense of the prior action. The surety contended that the *Reachi* rule should be limited to attachments establishing quasi in rem jurisdiction over nonresidents. *Held*, plaintiffs were entitled to recover.

(a) There is an even stronger reason for the rule where a resident defendant is involved, because the creditor does not have to attach in order to obtain jurisdiction. Moreover, the consequences to the defendant are the same in both cases; i.e., the only way to free property from an attachment regular on its face is to win on the merits. (218 C.A.2d 625.)

(b) Attachment may not always be a wise choice, in view of the possibility of such an award. "The ultimate resolution of all actions, including the purest contract right calling for the payment of a sum certain, is an unknown factor prior to final judicial determination. Therefore it appears entirely reasonable to require one who contemplates availing himself of this 'predetermination' right to weigh carefully the probabilities, the risks, the advantages and

disadvantages thereof. It must be assumed that he is fully informed as to the merits of his cause and his ability to establish it, and, if he entertains serious doubts on either point, he need only restrict himself to the position of the usual plaintiff who must await trial on the merits before seizing upon the assets of the defendant. Certainly this appears preferable to an arbitrary refusal fairly to compensate an alleged debtor for the monies he has expended in freeing his property of the encumbrance placed upon it by invoking the only procedure available to him." (218 C.A.2d 626.)

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J. Liability of Plaintiff for Wrongful Attachment.

1. Tort Action.

6 *Witkin Cal. Proc. Prov Rem* § 231

[§ 231] Tort Action.

The remedy against the sureties on an attachment undertaking is not based on a tortious act of the plaintiff, but merely on loss of the main action. (See *supra*, §224.) If, however, the plaintiff invokes the attachment procedure wrongfully, a tort action for malicious prosecution or abuse of process will lie. (See 36 Proof of Facts 2d 149 [wrongful attachment]; on wrongful attachment generally, see C.E.B., 1 Debt Collection Practice 2d, §6.91 et seq.)

The remedies against the sureties and the plaintiff may be simultaneously pursued, i.e., the attachment defendant may join the sureties and the plaintiff in one action on separately stated causes of action. (*Swain v. Los Angeles Morris Plan Co. (1923) 60 C.A. 667, 668, 213 P. 703.*) But the defendant need not await the termination of the main action to sue the wrongfully attaching plaintiff; the tort cause of action for abuse of process may be set up by cross-complaint in the main action. (*White Lighting Co. v. Wolfson (1968) 68 C.2d 336, 350, 66 C.R. 697, 438 P.2d 345, 5 Summary (10th), Torts, §523; see 9 Santa Clara Lawyer 132; 6 San Diego L. Rev. 139; 4 U.S.F. L. Rev. 38.*)

The situations in which a tort action for wrongful attachment are available were classified in *White Lighting Co. v. Wolfson* as follows:

(1) Regularly issued attachment in an action prosecuted maliciously and without probable cause: malicious prosecution. (68 C.2d 348.) (See *Goland v. Peter Nolan & Co. (1934) 2 C.2d 96, 98, 38 P.2d 783; Merron v. Title Guarantee & Trust Co. (1938) 27 C.A.2d 119, 121, 80 P.2d 740.*)

(2) Regularly issued attachment in a proper action, but use of it for an improper purpose: abuse of process. (68 C.2d 349.) (See *Pimentel v. Houk (1951) 101 C.A.2d 884, 886, 226 P.2d 739* [malice alone, without wrongful act, was not sufficient]; *Owens v. McManus (1952) 108 C.A.2d 557, 559, 239 P.2d 72* [malicious attachment involving keeper and storage of equipment].)

(3) Maliciously procured attachment in an action that is not of a type in which the statute authorizes attachment: abuse of process. (68 C.2d 348.) (For statutory remedy for attachment in action in which attachment is not authorized, see *infra*, §233.)

(4) Attachment of property that is either exempt or is of a value greatly in excess of the amount of the claim: abuse of process. (68 C.2d 349, footnote 8.) (See *Clark v. Nordholt* (1898) 121 C. 26, 28, 53 P. 400 [excessive levy]; *McNabb v. Byrnes* (1928) 92 C.A. 337, 341, 268 P. 428 [exempt property]; 30 U.C.L.A. L. Rev 1218 [abuse of process action is best remedy against excessive or wrongful attachment]; 56 A.L.R.3d 493 [liability of creditor for excessive attachment]; for statutory remedy for levy on exempt property, see *infra*, §233.)

West's Key Number Digest, Attachment 367 et seq.

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J. Liability of Plaintiff for Wrongful Attachment.

2. Statutory Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 232

[§ 232] Statutory Remedy.

(1) *Nonexclusive Remedy*. *C.C.P.* 490.010 et seq. provide a statutory remedy for wrongful attachment (see *infra*, §233 et seq.). The remedy, however, is not exclusive: "Nothing in this chapter limits the right to recovery for damages caused by an attachment or protective order on any common law theory of recovery." (*C.C.P.* 490.060.)

(2) *Procedure Under Bond and Undertaking Law*. The procedure for recovery for wrongful attachment is that outlined for enforcement of the liability of a principal or surety under the Bond and Undertaking Law (see *supra*, §35 et seq.). (On wrongful attachment generally, see 2C Am.Jur. P.P. Forms (2000 ed.), Attachment and Garnishment, § 497 et seq.; 36 Proof of Facts 2d 149.)

(3) *Commissioner May Not Act in Contested Cases*. A court commissioner may not act on a contested motion for determination of liability and damages for wrongful attachment. (*C.C.P.* 482.060(b)(2); see 10 *Pacific L. J.* 361; *supra*, §93.)

(4) *Remedies of Third Person*. The statutory procedure is limited to a claim by the defendant. A third person whose property is wrongfully attached may rely on common law remedies or the procedure provided by *C.C.P.* 720.010 et seq. for determining third-party claims before property is applied to satisfaction of a judgment (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §364 et seq.). (Law Rev. Com. Comment to *C.C.P.* 490.010.)

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Witkin Summary of California Law

II. ATTACHMENT

J. Liability of Plaintiff for Wrongful Attachment.

3. Acts Constituting Wrongful Attachment.

6 Witkin Cal. Proc. Prov Rem § 233

[§ 233] Acts Constituting Wrongful Attachment.

(1) *Attachment Not Authorized.* A wrongful attachment occurs where the levy of the writ or service of the temporary protective order is made in an action in which attachment is not authorized, unless both of the following are established:

(a) The levy was not authorized solely because of the prohibition of attachment against a natural person on a claim arising from personal, family, or household purposes in *C.C.P. 483.010(c)* (supra, §§70, 71). (*C.C.P. 490.010(a)(1).*)

(b) The person who sold, leased, or licensed the property, furnished the services, or loaned the money on which the claim is based "reasonably believed that it would not be used primarily for personal, family, or household purposes." (*C.C.P. 490.010(a)(2).*)

(2) *No Judgment for Plaintiff.* An attachment is wrongful where the levy is made or a temporary protective order is served and the plaintiff fails to recover judgment. (*C.C.P. 490.010(b).*)

(3) *Levy on Exempt Property.* An attachment is wrongful where it is obtained ex parte under *C.C.P. 484.510* et seq. (supra, §124 et seq.) or *C.C.P. 485.010* et seq. (supra, §128 et seq.) on property exempt from attachment (see supra, §82 et seq.), except where the plaintiff shows that he or she reasonably believed that the property was not exempt. (*C.C.P. 490.010(c).*) A determination that the property was not exempt does not preclude a finding that the plaintiff acted unreasonably; e.g., the determination may have been based on false affidavits or inadequate investigation by the plaintiff. (Legislative Com. Comment to *C.C.P. 490.010.*) (On tort action for attachment of exempt property, see supra, §231.) This section does not apply to an ex parte writ obtained for nonresident attachment (infra, §§241, 242). (Legislative Com. Comment to *C.C.P. 490.010.*)

(4) *Distinction: Failure To Increase Undertaking.* The plaintiff's failure to increase the amount of an undertaking when ordered to do so is not a wrongful attachment under *C.C.P. 490.010.* (*C.C.P. 489.130.*) However, excessive attachment is a form of abuse of process. (See supra, §231.)

West's Key Number Digest, Attachment 355 et seq.

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4. Measure of Plaintiff's Liability.

6 *Witkin Cal. Proc. Prov Rem* § 234

[§ 234] Measure of Plaintiff's Liability.

(1) *Items of Damage.* The plaintiff is liable for (a) all damages proximately caused to the defendant by the wrongful attachment, and (b) all costs and expenses, including attorneys' fees, reasonably expended in defending the attachment. (*C.C.P. 490.020(a)*; see Legislative Com. Comment, observing that "damages proximately caused" include such items as loss of credit and business losses.)

(2) *Limited to Amount of Undertaking.* The plaintiff's liability under *C.C.P. 490.010* et seq. is limited by the amount of the undertaking. (*C.C.P. 490.020(b)*.) Although the liability of the surety and the plaintiff together is limited to the amount of the undertaking, this limitation on the plaintiff's liability does not apply where an independent action based on a common law theory of relief is brought. (Legislative Com. Comment to *C.C.P. 490.020*; see *supra*, §§231, 232.)

(3) *Setoff Against Plaintiff's Judgment.* Despite a wrongful attachment, the plaintiff may recover judgment in the main action. Here, the amount of recovery against the plaintiff in the wrongful attachment proceeding is set off as far as possible against any unsatisfied amounts owed to the plaintiff by the defendant. (*C.C.P. 490.040*.)

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K. Nonresident Attachment.

1. In General.

a. Purpose.

6 Witkin Cal. Proc. Prov Rem § 235

[§ 235] Purpose.

Nonresident attachment is designed to operate where personal jurisdiction of a defendant cannot be obtained but quasi in rem jurisdiction can be obtained by seizure of the nonresident's property in the state. Attachment carries out the dual purposes of obtaining quasi in rem jurisdiction and furnishing security for the judgment. (See *6 Am.Jur.2d (1999 ed.)*, *Attachment and Garnishment* §226 et seq.; C.J.E.R., *Judges Benchbook*, Civil Proceedings: Before Trial 2d, §14.109; C.E.B., *1 Debt Collection Practice* 2d, §§6.6, 6:36; *Cal. Civil Practice*, 2A Procedure, §16:37; 2 *Cal. Proc. (5th)*, *Jurisdiction*, §247.)

SUPPLEMENT: [This section is current through the latest supplement]
See *6 Am.Jur.2d (2008 ed.)*, *Attachment and Garnishment* §191 et seq.



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1. In General.

b. Constitutionality.

6 *Witkin Cal. Proc. Prov Rem* § 236

[§ 236] Constitutionality.

The original statute (former C.C.P. 537(2)) was upheld against two constitutional challenges:

(1) *Equal protection*. The classification of nonresidents in the statute has two rational and proper purposes: (a) it gives the court jurisdiction quasi in rem; and (b) supplemental proceedings in aid of execution are not likely to be effective against nonresidents. (*National General Corp. v. Dutch Inns of America* (1971) 15 C.A.3d 490, 496, 93 C.R. 343.)

(2) *Due process*. The reasoning of *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 96 C.R. 709, 488 P.2d 13, supra, §50, does not apply to nonresident attachment. This type of statute has been recognized by all 50 states, and was held valid in *Ownbey v. Morgan* (1921) 256 U.S. 94, 41 S.Ct. 433, 435, 65 L.Ed. 837, 842.

In *Property Research Financial Corp. v. Superior Court* (1972) 23 C.A.3d 413, 422, 100 C.R. 233, the court observed that modern long-arm statutes (see 3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.) have substantially reduced the need for foreign attachment to obtain quasi in rem jurisdiction, but the more important purpose--to insure collectibility of the judgment, remains. The creditor's need is substantially greater than when the debtor is a resident; a nonresident debtor is more likely to transfer assets to his or her home state, and prior notice and hearing would give the debtor this opportunity. Thus, foreign attachment serves the same purpose as a *lis pendens*. (23 C.A.3d 419.) Moreover, foreign attachment will not ordinarily involve the necessities for day-to-day living, as in *Snidach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 *Summary* (10th), *Constitutional Law*, §646, or *Randone*. (23 C.A.3d 420.) Thus, "a situation requiring special protection to a state or creditor interest" is present, and the statute is valid. (23 C.A.3d 421.) (See *Banks v. Superior Court* (1972) 26 C.A.3d 143, 145, 102 C.R. 590 [following *Property Research*].) (On constitutional limits on scope of quasi in rem jurisdiction, see *Shaffer v. Heitner* (1977) 433 U.S. 186, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683, 703, 2 *Cal. Proc.* (5th), *Jurisdiction*, §254; Rutter Group, *Civil Proc. Before Trial* §9:871 [California statute for nonresident attachment may be overbroad].)

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1. In General.

c. Action for Money.

6 *Witkin Cal. Proc. Prov Rem* § 237

[§ 237] Action for Money.

(1) *Former Law.* Originally California's statute authorized nonresident attachment in an action on a contract, whether express or implied. (Former C.C.P. 537(2).) Later amendments authorized nonresident attachment in actions to recover money as damages, arising from an injury to person or property or death, in consequence of negligence, fraud, or other wrongful act. (See *Ponsonby v. Sacramento Suburban Fruit Lands Co.* (1930) 210 C. 229, 232, 291 P. 167.)

(2) *Current Law.* The ex parte procedure may be used in any action for the recovery of money against an authorized defendant (see *infra*, §§239, 240). The requirements set forth in *C.C.P. 483.010(a)* (*supra*, §§58, 65), which limit attachment to contract claims not less than \$ 500, are not applicable. (*C.C.P. 492.010.*)

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1. In General.

d. Property Subject to Attachment.

6 Witkin Cal. Proc. Prov Rem § 238

[§ 238] Property Subject to Attachment.

Notwithstanding the general rules governing property subject to and exempt from attachment (see *C.C.P. 487.010, 487.020*, supra, §75 et seq.), a writ of attachment issued under the nonresident procedure may be levied on property for which a method of levy is provided by *C.C.P. 488.300* et seq. (see supra, §158 et seq.). However, once the defendant files a general appearance, only nonexempt property may be levied on and exempt property previously levied on must be released on court order. (*C.C.P. 492.040.*)

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2. Nonresident Defendants.

a. Natural Person Not Residing in State.

6 *Witkin Cal. Proc. Prov Rem* § 239

[§ 239] Natural Person Not Residing in State.

(1) *Statutory Basis.* California's former statute allowed attachment against a defendant who did not reside in this state, or one who had left the state, or who could not after due diligence be found in the state, or who hid to avoid service of summons. *C.C.P. 492.010(a)* authorizes the ex parte procedure against a natural person not residing in this state.

(2) *What Constitutes Nonresidence of Natural Person.* "Residence" is an important concept in statutes dealing with venue and process as well as attachment. (See exhaustive discussion in *Briggs v. Superior Court* (1947) 81 C.A.2d 240, 245, 183 P.2d 758, 3 Cal. Proc. (5th), *Actions*, §§818, 820, 1029.)

Domicile in the technical sense of residence with an intention to remain permanently (see 2 Cal. Proc. (5th), *Jurisdiction*, §127) is less important than actual residence, even though it is temporary in character. A mere casual or transient stay does not establish residence; but "where a man has a settled abode for the time being in another state, for purposes of business or pleasure, we think that both reason and authority require him to be treated as a non-resident of this state within the meaning of the attachment law." (*Hanson v. Graham* (1890) 82 C. 631, 634, 23 P. 56 [defendant contractor, domiciled in California, went to Chile to engage in business, contemplated lengthy stay].)

In *Egener v. Juch* (1894) 101 C. 105, 106, 35 P. 432, attachment was sought in an action against a traveling theatrical troupe composed of New York residents temporarily performing in California. The court, in a brief opinion, upheld the trial judge's order dissolving the attachment on the ground that the affidavits were "conflicting" (attorney for defendants simply averred the conclusion that members of the troupe were California residents). The decision is wrong, as pointed out in the dissenting opinion. (See critical comment in *Briggs v. Superior Court*, *supra*, 81 C.A.2d 253.)

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2. Nonresident Defendants.

b. Foreign Corporation or Partnership.

6 *Witkin Cal. Proc. Prov Rem* § 240

[§ 240] Foreign Corporation or Partnership.

(1) *Foreign Corporation*. Decisions under the former statute held that a foreign corporation was a nonresident. (See *Title Ins. & Trust Co. v. California Dev. Co.* (1915) 171 C. 173, 218, 152 P. 542; *Warner Mfg. Co. v. Standard Interstate Mfg. Co.* (1950) 97 C.A.2d 494, 218 P.2d 131; *Property Research Financial Corp. v. Superior Court* (1972) 23 C.A.3d 413, 421, 100 C.R. 233, *supra*, §236; 14 A.L.R.2d 420 [availability of attachment in actions between nonresidents].)

The ex parte procedure may be used against a foreign corporation not qualified to do business in California under *Corp.C. 2100* et seq. (see 9 *Summary* (10th), *Corporations*, §227 et seq.). (*C.C.P. 492.010(b)*.)

(2) *Foreign Partnership*. The ex parte procedure is also available against a foreign partnership that has not filed a designation under *Corp.C. 15700* (now *Corp.C. 15800*; see 3 *Cal. Proc.* (5th), *Actions*, §1055). (*C.C.P. 492.010(c)*.)

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3. Procedure.

a. Application and Affidavit.

6 *Witkin Cal. Proc. Prov Rem § 241*

[§ 241] Application and Affidavit.

(1) *Application*. On filing the complaint or thereafter, the plaintiff may file an application for a right to attach order and writ of attachment for a nonresident attachment, which must conform with requirements governing an application in ordinary attachment (*C.C.P. 484.020*, *supra*, §§95, 97). (*C.C.P. 492.020(a)*, (b).)

(2) *Affidavit*. A supporting affidavit must show the following:

(a) The action is brought against a nonresident defendant under *C.C.P. 492.010* (see *supra*, §§239, 240). (*C.C.P. 492.020(b)(1)*.)

(b) On the facts presented, the plaintiff would be entitled to a judgment on the claim on which the attachment is based. (*C.C.P. 492.020(b)(2)*.)

(c) The property sought to be attached is subject to attachment under *C.C.P. 492.040* (see *supra*, §238). (*C.C.P. 492.020(b)(3)*.) This showing may be based on information and belief. (*C.C.P. 492.020(c)*.)

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3. Procedure.

b. Hearing, Order, and Writ.

6 *Witkin Cal. Proc. Prov Rem* § 242

[§ 242] Hearing, Order, and Writ.

(1) *Denial of Application.* If the court finds that the application and supporting affidavit are insufficient, it must so state and deny the order. If denial is based solely on the ground that the defendant is not a nonresident described in *C.C.P. 492.010* (supra, §§239, 240), the court must so state, but the denial does not preclude the plaintiff from proceeding under the ordinary attachment procedure (*C.C.P. 484.010* et seq.; supra, §95 et seq.) with the same affidavits and supporting papers. (*C.C.P. 492.030(b).*)

(2) *Granting of Application and Issuance of Order and Writ.* The court must issue a right to attach order stating the amount to be secured by the attachment and order a writ of attachment to be issued on the filing of an undertaking (see supra, §115), if it finds all of the following:

(a) The claim on which the attachment is based is one on which attachment may be issued. (*C.C.P. 492.030(a)(1).*)

(b) The plaintiff has established the probable validity of the claim on which the attachment is based. (*C.C.P. 492.030(a)(2)*; for definition of "probable validity," see supra, §108.)

(c) The defendant is a nonresident described in *C.C.P. 492.010* (supra, §§239, 240). (*C.C.P. 492.030(a)(3).*)

(d) The attachment is not sought for a purpose other than recovery on the claim on which the attachment is based. (*C.C.P. 492.030(a)(4).*)

(e) The supporting affidavit shows that the property sought to be attached, or the portion specified in the writ, is subject to attachment under *C.C.P. 492.040* (supra, §238). (*C.C.P. 492.030(a)(5).*)

(f) The amount to be secured by the attachment is greater than zero. (*C.C.P. 492.030(a)(6).*)

(3) *Judicial Council Form.* The Judicial Council has adopted an optional form for the order. (See Judicial Council Form No. AT-130 [Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Nonresident)].)

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3. Procedure.

c. Additional Writ.

6 *Witkin Cal. Proc. Prov Rem* § 243

[§ 243] Additional Writ.

(1) *Application.* After a right to attach order and writ of attachment have been issued under the nonresident procedure, but before the hearing on a motion to set aside or quash a nonresident attachment under *C.C.P. 492.050* (infra, §244), the plaintiff may apply ex parte for an additional writ. (*C.C.P. 492.060.*) After a hearing under *C.C.P. 492.050*, the application should be made under *C.C.P. 484.310* (supra, §119) or *C.C.P. 484.510* (supra, §§124, 125), governing additional writs in resident attachment. (*C.C.P. 492.050(d).*)

The application must be executed under oath and must include all of the following:

(a) A statement that the plaintiff has been issued a right to attach order and writ of attachment under *C.C.P. 492.030* (supra, §242). (*C.C.P. 492.070(a).*)

(b) A statement of the amount to be secured by the attachment. (*C.C.P. 492.070(b).*)

(c) A description of the property to be attached satisfying the requirements of *C.C.P. 484.020* (supra, §97), and a statement that the plaintiff is informed and believes that the property is subject to attachment under *C.C.P. 492.040* (supra, §238). (*C.C.P. 492.070(c).*)

(2) *Issuance of Writ.* The court must order a writ of attachment to be issued on the filing of an undertaking (see supra, §115) if it finds both of the following:

(a) A right to attach order has been issued under *C.C.P. 492.030*. (*C.C.P. 492.090(a).*)

(b) The supporting affidavit shows that the property sought to be attached, or the portion specified in the writ, is subject to attachment under *C.C.P. 492.040*. (*C.C.P. 492.090(b).*)

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3. Procedure.

d. Motion To Set Aside and Quash.

6 Witkin Cal. Proc. Prov Rem § 244

[§ 244] Motion To Set Aside and Quash.

(1) *In General.* A defendant whose property has been attached pursuant to a nonresident attachment may apply for an order setting aside the right to attach order, quashing the writ, and releasing property levied on. (*C.C.P. 492.050(a).*)

(2) *Motion.* The defendant files with the court and serves on the plaintiff a notice of motion stating the grounds on which the motion is based, accompanied by an affidavit supporting factual issues and points and authorities supporting legal issues. (*C.C.P. 492.050(a), (b).*)

(3) *Hearing.* The hearing on the motion takes precedence over all other civil matters on the day's calendar except older matters of the same character. (*C.C.P. 492.050(f).*) The court determines the motion on the basis of the pleadings and other papers in the record, but may, on good cause, receive and consider additional oral or documentary evidence and additional points and authorities, or may continue the hearing for the production of additional evidence or points and authorities. (*C.C.P. 492.050(e).*)

(4) *Determination.* If the plaintiff is not entitled to a right to attach order, the court must order the right to attach order set aside, the writ quashed, and the property released. If the plaintiff is entitled to the order, the attachment continues in effect except as provided in *C.C.P. 492.040* (*supra*, §238). (*C.C.P. 492.050(d).*)

(5) *Effect of General Appearance.* If the defendant has made a general appearance in the action, the right to attach order must be set aside unless the plaintiff shows that the right to attach is authorized by a provision other than *C.C.P. 492.010* (*see supra*, §239). (*C.C.P. 492.050(c).*) Even though the attachment was proper under the nonresident procedure, its use should be limited to its purpose, i.e., to obtain quasi in rem jurisdiction (*see supra*, §235). If the defendant appears, quasi in rem jurisdiction is not necessary, and the attachment should be made under the provisions governing resident attachment. (*See Nakasone v. Randall (1982) 129 C.A.3d 757, 761, 181 C.R. 324, citing the text.*)

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III. CLAIM AND DELIVERY

A. In General.

1. Nature of Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 245

[§ 245] Nature of Remedy.

A plaintiff entitled to the possession of personal property held by another may bring an action for specific recovery of the property. (See 5 *Cal. Proc.* (5th), *Pleading*, §692 et seq.) And, if immediate possession is important, the plaintiff may invoke the provisional remedy of claim and delivery to obtain possession without waiting for trial and judgment in the main action. (See *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 *C.A.4th* 1279, 1288, 64 *C.R.2d* 698 [claim and delivery statutes are based not only on fundamental common law concepts of property ownership and conversion, but on recognition of court's inherent authority to administer disputes over possession of chattels]; on procedure for obtaining writ of possession, see *infra*, §255 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.112 et seq.; C.E.B., 1 Debt Collection Practice 2d, §6.111 et seq.; Rutter Group, Civil Proc. Before Trial §9:784 et seq.; for practical considerations in using and opposing remedy, see *Cal. Civil Practice*, 2A Procedure, §16:84 et seq.; on alternative prejudgment creditors' remedies, see C.E.B., 1 Debt Collection Practice 2d, §6.1; on *F.R. Civ. P.*, Rule 64, making state remedy available in federal courts, see 11A *Federal Practice & Procedure* (Wright & Miller) §2931 et seq.)

Thus, the action may be brought and possession recovered in the usual manner by judgment, or the action may be brought and possession recovered by the provisional remedy before judgment. The provisional remedy cannot be employed independently, but only in the action. Moreover, the provisional remedy gives only temporary possession; title and right to possession are determined by the final judgment. (See *infra*, §270.) These distinctions are fundamental, though sometimes obscured by the confusing tendency of courts and attorneys to use the term "claim and delivery" indiscriminately to refer to both the action and the provisional remedy. (See *Faulkner v. First Nat. Bank* (1900) 130 *C.* 258, 263, 62 *P.* 463; *Barnard v. Municipal Court* (1956) 142 *C.A.2d* 324, 326, 298 *P.2d* 679; *McFaddin v. H.S. Crocker Co.* (1963) 219 *C.A.2d* 585, 590, 33 *C.R.* 389, quoting the text; 5 *Cal. Proc.* (5th), *Pleading*, §692.)

Where the property taken is claimed by a third person, the rules and proceedings applicable in cases of third-party claims under *C.C.P.* 720.010 et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §364 et seq.) apply. (*C.C.P.* 514.050.) (See C.E.B., 2 Debt Collection Practice, §9.49A et seq.)

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III. CLAIM AND DELIVERY

A. In General.

2. Constitutional Requirements.

a. Blair Case.

6 *Witkin Cal. Proc. Prov Rem* § 246

[§ 246] Blair Case.

The provisional remedy was originally covered by former C.C.P. 509 et seq. (See *American Machine & Foundry Co. v. Pitchess* (1968) 262 C.A.2d 490, 493, 68 C.R. 814, citing the text.) In *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, plaintiffs, Los Angeles residents and taxpayers, brought a taxpayers' action under C.C.P. 526a to enjoin the illegal expenditure of public funds. Defendants named were the county and civil enforcement officers executing the claim and delivery law. The constitutional challenge was based on the Fourth, Fifth, and Fourteenth Amendments to the federal Constitution and parallel provisions of the California Constitution (now Cal. Const., Art. I, §§13, 15). The lower court granted plaintiffs' motion for summary judgment, and issued an injunction restraining defendants from (a) taking personal property without a prior hearing on the merits of the case; and (b) entering a private place to search for and seize personal property without prior probable cause established before a magistrate. *Held*, affirmed; the law is unconstitutional.

(a) *Unreasonable search and seizure.* (1) The Fourth Amendment protection applies in civil as well as criminal proceedings. (5 C.3d 272; see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §293 et seq.) (2) The intrusion authorized by the claim and delivery statute is a search and seizure: the entry is to seize the property, and if the occupant refuses, the officer may call for assistance to overcome resistance. (5 C.3d 273.) (3) The search is unreasonable unless made on probable cause. This is not shown by the usual affidavits, which do not set forth facts to support the general allegation of wrongful detention and location of the property. These affidavits are passed on by a clerical staff for form, not by a magistrate for sufficiency. (5 C.3d 273.) (4) Acquiescence to a law officer's request, when the officer is armed with legal process, is not a voluntary waiver. (5 C.3d 275.) And the provision in the usual sales contract, authorizing entry and repossession by the seller or creditor, is not a consent to entry by a government officer. Moreover, this provision is part of a contract of adhesion (obtained under unequal bargaining power; see 1 *Summary* (10th), *Contracts*, §323 et seq.), and is ineffective for that reason. (5 C.3d 276.)

(b) *Violation of procedural due process.* (1) The reasoning of *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 *Summary* (10th), *Constitutional Law*, §646, is controlling. In both garnishment and claim and delivery there is a deprivation of the use of the property. And later federal and out-of-state cases have applied the *Sniadach* reasoning to invalidate other prejudgment remedies, such as termination of

welfare aid, confession of judgment, and claim and delivery procedure. (5 C.3d 280.) (2) *Sniadach* and similar cases recognize that in unusual situations, weighty state or creditor interests may justify summary procedure. But California's statute is not limited to extraordinary situations. Moreover, the advantages of its protection of the creditor are outweighed by the detrimental effect on those whose goods are seized, for these goods are usually the household appliances and furniture of a wage-earning family. (5 C.3d 279.) (3) No contract provision can waive this constitutional right to due process. (5 C.3d 281.)

(c) *Redrafting required.* The unconstitutional features of the statute cannot be eliminated without complete redrafting. (5 C.3d 283.) The court added an informative dictum on the nature and scope of possible valid legislation: "Of course, by our decision we do not foreclose the Legislature from enacting new prejudgment replevin remedies in conformity with the constitutional principles discussed herein. As we have indicated above, claim and delivery may be limited to those cases where the state or creditor interests outweigh the due process rights of those from whom the property is seized. Or the Legislature may choose to expedite the hearing procedure to assure that the defendant is afforded his or her day in court before the property is seized. The Legislature may provide for the issuance of appropriate process on probable cause to enable public officials to seize property without violating Fourth Amendment rights. Obviously, it is not within our judicial province to prescribe which of the multitude of possible, constitutional procedures for prejudgment claim and delivery relief should be adopted; that is a proper task for the Legislature." (5 C.3d 284.) (See 60 Cal. L. Rev. 845; 23 Hastings L. J. 496; for United States Supreme Court decisions, see *infra*, §§247, 248.)

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2. Constitutional Requirements.

b. Fuentes Case.

6 *Witkin Cal. Proc. Prov Rem* § 247

[§ 247] Fuentes Case.

In *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, the United States Supreme Court held unconstitutional the Florida and Pennsylvania prejudgment replevin laws, which were similar to California's claim and delivery statute. The opinion laid down a fundamental principle that procedural due process requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." (92 S.Ct. 1994, 32 L.Ed.2d 570.) The Court also made it clear that plaintiffs' interests as purchasers of household goods on conditional sales, without full title to the goods, were nevertheless protected by the Fourteenth Amendment:

(a) Although the deprivation of possession under prejudgment replevin may be only temporary, "[a]ny significant taking of property by the State is within the purview of the Due Process Clause." (92 S.Ct. 1997, 32 L.Ed.2d 573.)

(b) Although plaintiffs did not have title, the clause protects "any significant property interest," such as the possessory interest obtained by payment of installments on the price plus heavy finance charges. (92 S.Ct. 1997, 32 L.Ed.2d 573.)

(c) *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 Summary (10th), *Constitutional Law*, §646, and *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, 7 Summary (10th), *Constitutional Law*, §685, did not declare a narrow rule of protection only of absolute necessities of life. There may be gradations in the importance or necessity of consumer goods, but procedural due process cannot rest on these distinctions. (92 S.Ct. 1999, 32 L.Ed.2d 574.)

(d) Plaintiffs did not waive their basic procedural due process rights by signing the conditional sales contracts, thereby agreeing that on default the seller could repossess. The purported waiver provision, which appeared in relatively small type as part of a printed form sales contract, was a necessary condition of the sale. The contract says nothing about the waiver of a prior hearing. (92 S.Ct. 2001, 32 L.Ed.2d 578.)

(e) Due process requires that the seizure of goods to protect the security interests of creditors is subject to a prior hearing, the nature of which must be determined by the legislature. "We hold that the Florida and Pennsylvania

prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation, not adjudication. Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test." (92 S.Ct. 2002, 32 L.Ed.2d 579.) (See 86 Harv. L. Rev. 85; 88 Harv. L. Rev. 71.)

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2. Constitutional Requirements.

c. Later Cases.

6 *Witkin Cal. Proc. Prov Rem* § 248

[§ 248] Later Cases.

In *Mitchell v. W.T. Grant Co.* (1974) 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406, the United States Supreme Court examined the constitutionality of the Louisiana statute providing for a writ of sequestration of property. The seizure is authorized where the plaintiff claims ownership, the right to possession, or a lien, and it is within the defendant's power to conceal, dispose of, or waste the property. The writ is issued by a judge on the plaintiff's *ex parte* application supported by a verified petition or affidavit making the necessary factual showing, and on the filing of a sufficient bond. The defendant may immediately move to dissolve the sequestration, or may regain possession by filing his or her own bond.

Here, Grant Co. sold a refrigerator, range, stereo, and washing machine to M. M defaulted on installment payments. Grant Co. sued for the unpaid balance of \$ 574.17 and obtained a writ of sequestration. M moved to dissolve, challenging the procedure as a violation of due process. The Louisiana courts rejected this claim and the Supreme Court affirmed.

(a) *Due process where dual interests are involved.* This case does not involve sequestration of property exclusively owned by the defendant debtor. Both seller and buyer had current interests in the property, and the due process issue must be resolved by taking both into account. (94 S.Ct. 1898, 40 L.Ed.2d 412.) The statute recognizes that if payments cease and use by the buyer continues, the seller's security interest is irretrievably eroded. "The debtor, unlike the creditor, does not stand ready to make the opposing party whole, if his possession, pending a prior hearing, turns out to be wrongful." (94 S.Ct. 1900, 40 L.Ed.2d 414.) Moreover, the danger of destruction or alienation cannot be guarded against if notice and hearing are supplied before seizure. (94 S.Ct. 1901, 40 L.Ed.2d 414.) The statutory procedure effects a constitutional accommodation of the conflicting interests. "[W]e think it comports with due process to permit the initial seizure on sworn *ex parte* documents, followed by the early opportunity to put the creditor to his proof. The nature of the issues at stake minimizes the risk that the writ will be wrongfully issued by a judge. The potential damage award available, if there is a successful motion to dissolve the writ, as well as the creditor's own interest in avoiding interrupting the transaction, also contribute to minimizing this risk." (94 S.Ct. 1901, 40 L.Ed.2d 415.)

(b) *Prior cases distinguished.* Prior cases do not require a declaration of unconstitutionality. (1) *Sniadach v. Family*

Finance Corp. of Bay View (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 Summary (10th), *Constitutional Law*, §646, dealt with prejudgment garnishment of wages, a specialized type of property presenting distinct problems; and the creditor had no prior interest in the property attached. (94 S.Ct. 1903, 40 L.Ed.2d 417.) (2) *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, supra, §247, involved a procedure permitting repossession of sold goods without judicial order, approval, or participation; a bare conclusionary claim was sufficient, and the clerk issued the writ of replevin. (3) Here, specific facts must be alleged by the creditor, and judicial control of the procedure is provided, to minimize the risk that the ex parte procedure will lead to a wrongful taking. "The system protects the debtor's interest in every conceivable way, except allowing him to have the property to start with, and this is done in pursuit of what we deem an acceptable arrangement *pendente lite* to put the property in the possession of the party who furnishes protection against loss or damage to the other pending trial on the merits." (94 S.Ct. 1905, 40 L.Ed.2d 420.)

The concurring and dissenting opinions suggested that this retreat from *Fuentes* was a result of changes in membership of the court. (See 88 Harv. L. Rev. 71, 82 [commenting on uncertainties in *Mitchell*].)

In *North Georgia Finishing v. Di-Chem* (1975) 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, 7 Summary (10th), *Constitutional Law*, §646, the Georgia garnishment statute was held invalid by a divided court. The statute was in the traditional form, authorizing a creditor to garnish on a conclusory affidavit and bond, with the writ issued by a court clerk, and no method of discharge except by filing a bond. The court, following *Fuentes*, attempted to explain the distinction between statutes invalid under *Fuentes* and valid under *Mitchell* and emphasized the broad scope of the *Fuentes* rule, which applies to any deprivation of property. (See 88 Harv. L. Rev. 1510.)

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2. Constitutional Requirements.

d. Requisites of Valid Statute.

6 *Witkin Cal. Proc. Prov Rem* § 249

[§ 249] Requisites of Valid Statute.

The California Law Revision Commission, on a careful analysis of *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, supra, §246, and *Fuentes v. Shevin* (1972) 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, supra, §247, concluded that the constitutional requirements for a valid prejudgment judicial repossession procedure are as follows:

(1) *Opportunity for a preseizure hearing in the usual case.* (*Fuentes.*) (11 Cal. Law Rev. Com. Reports, p. 309.)

(2) *Ex parte seizure limited to extraordinary circumstances.* (*Blair and Fuentes.*) *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 96 C.R. 709, 488 P.2d 13, supra, §50, dealing with attachment, indicated that the creditor's interest is not sufficient to justify depriving a debtor of a necessity of life prior to a hearing. Claim and delivery and attachment are distinguishable in that a claim and delivery plaintiff claims an interest in the specific property, while the attachment plaintiff takes any property of the defendant. But if the attaching creditor cannot take the necessities of life without a hearing, it is difficult to justify a rule that permits a claim and delivery plaintiff to do so. (11 Cal. Law Rev. Com. Reports, p. 310.)

(3) *No unreasonable search and seizure.* (*Blair.*) The Fourth Amendment applies to a claim and delivery taking; hence, the plaintiff must show probable cause to believe the claim is valid, and also probable cause to believe that the property is at the specified location. Moreover, a judicial officer, not a clerk, must pass on these issues. (11 Cal. Law Rev. Com. Reports, p. 312.)

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B. Revised Statute.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 250

[§ 250] In General.

(1) *Enactment and Effective Date.* To overcome the constitutional objections to the former law (see *supra*, §249), the 1972 Legislature enacted an urgency measure taking effect immediately (on August 14, 1972). The interim law was repealed in 1973, and replaced by the revised law, effective July 1, 1974. (See 5 *Pacific L. J.* 272; 14 *Santa Clara Lawyer* 698.) (For a general discussion of the revised law, see C.E.B., 1 *Debt Collection Practice* 2d, §6.111 et seq.; and see generally 66 *Am.Jur.2d* (2001 ed.), *Replevin* §3 et seq.; 21B *Am.Jur. P.P. Forms* (2001 ed.), *Replevin*, §1 et seq.)

(2) *Statutory Framework.* The revised law has the following articles:

(a) Definitions. (*C.C.P.* 511.010 et seq.; see *infra*, §§251, 261, 266.)

(b) Writ of Possession. (*C.C.P.* 512.010 et seq.; see *infra*, §255 et seq.)

(c) Temporary Restraining Order. (*C.C.P.* 513.010 et seq.; see *infra*, §265 et seq.)

(d) Levy and Custody. (*C.C.P.* 514.010 et seq.; see *infra*, §268 et seq.)

(e) Undertakings. (*C.C.P.* 515.010 et seq.; see *infra*, §§254, 264, 265, 271.)

(f) Miscellaneous Provisions. (*C.C.P.* 516.010 et seq.; see *infra*, §§252, 253.)

(3) *Defenses to Plaintiff's Action Are Not Waived.* The defendant's failure to oppose a writ of possession or to rebut evidence produced by the plaintiff does not constitute a waiver of any defense to the plaintiff's claim or have any effect on the right of the defendant to produce or exclude evidence. (*C.C.P.* 512.100.)

(4) *Scope of Determinations Is Limited.* The court determinations under the claim and delivery statutes may not affect the determination of any issue in the action other than those issues relevant to proceedings under the claim and delivery statutes, nor may they affect the rights of any party in any other action arising out of the same claim. These determinations may not be given in evidence or referred to in the trial of any such action. (*C.C.P.* 512.110.) However, an affidavit filed in the proceeding is not rendered inadmissible in other proceedings; i.e., its admissibility is determined

by the general rules of evidence. (Legislative Com. Comment to *C.C.P.* 512.110.)

(5) *Injunctive Relief Is Not Precluded.* The claim and delivery statutes do not preclude injunctive relief under *C.C.P.* 525 et seq. (see *infra*, §274 et seq.). (*C.C.P.* 516.050.)

(6) *Subordinate Judicial Duties.* The judicial duties to be performed under the claim and delivery statutes are "subordinate judicial duties" within the meaning of Cal. Const., Art. VI, §22, i.e., they may be performed by appointed officers such as court commissioners. (*C.C.P.* 516.040; see 2 *Cal. Proc.* (5th), *Courts*, §343 et seq.)

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B. Revised Statute.

2. Definitions.

6 *Witkin Cal. Proc. Prov Rem* § 251

[§ 251] Definitions.

The statute contains the usual limiting provision: "Unless the provision or context otherwise requires, the definitions in this article govern the construction of this chapter." (*C.C.P. 511.010.*) And common terms are given their typical inclusive meanings:

- (a) "Complaint" includes a cross-complaint. (*C.C.P. 511.020.*)
- (b) "Plaintiff" is a person who files a complaint or a cross-complaint. (*C.C.P. 511.080.*)
- (c) "Defendant" includes a cross-defendant. (*C.C.P. 511.030.*)
- (d) "Levying officer" is the sheriff or marshal who is directed to execute or a writ of possession issued under the claim and delivery law. (*C.C.P. 511.060.*)
- (e) "Person" includes an individual, a corporation, a partnership or other unincorporated association, a limited liability company, and a public entity. (*C.C.P. 511.070.*)
- (f) "Public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and "any other political subdivision or public corporation in the state." (*C.C.P. 511.100.*)
- (g) "Farm products." (See *infra*, §266.)
- (h) "Inventory." (See *infra*, §266.)
- (i) "Probable validity." (See *infra*, §261.)

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B. Revised Statute.

3. Judicial Council Forms.

6 *Witkin Cal. Proc. Prov Rem* § 252

[§ 252] Judicial Council Forms.

The Judicial Council is required to prescribe the form of the documents required by the claim and delivery statutes. (*C.C.P. 516.020.*) The following forms have been approved for mandatory use:

Form No. CD-100 [Application for Writ of Possession].

Form No. CD-110 [Notice of Application for Writ of Possession and Hearing].

Form No. CD-120 [Order for Writ of Possession].

Form No. CD-130 [Writ of Possession].

Form No. CD-140 [Undertaking by Personal Sureties].

Form No. CD-160 [Application and Notice of Application and Hearing for Order To Quash Ex Parte Writ of Possession].

Form No. CD-170 [Order for Release and Redelivery of Property].

Form No. CD-180 [Declaration for Ex Parte Writ of Possession].

(9) Form No. CD-190 [Application for Temporary Restraining Order].

(10) Form No. CD-200 [Temporary Restraining Order].

These forms are reproduced in West's Judicial Council Forms, Volume I, and C.E.B., 1 Debt Collection Practice 2d, §6.156 et seq.

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B. Revised Statute.

4. Affidavits.

6 *Witkin Cal. Proc. Prov Rem* § 253

[§ 253] Affidavits.

C.C.P. 516.030 sets forth the following standards for affidavits used in claim and delivery:

(1) The facts must be set forth with particularity.

(2) Except where statements on information and belief are permitted (see *C.C.P. 512.010(b)(2)*, (b)(4), *infra*, §256), the affidavit must show affirmatively that the affiant, if sworn as a witness, will be able to testify competently to the facts stated in the affidavit.

(3) The affiant may be any person who has knowledge of the facts.

A verified complaint that satisfies these requirements may be used instead of or in addition to an ordinary affidavit. (*C.C.P. 516.030*.)

These standards are comparable to, but less restrictive than, those provided for affidavits in summary judgment procedure. (Law Rev. Com. Comment to *C.C.P. 516.030*; for same provision in Attachment Law, see *C.C.P. 482.040*, *supra*, §89.) (On required affidavits, see *infra*, §§255, 258.)

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B. Revised Statute.

5. Undertakings.

6 *Witkin Cal. Proc. Prov Rem* § 254

[§ 254] Undertakings.

The plaintiff seeking either a writ of possession or a temporary restraining order must file an undertaking. (*C.C.P. 515.010*; see *infra*, §§264, 265.) The defendant may (a) prevent the plaintiff from taking possession of property under a writ of possession, or (b) regain possession of property so taken, by filing an undertaking. (*C.C.P. 515.020*; see *infra*, §271.)

The plaintiff and the defendant may object to each other's undertakings. The court may order the property to be delivered to one of the parties, depending on the sufficiency of their respective undertakings. (*C.C.P. 515.030*; *infra*, §§264, 271.)

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C. Writ of Possession.

1. Application.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 255

[§ 255] In General.

(1) *Time*. The plaintiff may apply for a writ of possession when the complaint is filed or at a later time. (*C.C.P.* 512.010(a).)

(2) *Form*. A written application, executed under oath, must be filed with the court in which the action is brought. (*C.C.P.* 512.010(a), (b).) An application is required; a verified complaint alone is not sufficient. (Legislative Com. Comment to *C.C.P.* 512.010; see Judicial Council Form No. CD-100 [Application for Writ of Possession].) (On contents of application, see *infra*, §256.)

(3) *Supporting Affidavits*. The matters required to be shown by the application (see *infra*, §256) may instead be shown by one or more affidavits filed with the application. (*C.C.P.* 512.010(c); on standards for affidavits and use of verified complaint in lieu of affidavit, see *C.C.P.* 516.030, *supra*, §253.) No affidavits are necessary, however, if the application itself provides the required information. (Legislative Com. Comment to *C.C.P.* 512.010.)

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C. Writ of Possession.

1. Application.

b. Content.

6 Witkin Cal. Proc. Prov Rem § 256

[§ 256] Content.

The application must contain the following information:

(1) *Basis of Plaintiff's Claim.* It must show (a) the basis of the plaintiff's claim; and (b) that the plaintiff is entitled to possession of the property claimed. If the basis is a written instrument, a copy must be attached. (C.C.P. 512.010(b)(1).) Ownership is not required, because an "owner" might not be entitled to possession, and right to possession is the ultimate issue. (Legislative Com. Comment to C.C.P. 512.010.)

(2) *Defendant's Detention.* It must show (a) that the property is wrongfully detained by the defendant, (b) the manner in which the defendant came into possession of the property, and (c) the reason for detention according to the plaintiff's "best knowledge, information, and belief." (C.C.P. 512.010(b)(2).)

(3) *Description and Value.* It must contain a particular description of the property and a statement of its value. (C.C.P. 512.010(b)(3).)

(4) *Location of Property.* (a) It must contain a statement of the property's location according to the plaintiff's "best knowledge, information, and belief." (b) If all or part of the property is in a "private place" that may have to be entered to obtain possession, it must contain a showing that there is probable cause to believe that the property is located there. (C.C.P. 512.010(b)(4); see C.C.P. 512.060(b), *infra*, §261.) This "private place" provision carries out the directive of *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, *supra*, §246, and, although the showing may be based on information and belief, the court must be given facts sufficient to show that the information and the informant are credible and reliable. (Legislative Com. Comment to C.C.P. 512.010.)

(5) *Property Not Taken or Seized.* It must contain a statement that the property has not been (a) taken under a statute "for a tax, assessment, or fine"; (b) seized under an execution against the plaintiff's property; or (c) if so seized, that it is exempt by statute from this seizure. (C.C.P. 512.010(b)(5).)

Additional requirements apply where the plaintiff also seeks a temporary restraining order in connection with the

application for a writ. (See *C.C.P. 513.010*, *infra*, §265.)

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C. Writ of Possession.

2. Hearing.

a. Noticed Motion.

6 *Witkin Cal. Proc. Prov Rem* § 257

[§ 257] Noticed Motion.

(1) *Necessity of Hearing on Motion.* Except in the extraordinary situations justifying issuance of the writ ex parte (see *infra*, §259), no writ of possession may be issued under the claim and delivery statutes except after a hearing on a noticed motion. (*C.C.P. 512.020(a)*.) (On usual rules of motion practice, see 6 *Cal. Proc. (5th), Proceedings Without Trial*, §38 et seq.)

(2) *Service of Papers on Defendant.* Before the hearing, the defendant must be served with (a) a copy of the summons and complaint; (b) a Notice of Application and Hearing; and (c) a copy of the application and any supporting affidavit. (*C.C.P. 512.030(a)*.) If the defendant has not appeared, and a writ, notice, or order, or other paper is required to be personally served on him or her under the claim and delivery law, service must be made in the manner of service of a summons under *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (5th), Actions*, §1001 et seq.). (*C.C.P. 512.030(b)*.)

(3) *Notice of Application for Writ of Possession and Hearing.* The Notice of Application and Hearing must give the defendant the following information to enable the defendant to protect his or her possession:

(a) The place and time of the hearing. (*C.C.P. 512.040(a)*.)

(b) If the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established, it will issue the writ. The hearing will not determine whether the claim is actually valid. This determination is made in subsequent proceedings in the action and will not be affected by the decision at the hearing on the writ application. (*C.C.P. 512.040(b)*.)

(c) To oppose issuance of the writ, the defendant must file either (1) an affidavit providing sufficient evidence to defeat the plaintiff's right to the writ, or (2) an undertaking under *C.C.P. 515.020* to stay delivery of the property. (*C.C.P. 512.040(c)*); on time for filing opposing papers, see 6 *Cal. Proc. (5th), Proceedings Without Trial*, §15; on opposition to writ of possession, see C.E.B., 1 Debt Collection Practice 2d, §6.119; on effect of failure to oppose writ, see *supra*, §250; on undertaking, see *infra*, §271.)

(d) The notice must contain the following statement: "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he may assist you before the time set for the hearing." (*C.C.P. 512.040(d)*.)

The Judicial Council has adopted a form for the notice. (See Judicial Council Form No. CD-110 [Notice of Application for Writ of Possession and Hearing].)

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C. Writ of Possession.

2. Hearing.

b. Determination.

6 *Witkin Cal. Proc. Prov Rem* § 258

[§ 258] Determination.

C.C.P. 512.050, designed to encourage an early showing on both sides, requires each party to file with the court and serve on the other party within the time prescribed by rule affidavits and points and authorities that each party intends to rely on at the hearing. This section contemplates Judicial Council rules, not yet adopted. (Law Rev. Com. Comment to *C.C.P. 512.050*.)

At the hearing, the court makes its determinations on the basis of the pleadings and other papers in the record. (*C.C.P. 512.050*.) However, for good cause, the court may (1) receive and consider additional evidence and authority produced at the hearing, or (2) continue the hearing for production of additional oral or documentary evidence or the filing of other affidavits or points and authorities. (*C.C.P. 512.050*.)

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3. Issuance of Writ Ex Parte.

a. Conditions.

6 Witkin Cal. Proc. Prov Rem § 259

[§ 259] Conditions.

A writ of possession may be issued ex parte "if probable cause appears" that any of the following conditions exists:

(1) *Felonious Taking*. The defendant obtained possession of the property by feloniously taking it from the plaintiff. (C.C.P. 512.020(b)(1); on theft and other crimes against property, see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §1 et seq.) This provision does not, however, apply where the defendant has (a) fraudulently appropriated property entrusted to him; or (b) obtained possession by false or fraudulent representation or pretense, or embezzlement. (C.C.P. 512.020(b)(1); see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §14 [larceny by trick]; 2 Cal. Crim. Law (3d), *Crimes Against Property*, §26 et seq. [embezzlement], 2 Cal. Crim. Law (3d), *Crimes Against Property*, §42 et seq. [false pretenses]; 2 Cal. Crim. Law (3d), *Crimes Against Property*, §177 et seq. [false personation, cheats, and business frauds].) In these situations, the plaintiff must proceed by noticed motion (see supra, §255 et seq.) or invoke the criminal sanctions. (Legislative Com. Comment to C.C.P. 512.020.)

(2) *Credit Card*. The property is a credit card. (C.C.P. 512.020(b)(2).)

(3) *Commercial Property Not Necessary for Support*. "The defendant acquired possession of the property in the ordinary course of his trade or business for commercial purposes," subject, however, to the following limitations: (a) The property is not necessary for the support of the defendant or his or her family; (b) there is immediate danger that the property will become unavailable to levy by reason of transfer, concealment, or removal from the state, or substantially impaired in value by acts of destruction or failure to take reasonable care of it; and (c) ex parte issuance of a writ is necessary to protect the property. (C.C.P. 512.020(b)(3).) (On issuance of writ ex parte generally, see C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.119.)

In *Sea Rail Truckloads v. Pullman* (1982) 131 C.A.3d 511, 182 C.R. 560, a buyer of trailer vans was unable to make installment payments and returned the vans to the seller. When later able to make payments, the buyer sought a writ of possession, which was granted ex parte. *Held*, reversed. (a) The buyer failed to carry its burden of satisfying the special conditions for ex parte issuance under C.C.P. 512.020(b)(3), i.e., showing immediate danger that the property would become unavailable and that the transfer was necessary to protect the property. (131 C.A.3d 515.) (b) The buyer also

failed to offer evidence that a less intrusive remedy, such as a temporary restraining order, would have been ineffective to prevent sale and to safeguard the property. (*131 C.A.3d 515.*)

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3. Issuance of Writ Ex Parte.

b. Procedure.

6 *Witkin Cal. Proc. Prov Rem § 260*

[§ 260] Procedure.

(1) *Application*. The application is similar to that required for the noticed motion procedure (see *supra*, §255 et seq.), except that it must also include a showing of the special conditions permitting ex parte issuance. (*C.C.P. 512.020(b)*; see Judicial Council Form No. CD-180 [Declaration for Ex Parte Writ of Possession].)

(2) *Issuance of Writ*. The writ may issue, in the court's discretion, if the court finds that (a) the conditions required by *C.C.P. 512.020(b)* (see *supra*, §259) exist; and (b) the requirements of *C.C.P. 512.060* (see *infra*, §261) are met. (*C.C.P. 512.020(b)*.)

(3) *Service of Papers on Defendant and Others*. If the writ issues, the following papers must be served on the defendant and any other person on whom service of the writ must be made under *C.C.P. 514.020* (*infra*, §269): (a) a copy of the summons and complaint; (b) a copy of the application and any supporting affidavit; and (c) a notice that satisfies the requirements of *C.C.P. 512.040(c)* and (d) (*supra*, §257) and informs the defendant of his or her rights under *C.C.P. 512.020(b)*. (*C.C.P. 512.020(b)*.)

(4) *Defendant's Motion To Quash*. A defendant whose property has been taken under the writ may make a noticed motion to quash, to be followed by a hearing under *C.C.P. 512.050* (*supra*, §258). Pending the hearing the court may stay delivery of property already levied on. (*C.C.P. 512.020(b)*.) If the court determines that the plaintiff is not entitled to a writ, it must (a) quash the writ and order release and redelivery of the property, and (b) award the defendant any damages proximately caused by the levy and the loss of possession. (*C.C.P. 512.020(b)*.) (See Law Rev. Com. Comment to *C.C.P. 512.020*, pointing out that nothing in this subdivision precludes release of the property on an undertaking under *C.C.P. 515.020*, *infra*, §271; on opposition to writ of possession, see *supra*, §257; for forms, see Judicial Council Form No. CD-160 [Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession]; Judicial Council Form No. CD-170 [Order for Release and Redelivery of Property].)

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4. Writ and Order.

a. Issuance of Writ.

6 *Witkin Cal. Proc. Prov Rem* § 261

[§ 261] Issuance of Writ.

If the determination is in favor of the plaintiff, the court will direct the issuance of a writ of possession. (*C.C.P.* 512.060; for form of order for writ of possession, see Judicial Council Form No. CD-120 [Order for Writ of Possession].) Issuance depends, however, on the following findings:

(1) The plaintiff has established the probable validity of the claim to possession of the property. (*C.C.P.* 512.060(a)(1).) "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." (*C.C.P.* 511.090.) The definition of "probable validity" calls for the establishment of a prima facie case by the plaintiff, who has the burden of proof on this issue; and the plaintiff will not be entitled to the writ if the defendant shows that there is a reasonable probability of a successful defense to the action. (Legislative Com. Comment to *C.C.P.* 512.060.) Thus, if the defendant appears, the court must consider the relative merits of the positions of both parties and determine the probable outcome of the litigation. (Law Rev. Com. Comment to *C.C.P.* 511.090.)

(2) The undertaking requirements of *C.C.P.* 515.010 (see *infra*, §264) have been satisfied. (*C.C.P.* 512.060(a)(2).)

Before a writ may be issued directing the levying officer to enter a private place to take possession of any property, the plaintiff must establish that there is probable cause to believe that the property is located in that place. (*C.C.P.* 512.060(b); see *supra*, §§249, 256.)

Any claim that the defendant may have for damages for defects in the property is unrelated to the plaintiff's claim for possession. (*RCA Service Co. v. Superior Court* (1982) 137 C.A.3d 1, 3, 187 C.R. 602 [leased equipment].)

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4. Writ and Order.

b. Form and Content of Writ.

6 *Witkin Cal. Proc. Prov Rem* § 262

[§ 262] Form and Content of Writ.

The following requirements apply to the writ:

- (1) It must be directed to the levying officer within whose jurisdiction the property is located. (*C.C.P. 512.080(a).*)
- (2) It must describe the specific property to be seized. (*C.C.P. 512.080(b).*)
- (3) It must specify any private place that may be entered. (*C.C.P. 512.080(c).*) However, the plaintiff may make a written ex parte application to the court for an endorsement on the writ directing the officer to seize the property at a private place not specified in the writ; and the court must make the endorsement if the plaintiff establishes by affidavit that there is probable cause to believe that the property or some part of it may be found there. (*C.C.P. 512.090.*)
- (4) It must direct the levying officer to levy on the property, if found, under *C.C.P. 514.010* (infra, §268), and to retain it in custody until released or sold under *C.C.P. 514.030* (infra, §270). (*C.C.P. 512.080(d).*)
- (5) It must inform the defendant that he or she has the right to (a) object to the plaintiff's undertaking (see infra, §264), a copy of which must be attached to the writ; or (b) obtain redelivery of the property by filing an undertaking under *C.C.P. 515.020* (infra, §271). (*C.C.P. 512.080(e).*)

The Judicial Council has adopted a form for the writ. (See Judicial Council Form No. CD-130 [Writ of Possession].)

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4. Writ and Order.

c. Turnover Order.

6 *Witkin Cal. Proc. Prov Rem* § 263

[§ 263] Turnover Order.

With a writ of possession, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. The order must contain a notice to the defendant that failure to comply with the order may subject the defendant to being held in contempt of court. (*C.C.P. 512.070*.)

This section makes clear that the court has power to direct the defendant "to cooperate," and that the order is not issued in lieu of a writ but rather in addition to or in aid of it, permitting the plaintiff to select a more informal and less expensive means of obtaining possession. (Law Rev. Com. Comment to *C.C.P. 512.070*; see *Edwards v. Superior Court* (1991) 230 *C.A.3d* 173, 178, 281 *C.R. 30* [turnover order is not separate remedy but alternative means of enforcing writ of possession].)

This provision is implemented by an optional paragraph in Judicial Council Form No. CD-120 [Order for Writ of Possession].

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5. Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 264

[§ 264] Undertaking.

(1) *Necessity and Form.* The writ cannot be issued until the plaintiff files an undertaking with the court. It must provide (a) that the sureties are bound for return of the property to the defendant if return is ordered, and (b) for payment to the defendant of any sum he or she may recover against the plaintiff. (*C.C.P. 515.010(a)*); see Judicial Council Form No. CD-140 [Undertaking by Personal Sureties]; on enforcement of surety's liability, see *C.C.P. 996.430, 996.440*, *supra*, §37 et seq.) However, if the court finds that the defendant has no interest in the property, it must waive the requirement of the plaintiff's undertaking and include in the order for issuance of the writ the amount of the defendant's undertaking sufficient to satisfy the requirements of *C.C.P. 515.020(b)* (*infra*, §271). (*C.C.P. 515.010(b)*.)

(2) *Amount.* The amount of the undertaking must be not less than twice the value of the defendant's interest in the property. The value of this interest is based on the market value of the property less (a) any amount due and owing on a conditional sales contract or security agreement; and (b) any liens and encumbrances on the property. The court may consider any other factors needed to determine the defendant's interest. (*C.C.P. 515.010(a)*.)

(3) *Objections.* The defendant may object to the plaintiff's undertaking not later than 10 days after levy of the writ by mailing notice of objection to the levying officer. (*C.C.P. 515.030(a)*.) (On manner of objecting to undertakings in actions and proceedings, see *C.C.P. 995.930*, *supra*, §28.)

(4) *Where Undertaking Is Sufficient.* If the court determines that the plaintiff's undertaking is sufficient, it must order the levying officer to deliver the property to the plaintiff. (*C.C.P. 515.030(c)*.)

(5) *Where Undertaking Is Not Sufficient.* If the court determines that the plaintiff's undertaking is not sufficient and a sufficient undertaking is not filed within the time required by statute, the court must vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession, and, if levy has occurred, must order the levying officer or the plaintiff to return the property to the defendant. (*C.C.P. 515.030(c)*.)

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D. Temporary Restraining Order.

1. Nature of Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 265

[§ 265] Nature of Remedy.

There is an alternative to the ex parte application for a writ provided by *C.C.P. 512.020(b)* (supra, §259): when or after the plaintiff files an application for a writ of possession, the plaintiff may also apply for a temporary restraining order. (*C.C.P. 513.010(a)*.) (See generally C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.120 et seq.; for form, see Judicial Council Form No. CD-190 [Application for Temporary Restraining Order].)

The grounds for issuance are as follows:

- (1) The plaintiff has established the probable validity of the claim to possession. (*C.C.P. 513.010(b)(1)*); for definition of "probable validity," see supra, §261.)
- (2) The plaintiff has provided an undertaking as required by *C.C.P. 515.010* (supra, §264). (*C.C.P. 513.010(b)(2)*.)
- (3) The plaintiff has shown the probability that there is an immediate danger of the property claimed being transferred, concealed, or removed, or substantially impaired in value, and thereby becoming unavailable to levy. (*C.C.P. 513.010(b)(3)*); for similar ground for issuance of writ ex parte, see supra, §259.)

Except as otherwise provided in the claim and delivery statutes, the general provisions on temporary restraining orders (*C.C.P. 525* et seq.; see infra, §363 et seq.) apply. (*C.C.P. 513.010(a)*.)

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2. Provisions of Order.

6 *Witkin Cal. Proc. Prov Rem* § 266

[§ 266] Provisions of Order.

The transfer of property that is subject to a temporary restraining order should be prohibited except where this prohibition would interfere with the necessary operation of a business. (See Legislative Com. Comment to *C.C.P.* 513.020; for form of order, see Judicial Council Form No. CD-200 [Temporary Restraining Order].)

Thus, the court, in its discretion, may prohibit the defendant from doing any or all of the following:

(1) Disposing of or encumbering the property or any interest in it by sale, pledge, grant of a security interest, or any other means. (*C.C.P.* 513.020(a).) If the property consists of farm products held for sale or lease or inventory, transfer in the ordinary course of business cannot be prohibited, but the order may impose "appropriate restrictions" on the disposition of the proceeds. (*C.C.P.* 513.020(a).) "Farm products" includes crops or livestock or supplies used or produced in farming operations or products of crops or livestock in their unmanufactured states (e.g., ginned cotton, wool clip, maple syrup, honey, milk, and eggs) while in the possession of a defendant engaged in farming operations. Tangible personal property that is a farm product is not inventory. (*C.C.P.* 511.040.) "Inventory" includes tangible personal property in the possession of a defendant who holds it for sale or lease or to be furnished under a service contract. (*C.C.P.* 511.050.) "Equipment" is not defined, for it would not usually be sold in the ordinary course of business. (Law Rev. Com. Comment to *C.C.P.* 511.040.)

(2) Concealing or otherwise removing the property so as to make it less available to seizure by the levying officer. (*C.C.P.* 513.020(b).)

(3) Impairing the property's value either by (a) acts of destruction, or (b) failure to care for the property in a reasonable manner. (*C.C.P.* 513.020(c).) This provision takes care of the case where property will perish or deteriorate if not given proper care; the defendant can be ordered to take necessary precautions to preserve the property until the hearing. (Legislative Com. Comment to *C.C.P.* 513.020.)

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3. Procedure After Hearing on Writ.

6 *Witkin Cal. Proc. Prov Rem* § 267

[§ 267] Procedure After Hearing on Writ.

(1) *Plaintiff's Remedies.* The plaintiff, if successful at the hearing on issuance of the writ of possession (see *supra*, §258), may be given a preliminary injunction that remains in effect until the property claimed is seized under the writ of possession. (*C.C.P. 513.010(c)*.) Moreover, the plaintiff may apply for injunctive relief under *C.C.P. 525* et seq. (*C.C.P. 516.050*, *supra*, §250.) Denial of a writ of possession due to a close factual case on liability should not prejudice an application for injunctive relief where an injunction will provide relief less drastic than repossession. (Legislative Com. Comment to *C.C.P. 513.010*.)

(2) *Defendant's Remedies.* If the court determines that the plaintiff is not entitled to the writ, it must dissolve the temporary restraining order. (*C.C.P. 513.010(c)*.) The defendant may also obtain relief under the general law (e.g., a motion to modify or vacate under *C.C.P. 532*, *infra*, §399 et seq.). (See Legislative Com. Comment to *C.C.P. 513.010*.)

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E. Levy and Custody.

1. Search and Seizure.

6 Witkin Cal. Proc. Prov Rem § 268

[§ 268] Search and Seizure.

(1) *In General.* In the usual case the levying officer, on receipt of the writ, must search for and take custody of the property specified in the writ, if it is in the possession of the defendant or the defendant's agent. The officer may either (a) remove the property to a "place of safekeeping," or (b) install a keeper. (C.C.P. 514.010(a).) (On levy and custody generally, see C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.129 et seq.; C.E.B., 1 Debt Collection Practice 2d, §6.143 et seq.)

(2) *Property Used as Dwelling.* If the specified property is used as a dwelling, e.g., a mobilehome or a boat, levy must be made as follows: (a) A keeper must be placed in charge for 2 days at the plaintiff's expense. (b) The officer must then remove the occupants and any contents not specified in the writ and take exclusive possession of the property. (C.C.P. 514.010(b).)

(3) *Property in Private Place.* Special procedures are prescribed where the specified property or part of it "is in a private place":

(a) The officer must, at the time he or she demands possession, "announce his or her identity, purpose, and authority." (C.C.P. 514.010(c).)

(b) If the property is not voluntarily delivered, the officer may have any enclosure where the property may be located broken open in a manner the officer reasonably believes will cause the least damage and may call on the county for aid and protection. But if the officer "reasonably believes" that a "substantial risk of death or serious bodily harm" will result from entry and seizure, the officer must refrain from seizure, and must "promptly make a return to the court from which the writ issued" stating the reasons the officer believes that there is such a risk. The court must then make any appropriate orders. (C.C.P. 514.010(c).)

As already pointed out, a private place must be specified in the writ or in an endorsement on the writ (see *supra*, §262), and the officer cannot enter or search any private place not specified in the writ or other court order. (C.C.P. 514.010(d).) A writ to take possession of property in a private place requires a showing of probable cause to believe that the property is located in that place. (C.C.P. 512.060(b), *supra*, §261.)

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2. Service of Writ and Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 269

[§ 269] Service of Writ and Undertaking.

(1) *Delivery to Person in Possession.* At the time of levy, the officer must deliver to the person in possession of the property (a) a copy of the writ, (b) a copy of the plaintiff's undertaking, if any, and (c) a copy of the order for issuance of the writ. (*C.C.P. 514.020(a).*)

(2) *Service on Defendant Where No One Is in Possession.* If no one is in possession of the property at the time of levy, the officer must subsequently serve the writ and attached undertaking on the defendant. If the defendant has appeared, service is made in the manner of notices and other papers under *C.C.P. 1010* et seq. (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §12 et seq.); if the defendant has not appeared, service must be made in the manner provided for service of summons and complaint under *C.C.P. 415.10* et seq. (see 3 *Cal. Proc.* (5th), *Actions*, §1008 et seq.). (*C.C.P. 514.020(b).*)

Because the summons and complaint and application for the writ have already been served on the defendant under *C.C.P. 512.030* (see *supra*, §257), there is no requirement of a second service of these papers. (Legislative Com. Comment to *C.C.P. 514.020.*)

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3. Custody, Delivery, Redelivery, or Sale of Property.

6 Witkin Cal. Proc. Prov Rem § 270

[§ 270] Custody, Delivery, Redelivery, or Sale of Property.

(1) *Custody of Levying Officer.* After the officer takes possession, he or she must keep the property "in a secure place." (C.C.P. 514.030(a).)

(2) *Delivery to Plaintiff.* If the defendant takes no steps to oppose within 10 days after levy, the officer must deliver the property to the plaintiff on receipt of the fees for taking and the necessary expenses for keeping the property. (C.C.P. 514.030(a)(1).)

(3) *Nature of Plaintiff's Possession.* Cases decided under the former law point out that the plaintiff's possession is temporary, and the property is still deemed to be in the custody of the law during the trial of the main action for specific recovery. Hence: (a) The property in the hands of the plaintiff is held exempt from attachment or execution, just as it would be if it were still in the hands of the levying officer. (See *Hawi Mill & Plantation Co. v. Leland* (1922) 56 C.A. 224, 229, 205 P. 485; *Bisconer v. Billing* (1925) 71 C.A. 779, 787, 236 P. 329.) (b) The plaintiff is not entitled to sell or otherwise dispose of the property. (*Steele v. Marlborough Hall Corp.* (1929) 100 C.A. 491, 495, 280 P. 380.)

(4) *Redelivery to Defendant.* The defendant may get the property back by giving notice to the officer, within 10 days after levy, of the filing of an undertaking for redelivery (see *infra*, §271). If no objection is made to the defendant's undertaking, the officer must redeliver the property to the defendant on receipt of fees for taking and expenses for keeping not already paid or advanced by the plaintiff. (C.C.P. 514.030(a)(2).)

(5) *Objection to Undertaking.* If either the plaintiff or the defendant objects to the other's undertaking, the officer must not deliver or redeliver the property until the time provided in C.C.P. 515.030 (*supra*, §264 and *infra*, §271). (C.C.P. 514.030(a)(3).)

(6) *Necessary Sale of Property.* Where the defendant has not filed an undertaking for redelivery (*infra*, §271) and there is no contrary contractual agreement, either party may apply for an order that the property be sold and the proceeds deposited in court. The court may make the order on a showing "that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason that the interests of the parties will be best served thereby." (C.C.P. 514.030(b).)

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4. Defendant's Undertaking To Protect Possession.

6 Witkin Cal. Proc. Prov Rem § 271

[§ 271] Defendant's Undertaking To Protect Possession.

(1) *In General.* Former C.C.P. 514 provided that the defendant could require return of the property by giving his or her own notice and undertaking ("redelivery bond") in the same form as the plaintiff's undertaking. (See *Prescott v. Farquhar* (1933) 135 C.A. 469, 473, 27 P.2d 390; *Prescott v. Farquhar* (1936) 12 C.A.2d 286, 289, 55 P.2d 283 [same case on retrial]; *Phillips Aviation Co. v. Superior Court* (1966) 246 C.A.2d 46, 54, 54 C.R. 415 [relief under C.C.P. 473 is not available to defendant who failed to give redelivery bond].) C.C.P. 515.020 permits the defendant to keep or regain possession by such an undertaking. (See C.E.B., 1 Debt Collection Practice 2d, §§6.138, 6.139; for Bond and Undertaking Law, see supra, §8 et seq.) Because the filing of a "counterbond" under C.C.P. 515.020 prevents seizure of property under a writ of possession, it also excuses compliance with a turnover order issued under C.C.P. 512.070 in aid of a writ of possession (see supra, §263). (*Edwards v. Superior Court* (1991) 230 C.A.3d 173, 177, 281 C.R. 30.)

(2) *Time of Filing.* The undertaking may be filed either before or after levy. (C.C.P. 515.020(c).)

(3) *Content and Form.* The undertaking must be in an amount equal to the amount of the plaintiff's undertaking required by C.C.P. 515.010(a) or in the amount determined by the court under C.C.P. 515.010(b) (supra, §264). (C.C.P. 515.020(a).) It must state that, if the plaintiff recovers judgment in the action, the defendant will pay (a) all costs awarded to the plaintiff, and (b) all damages that the plaintiff sustains through loss of possession of the property. The damages recoverable by the plaintiff must include all damages proximately caused by failure to gain or retain possession. (C.C.P. 515.020(b).) (On limitation of liability to amount of undertaking, see C.C.P. 996.470, supra, §36.)

(4) *Mailing of Copy.* A copy of the undertaking must be mailed to the levying officer. (C.C.P. 515.020(c).)

(5) *Objections.* The plaintiff may object to the defendant's undertaking not later than 10 days after it is filed. The plaintiff must also mail notice of objection to the levying officer. (C.C.P. 515.030(b).) (On manner of objecting to undertakings in actions and proceedings, see C.C.P. 995.930, supra, §28.)

(6) *Delivery or Redelivery.* (a) If an undertaking for redelivery is filed and the defendant's undertaking is not objected to, the levying officer must deliver the property to the defendant. If the plaintiff has previously been given possession, then the plaintiff must deliver the property to the defendant. (b) If an undertaking for redelivery is filed and

the defendant's undertaking is objected to, the procedure under *C.C.P. 515.030* applies. (*C.C.P. 515.020(d)*.)

(7) *Where Undertaking Is Sufficient.* If the court determines that the defendant's undertaking is sufficient, the court must order the levying officer or the plaintiff to deliver the property to the defendant. (*C.C.P. 515.030(d)*.)

(8) *Where Undertaking Is Not Sufficient.* If the court determines that the defendant's undertaking is insufficient and a sufficient undertaking is not filed within the statutory time, the court must order the levying officer to deliver the property to the plaintiff. If the plaintiff already has possession, he or she may retain it. (*C.C.P. 515.030(d)*.)

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III. CLAIM AND DELIVERY

E. Levy and Custody.

5. Return of Writ.

6 *Witkin Cal. Proc. Prov Rem* § 272

[§ 272] Return of Writ.

The levying officer must return the writ of possession, "with his proceedings thereon," to the court (1) within 30 days after levy, but (2) not more than 60 days after issuance of the writ (i.e., even if no levy was made). (*C.C.P. 514.040.*)

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III. CLAIM AND DELIVERY

F. Effect of Judgment in Main Action.

6 *Witkin Cal. Proc. Prov Rem* § 273

[§ 273] Effect of Judgment in Main Action.

(1) *Where Plaintiff Prevails.* If the plaintiff prevails in the main action, the result is a judgment for specific recovery of the property, or, if delivery is impossible, for the value of the property, and damages for its detention. (See *C.C.P.* 627, 667.)

(2) *Where Defendant Prevails.* If the property is taken from the defendant but the defendant prevails in the main action, the defendant is entitled to verdict and judgment for return of possession with damages for detention, provided the defendant sets up the right to possession in the answer to the complaint. (*C.C.P.* 627, 667; see *Pico v. Pico* (1880) 56 C. 453, 458; *Imperial Valley Auto Co. v. Toney* (1920) 47 C.A. 541, 542, 190 P. 1043; *Floyd v. Riskin* (1938) 25 C.A.2d 297, 300, 77 P.2d 233.)

A plaintiff who fails to recover judgment in the action must redeliver the property to the defendant and is liable for all damages sustained by the defendant from: (a) any temporary restraining order and preliminary injunction; (b) levy of the writ of possession; and (c) loss of possession pursuant to levy of the writ or compliance with a turnover order under *C.C.P.* 512.070 (*supra*, §263). (*C.C.P.* 512.120.)

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IV. INJUNCTION

A. In General.

1. Nature of Injunction.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 274

[§ 274] In General.

(1) *Definition of Injunction.* An injunction is an order or decree of a court either preventing (prohibitory injunction) or compelling (mandatory injunction) an act. (See C.C. 3420 et seq. [preventive relief]; C.C.P. 525 [injunction defined]; Rest.2d, Torts, Chap. 48, Note on Terminology; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.2 et seq.; C.E.B., 2 Civil Proc. Before Trial 4th, §§32.4, 32.11 et seq.; Rutter Group, Civil Proc. Before Trial §9:500 et seq.; Cal. Civil Practice, 2A Procedure, §16:103 et seq.; 78 *Harv. L. Rev.* 994 [Developments in the Law]; 14A Am.Jur. P.P. Forms (2002 ed.), Injunctions, §6 et seq.; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §1; on federal practice, see *F.R. Civ. P.*, Rule 65; 19 Federal Procedure, L.Ed. §47:1 et seq.; 11A Federal Practice & Procedure (Wright, Miller & Kane) §2941 et seq.; on summary injunctive relief as an exercise of court's inherent power, see *Meehan v. Hopps* (1955) 45 C.2d 213, 215, 288 P.2d 267, 9 Cal. Proc. (5th), *Appeal*, §106 [informal application by motion, to prevent former attorney for party from acting as attorney for adverse party].)

(2) *Equitable Nature of Remedy.* Injunction is a remedy, not a cause of action. (See 5 Cal. Proc. (5th), *Pleading*, §822.) An action seeking the remedy of permanent injunction is equitable in nature and triable by a court having equity jurisdiction and sitting without a jury. (See 2 Cal. Proc. (5th), *Jurisdiction*, §50; 3 Cal. Proc. (5th), *Actions*, §127; *infra*, §288.) But a temporary restraining order (*infra*, §284) or a preliminary injunction (*infra*, §285 et seq.) may be just as necessary or desirable in some kinds of legal actions. (See *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 769, 312 P.2d 308, *infra*, §297.)

(3) *Extraordinary Nature of Remedy.* The power to enjoin is an extraordinary power that must be exercised with great caution. The power should rarely, if ever, be exercised in a doubtful case. (*Dawson v. East Side Union High School Dist.* (1994) 28 C.A.4th 998, 1041, 34 C.R.2d 108; see *infra*, §355.)

(4) *Interim Nature of Remedy.* Because a preliminary injunction is an interim remedy, and not a cause of action, a cause of action must exist before an injunction can be issued. (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 C.A.4th 618, 623, 9 C.R.2d 237; *Korean Amer. Legal Advocacy Foundation v. Los Angeles* (1994) 23 C.A.4th 376, 398, 399, 28 C.R.2d 530.)

The fate of a preliminary injunction, having a strictly adjunct character, hinges on the main action. (*Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 C.A.3d 207, 223, 281 C.R. 216.) Thus, if the court determines that a complaint fails to state a cause of action, a preliminary injunction that has been granted must be reversed. (*MaJor v. Mirverde Homeowners Assn.*, *supra*; *Korean Amer. Legal Advocacy Foundation v. Los Angeles*, *supra*.)

(5) *Standing*. Where a plaintiff has standing to have the underlying controversy adjudicated and the desired relief granted, no greater interest is required to request the same relief on an interim basis. Thus, the plaintiff need not show a separate basis for standing to obtain a preliminary injunction, distinct from his or her standing to seek relief at a trial on the merits. (*Common Cause of Calif. v. Board of Supervisors* (1989) 49 C.3d 432, 439, 261 C.R. 574, 777 P.2d 610; *Venice Town Council v. Los Angeles* (1996) 47 C.A.4th 1547, 1564, 55 C.R.2d 465.)

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A. In General.

1. Nature of Injunction.

b. Purpose.

6 Witkin Cal. Proc. Prov Rem § 275

[§ 275] Purpose.

The purpose of a preliminary injunction is to preserve the status quo until a final determination of the controversy following a trial. (*Scaringe v. J.C.C. Enterprises* (1988) 205 C.A.3d 1536, 1542, 253 C.R. 344; *O'Connell v. Superior Court* (2006) 141 C.A.4th 1452, 1472, 47 C.R.3d 147 [preliminary injunction prohibiting State Board of Education from denying diplomas to otherwise eligible members of 2006 graduating class at public high schools who had not passed exit exam did not preserve status quo; if board ultimately prevailed in litigation, it was unlikely that students would return their diplomas].) Thus, a preliminary injunction may be issued to prevent prospective damage as well as to contain ongoing damage. (*Robbins v. Superior Court* (1985) 38 C.3d 199, 205, 211 C.R. 398, 695 P.2d 695, *infra*, §356; *Nutro Products v. Cole Grain Co.* (1992) 3 C.A.4th 860, 867, 5 C.R.2d 41.) A plaintiff may seek injunctive relief against threatened infringement of his or her rights, and need not wait until he or she has suffered actual harm. (*Maria P. v. Riles* (1987) 43 C.3d 1281, 1292, 240 C.R. 872, 743 P.2d 932 [preliminary injunction prohibiting school district from reporting child's immigration status to Immigration and Naturalization Service as required by statute (since repealed) was proper even though neither state nor local defendants had previously enforced statute]; *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co.* (1991) 230 C.A.3d 207, 223, 281 C.R. 216.)

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IV. INJUNCTION

A. In General.

1. Nature of Injunction.

c. Jurisdiction.

6 *Witkin Cal. Proc. Prov Rem* § 276

[§ 276] Jurisdiction.

(1) *Jurisdiction of Courts.* The superior court has general civil jurisdiction and may grant provisional or permanent injunctive relief. (See 2 *Cal. Proc.* (5th), *Courts*, §210; on venue, see 3 *Cal. Proc.* (5th), *Actions*, §825.) Actions to issue temporary restraining orders and preliminary injunctions to preserve the property or rights of a party to a limited civil case are limited civil cases. (*C.C.P.* 86(a)(8); see 2 *Cal. Proc.* (5th), *Courts*, §247.) But a permanent injunction may not be granted in a limited civil case, except as otherwise authorized by statute. (*C.C.P.* 580(b)(2).)

(2) *Personal Jurisdiction Is Required.* An injunctive order or decree is in personam, binding only when personal jurisdiction is obtained over the person enjoined. (*Berger v. Superior Court* (1917) 175 C. 719, 721, 167 P. 143; *Comfort v. Comfort* (1941) 17 C.2d 736, 741, 112 P.2d 259; *Rothschild v. Erda* (1968) 258 C.A.2d 750, 753, 66 C.R. 209, citing the text; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §106 et seq.; *infra*, §391.)

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A. In General.

1. Nature of Injunction.

d. Extraordinary Writs Compared.

6 *Witkin Cal. Proc. Prov Rem* § 277

[§ 277] Extraordinary Writs Compared.

Injunction differs from extraordinary writs as follows:

(1) Prohibition, like a prohibitory injunction, restrains action; but prohibition is issued against an inferior court, and restrains judicial action alone. (*C.C.P. 1102, 1103*; see 8 *Cal. Proc. (5th), Extraordinary Writs*, §22.)

(2) Mandamus, like a mandatory injunction, compels action; but mandamus is limited to duties specially required by law. (*C.C.P. 1085*; see 8 *Cal. Proc. (5th), Extraordinary Writs*, §24.)

A further distinction is that appellate courts may issue writs of prohibition or mandamus, but traditionally have no power to grant an injunction. (On effect of constitutional grant of jurisdiction to issue writs, see 8 *Cal. Proc. (5th), Extraordinary Writs*, §3.)

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A. In General.

2. Classification by Type of Relief.

a. Prohibitory Injunction.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 278

[§ 278] In General.

(1) *Nature of Prohibitory Injunction.* C.C.P. 525 states that "[a]n injunction is a writ or order requiring a person to refrain from a particular act." This statute succinctly defines a prohibitory injunction. The principal reason for distinguishing prohibitory and mandatory decrees is that an appeal stays a mandatory injunction but not a prohibitory injunction. (See *infra*, §403.) This distinction is of such importance that, in classifying an injunction, the reviewing court will not be greatly influenced either by the designation or the form of the language, but will consider whether its effect is to prohibit or to compel action. (See *United Railroads of San Francisco v. Superior Court* (1916) 172 C. 80, 87, 91, 155 P. 463, *infra*, §279; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.6; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §4.)

(2) *Illustrations of Prohibitory Injunctions.* The following are illustrations of prohibitory injunctions:

(a) An injunction against charging prices lower than a minimum schedule. (*Dry Cleaners & Dyers Institute of San Francisco & Bay Counties v. Reiss* (1936) 5 C.2d 306, 309, 54 P.2d 470.)

(b) An injunction against building a structure. (*Katenkamp v. Superior Court* (1940) 16 C.2d 696, 698, 108 P.2d 1.)

(c) An injunction against using an easement for the storage of vehicles. (*Kettenhofen v. Superior Court* (1961) 55 C.2d 189, 191, 10 C.R. 356, 358 P.2d 684, *infra*, §283.)

(d) An injunction against the continued use of a trade name. (*Jaynes v. Weickman* (1921) 51 C.A. 696, 702, 197 P. 672.)

(e) An injunction against picketing. (*Rubin v. American Sportsmen Television Equity Soc.* (1951) 102 C.A.2d 288, 292, 227 P.2d 303.)

(f) An injunction against the enforcement of a state marketing order. (*Sun-Maid Raisin Growers of Calif. v. Paul* (1964) 229 C.A.2d 368, 369, 374, 40 C.R. 352.)

(g) An injunction against interference by a company with a tax audit. (*Franchise Tax Bd. v. Firestone Tire & Rubber Co.* (1983) 139 C.A.3d 843, 845, 189 C.R. 99.)

(h) An injunction against a credible threat of unlawful violence directed against an employee. (*USS-Posco Industries v. Edwards* (2003) 111 C.A.4th 436, 443, 4 C.R.3d 54.)

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2. Classification by Type of Relief.

a. Prohibitory Injunction.

2. Prohibitory Despite Incidental Mandatory Aspect.

6 *Witkin Cal. Proc. Prov Rem* § 279

[§ 279] Prohibitory Despite Incidental Mandatory Aspect.

If the injunction is substantially prohibitory in object and effect, it will not be stayed on appeal even though it has incidental mandatory aspects. In *United Railroads of San Francisco v. Superior Court* (1916) 172 C. 80, 155 P. 463, plaintiff street railway company obtained a preliminary injunction against defendant city prohibiting the city from using plaintiff's tracks for municipally owned cars in excess of an agreed number. Defendant city contended that the injunction was mandatory and stayed on appeal because it compelled the city to surrender an existing right to use the tracks. (See *infra*, §283.) *Held*, the order simply enjoined continuing trespasses and was not stayed. "[T]he court will not destroy the relief granted by any excessive astuteness in selecting some minor mandatory feature of the injunction and holding that that should control the consideration of the nature of the relief awarded." (172 C. 88.) "If we take words in their ordinary meaning, it is difficult to see that any affirmative action is required by an order which merely prohibits a defendant from operating cars over a certain route. The fact that the defendant had for some time been enjoying its asserted right to so run cars does not change the character of the order. If this were not so, almost any injunction against the doing of repeated acts would be mandatory if the performance of the acts had begun and been carried on for any considerable time prior to the application for the injunction." (172 C. 91.)

The theory of *United Railroads* was again expounded in *Jaynes v. Weickman* (1921) 51 C.A. 696, 197 P. 672, where defendants, enjoined from using a trade name, contended that the injunction was mandatory because it compelled them to remove the name from their trucks, place of business, and display advertising. *Held*, the injunction was prohibitory. "An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden acts. An injunction that restrains the continuance of an act or series of acts may be just as much a preventive or prohibitory injunction as one that restrains the commission of an act. ... [T]he affirmative acts necessary to be done by defendants in order to continue the transaction of their business without disobeying the injunctive features of the judgment are but acts that are necessary to effectuate the principal purpose of the injunction, which is to forbid further infringement upon plaintiff's right to the exclusive use of the business name that she had adopted before the defendants entered the field of competition. The injunctive parts of the decree, therefore, only *incidentally* involve the doing of any affirmative act."

(51 C.A. 699, 700.) (See *Carolina Pines v. Catalina Pines* (1932) 128 C.A. 84, 88, 16 P.2d 781; *Youngblood v. Wilcox* (1989) 207 C.A.3d 1368, 1372, footnote 1, 255 C.R. 527 [injunction requiring club to allow expelled members to continue to exercise their membership rights was prohibitory; citing *Jaynes*]; on injunctions that are mandatory in effect though prohibitory in form, see *infra*, §281 et seq.)

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See *People v. iMergent* (2009) 170 C.A.4th 333, 342, 87 C.R.3d 844 [injunction requiring sellers of products and services purporting to help buyers establish home-based Internet businesses to comply with disclosure provision of California law was prohibitory; any aspects of injunction requiring defendants to engage in affirmative conduct was incidental to objective of restraining defendants from further violating state consumer protection laws].



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2. Classification by Type of Relief.

b. Mandatory Injunction.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 280

[§ 280] In General.

Although an injunction is defined by statute (*C.C.P.* 525, *supra*, §278) as a writ or order prohibiting, rather than compelling action, it has long been settled that a court with equitable jurisdiction may grant a mandatory injunction. "The principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied." (*Allen v. Stowell* (1905) 145 C. 666, 669, 79 P. 371; see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§5, 6; *infra*, §360.)

The important distinction between mandatory and prohibitory injunctions is more complicated than appears at first glance. No difficulty is encountered in classifying as mandatory an order that compels a party to build or remove a structure, or perform some other physical act. (See, e.g., *Katenkamp v. Superior Court* (1940) 16 C.2d 696, 698, 108 P.2d 1 [remove groins erected on beach]; *In re Donovan* (1949) 94 C.A.2d 399, 401, 210 P.2d 860, *infra*, §283 [remodel a house].) But an injunctive decree may be mandatory in effect, and stayed on appeal, even though it is only prohibitory in form. (See *infra*, §281 et seq.; on injunctions that are prohibitory in effect despite incidental mandatory aspects, see *supra*, §279.)

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2. Classification by Type of Relief.

b. Mandatory Injunction.

2. Mandatory Though Prohibitory in Form.

aa. Compelling Surrender of Property or Office.

6 Witkin Cal. Proc. Prov Rem § 281

[§ 281] Compelling Surrender of Property or Office.

A typical illustration of a decree mandatory in effect is one that compels the surrender of property. Thus, in *Byington v. Superior Court* (1939) 14 C.2d 68, 92 P.2d 896, the injunction prohibited the city from storing water in excess of a certain amount. *Held*, it was mandatory because the city was the owner of appropriative rights, and the effect of the decree was to deprive the city of those rights. (14 C.2d 70, 72.) (See *In re O'Connell* (1925) 75 C.A. 292, 242 P. 741 [injunction prohibiting husband from entering dwelling house; mandatory because he was in joint possession and decree would compel surrender of possession]; *Podesta v. Linden Irr. Dist.* (1955) 132 C.A.2d 250, 261, 281 P.2d 905 [injunction prohibiting use of watercourse through plaintiff's land to convey water to reservoir; mandatory because it would compel defendant to give up easement].)

The same is true where the effect is to compel the surrender of an office. In *Clute v. Superior Court* (1908) 155 C. 15, 99 P. 362, plaintiff hotel corporation alleged that defendant, its former manager, had been removed, but nevertheless continued to occupy the position. A preliminary injunction was issued restraining him from collecting or disbursing money, directing employees, or otherwise acting as manager. *Held*, the injunction was mandatory and stayed by defendant's appeal. He claimed a right to the position and to possession of the property under his contract, and denied the authority of those apparently in control of the corporation to remove him. "If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory." (155 C. 20.)

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b. Mandatory Injunction.

2. Mandatory Though Prohibitory in Form.

bb. Compelling Performance of Services.

6 *Witkin Cal. Proc. Prov Rem* § 282

[§ 282] Compelling Performance of Services.

In *Paramount Pictures Corp. v. Davis* (1964) 228 C.A.2d 827, 39 C.R. 791, defendant Bette Davis was employed by plaintiff to act in a motion picture, which she did. The contract contained a provision for additional services in any added scene, and plaintiff notified defendant that her services were required for that purpose. Defendant, who had entered into a subsequent agreement to work exclusively for A Co., and had begun performing under this agreement, refused to perform for plaintiff. Plaintiff obtained a preliminary injunction against her acting in any other picture unless she agreed to perform for plaintiff. She appealed, the trial judge denied a stay (except to extend the effective date of his order a few days to permit application for supersedeas), and defendant applied for the writ. *Held*, granted as to the mandatory part.

(a) The order was intended to induce defendant to make the additional scene for plaintiff or be compelled to breach her contract with A Co. And insofar as it required that defendant perform services for plaintiff during the period of the contract with A Co., it was a mandatory injunction, automatically stayed. (228 C.A.2d 839.)

(b) To the extent that it restrained further services by defendant in connection with any other picture, it was prohibitory, and no showing of necessity for supersedeas was made. (228 C.A.2d 839.)

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2. Classification by Type of Relief.

b. Mandatory Injunction.

2. Mandatory Though Prohibitory in Form.

cc. Changing Relative Positions or Rights.

6 *Witkin Cal. Proc. Prov Rem* § 283

[§ 283] Changing Relative Positions or Rights.

The principle is sometimes more broadly stated that an injunction that necessarily contemplates a change in the relative positions or rights of the parties is mandatory. *In re Donovan* (1949) 94 C.A.2d 399, 210 P.2d 860, is an example. Petitioner had unlawfully converted a single-family dwelling into 13 living units. The injunction ordered him to remodel, and also to refrain from occupying or maintaining the premises except as a single-family dwelling. *Held*, this was mandatory because it required that he take affirmative action to dispossess his tenants and to alter his own status by vacating and discontinuing use of the property until the remodeling was done. (94 C.A.2d 401.)

In *Kettenhofen v. Superior Court* (1961) 55 C.2d 189, 10 C.R. 356, 358 P.2d 684, petitioner was enjoined from interfering with an easement over his land. The decree (1) ordered him to remove an existing fence along his boundary, and (2) restrained him from using the easement for the storage of vehicles. *Held*, part (1) changed the status quo, required affirmative action, hence was mandatory and stayed on appeal; part (2) was prohibitory and not stayed.

To similar effect are the following decisions: *Mark v. Superior Court* (1900) 129 C. 1, 61 P. 436 [injunction requiring board of education to substitute another penmanship system for system already in use in public schools]; *Pomin v. Superior Court* (1941) 44 C.A.2d 206, 210, 112 P.2d 17 [injunction requiring removal of fence from right-of-way]; *Ambrose v. Alioto* (1944) 62 C.A.2d 680, 686, 145 P.2d 32 [injunction against selling fish to S Co. or anyone other than W Co. was in effect an order to deliver to W Co.]; *People v. Stutz* (1944) 66 C.A.2d 791, 793, 153 P.2d 182 [injunction ordering discontinuance of residential use of portions of building until certain structural changes were made]; *Pasadena v. Alhambra* (1946) 75 C.A.2d 91, 95, 170 P.2d 499 [injunction requiring one defendant to give up substantial existing water rights and requiring all defendants to measure and record production, diversion, and distribution of water]; *Davenport v. Blue Cross of Calif.* (1997) 52 C.A.4th 435, 446, 60 C.R.2d 641, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §530 [preliminary injunction that ordered health insurer to authorize and pay for insured's treatment for ovarian cancer].

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IV. INJUNCTION

A. In General.

3. Procedural Classification.

a. Temporary Restraining Order.

6 Witkin Cal. Proc. Prov Rem § 284

[§ 284] Temporary Restraining Order.

(1) *Definition.* A temporary restraining order is issued to prohibit the acts complained of, pending a hearing on whether the plaintiff is entitled to a preliminary injunction. (See *C.C.P.* 527; *San Diego Water Co. v. Pacific Coast Steamship Co.* (1894) 101 C. 216, 218, 35 P. 651; *Biasca v. Superior Court* (1924) 194 C. 366, 367, 228 P. 861; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.10; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §7; 14A *Am.Jur.* P.P. Forms (2002 ed.), *Injunctions*, §37, 40 et seq., 50, 55 et seq., 88 et seq., 102, 106 113 et seq., 122; cf. *F.R. Civ. P.*, *Rule 65(b)*; 19 Federal Procedure, L.Ed. §47:69 et seq.; 11A Federal Practice & Procedure (Wright, Miller & Kane) §2951 et seq.)

(2) *Comparison With Injunction.* The order is, of course, an injunction while it is effective, and, for purposes of appeal and enforcement by contempt proceedings, is regarded as an injunction. (See *infra*, §§396, 402.) But it is distinguishable in the following respects: it may be issued *ex parte*; a bond, though commonly required, is not essential; and it is of short duration, normally expiring at the time of the hearing on the preliminary injunction. (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 237, footnote 1, 256 C.R. 194, *infra*, §318, quoting the text [order, issued after hearing, though styled temporary restraining order, was preliminary injunction]; *infra*, §363 et seq.)

(3) *Constitutionality.* The constitutionality of *C.C.P.* 527 was upheld against a challenge based on the decisions in *Sniadach v. Family Finance Corp. of Bay View* (1969) 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, 7 *Summary* (10th), *Constitutional Law*, §646; *Blair v. Pitchess* (1971) 5 C.3d 258, 96 C.R. 42, 486 P.2d 1242, *supra*, §246; and *Randone v. Appellate Dept.* (1971) 5 C.3d 536, 543, 96 C.R. 709, 488 P.2d 13, *supra*, §50. (*Chrysler Credit Corp. v. Waegle* (1972) 29 C.A.3d 681, 684, 105 C.R. 914.) However, *ex parte* issuance is unconstitutional where constitutional rights are involved. (See *infra*, §363.)

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b. Preliminary Injunction.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 285

[§ 285] In General.

A preliminary injunction (sometimes called an "injunction pendente lite") is also temporary in purpose and effect:

(1) *Provisional Remedy*. If the main action seeks some other remedy, the preliminary injunction is a provisional or auxiliary remedy to preserve the status quo until final judgment. (See *Kendall v. Foulks* (1919) 180 C. 171, 173, 179 P. 886 [action for accounting and dissolution of partnership].)

(2) *Injunction Does Not Decide Merits*. If the main action seeks a permanent injunction, the order for a preliminary injunction is not a determination of the ultimate right to a permanent injunction; it is based on a showing that it is desirable to maintain the status quo pending a determination of the merits. (See *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 528, 67 C.R. 761, 439 P.2d 889; *State Bd. of Barber Examiners v. Star* (1970) 8 C.A.3d 736, 739, 740, 87 C.R. 450 [trial judge's purported ruling on constitutional question at hearing on preliminary injunction was not binding on court at trial]; *Transcentury Properties v. California* (1974) 41 C.A.3d 835, 843, 116 C.R. 487, citing the text; *People v. Mitchell Bros.' Santa Ana Theater* (1981) 118 C.A.3d 863, 872, 173 C.R. 476 [in issuing preliminary injunction, trial judge merely decides that defendant's activities should be limited during period before final judgment]; *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 253, 256 C.R. 194, *infra*, §318, citing the text.) Therefore, such a pretrial ruling may not be given issue-preclusive effect on the merits of the action. (*People v. Wind River Mining Project* (1990) 219 C.A.3d 1390, 1395, 269 C.R. 106.)

In *Paul v. Allied Dairymen* (1962) 209 C.A.2d 112, 25 C.R. 595, P, the California Director of Agriculture, sued to restrain defendant milk producers from violating minimum price regulations in sales to a federal government purchaser. There were intermediate proceedings in the federal courts; then, on application of P for a preliminary injunction, the judge dismissed the action for lack of jurisdiction of the cause, even though in another department an answer had been filed setting up several defenses. *Held*, reversed; the judge lacked authority to decide the merits on an application for a preliminary injunction, and the dismissal, which had this effect, was in excess of jurisdiction. (209 C.A.2d 122.) (See *Anderson v. Joseph* (1956) 146 C.A.2d 450, 454, 303 P.2d 1053 [unless based on stipulation or other satisfactory showing submitting cause on merits, court was without jurisdiction to determine merits on hearing of motion for

preliminary injunction]; *infra*, §287.)

(3) *Injunction Terminates on Judgment.* The operation of a preliminary injunction is limited to the period up to the entry of final judgment. At that time, either a permanent injunction is granted and the preliminary injunction is merged with it, or a permanent injunction is denied and the preliminary injunction ceases to have any effect. (See *Shahen v. Superior Court* (1941) 46 C.A.2d 187, 188, 115 P.2d 516; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.11 et seq.; 42 Am.Jur.2d (2000 ed.), *Injunctions* §§8, 9; *infra*, §402; but see *San Diego Water Co. v. Pacific Coast Steamship Co.* (1894) 101 C. 216, 218, 35 P. 651, [while courts sometimes speak of making preliminary injunction perpetual, permanent injunction may, and often does, differ from preliminary injunction in its effect and terms].)

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b. Preliminary Injunction.

2. Duration.

6 *Witkin Cal. Proc. Prov Rem* § 286

[§ 286] Duration.

The temporary restraining order and preliminary injunction are sometimes confused by the parties, but the designation is immaterial. If the purported restraining order is in terms given a duration beyond the time of the hearing on the preliminary injunction, e.g., "until further order of this court," or until final judgment, it is a preliminary injunction and requires a bond. (*San Diego Water Co. v. Pacific Coast Steamship Co.* (1894) 101 C. 216, 218, 35 P. 651 ["If ... beyond the pendency of the motion for an injunction, then it would convert the order into a preliminary injunction, which could not be operative until a bond was given"]; *Yellen v. Fidelity & Cas. Co. of New York* (1931) 115 C.A. 434, 436, 1 P.2d 1019 ["The nomenclature used does not determine its character"].)

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b. Preliminary Injunction.

3. Granting Permanent Relief at Hearing.

6 *Witkin Cal. Proc. Prov Rem* § 287

[§ 287] Granting Permanent Relief at Hearing.

The rule that a court lacks power to render a judgment on the merits at the hearing on a preliminary injunction (see *supra*, §285) is subject to an exception where there is a satisfactory showing that warrants submission of the cause for decision. (*Camp v. Board of Supervisors* (1981) 123 C.A.3d 334, 358, 176 C.R. 620, restating dictum in *Paul v. Allied Dairymen* (1962) 209 C.A.2d 112, 25 C.R. 595, *supra*, §285; see *infra*, §362.)

Camp involved proceedings challenging the validity of a county's general plan. Resolution of the issue required interpretation of the plan in the light of the statutory requirements, and determination of the question of law without resort to extrinsic evidence. Thus, the hearing itself was a trial on the merits. "It was made to appear at the hearing that the limited question before the court was one of law alone, that it was to be resolved without extrinsic or additional evidence, and that there was accordingly no purpose to be served by a 'trial' of either action in the future. This was a 'showing' which avoided the inhibition of the *Anderson-Paul* rule by invoking its exception." (123 C.A.3d 358.)

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c. Permanent Injunction.

6 Witkin Cal. Proc. Prov Rem § 288

[§ 288] Permanent Injunction.

(1) *Nature of Permanent Injunction.* A permanent injunction is an equitable remedy for certain torts or wrongful acts of a defendant where the remedy of damages is inadequate. It is awarded where the plaintiff has prevailed on the merits on a cause of action and equitable relief is appropriate. (*Art Movers v. Ni West* (1992) 3 C.A.4th 640, 646, 4 C.R.2d 689; see C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.28 et seq.; for limits on award of permanent injunction by arbitrator, see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §500.)

(2) *Comparison With Preliminary Injunction.* A permanent injunction is very different from a preliminary injunction. While a preliminary injunction is issued to maintain the status quo, a permanent injunction is a final judgment on the merits. (*Dawson v. East Side Union High School Dist.* (1994) 28 C.A.4th 998, 1041, 34 C.R.2d 108; *Art Movers v. Ni West*, *supra*; see *infra*, §354.)

(3) *Limitation by Underlying Action.* Because an injunction is a remedy and not a cause of action, the extent of the injunctive relief is limited by the underlying cause of action. Thus, in *South Pasadena v. Department of Trans.* (1994) 29 C.A.4th 1280, 35 C.R.2d 113, an injunction against building a freeway through the city without a freeway agreement was sufficient to enforce a declaratory relief judgment that prohibited construction of the freeway without such an agreement. There was no basis for broadening the injunction to prohibit route approval and adoption, or to enforce defendant's policy of obtaining agreements even when they are not required. (29 C.A.4th 1293.)

If the complaint does not seek injunction as an ultimate remedy, there is no permanent injunction. A favorable final judgment will be for whatever relief is demanded, and the restraint of the preliminary injunction, having accomplished its purpose of maintaining the status quo during the trial, will terminate. But if the plaintiff seeks an injunction as an ultimate remedy, a favorable final judgment is a permanent injunction, granting equitable injunctive relief after a trial on the merits. (See *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 253, 256 C.R. 194, *infra*, §318, citing the text; *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1661, 39 C.R.2d 189, 7 Summary (10th), *Constitutional Law*, §399.) "It is true we sometimes speak of making the preliminary injunction perpetual. But while the injunction by the judgment may be the same in scope and effect, it is a restraint imposed by a new and distinct command. It is a new injunction which may be and often is different in its effect and terms." (*San*

Diego Water Co. v. Pacific Coast Steamship Co. (1894) 101 C. 216, 220, 35 P. 651.)

(4) *No Requirement of Bond.* Because the decree is a final determination of the rights of the parties on the merits, no bond is required. The bond requirement is designed to protect the defendant during the temporary restraint of a preliminary injunction. (See *infra*, §382.) When a permanent injunction is decreed, the trial judge cannot require a bond even though the defendant appeals from the decree; the defendant's only remedy (where the injunction is not stayed on appeal) is an application to the appellate court for a writ of supersedeas. (*Shahen v. Superior Court* (1941) 46 C.A.2d 187, 189, 115 P.2d 516; see 9 Cal. Proc. (5th), *Appeal*, §288.)

(5) *Discretion of Trial Judge.* The decision to issue a permanent injunction rests in the sound discretion of the trial court; the decision will not be disturbed on appeal without a clear showing by the complaining party of abuse of that discretion. (*Jameson v. Five Feet Restaurant* (2003) 107 C.A.4th 138, 145, 131 C.R.2d 771 [employer who was enjoined to comply with *Lab.C.* 351 (prohibiting employer from taking employee's tips) failed to show that issuance of injunction was abuse of discretion; despite employer's expressed intent to comply with statute, record did not show employer's promise to do so].)

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B. Right to Injunction.

1. Factors Determining Right.

a. Statutory Framework.

1. Conditions.

6 *Witkin Cal. Proc. Prov Rem* § 289

[§ 289] Conditions.

(1) *Governing Statutes.* The current statutory scheme governing injunctions was originally enacted in 1872. Preventive relief is granted by injunction, provisional or final (see C.C. 3420 et seq.). (C.C. 3420.) Provisional injunctions are governed by the Code of Civil Procedure (see C.C.P. 525 et seq.). (C.C. 3421.)

(2) *Permanent and Preliminary Injunctions.* A permanent injunction may be granted under any of the following circumstances, and an injunction may be granted as a provisional remedy under the same conditions:

(a) Pecuniary compensation would be inadequate. (C.C. 3422(1); C.C.P. 526(a)(4); see infra, §294.)

(b) The proper pecuniary compensation would be extremely difficult to ascertain. (C.C. 3422(2); C.C.P. 526(a)(5); see infra, §294.)

(c) The injunction is necessary to prevent multiple judicial proceedings. (C.C. 3422(3); C.C.P. 526(a)(6); see infra, §296.)

(d) The obligation arises from a trust. (C.C. 3422(4); C.C.P. 526(a)(7); see infra, §309.)

(3) *Preliminary Injunctions Only.* An injunction may be granted as a provisional remedy under these additional conditions:

(a) The complaint shows that the plaintiff is entitled to the requested relief, and that relief consists in restraining the act complained of. (C.C.P. 526(a)(1).)

(b) The complaint or affidavits show that the commission or continuance of an act during the litigation would cause waste, or great or irreparable injury, to a party. (C.C.P. 526(a)(2); see infra, §295.)

(c) During the action it appears that a party is doing or about to do, threatening, procuring, or allowing an act that

violates the rights of another party regarding the subject of the action, and that tends to render the judgment ineffective. (C.C.P. 526(a)(3); see infra, §§297, 298.)

West's Key Number Digest, Injunction 9 et seq.

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a. Statutory Framework.

2. Nature and Scope.

6 *Witkin Cal. Proc. Prov Rem* § 290

[§ 290] Nature and Scope.

The statutory provisions in part state the general conditions of preventive equitable relief (*infra*, §293 *et seq.*), and in part declare the availability of the remedy in particular situations (*infra*, §299 *et seq.*). However, in setting forth the major condition of inadequacy of legal remedy (see *infra*, §294), the codes merely state the general principle that in any kind of action in which this condition is shown, an injunction may be proper. Thus, no complete listing of actions can be found in the statutes; the substantive law of equity furnishes the illustrations (*infra*, §299 *et seq.*). (See *In re Marriage of Van Hook* (1983) 147 C.A.3d 970, 983, 195 C.R. 541, citing the text; Rutter Group, Civil Proc. Before Trial §9:671 *et seq.*)

Some statutes give certain administrative agencies the right to enjoin violations of regulatory provisions without the necessity of showing the inadequacy of legal remedies and the threat of irreparable harm. However, most of them do not make the issuance of an injunction mandatory; the court must still exercise its discretion, although it should give favorable consideration to the objectives of the regulation. (See *Woods v. Superior Court* (1980) 102 C.A.3d 608, 617, 162 C.R. 577 [*Health & Saf.C. 1541* does not state " 'the injunction shall issue' or provide any similar mandate"]; cf. *Universal Life Church v. California* (1984) 158 C.A.3d 533, 537, 205 C.R. 11 [*Health & Saf.C. 1541* was amended to mandate issuance of injunction].) Similarly, where a statute that specifically authorizes injunctions in certain situations incorporates the Code of Civil Procedure sections relating to injunctions generally, the court must conform to these requirements and has discretion whether to grant an injunction in the situations specified. (*Stroh v. Midway Restaurant Systems* (1986) 180 C.A.3d 1040, 1055, 226 C.R. 153.)

West's Key Number Digest, Injunction 1 *et seq.*

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a. Statutory Framework.

3. Special Statutes.

6 *Witkin Cal. Proc. Prov Rem* § 291

[§ 291] Special Statutes.

The right to injunctive relief in particular actions is declared in a number of special statutes. The following are illustrative:

- (1) Injunction to restrain violation of various consumer protection laws. (*B. & P.C. 125.5(a).*)
- (2) Injunction to restrain violation of Department of Alcoholic Beverage Control rules. (*B. & P.C. 23053.1.*)
- (3) Temporary restraining order to restrain licensee from engaging in business or profession. (*B. & P.C. 125.7(a), 125.8(a).*)
- (4) Temporary restraining order or injunction in partition action. (*C.C.P. 872.130.*)
- (5) Temporary restraining order or injunction in class action. (*C.C.P. 527(b)* [class need not be certified].)
- (6) Injunction to restrain ultra vires acts of corporation. (*Corp.C. 208(a)*; see 9 *Summary* (10th), *Corporations*, §121.)
- (7) Temporary restraining order or injunction against dissemination of information in violation of the Truth in Endorsements Law. (*Elec.C. 20006.*)
- (8) Temporary restraining order in proceedings to dissolve or nullify marriage or for legal separation, to secure child support, or under the Domestic Violence Prevention Act or the Uniform Parentage Act. (*Family C. 240 et seq.*; see 11 *Summary* (10th), *Husband and Wife*, §7.)
- (9) Injunction to restrain removal of child. (*Family C. 7501.*)
- (10) Injunction to restrain subdivision, sale, lease, or financing of real property in violation of laws regulating

subdivided lands. (*Govt.C. 66499.33.*)

(11) Injunction to restrain contamination by waste. (*Health & Saf.C. 5460.*)

(12) Injunction to restrain violation of nonvehicular air pollution control laws or regulations. (*Health & Saf.C. 41513, 42453, 42454*; see 5 *Cal. Proc. (5th), Pleading*, §832.)

(13) Injunction or temporary restraining order to restrain use of dangerous place of employment or operation of dangerous machinery. (*Lab.C. 6323, 6324.*)

(14) Injunction to restrain violation of law by public utility. (*Pub.Util.C. 2102, 2103.*)

(15) Injunction to restrain violation of Vehicle Code licensing requirements. (*Veh.C. 1651.2.*)

(16) Injunction to restrain unauthorized diversion or use of water. (*Water C. 1052(c)*; see 12 *Summary (10th), Real Property*, §949.)

(17) Injunction to restrain enforcement of claim for money or property against victim of identity theft. (*C.C. 1798.93(c)(3).*)

(18) Injunction to restrain gaming that violates exclusive right of Indian tribe. (*C.C.P. 1811.*)

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1. Factors Determining Right.

b. Torts Restatement Analysis.

6 *Witkin Cal. Proc. Prov Rem* § 292

[§ 292] Torts Restatement Analysis.

The Second Restatement of Torts, Chapter 48 contains a comprehensive analysis of the remedy of injunction in the field of torts. "It states the factors entering into and the administrative methods directing the discretionary determination of the appropriateness of an injunction in this field." (Scope Note, p. 556.)

Some enjoined torts are not covered because the principles of substantive tort law have become less important in the light of constitutional and statutory provisions and administrative regulations; e.g., unfair competition and wrongful trade practices, infringement of patents, copyrights, and trademarks, and wrongful conduct in labor disputes. (Scope Note, p. 557.)

Some wrongs commonly the subject of injunction are not discussed in either the Restatement of Torts or the Restatement of Property; e.g., injunction against wrongful litigation in courts of another jurisdiction, injunction against enforcement of an unconstitutional statute, and injunction against public nuisance or crime. (Scope Note, p. 557.)

Also excluded are injunctions authorized by statute changing the common law (e.g., injunction to enforce compliance with orders of administrative tribunals or to prevent collection of taxes), and injunctions as incidental or ancillary remedies in connection with such equitable procedures as bills of interpleader, of peace, quia timet, to quiet title, and to remove cloud. (Scope Note, pp. 557, 558.)

The chapter is divided into two Topics:

Topic 1 "is concerned with the test of the appropriateness of permanent and interlocutory injunctions against tort; with the method and the time of making the test; and with the factors entering into and the administrative methods directing the discretionary determination of the appropriateness of an injunction against a tort." (Scope Note, p. 558.) (See *Rest.2d, Torts* §933 et seq.)

Topic 2 "spells out one of the factors of the appropriateness of permanent and interlocutory injunctions against a tort, namely, the relative adequacy, as compared with an injunction, of other remedies, such as an action for damages,

recovery of possession of land and chattels and declaratory judgment." (Scope Note, p. 558.) (See *Rest.2d, Torts* §944 et seq.)

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1. Factors Determining Right.

c. Probable Success and Relative Harm.

6 *Witkin Cal. Proc. Prov Rem* § 293

[§ 293] Probable Success and Relative Harm.

(1) *Nature of Test.* The test most commonly applied by courts in determining whether to issue a preliminary injunction considers the following two interrelated factors:

(a) The likelihood that the plaintiff will succeed on the merits at trial. (See *infra*, §349.)

(b) The interim harm that the plaintiff will suffer if the injunction is not issued compared to the interim harm that the defendant will suffer if it is. (See *IT Corp. v. Imperial* (1983) 35 C.3d 63, 69, 70, 196 C.R. 715, 672 P.2d 121, *infra*, §359; *Cohen v. Board of Supervisors* (1985) 40 C.3d 277, 286, 219 C.R. 467, 707 P.2d 840; *Voorhies v. Greene* (1983) 139 C.A.3d 989, 995, 189 C.R. 132; *Hart v. Cult Awareness Network* (1993) 13 C.A.4th 777, 785, 16 C.R.2d 705; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 C.A.4th 415, 422, 21 C.R.2d 303.) In balancing the hardships, the trial court must exercise its discretion in favor of the party that is more likely to be injured by that exercise. (*Family Record Plan v. Mitchell* (1959) 172 C.A.2d 235, 242, 342 P.2d 10; *Mitsui Mfrs. Bank v. Texas Commerce Bank-Fort Worth* (1984) 159 C.A.3d 1051, 1059, 206 C.R. 218; on denial of injunction based on relative hardship, see *infra*, §345 et seq.; on grounds for issuance of temporary restraining order or preliminary injunction generally, see C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.13 et seq.; for proposed alternative to balancing rule, see 58 *Stanf. L. Rev.* 381 [Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine].)

(2) *Interrelationship of Factors.* The more likely it is that the plaintiff will prevail on the merits, the less severe the interim harm that the plaintiff must allege, particularly where the injunction maintains, rather than alters, the status quo. (*King v. Meese* (1987) 43 C.3d 1217, 1227, 1228, 240 C.R. 829, 743 P.2d 889.) Where the showing of likelihood of prevailing on the merits is sufficiently strong, the trial court has discretion to issue the injunction even though the party seeking the injunction cannot show that the balance of harm tips in his or her favor. (*Common Cause of Calif. v. Board of Supervisors* (1989) 49 C.3d 432, 447, 261 C.R. 574, 777 P.2d 610; *Pleasant Hill Bayshore Disposal v. Chip-It Recycling* (2001) 91 C.A.4th 678, 696, 110 C.R.2d 708.) However, this does not mean that a sufficient showing of likelihood of success on the merits relieves a trial court from considering the relative balance of hardships, or that the court may grant a preliminary injunction solely on the basis of likelihood of success even though the balance of

hardships strongly favors denial of the injunction. And because a main objective of a preliminary injunction is to minimize the harm an erroneous interim decision may cause, the court may not ignore the possibility that its initial assessment of the merits may be incorrect. (See *White v. Davis* (2003) 30 C.4th 528, 561, 133 C.R.2d 648, 68 P.3d 74 [reversing grant of preliminary injunction preventing Controller from making payments from state treasury until budget bill was passed; general interest of taxpayers in avoiding illegal expenditure of public funds (see *infra*, §312) was far outweighed by interest of many persons who would be deprived of vital funds and threat to continued delivery of essential public services; citing *IT Corp. v. Imperial*].)

(3) *Relationship to Other Factors*. Other factors traditionally applied in considering whether a preliminary injunction should issue, such as whether denial of the injunction will cause irreparable injury (see *infra*, §295), or an adverse effect of issuance of the injunction on the public interest (see *infra*, §344), are often taken into account by the court in making the interim harm determination. (See *Cohen v. Board of Supervisors*, *supra*, 40 C.3d 286, footnote 5.)

(4) *Free Speech Versus Private Property Rights*. In the unique setting of free speech versus private property rights, the interim harm analysis and the likelihood of success on the merits analysis are the same. When these rights collide, the court must determine which right, under the circumstances, is more worthy of protection, or, in other words, which right, if left unprotected, would lead to the most constitutional harm. (*Bank of Stockton v. Church of Soldiers of the Cross of Christ* (1996) 44 C.A.4th 1623, 1631, 52 C.R.2d 429, 7 Summary (10th), *Constitutional Law*, §317 [bank was entitled to enjoin church from soliciting donations on its private sidewalk].)

West's Key Number Digest, Injunction 138.15 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Interrelationship of Factors*. In *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 C.A.4th 336, 72 C.R.3d 678, Supp., *infra*, §356, the trial court denied plaintiff's request for a preliminary injunction preventing defendant from demolishing 49 units of housing to make way for a new school. Plaintiff requested the injunction in connection with its challenge to the certification of the Environmental Impact Report for the project under the California Environmental Quality Act. The trial court expressly refused to address the likelihood of plaintiff's success on the merits, and denied the injunction on the ground that there was no harm in allowing defendant to demolish the housing units. *Held*, the trial court erred in exercising its discretion to deny the preliminary injunction without considering the likelihood that plaintiff would prevail on the merits. The court is required to consider the two interrelated factors of likelihood of success on the merits and the comparative harm to be suffered by the parties. If a plaintiff can make a sufficiently strong showing that it is likely to succeed on the merits, the trial court has discretion to issue the injunction even if plaintiff cannot show that the balance of harms tips in its direction. Reversal and remand were required to allow the trial court to apply the two interrelated factors. (160 C.A.4th 342.)



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1. Factors Determining Right.

d. Inadequacy of Other Remedies.

6 *Witkin Cal. Proc. Prov Rem* § 294

[§ 294] Inadequacy of Other Remedies.

(1) *In General.* The usual statement of this factor is in terms of "inadequacy of the legal remedy" or, even more narrowly, "inadequacy of damages." The idea, which dates from the time of the early courts of chancery, is that an injunction is an unusual or extraordinary equitable remedy that will not be granted if the remedy at law (usually damages) will adequately compensate the injured plaintiff. (See *Rest.2d, Torts* §§938, 944 et seq.) The plaintiff must demonstrate a real threat of immediate and irreparable injury due to the inadequacy of legal remedies; thus, the existence of other effective judicial remedies may compel denial of injunctive relief. (*Triple A Machine Shop v. California* (1989) 213 C.A.3d 131, 138, 261 C.R. 493, citing the text; see *Department of Fish & Game v. Anderson-Cottonwood Irr. Dist.* (1992) 8 C.A.4th 1554, 1564, 11 C.R.2d 222, quoting the text [denial of injunction reversed; no adequate remedy at law]; *Estes v. Rowland* (1993) 14 C.A.4th 508, 535, 17 C.R.2d 901; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 C.A.4th 415, 422, 21 C.R.2d 303; *Simms v. NPCK Enterprises* (2003) 109 C.A.4th 233, 242, 243, 134 C.R.2d 557 [reversing injunction requiring plaintiffs to relinquish fixtures and equipment in which defendant had security interest; "[t]he claim and delivery law provides a complete prejudgment remedy to recover possession of personal property"]; *Pacific Decision Sciences Corp. v. Superior Court* (2004) 121 C.A.4th 1100, 1110, 18 C.R.3d 104, supra, §114 [plaintiff that obtained right to attach order had presumably persuaded court that claim was based on breach of contract in "fixed or readily ascertainable" amount and had not shown that defendant would be unable to respond in damages to final judgment against it; thus, unenforceable turnover order in aid of writ of attachment could not stand as preliminary injunction]; for cases holding other remedies adequate, see *infra*, §337 et seq.)

(2) *Language of Statutes.* California's statutes cover this factor in the following language: "When pecuniary compensation would not afford adequate relief." (C.C.P. 526(a)(4); see C.C. 3422(1).) "Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." (C.C.P. 526(a)(5); C.C. 3422(2).) (See generally 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §24 et seq.)

In *Union Oil Co. of Calif. v. Domengeaux* (1939) 30 C.A.2d 266, 86 P.2d 127, an action to enjoin subsurface slant drilling for oil, defendant argued that, because plaintiff could not show the actual amount taken, the injury was too trifling to warrant an injunction. But this circumstance, far from being a defense, was a sound reason for the injunction:

the acts of trespass took place in an area (underground) where it was extremely difficult to ascertain the extent of damage. (30 C.A.2d 271 [citing C.C. 3422(2)].) (See *Huong Que v. Luu* (2007) 150 C.A.4th 400, 411, 416, 58 C.R.3d 527 [that plaintiffs could not easily quantify harm to them from interference with their business, and that more certain assessment of their injuries could be made at end of selling season, were arguments for, not against, injunction]; 5 Cal. Proc. (5th), Pleading, §826.)

(3) *Effect of Insolvency.* Insolvency of the defendant, by the better view, though not an independent ground for an injunction, is a factor to be considered in determining the adequacy of the remedy of an action for damages. (See *Hicks v. Compton* (1861) 18 C. 206, 210; *De Groot v. Peters* (1899) 124 C. 406, 408, 57 P. 209; *Emirzian v. Asato* (1913) 23 C.A. 251, 258, 137 P. 1072; *Union Oil Co. v. Domengeaux*, *supra*, 30 C.A.2d 272; *West Coast Const. Co. v. Oceano Sanitary Dist.* (1971) 17 C.A.3d 693, 700, 95 C.R. 169; *Paradise Hills Associates v. Procel* (1991) 235 C.A.3d 1528, 1538, 1 C.R.2d 514, *infra*, §352; 42 Am.Jur.2d (2000 ed.), Injunctions §22.)

(4) *Effect of Declaratory Judgment.* A declaratory judgment is a cumulative remedy (see 5 Cal. Proc. (5th), Pleading, §868) and does not preclude the issuance of an injunction based on the same facts. (*Syngenta Crop Protection v. Helliker* (2006) 138 C.A.4th 1135, 1167, 42 C.R.3d 191 [where there was no determination whether statute prohibiting use of certain data in support of applications for registration of pesticides had been violated, award of declaratory relief would not insure that any improper registrations would be cancelled or would not be renewed].)

(5) *Effect of Statute Authorizing Injunction.* Where injunctive relief is authorized by statute and the statutory conditions for issuance are satisfied, inadequacy of a remedy at law need not be shown to obtain injunctive relief. (*In re Marriage of Van Hook* (1983) 147 C.A.3d 970, 985, 195 C.R. 541 [injunctive relief in marital dissolution proceeding under former C.C. 4359 (now Family C. 6300 et seq.)]; on court's discretion to grant injunction, see *supra*, §290.)

West's Key Number Digest, Injunction 138.9 et seq.

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1. Factors Determining Right.

e. Irreparable Injury.

6 Witkin Cal. Proc. Prov Rem § 295

[§ 295] Irreparable Injury.

(1) *In General.* It is common to speak of the necessity of a showing of threatened "irreparable injury" as the basis for an injunction. (See *Nicholson v. Getchell* (1892) 96 C. 394, 31 P. 265; *E.H. Renzel Co. v. Warehousemen's Union I.L.A.* 38-44 (1940) 16 C.2d 369, 373, 106 P.2d 1; *Lezama v. Justice Court* (1987) 190 C.A.3d 15, 21, 235 C.R. 238 [prerequisites to injunctive relief are inadequate remedy at law and serious risk of irreparable harm]; *Leach v. San Marcos* (1989) 213 C.A.3d 648, 660, 261 C.R. 805; *Loder v. Glendale* (1989) 216 C.A.3d 777, 782, 786, 265 C.R. 66 [plaintiff must present evidence of irreparable injury]; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 C.A.4th 415, 431, 21 C.R.2d 303 [preliminary injunction was reversed for failure to show real threat of immediate and irreparable interim harm]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§33, 34; 5 *Cal. Proc.* (5th), *Pleading*, §826.) An injunction should be granted if the plaintiff is likely to prevail at trial and the failure to provide an injunction would cause irreparable harm. (*Barajas v. Anaheim* (1993) 15 C.A.4th 1808, 1813, 19 C.R.2d 764 [plaintiffs were entitled to seek injunctive relief against municipal ordinance that would result in loss of their livelihoods].) The deprivation of First Amendment rights, even for a brief time, constitutes irreparable harm. (*Ketchens v. Reiner* (1987) 194 C.A.3d 470, 480, 239 C.R. 549 [preliminary injunction against prosecution of parent for insulting teacher in presence of students or school personnel in violation of Education Code was improperly denied]; *Paradise Hills Associates v. Procel* (1991) 235 C.A.3d 1528, 1538, 1 C.R.2d 514, *infra*, §352; on insufficiency of evidence of illegal expenditure of public funds to show irreparable harm required for preliminary injunction, see *infra*, §312.)

(2) *Language of Statutes.* The term "irreparable injury" is not found in C.C. 3422, which emphasizes, as a basis for granting an injunction, the inadequacy of the legal remedy of damages. In C.C.P. 526(a)(2), on the other hand, irreparable injury is expressly made a ground of the provisional remedy. It has been suggested that the term adds nothing to the broader concept of inadequacy of the legal remedy, and that both are merely shorthand expressions covering the factors that determine the right to an injunction. (See *Rest.2d, Torts* §933, Reporter's Note.)

(3) *Effective of Statute Authorizing Injunction.* It has been stated that, where injunctive relief is authorized by statute and the statutory conditions for issuance are satisfied, irreparable injury need not be shown to obtain injunctive relief. (*Paul v. Wadler* (1962) 209 C.A.2d 615, 625, 26 C.R. 341; on court's discretion whether to grant injunction, see *supra*, §290.) However, it is incorrect to state, as a blanket statement of law, that authorization of an injunction by

statute is sufficient to justify its issuance. If the plaintiff is not a governmental entity, and the statute does not expressly provide that a showing of interim harm is not required, a showing must be made. (*DVD Copy Control Assn. v. Bunner* (2004) 116 C.A.4th 241, 250, 10 C.R.3d 185 [where plaintiff seeking to enjoin alleged violation of California's Uniform Trade Secrets Act was private company and act did not authorize injunction absent showing of harm, plaintiff was required to show both likelihood of success on merits and that balance of harms weighed in favor of granting injunction].)

(4) *Effect of Delay in Seeking Injunction.* A significant delay in seeking injunctive relief does not necessarily indicate an absence of irreparable injury. Delay should be considered merely as one factor bearing on irreparable injury. (*Nutro Products v. Cole Grain Co.* (1992) 3 C.A.4th 860, 866, 5 C.R.2d 41 [alleged 15-month delay did not establish lack of irreparable injury; extent of delay was disputed, and plaintiff had devoted substantial time to discovery, independent market survey, and otherwise obtaining proof of threatened irreparable injury]; on defense of laches, see *infra*, §342.)

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1. Factors Determining Right.

f. Multiplicity of Actions.

6 *Witkin Cal. Proc. Prov Rem* § 296

[§ 296] Multiplicity of Actions.

An injunction is authorized "[w]here the restraint is necessary to prevent a multiplicity of judicial proceedings." (*C.C.P.* 526(a)(6); *C.C.* 3422(3); see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §38 et seq.)

This ground is principally applied in actions to enjoin repeated trespasses, when numerous actions would not be an adequate remedy. (See *Mendelson v. McCabe* (1904) 144 C. 230, 233, 77 P. 915; *Eames v. Philpot* (1925) 72 C.A. 151, 158, 236 P. 373; 5 *Cal. Proc.* (5th), *Pleading*, §827; *infra*, §302.) It is also invoked in actions to enjoin multiple judicial proceedings. (See *infra*, §333.)

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g. Act Rendering Judgment Ineffective.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 297

[§ 297] In General.

An injunction is expressly authorized during an action where it appears that a party is doing or about to do, threatening, procuring, or allowing an act that violates the rights of another party regarding the subject of the action, and that tends to render the judgment ineffective. (*C.C.P.* 526(a)(3); see *Porter v. Jennings* (1891) 89 C. 440, 444, 26 P. 965, *infra*, §356; *Rohrer v. Babcock* (1896) 114 C. 124, 45 P. 1054 [threatened removal and consumption of plaintiff's personal property]; *Kendall v. Foulks* (1919) 180 C. 171, 173, 179 P. 886; *Steele v. Marlborough Hall Corp.* (1929) 100 C.A. 491, 497, 280 P. 380.)

The statute is not limited to equitable actions. In *Lenard v. Edmonds* (1957) 151 C.A.2d 764, 312 P.2d 308, plaintiffs bought a motel from defendant, giving a note, a deed of trust, and third-party notes as partial payment. Thereafter they sued on two counts, for rescission and damages. Before trial, they obtained a preliminary injunction restraining defendant from disposing of the third-party notes or selling the motel on foreclosure. They were properly granted a jury trial on the damage count, and, at the trial, abandoned the rescission count, leaving the action purely legal in character. After judgment for plaintiffs, defendant contended on appeal that obtaining the preliminary injunction was a binding election of the equitable remedy that precluded abandonment of the rescission count in favor of the damage count. The court held, however, that granting the preliminary injunction, on a showing of threatened sale of the motel and notes that might render defendant incapable of satisfying the judgment, was entirely consistent with a main legal action for damages. (151 C.A.2d 769.)

Under *C.C.P.* 526(a)(3), an injunction may issue only where the party enjoined intends to engage in the prohibited activity; an injunction cannot be based on the proponent's fear of something that may happen in the future. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 C.A.4th 1069, 1083, 92 C.R.2d 275 [injunction that prohibited plaintiff church's parent organization from establishing bank accounts, entering into contracts on behalf of church, or representing to third persons that it speaks for church was overbroad where there was no evidence that parent organization had done or intended to do any of these things].)

In *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 C.A.4th 1168, 102 C.R.2d 770, quoting

the text, several lawyers and law firms were enjoined by the Alameda superior court from prosecuting civil actions for damages and declaratory relief in the San Diego superior court based on a class action that had been pending in Alameda for over 4 years. At the time the injunction issued, the class action was pending on appeal from a judgment approving the settlement of the action and the award of attorneys' fees. *Held*, affirmed. "[T]he first court to assert subject matter jurisdiction possesses the power and authority to grant equitable relief restraining proceedings in another court that threatens to impair the judgment." (85 C.A.4th 1176.)

C.C.P. 526(a)(3) also applies where the "judgment" under consideration is not a determination on the merits of the entire action or a final judgment, but rather a determination of the right to discovery. (*Dodge, Warren & Peters Ins. Services v. Riley* (2003) 105 C.A.4th 1414, 1418, 130 C.R.2d 385, 2 Cal. Evidence (4th), Discovery, Supp., §6.) In *Dodge*, an action for misappropriation of trade secrets brought by an insurance broker, former employees left their employment to start their own brokerage, taking with them electronic files belonging to the employer. *Held*, issuance of a preliminary injunction requiring the preservation of electronic evidence was proper.

(a) *Lack of adequate remedy at law*. The employer had no adequate remedy at law. The Civil Discovery Act of 1986 does not provide a mechanism for the preservation of evidence. In *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, the Supreme Court refused to recognize a separate tort action for intentional spoliation of evidence. While mentioning evidentiary and monetary sanctions, as well as criminal penalties, as deterrents to intentional acts of spoliation, the court did not disapprove of injunctive relief as a nontort alternative and did not suggest that a litigant could do nothing to prevent spoliation. In recognizing the difficulty of proving damages for intentional spoliation, the court recognized that irreparable harm is likely to result when evidence is destroyed. (105 C.A.4th 1419.)

(b) *Likelihood of success on the merits*. Plaintiff was likely to prevail on the merits because defendants had admitted to copying many of the employer's computer files onto discs for later use at their new agency. (105 C.A.4th 1420.)

(c) *Balancing of hardships*. Plaintiff faced irreparable injury from the irretrievable loss of evidence while the harm to defendants was likely to be negligible: the files would be copied by a court-appointed expert after working hours, and no information would be lost. (105 C.A.4th 1421.)

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6 *Witkin Cal. Proc. Prov Rem* § 298

[§ 298] Injunction in Lieu of Attachment Is Prohibited.

Lenard v. Edmonds (1957) 151 C.A.2d 764, 312 P.2d 308, supra, §297, was distinguished in *Doyka v. Superior Court* (1991) 233 C.A.3d 1134, 285 C.R. 14. D borrowed \$ 125,000 from a trust and promised to secure the loan with a second deed of trust on certain property. He failed to perform his promise, and at the request of the trustee, the superior court granted a preliminary injunction preventing D from disposing of funds in the sum of \$ 125,000, on deposit in a bank or financial institution, for any purpose. D asserted that he did not have that sum in any bank account, and that the order prevented him from spending money to meet his payroll or for the necessities of life. *Held*, mandamus issued directing the superior court to vacate the injunction.

(a) In *Lenard*, the injunction restrained the use of identifiable assets for specific purposes. Here the loan funds were no longer in the bank and all but a small fraction had already been used for renovation of the properties. Hence, the trustee was not seeking to prevent dissipation of assets, but was trying to force D to replace them with money from his bank accounts. (233 C.A.3d 1136.)

(b) What the trustee obtained was, in effect, a prejudgment attachment without meeting the requirements of the attachment statute, and the injunction was in excess of the court's authority. (233 C.A.3d 1137.)

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a. Injuries Involving Land.

1. Waste.

6 *Witkin Cal. Proc. Prov Rem* § 299

[§ 299] Waste.

Waste is expressly mentioned in the statute as an independent ground for a preliminary injunction, and is a common ground for a permanent injunction. (*C.C.P.* 526(a)(2); see *San Juan Gold Co. v. San Juan Ridge Mut. Water Assn.* (1939) 34 *C.A.2d* 159, 172, 174, 93 *P.2d* 582 [lessee wrongfully taking water from reservoir, depriving lessor of water and leading to prescriptive right]; 4 *A.L.R.2d* 198, 201 [oil or gas]; 12 *Summary* (10th), *Real Property*, §31; 5 *Cal. Proc.* (5th), *Pleading*, §828.)

However, where the action is by a mortgagee or unpaid contract vendor rather than by the owner of the land, a showing of waste alone is not enough; the plaintiff must plead and prove that the security was impaired. (*Miller v. Waddingham* (1891) 91 *C.* 377, 382, 27 *P.* 750 [vendor's action; no sufficient showing that security would be rendered less valuable]; see 4 *Summary* (10th), *Security Transactions in Real Property*, §85 et seq.)

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2. Right in Particular Situations.

a. Injuries Involving Land.

2. Taking From Realty.

6 *Witkin Cal. Proc. Prov Rem* § 300

[§ 300] Taking From Realty.

Proof that a trespasser threatens to take and remove part of the realty is enough for an injunction; the plaintiff need not establish any pecuniary value of the part taken. (*Kellogg v. King* (1896) 114 C. 378, 386, 46 P. 166 [destruction of value of game reserve lease by driving away wild game]; *Conde v. Sweeney* (1911) 16 C.A. 157, 162, 116 P. 319 [fixtures]; *Eames v. Philpot* (1925) 72 C.A. 151, 156, 236 P. 373 [wood]; *Union Oil Co. of Calif. v. Domengeaux* (1939) 30 C.A.2d 266, 270, 86 P.2d 127, *supra*, §294 [slant drilling taking subsurface oil; plaintiffs were unable to show precise amount of damage]; 14859 *Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 C.A.4th 1396, 1408, 74 C.R.2d 712, citing the text [where legitimacy of sale of condominium complex to developer was subject to litigation, uncontradicted evidence that developer was carrying away items of realty was sufficient to establish irreparable injury, without proof of their pecuniary value]; see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §116 [trees].)

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3. Interference With Water Rights.

6 *Witkin Cal. Proc. Prov Rem* § 301

[§ 301] Interference With Water Rights.

A wrongful diversion or obstruction of a watercourse may be enjoined. (See *Lema v. Ferrari* (1938) 27 C.A.2d 65, 71, 80 P.2d 157 [defendants allowed livestock to trample banks and obstruct flow]; 42 A.L.R.3d 426 [injunction against diversion of water by municipal corporation or public utility]; 12 *Summary* (10th), *Real Property*, §968.) (On special procedural requirements where diversion of water is involved, see *C.C.P.* 530, 534.)

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4. Repeated Acts of Trespass.

6 *Witkin Cal. Proc. Prov Rem* § 302

[§ 302] Repeated Acts of Trespass.

A single act of trespass can scarcely be the basis of an injunction; but repeated trespasses are often enjoined on consideration of one or more of three factors:

(1) Where the trespasser claims a right adverse to the owner, there is a likelihood that the acts may ripen into a prescriptive right.

(2) Where the individual acts of trespass cause only small or unascertainable damage, the legal remedy of multiple actions for damages is inadequate.

(3) Where the defendant is insolvent, actions for damages offer no prospect of relief.

A number of decisions address these and other factors. (See *Kellogg v. King* (1896) 114 C. 378, 387, 46 P. 166 [trespassing hunters taking wild game; factor (2)]; *Mendelson v. McCabe* (1904) 144 C. 230, 233, 77 P. 915 [interference with easement of right of way; factors (1) and (2)]; *United Railroads of San Francisco v. Superior Court* (1916) 172 C. 80, 84, 155 P. 463, *supra*, §279 [defendant was prohibited from using plaintiff's tracks and loops with excess number of cars; factor (2)]; *Harmon v. De Turk* (1917) 176 C. 758, 763, 169 P. 680 [lessor obstructing lessee's access to land; factor (1)]; *Bishop v. Owens* (1907) 5 C.A. 83, 87, 89 P. 844 [dictum; additional factors listed, all threatening irreparable injury]; *Uptown Enterprises v. Strand* (1961) 195 C.A.2d 45, 52, 15 C.R. 486 [law enforcement officers entered business premises to harass owner and patrons and give business bad reputation; factor (2)]; *Trader Joe's Co. v. Progressive Campaigns* (1999) 73 C.A.4th 425, 429, 86 C.R.2d 442 [injunction barring organization from soliciting initiative signatures at retail food store; defendant disrupted store business]; 60 A.L.R.2d 310 [injunctions against repeated or continuous trespasses on land]; 42 Am.Jur.2d (2000 ed.), *Injunctions* §110.)

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5. Withholding Possession.

6 *Witkin Cal. Proc. Prov Rem* § 303

[§ 303] Withholding Possession.

If the defendant wrongfully withholds possession of land to which the plaintiff is entitled, the theory of equitable protection of interests in land might justify injunctive relief. But because the traditional legal remedy of ejectment (see 5 *Cal. Proc.* (5th), *Pleading*, §634 et seq.) is usually adequate, an injunction is usually refused. (See *Martin v. Danziger* (1913) 21 C.A. 563, 566, 132 P. 284; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §53.)

However, in *Harmon v. De Turk* (1917) 176 C. 758, 169 P. 680, exceptional circumstances justified relief. Plaintiff lessee had a right to take sand and gravel from the leased land and was under an obligation to erect a plant with suitable capacity by a stated date. Defendant, the lessor's wife, prevented his entry. Because a legal action would not give him possession in time to allow him to meet his obligations, an injunction was properly granted. (176 C. 762.)

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a. Injuries Involving Land.

6. Private Nuisance.

6 *Witkin Cal. Proc. Prov Rem* § 304

[§ 304] Private Nuisance.

(1) *In General.* The most common ground for an injunction is a private nuisance. (See *Nicholson v. Getchell* (1892) 96 C. 394, 395, 31 P. 265 [breakwater forcing water onto plaintiff's land; mandatory injunction was granted]; *Allen v. Stowell* (1905) 145 C. 666, 668, 79 P. 371 [dam diverting water on plaintiff's land; mandatory injunction was granted]; *Vowinkel v. N. Clark & Sons* (1932) 216 C. 156, 163, 13 P.2d 733 [kilns and furnaces]; *Anderson v. Souza* (1952) 38 C.2d 825, 834, 243 P.2d 497 [low flying airplanes]; *Haynes v. Indio Levee Dist.* (1920) 46 C.A. 436, 438, 189 P. 475 [dam and channel diverting water onto plaintiff's land]; *Wilms v. Hand* (1951) 101 C.A.2d 811, 816, 226 P.2d 728 [dog hospital]; 13 *Summary* (10th), *Equity*, §133 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §828.)

(2) *Encroachment.* A structure that encroaches on the plaintiff's land is a continuing trespass and nuisance. (*Posey v. Leavitt* (1991) 229 C.A.3d 1236, 1243, 280 C.R. 568.) A mandatory injunction may be granted to compel its removal on the theory that multiple actions for damages are inadequate remedies and that the defendant in uninterrupted possession might gain a prescriptive title or easement. (See *Fairrington v. Dyke Water Co.* (1958) 50 C.2d 198, 201, 323 P.2d 1001; *Case v. Sisich* (1929) 97 C.A. 106, 110, 275 P. 492; but see *Christensen v. Tucker* (1952) 114 C.A.2d 554, 559, 250 P.2d 660, *infra*, §§346, 348 [exhaustive review of California cases granting and denying injunction].)

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b. Contract Rights.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 305

[§ 305] In General.

(1) *Availability of Injunction.* The normal remedy of a party seeking the judicial enforcement of contract rights (rather than damages for breach) is specific performance, i.e., an affirmative decree directing the defendant to perform. But if the covenant is negative, i.e., a promise not to do a particular thing, the appropriate remedy is an injunction restraining the defendant from its violation. (See 13 *Summary* (10th), *Equity*, §25.) Where the covenant is affirmative, an injunction against breach would give much the same benefits as a decree of specific performance, and, with certain exceptions, is subject to the same limitations; i.e., an injunction ordinarily will not be granted to prevent breach of a contract that cannot be specifically enforced. (See C.C. 3423(e); C.C.P. 526(b)(5); *Thayer Plymouth Center v. Chrysler Motors Corp.* (1967) 255 C.A.2d 300, 304, 63 C.R. 148; *Woolley v. Embassy Suites* (1991) 227 C.A.3d 1520, 1534, 278 C.R. 719, 3 *Summary* (10th), *Agency and Employment*, §221; *Rest.2d, Contracts* §357 et seq.; 12 Corbin (Interim ed.), §1138.)

(2) *Inducing Breach of Contract.* An injunction is an appropriate remedy against a person who attempts to induce a promisor to breach a contract with the plaintiff. (See *Imperial Ice Co. v. Rossier* (1941) 18 C.2d 33, 39, 112 P.2d 631; 5 *Summary* (10th), *Torts*, §730 et seq.; 5 *Cal Proc.* (5th), *Pleading*, §771 et seq.)

West's Key Number Digest, Injunction 57 et seq.

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2. Unique Personal Services.

6 Witkin Cal. Proc. Prov Rem § 306

[§ 306] Unique Personal Services.

An agreement to render ordinary personal services is not specifically enforceable. (See *Beverly Glen Music v. Warner Communications* (1986) 178 C.A.3d 1142, 1144, 224 C.R. 260 [new employer could not be enjoined by former employer from accepting services of breaching employee]; *Woolley v. Embassy Suites* (1991) 227 C.A.3d 1520, 1534, 278 C.R. 719, 3 Summary (10th), *Agency and Employment*, §221.) But an agreement for services of a "special, unique, unusual, extraordinary, or intellectual character" for compensation of at least \$ 6,000 per year as to contracts entered into on or before December 31, 1993, may be specifically enforced. (C.C. 3423(e); C.C.P. 526(b)(5); see *MCA Records v. Newton-John* (1979) 90 C.A.3d 18, 22, 153 C.R. 153 [minimum annual compensation of \$ 6,000 did not mean net profit, and even if it did, defendant with exclusive control of production costs could make suitable recordings each year from a guaranteed \$ 200,000 annual advance to net \$ 6,000]; *Motown Record Corp. v. Brockert* (1984) 160 C.A.3d 123, 135, 207 C.R. 574 [minimum compensation of \$ 6,000 must be guaranteed, option to pay that amount will not support injunction under C.C. 3423].)

As to contracts entered into on or after January 1, 1994, the compensation must meet either of the following requirements:

(1) The compensation must be at least \$ 9,000 for the first year; at least \$ 12,000 for the second year; and at least \$ 15,000 per year for the third year through the seventh year of the contract. In addition, after the third year of the contract, there must actually have been paid for the services through and including the contract year during which the injunctive relief is sought, over and above the minimum compensation specified above, \$ 15,000 per year during the fourth and fifth years, and \$ 30,000 per year during the sixth and seventh years of the contract. These amounts may be paid at any time before seeking injunctive relief. (C.C. 3423(e)(2)(A); C.C.P. 526(b)(5)(B)(i).)

(2) In the aggregate the compensation actually received for the services must be at least 10 times the applicable aggregate minimum amount specified above through and including the contract year during which the injunctive relief is sought. This amount may be paid at any time before seeking injunctive relief. (C.C. 3423(e)(2)(B); C.C.P. 526(b)(5)(B)(ii).)

Compensation paid in a contract year in excess of the minimums specified above will apply to reduce the compensation otherwise required to be paid in a subsequent contract years. (C.C. 3423(e)(3); C.C.P. 526(b)(5)(C).)

Although the statutory language literally permits an injunction to enforce the affirmative promise, the more reasonable interpretation is that it authorizes the traditional equitable relief against breach of the express or implied negative promise (not to work for another). (See 13 *Summary* (10th), *Equity*, §51; Rutter Group, Civil Proc. Before Trial §9:514 et seq.; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§129, 130.)

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3. Covenant Not To Compete.

6 Witkin Cal. Proc. Prov Rem § 307

[§ 307] Covenant Not To Compete.

A contract of an employee not to compete with his or her former employer on termination of the employment may be an illegal restraint of trade under *B. & P.C. 16600*, and if so, an injunction against breach will be denied. (See 1 *Summary* (10th), *Contracts*, §579 et seq.) But a valid contract not to compete within a geographical area may be made by partners dissolving a business, a partner dissociating from the partnership, a seller of the goodwill of a business, or certain owners of business entities where there is a sale of all or substantially all of the shares, or the operating assets and goodwill, of the corporation or one of its divisions or subsidiaries. The geographical area must be one where the partnership or other business has been transacted and within which the buyer or another member of the partnership, or a person deriving title to the goodwill or ownership from the buyer or partner, carries on a like business. A "business entity" includes a partnership (including a limited partnership or a limited liability partnership), a limited liability company (including a series of a limited liability company under the laws of a jurisdiction that recognizes such a series), or a corporation. An "owner of a business entity" includes a partner, in the case of a partnership, a member, in the case of a limited liability company, or an owner of capital stock, in the case of a corporation. (*B. & P.C. 16601, 16602*; see 15 Corbin (Rev. ed.) §80.8 et seq.; 1 *Summary* (10th), *Contracts*, §583 et seq.) In these cases breach may be enjoined.

Moreover, an employee's agreement not to disclose his or her former employer's confidential customer lists or other trade secrets or not to solicit those customers may be upheld. (*Loral Corp. v. Moyes* (1985) 174 C.A.3d 268, 274, 219 C.R. 836, 1 *Summary* (10th), *Contracts*, §582; *John F. Matull & Associates v. Cloutier* (1987) 194 C.A.3d 1049, 1056, 240 C.R. 211.) But the injunction may not go beyond restraining that disclosure or solicitation. Thus, in *John F. Matull & Associates v. Cloutier*, an agreement by defendant, a labor lawyer, not to compete with plaintiff, a labor relations consulting firm, for 5 years was enforceable, and a preliminary injunction restraining defendant from soliciting traditional labor consulting business from plaintiff's customers was valid. However, the injunction was invalid to the extent that it (a) prohibited defendant from providing legal services, which could not be performed by plaintiff; (b) prohibited defendant from using customer lists for legitimate purposes, such as notifying her legal clients about her change in employment; and (c) required defendant to return all of plaintiff's files, including legal files. (194 C.A.3d 1056.)

The misappropriation of trade secrets constitutes an exception to *B. & P.C. 16600*. Where a former employee uses a former employer's trade secret, or otherwise commits unfair competition, California courts, applying a judicial exception to *B. & P.C. 16600*, will enforce a restrictive covenant. And injunctive relief is proper for misappropriation of trade secrets even in the absence of a confidentiality or nondisclosure agreement. (See *ReadyLink Healthcare v. Cotton* (2005) 126 C.A.4th 1006, 1021, 24 C.R.3d 720, citing *Klamath-Orleans Lumber v. Miller* (1978) 87 C.A.3d 458, 151 C.R. 118; *infra*, §309.)

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Valid contract not to compete: In *Alliant Ins. Services v. Gaddy* (2008) 159 C.A.4th 1292, 72 C.R.3d 259, defendant received \$ 1.4 million for an agreement not to compete within all 58 counties of California when he sold his competing insurance brokerage business to plaintiff and became plaintiff's employee. After termination of his employment, there was evidence that defendant, who had disclosed to plaintiff that he intended to start a consulting business providing insurance and surety consulting, solicited some of his former clients for his new business. *Held*, preliminary injunction upheld. *B. & P.C. 16601* (1 Summary (10th), *Contracts*, §583 et seq.) allows the seller of the goodwill of a business to agree with the buyer to refrain from carrying on a similar business in a specified geographic area in which the business being sold has carried on business, so long as the buyer carries on a similar business in that area. Although plaintiff's office and its construction clients were located mostly in Northern California, plaintiff also provided insurance products to construction-based insurance companies throughout California. Thus, plaintiff "carried on" its business in all 58 counties of the state and a statewide injunction was proper. (159 C.A.4th 1303, 1306.)



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4. Other Contracts.

6 *Witkin Cal. Proc. Prov Rem* § 308

[§ 308] Other Contracts.

(1) *Cooperative Marketing Contract*. The statutes expressly permit an injunction to prevent breach of a cooperative marketing agreement between a nonprofit cooperative corporation or association and a member or stockholder. (C.C. 3423(e); *C.C.P.* 526(b)(5); see 12 Corbin (Interim ed.), §1193; 13 *Summary* (10th), *Equity*, §37.)

(2) *Collective Bargaining Agreement*. The traditional objection to specific enforcement of personal service contracts has been relaxed by statutes authorizing enforcement of collective labor agreements, and of arbitration provisions in those agreements. (See *Lab.C.* 1126; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §517.)

(3) *Miscellaneous Contracts*. The basic factors supporting injunctive relief (see *supra*, §293 et seq.) have been applied in upholding injunctions in other types of contracts. (See *Smith v. Mendonsa* (1952) 108 C.A.2d 540, 545, 238 P.2d 1039 [contract between adjoining owners involving use of property]; *Nyman v. Desert Club* (1952) 109 C.A.2d 63, 64, 240 P.2d 37 [contract or property right of member of social club]; *Wind v. Herbert* (1960) 186 C.A.2d 276, 284, 8 C.R. 817 [action by plaintiff limited partners against defendant general partners, alleging fraud and breach of contract resulting in irreparable injury to partnership assets].)

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(2a) *(New) Franchise Agreement*. Where the evidence shows that a franchisee has breached the franchise agreement, an injunction may issue prohibiting the franchisee from continuing to use the franchise and trademarks. A franchisee may not cease performance and continue to take advantage of the benefits of the franchise agreement. (*Jay Bharat Developers v. Minidis* (2008) 167 C.A.4th 437, 443, 84 C.R.3d 267.)



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c. Business and Personal Property Interests.

6 *Witkin Cal. Proc. Prov Rem* § 309

[§ 309] Business and Personal Property Interests.

An injunction may be granted to protect various kinds of interests in business and personal property. The following are important examples:

(1) *Unlawful interference with lawful business.* (See *Uptown Enterprises v. Strand* (1961) 195 C.A.2d 45, 51, 15 C.R. 486; *California Satellite Systems v. Nichols* (1985) 170 C.A.3d 56, 65, 66, 216 C.R. 180 [enjoining unauthorized interception and use of television signal microwaves in violation of federal Communications Act]; *Paradise Hills Associates v. Procel* (1991) 235 C.A.3d 1528, 1538, 1 C.R.2d 514, *infra*, §352; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §55 et seq.; 5 *Summary* (10th), *Torts*, §759 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §774 et seq.)

(2) *Breach of duty of loyalty.* (See *Huong Que v. Luu* (2007) 150 C.A.4th 400, 411, 416, 58 C.R.3d 527 [enjoining sellers of calendar business, who contracted to act as agents for buyers, from soliciting buyers' customers for competing business].)

(3) *Infringement of trademark or tradename and imitation of appearance or name.* (See *Morton v. Morton* (1905) 148 C. 142, 145, 82 P. 664; *Lutz v. Western Iron & Metal Co.* (1923) 190 C. 554, 560, 213 P. 962; *Jaynes v. Weickman* (1921) 51 C.A. 696, 699, 197 P. 672; *Hall v. Holstrom* (1930) 106 C.A. 563, 571, 289 P. 668; *Carolina Pines v. Catalina Pines* (1932) 128 C.A. 84, 88, 16 P.2d 781; 13 *Summary* (10th), *Equity*, §78 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §§777, 829.)

(4) *Infringement of common law copyright of unpublished material.* (See *Carpenter Foundation v. Oakes* (1972) 26 C.A.3d 784, 797, 103 C.R. 368.)

(5) *Wrongful use of trade secrets.* (See *George v. Burdusis* (1942) 21 C.2d 153, 159, 130 P.2d 399 [customer list]; *Sketchley v. Lipkin* (1950) 99 C.A.2d 849, 854, 222 P.2d 927 [unpatented invention]; *Greenly v. Cooper* (1978) 77 C.A.3d 382, 392, 143 C.R. 514 [customer list]; *ABBA Rubber Co. v. Seaquist* (1991) 235 C.A.3d 1, 17, 286 C.R. 518 [same]; *ReadyLink Healthcare v. Cotton* (2005) 126 C.A.4th 1006, 1017, 24 C.R.3d 720 [customer lists, compilations of compensation, employment preferences, contact information, employee applications and tests, and unique per diem

program]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §61 et seq.; 13 *Summary* (10th), *Equity*, §81 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §§778, 829; *supra*, §307.)

(6) *Violation of Unfair Practices Act.* (See *B. & P.C.* 17078; *People v. Gordon* (1951) 105 *C.A.2d* 711, 722, 234 *P.2d* 287; *E & H Wholesale v. Glaser Bros.* (1984) 158 *C.A.3d* 728, 733, 204 *C.R.* 838; 1 *Summary* (10th), *Contracts*, §609 et seq.)

(7) *Combination violating Cartwright Act.* (See *B. & P.C.* 16754.5; *Kold Kist v. Amalgamated Meat Cutters & Butchers Workmen of North America, Local No. 421* (1950) 99 *C.A.2d* 191, 193, 221 *P.2d* 724; 1 *Summary* (10th), *Contracts*, §591 et seq.)

(8) *Unfair competition under B. & P.C. 17200 et seq.* (See *Committee on Children's Television v. General Foods Corp.* (1983) 35 *C.3d* 197, 205, 211, 197 *C.R.* 783, 673 *P.2d* 660, 5 *Cal. Proc.* (5th), *Pleading*, §§716, 781 [cause of action stated under both unfair competition law and false advertising law]; *ReadyLink Healthcare v. Cotton*, *supra*, 126 *C.A.4th* 1020.)

(9) *Trade libel.* (See *Leonardini v. Shell Oil Co.* (1989) 216 *C.A.3d* 547, 574, 579, 264 *C.R.* 883, quoting the text [although trade libel may be enjoined in proper case, statements made as part of public debate before governmental agency on matter of public health cannot be enjoined].)

(10) *Violation of obligation arising from trust.* (See *C.C.* 3422(4); *C.C.P.* 526(a)(7); *Heckmann v. Ahmanson* (1985) 168 *C.A.3d* 119, 128, 214 *C.R.* 177 [corporate shareholders' breach of fiduciary duty to other shareholders resulting from shareholders' abandonment of derivative action]; *Save the Welwood Murray Memorial Library Committee v. City Council* (1989) 215 *C.A.3d* 1003, 1017, 263 *C.R.* 896, *infra*, §332.)

(11) *Retaliatory eviction.* A residential tenant may seek a preliminary injunction to prevent a landlord from raising rent or bringing unlawful detainer in retaliation for the tenant's exercise of his or her statutory right to spend rent money for necessary repairs. (*Aweeka v. Bonds* (1971) 20 *C.A.3d* 278, 282, 97 *C.R.* 650, 12 *Summary* (10th), *Real Property*, §707.)

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d. Consumer Protection Action.

6 *Witkin Cal. Proc. Prov Rem* § 310

[§ 310] Consumer Protection Action.

Both preliminary and permanent injunctions are available under *B. & P.C. 17535* to restrain false or misleading advertising. (See *People v. Toomey* (1984) 157 C.A.3d 1, 20, 203 C.R. 642 [failure to comply with preliminary injunction restricting misleading marketing of casino and shopping coupons justified permanent injunction]; *People v. Custom Craft Carpets* (1984) 159 C.A.3d 676, 681, 206 C.R. 12.) Restitution is also available under the statute. (*B. & P.C. 17535*; see *Committee on Children's Television v. General Foods Corp.* (1983) 35 C.3d 197, 210, 197 C.R. 783, 673 P.2d 660, 5 Cal. Proc. (5th), *Pleading*, §§716, 781 [complaint stated cause of action for injunctive relief and restitution under false advertising law and unfair competition law]; *People v. Pacific Land Research Co.* (1977) 20 C.3d 10, 16, 141 C.R. 20, 569 P.2d 125 [inclusion in complaint of prayer for restitution does not require treatment of *B. & P.C. 17535* action seeking injunctive relief and civil penalties as well as restitution as private class action].) (On false advertising generally, see 13 *Summary* (10th), *Equity*, §109.)

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e. Action or Cross-Complaint by Victim of Identity Theft.

6 Witkin Cal. Proc. Prov Rem § 311

[§ 311] Action or Cross-Complaint by Victim of Identity Theft.

A person may bring an action against a claimant to prove that he or she is a victim of identity theft, or may file a cross-complaint for that purpose in an action by the claimant to recover on the claim. A person who establishes that he or she is a victim of identity theft is entitled to an injunction restraining the claimant from (1) collecting or attempting to collect from the victim on the claim; (2) enforcing or attempting to enforce a security interest or other interest in the victim's property in connection with the claim; or (3) enforcing or executing on a judgment against the victim on the claim. (C.C. 1798.93.) (On identity theft generally, see *2 Cal. Crim. Law (3d), Crimes Against Property, §§209, 209A.*)

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f. Taxpayer's Action.

6 *Witkin Cal. Proc. Prov Rem* § 312

[§ 312] Taxpayer's Action.

(1) *In General.* A taxpayer, whether a corporation or a "citizen resident" of a political subdivision, required to pay a tax in that subdivision may bring an action to enjoin the illegal expenditure of public funds, waste of public property of that subdivision, or injury thereto. The action may be brought against any officer of the political subdivision, or any agent or other person acting in its behalf. (*C.C.P.* 526a.) (On liberal construction of statute to include state agencies and officers, see 4 *Cal. Proc.* (5th), *Pleading*, §164; on injunction against enforcement of invalid statute or ordinance, see *infra*, §331.)

(2) *Calendar Preference.* The statute does not affect any right of action in favor of the political subdivision, or of any public officer. No injunction may be granted restraining the offer, sale, or issuance of municipal bonds for public improvements or utilities. (*C.C.P.* 526a.)

(3) *Irreparable Injury Requirement.* An action under the statute to enjoin a public improvement project takes precedence over all civil matters on the court's calendar, except those to which equal precedence is granted by law. (*C.C.P.* 526a.) (For detailed discussion of taxpayer's actions, see 4 *Cal. Proc.* (5th), *Pleading*, §162 et seq.)

A taxpayer's claim that public funds are being expended illegally, while sufficient to support standing to bring a taxpayer's action under *C.C.P.* 526a and to obtain a permanent injunction after a hearing on the merits, is not ordinarily sufficient to demonstrate the type of irreparable injury that would justify the imposition of a preliminary injunction. (*White v. Davis* (2003) 30 *C.4th* 528, 554, 133 *C.R.2d* 648, 68 *P.3d* 74, *supra*, §293 [citing *Cohen v. Board of Supervisors* (1986) 178 *C.A.3d* 447, 225 *C.R.* 114, *infra*, §331; *Leach v. San Marcos* (1989) 213 *C.A.3d* 648, 261 *C.R.* 805, and *Loder v. Glendale* (1989) 216 *C.A.3d* 777, 265 *C.R.* 66]; on irreparable injury generally, see *supra*, §295.)

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g. Labor Dispute.

6 *Witkin Cal. Proc. Prov Rem* § 313

[§ 313] Labor Dispute.

It has generally been held that injunctions may be granted in labor disputes where (1) the object of the concerted action is invalid, or (2) the means used are improper, e.g., picketing accompanied by acts of violence, threats, physical intimidation, or fraud. (See *48B Am.Jur.2d* (2005 ed.), *Labor and Labor Relations* §2706 et seq.; 3 *Summary* (10th), *Agency and Employment*, §531 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §831) The power of the courts to grant temporary restraining orders and injunctions in labor disputes has been substantially limited by *C.C.P.* 527.3, which provides that the following acts may not be enjoined:

(1) Publicizing, obtaining, or communicating information regarding a labor dispute by any method not involving fraud, violence, or breach of the peace. (*C.C.P.* 527.3(b)(1).)

(2) Peaceful picketing or patrolling involving a labor dispute. (*C.C.P.* 527.3(b)(2).)

(3) Assembling peaceably to do an act specified above or to promote lawful interests. (*C.C.P.* 527.3(b)(3).)

Acts constituting a breach of the peace, disorderly conduct, unlawful blocking access or egress to the premises of a labor dispute, or similar unlawful activity are not protected under the statute. (*C.C.P.* 527.3(e); for full discussion, see 3 *Summary* (10th), *Agency and Employment*, §652 et seq.)

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h. Invasion of Personal Rights.

6 *Witkin Cal. Proc. Prov Rem* § 314

[§ 314] Invasion of Personal Rights.

The older decisions tended to deny equitable relief against an invasion of personal rights unless a property right was also involved; today, interests in privacy, reputation, membership in associations, and civil rights are recognized as proper matters for injunctive relief. (See *Orloff v. Los Angeles Turf Club* (1947) 30 C.2d 110, 117, 180 P.2d 321, 13 Summary (10th), *Equity*, §76 [admission to public horse racing course]; *Robbins v. Superior Court* (1985) 38 C.3d 199, 212, 213, 211 C.R. 398, 695 P.2d 695, *infra*, §356 [privacy rights of public assistance recipients]; *Dandini v. Dandini* (1948) 86 C.A.2d 478, 487, 195 P.2d 871, 13 Summary (10th), *Equity*, §76 [wife with separate maintenance decree was given injunction against husband's bigamous remarriage]; *Phipps v. Saddleback Valley Unified School Dist.* (1988) 204 C.A.3d 1110, 1117, 251 C.R. 720 [right of student who tested positive for AIDS virus to attend public school]; 47 A.L.R.2d 715 [defamation]; 54 A.L.R.2d 1240 [action for divorce in another state or country]; 40 A.L.R.5th 697 [one parent's attempt to change name of child over other parent's objection]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §73 et seq.; 8 Summary (10th), *Constitutional Law*, §814 et seq. [civil rights]; 13 Summary (10th), *Equity*, §§76, 77; on injunctive relief in marital dissolution proceedings, see *In re Marriage of Van Hook* (1983) 147 C.A.3d 970, 977, 978, 195 C.R. 541, 11 Summary (10th), *Husband and Wife*, §89.)

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i. Domestic Violence.

6 *Witkin Cal. Proc. Prov Rem* § 315

[§ 315] Domestic Violence.

The Domestic Violence Prevention Act (*Family C. 6200 et seq.*) provides a procedure for restraining recurring acts of violence by one member of a household against other members. (See *In re Marriage of Van Hook* (1983) 147 C.A.3d 970, 978, 979, 195 C.R. 541; *Caldwell v. Coppola* (1990) 219 C.A.3d 859, 863, 864, 268 C.R. 453; 11 *Summary* (10th), *Husband and Wife*, §373 et seq.) Temporary restraining orders issued under the Domestic Violence Prevention Act are governed by *Family C. 240 et seq.*, drawn from the provisions of *C.C.P. 527* (procedure for obtaining provisional remedy, see *infra*, §363 et seq.). (See *C.C.P. 527(g)* [*C.C.P. 527* does not apply to order issued under Family Code]; 11 *Summary* (10th), *Husband and Wife*, §7.) (For domestic violence prevention forms, see Judicial Council Form Nos. DV-100 et seq., EPO-001; for list of these forms, see 2 *Cal. Proc.* (5th), *Courts*, §§412, 414.) (On protective orders for elder or dependent adults who have suffered abuse, see *Welf.C. 15657.03*; 6 *Summary* (10th), *Torts*, §1688 [forms]; 11 *Summary* (10th), *Husband and Wife*, §§376, 387; for elder or dependent abuse forms, see Judicial Council Form Nos. EA-100 et seq.; for list of these forms, see 2 *Cal. Proc.* (5th), *Courts*, §413.)

The California Courts Self-Help Center (www.courtinfo.ca.gov/selfhelp) provides assistance to self-represented litigants involving domestic violence, including information about civil restraining orders and criminal protective orders.

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j. Harassment.

1. Nature and Scope of Statute.

6 *Witkin Cal. Proc. Prov Rem* § 316

[§ 316] Nature and Scope of Statute.

(1) *Purpose of Statute.* C.C.P. 527.6 is intended "to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution." (Stats. 1978, Chap. 1307, §1; see Cal. Const., Art. I, §1; 7 *Summary* (10th), *Constitutional Law*, §575 et seq. [privacy rights].) It does so by providing expedited injunctive relief to harassment victims. (See *Smith v. Silvey* (1983) 149 C.A.3d 400, 197 C.R. 15, *infra*, §318; *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 C.A.3d 719, 730, 255 C.R. 453; *Kobey v. Morton* (1991) 228 C.A.3d 1055, 1059, 278 C.R. 530.) The statute authorizes a person who has suffered harassment to obtain a temporary restraining order and injunction against that harassment. (C.C.P. 527.6(a); for definition of "harassment," see *infra*, §317.) (On use of active protective order under C.C.P. 527.6 by victim of domestic violence to obtain new license plates, see *Veh.C. 4467*; on issuance of emergency protective order against stalking, including order under C.C.P. 527.6, see P.C. 646.91, 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §297.)

(2) *Scope of Statute.* C.C.P. 527.6 provides for a personal injunction prohibiting harassment. Thus, it cannot be invoked to enjoin activity resulting in a devaluation of property. (*Schild v. Rubin* (1991) 232 C.A.3d 755, 765, footnote 4, 283 C.R. 533.) Nor does it authorize an eviction order for the protection of property. (See *Marquez-Luque v. Marquez* (1987) 192 C.A.3d 1513, 1517, 1518, 238 C.R. 172 [executor's proper remedy for acquiring possession of decedent's real property from holdover tenant was action for ejectment, quiet title, or unlawful detainer].) And because it provides for temporary relief only, it cannot finally determine the respective rights and duties of the parties regarding the use of an easement; the statute was never intended to provide an expedited procedure to resolve real property disputes. (*Byers v. Cathcart* (1997) 57 C.A.4th 805, 810, 67 C.R.2d 398.)

Because the statute is intended to provide a remedy for harassment against individuals, the term "person," as used in the statute, refers only to natural persons, and not to artificial persons such as corporations and associations. (*Diamond View, Ltd. v. Herz* (1986) 180 C.A.3d 612, 616, 618, 225 C.R. 651, citing the text [reversing order granting injunction against harassment of limited partnership operating hotel and bar].)

Under C.C.P. 527.6(l), the statute does not apply to actions covered by the following statutes:

(a) C.C. 1788 et seq. (Fair Debt Collection Practices Act). (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §5 et seq.)

(b) *Family C.* 6200 et seq. (Domestic Violence Prevention Act). (See 11 *Summary* (10th), *Husband and Wife*, §373 et seq.; *supra*, §315.)

(3) *Effect of Bankruptcy Act.* A harassment action that sought to enjoin playing loud music late at night, that had nothing to do with plaintiff's bankruptcy, and that posed no threat to bankruptcy court jurisdiction was not subject to an automatic stay under the federal bankruptcy law, 11 U.S.C., §362(a). (*Grant v. Clampitt* (1997) 56 C.A.4th 586, 590, 65 C.R.2d 727.)

(4) *Restriction on Locating Protected Party.* Unless there is good cause not to do so, the court must order that a person subject to a protective order under C.C.P. 527.6 may not act to obtain the address or location of a protected party or his or her family members, caretakers, or guardian. (C.C.P. 527.10.)

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2. Right in Particular Situations.

j. Harassment.

2. Definitions.

6 *Witkin Cal. Proc. Prov Rem* § 317

[§ 317] Definitions.

(1) *Harassment*. "Harassment" is "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff." (*C.C.P.* 527.6(b).) (See *Schild v. Rubin* (1991) 232 *C.A.3d* 755, 763, 283 *C.R.* 533 [no medical, psychological, or other evidence established that noise from neighbors' basketball court, however offensive or annoying, caused "substantial emotional distress" within meaning of *C.C.P.* 527.6(b)]; *Byers v. Cathcart* (1997) 57 *C.A.4th* 805, 812, 67 *C.R.2d* 398 [legitimacy of purpose negates harassment; because plaintiff who parked her car on disputed driveway easement for sole purpose of storing it when not in use had legitimate purpose, parking did not constitute harassment]; *Brekke v. Wills* (2005) 125 *C.A.4th* 1400, 1413, 23 *C.R.3d* 609, *infra*, §318 [conduct of plaintiff's minor daughter's 15-year-old boyfriend, which included writing daughter "vile and vitriolic" letters that he intended plaintiff to see, attempting to undermine plaintiff's authority, ridiculing plaintiff, and encouraging plaintiff's daughter to contemplate killing her parents, constituted harassment under *C.C.P.* 527.6(b)].)

(2) *Course of Conduct*. "Course of conduct" means a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose" and includes following or stalking a person, or making harassing telephone calls or sending harassing correspondence to a person. The correspondence may be by any means, including public or private mail, interoffice mail, fax, or e-mail. Constitutionally protected activity is excluded. (*C.C.P.* 527.6(b)(3).) (See *Leydon v. Alexander* (1989) 212 *C.A.3d* 1, 5, 260 *C.R.* 253 [single incident in which former city employee verbally abused plaintiff and another employee at city offices did not meet statutory requirement of course of conduct].) (On constitutionally protected activity, see *infra*, §318.)

(3) *Unlawful Violence*. "Unlawful violence" includes assault or battery, or stalking as prohibited by *P.C.* 646.9 (see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §294 *et seq.*), but does not include lawful acts of self-defense or defense of others. (*C.C.P.* 527.6(b)(1).)

(4) *Credible Threat of Violence*. A "credible threat of violence" is a knowing and wilful statement or course of conduct that would put a reasonable person in fear for his or her safety, or that of his or her immediate family, and that serves no legitimate purpose. (*C.C.P.* 527.6(b)(2).)

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6 Witkin Cal. Proc. Prov Rem § 318

[§ 318] Constitutionally Protected Activity.

Speech that constitutes harassment within the meaning of *C.C.P.* 527.6 is not constitutionally protected, and the victim of the harassment may obtain injunctive relief. However, an injunction burdening protected speech will be upheld only to the extent that its provisions burden no more speech than required to serve a significant government interest. The state's interest in preserving residential privacy is a particularly potent government interest. (*Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1250, 1265, 29 C.R.3d 521, citing *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 C.A.4th 290, 57 C.R.2d 736; see *Leydon v. Alexander* (1989) 212 C.A.3d 1, 5, 260 C.R. 253 [city employee's action against city for wrongful termination was exercise of constitutionally protected right to petition court for redress of grievances, not harassment under *C.C.P.* 527.6]; *Nebel v. Sulak* (1999) 73 C.A.4th 1363, 1370, 87 C.R.2d 385 [injunction prohibiting defendant from being within 25 feet of plaintiff, whom defendant persisted in observing while she conducted judgment debtor examinations, was overbroad and not based on showing that defendant engaged in harassing conduct; defendant's activity in quietly observing public examinations was lawful]; on exclusion of constitutionally protected activity from definition of course of conduct, see *supra*, §317.)

In *Huntingdon*, a preliminary injunction prohibited defendant, an American entity associated with a British animals rights group, and its president (a) from coming within 100 feet of the real property, person, family members, friends, or business associates of plaintiff's employees, and (b) from posting or maintaining on any website information regarding any such person. *Held*, the injunction was overbroad.

(a) Although there had been picketing and vandalism at the home of an employee of plaintiff in San Diego, there was no evidence that the president or anyone else associated with defendant was involved. Therefore, there was no ground for restrictions on picketing or approaching the real property, etc., of plaintiff's employees. (129 C.A.4th 1266.)

(b) The case against defendant and its president was based on the risk of continuing threats of violence posted on defendant's website. Therefore, the injunction must be tailored to preclude such a threat. Defendant and its president may be prohibited from targeting plaintiff's employees and their family members, and from publishing their names,

addresses, or other identifying information, and reports of illegal activity at their homes on the website. However, they may not be precluded from publishing a conviction of an employee for animal cruelty, should such a conviction occur, or be required to remove public reference to plaintiff's employees in materials that are merely being republished on defendant's website. (129 C.A.4th 1266.)

In *Brekke v. Wills* (2005) 125 C.A.4th 1400, 23 C.R.3d 609, an injunction was obtained by the mother of a 16-year-old girl requiring the girl's 15-year-old boyfriend to stay away from the girl and her family after he annoyed, ridiculed, and threatened the mother. The boy claimed that the injunction violated his constitutional rights of freedom of expression and association and his right to privacy. *Held*, affirmed.

(a) *Freedom of speech*. Defendant's speech was not entitled to protection because it was between and about private parties on private matters, and thus did not threaten the free debate of public issues that the First Amendment is designed to protect. (125 C.A.4th 1404, 1409.) And the song lyrics that defendant quoted in a letter to plaintiff were not protected speech because they were not used to entertain, but to ridicule and annoy plaintiff. (125 C.A.4th 1409.)

(b) *Freedom of association*. Defendant had no right to associate with plaintiff's daughter, a minor, against her parents' will. Not only do parents have a constitutional right to control their children's activities, including the persons with whom they may associate, they have a legal duty to do so. (125 C.A.4th 1410.) The duty of parents to exercise reasonable control over their minor children under P.C. 272 is intended to protect children from influences that would cause them to become delinquent. (125 C.A.4th 1411, citing *People v. Calkins* (1941) 48 C.A.2d 33, 119 P.2d 142, and P.C. 272(b)(5).) Evidence indicated that defendant was such an influence on plaintiff's daughter. (125 C.A.4th 1411.)

(c) *Right to privacy*. Defendant's claim that letters he wrote to plaintiff's daughter were protected by the right of privacy was without merit. Defendant admitted that he intended plaintiff to read the letters. And he had no reasonable expectation of privacy in letters he wrote to a minor whose parents had the right to exercise supervision and control over her, and were entitled to search her room and her possessions. Moreover, defendant had no right to communicate with plaintiff's daughter against her parents' wishes. (125 C.A.4th 1411.)

In *Smith v. Silvey* (1983) 149 C.A.3d 400, 197 C.R. 15, plaintiff, the owner of a mobilehome park, filed a petition for an injunction against defendant, a former tenant. The pleadings alleged that defendant, while a tenant, became dissatisfied with plaintiff's operation of the park, made a number of complaints to governmental agencies over a period of years, brought a legal action to force reinspection of park improvements, and, unless enjoined, would continue to harass plaintiff by phone calls, letters, and personal visits to employees and officials of public agencies, and would attempt, by false statements and threats to those persons, to initiate unwarranted administrative action against plaintiff. The trial judge, on the showing by declarations, made an order (1) restraining defendant from initiating complaints with public agencies concerning plaintiff's operation of the park, and (2) restraining defendant from contacting the residents of the park. *Held*, reversed.

(a) Defendant's complaints to governmental agencies were an exercise of his constitutional right to petition for redress of grievances. (149 C.A.3d 406, citing *Long Beach v. Bozek* (1982) 31 C.3d 527, 183 C.R. 86, 645 P.2d 137, 5 Summary (10th), Torts, §487.)

(b) That part of the order restraining defendant from "contacting" residents of the Park was overbroad: It could be interpreted as prohibiting not only physically or verbally threatening acts, but also constitutionally protected speech. (149 C.A.3d 407.)

In *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 256 C.R. 194, plaintiff center operated a clinic in the City of Chico where abortions were performed. Defendants were Chico citizens who picketed the center, harassing the clients by attempting to stop them on the sidewalk, photographing them, and recording their vehicle license plate numbers. The center sought and the trial judge granted a preliminary injunction against a number of specified acts. Both parties appealed. *Held*, injunction order affirmed with modifications.

(a) *No right to exclude defendants from public streets and sidewalks.*

(1) Plaintiff argued that defendants should have been enjoined from being present when abortions were performed because, by learning the identity of clients, they violated the clients' constitutional right of privacy. Thus, the invasion of privacy claimed was mere recognition. (208 C.A.3d 241.)

(2) The California constitutional privacy guarantee (Cal. Const., Art I, §1; see 7 *Summary* (10th), *Constitutional Law*, §575 et seq.) is broader than the federal privacy right, and protects against information about a citizen's participation in a medical procedure, including abortion. (208 C.A.3d 241.) And the state privacy right protects against invasion by private citizens as well as the state. (208 C.A.3d 242.)

(3) A different question arises, however, whether that privacy interest protects their identities on public streets, for a citizen's reasonable expectations of privacy are conditioned by the world in which the citizen lives. "Because Chico is a small city, the clients are more likely to be recognized. But that increased chance of recognition on a public street is a 'common habit' of Chico." (208 C.A.3d 242.)

(4) Even assuming that the clients had a limited privacy interest on the public streets, the proposed rule could not be fairly and equally applied by the courts, for the privacy interest of the center's clients is not unique. "It is shared by other citizens who participate in a myriad of other medical procedures ranging from oncology to plastic surgery to psychiatry. It is also shared, to different degrees, by those who visit attorneys and pharmacies and adult book stores. Indeed, the list of providers of goods or services that, by their nature, disclose private aspects of the life of the consumer is long. Were we to adopt the rule sought by the Center, we think the courts would soon be deluged with requests from these providers for privacy protection for clients on the public streets during ordinary business hours." (208 C.A.3d 243.)

(b) *No right to bar defendants from vicinity on Saturdays when abortions are performed.*

(1) "The 'public forum' doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication--such as in those places historically associated with first amendment activities, such as streets, sidewalks, and parks--especially because of how indispensable communication in these places is to people who lack access to more elaborate (and more costly) channels." (208 C.A.3d 244.)

(2) The principle that in a public forum the regulation must leave open ample alternative channels of communication was applied in *Frisby v. Schultz* (1988) 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420, 7 *Summary* (10th), *Constitutional Law*, §398, which is controlling here. (208 C.A.3d 244, 245.)

(3) "It has been widely recognized that ample alternative channels of communication do not exist if a speaker's target audience is altogether insulated from the speaker's message." (208 C.A.3d 246.) That is the case here; the center performs abortions only on Saturdays, and it made no showing that defendants had a means of reaching their target audience if defendants were excluded from the vicinity on those days. (208 C.A.3d 246.)

(4) Moreover, an injunction limiting free speech rights must be narrowly drawn. Thus, the trial court did not abuse its discretion in designing narrower orders to protect against clients' emotional distress, rather than enjoining all communication between defendants and the center's clients. (208 C.A.3d 247.) (See *Planned Parenthood Shasta-Diablo v. Williams* (1995) 10 C.4th 1009, 1025, 43 C.R.2d 88, 898 P.2d 402, 7 *Summary* (10th), *Constitutional Law*, §402; *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1661, 39 C.R.2d 189, 7 *Summary* (10th), *Constitutional Law*, §399.)

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4. Restriction on Possession of Firearms.

6 *Witkin Cal. Proc. Prov Rem* § 319

[§ 319] Restriction on Possession of Firearms.

(1) *In General.* A person subject to a protective order under *C.C.P.* 527.6 may not own, possess, purchase, attempt to purchase, or receive a firearm while the order is in effect. A person who does so is punishable under P.C. 12021(g) (acquisition of firearm by subject of restraining order or injunction; 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §180). The court must order the person to relinquish any firearms he or she owns or possesses. (*C.C.P.* 527.6(k).)

(2) *Relinquishment Procedure.* On the issuance of a protective order under *C.C.P.* 527.6 or 527.8 (*infra*, §326 et seq.), the court must order the person subject to the order to relinquish firearms in that person's immediate possession or control within 24 hours of being served with the order. Within 48 hours after receiving the order, the person must file a receipt with the court showing that the firearm was surrendered to local law enforcement or sold to a licensed gun dealer. (*C.C.P.* 527.9(b).) The law enforcement agency may charge a storage fee not to exceed the cost of storage. (*C.C.P.* 527.9(c).) The restraining order must state on its face the prohibition against ownership or possession of a firearm, the requirements of relinquishment or sale of the weapon and filing of proof of surrender, and the expiration date for the relinquishment. (*C.C.P.* 527.9(d).) (See *C.C.P.* 527.9(f)) [court is authorized to make exception to relinquishment requirement for person needing firearm for employment, including peace officer]; *C.C.P.* 527.9(g) [person subject to order may make one-time sale of all firearms in possession of local law enforcement during duration of relinquishment order]; Judicial Council Form No. CH-145 [Proof of Firearms Turned In or Sold (Civil Harassment)].

(3) *Return of Firearm.* At the expiration of the relinquishment order, the local law enforcement agency must return a surrendered firearm, except where the firearm is stolen or the person is prohibited from owning or possessing the firearm by statute or by another successive restraining order as specified by the statute. (*C.C.P.* 527.9(e).)

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5. Judicial Council Forms.

6 *Witkin Cal. Proc. Prov Rem* § 320

[§ 320] Judicial Council Forms.

The Judicial Council is required to promulgate forms for the operation of the harassment statute. The petition and response forms must be simple and concise and are mandatory. (*C.C.P. 527.6(m)*.) The following forms have been approved:

Form No. CH-100 [Request for Orders to Stop Harassment (Civil Harassment)].

Form No. CH-101 [Request and Order for Free Service of Restraining Order (Sexual Assault or Stalking)].

Form No. CH-102 [Confidential CLETS Information (Domestic Violence, Civil Harassment, Elder Abuse)].

Form No. CH-110 [Answer to Request for Order to Stop Harassment (Civil Harassment)].

Form No. CH-120 [Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment)].

Form No. CH-125 [Reissue Temporary Restraining Order (Civil Harassment)].

Form No. CH-130 [Proof of Personal Service (Civil Harassment)].

Form No. CH-131 [Proof of Service by Mail (Civil Harassment)].

Form No. CH-135 [What Is Proof of Service? (Civil Harassment)].

Form No. CH-140 [Restraining Order After Hearing to Stop Harassment (CLETS) (Civil Harassment)].

Form No. CH-145 [Proof of Firearms Turned In or Sold (Civil Harassment)].

Form No. CH-150 [Can a Civil Harassment Restraining Order Help Me? (Civil Harassment)].

Form No. CH-151 [How Can I Answer a Request for Orders to Stop Harassment? (Civil Harassment)].

Form No. EPO-001 [Emergency Protective Order (CLETS--EPO) (Domestic Violence, Child Abuse, Elder or Dependent Adult Abuse, or Stalking)].

These forms are reproduced in West's California Judicial Council Forms, Volume I.

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6. Petition, Service, and Response.

6 Witkin Cal. Proc. Prov Rem § 321

[§ 321] Petition, Service, and Response.

(1) *Temporary Restraining Order*. On filing a petition for an injunction against harassment, the plaintiff may obtain a temporary restraining order in accordance with *C.C.P.* 527 (see *infra*, §363 et seq.), except to the extent *C.C.P.* 527.6 provides a rule that is inconsistent. (*C.C.P.* 527.6(c).) It may be granted, with or without notice, "upon an affidavit that, to the satisfaction of the court, shows reasonable proof of harassment" and that "great or irreparable harm would result to the plaintiff." In the court's discretion, and on a showing of good cause, a temporary restraining order or injunction issued under *C.C.P.* 527.6 may include other named family or household members residing with the plaintiff. (*C.C.P.* 527.6(c).) No memorandum is required unless otherwise ordered. (C.R.C., Rule 3.1152(b).) The order remains in effect up to 15 days, or, if the court extends the time for hearing under *C.C.P.* 527.6(d), up to 22 days, at the court's discretion, unless modified or terminated. (*C.C.P.* 527.6(c).) (See Judicial Council Form No. CH-100 [Request for Orders to Stop Harassment (Civil Harassment)]; Judicial Council Form No. CH-120 [Notice of Hearing and Temporary Restraining Order (CLETS) (Civil Harassment)].)

A temporary restraining order or injunction issued under *C.C.P.* 527.6 must be issued on forms adopted by the Judicial Council and approved by the Department of Justice under *Family C.* 6380(i), although orders not issued on those forms are not therefore unenforceable. (*C.C.P.* 527.6(n).) Information on the temporary restraining order or injunction must be transmitted to the Department of Justice in accordance with *Family C.* 6380(b). (*C.C.P.* 527.6(o).) (See Judicial Council Form No. CH-140 [Restraining Order After Hearing to Stop Harassment (CLETS) (Civil Harassment)].)

(2) *Service on Defendant*. The defendant must be personally served at least 5 days before the hearing with a copy of the petition, the temporary restraining order, if any, and notice of the hearing. The time for service on the defendant may be shortened by the court for good cause on motion of the plaintiff or on the court's own motion. (*C.C.P.* 527.6(g); see C.R.C., Rule 3.1152(c).) Service must be in the manner required for personal service of summons in civil actions. (C.R.C., Rule 3.1152(c); see 3 *Cal. Proc.* (5th), *Actions*, §1008 et seq.) (See Judicial Council Form No. CH-130 [Proof of Personal Service; (Civil Harassment)].)

(3) *Response by Defendant.* The defendant may file a response that "explains, excuses, justifies, or denies" the alleged harassment, or may file a cross-complaint. (*C.C.P.* 527.6(d).) The defendant's response must be filed and delivered to the plaintiff, or the plaintiff's attorney, "no later than 48 hours before the hearing." (*C.R.C.*, Rule 3.1152(d).) (See Judicial Council Form No. CH-110 [Answer to Request for Order to Stop Harassment (Civil Harassment)]; Judicial Council Form No. CH-131 [Proof of Service by Mail (Civil Harassment)].)

As explained in *Kobey v. Morton* (1991) 228 C.A.3d 1055, 278 C.R. 530, in the absence of a cross-complaint, no injunction can be granted against the plaintiff. In *Kobey*, the trial judge granted mutual injunctions against plaintiff and defendant in an asserted exercise of its inherent power to keep the peace. *C.C.P.* 527.6 calls for the formality of a cross-complaint as an element of due process; and "[t]he court's inherent power does not extend so far as to encompass an order without a petition to serve as a vehicle for that order." (228 C.A.3d 1060.) (See *Nora v. Kaddo* (2004) 116 C.A.4th 1026, 1029, 10 C.R.3d 862 [grant of defendant's oral request at close of hearing to make injunctive relief mutual, where defendant neither filed cross-complaint nor presented evidence of harassment, was abuse of discretion; following *Kobey*].)

(4) *Anti-SLAPP Motion Is Available.* A petition for injunctive relief under *C.C.P.* 527.6 is a "cause of action" subject to an anti-SLAPP motion. (*Thomas v. Quintero* (2005) 126 C.A.4th 635, 646, 24 C.R.3d 619 [issue of first impression; fact that *C.C.P.* 527.6 provides special procedure to expedite injunctive relief does not preclude application of anti-SLAPP motion].) (On SLAPP actions generally, see 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.)

(5) *Motion To Strike Is Not Available.* No motion to strike can be filed in response to the procedure for a temporary restraining order provided in *C.C.P.* 527.6 because it is simply an "application" that does not qualify as a "cause of action" under *C.C.P.* 425.16. (*Thomas v. Quintero* (2005) 126 C.A.4th 635, 652, 24 C.R.3d 619.)

(6) *No Filing Fee.* No filing fee may be charged for a petition or response filed in an action under the harassment statute that involves violence, the threat of violence, stalking, or an action or speech that has placed the petitioner in reasonable fear of violence, and no fee may be charged for a subpoena filed in connection with a petition alleging these acts. (*C.C.P.* 527.6(p).)

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7. Hearing, Determination, and Enforcement Response.

6 *Witkin Cal. Proc. Prov Rem* § 322

[§ 322] Hearing, Determination, and Enforcement Response.

(1) *Hearing and Determination.* A hearing must be held within 15 days, or, if good cause appears to the court, within 22 days from the date of the temporary restraining order. (*C.C.P.* 527.6(d); see *C.R.C.*, Rule 3.1152(a).) At the hearing, the judge must receive relevant testimony and may make "an independent inquiry." If the judge finds "by clear and convincing evidence" that unlawful harassment exists, the judge must issue the injunction. (*C.C.P.* 527.6(d); see *Schraer v. Berkeley Property Owners' Assn.* (1989) 207 *C.A.3d* 719, 729, 255 *C.R.* 453 [if relevant oral testimony of available witness is offered, it must be taken; trial judge may not issue injunction unless judge finds by clear and convincing evidence that unlawful harassment already exists in fact]; *Adler v. Vaicius* (1993) 21 *C.A.4th* 1770, 1771, 27 *C.R.2d* 32 [quoting *Schraer*]; *Nora v. Kaddo* (2004) 116 *C.A.4th* 1026, 1029, 10 *C.R.3d* 862 [in ruling on declarations and exhibits attached to petition, despite parties' requests to present testimony, trial court contravened *C.C.P.* 527.6(d) and deprived parties of their due process rights to present evidence and cross-examine witnesses].) (On clear and convincing evidence, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §38 et seq.) However, neither (a) direct testimony by the petitioner of emotional distress, nor (b) specific findings by the court of the existence of the statutory elements of harassment are a prerequisite to the issuance of an injunction under *C.C.P.* 527.6. (*Ensworth v. Mullvain* (1990) 224 *C.A.3d* 1105, 1110, 274 *C.R.* 447.)

Neither party is precluded from being represented by private counsel or from self-representation. (*C.C.P.* 527.6(e).) A minor, accompanied by a duly appointed and acting guardian ad litem, may be permitted to appear in court without counsel to obtain or oppose an injunction or temporary restraining order or both under *C.C.P.* 527.6. (*C.R.C.*, Rule 3.1153.) Where there are allegations of domestic violence, a party may be accompanied by a support person; however, that person may not give legal advice. (*C.C.P.* 527.6(f) [court has discretion to remove support person who court believes is prompting, swaying, or influencing party].)

(2) *Duration of Injunction.* An injunction may be granted for not more than 3 years, but the plaintiff may apply for a renewal by filing a new petition within 3 months before expiration. (*C.C.P.* 527.6(d).)

Brekke v. Wills (2005) 125 *C.A.4th* 1400, 23 *C.R.3d* 609, supra, §318, held that an injunction, obtained by the

mother of a 16-year-old girl, that required the girl's 15-year-old boyfriend to stay away from the girl and her family was valid, even though the judge had failed to fill in the expiration date on the written order. The judge orally specified that the injunction would be for 3 years, and the order form provided that if no date was specified, the order would expire 3 years from the date of issuance. However, the injunction was modified to expire when the girl turned age 18, at which time she would be entitled to make her own decisions, although she herself could seek to renew it. (125 C.A.4th 1415.)

(3) *Enforcement.* On the plaintiff's request, an order issued under C.C.P. 527.6 must be served on the defendant, whether taken into custody or not, by any law enforcement officer at the scene of reported harassment involving the parties. The plaintiff must provide the officer with an endorsed copy of the order and a proof of service, which the officer must complete and forward to the issuing court. If the protected person cannot produce a certified copy of the order, the officer must immediately attempt to verify the order's existence. If the officer determines that the order has been issued but not served, he or she must immediately notify the defendant of the terms of the order and enforce it. Verbal notice constitutes service of the order and is sufficient for the purposes of C.C.P. 527.6, P.C. 273.6 (violation of order to prevent harassment, disturbing peace, or violence; 1 Cal. Crim. Law (3d), Crimes Against the Person, §63), and P.C. 12021(g) (acquisition of firearm by subject of restraining order; 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §180). (C.C.P. 527.6(h).)

Wilful disobedience of a restraining order or injunction is punishable under P.C. 273.6. (C.C.P. 527.6(j).) (On punishment of violation of injunction as contempt, see *infra*, §396.)

(4) *Costs and Attorneys' Fees.* Costs and attorneys' fees may be awarded to the prevailing party in an action under C.C.P. 527.6. (C.C.P. 527.6(i); see *Elster v. Friedman* (1989) 211 C.A.3d 1439, 1443, 1444, 260 C.R. 148 [whether party prevailed is within discretion of trial court; trial court did not abuse its discretion in awarding costs and fees to plaintiffs even though they were symmetrically bound by injunction and injunction was issued under stipulated judgment].)

(5) *Other Civil Remedies.* C.C.P. 527.6 does not preclude the plaintiff from using other civil remedies. (C.C.P. 527.6(l).)

(6) *No Filing Fee.* Subject to Govt.C. 6103.2(b)(4) (payment of fees for official services of sheriff, marshal, or constable), no filing fee may be charged for the service of a protective order, restraining order, or injunction to be issued pursuant to C.C.P. 527.6, under any of the following conditions:

(a) The order or injunction is based on stalking under P.C. 646.9 (see 1 Cal. Crim. Law (3d), Crimes Against the Person, §294 et seq.). (C.C.P. 527.6(q)(1)(A).)

(b) The order or injunction is based on a credible threat of violence. (C.C.P. 527.6(q)(1)(B).)

(c) The order or injunction is issued under Family C. 6222. (C.C.P. 527.6(q)(1)(C).)

(7) *Judicial Council Forms.* The Judicial Council must prepare and develop forms for applicants who wish to avail themselves of the services described in C.C.P. 527.6(q). (C.C.P. 527.6(q)(2).) The following forms have been adopted:

Form No. CH-100 [Request for Orders to Stop Harassment (Civil Harassment)].

Form No. CH-101 [Request and Order for Free Service of Restraining Order (Sexual Assault or Stalking)].

Form No. CH-110 [Answer to Request for Orders to Stop Harassment (Civil Harassment)].

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Costs and Attorneys' Fees.* A prevailing defendant may recover attorneys' fees under C.C.P. 527.6(i) even if the action was brought in good faith and was not frivolous, if the trial court, in its discretion, awards these fees. (*Krug v.*

Maschmeier (2009) 172 C.A.4th 796, 798, 800, 91 C.R.3d 452.)

Corrections: Page 262, heading should read "*Hearing, Determination, and Enforcement.*"

Page 263, fourth and fifth lines from end of page, "*filing fee*" should read "*fee*" and "*sheriff, marshal, or constable*" should read "*sheriff or marshal*".



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IV. INJUNCTION

B. Right to Injunction.

2. Right in Particular Situations.

k. Transitional Housing Participant Misconduct.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 323

[§ 323] In General.

(1) *Availability of Injunctive Relief.* Temporary restraining orders and injunctions may be obtained by program operators of transitional housing programs to prevent abuse or program misconduct by participants in these programs against other participants, staff members, and neighbors residing within 100 feet of the program site. However, a temporary restraining order is not available after the participant has been under contract with the operator for 6 months or more unless (a) an action is pending against the participant; or (b) a temporary restraining order is in effect and subject to further orders. (*Health & Saf.C. 50585(a)*; for definitions of "program operator," "transitional housing program," "participant," "abuse," "program misconduct," and "program site," see *Health & Saf.C. 50582.*)

(2) *Judicial Council Forms.* The Judicial Council is required to promulgate forms and instructions to implement the Transitional Housing Misconduct Act. The petition and response forms must be simple and concise. (*Health & Saf.C. 50588.*) The following forms have been adopted:

Form No. TH-100 [Petition for Order Prohibiting Abuse or Program Misconduct].

Form No. TH-110 [Order to Show Cause and Temporary Restraining Order].

Form No. TH-120 [Participant's Response].

Form No. TH-130 [Order After Hearing].

Form No. TH-140 [Proof of Personal Service].

Form No. TH-190 [Restatement of Transitional Housing Misconduct Act].

Form No. TH-200 [Instructions for Program Operators].

Form No. TH-210 [Instructions for Participants].

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k. Transitional Housing Participant Misconduct.

2. Temporary Restraining Order and Order To Show Cause.

6 *Witkin Cal. Proc. Prov Rem* § 324

[§ 324] Temporary Restraining Order and Order To Show Cause.

(1) *Temporary Restraining Order.* On filing a petition for an injunction and giving notice to the opposing party, the program operator may obtain a temporary restraining order. However, notice is not required if facts shown by affidavit establish that great or irreparable harm would result to the program manager, a program participant, or a person residing within 100 feet of the program site before the matter could be heard on notice. (*Health & Saf.C. 50585(b)*.) Under *Health & Saf.C. 50585(b)*, the operator or the operator's attorney must show by affidavit one of the following:

(a) Within a reasonable time before the application the applicant informed the opposing party or the party's attorney of the time and place the application would be made.

(b) The applicant in good faith attempted to inform the opposing party or the party's attorney of the time and place the application would be made, but was unable to do so, specifying the efforts made.

(c) For reasons specified the applicant should not be required to inform the opposing party or the party's attorney of the time and place the application would be made.

The temporary restraining order may be granted on an affidavit showing reasonable proof of abuse or program misconduct that would result in great or irreparable harm. The order remains in effect, at the court's discretion, for not more than 5 days unless modified, extended, or terminated by the court. (*Health & Saf.C. 50585(b)*.) (See Judicial Council Form No. TH-100 [Petition for Order Prohibiting Abuse or Program Misconduct]; Judicial Council Form No. TH-110 [Order to Show Cause and Temporary Restraining Order].)

(2) *Order To Show Cause.* Not more than 5 days from the date of the temporary restraining order, the matter must be made returnable on an order to show cause why the injunction should not be granted. (*Health & Saf.C. 50585(c)*.)

(3) *Service on Defendant.* At least 2 days before the hearing, the party who obtained the order must serve on the opposing party a copy of the petition, the temporary restraining order, if any, the notice of hearing, copies of all

affidavits, and a copy of any points and authorities. (*Health & Saf.C. 50585(c).*) The notice of hearing must contain on its face the name and telephone number of a federal Legal Services Corporation office that provides legal services to low-income persons in the county where the action was filed, and must indicate that the number may be called for advice on filing a response to the petition. (*Health & Saf.C. 50585(f).*) If the party who obtained the temporary restraining order is not ready or fails to comply with the service requirements, the court must dissolve the order. The court may, on the filing of an affidavit by the program manager, or by his or her attorney, stating that the participant could not be served on time, reissue the order and state its new expiration date on its face. No fees may be charged for this reissuance. (*Health & Saf.C. 50585(c).*) (See Judicial Council Form No. TH-140 [Proof of Personal Service].)

(4) *Hearing Date and Continuance.* The participant is entitled to a continuance requested before the hearing date. The hearing must be set within 15 days of the application unless the participant requests a later date. The court may extend or modify and extend a temporary restraining order until the hearing is held. (*Health & Saf.C. 50585(c).*)

(5) *Response.* The participant may file a response explaining, excusing, justifying, or denying the alleged conduct. No fee may be charged for filing a response. (*Health & Saf.C. 50585(c).*) (See Judicial Council Form No. TH-120 [Participant's Response].)

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2. Right in Particular Situations.

k. Transitional Housing Participant Misconduct.

3. Hearing and Order.

6 *Witkin Cal. Proc. Prov Rem* § 325

[§ 325] Hearing and Order.

(1) *Hearing*. The judge must receive any relevant testimony or evidence, and may make an independent inquiry. Where clear and convincing evidence of abuse or program misconduct exists, the judge must issue an injunction prohibiting that conduct. (*Health & Saf.C. 50585(c)*.) Neither party is precluded from being represented by private counsel or from self-representation. (*Health & Saf.C. 50585(e)*.) (See Judicial Council Form No. TH-130 [Order After Hearing].)

(2) *Duration of Injunction*. The injunction may be granted for not more than 1 year. Within 3 months before the expiration date, the program operator may apply to renew the injunction by filing a new petition. (*Health & Saf.C. 50585(c)*.)

(3) *Exclusion Order*. In addition to an order restraining abuse, the court may issue an order excluding the participant from the program site or restraining the participant from coming within 200 feet of the site, on an affidavit showing clear and convincing evidence of (a) abuse of a project employee, another participant, or a person residing within 100 feet of the program site, and (b) that great and irreparable injury would result to one of these persons absent the order. An exclusion order may be included in the temporary restraining order only where necessary to protect one of these persons from imminent serious bodily injury. (*Health & Saf.C. 50585(d)*.)

(4) *Enforcement of Injunction*. The clerk must transmit a copy of the temporary restraining order or injunction, or a modification or termination of it, by the close of the business day on which it was granted, to the law enforcement agencies with jurisdiction over the program site. The agency may make available information as to the existence and status of these orders to law enforcement officers responding to the scene of reported abuse or program misconduct. (*Health & Saf.C. 50586(a)*.)

(5) *Effect of Order and Violation*. An order issued under *Health & Saf.C. 50585* does not affect the rights of anyone not named in the order. (*Health & Saf.C. 50585(g)*.) If a participant is found in contempt of the order, the court may modify it to exclude the participant from the program site. (*Health & Saf.C. 50586(c)*.) A participant who violates the

order will be considered to have failed to perform the condition of the agreement under which the property is held, and these conditions cannot afterward be performed. (*Health & Saf.C. 50587.*) Moreover, wilful disobedience of a temporary restraining order or injunction granted under the statute is a misdemeanor under P.C. 166 (criminal contempt, see 2 *Cal. Crim. Law (3d)*, *Crimes Against Governmental Authority*, §§29, 30). (*Health & Saf.C. 50586(b).*)

(6) *Other Civil Remedies.* These provisions do not preclude the program operator from using other civil remedies. (*Health & Saf.C. 50585(g).*)

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2. Right in Particular Situations.

1. Workplace Violence and Threats.

1. Nature and Scope of Statute.

6 *Witkin Cal. Proc. Prov Rem* § 326

[§ 326] Nature and Scope of Statute.

(1) *In General.* *C.C.P. 527.8* authorizes an employer to obtain a temporary restraining order and injunction on behalf of an employee where the employee has suffered "unlawful violence or a credible threat of violence" from an individual "that can reasonably be construed to be carried out or to have been carried out at the workplace." The employer may, at the discretion of the court, also seek a temporary restraining order and an injunction on behalf of other employees at the workplace and, if appropriate, other employees at other workplaces of the employer. (*C.C.P. 527.8(a)*.) However, *C.C.P. 527.8* may not be construed to allow a court to issue a temporary restraining order or injunction prohibiting speech or other activities that are constitutionally protected or protected by *C.C.P. 527.3* (labor disputes; see *supra*, §313) or other provisions of law. (*C.C.P. 527.8(c)*.) Moreover, the statute may not be construed to expand, diminish, or modify an employer's duty, if any, to provide a safe workplace. (*C.C.P. 527.8(l)*.) (On use of active protective order under *C.C.P. 527.8* to obtain new license plates, see *Veh.C. 4467*; on issuance of emergency protective order against stalking, including order under *C.C.P. 527.8*, see *P.C. 646.91 (1 Cal. Crim. Law (3d), Crimes Against the Person, §297)*.)

(2) *Injunction Applies to Natural Person Only.* An injunction prohibiting unlawful violence or threats of violence by an "individual" under *C.C.P. 527.8(a)* may be directed only to a natural person. (*Los Angeles v. Animal Defense League (2006) 135 C.A.4th 606, 622, 37 C.R.3d 632*.)

(3) *Generalized Threat.* An employer may obtain injunctive relief under *C.C.P. 527.8* on behalf of an employee who is a logical target of a generalized credible threat of workplace violence, even if the employee was not specifically identified by the person making the threat. The statute is not limited to threats of violence directed against a particular employee. Given the intent of *C.C.P. 527.8*--to protect against workplace violence--the statute should not be read to except from its operation a threat to indiscriminately shoot employees on the premises. (*USS-Posco Industries v. Edwards (2003) 111 C.A.4th 436, 438, 443, 4 C.R.3d 54* [injunction properly issued to protect department manager who had instigated disciplinary action that led to suspension and termination of employee who had made generalized threats of workplace violence, including threat to "come in gunning"].)

(4) *Award Contravening Injunction. Palo Alto v. Service Employees Int. Union* (1999) 77 C.A.4th 327, 91 C.R.2d 500, involved a city employee who was terminated from employment for threatening to shoot a coemployee and his family. An injunction issued under C.C.P. 527.8 forbidding the employee from going to the coemployee's place of work. Subsequently, an arbitrator's award ordered that the employee be reinstated. The city petitioned to vacate the award. The trial court denied the petition and confirmed the award. *Held*, reversed.

(a) Public policy requires that an injunction be obeyed until it is vacated or withdrawn. (77 C.A.4th 338, citing *W.R. Grace & Co. v. Local Union 759, Int. Union of the United Rubber, Cork, Linoleum & Plastic Workers of America* (1983) 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298.) Enforcement of protective-type orders is considered especially important. This is indicated by the fact that a violation of these orders, including orders under C.C.P. 527.8, is punishable as a criminal contempt. (77 C.A.4th 339.)

(b) The injunction prohibited the employee from going to the coemployee's place of work, which was also the employee's place of work. Thus, the arbitrator's award could not have been put into effect without the employee disobeying the injunction. The arbitrator's award was therefore irreconcilable with the public policy requiring obedience to court orders. (77 C.A.4th 339.)

(5) *Restriction on Ownership, etc. of Firearms.* A person subject to a protective order under C.C.P. 527.8 may not own, possess, purchase, attempt to purchase, or receive a firearm while the order is in effect, and a person who does so is punishable under P.C. 12021(g). The court must order the person to relinquish any firearms he or she owns or possesses. (C.C.P. 527.8(j).) (On relinquishment procedure, see C.C.P. 527.9, *supra*, §319; Judicial Council Form No. WV-145] [Proof of Sale or Turning in of Firearms.)

(6) *Restriction on Locating Protected Party.* Unless there is good cause not to do so, the court must order that a person subject to a protective order under C.C.P. 527.8 may not act to obtain the address or location of a protected party or his or her family members, caretakers, or guardian. (C.C.P. 527.10.)

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1. Workplace Violence and Threats.

2. Definitions.

6 *Witkin Cal. Proc. Prov Rem* § 327

[§ 327] Definitions.

(1) *Unlawful Violence*. "Unlawful violence" means an assault or battery, or stalking as prohibited by P.C. 646.9 (see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §294 et seq.), but does not include lawful acts of self-defense or defense of others. (*C.C.P.* 527.8(b)(1).)

(2) *Credible Threat of Violence*. "Credible threat of violence" is a knowing and wilful statement or course of conduct that would put a reasonable person in fear for his or her safety, or that of his or her immediate family, and that serves no legitimate purpose. (*C.C.P.* 527.8(b)(2).)

(3) *Course of Conduct*. "Course of conduct" means a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." It may include following or stalking the employee to or from work; entering the workplace; following the employee during work hours; making telephone calls or sending correspondence to an employee by any means including public or private mail, interoffice mail, fax, or e-mail. (*C.C.P.* 527.8(b)(3).)

(4) *Employer and Employee*. "Employer" and "employee" mean persons defined in *Lab.C.* 350. An employer includes a federal agency, the state, a state agency, a city, county, or district, and a private, public or quasi-public corporation, or any public agency thereof or therein. An employee includes members of boards of directors of private, public, and quasi-public corporations and elected and appointed public officers, as well as volunteers or independent contractors performing services for the employer at the employer's worksite. (*C.C.P.* 527.8(d).)

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3. Judicial Council Forms.

6 *Witkin Cal. Proc. Prov Rem* § 328

[§ 328] Judicial Council Forms.

The Judicial Council is required to promulgate forms, instructions, and rules for scheduling hearings and other procedures under the workplace harassment statute. The petition and response forms must be simple and concise, and their use is mandatory. (*C.C.P. 527.8(m)*.) The following forms have been approved:

Form No. WV-100 [Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee].

Form No. WV-110 [Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)].

Form No. WV-120 [Order to Show Cause and Temporary Restraining Order (CLETS)].

Form No. WV-130 [Proof of Personal Service (Workplace Violence)].

Form No. WV-131 [Proof of Service of Completed Response (Workplace Violence)].

Form No. WV-132 [Proof of Service of Completed Response (Workplace Violence)].

Form No. WV-140 [Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (CLETS)].

Form No. WV-145 [Proof of Sale or Turning in of Firearms].

Form No. WV-150-INFO [Instructions for Petitions to Prohibit Workplace Violence].

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4. Petition, Service, and Response.

6 *Witkin Cal. Proc. Prov Rem* § 329

[§ 329] Petition, Service, and Response.

(1) *Temporary Restraining Order.* On filing a petition for an injunction against workplace violence and threats, the plaintiff may obtain a temporary restraining order in accordance with *C.C.P. 527(a)* (see *infra*, §363 et seq.) if the plaintiff also files an affidavit that shows, to the court's satisfaction, reasonable proof that an employee has suffered "unlawful violence or a credible threat of violence by the defendant, and that great or irreparable harm would result to an employee." The order remains in effect for up to 15 days, at the court's discretion, unless modified or terminated by the court. In the court's discretion, and on a showing of good cause, a temporary restraining order or injunction issued under *C.C.P. 527.8* may include other named family or household members residing with the employee, or other persons employed at his or her workplace or workplaces. (*C.C.P. 527.8(e)*.) A memorandum of points and authorities is not required, unless otherwise ordered. (*C.R.C., Rule 3.1152(b)*.)

A temporary restraining order or injunction issued under *C.C.P. 527.8* must be issued on forms adopted by the Judicial Council and approved by the Department of Justice under *Family C. 6380(i)*, although orders not issued on those forms are not therefore unenforceable. (*C.C.P. 527.8(n)*.) Information on a temporary restraining order issued under *C.C.P. 527.8* must be transmitted to the Department of Justice in accordance with *Family C. 6380(b)*. (*C.C.P. 527.8(o)*.) (See Judicial Council Form No. WV-100 [Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee]; Judicial Council Form No. WV-120 [Order to Show Cause and Temporary Restraining Order (CLETS)].)

(2) *Service on Defendant.* The defendant must be personally served with a copy of the petition, the temporary restraining order, if any, and a notice of hearing of the petition. Service must be made at least 5 days before the hearing. The time for service on the defendant may be shortened for good cause on motion of the plaintiff or on the court's own motion. (*C.C.P. 527.8(h)*.) Service must be made in the manner provided by law for personal service of a summons in a civil action. (*C.R.C., Rule 3.1152(c)*.) (See Judicial Council Form No. WV-130 [Proof of Personal Service (Workplace Violence)].)

(3) *Response by Defendant.* The defendant may file a response that "explains, excuses, justifies, or denies" the

alleged violence or threats of violence or may file a cross-complaint. (*C.C.P.* 527.8(f).) The defendant's response must be filed and delivered to the plaintiff or the plaintiff's attorney within 48 hours before the hearing. (*C.R.C.*, Rule 3.1152(d).) (See Judicial Council Form No. WV-110 [Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)]; Judicial Council Form No. WV-131 [Proof of Service of Completed Response (Workplace Violence)]; Judicial Council Form No. WV-132 [Proof of Service of Completed Response (Workplace Violence)].)

(4) *Anti-SLAPP Motion Is Available.* A petition for injunctive relief under *C.C.P.* 527.8 is subject to an anti-SLAPP motion. (*Los Angeles v. Animal Defense League* (2006) 135 *C.A.4th* 606, 617, 37 *C.R.3d* 632 [citing *Thomas v. Quintero* (2005) 126 *C.A.4th* 635, 24 *C.R.3d* 619, *supra*, §321].) (On SLAPP actions generally, see 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.)

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5. Hearing, Determination, and Enforcement.

6 *Witkin Cal. Proc. Prov Rem* § 330

[§ 330] Hearing, Determination, and Enforcement.

(1) *Hearing and Determination.* Within 15 days after the petition is filed, a hearing must be held. (*C.C.P.* 527.8(f); see *C.R.C.*, Rule 3.1152(a).) The judge must receive relevant testimony and may make an independent inquiry. If the defendant is a current employee of the entity seeking the injunction, the judge must receive evidence as to the employer's retention, termination, or other discipline of the defendant. If the judge finds that there is clear and convincing evidence that the defendant engaged in unlawful violence or made a credible threat of violence, the judge must issue the injunction. (*C.C.P.* 527.8(f).) (On clear and convincing evidence, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §38 et seq.)

The plaintiff must also establish that, without an injunction, harm would result to an employee. In *Scripps Health v. Marin* (1999) 72 *C.A.4th* 324, 85 *C.R.2d* 86, plaintiff hospital obtained an injunction under *C.C.P.* 527.8(f) prohibiting defendant from contacting any of plaintiff's employees or coming within 500 yards of plaintiff's facility. Plaintiff sought the injunction after defendant allegedly became upset about the treatment his mother was receiving at the hospital and assaulted one of plaintiff's employees. *Held*, reversed.

(a) While at first glance *Welf.C.* 527.8(f) appears to state that once the trial court finds by clear and convincing evidence that defendant has engaged in an act of unlawful violence a permanent injunction must issue prohibiting further unlawful violence, such a literal interpretation cannot be given to the statutory language. (72 *C.A.4th* 332.)

(b) Under *C.C.P.* 527.8(e) (*supra*, §329), a plaintiff may obtain a temporary restraining order if it files an affidavit establishing reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by defendant and that great or irreparable harm would result to an employee. This means that a plaintiff must show that future unlawful violence is likely in the absence of a restraining order. "In this light, to read literally the language of section 527.8, subdivision (f) would result in the absurd consequence of placing a greater burden of proof on plaintiff to obtain an *ex parte* TRO than a permanent injunction." (72 *C.A.4th* 334.)

(c) The underlying legislative history does not indicate that the Legislature intended to alter the traditional nature of

prohibitory injunctive relief. "Rather, it is quite clear the Legislature intended to provide employers with the remedy of injunctive relief to protect their employees by preventing unlawful violence where it is reasonably likely such unlawful violence may occur in the future." (72 C.A.4th 335.)

(d) The record here lacked substantial evidence that defendant was likely to commit further acts of violence against any of plaintiff's employees. Plaintiff's counsel acknowledged that there had been no threats of violence by defendant before or after the alleged assault. Defendant was not subject to a restraining order for 2 months before the evidentiary hearing on the permanent injunction and made no threats and caused no violence during that time, even though his mother remained a patient at plaintiff's facility. Thereafter, defendant's mother transferred her health insurance, making it unlikely that she would return to plaintiff's facility. (72 C.A.4th 336.) (On effect of changed circumstances generally, see *infra*, §343.)

Neither party is precluded from being represented by private counsel or from self-representation. (C.C.P. 527.8(g).) A minor, accompanied by a duly appointed and acting guardian ad litem, may be permitted to appear in court without counsel to obtain or oppose an injunction or temporary restraining order under C.C.P. 527.8. (C.R.C., Rule 3.1153.) (See Judicial Council Form No. WV-140 [Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (CLETS)].)

(2) *Duration of Injunction.* An injunction may be granted for not more than 3 years. The plaintiff may apply to renew the injunction by filing a new petition within 3 months before the injunction expires. (C.C.P. 527.8(f).)

(3) *Enforcement.* The court must order the plaintiff or the plaintiff's attorney to deliver a copy of any restraining order or injunction, or any modification or termination of these orders, by the close of the business day on which it is granted, "to the law enforcement agencies within the court's discretion" requested by the plaintiff. Each agency must make available information to law enforcement officers responding to the scene of reported unlawful violence or a credible threat of violence as to the existence and current status of these orders. (C.C.P. 527.8(i)(1).)

At the request of the plaintiff, an order issued under C.C.P. 527.8 must be served on the defendant, whether or not he or she has been taken into custody, by any law enforcement officer who is present at the scene of reported unlawful violence or a credible threat of violence involving the parties. The plaintiff must provide the officer with an endorsed copy of the order and proof of service, which the officer must complete and send to the issuing court. (C.C.P. 527.8(i)(2).) On receiving information at the scene that a protective order has been issued under C.C.P. 527.8, or that a person who has been taken into custody is the subject of an order, a law enforcement officer, if the plaintiff or the protected person cannot produce an endorsed copy of the order, must immediately attempt to verify its existence. (C.C.P. 527.8(i)(3).)

If the officer determines that a protective order has been issued, but not served, the officer must immediately notify the defendant of its terms, which notification constitutes service of the order, and obtain the defendant's address. The officer must at that time also enforce the order, but may not arrest or take the defendant into custody for acts in violation of the order that were committed before the verbal notice of the terms and conditions of the order. The officer's verbal notice also constitutes sufficient notice for purposes of C.C.P. 527.8, P.C. 273.6 (violation of order to prevent harassment, disturbing peace, or violence; 1 *Cal. Crim. Law (3d)*, *Crimes Against the Person*, §63), and P.C. 12021(g) (acquisition of firearm by subject of restraining order or injunction; 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §180). The plaintiff must mail an endorsed copy of the order to the defendant's mailing address provided to the law enforcement officer within 1 business day of the reported incident. (C.C.P. 527.8(i)(4).)

Intentional disobedience of a restraining order or injunction is punishable under P.C. 273.6. (C.C.P. 527.8(k).) (On punishment of violation of injunction as contempt, see *infra*, §396.)

(4) *No Filing Fee.* Subject to Govt.C. 6103.2(b)(4) (payment of fees for official services of sheriff, marshal, or constable), no filing fee may be charged for the service of a temporary restraining order, or injunction to be issued

pursuant to *C.C.P.* 527.8, if the order or injunction is (a) based on stalking under P.C. 646.9 (see *1 Cal. Crim. Law (3d), Crimes Against the Person*, §294 et seq.), or (b) based on a credible threat of violence. (*C.C.P.* 527.8(q)(1).)

The Judicial Council must prepare and develop forms for applicants who wish to avail themselves of the services described in *C.C.P.* 527.8(q). (*C.C.P.* 527.8(q)(2).) The Judicial Council has adopted the following forms:

Form No. WV-100 [Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)].

Form No. WV-110 [Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)].

SUPPLEMENT: [This section is current through the latest supplement]

Correction: Page 274, fourth and fifth lines from end of page, "*filing fee*" should read "*fee*" and "*sheriff, marshal, or constable*" should read "*sheriff or marshal*".



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2. Right in Particular Situations.

m. Invalid Statute or Ordinance.

1. Injunction Against Enforcement.

6 *Witkin Cal. Proc. Prov Rem* § 331

[§ 331] Injunction Against Enforcement.

(1) *General Rule.* An injunction cannot be granted "[t]o prevent the execution of a public statute, by officers of the law, for the public benefit." (C.C. 3423(d); see *C.C.P.* 526(b)(4).) This general rule applies where the statute is valid and the action taken is required or authorized by it. (See *Agricultural Lab. Rel. Bd. v. Superior Court* (1976) 16 C.3d 392, 401, 128 C.R. 183, 546 P.2d 687 [rule applied to regulation adopted by board under statutory delegation of rulemaking authority and with force and effect of statute]; *People v. Superior Court (Witzerman)* (1967) 248 C.A.2d 276, 282, 56 C.R. 393; *Theresa Enterprises v. Davis* (1978) 81 C.A.3d 940, 946, 146 C.R. 802; *De Mott v. Board of Police Commrs.* (1981) 122 C.A.3d 296, 300, 175 C.R. 879; *Casmalia Resources, Ltd. v. Santa Barbara* (1987) 195 C.A.3d 827, 836, 837, 240 C.R. 903; *Fort Emory Cove Boatowners Assn. v. Cowett* (1990) 221 C.A.3d 508, 514, 270 C.R. 527; *Donaldson v. Lungren* (1992) 2 C.A.4th 1614, 1623, 4 C.R.2d 59 [terminally ill individual contemplating suicide followed by cryogenic preservation could not enjoin coroner from performing autopsy on his body]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§170 et seq.) And where the exercise of authority under a valid statute constitutes an abuse of discretion, that exercise may not be enjoined, but rather is subject to judicial review. (*McCarthy v. Superior Court* (1987) 191 C.A.3d 1023, 1031, 236 C.R. 833 [although parole board's intention to release parolee to Contra Costa County constituted abuse of discretion under P.C. 3003, superior court lacked jurisdiction to enter temporary restraining order prohibiting release].)

(2) *Exceptions.* An injunction against enforcement of a statute or ordinance may issue in four situations:

(a) Where the statute or ordinance is unconstitutional and a showing is made of irreparable injury to property or business. (See *San Diego Tuberculosis Assn. v. East San Diego* (1921) 186 C. 252, 255, 200 P. 393; *Bueneman v. Santa Barbara* (1937) 8 C.2d 405, 407, 65 P.2d 884; *McKay Jewelers v. Bowron* (1942) 19 C.2d 595, 599, 122 P.2d 543; but see *Conover v. Hall* (1974) 11 C.3d 842, 850, 114 C.R. 642, 523 P.2d 682; *Golden Gate Sightseeing Tours v. San Francisco* (1937) 21 C.A.2d 582, 585, 69 P.2d 899 [no showing of irreparable injury]; *Cohen v. Board of Supervisors* (1986) 178 C.A.3d 447, 454, 225 C.R. 114 [insufficient showing of interim harm to plaintiff taxpayer]; *Leach v. San Marcos* (1989) 213 C.A.3d 648, 660, 661, 261 C.R. 805 [same, citing *Cohen* and the text]; see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§177, 184; 7 *Summary* (10th), *Constitutional Law*, §§98, 99.)

(b) Where the statute is valid but is enforced in an unconstitutional manner. (See *Brock v. Superior Court* (1939) 12 C.2d 605, 610, 86 P.2d 805; *Robbins v. Superior Court* (1985) 38 C.3d 199, 212, 213, 211 C.R. 398, 695 P.2d 695, *infra*, §356 [injunction against enforcement of county public assistance program violating recipients' constitutional privacy rights]; *Alfaro v. Terhune* (2002) 98 C.A.4th 492, 500, 120 C.R.2d 197 [implementation of DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. 295 et seq.) without "fleshing out" by administrative regulations was not unconstitutional; regulations were required only "as necessary" to give effect to intent of Act, and Act was sufficiently clear to be implemented without regulations].)

(c) Where the statute is valid but, as construed, does not cover the activities of the plaintiff. (See *MacLeod v. Los Altos* (1960) 182 C.A.2d 364, 369, 6 C.R. 326; *Novar Corp. v. Bureau of Collection & Investigative Services* (1984) 160 C.A.3d 1, 6, 206 C.R. 287 [citing *McLeod*]; *San Jose v. Department of Health Services* (1998) 66 C.A.4th 35, 46, 77 C.R.2d 609 [injunction was proper remedy to stop state department from enforcing, within city's territorial limits, smoking regulations in conflict with city's smoking ordinance, which was valid and was not preempted by state or federal law].)

(d) Where the public official's action exceeds his or her authority. (See *Associated Calif. Loggers v. Kinder* (1978) 79 C.A.3d 34, 45, 144 C.R. 786 [Insurance Commissioner exceeded authority in ordering cancellation of collateral service contracts]; *Alfaro v. Terhune*, *supra* [implementation of DNA and Forensic Identification Data Base and Data Bank Act of 1998 (P.C. 295 et seq.) without "fleshing out" by administrative regulations did not exceed authority of public officials; regulations were required only "as necessary" to give effect to intent of Act, and Act was sufficiently clear to be implemented without regulations].)

However, although the general rule does not preclude the court from issuing an injunction where the constitutionality of a statute or ordinance is challenged, the trial judge should be reluctant to enjoin, before a trial on the merits, the enforcement of an ordinance adopted by duly elected public officials to protect public morality. (*Cohen v. Board of Supervisors* (1986) 178 C.A.3d 447, 453, 225 C.R. 114 [denial of preliminary injunction against enforcement of ordinance regulating escort services was not abuse of discretion]; *Sundance Saloon v. San Diego* (1989) 213 C.A.3d 807, 812, 261 C.R. 841 [affirming denial of preliminary injunction against enforcement of municipal ordinance that generally required cabarets to close between 2:00 and 6:00 a.m.]; see *Xiloj-Itzep v. Agoura Hills* (1994) 24 C.A.4th 620, 635, 29 C.R.2d 879 [First Amendment challenge to application of ordinance].)

(3) *Taxing Statutes*. Taxing statutes present a special problem. Many of them expressly prohibit injunctive relief, and, even though a showing of invalidity is made, the taxpayer is relegated to the remedies of payment under protest and action for a refund. (See *Helms Bakeries v. State Bd. of Equalization* (1942) 53 C.A.2d 417, 422, 128 P.2d 167; 9 *Summary* (10th), *Taxation*, §§295 et seq., 372 et seq.) Taxpayers may not obtain injunctive relief against a state or local tax under 42 U.S.C., §1983 when there is an adequate legal remedy. (*National Private Truck Council v. Oklahoma Tax Com.* (1995) 515 U.S. 582, 115 S.Ct. 2351, 2354, 2355, 132 L.Ed.2d 509, 515; *Writers Guild of America, West v. Los Angeles* (2000) 77 C.A.4th 475, 479, 91 C.R.2d 603 [writers working at home who challenged constitutionality of local business tax had adequate legal remedy in form of action for refund].) (On injunction to prevent waste or illegal expenditure of public funds, see *C.C.P.* 526a; 4 *Cal. Proc.* (5th), *Pleading*, §162.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Exceptions*.

(c) *Statute valid but does not cover activities of plaintiff*: In *Cinquegrani v. Department of Motor Vehicles* (2008) 163 C.A.4th 741, 77 C.R.3d 816, the trial court properly enjoined the DMV from suspending the driver's licenses of individuals convicted of "boating under the influence" (BUI). The DMV based these suspensions on *Veh.C.* 23620(b), which provides that for specified purposes certain BUI violations are separate violations of *Veh.C.* 23152. This statute treats a BUI conviction as if it were a driving under the influence (DUI) conviction for purposes of punishment of a DUI. It cannot properly be interpreted to permit suspension of a driver's license for a BUI conviction. Moreover, suspension of a person's driver's license often constitutes a severe personal and economic hardship, whereas granting the

injunction does not harm the DMV, which is imposing an unauthorized punishment on the public. (163 C.A.4th 749, 751.)



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m. Invalid Statute or Ordinance.

2. Injunction Against Enactment.

6 *Witkin Cal. Proc. Prov Rem* § 332

[§ 332] Injunction Against Enactment.

An injunction cannot issue "[t]o prevent a legislative act by a municipal corporation." (C.C. 3423(g); C.C.P. 526(b)(7).)

The invalidity exception (*supra*, §331) is more difficult to apply here. An individual seeking this extraordinary interference with the legislative process to stop the enactment of legislation unconstitutional as to him or her cannot show irreparable injury, because the individual will have an adequate remedy by action to enjoin its enforcement if it is enacted and if enforcement is attempted. (*Johnston v. Board of Supervisors* (1947) 31 C.2d 66, 71, 187 P.2d 686; *Los Angeles v. Superior Court (Los Angeles Dodgers)* (1959) 51 C.2d 423, 430, 333 P.2d 745; see 19 A.L.R.2d 519 [enjoining submission of constitutional amendment, statute, or municipal charter or ordinance on ground of unconstitutionality]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §154.)

However, the injunction seems appropriate where the very enactment of the unconstitutional legislation would constitute a waste of public money and consequently an irreparable injury to taxpayers. (See *Harnett v. Sacramento* (1925) 195 C. 676, 683, 235 P. 445; *Santa Clara v. Superior Court* (1949) 33 C.2d 552, 557, 203 P.2d 1 [irreparable injury was not shown]; *Kevelin v. Jordan* (1964) 62 C.2d 82, 83, 41 C.R. 169, 396 P.2d 585, 7 *Summary* (10th), *Constitutional Law*, §102 [same test applied to petition for mandamus, and writ denied]; *Legislature v. Deukmejian* (1983) 34 C.3d 658, 665, 194 C.R. 781, 669 P.2d 17, 7 *Summary* (10th), *Constitutional Law*, §103 [writ granted]; *American Federation of Labor-Congress of Industrial Organizations v. Eu* (1984) 36 C.3d 687, 695, 206 C.R. 89, 686 P.2d 609, 7 *Summary* (10th), *Constitutional Law*, §103 [same].) Moreover, the injunction is appropriate where the legislative act results in the loss of property held for the public benefit without an express legislative determination that the loss is in the public's interest. (*Save the Welwood Murray Memorial Library Committee v. City Council* (1989) 215 C.A.3d 1003, 1017, 263 C.R. 896 [city that agreed with developer to use property dedicated for use as public library for dining tables and benches and for improved pedestrian access to commercial development was enjoined from nonlibrary use].)

SUPPLEMENT: [This section is current through the latest supplement]



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n. Judicial Proceeding.

6 *Witkin Cal. Proc. Prov Rem* § 333

[§ 333] Judicial Proceeding.

An injunction may not be granted to stay judicial proceedings of three kinds:

(1) *Pending Judicial Proceeding*. "To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless this restraint is necessary to prevent a multiplicity of proceedings." (C.C. 3423(a); C.C.P. 526(b)(1); see *Wright v. Superior Court* (1903) 139 C. 469, 474, 73 P. 145; *Crittenden v. Superior Court* (1964) 61 C.2d 565, 569, 39 C.R. 380, 393 P.2d 692, 2 Cal. Proc. (5th), *Jurisdiction*, §325; *In re Marriage of Van Hook* (1983) 147 C.A.3d 970, 987, 195 C.R. 541 [restriction does not prohibit enjoining enforcement of final judgment]; *Glade v. Glade* (1995) 38 C.A.4th 1441, 1455, 45 C.R.2d 695, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §47 [necessarily implied in C.C.P. 526(b)(1) is that judicial proceeding that was not pending at commencement of action in which injunction is demanded may be stayed]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §185 et seq.)

The multiplicity of actions exception is chiefly applied where a number of separate actions are brought involving the same matters, and an injunction in the nature of a bill of peace is granted, staying all but one to be tried. (See 4 Cal. Proc. (5th), *Pleading*, §348; supra, §296.) It may also be proper where a second court attempts to interfere with the continuing jurisdiction of the first court. (See *Rynsbarger v. Dairymen's Fertilizer Cooperative* (1968) 266 C.A.2d 269, 279, 72 C.R. 102.)

(2) *Proceeding in Federal Court*. "To stay proceedings in a court of the United States." (C.C. 3423(b); C.C.P. 526(b)(2); see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §218.)

(3) *Proceeding in Another State*. To stay proceedings in another state on a judgment of that state's court. (C.C. 3423(c); C.C.P. 526(b)(3); see 20 A.L.R.6th 211 [propriety of state court injunction against nonmatrimonial action in court of sister state]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §195 et seq.)

Even where no statutory prohibition against enjoining a judicial proceeding applies, the principles of judicial restraint and comity require that California courts use the power to enjoin parties in foreign courts sparingly. In *Advanced Bionics Corp. v. Medtronic* (2002) 29 C.4th 697, 128 C.R.2d 172, 59 P.3d 231, 1 Summary (10th), *Contracts*,

§588, an employee of a Minnesota corporation, who signed a noncompetition agreement on accepting employment, quit his job and took a job with a competitor in California. The employee and his new employer brought an action in California to declare that the noncompetition agreement violated California public policy and was void under *B. & P.C. 16600*. The former employer brought an action in Minnesota to enforce the agreement. The employee and his new employer sought a temporary restraining order (TRO) in California to prohibit the former employer from taking further steps in the Minnesota action. *Held*, the TRO was invalid. Although parallel proceedings naturally result in potentially conflicting judgments, this is not sufficient reason for issuance of a TRO. Nor did California's strong interest in protecting its employees from noncompetition agreements justify issuance of the TRO. Neither of these considerations presents exceptional circumstances sufficient to outweigh the deference owed to an independent foreign proceeding. (29 C.4th 704.)

The *Advanced Bionics* exceptional circumstances test also applies where a TRO seeks to restrain filing an action in a foreign court. (*Biosense Webster v. Superior Court* (2006) 135 C.A.4th 827, 838, 37 C.R.3d 759.) (See 36 U.C. Davis L. Rev. 993 [antisuit injunctions and Full Faith and Credit]; on public policy exception to requirement that sister state injunction be enforced under Full Faith and Credit Clause, see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §447.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Proceeding in Another Country.* Considerations of judicial restraint and international comity require that California courts use the power to enjoin parties in courts outside the United States sparingly. Thus, the exceptional circumstance test of *Advanced Bionics Corp. v. Medtronic* (2002) 29 C.4th 697, 128 C.R.2d 172, 59 P.3d 231, text, p. 279, also applies to courts in foreign nations. (*TSMC North America v. Semiconductor Mfg. Int. Corp.* (2008) 161 C.A.4th 581, 590, 602, 74 C.R.3d 328 [speculation that Beijing Municipal Court was unable or unwilling to decide parties' dispute fairly and efficiently was insufficient to justify antisuit injunction].)



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o. Arbitration Proceeding.

6 *Witkin Cal. Proc. Prov Rem* § 334

[§ 334] Arbitration Proceeding.

Under both California law and the Federal Arbitration Act (9 U.S.C., §1 et seq.), the trial court has authority to grant injunctive relief pending contractual arbitration, but only if an injunction is necessary to preserve the effectiveness of arbitration. (*Davenport v. Blue Cross of Calif.* (1997) 52 C.A.4th 435, 448, 60 C.R.2d 641, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §530 [authority to grant injunction exists only where injunction is necessary to preserve effectiveness of arbitration].) A party to an arbitration agreement can apply for an injunction in connection with an arbitrable controversy on the ground that the award to which the applicant may be entitled may be rendered ineffectual without the injunction. (C.C.P. 1281.8(b).) This provision applies to temporary restraining orders and injunctions issued under C.C.P. 527 (C.C.P. 1281.8(a)(3)), which permits an injunction on a showing that sufficient grounds exist for its issuance. Grounds for issuing an injunction are found in C.C.P. 526. By referring to C.C.P. 527, C.C.P. 1281.8 incorporates the general provisions governing injunctions found elsewhere in the Code of Civil Procedure. Thus, the statute does not relieve an applicant from the burden of showing that the other statutory and common law requirements for injunctive relief have been satisfied. (*Woolley v. Embassy Suites* (1991) 227 C.A.3d 1520, 1528, 1529, 278 C.R. 719, 3 Summary (10th), *Agency and Employment*, §221.) (See 44 U.C.L.A. L. Rev. 2061 [arguing for limited federal court jurisdiction over preliminary injunctions in arbitrable disputes].)

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p. Crime That Is Enjoinable Tort.

6 Witkin Cal. Proc. Prov Rem § 335

[§ 335] Crime That Is Enjoinable Tort.

Equity jurisdiction has a limited operation in the area of criminal conduct:

(1) *Public Nuisance*. If the criminal act is a public nuisance, either under the general statutory definition (C.C. 3480) or by special statutory provision, it may be enjoined. (See C.C. 3369; *People v. Lim* (1941) 18 C.2d 872, 880, 118 P.2d 472 [dictum]; 42 Am.Jur.2d (2000 ed.), *Injunctions* §146; 13 Summary (10th), *Equity*, §73; 4 Cal. Crim. Law (3d), *Jurisdiction and Venue*, §9.) The scope of permissible injunctive relief under California's public nuisance statutes is not limited to independently criminal conduct; however, interference with a collective social interest, to constitute a nuisance, must be both substantial and unreasonable. (*People v. Acuna* (1997) 14 C.4th 1090, 1101, 1107, 60 C.R.2d 277, 929 P.2d 596, 13 Summary (10th), *Equity*, §73 [tracing history of public nuisance doctrine].) (See 24 California Lawyer 43 (October 2004) [gang injunctions].)

(2) *Unfair Competition*. If the conduct is a crime and also constitutes unfair competition, it may be enjoined. (See B. & P.C. 17202; *People v. National Research Co. of Calif.* (1962) 201 C.A.2d 765, 769, 20 C.R. 516, 13 Summary (10th), *Equity*, §110; 42 Am.Jur.2d (2000 ed.), *Injunctions* §151; 13 Summary (10th), *Equity*, §105 et seq.)

(3) *Crime Specifically Made Enjoinable*. If the criminal conduct is specifically made enjoinable, it may be enjoined. The following are illustrative:

(a) C.C.P. 527.7 [proscribing meeting to advocate unlawful acts of violence or force likely to produce imminent and unlawful infliction of serious bodily injury or death, and granting right to enjoin such advocacy at future meetings].

(b) Food & Ag.C. 5310 [violation of agricultural quarantine regulations may be enjoined].

(c) Health & Saf.C. 11570 et seq. [use of place for selling, storing, etc., of illegal drugs may be enjoined].

(d) P.C. 136.2 [court with jurisdiction over criminal matter may restrain conduct intimidating or harassing witness or victim].

Where the criminal act is neither a public nuisance nor unfair competition, and no other statutory authorization for an injunction exists, the court cannot evade the limitations on its civil jurisdiction and deprive the accused of a jury trial by enjoining the act and punishing its violation as a contempt. (See *People v. Lim, supra*; 4 *Cal. Crim. Law* (3d), *Jurisdiction and Venue*, §9.)

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q. Criminal Investigation or Prosecution.

6 *Witkin Cal. Proc. Prov Rem* § 336

[§ 336] Criminal Investigation or Prosecution.

In *Triple A Machine Shop v. California* (1989) 213 C.A.3d 131, 261 C.R. 493, civil and criminal proceedings were pending against Triple A for alleged unlawful disposal of hazardous wastes. The trial judge granted a preliminary injunction prohibiting the district attorney from contacting present and former employees of Triple A on the ground that the prohibited acts violated the attorney-client privilege. The order granting the injunction was reversed, and the court made the following observations on judicial restraint in enjoining criminal investigations:

(a) The discretionary authority of the district attorney is subject to injunctive relief only in extraordinary circumstances, such as "egregiously illegal conduct" or "a clear and imminent threat of such future misconduct." (213 C.A.3d 145.)

(b) The exercise of judicial restraint is also based on the recognition that the law provides adequate remedies for common forms of governmental misconduct in criminal proceedings, such as prohibition against use of evidence obtained in violation of the Sixth Amendment, suppression of evidence seized in violation of the Fourth Amendment, sanctions for prosecutorial misconduct, and disqualification of the prosecutor for conflict of interest. (213 C.A.3d 145.)

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3. Reasons for Denying Injunction.

a. Other Remedies Are Adequate.

1. Damages.

6 *Witkin Cal. Proc. Prov Rem* § 337

[§ 337] Damages.

If the damage is easily ascertainable and a money judgment will afford adequate relief, an injunction should be denied. (*Schwartz v. Arata* (1920) 45 C.A. 596, 601, 188 P. 313 [continuous trespass and conversion of mineral deposits, but defendants were solvent and able to respond in damages]; *Duvall v. White* (1920) 46 C.A. 305, 308, 189 P. 324 [complaint showed amount of loss and no averment of defendant's insolvency]; *Pellissier v. Whittier Water Co.* (1922) 59 C.A. 1, 6, 209 P. 593 [shutting off water supply; but plaintiff could get water by paying questioned rate, and damages, if any, would be amount of overcharge]; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 C.A.3d 121, 130, 135 C.R. 192 [modification of injunction as to remedy upheld; once county transit district terminated its Dial-A-Ride services in areas served by defendant taxi cab companies, injunction was unnecessary because damages were ascertainable]; *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 C.A.3d 454, 459, 191 C.R. 104 [nonjudicial foreclosure sale of condominium units; units had established sales prices and were being openly marketed]; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 C.A.4th 1459, 1472, 28 C.R.2d 734 [allegedly unlawful fee charged by state for mitigation of environmental damage as condition of granting homeowners' permits to build adjacent to Lake Tahoe; damages were readily ascertainable and would fully compensate homeowners if plaintiff homeowners association prevailed]; see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §25; 13 *Summary* (10th), *Equity*, §24.) Moreover, an injunction is inappropriate where monetary damages will afford adequate relief for a breach of contract and these damages are not extremely difficult to ascertain. (*Thayer Plymouth Center v. Chrysler Motors Corp.* (1967) 255 C.A.2d 300, 306, 63 C.R. 148; *Voorhies v. Greene* (1983) 139 C.A.3d 989, 997, 189 C.R. 132.)

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B. Right to Injunction.

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a. Other Remedies Are Adequate.

2. Judicial Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 338

[§ 338] Judicial Remedy.

Injunctive relief may also be denied on the ground that a remedy other than an action for damages is available and adequate. The following are examples:

(1) *Action for Tax Refund*. An injunction will not issue to prevent collection of a tax. (Cal. Const., Art. XIII, §32; see 9 *Summary* (10th), *Taxation*, §297.) The statutory procedure for recovering a tax claimed to be illegal is exclusive. (See 9 *Summary* (10th), *Taxation*, §292 et seq.)

(2) *Mandamus*. In *Moore v. Superior Court* (1936) 6 *C.2d* 421, 57 *P.2d* 1314, an action to enjoin the Fish and Game Commission from enforcing an allegedly arbitrary limitation on the taking of fish for reduction purposes was held improper; plaintiff had the legal remedy of mandamus to compel the granting of the desired permit. (6 *C.2d* 423.) (See 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §26.)

(3) *Quo Warranto*. No injunction may be granted "[t]o prevent the exercise of a public or private office, in a lawful manner, by the person in possession." (C.C. 3423(f); C.C.P. 526(b)(6).) This is true even though the person exercising the office is not legally entitled to it, for other appropriate remedies (e.g., the modern equivalent of the writ of quo warranto) are available. (See *Somo v. Superior Court* (1933) 135 *C.A.* 584, 586, 27 *P.2d* 790; *Hallinan v. Mellon* (1963) 218 *C.A.2d* 342, 348, 32 *C.R.* 446; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §27; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §25.)

(4) *Action for Recovery of Property*. A court of equity ordinarily will not interfere by preliminary injunction to change the possession of real or personal property. (See *San Antonio Water Co. v. Bodenhamer & Sierra Water & Power Co.* (1901) 133 *C.* 248, 251, 65 *P.* 471 [order refusing to dissolve injunction was reversed]; *Voorhies v. Greene* (1983) 139 *C.A.3d* 989, 996, 189 *C.R.* 132; *Simms v. NPCK Enterprises* (2003) 109 *C.A.4th* 233, 243, 134 *C.R.2d* 557 [citing *San Antonio Water Co.* and *Voorhies*]; *Rest.2d*, *Torts* §§945, 946.)

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3. Administrative Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 339

[§ 339] Administrative Remedy.

The existence of an administrative remedy will bar equitable as well as legal relief until it has been exhausted. (*Teeter v. Los Angeles* (1930) 209 C. 685, 687, 290 P. 11; see *Plumbing, Heating & Piping Employers Council v. Howard* (1975) 53 C.A.3d 828, 834, 126 C.R. 406 [grievance-arbitration procedure of collective bargaining agreement]; *Rest.2d, Torts* §948; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §30; 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §125; 3 *Cal. Proc.* (5th), *Actions*, §325 et seq.)

Where an administrative agency is better equipped to provide an alternative and more effective remedy, the courts may abstain from issuing an injunction. (*Alvarado v. Selma Convalescent Hosp.* (2007) 153 C.A.4th 1292, 1306, 64 C.R.3d 250, citing *Diaz v. Kay-Dix Ranch* (1970) 9 C.A.3d 588, 88 C.R. 443, *infra*, §340.) In *Alvarado*, plaintiff filed a class action lawsuit seeking restitution and injunctive relief to require owners and operators of skilled nursing and intermediate care facilities to comply with nursing hour requirements set forth in *Health & Saf.C. 1276.5(a)*. The trial court sustained a demurrer without leave to amend. *Held*, affirmed. Granting injunctive relief "would place a tremendous burden on trial court to undertake a classwide regulatory function and manage a long-term monitoring process to ensure compliance" with the statute. The State Department of Health Care Services, on the other hand, has the power, expertise, and statutory mandate to regulate and enforce *Health & Saf.C. 1276.5(a)*. Because there was an alternative and more effective means of ensuring compliance with the statute, the trial court did not abuse its discretion in abstaining from issuing an injunction. (153 C.A.4th 1306.)

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Correction: Page 283, line 2 of section, "*Teeter v. Los Angeles*" should be "*Teeter v. Los Angeles*".



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a. Other Remedies Are Adequate.

4. Federal Executive Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 340

[§ 340] Federal Executive Remedy.

In *Diaz v. Kay-Dix Ranch* (1970) 9 C.A.3d 588, 88 C.R. 443, plaintiffs, migratory farm workers employed at ranches in the Sacramento valley, sued defendants, owner-operators of the ranches. The complaint alleged that defendants commonly employed illegal entrants under inferior conditions, thereby unlawfully competing with domestic farm workers. The prayer was for an injunction against knowing employment of illegal entrants. *Held*, judgment for defendants on demurrer affirmed.

(a) Assuming that defendants' activities were tortious because they violated the policy of the federal Immigration and Nationality Act, and that plaintiffs had a cause of action for unfair competition or interference with the right to pursue a lawful occupation, the court must compare the effects of granting and withholding equitable relief. (9 C.A.3d 593.)

(b) Plaintiffs' need for protection against job competition of illegal entrants is undeniable, and the statute expresses a national policy to protect them. But the lack of protection is a result of the federal Government failing to enforce the law, and, through the Social Security Administration, aiding in its frustration. (9 C.A.3d 597.)

(c) If the state courts undertook the task of enforcement, there would be innumerable injunctions, with sanctions and court proceedings to supervise employment activities. These would subject farm operators to burdensome regulation and the courts to burdensome responsibilities. (9 C.A.3d 599.)

(d) Although the farm workers' need outweighs the possible predicament of enjoined employers, a third factor, "the comparative efficacy of federal action," tips the scales against the relief sought. "Plaintiffs seek the aid of equity because the national government has breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." (9 C.A.3d 599.)

Several additional decisions are noteworthy. (See *Larez v. Oberti* (1972) 23 C.A.3d 217, 221, 222, 100 C.R. 57

[following *Diaz*, but pointing out that *Lab.C. 2805*, enacted in 1971 and repealed in 1988, made such conduct a criminal offense and permitted action for damages, and that this legal remedy was an additional reason for denying an injunction]; *Congress of Calif. Seniors v. Catholic Healthcare West* (2001) 87 C.A.4th 491, 510, 104 C.R.2d 655 [union was not entitled to state court injunction requiring hospital to disgorge money acquired by means of alleged unfair business practices, i.e., obtaining Medi-Cal reimbursement for costs incurred by hospital to deter unionization by employees; federal rather than state system is appropriate place to enforce Medi-Cal cost provisions; following *Diaz*.)]

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b. Plaintiff's Unclean Hands.

6 *Witkin Cal. Proc. Prov Rem* § 341

[§ 341] Plaintiff's Unclean Hands.

As in other equitable proceedings, the plaintiff's wrongful conduct in the same transaction ("unclean hands") is a bar to equitable relief. (See *Germo Mfg. Co. of Missouri v. McClellan* (1930) 107 C.A. 532, 541, 290 P. 534 [reviewing cases holding that misconduct is not bar unless connected with transaction]; *London v. Marco* (1951) 103 C.A.2d 450, 453, 229 P.2d 401; *Rest.2d, Torts* §940; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §20; 5 *Cal. Proc.* (5th), *Pleading*, §1126; on what constitutes unclean hands, see 13 *Summary* (10th), *Equity*, §9 et seq.)

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See *Jay Bharat Developers v. Minidis* (2008) 167 C.A.4th 437, 445, 84 C.R.3d 267 [alleged fraud of franchisor did not constitute unclean hands precluding injunctive relief where terminated franchisee continued to use franchisor's trademark; nature of alleged misconduct did not affect equitable relations between litigants, and fraud, if established, was compensable by money damages].



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c. Laches.

6 *Witkin Cal. Proc. Prov Rem* § 342

[§ 342] Laches.

The plaintiff's delay in asking for relief while the defendant expends effort and money, or incurs substantial obligations, is another strong reason for denying an injunction. (See *Schwartz v. Arata* (1920) 45 C.A. 596, 602, 188 P. 313; *Vesper v. Forest Lawn Cemetery Assn.* (1937) 20 C.A.2d 157, 165, 67 P.2d 368; *Rest.2d, Torts* §939, Comment a [plaintiff's unreasonable delay in bringing action after he knew or should have known of tort may result in denial of injunctive relief if delay has operated to prejudice defendant or has weakened court's facility of administration]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §41 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §1125; on what constitutes laches, see 13 *Summary* (10th), *Equity*, §16 et seq.; on effect of delay on claim of irreparable injury, see *supra*, §295.)

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d. Change in Circumstances.

6 *Witkin Cal. Proc. Prov Rem* § 343

[§ 343] Change in Circumstances.

(1) *When Compliance Is Voluntary.* An injunction is no longer necessary when the defendant voluntarily discontinues the wrongful conduct. (*California Service Station & Automotive Repair Assn. v. Union Oil Co.* (1991) 232 C.A.3d 44, 57, 283 C.R. 279, citing the text; *Environmental Protection Information Center v. Maxxam Corp.* (1992) 4 C.A.4th 1373, 1382, 6 C.R.2d 665.) "If, therefore, at the time of the order or judgment ... there is no reasonable probability that past acts complained of will recur, injunctive relief will be denied. Injunctive power is not used as punishment for past acts and is ordered against them only if there is evidence they will probably recur." (*Mallon v. Long Beach* (1958) 164 C.A.2d 178, 190, 330 P.2d 423; see *Donald v. Cafe Royale* (1990) 218 C.A.3d 168, 184, 266 C.R. 804, citing the text; *Thome v. Honcut Dredging Co.* (1941) 43 C.A.2d 737, 742, 111 P.2d 368; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 C.A.4th 415, 422, 21 C.R.2d 303; *Scripps Health v. Marin* (1999) 72 C.A.4th 324, 85 C.R.2d 86, *supra*, §330; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §3.)

In *Mallon, supra*, defendant city, receiving tideland oil revenues under a public trust, deliberately diverted them to general municipal uses. The state sued the city, a settlement was reached and approved by the Legislature, and a consent decree was entered against the city. In this taxpayer's action commenced before the state's action, the city declared its intention to continue use of the funds; after the consent decree, it filed an amended answer stating its intention to comply. *Held*, this change in circumstances justified the trial judge's denial of an injunction. (164 C.A.2d 190.)

In *Engle v. Oroville* (1965) 238 C.A.2d 266, 47 C.R. 630, a flood on the Feather River in December 1955 inundated defendant city's sewage plant, and some effluent reached and contaminated plaintiff's land one-quarter mile below, riparian to the stream. Plaintiff sued for an injunction and damages. By the time of trial, the city had built a new plant elsewhere and the nuisance had wholly ceased. The trial judge nevertheless granted the injunction without prejudice to a motion to dissolve it. The city appealed, thereby depriving the judge of jurisdiction to consider such a motion. *Held*, the injunction should be dissolved. Injunctive relief should not be granted where, at the time of hearing, the conditions have ceased and will not recur, and the right must be determined as of the date of the appellate court decision. Here, under the facts shown by the record, the injunction could serve no useful purpose. (238 C.A.2d 270.)

A number of additional decisions are illustrative.

Cisneros v. U.D. Registry (1995) 39 C.A.4th 548, 573, 46 C.R.2d 233 [where corporation providing renter information had stopped reporting actions unless it could positively identify consumer and had begun disclosing to consumers all cases about which it had made reports, injunction compelling this conduct was properly denied].

East Bay Mun. Util. Dist. v. Department of Forestry & Fire Protection (1996) 43 C.A.4th 1113, 1124, 51 C.R.2d 299 [trial court did not err in refusing to require department to direct policy changes it had already implemented, or in refusing to enjoin department from using illegal guidelines it had expressly and publicly disavowed].

Vernon v. Central Basin Mun. Water Dist. (1999) 69 C.A.4th 508, 518, 81 C.R.2d 650 [trial court properly declined to prohibit water district board member from participating in future decisions in which he might have financial interest; board member had refrained from participating in two most recent decisions and plaintiff failed to show reasonable probability that he would participate again].

Russell v. Douvan (2003) 112 C.A.4th 399, 400, 402, 5 C.R.3d 137 [reversing injunction based on single instance of battery on opposing counsel; at time of hearing on injunction victim no longer represented party in underlying action and attorneys did not regularly oppose each other].

(2) *When Action Is Moot.* The same conclusion is reached where circumstances have so changed as to make the action moot. (See 3 Cal. Proc. (5th), *Actions*, §32.)

(3) *When Injunction Is Proper.* Where there is evidence that the acts will probably recur, injunctive relief is proper. (See *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church* (1952) 39 C.2d 121, 144, 245 P.2d 481; *Fretz v. Burke* (1967) 247 C.A.2d 741, 744, 55 C.R. 879; *Phipps v. Saddleback Valley Unified School Dist.* (1988) 204 C.A.3d 1110, 1118, 251 C.R. 720, quoting the text [permanent injunction compelling school district to admit student with positive test result for AIDS was proper even though student was back in school by time of trial where there was no guarantee that school district would not change its policy]; *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1658, 39 C.R.2d 189, 7 Summary (10th), *Constitutional Law*, §399 [injunction imposing time, place, and manner restrictions on activities of antiabortion demonstrators at clinic]; *Conway v. Pasadena Humane Soc.* (1996) 45 C.A.4th 163, 179, 52 C.R.2d 777, citing the text [request for injunction prohibiting humane society officers from violating Fourth Amendment rights of local pet and property owners was not moot, even though pet seized during unlawful entry had died; it was not shown whether plaintiffs owned some other pet subject to city leash law].)

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e. Public Interest.

6 *Witkin Cal. Proc. Prov Rem* § 344

[§ 344] Public Interest.

The interest of the public may be a reason for denying an injunction against an undertaking of vital importance to the community. (See *Santa Cruz Fair Bldg. Assn. v. Grant* (1894) 104 C. 306, 308, 37 P. 1034; *Loma Portal Civic Club v. American Airlines* (1964) 61 C.2d 582, 588, 39 C.R. 708, 394 P.2d 548, 13 Summary (10th), *Equity*, §173 [denying injunction against major airline terminal for passenger jets]; *Cota v. Los Angeles* (1980) 105 C.A.3d 282, 292, 164 C.R. 323 [damages from halting construction of public building would have exceeded cost of completion]; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 C.A.4th 1459, 1472, 28 C.R.2d 734 [denying injunction against assessment of fee to mitigate environmental damage to Lake Tahoe charged by state as condition of granting permits to build adjacent to lake]; *Rest.2d, Torts* §942; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §36; on public policy exception to requirement that sister state injunction be enforced under Full Faith and Credit Clause, see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §447.)

Thus, where a landowner's water right is invaded by a municipality or public utility under a claim of public use, the defendant may defeat the injunction by an "inverse" condemnation action. In other words, the injunction will be denied, the defendant will be awarded the water right, and the plaintiff will receive an award of money. (See *Hillside Water Co. v. Los Angeles* (1938) 10 C.2d 677, 688, 76 P.2d 681; 8 Summary (10th), *Constitutional Law*, §1143 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §689.)

The public interest may be asserted by statute. Thus, *C.C.P.* 731c precludes an injunction against properly conducted "secondary recovery operations for oil or gas" if an undertaking is given for payment of damages that may result. And *C.C.P.* 526a prohibits injunctions restraining the offer, sale, or issuance of municipal bonds for public improvements or public utilities.

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f. Relative Hardship.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 345

[§ 345] In General.

The relative hardship to the parties is an important factor in determining the right to injunctive relief. (See *IT Corp. v. Imperial* (1983) 35 C.3d 63, 71, 196 C.R. 715, 672 P.2d 121, *infra*, §359; *Butt v. California* (1992) 4 C.4th 668, 692, 15 C.R.2d 480, 842 P.2d 1240, 8 Summary (10th), *Constitutional Law*, §807 [weighing relative harm to state and students if school district closed its schools 6 weeks early due to budget crisis]; *Transcentury Properties v. California* (1974) 41 C.A.3d 835, 843, 116 C.R. 487, citing the text; *Rest.2d, Torts* §941; 23 *Loyola L.A. L. Rev.* 1215 [economic and statistical analysis of rule balancing hardships for granting preliminary injunctions]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §35 et seq.; 13 *Summary* (10th), *Equity*, §169 et seq.; *supra*, §293.)

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f. Relative Hardship.

2. Doctrine Applied.

6 *Witkin Cal. Proc. Prov Rem* § 346

[§ 346] Doctrine Applied.

In *Christensen v. Tucker* (1952) 114 C.A.2d 554, 250 P.2d 660, *infra*, §348, defendants' structures (cement curb, driveway, etc.) encroached from inches to several feet on 21/2% of the total area of plaintiff's land. The trial judge gave defendants the option of removal and payment of \$ 50 damages, or title to the encroached area on payment of \$ 200 (which they chose). *Held*, the judgment was erroneous (a) in granting title to defendants where an easement would have been sufficient protection; (b) for failure of the court to determine whether the respective parties were negligent; (c) for failure to take evidence on the amount of hardship. (114 C.A.2d 563.)

In *O'Connell v. Superior Court* (2006) 141 C.A.4th 1452, 47 C.R.3d 147, the trial court granted a preliminary injunction prohibiting the State Board of Education from denying diplomas to otherwise eligible members of the 2006 graduating class at California public high schools who had not passed the California high school exit exam. The trial court concluded that there would be no harm from granting the injunction and that plaintiff students would suffer severe and irreparable injury if the injunction were not granted. *Held*, the trial court failed to consider and balance the harm from granting the injunction.

(a) *Harm to plaintiffs*. The trial court based its determination that the potential harm weighed heavily in favor of plaintiffs on the deleterious effects of the deprivation of a high school diploma. However, the trial court failed to consider that at least in some cases, plaintiffs' failure to pass the exam would result only in a delay in receiving the diploma, rather than a permanent denial. The record indicated numerous options by which plaintiffs could continue their education and obtain a high school diploma or a similar certificate. (141 C.A.4th 1468.) Plaintiffs contended that all the alternatives were not available to every student, and that delaying educational or employment opportunities would cause appreciable harm in itself. However, the trial court did not enter specific factual finding on these matters. (141 C.A.4th 1469.)

(b) *Harm to defendants*. The trial court failed to consider evidence in the record that the injunction would cause substantial harm to students who did pass the exam, to students who did not pass the exam, and to the public interest. Granting diplomas to students who had not passed the exam would debase the value of the diplomas earned by those

students who had passed the exam. Moreover, the award of diplomas to students who had not passed the exam would deprive them of additional remediation. Finally, the court disregarded the public interest in enforcing the exit exam diploma requirement as part of the effort to raise academic standards in the public schools. (*141 C.A.4th 1471.*)

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f. Relative Hardship.

3. Defense Rejected.

6 *Witkin Cal. Proc. Prov Rem* § 347

[§ 347] Defense Rejected.

In *Pacific Gas & Elec. Co. v. Minnette* (1953) 115 C.A.2d 698, 252 P.2d 642, defendants built a concrete block building underneath the electric transmission wires of plaintiff, in violation of its easements and in dangerous proximity to the wires. *Held*, a mandatory injunction to compel removal was properly granted. The court applied the Restatement tests, pointing out that defendants were deliberate wrongdoers acting with full knowledge of the situation, and that plaintiff was a public utility with its property dedicated to a public use and not guilty of any misconduct or laches. On the relative adequacy of injunction and other remedies, the court said: "Encroachment was substantial, permanent and continuing, in gross violation of the plaintiff's rights of way; the situation created by appellants' building might well subject respondent to the alternative of corrective construction of its lines, or the risk of injury to third parties with resultant litigation. On the other hand, the damage alternative would be difficult to admeasure and would involve a large amount of speculation, as even corrective measures, such as raising the wires, could easily involve inconvenience and expense in future maintenance." (115 C.A.2d 709.)

Another indication that the relative hardship defense is not to be loosely upheld on vague equitable considerations appears in *Fairrington v. Dyke Water Co.* (1958) 50 C.2d 198, 323 P.2d 1001. Defendants purchased land with a revocable license to erect a sign on property retained by the vendors. On the death of the vendors, which terminated the license, plaintiffs, their successors, sought a mandatory injunction to remove the sign. The trial judge, though retaining jurisdiction for the future, denied relief on the grounds that (a) the sign "is a substantial benefit to the defendant in the carrying on of its business," and (b) it "constitutes no substantial detriment to Plaintiffs at the present time and does not interfere with any present or contemplated use of their property by them." (50 C.2d 200.) *Held*, these findings were no defense, and plaintiffs were entitled to an injunction and a decree quieting their title. "Deprivation of a substantial benefit ... falls short of the imposition of substantial hardship. ... When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. ... Thus, proof of irreparable injury is a necessary element of a defense based upon a balancing of conveniences." (50 C.2d 200; on irreparable injury, see *supra*, §295.)

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g. Bad Faith.

6 Witkin Cal. Proc. Prov Rem § 348

[§ 348] Bad Faith.

(1) *Theory and Test.* In *Christensen v. Tucker* (1952) 114 C.A.2d 554, 250 P.2d 660, supra, §346, the court made the following definitive statement of the correct judicial approach to an encroachment case: "It starts with the premise that defendant is a wrongdoer, and that plaintiff's property has been occupied. Thus, doubtful cases should be decided in favor of the plaintiff. In order to deny the injunction, certain factors must be present: 1. Defendant must be innocent--the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant. But where these factors exist, the injunction should be denied, otherwise, the court would lend itself to what practically amounts to extortion." (114 C.A.2d 562, 563.)

(2) *Application of Test.* In *Brown Derby Hollywood Corp. v. Hatton* (1964) 61 C.2d 855, 40 C.R. 848, 395 P.2d 896, the owner leased a restaurant building to defendant H, and the adjacent lot to System Auto Parks as a parking lot. Later the owner leased the parking lot to Broadway, which subleased to plaintiff. The controversy arose out of defendant H's use of a strip of the parking lot, 5 feet by 48 feet, for storing the garbage from the restaurant. H did so for many years without objection from plaintiff's predecessors or plaintiff. But in 1961, the health and fire departments ordered discontinuance of the uncovered storage of garbage, and H, with approval of the owner but not of plaintiff, built a brick extension of his building on the strip, at a cost of about \$ 5,000. In this action by plaintiff, the trial judge denied a mandatory injunction and instead awarded damages of \$ 728.79. Thus, the judge determined that defendant H had no prescriptive right, but failed to make an express finding on the crucial issue: whether defendant H acted in good faith or acted in wilful disregard of plaintiff's rights, hoping that a court would allow the structure to remain and grant only damages. (61 C.2d 860.) *Held*, reversed.

The rule against mandatory injunction applies where the defendant is innocent, but one is not innocent if one wilfully encroaches, without a good faith belief in one's right. So the question was not just whether defendant H

intentionally encroached, but whether he did so in a good faith belief (here perhaps induced, as he claimed, by plaintiff's prior conduct) that he had a right to do so. (61 C.2d 859.) (See *Scheble v. Nell* (1962) 200 C.A.2d 435, 438, 19 C.R. 375 [encroachment doctrine was applicable and summary judgment was reversed for failure to consider it]; *D'Andrea v. Pringle* (1966) 243 C.A.2d 689, 695, 52 C.R. 606 [encroachment, following *Brown Derby*; judgment denying injunction was reversed for failure to make proper findings on innocence or good faith]; *State Bd. of Barber Examiners v. Star* (1970) 8 C.A.3d 736, 739, 87 C.R. 450; *Donnell v. Bisso Bros.* (1970) 10 C.A.3d 38, 46, 88 C.R. 645; *Cota v. Los Angeles* (1980) 105 C.A.3d 282, 292, 164 C.R. 323.)

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h. Success on Merits Is Improbable.

6 *Witkin Cal. Proc. Prov Rem* § 349

[§ 349] Success on Merits Is Improbable.

A trial judge may not grant a preliminary injunction, regardless of the balance of interim harm, if there is no possibility that the plaintiff will ultimately prevail on the merits. (*Butt v. California* (1992) 4 C.4th 668, 678, 15 C.R.2d 480, 842 P.2d 1240, 8 Summary (10th), *Constitutional Law*, §807; *Walker v. Meehan* (1987) 194 C.A.3d 1290, 1304, 240 C.R. 171; *supra*, §293.) Thus, the scope of the relief that the plaintiff may obtain preliminarily must be limited by the scope of the relief that the plaintiff is likely to obtain ultimately at the trial on the merits (*Common Cause of Calif. v. Board of Supervisors* (1989) 49 C.3d 432, 442, 261 C.R. 574, 777 P.2d 610.)

If the plaintiff has failed to demonstrate a reasonable probability of success on the merits, a preliminary injunction should be denied. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 C.A.3d 438, 442, 216 C.R. 462; *Scaringe v. J.C.C. Enterprises* (1988) 205 C.A.3d 1536, 1542, 253 C.R. 344; *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 C.A.4th 1487, 1497, 83 C.R.2d 455 [even though defendants resorted to self-help in placing fence in middle of contested easement, trial court should not have granted preliminary injunction requiring removal of fence; plaintiff had no reasonable probability of succeeding on merits]; *Citizens for Better Streets v. Board of Supervisors of San Francisco* (2004) 117 C.A.4th 1, 6, 11 C.R.3d 349 [preliminary injunction against city's long-term lease of real property at fraction of its fair market value was properly denied; lease complied with statutory requirement that land conveyed to city, or proceeds of its sale, be used solely for building system of alternate streets to replace freeway].) Denial of the injunction is appropriate under these circumstances even though irreparable injury may result; there is no justification for delaying an injury that, even though irreparable, is inevitable. (*Jessen v. Keystone Savings & Loan Assn.* (1983) 142 C.A.3d 454, 459, 191 C.R. 104; *Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 C.A.4th 415, 422, 21 C.R.2d 303.)

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Failure to demonstrate reasonable probability of success: See *Nelson v. Avondale Homeowners Assn.* (2009) 172 C.A.4th 857, 863, 91 C.R.3d 726 [trial court did not abuse its discretion in denying plaintiff's motion for preliminary injunction to stop his homeowners association from barring patients of his counseling practice from entering premises; plaintiff admitted he was operating home business, which was direct violation of association's rules and regulations, and

failed to present cogent legal arguments and authority and citations to record to support his discrimination claims].



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i. Completed Acts.

1. General Rule.

6 *Witkin Cal. Proc. Prov Rem* § 350

[§ 350] General Rule.

It is said that an injunction lies only to prevent threatened injury, and that it cannot be used to prohibit an act already completed. This statement is true in a limited sense: no prohibitory injunction can issue to restrain a completed act, and no mandatory injunction will issue if the wrong is one that can no longer be corrected by affirmative steps. As the court observed in *McManus v. KPAL Broadcasting Corp.* (1960) 182 C.A.2d 558, 6 C.R. 441: "Obviously, a completed wrong cannot be corrected by a preliminary injunction, the purpose of which is to preserve the *status quo* until after final judgment, though the facts be such that the plaintiff is entitled to some form of permanent relief. Thus, an injunction will not be granted to restrain the destruction of a ditch already destroyed, or to prevent the opening of a street already opened, or to prohibit the erection of a building previously built." (182 C.A.2d 563.)

In *McManus*, a preliminary injunction issued to prevent construction of a radio tower on the ground of invalidity of proceedings before the planning commission and excess of authority of the city council in granting the permit. However, prior to service of the order to show cause and issuance of a restraining order, the tower was erected. *Held*, order granting injunction reversed. (182 C.A.2d 564.)

In *Wright v. Board of Public Works of Los Angeles* (1912) 163 C. 328, 125 P. 353, plaintiff sought to enjoin a sale of land for delinquent assessments. At the time of hearing on the application for a preliminary injunction, defendant board had already made the sale. *Held*, the application was properly denied because "a court of equity will not undertake to restrain the doing of an act, single and complete in its nature, that has already been performed." (163 C. 330.)

A number of decisions are to similar effect. (See *Flood v. E.L. Goldstein Co.* (1910) 158 C. 247, 250, 110 P. 916 [preliminary injunction to prevent wrecking of building in which plaintiff tenant had room; dissolved because wrecking was nearly complete and plaintiff's term had nearly expired]; *Griffith v. Department of Public Works* (1959) 52 C.2d 848, 854, 345 P.2d 469 [no injunction against erection of freeway that was virtually completed when affidavits were filed]; *Thome v. Honcut Dredging Co.* (1941) 43 C.A.2d 737, 741, 111 P.2d 368; *Allen v. Hotel & Restaurant Employees' Int. Alliance & Bartenders' Int. League* (1950) 97 C.A.2d 343, 347, 217 P.2d 699, *infra*, §351; *People v.*

Paramount Citrus Assn. (1957) 147 C.A.2d 399, 413, 305 P.2d 135.) (See 42 Am.Jur.2d (2000 ed.), *Injunctions* §2.)

Where the harm that an injunction was sought to correct has already been done, and there is no indication that the conduct causing the harm will recur, there is nothing left to prevent, and the completed act doctrine prohibits issuance of an injunction. But where the harm is a continuing interference with the plaintiff's rights, which could be prevented by granting an injunction, the completed act doctrine does not preclude the issuance of an injunction. (*Sahlolbei v. Providence Healthcare* (2003) 112 C.A.4th 1137, 1157, 5 C.R.3d 598 [physician who was entitled to hearing before termination of his staff membership was also entitled to injunction reinstating his staff privileges pending hearing; citing *Volpicelli v. Jared Sydney Torrance Memorial Hosp.* (1980) 109 C.A.3d 242, 167 C.R. 610].)

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i. Completed Acts.

2. Mandatory Injunction.

6 *Witkin Cal. Proc. Prov Rem* § 351

[§ 351] Mandatory Injunction.

If the wrong is one that can be undone, the so-called rule against injunctive relief would mean that the court cannot issue a mandatory injunction. It is well settled, however, that in a proper case, a permanent mandatory injunction may issue to compel the defendant to remove encroachments or otherwise restore original conditions, thus undoing a completed wrong. (See *Taft v. Washington* (1915) 29 C.A. 197, 199, 154 P. 1073; *supra*, §280.)

On the other hand, a mandatory injunction may be improper where a prohibitory injunction gives all the necessary relief. *People v. Paramount Citrus Assn.* (1957) 147 C.A.2d 399, 305 P.2d 135, is an example: "It is thus apparent that the prohibitory injunction granted by the court, which enjoined appellant from further engaging in business as a processor without complying with the marketing order, fully served the preventive purposes for which an injunction is granted, and that the mandatory injunction served only to penalize the appellant for the wrong that it had committed, and to force it to undo those wrongs. Its further effect was to grant the plaintiff damages payable in kind without any proof as to the amount of damage actually sustained." (147 C.A.2d 413.)

In *Allen v. Hotel & Restaurant Employees' Int. Alliance & Bartenders' Int. League* (1950) 97 C.A.2d 343, 217 P.2d 699, plaintiffs, expelled from defendant union, sued for an injunction and damages. They were given a preliminary injunction prohibiting defendant from (a) interfering with their employment, and (b) doing various acts of expulsion. The expulsion had already taken place and the decree stated that its purpose was to restore plaintiffs to their membership. The appellate court reversed the order as to the second (mandatory) part, holding that, whatever might be done by final judgment, a preliminary injunction could not compel restoration of membership. A concurring opinion makes it clear that the question is not one of the court's power, and that, in a compelling case, a mandatory injunction could issue. But it would be too much of a prejudgment of the ultimate issue to compel immediate restoration of membership, and the preliminary prohibitory injunction gave all of the relief presently necessary--protection of job-getting while the issue of right to membership was being tried. (97 C.A.2d 348.)

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j. Constitutionally Protected Activity.

6 *Witkin Cal. Proc. Prov Rem* § 352

[§ 352] Constitutionally Protected Activity.

(1) *Protected Speech*. In *Paradise Hills Associates v. Procel* (1991) 235 C.A.3d 1528, 1 C.R.2d 514, plaintiff developer sued defendant purchaser of a home in plaintiff's subdivision for interference and conspiracy to interfere with prospective economic advantage. The trial judge enjoined defendant from publicizing her dispute with plaintiff over the quality of materials and workmanship in the home. While claiming that defendant's statements were intended to injure his business, plaintiff did not allege that her statements were untrue. *Held*, order granting preliminary injunction reversed.

(a) *Balancing of hardships*. While plaintiff's economic interests were at stake, these were outweighed by defendant's First Amendment right to free speech. An injunction is a prior restraint, and a party seeking to justify a prior restraint carries a heavy burden. (235 C.A.3d 1542.)

(b) *Likelihood of success on merits*. Plaintiff was not likely to succeed on the merits.

(1) Defendant's speech and conduct were protected under the holding in *Blatty v. New York Times Co.* (1986) 42 C.3d 1033, 232 C.R. 542, 728 P.2d 1177, that First Amendment doctrines apply to the tort of intentional interference with prospective economic advantage. *Blatty* was interpreted by *Hofmann Co. v. E.I. Du Pont de Nemours & Co.* (1988) 202 C.A.3d 390, 248 C.R. 384, as barring an action for intentional interference with prospective economic advantage based solely on true statements of fact or opinion. It is immaterial that defendant, unlike the defendants in *Blatty*, was not a member of the press. (235 C.A.3d 1543.)

(2) Defendant was engaged in commercial speech. The free flow of this speech, which insures that private economic decisions will be intelligent and well-informed, is in the public interest and is protected by the *First Amendment*. (235 C.A.3d 1545.)

(3) Under *In re Lane* (1969) 71 C.2d 872, 79 C.R. 729, 457 P.2d 561, defendant's peaceful picketing activities are a form of protected expression. (235 C.A.3d 1545.)

(4) The injunction prohibited defendant from commenting to members of the public on plaintiff's business or the subdivision where her house was located, or from preventing or hindering people from visiting the developer's sales office (which could be done by verbal persuasion as well as physical interference and harassment). These provisions prohibited defendant from making statements based on truthful information and from expressing honestly held opinions, which was an infringement on defendant's First Amendment right to communicate her views. The injunction was therefore overbroad. (235 C.A.3d 1546.)

Several other opinions are illustrative. (See *San Diego Unified Port Dist. v. United States Citizens Patrol* (1998) 63 C.A.4th 964, 970, 74 C.R.2d 364 [injunction requiring political groups to limit their activities at airport to typical airport activities constituted "heckler's veto" in violation of First Amendment; in preventing political conversation or leafleting, injunction went beyond plaintiff's legitimate interest in preventing hostile confrontation] ; *DVD Copy Control Assn. v. Bunner* (2004) 116 C.A.4th 241, 255, 10 C.R.3d 185 [evidence failed to show when defendant posted technology designed to prevent piracy of DVDs on Internet, or that technology was secret when he did so, and ample evidence showed that at time preliminary injunction was sought technology had been widely distributed; injunction was unlawful restraint on right of free speech].)

However, persons who wish to express their views do not have the right to do so whenever and wherever they please without restriction. Hence, an order restraining a person from trespassing on private party and disrupting a religious assemblage is proper. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 C.A.4th 1244, 1252, 121 C.R.2d 810 [church was entitled to restraining order prohibiting former member from trespassing on its property to harass church members and disrupt services; former member's right of free speech did not trump church's right to prohibit her disruptive conduct on its property, which conduct is criminalized by P.C. 302 (intentionally disrupting religious assemblage; 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §16)].)

(2) *Persons Restrained*. An actual notice provision in an injunction restraining activities of antiabortion protestors could not, as a matter of law, bind protestors not named in the injunction as individuals or as part of a class designated by the injunction or affiliated with those named. To determine whether a particular restriction violates free speech rights requires a fact-specific inquiry into whether the restriction burdens more speech than is necessary to serve a significant government interest. The outcome of this inquiry depends on the specific conduct of the persons against whom the restriction is sought to be imposed. Thus, a provision in an injunction stating that the injunction applies to all persons with actual notice of the injunction is overbroad on its face because it purports to enjoin persons without regard to whether they are named parties or affiliated with named parties. (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 C.A.4th 345, 354, 132 C.R.2d 46, *infra*, §391 [use of actual notice provision to obtain injunctive relief against all antiabortion protestors with notice of injunction would make injunction "content based and virtually impossible to justify under current First Amendment jurisprudence"].)

(3) *Exception for Time, Speech, and Manner Regulation*. In *Savage v. Trammell Crow Co.* (1990) 223 C.A.3d 1562, 273 C.R. 302, individuals sought an injunction against defendant shopping center, which was preventing them from placing religious literature on automobiles in the center's parking lot. *Held*, denial of injunction affirmed. While Cal. Const., Art. I, §2, protects the exercise of free speech even in privately owned shopping centers (223 C.A.3d 1571, citing *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 910, 153 C.R. 854, 592 P.2d 341), the property owner has the right to regulate the time, place, and manner of speech. Defendant presented persuasive evidence that its prohibition against leafleting was to avoid litter and traffic control problems, and thus was a valid time, place, and manner regulation. (223 C.A.3d 1571.) (See *Planned Parenthood Shasta-Diablo v. Williams* (1995) 10 C.4th 1009, 1025, 43 C.R.2d 88, 898 P.2d 402, 7 Summary (10th), *Constitutional Law*, §402 [upholding injunction imposing place restriction on picketers at abortion clinic]; *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court* (1997) 56 C.A.4th 996, 1009, 65 C.R.2d 838; but see *Westside Sane/Freeze v. Ernest W. Hahn* (1990) 224 C.A.3d 546, 549, 274 C.R. 51 [upholding preliminary injunction prohibiting shopping mall owners from interfering with political leafleting and speaking at mall; activities protected by *Pruneyard* are not limited to collecting signatures for petitions].)

(4) *Exception for Injunction Prohibiting Continuation of Unlawful Activity.* Once a court has found that a specific pattern of speech is unlawful, an injunctive order prohibiting the repetition, perpetuation, or continuation of that practice is not a prohibited prior restraint of speech. (*Aguilar v. Avis Rent A Car System* (1999) 21 C.4th 121, 140, 144, 87 C.R.2d 132, 980 P.2d 846 [trial court properly enjoined employer from using racial epithets in workplace; jury had determined that employer had engaged in employment discrimination under Fair Employment and Housing Act and injunction simply precluded employer from continuing unlawful activity].) Thus, a court may enjoin the repetition of a statement that has been determined at trial to be defamatory. Such an injunction does not constitute a prohibited prior restraint. (*Balboa Island Village Inn v. Lemen* (2007) 40 C. 4th 1141, 1151, 57 C.R.3d 320, 156 P.3d 339 [following *Aguilar*].)

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(1) *Protected Speech.* In *Evans v. Evans* (2008) 162 C.A.4th 1157, 76 C.R.3d 859, husband sued wife and wife's mother for harassment, defamation, and breach of privacy. Husband obtained a preliminary injunction enjoining wife and her mother from publishing "false and defamatory statements" and "confidential information" about him on the Internet and from contacting his employer, a county sheriff's department, regarding him except to make 911 calls to report criminal activity. *Held*, the preliminary injunction was overbroad and constituted an invalid prior restraint.

(a) *Publishing false and defamatory statements.* While an order prohibiting a party from publishing false statements is a classic type of unconstitutional prior restraint, this rule does not apply to an order issued after a trial prohibiting the defendant from repeating specified statements that have been determined at trial to be defamatory. (162 C.A.4th 1167, citing *Balboa Island Village Inn v. Lemen* (2007) 40 C.4th 1141, 57 C.R.3d 320, 156 P.3d 339, text, p. 298.) Here, however, there had been no determination that any statement made by wife was defamatory; thus, the court's preliminary injunction prohibiting "false and defamatory" statements is constitutionally invalid. Moreover, this broad prohibition fails to adequately delineate what future comments might violate the injunction. That speech on the Internet is involved does not change the analysis; this speech receives the same First Amendment protection as speech on other forums. (162 C.A.4th 1169.)

(b) *Disclosing confidential information.* A prohibition against disclosing confidential information constitutes a prior restraint. However, because it also implicates the right of privacy under Cal. Const., Art. I, §1, a prohibition may be proper under certain compelling or extraordinary circumstances. In this situation, the rights of free speech and privacy must be balanced. Here, it is impossible to determine whether the proper balancing test was applied because the order did not define "confidential personal information." Nor did the injunction sufficiently inform wife as to what information she was prohibited from placing on the Internet. Thus, the order was "vague, overbroad, and not narrowly tailored." (162 C.A.4th 1171.)

(c) *Contacting sheriff's department.* The order prohibiting wife from communicating with the sheriff's department about husband was overbroad. As a citizen, wife was entitled to present concerns to a government agency with law enforcement jurisdiction over the area in which she resided. Balanced against this right, there was little evidence supporting a need for a pretrial injunction. There was no showing in the record that her complaints were numerous or improper, or that they were a factor in husband's failure to be promoted. Husband's embarrassment, alleged hindrance of his ability to conduct his duties, and the possibility that wife's communications would cast the department in a negative light were not alone sufficient to show a need for injunctive relief. Moreover, if the sheriff's department believed the complaints to be unwarranted, it could address this concern through administrative action. (162 C.A.4th 1172.)



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k. Burden on Interstate Commerce.

6 *Witkin Cal. Proc. Prov Rem* § 353

[§ 353] Burden on Interstate Commerce.

In *People v. Eller Telecasting Co.* (1970) 13 C.A.3d 296, 91 C.R. 468, defendant, an Arizona corporation, transmitted television programs to Arizona, Mexico, and Imperial County, California. It carried an optical company's advertisements of eye treatments and devices at fixed prices. This was legal in Arizona, but illegal in California (former B. & P.C. 3129). The district attorney of Imperial County, in an action under the California statute, obtained a preliminary injunction. *Held*, reversed. (a) The injunction imposed an undue burden on interstate commerce (broadcasting across state lines). (13 C.A.3d 300, 302.) (b) It also discriminated against defendant because it was engaged in interstate commerce; other stations in Arizona, operating only locally, could freely accept the advertising. (13 C.A.3d 303.)

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4. Discretion To Grant or Deny Preliminary Injunction.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 354

[§ 354] In General.

While the trial court has broad and flexible discretionary powers in deciding whether to issue a permanent injunction (*Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 C.A.3d 121, 132, 135 C.R. 192), the court's discretion to issue a permanent injunction is not nearly so broad as the discretion it may exercise in determining whether to issue a preliminary injunction. This is so because while a permanent injunction is a determination, on the merits, that the plaintiff has prevailed against the defendant on a cause of action and that equitable relief is proper, a preliminary injunction is merely rendered to maintain the status quo while the cause of action is decided. (*Art Movers v. Ni West* (1992) 3 C.A.4th 640, 646, 4 C.R.2d 689; *Dawson v. East Side Union High School Dist.* (1994) 28 C.A.4th 998, 1041, 34 C.R.2d 108; see *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 240, 256 C.R. 194, supra, §318; *California Service Station & Automotive Repair Assn. v. Union Oil Co.* (1991) 232 C.A.3d 44, 57, 283 C.R. 279.)

The grant or denial of a preliminary injunction is generally within the discretion of the trial court, and the reviewing court finds an abuse of discretion only where the trial court exceeds the bounds of reason or contravenes the uncontradicted evidence. (*Amezcuca v. Pomona* (1985) 170 C.A.3d 305, 309, 216 C.R. 37; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 C.A.4th 1459, 1470, 28 C.R.2d 734; *Xiloj-Itzep v. Agoura Hills* (1994) 24 C.A.4th 620, 636, 29 C.R.2d 879; see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§13, 14.) The party challenging the injunction has the burden of showing an abuse of discretion. (*Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 527, 67 C.R. 761, 439 P.2d 889; *IT Corp. v. Imperial* (1983) 35 C.3d 63, 69, 196 C.R. 715, 672 P.2d 121, infra, §359; *Planned Parenthood v. Wilson* (1991) 234 C.A.3d 1662, 1667, 286 C.R. 427; *Los Altos v. Barnes* (1992) 3 C.A.4th 1193, 1199, 5 C.R.2d 77.)

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b. Discretion To Deny.

1. Denial Upheld.

6 *Witkin Cal. Proc. Prov Rem* § 355

[§ 355] Denial Upheld.

Injunction has long been regarded as an extraordinary remedy that should be granted with great caution. This is particularly true of injunctions pending litigation, issued before a trial on the merits. Even though the plaintiff makes a strong showing of the conditions that might ultimately support a final judgment granting a permanent injunction, that showing may be controverted by the defendant, and at this early stage the case may be regarded as a "doubtful" one. Moreover, a strong showing of the grounds for equitable relief and therefore of the ultimate right to a permanent injunction is not the equivalent of a showing of a pressing need for immediate temporary relief. Hence, the discretion in deciding against provisional injunctive relief is seldom disturbed. "Upon such application a court will consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; and if the court is satisfied, from the nature of the action and the threatened injury, that the rights of the plaintiff will be fully conserved by granting an injunction, after a hearing upon the merits, while, in case the plaintiff should fail to sustain his complaint, the injury sustained by the defendant from the preliminary injunction could not be compensated, a wise discretion would dictate its refusal." (*Santa Cruz Fair Bldg. Assn. v. Grant* (1894) 104 C. 306, 308, 37 P. 1034.)

The same idea was expressed in *Lagunitas Water Co. v. Marin County Water Co.* (1912) 163 C. 332, 125 P. 351: "But a preliminary injunction is not a matter of right. It is addressed to the discretion of the court. In denying it the court does not necessarily determine anything as to the merits of the main controversy. It may conclude that from the evidence produced on the application for a preliminary injunction it does not appear that pending a trial any possible injury can result to the plaintiff, and may decline to grant an injunction until after the trial of the cause." (163 C. 336.) (See *Schwartz v. Arata* (1920) 45 C.A. 596, 601, 188 P. 313 ["It is an extraordinary power, and is to be exercised always with great caution and in those cases only where it fairly appears 'upon all the papers presented, before such injunction is granted, that the plaintiff will suffer irreparable injury if it be not issued, or that it is necessary to preserve the estates of the parties, or some sufficient cause showing that need of hasty action exists'"]; *Hueneme, Malibu & Port Los Angeles Ry. v. Fletcher* (1924) 65 C.A. 698, 703, 224 P. 774; *McCoy v. Matich* (1954) 128 C.A.2d 50, 54, 274 P.2d 714; *Gosney v. California* (1970) 10 C.A.3d 921, 924, 89 C.R. 390; *Gleaves v. Waters* (1985) 175 C.A.3d 413, 416, 220 C.R. 621.)

Where a preliminary injunction has been denied, the denial must be upheld unless the trial court abused its discretion in making the determination. (*IT Corp. v. Imperial* (1983) 35 C.3d 63, 69, 70, 196 C.R. 715, 672 P.2d 121, *infra*, §359.) In exercising its discretion, the courts commonly consider the likelihood that the plaintiffs will prevail on the merits at trial as well as the comparative harm to be suffered by the plaintiffs if the injunction does not issue against the harm to be suffered by defendants if it does. (See *supra*, §293.) If the plaintiffs fail to satisfy either or both of these two prerequisites (interim harm and likelihood of success on the merits), a trial judge's denial of the request for a preliminary judgment will be upheld. (*Cohen v. Board of Supervisors* (1985) 40 C.3d 277, 287, 219 C.R. 467, 707 P.2d 840; see *King v. Meese* (1987) 43 C.3d 1217, 1228, 1235, 240 C.R. 829, 743 P.2d 889 [balance of harms favored defendants and plaintiffs were not likely to succeed on merits]; *Sundance Saloon v. San Diego* (1989) 213 C.A.3d 807, 811, 812, 261 C.R. 841; *Scates v. Rydingsword* (1991) 229 C.A.3d 1085, 1094, 280 C.R. 544.)

The following decisions are illustrative:

Casmalia Resources, Ltd. v. Santa Barbara (1987) 195 C.A.3d 827, 836, 837, 839, 240 C.R. 903 [denial of injunction against enforcement of ordinance regulating hazardous waste site upheld; there was no showing that local regulation was preempted by state law, that ordinance was unreasonable on its face, or that denial would cause waste site operator to sustain damages].

Buhl v. Hannigan (1993) 16 C.A.4th 1612, 1619, 20 C.R.2d 740, 8 Summary (10th), *Constitutional Law*, §1071 [denial of injunction against motorcycle helmet law upheld; plaintiffs were not likely to prevail on merits because law is rationally related to legitimate state interest in ensuring highway safety and is not impermissibly vague].

Metro Traffic Control v. Shadow Traffic Network (1994) 22 C.A.4th 853, 859, 860, 863, 27 C.R.2d 573 [denial of preliminary injunction to restrain competitor from hiring former employees upheld; at will employees were entitled to seek betterment, training received from former employer was not trade secret, and employees were not hired until after competitor had contracted with company's former client].

Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd. (1994) 23 C.A.4th 1459, 1472, 1473, 1484, 28 C.R.2d 734 [denial of injunction prohibiting mitigation fees as condition of permit to build adjacent to Lake Tahoe upheld; state could refund fees if it did not prevail, but might not be able to later collect fees if it did, and fee was negotiated solution to environmental degradation caused by development].

Even if the appellate court finds that the trial court abused its discretion as to one of these factors, it may affirm the trial court's order if it finds no abuse of discretion as to the other. (*Cohen v. Board of Supervisors*, *supra*; see *Leach v. San Marcos* (1989) 213 C.A.3d 648, 657, 261 C.R. 805 [quoting *Cohen*; no interim harm]; *Savage v. Trammell Crow Co.* (1990) 223 C.A.3d 1562, 1571, footnote 2, 273 C.R. 302 [quoting *Cohen*, plaintiff was not likely to succeed on merits]; *Hart v. Cult Awareness Network* (1993) 13 C.A.4th 777, 785, 16 C.R.2d 705 [denial will be upheld if reviewing court determines that trial court's discretion was properly exercised as to either prerequisite]; *Union of Needletrades, Industrial & Textile Employees, AFL-CIO v. Superior Court* (1997) 56 C.A.4th 996, 1009, 65 C.R.2d 838 [labor union seeking to enjoin six malls from enforcing their rules governing free speech rights did not establish probability of prevailing on merits where (a) time, place, and manner rules, (b) questions about insurance, participants, and prior activities, and (c) requirements of insurance or deposit and prior submission of signs were all constitutional]; on relationship between two factors, see *supra*, §293; on outcome where success on merits is improbable, see *supra*, §349.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Discretion To Deny.

2. Denial Reversed.

6 *Witkin Cal. Proc. Prov Rem* § 356

[§ 356] Denial Reversed.

The discretion to deny a preliminary injunction (*supra*, §355) is not whimsical or unlimited, and the reviewing court should reverse an order arbitrarily denying a preliminary injunction to which the plaintiff is obviously entitled. This is true, e.g., where the main action seeks a permanent injunction, and the denial of the temporary restraint would destroy or diminish the value of the final judgment. The early case of *Hicks v. Compton* (1861) 18 C. 206, reversed an order dissolving an injunction against repeated trespass and conversion. "The rights of the defendants are protected by a bond, and no injury can result to them from the continuance of the injunction. The plaintiff has no security whatever, and the dissolution of the injunction leaves him at the mercy of the defendants. The granting and continuing of injunctions of this nature are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured." (18 C. 210.)

To the same effect is *Porter v. Jennings* (1891) 89 C. 440, 26 P. 965, reversing an order refusing a preliminary injunction against the sale of plaintiff's land on execution against his grantor. If the injunction were granted, defendants could not be injured because they were protected by their execution lien and by the injunction bond, but by its denial, plaintiff would lose the benefit of his judgment if he were successful. "[I]f plaintiff prove the allegations of his complaint at the trial, he will be entitled to a judgment of perpetual injunction; but then his judgment is a nullity; the calamity has befallen him; the horse has already been stolen; the sale has already been made; the relief has come too late; the cloud upon his title is an accomplished fact." (89 C. 444.)

In *Riviello v. Journeymen Barbers, Hairdressers & Cosmetologists' Int. Union of America, Local No. 148* (1948) 88 C.A.2d 499, 199 P.2d 400, plaintiff barbers sought an injunction against picketing by defendant union, which offered them only nonactive membership. The trial judge's order denying a preliminary injunction was reversed on the grounds that (a) the uncontradicted evidence supported plaintiffs' demand; (b) plaintiffs' business would be destroyed by picketing during the trial, while the preliminary injunction would only postpone the union's activities until determination on the merits (irreparable injury to plaintiff, only slight injury to defendant). (88 C.A.2d 510.) (See *Carolina Pines v. Catalina Pines* (1932) 128 C.A. 84, 89, 16 P.2d 781; *Ellis v. American Federation of Labor* (1941) 48 C.A.2d 440, 446, 120 P.2d 79; *Plumbing, Heating & Piping Employers Council v. Howard* (1975) 53 C.A.3d 828, 835,

126 C.R. 406, citing the text.)

Where the plaintiff establishes not only that he or she will suffer more harm from denial of the injunction than will the defendant from its grant, but that there is a reasonable probability that he or she will succeed on the merits, the trial court abuses its discretion in denying a preliminary injunction. (*Robbins v. Superior Court* (1985) 38 C.3d 199, 218, 211 C.R. 398, 695 P.2d 695 [denial of injunction prohibiting county assistance program from requiring certain recipients to accept in-kind benefits in lieu of cash grants reversed]; *MaJor v. Miraverde Homeowners Assn.* (1992) 7 C.A.4th 618, 624, 9 C.R.2d 237; *Gardner v. Los Angeles* (1995) 34 C.A.4th 200, 205, 40 C.R.2d 271 [plaintiffs were entitled to injunction prohibiting county from reducing its general relief cash grants to indigent residents].)

Where a person seeking an injunction cannot prevail on the merits, there is no justification for delaying harm to that party that, though it may be irreparable, is also inevitable. (See *supra*, §349.) This principle also applies to a person opposing an injunction. In *14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 C.A.4th 1396, 74 C.R.2d 712, plaintiff, the owner of two condominiums, was denied a preliminary injunction prohibiting a developer, who had purchased the condominium complex from the condominium association, from asserting the validity of the grant deed by which the complex was conveyed. The sales agreement provided that the sale was contingent on the court issuing a partition order, but the complex was sold without a partition order having been issued. *Held*, reversed.

(a) *Success on the merits*. Under C.C. 1358 and 1359, the association could not lawfully convey good title by a grant deed to the developer without first securing a judicial partition of the complex. Thus, there was no likelihood that the developer would prevail on the merits. (63 C.A.4th 1403.)

(b) *Relative harm*. The condominium owner showed that he was preserving the status quo, and that the developer was carrying away items of realty from the complex. The developer attempted to overcome this showing with evidence that the city was threatening to demolish the complex. However, this damage to the complex could not be averted by the developer's flimsy assertion of title; thus, this threatened harm, while perhaps irreparable, was also inevitable, and there was no cognizable countervailing showing of harm. (63 C.A.4th 1408.)

In the following cases, the trial court abused its discretion in refusing to issue a preliminary injunction:

Masonite Corp. v. Mendocino Air Quality Management Dist. (1996) 42 C.A.4th 436, 444, 49 C.R.2d 639 [corporation was entitled to injunction prohibiting disclosure by public agency of information classified as emission factors].

Church of Christ in Hollywood v. Superior Court (2002) 99 C.A.4th 1244, 1252, 121 C.R.2d 810 [church was entitled to restraining order barring former member who had been expelled for harassing congregants and disrupting services from entering church property].

Sahlolbei v. Providence Healthcare (2003) 112 C.A.4th 1137, 1155, 1157, 5 C.R.3d 598, *supra*, §350 [doctor whose staff membership was terminated before hearing, contrary to statutory scheme requiring hearing before proposed action was taken against doctor, was likely to prevail on his claim for reinstatement of his privileges pending hearing, and deprivation of his livelihood was greater hardship to doctor than risk of defects in his performance was to hospital, which could seek alternative remedy].

SUPPLEMENT: [This section is current through the latest supplement]

(*New*) *Effect of reversal*: In *Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 C.A.4th 336, 72 C.R.3d 678, *Supp.*, *supra*, §293, the trial court denied plaintiff's request for a preliminary injunction preventing defendant from demolishing 49 units of housing to make way for a new school. Plaintiff requested the injunction in connection with its challenge to the certification of the Environmental Impact Report (EIR) for the project under the California Environmental Quality Act (CEQA). The trial court expressly refused to address the likelihood of plaintiff's success on the merits, and denied the injunction on the ground that there was no harm in allowing defendant to demolish the

housing units. *Held*, remand was required for the trial court to redetermine the application for preliminary injunction, with due consideration of the interrelated factors of likelihood of success on the merits and relative harm.

(a) *Abuse of discretion standard not applicable.* Ordinarily when it denies an application for a preliminary injunction, the trial court implicitly finds that the plaintiffs have failed to satisfy either or both the interim harm and likelihood of success on the merits factors. On appeal, the question is whether the trial court abused its discretion in ruling on those factors. Even if the appellate court determines that the trial court abused its discretion on one of the factors, it may affirm the order if it finds no abuse of discretion as to the other. Here, however, because the trial court refused to consider the likelihood of success on the merits, the deferential abuse of discretion standard did not apply. (160 C.A.4th 344.)

(b) *Remand required.* In *King v. Meese* (1987) 43 C.3d 1217, 240 C.R. 829, 743 P.2d 889, as here, the trial court denied the plaintiff's motion for a preliminary injunction without considering the likelihood of success on the merits. That case presented a pure question of law on a significant issue of statewide importance, and the appellate court took "the unusual, but practical, step" of resolving the issue on the merits. Ordinarily, it is the role of the appellate court "to review the trial court's exercise of its discretion in applying and weighing the two interrelated factors, rather than to exercise discretion in the first instance." (160 C.A.4th 345.) Moreover, a decision by the appellate court on the merits would "cast a great shadow over the trial on the merits of the CEQA petition." (160 C.A.4th 346.) Thus here, where an ordinary challenge to the sufficiency of an EIR for a local school construction project is involved, remand was appropriate. (160 C.A.4th 345.)



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c. Discretion To Grant.

1. Prohibitory Injunction.

aa. Grant Upheld.

6 *Witkin Cal. Proc. Prov Rem* § 357

[§ 357] Grant Upheld.

The discretion of the trial judge to grant a provisional injunction is of course as broad as the discretion to deny it. (See *supra*, §355.) In upholding the order granting relief, the reviewing court usually stresses its temporary character and the fact that it does not constitute a binding determination on the merits. The governing principle, which calls for a balancing of hardships, is thus stated in *Wilms v. Hand* (1951) 101 C.A.2d 811, 226 P.2d 728, quoting Am.Jur.: "[A] preliminary injunction may be properly issued whenever the questions of law or fact are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss to the opposing party will be trivial if it is granted." (101 C.A.2d 815.)

In *French Art Cleaners v. State Bd. of Dry Cleaners* (1949) 91 C.A.2d 890, 206 P.2d 25, plaintiff dry cleaner was given a preliminary injunction against an allegedly unconstitutional minimum price regulation established by defendant board pursuant to statute. The appellate court affirmed the order, pointing out that the board would suffer no unusual detriment in allowing lower prices to be charged in the interim, but that plaintiff, under threat of fines and other punishment, would have to abandon its low price business if denied relief. The constitutionality of the statute was not determined; the only matter decided was that, balancing the equities, the status quo ought to be maintained until final determination of the constitutional issue. (91 C.A.2d 897.)

In *Heckmann v. Ahmanson* (1985) 168 C.A.3d 119, 214 C.R. 177, corporate directors averted a takeover attempt by purchasing shares from the takeover shareholders at a premium. Other shareholders sought to recover the profit on the sale, alleging a breach of fiduciary duty by both the corporate directors and the takeover shareholders. The trial judge granted a preliminary injunction that imposed a constructive trust on the profits. *Held*, affirmed. The purpose of the injunction was to restrain the takeover shareholders from dissipating the profit from the sale and, thereby, destroying plaintiffs' equitable remedy of constructive trust. There was sufficient evidence that dissipation was already occurring, and that plaintiffs would be left with only a legal claim for damages. (168 C.A.3d 136.)

In *Baypoint Mortg. Corp. v. Crest Premium Real Estate Inv. Retirement Trust* (1985) 168 C.A.3d 818, 214 C.R.

531, defendant, the holder of deeds of trust, began foreclosure proceedings, based on the late payment of installments. Plaintiff debtor brought an action for declaratory relief, alleging bad faith and unfair business practices, and obtained a preliminary injunction prohibiting the creditor from proceeding. *Held*, affirmed. The greater hardship to plaintiff debtor is clear. If the creditor prevails on the merits, the most it will suffer, from issuance of the injunction, will be delay in foreclosure, because it is protected against future losses by the debtor's bond. If the injunction is denied, the debtor could lose its trust deeds and be chargeable with sizable foreclosure expenses. (168 C.A.3d 824, 825.)

Many other cases affirm orders granting preliminary injunctions under various circumstances:

Continental Baking Co. v. Katz (1968) 68 C.2d 512, 528, 67 C.R. 761, 439 P.2d 889, citing the text [restraining defendant from interfering with plaintiff's use of disputed easement].

IT Corp. v. Imperial (1983) 35 C.3d 63, 69, 196 C.R. 715, 672 P.2d 121, *infra*, §359 [enjoining alleged violations of conditional use permit to build and operate hazardous waste disposal facility].

People v. Acuna (1997) 14 C.4th 1090, 1101, 1107, 60 C.R.2d 277, 929 P.2d 596 [enjoining gang member from appearing publicly in four-square-block "urban war zone" with known gang member and from harassing those area residents known to have complained to public authorities about gang activities; provisions were not unconstitutionally vague and did not implicate protected First Amendment conduct].

People v. Columbia Research Corp. (1977) 71 C.A.3d 607, 610, 614, 139 C.R. 517 [rejecting claim of constitutional protection for advertising found to be false or misleading].

California Satellite Systems v. Nichols (1985) 170 C.A.3d 56, 65, 66, 216 C.R. 180 [enjoining unauthorized interception and use of television signal microwaves in violation of federal Communications Act].

Zakaria v. Lincoln Property Co. (1986) 185 C.A.3d 500, 506, 507, 229 C.R. 669 [enjoining developer from rejecting rental applications from qualifying low-income tenants alleged to be third-party beneficiaries of development contract].

Youngblood v. Wilcox (1989) 207 C.A.3d 1368, 1376, 255 C.R. 527 [enjoining club from denying membership privileges to expelled members].

American Academy of Pediatrics v. Van De Kamp (1989) 214 C.A.3d 831, 838, 848, 263 C.R. 46 [enjoining implementation of legislation prohibiting therapeutic abortions for unemancipated minors absent consent of parent or guardian or of juvenile court].

Crespin v. Kizer (1990) 226 C.A.3d 498, 518, 276 C.R. 571 [citing *Robbins v. Superior Court* (1985) 38 C.3d 199, 211 C.R. 398, 695 P.2d 695, *supra*, §356; enjoining State Department of Health Services, under certain circumstances, from denying Medi-Cal coverage to undocumented aliens and from requiring them to disclose extensive information regarding immigration status when applying for coverage].

Pillsbury, Madison & Sutro v. Schectman (1997) 55 C.A.4th 1279, 1283, 64 C.R.2d 698 [injunction prohibiting employees from gathering evidence for use in contemplated litigation against their employers was justified under court's inherent authority to administer resolution of disputes, and under claim and delivery statutes (*supra*, §245 et seq.)].

SUPPLEMENT: [This section is current through the latest supplement]
The following case affirmed an order granting a preliminary injunction:

Alliant Ins. Services v. Gaddy (2008) 159 C.A.4th 1292, 1295, 72 C.R.3d 259, Supp., *supra*, §307 [agreement not to compete].



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c. Discretion To Grant.

1. Prohibitory Injunction.

bb. Grant Reversed.

6 *Witkin Cal. Proc. Prov Rem* § 358

[§ 358] Grant Reversed.

The usual factors--likelihood of success on the merits and balancing of the harms--are considered in cases reversing an order granting a preliminary injunction. In *Bullock v. San Francisco* (1990) 221 C.A.3d 1072, 271 C.R. 44, the trial judge granted a city a preliminary injunction restraining a hotel owner from violating a local ordinance prohibiting the conversion of the hotel's residence units to tourist use. *Held*, reversed. The balancing of the harms weighed against granting the injunction, because the uncontradicted evidence showed the injunction would destroy the hotel owner's business and drive him into insolvency, cause unemployment for the staff of the hotel and its restaurant, and cause considerable inconvenience to the guests. Moreover, the city was not likely to prevail on the merits because the prohibition in the local ordinance was superseded by state law. (221 C.A.3d 1102, 1103.)

Carsten v. Del Mar (1992) 8 C.A.4th 1642, 11 C.R.2d 252, reversed a preliminary injunction barring the city from commencing work under a traffic control plan involving the construction of "traffic medians, islands, or other barriers" on city streets. The barriers did not amount to street closures and were within the city's general powers to construct and maintain streets. Plaintiff did not present evidence of a threat of irreparable harm whereas the injunction would expose the city to damages for contract delay or termination, jeopardize its entitlement to federal aid, and disrupt its ongoing street programs. (8 C.A.4th 1652, 1655.)

In the following cases, the trial court's grant of a preliminary injunction was reversed:

People v. Synanon Foundation (1979) 88 C.A.3d 304, 309, 151 C.R. 757 [reversing injunction restraining defendant's use of its property as private airport without obtaining use permit; zoning ordinance provided that violation was public nuisance, but where serious question existed whether zoning ordinance applied, trial court erred in failing to balance harms, which weighed in favor of defendant].

Voorhies v. Greene (1983) 139 C.A.3d 989, 995, 189 C.R. 132 [reversing portion of injunction granting plaintiff attorney's access to office and client files of law corporation, continued employment, and participation in management].

Triple A Machine Shop v. California (1989) 213 C.A.3d 131, 138, 261 C.R. 493 [stating two-factor test, and citing *IT Corp. v. Imperial* (1983) 35 C.3d 63, 196 C.R. 715, 672 P.2d 121, *infra*, §359].

Scates v. Rydingsword (1991) 229 C.A.3d 1085, 1096, 280 C.R. 544 [innovative programs providing overnight shelter for homeless were not part of general assistance program, which required studies of minimum subsistence needs where county altered grant levels; reversing injunction that prohibited reducing or terminating programs without studies].

Paradise Hills Associates v. Procel (1991) 235 C.A.3d 1528, 1538, 1542, 1 C.R.2d 514, *supra*, §352 [reversing preliminary injunction; plaintiff's prospective economic hardship was outweighed by potential for interference with defendant's freedom of speech and plaintiff was not likely to succeed on merits].

Pro-Family Advocates v. Gomez (1996) 46 C.A.4th 1674, 1680, 54 C.R.2d 600 [trial court erred in granting preliminary injunction barring enforcement of administrative regulation excluding certain prisoners from overnight family visitation; because regulation was not *ex post facto* law and did not violate equal protection, group challenging regulation was not likely to succeed on merits].

Doe v. Wilson (1997) 57 C.A.4th 296, 300, 67 C.R.2d 187, 9 Cal. Proc. (5th), *Administrative Proceedings*, §49 [reversing injunction prohibiting enforcement of state emergency regulations implementing federal law that bars use of public funds for routine prenatal care for illegal aliens (8 U.S.C., §1601 *et seq.*); injunction effectively required state officials to continue program made illegal by plenary federal law].

SUPPLEMENT: [This section is current through the latest supplement]



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1. Prohibitory Injunction.

cc. Injunction Against Violation of Zoning Ordinance.

6 *Witkin Cal. Proc. Prov Rem* § 359

[§ 359] Injunction Against Violation of Zoning Ordinance.

In *IT Corp. v. Imperial* (1983) 35 C.3d 63, 196 C.R. 715, 672 P.2d 121, plaintiff obtained a conditional use permit to build and operate a hazardous waste disposal facility. In plaintiff's action for declaratory relief, defendant county filed a cross-complaint seeking an injunction against alleged violations of the permit. The trial judge granted the injunction. *Held*, affirmed.

Ordinarily, the trial judge should apply the two-factor test--(1) the likelihood that the plaintiff will prevail on the merits, and (2) the interim harm that the plaintiff is likely to sustain on denial as compared to the harm the defendant is likely to suffer on granting. (See *supra*, §293.) The new question raised here is whether that test applies to a governmental entity's action to enjoin violation of a zoning ordinance that provides for injunctive relief. But the county's contention, that it need not show actual harm or prevail in a balancing of harms, is not acceptable. (35 C.3d 70, 71, 72.) The propriety of the injunction must be judged by these standards:

(a) Where the governmental entity establishes that it is reasonably probable that it will prevail on the merits, "a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant." (35 C.3d 72.)

(b) "If the defendant shows that it would suffer grave or irreparable harm ... the court must then examine the relative actual harms to the parties." (35 C.3d 72.)

(c) "Once the defendant has made such a showing, an injunction should issue only if--after consideration of both (1) the degree of certainty of the outcome on the merits, and (2) the consequences to each of the parties of granting or denying interim relief--the trial court concludes that an injunction is proper." (35 C.3d 72.)

(d) Applying these principles, a trial judge might legitimately decide that an injunction should issue even though the plaintiff is unable to prevail in a balancing of the harms, if it appears clear that the plaintiff will prevail on the

merits. On the other hand, the harm that the defendant might suffer if the injunction were granted might so outweigh that the plaintiff would suffer if it were denied that the injunction should be denied even though the plaintiff is likely to prevail on the merits. (35 C.3d 72, 73.) (See *Los Altos v. Barnes* (1992) 3 C.A.4th 1193, 1199, 5 C.R.2d 77 [following *IT Corp.*].)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Discretion To Grant.

2. Mandatory Injunction.

6 *Witkin Cal. Proc. Prov Rem* § 360

[§ 360] Mandatory Injunction.

The judiciary's broad discretion to apply the type of equitable relief that fits a case's particular circumstances includes the power to grant a mandatory injunction. (*Ojavan Investors v. California Coastal Com.* (1997) 54 C.A.4th 373, 394, 62 C.R.2d 803 [injunction requiring investors to rescind sales that violated deed restrictions under Coastal Act was civil remedy designed to protect public and did not constitute unconstitutional forfeiture].) However, the judicial resistance to injunctive relief increases when the attempt is made to compel the doing of affirmative acts. A preliminary mandatory injunction is rarely granted, and is subject to a stricter review on appeal. Several cases reversing orders granting mandatory preliminary injunctions make this clear. "The granting of a mandatory injunction pending the trial, and before the rights of the parties in the subject matter which the injunction is designed to affect have been definitely ascertained by the chancellor, is not permitted except in extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal." (*Hagen v. Beth* (1897) 118 C. 330, 331, 50 P. 425; see *Gardner v. Stroeve* (1889) 81 C. 148, 150, 22 P. 483 ["a very strong and urgent case is required"]; *Allen v. Hotel & Restaurant Employees' Int. Alliance & Bartenders' Int. League* (1950) 97 C.A.2d 343, 348, 217 P.2d 699, supra, §351; *Shoemaker v. Los Angeles* (1995) 37 C.A.4th 618, 633, 43 C.R.2d 774; *Perez v. Hastings College of the Law* (1996) 45 C.A.4th 453, 456, 53 C.R.2d 1 [grant of injunction requiring readmission of probationary law student was error; student failed to maintain passing grades, which was condition of probation, and offered no evidence of extraordinary or compelling circumstances excusing failure]; *Davenport v. Blue Cross of Calif.* (1997) 52 C.A.4th 435, 448, 60 C.R.2d 641, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §530 [insured failed to demand arbitration, to explain her failure to do so, or to show that arbitration could not be concluded within window of opportunity available for her treatment; she was not entitled to preliminary injunction requiring her insurer to authorize and pay for her ovarian cancer treatment]; 15 A.L.R.2d 213 [mandatory injunction before hearing].)

Bo Kay Chan v. Gerdon Land Co. (1951) 103 C.A.2d 724, 230 P.2d 1, is a good illustration. The complaint of plaintiff tenant alleged that defendant landlord interfered with his easement of ingress and egress by certain construction. A preliminary injunction was issued ordering removal of the structures, based on a finding that plaintiff had acquired an easement to the area in question. *Held*, this was error; the basic issue of easement could only be decided

after a trial on the merits. (103 C.A.2d 727.)

In *Alvarez v. Eden Township Hosp. Dist.* (1961) 191 C.A.2d 309, 12 C.R. 661, citing the text, the request was for an order to compel admission of plaintiff's doctor to defendant's hospital. *Held*, it was properly denied. There was no emergency, other surgeons were available, and there was no need to predetermine the main issue. (191 C.A.2d 312.)

In *Board of Supervisors of Butte v. McMahon* (1990) 219 C.A.3d 286, 268 C.R. 219, county voters had enacted a measure prohibiting county officials from using local funds in state-mandated programs administered by the county welfare department. The trial judge issued a preliminary injunction ordering the state to fund the entire nonfederal share of the aid to families with dependent children (AFDC) program in the county. *Held*, this was an abuse of discretion.

(a) *Applicable test.* A preliminary injunction is improper if either the plaintiff is not likely to prevail on the merits, or the interim harm that the plaintiff will suffer if the injunction is not issued is less than the interim harm that the defendant will suffer if it is. (219 C.A.3d 295; see *supra*, §293.)

(b) *Success on merits not likely.* The county failed to demonstrate a reasonable probability of prevailing on its claim that compliance with the state mandate was impossible. Home rule principles do not prevent the state from requiring local contributions because this is a matter of statewide concern. The county has no due process right to challenge the AFDC funding statutes, because both the state and federal constitutional due process protections apply to individual citizens only, and the county has no "property" interest in its revenues as against the state. Moreover, the state Constitution does not require the state to fully fund all mandated local programs. (219 C.A.3d 297.)

In *Shoemaker v. Los Angeles* (1995) 37 C.A.4th 618, 43 C.R.2d 774, an injunction against removing a doctor from his dual administrative posts as head of emergency medicine and of the university medical center was reversed. The doctor retained his employment, although with reduced salary in one position, and had access to two separate remedial schemes to redress any damage to his reputation. On the other hand, retention of the doctor threatened the accreditation of the emergency medicine residency program. (37 C.A.4th 633.)

In the following cases, extraordinary circumstances justified the issuance of a mandatory preliminary injunction:

Piper v. Hawley (1918) 179 C. 10, 18, 175 P. 417 [order to remove embankment that caused floodwaters to threaten land].

Fretz v. Burke (1967) 247 C.A.2d 741, 744, 55 C.R. 879 [defendant general partner, in action for dissolution, was compelled to pay current profits withheld from plaintiff limited partners].

Bennett v. Lew (1984) 151 C.A.3d 1177, 1185, 1186, 199 C.R. 241 [defendant adjoining owner was required to remove fence constructed to prevent plaintiff from using prescriptive easement of ingress and egress over defendant's driveway].

McCain v. Phoenix Resources (1986) 185 C.A.3d 575, 581, 230 C.R. 25 [general partner and attorneys were compelled to allow limited partners to inspect documents relating to operation and financial affairs of partnership; citing *Fretz v. Burke*].

Butt v. California (1992) 4 C.4th 668, 678, 15 C.R.2d 480, 842 P.2d 1240, 8 Summary (10th), *Constitutional Law*, §807 [state was directed to ensure that school district's schools remained open until end of school year, and Superintendent of Public Instruction was ordered to assume control of district's affairs].

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B. Right to Injunction.

4. Discretion To Grant or Deny Preliminary Injunction.

c. Discretion To Grant.

3. Limited Injunctive Relief.

6 *Witkin Cal. Proc. Prov Rem* § 361

[§ 361] Limited Injunctive Relief.

The modern approach to discretion in this area is that the court need not decide wholly for the plaintiff or the defendant. It may grant partial injunctive relief; it may impose terms and conditions on the relief granted; and it may substitute its own form of relief for the one demanded by the plaintiff. (See *Farmers Ins. Exchange v. Ruiz* (1967) 250 C.A.2d 741, 746, 59 C.R. 13 [court has power to grant a "limited" injunction]; *Oceanside Community Assn. v. Oceanside Land Co.* (1983) 147 C.A.3d 166, 177, 195 C.R. 14 [instead of issuing requested injunction requiring developer to restore golf course that was badly deteriorated before developer acquired property, court imposed equitable lien against land]; *Bennett v. Lew* (1984) 151 C.A.3d 1177, 1186, 199 C.R. 241, quoting the text; 78 Harv. L. Rev. 1063; 42 Am.Jur.2d (2000 ed.), *Injunctions* §274.)

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B. Right to Injunction.

5. Questions of Law.

6 Witkin Cal. Proc. Prov Rem § 362

[§ 362] Questions of Law.

(1) *In General.* Ordinarily an appeal from the grant or denial of a preliminary injunction is subject to review of the trial court's exercise of discretion concerning (a) whether the plaintiff is likely to prevail on the merits, and (b) the harm the plaintiff will suffer if the injunction is denied compared to the harm the defendant will suffer if the injunction is granted. (See *supra*, §355.) However, the likelihood that the plaintiff will prevail on the merits occasionally depends on a question of pure law. This situation occurs, e.g., when it is asserted that a statute or ordinance is unconstitutional on its face and there is no factual controversy to be tried. And this question of pure law may be determinative over the other factor, e.g., where there is no possibility that the plaintiff will succeed on the merits. (See *supra*, §349.) Moreover, even where the question of law is not entirely determinative, it may be appropriate for the appellate court to give its opinion to clarify or narrow the issues for trial. (*Hunter v. Whittier* (1989) 209 C.A.3d 588, 596, 257 C.R. 559; see *Carsten v. Del Mar* (1992) 8 C.A.4th 1642, 1649, 11 C.R.2d 252.) And on appeal from an order granting a preliminary injunction, where the reviewing court finds the trial judge's determination of interim harm to be correct, or where the determination is undisputed, the reviewing court may reach the merits of a purely legal question. (*Ortiz v. Woods* (1982) 129 C.A.3d 672, 676, 181 C.R. 209; *Crespin v. Kizer* (1990) 226 C.A.3d 498, 507, 276 C.R. 571; *San Diego Unified Port Dist. v. United States Citizens Patrol* (1998) 63 C.A.4th 964, 969, 74 C.R.2d 364 [whether injunction requiring political groups to limit their activities inside airport to typical airport activities constituted "heckler's veto" in violation of First Amendment presented purely legal question subject to independent review].)

(2) *Statutory Interpretation.* Where the trial judge's decision to grant an injunction is based solely on the interpretation of a statute, the appellate court reviews the matter as a question of law. It is not bound by the abuse of discretion standard, but rather determines whether the trial judge's interpretation is correct as a matter of law, and does not consider the relative harm suffered by the parties. (*Garamendi v. Executive Life Ins. Co.* (1993) 17 C.A.4th 504, 512, 21 C.R.2d 578; *Ciani v. San Diego Trust & Savings Bank* (1991) 233 C.A.3d 1604, 1611, 285 C.R. 699; *Thornton v. Carlson* (1992) 4 C.A.4th 1249, 1255, 6 C.R.2d 375; *Citizens for Better Streets v. Board of Supervisors of San Francisco* (2004) 117 C.A.4th 1, 6, 11 C.R.3d 349 [trial court denied plaintiffs' motion for preliminary injunction in part on ground that plaintiffs' interpretation of statute was unlikely to be sustained; under *Garamendi*, this determination was subject to de novo review].)

In *Miller v. Hermosa Beach* (1993) 13 C.A.4th 1118, 17 C.R.2d 408, the trial judge erred in denying plaintiff,

acting as a private attorney general, an injunction to halt construction of a hotel that she contended would have significant adverse environmental impact. Because the trial judge considered only the legal issue of the likelihood of plaintiff's success on the merits, the matter was subject to de novo review. (13 C.A.4th 1138.) Contrary to the trial judge's decision, it was reasonably probable that plaintiff would prevail on the merits. The construction project was a large, unique use, to be situated near a public beach and likely to affect adjacent private properties, the storm drain system, and the sanitary sewer line. For these reasons it was a discretionary project requiring the exercise of judgment by the public agency required to approve it, and therefore should not have been approved without an environmental impact report as required by the California Environmental Quality Act (*Pub.Res.C. 21000 et seq.*). (13 C.A.4th 1141, 1142.)

(3) *Final Determination by Appellate Court.* Where the party opposing the injunction is wrong as a matter of law, and therefore has no possibility of success on the merits, the appellate court may not only reverse the order, but may remand the matter to the trial court to enter an order granting the injunction. (*Pacific Landmark Hotel, Ltd. v. Marriott Hotels* (1993) 19 C.A.4th 615, 624, 629, 23 C.R.2d 555 [corporation that entered into agreement with hotel owner did not have interest coupled with agency so as to make agreement irrevocable; thus, trial court wrongfully denied injunction against corporation that refused to leave hotel after owner terminated agreement].) Where the trial court erroneously determines that the party seeking the injunction cannot succeed on the merits and denies the injunction, remand to the trial court for a balancing of the harms is usually appropriate. But if there is no factual dispute, the appellate court may resolve the preliminary injunction on the merits. (*Department of Fish & Game v. Anderson-Cottonwood Irr. Dist.* (1992) 8 C.A.4th 1554, 1561, 11 C.R.2d 222 [judgment denying preliminary injunction reversed; denial was based on trial judge's erroneous conclusion that plaintiff could not prevail on merits, due to judge's incorrect interpretation of statute]; see *Barajas v. Anaheim* (1993) 15 C.A.4th 1808, 1813, 19 C.R.2d 764.)

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1. Temporary Restraining Order.

a. Ex Parte Issuance.

6 *Witkin Cal. Proc. Prov Rem* § 363

[§ 363] Ex Parte Issuance.

(1) *Verified Complaint or Affidavits.* A temporary restraining order may not be granted without notice to the opposing party, unless it appears from facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice. (*C.C.P.* 527(c)(1); see *Brewster v. Southern Pac. Trans. Co.* (1991) 235 *C.A.3d* 701, 714, 1 *C.R.2d* 89 [failure to notify defendant without adequate grounds for lack of notice rendered application meritless].) Under this provision, a temporary restraining order may be issued ex parte, in the judge's discretion, if the verified complaint or affidavit makes a showing that irreparable injury would result before the hearing on a preliminary injunction could be had. For this purpose, a "complaint" includes a cross-complaint. (*C.C.P.* 527(h)(1).) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.17 et seq.; *C.E.B.*, 2 Civil Proc. Before Trial 4th, §32.36 et seq.; Rutter Group, Civil Proc. Before Trial §9:587 et seq.; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §§245, 246; for forms, see *Cal. Civil Practice*, 2A Procedure, §16:111 et seq.; cf. *F.R. Civ. P.*, Rule 65(b); 19 Federal Procedure, L.Ed. §47:76 et seq.; 11A Federal Practice & Procedure (Wright, Miller & Kane) §2952.)

(2) *Notice to Party.* The applicant or the applicant's attorney must certify, under oath, one of the following:

(a) Within a reasonable time prior to the application the applicant informed the opposing party or the party's attorney of the time and place the application would be made. (*C.C.P.* 527(c)(2)(A).)

(b) The applicant in good faith attempted to inform the opposing party or the party's attorney of the time and place the application would be made, but was unable to do so, specifying the efforts made. (*C.C.P.* 527(c)(2)(B).)

(c) For reasons specified the applicant should not be required to inform the opposing party or the opposing party's attorney of the time and place the application would be made. (*C.C.P.* 527(c)(2)(C).)

(3) *First Amendment Freedoms.* In *United Farm Workers of America v. Superior Court* (1975) 14 *C.3d* 902, 122 *C.R.* 877, 537 *P.2d* 1237, the court held that an ex parte temporary restraining order limiting picketing was a violation of defendants' constitutional right to freedom of speech. The result, said the court, is that the requirement of notice must be read into the procedure prescribed by *C.C.P.* 527 for all cases involving First Amendment rights. (14 *C.3d* 913.) (See

C.C.P. 527.3, *supra*, §313; 64 *Cal. L. Rev.* 369; for discussion of principles involved, see 7 *Summary* (10th), *Constitutional Law*, §397.)

(4) *Summary Seizure of Property*. In *Skinner v. Superior Court* (1977) 69 *C.A.3d* 183, 188, 189, 137 *C.R.* 851, 7 *Summary* (10th), *Constitutional Law*, §656, temporary restraining orders issued ex parte, which authorized seizure of defendants' allegedly obscene films and other personal property, were held void as a denial of due process and a deprivation of Fourth Amendment rights.

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1. Temporary Restraining Order.

b. Order To Show Cause and Restraining Order.

6 Witkin Cal. Proc. Prov Rem § 364

[§ 364] Order To Show Cause and Restraining Order.

(1) *In General.* The matter must be made returnable on an order requiring that cause be shown why a preliminary injunction should not be granted. (C.C.P. 527(d)(1).) Thus, there are actually two orders, a restraining order effective at once and an order to show cause why a preliminary injunction should not be granted. However, both orders are usually included in one document. (See *Biasca v. Superior Court* (1924) 194 C. 366, 228 P. 861.)

Applications for temporary restraining orders and preliminary injunctions (see *infra*, §368) are governed by C.R.C., Rule 3.1150:

(2) *Form of Temporary Restraining Order (TRO) and Order To Show Cause (OSC).* The TRO and OSC must be stated separately, OSC first. The restraining language must be separately stated in both the OSC and the TRO. The OSC must describe the injunction to be sought at the hearing, and the TRO must describe the activities to be enjoined pending the hearing. A proposed OSC must contain blanks for the time and manner of service on responding parties, the date on which the proof of service must be delivered to the court hearing the OSC, a briefing schedule, and, if applicable, the expiration date of the TRO. (C.R.C., Rule 3.1150(c).) The applicant should prepare a form of each order. (See Cal. Civil Practice, 2A Procedure, §16:137 et seq.; C.E.B., 2 Civil Proc. Before Trial 4th, §32.46; 14A Am.Jur. P.P. Forms (2002 ed.), Injunctions, §§37, 56 et seq.; on orders in domestic relations cases, see C.R.C., Rule 5.118; 11 Summary (10th), *Husband and Wife*, §87.) These papers are presented to the judge for signature.

(3) *Filing of Complaint.* If the action is initiated the same day a TRO or an OSC is sought, the complaint must be filed first. (C.R.C., Rule 3.1150(b).)

(4) *Availability of File at Hearing.* If an application for a TRO or an OSC is made in an existing case, the moving party must request that the court file be made available to the judge hearing the application. (C.R.C., Rule 3.1150(b).)

(5) *Attendance at Hearing.* A TRO will not be granted unless the moving party or counsel is personally present when the request for a TRO is made. (C.R.C., Rule 3.1150(d).)

(6) *Statement of Previous Applications.* An application for a TRO or an OSC must state the fact and result of any previous application for similar relief. (C.R.C., Rule 3.1150(e).)

(7) *Effect of Order.* The issuance of the temporary restraining order does not determine the merits of the controversy. The order merely maintains the status quo until the hearing on the application for the preliminary injunction. (*Landmark Holding Group v. Superior Court* (1987) 193 C.A.3d 525, 529, 238 C.R. 475.)

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1. Temporary Restraining Order.

c. Return Date.

6 *Witkin Cal. Proc. Prov Rem* § 365

[§ 365] Return Date.

The matter must be made returnable on the earliest day the business of the court will allow, but not later than 15 days or, if the court determines there is good cause, 22 days from the issuance of the temporary restraining order. (*C.C.P.* 527(d)(1).) These return dates also apply to a previously issued temporary restraining order that is reissued, measured from the date of reissuance. (*C.C.P.* 527(d)(5); for form used to obtain reissuance, see *infra*, §370.) For this purpose, "court" means the court in which the action is pending. (*C.C.P.* 527(h)(2).)

The date may of course be shorter. In *McDonald v. Superior Court* (1937) 18 *C.A.2d* 652, 64 *P.2d* 738, an initial order was void because it was inadvertently made returnable in 11 days (under the former wording of the statute allowing 10 days). At the hearing, the court dissolved the order and immediately issued another order to show cause returnable the same day, which was promptly served on defendant in open court. (18 *C.A.2d* 654, 655.)

The time limit is jurisdictional; if the return date is beyond that authorized by the statute, the order is void. (*McDonald v. Superior Court*, *supra*, 18 *C.A.2d* 655 [restraining order was properly dissolved]; *Agricultural Prorate Com. v. Superior Court* (1938) 30 *C.A.2d* 154, 155, 85 *P.2d* 898 [prohibition granted to restrain enforcement]; *Oksner v. Superior Court* (1964) 229 *C.A.2d* 672, 686, 40 *C.R.* 621.) However, a defendant who participates in the hearing may be estopped to challenge the validity of the preliminary injunction for the first time on appeal. (*West Coast Const. Co. v. Oceano Sanitary Dist.* (1971) 17 *C.A.3d* 693, 699, 95 *C.R.* 169, citing the text.)

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d. Undertaking.

6 Witkin Cal. Proc. Prov Rem § 366

[§ 366] Undertaking.

C.C.P. 529, which requires an undertaking on the issuance of a preliminary injunction (see *infra*, §382 et seq.), does not call for an undertaking on a temporary restraining order, and a valid order may be issued without one. (*Biasca v. Superior Court* (1924) 194 C. 366, 367, 228 P. 861; *River Farms Co. of Calif. v. Superior Court* (1933) 131 C.A. 365, 370, 21 P.2d 643; see 73 A.L.R.2d 854 [bond as prerequisite to temporary restraining order].)

It is, however, the better practice to give the defendant this protection, and the judge may require it. (See *Biasca v. Superior Court*, *supra*, 194 C. 368; *Greenly v. Cooper* (1978) 77 C.A.3d 382, 387, 143 C.R. 514 [bond posted in connection with pending temporary restraining order also applied to preliminary injunction granted in separate application]; *South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 C.A.4th 916, 920, 14 C.R.2d 323; 73 A.L.R.2d 854, 856 [inherent power to require bond]; 14A Am.Jur. P.P. Forms (2002 ed.), Injunctions, §88 et seq.; but see *F.R. Civ. P.*, Rule 65(c) [requiring bond for restraining order]; 19 Federal Procedure, L.Ed. §47:81 et seq.; 46 *Hastings L. J.* 1863, 1865 ["inconsistent application and inappropriate extensions" of exceptions to *F.R. Civ. P.*, Rule 65(c) bond requirement].) (On bonds and undertakings under general statute, see *supra*, §8 et seq.)

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1. Temporary Restraining Order.

e. Duration of Restraining Order.

6 *Witkin Cal. Proc. Prov Rem* § 367

[§ 367] Duration of Restraining Order.

A temporary restraining order is intended to be effective only until the hearing on the preliminary injunction. (*Houser v. Superior Court* (1932) 121 C.A. 31, 35, 8 P.2d 483.) The restraining order terminates automatically when a preliminary injunction is granted or denied. (*Landmark Holding Group v. Superior Court* (1987) 193 C.A.3d 525, 529, 238 C.R. 475.) On the granting of a preliminary injunction, the order is superseded or merged with it. (See *Houser v. Superior Court*, *supra*.) The restraining order remains in effect, however, between the time of granting the preliminary injunction and the filing of the bond. (See *infra*, §385.)

If, at the hearing, the court takes no action at all, the restraining order will ordinarily expire automatically by its own terms. But there are two exceptions to this rule: (1) where the proceeding is continued because of the defendant's failure to serve affidavits 2 days before the hearing; (2) where the proceeding is continued because of the inability of the court to hear it. (See *infra*, §373 et seq.)

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C. Procedure for Obtaining Provisional Remedy.

2. Preliminary Injunction.

a. Application and Notice.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 368

[§ 368] In General.

(1) *Notice Required.* A preliminary injunction may not be granted without notice to the opposing party. (*C.C.P.* 527(a); see *People v. Broderick Boys* (2007) 149 C.A.4th 1506, 1519, 59 C.R.3d 64 [service of notice of complaint seeking to enjoin gang activity on single gang member of unknown rank, who immediately said he would not appear in proceeding, was not sufficient notice to gang].) (See *C.C.P.* 528 [after defendant has answered, injunction requires notice or show cause order, but restraining order is permitted until decision of court granting or refusing injunction].) (On federal practice, see *F.R. Civ. P.*, Rule 65(a); 11A Federal Practice & Procedure (Wright & Miller) §2949.)

(2) *Methods for Obtaining Injunction.* A preliminary injunction may be obtained by noticed motion or by application for an order to show cause. (C.R.C., Rule 3.1150(a).)

(3) *Order To Show Cause and Restraining Order.* A plaintiff who is entitled to the immediate protection of a restraining order may obtain that order by an ex parte application. (See *supra*, §363.) The accompanying order to show cause, served on the defendant, fulfills the statutory requirement of notice for a preliminary injunction. And if the party against whom the injunction is sought has not appeared, the order to show cause personally served gives the court jurisdiction over that party. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §§60, 62.)

An order to show cause (OSC) must be used when a temporary restraining order (TRO) is sought, or if the party against whom the injunction is sought has not appeared. If the responding party has not appeared, service must be made in the manner of a summons and complaint (see 3 *Cal. Proc.* (5th), *Actions*, §1001 et seq.). (C.R.C., Rule 3.1150(a).) (On procedure, see *supra*, §364.)

(4) *Notice of Motion.* A plaintiff who does not seek the immediate protection of a restraining order may obtain a preliminary injunction by serving a notice of motion in accordance with the usual motion procedure. (See *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 C.A.4th 1279, 1283, 64 C.R.2d 698 [notice was adequate even though it listed only request for statutory writ of possession; pleadings requested injunctive relief, and this relief was discussed at hearing; *C.C.P.* 512.070 (*supra*, §263) provides for mandatory injunctive relief as concomitant of writ of possession,

without requiring separate notice]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.23 et seq.; C.E.B., 2 Civil Proc. Before Trial 4th, §32.61 et seq.; Rutter Group, Civil Proc. Before Trial §9:621 et seq.; Cal. Civil Practice, 2A Procedure, §16:118; 14A Am.Jur. P.P. Forms (2002 ed.), Injunctions, §51 et seq.; 19 Federal Procedure, L.Ed. §47:54; 6 *Cal. Proc. (5th), Proceedings Without Trial*, §7 et seq.)

Even though the time requirements of *C.C.P. 527* are not satisfied, the court may still hear the order to show cause if the moving and supporting papers are served in the time required for giving notice of motion under *C.C.P. 1005* (6 *Cal. Proc. (5th), Proceedings Without Trial*, §15 et seq.) and either of the following occurs:

(a) The order to show cause is issued without a restraining order. (*C.C.P. 527(f)(1)*.)

(b) The order to show cause is issued with a restraining order, but is not set for hearing within the time required by *C.C.P. 527(d)(1)* or served within the time required by *C.C.P. 527(d)(2)*. (*C.C.P. 527(f)(2)*.) For this purpose, "court" means the court in which the action is pending. (*C.C.P. 527(h)(2)*.)

An injunction to suspend the business of a corporation requires notice to the proper corporate officers or agents, except where the state is a party. (*C.C.P. 531*.)

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2. Preliminary Injunction.

a. Application and Notice.

2. Waiver of Notice.

6 *Witkin Cal. Proc. Prov Rem* § 369

[§ 369] Waiver of Notice.

Despite the mandatory language of the statute (see *supra*, §368), notice may be waived. In *Walberg v. Underwood* (1919) 39 C.A. 748, 180 P. 55, plaintiff's counsel, on his verified complaint, asked the judge for a preliminary injunction. The matter was heard in chambers with counsel for defendant present and participating without objection to the lack of notice. (39 C.A. 751.) (See *Remillard Brick Co. v. Dandini* (1941) 47 C.A.2d 63, 65, 117 P.2d 432 [order to show cause was directed to only three of five defendants, but all appeared at hearing].)

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b. Service of Supporting Papers.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 370

[§ 370] In General.

Under *C.C.P. 527(d)(2)*, a party who obtains a temporary restraining order must, within the earlier of 5 days from the date the order was issued or 2 days before the hearing, serve the following on the adverse party:

- (1) A copy of the complaint, if not previously served.
- (2) The order to show cause stating the date, time, and place of the hearing.
- (3) Any affidavits to be used in the application.
- (4) A copy of points and authorities in support of the application.

The court may shorten the time for service for good cause on its own motion or that of the applicant. (*C.C.P. 527(d)(2)*; see 2 C.E.B., *Civil Proc. Before Trial* 4th, §32.55.)

If the party who obtained the temporary restraining order fails to effect service as required, the court must dissolve the restraining order. (*C.C.P. 527(d)(3)*.) However, if the applicant files an affidavit stating that the opposing party could not be served within the time required, the court may reissue a previously issued temporary restraining order, and no fee may be charged for reissuing the order. (*C.C.P. 527(d)(5)*.) (For general form, see Judicial Council Form No. CIV-025 [Application and Order for Reissuance of Order to Show Cause and Temporary Restraining Order]; for form tailored for use in harassment cases, see Judicial Council Form No. CH-125 [Reissue Temporary Restraining Order (Civil Harassment)].)

In other words, the order to show cause is obtained *ex parte* by showing the complaint and affidavits to the judge, but the party temporarily restrained is entitled to see them in time to prepare for the hearing on the preliminary injunction. "The evident purpose of the statute is to prevent surprise--to the end that no unfair advantage may be taken of the defendant in the way of evidence which has not been anticipated." (*Green v. Superior Court* (1924) 65 C.A. 237, 239, 223 P. 582.)

The requirement is doubly jurisdictional: If the plaintiff fails to comply with it, the court (a) must dissolve the temporary restraining order, and (b) cannot hear the order to show cause why a preliminary injunction should not be granted. (*Green v. Superior Court, supra*, 65 C.A. 240 [affidavits were filed on day of hearing; prohibition issued to prevent enforcement of preliminary injunction]; *Kelsey v. Superior Court (1919)* 40 C.A. 229, 235, 180 P. 662 [failure to serve points and authorities; prohibition issued]; *Northcutt v. Superior Court (1924)* 66 C.A. 350, 353, 226 P. 25 [same].)

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b. Service of Supporting Papers.

2. Waiver of Service.

6 *Witkin Cal. Proc. Prov Rem* § 371

[§ 371] Waiver of Service.

The service requirement (see *supra*, §370) may nevertheless be waived by the defendant. This was done in *Remillard Brick Co. v. Dandini* (1941) 47 C.A.2d 63, 117 P.2d 432, where defendants, instead of seeking dissolution of the restraining order and dismissal of the proceeding, demanded an immediate hearing and participated in it. (47 C.A.2d 67.) And in *McDonald v. Superior Court* (1937) 18 C.A.2d 652, 64 P.2d 738, where the hearing was continued at defendant's request (*infra*, §373), the missing points and authorities, served more than 2 days before the new time for hearing, were held timely. (18 C.A.2d 657.)

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c. Hearing.

1. Time.

6 *Witkin Cal. Proc. Prov Rem* § 372

[§ 372] Time.

On the day the order is made returnable, the hearing takes precedence over all other matters on that day's calendar, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue it must be set for trial at the earliest possible date and likewise takes precedence over all other cases, with the same exceptions. (*C.C.P.* 527(e); see *F.R. Civ. P.*, Rule 65(b) [expedited procedure where temporary restraining order is granted ex parte]; 7 *Cal. Proc.* (5th), *Trial*, §66 et seq.)

C.C.P. 527(e) deals only with the time for hearing specified in an ex parte order to show cause, which is 15 days (or 22 days for good cause shown) from its issuance (supra, §365). If the plaintiff proceeds by noticed motion, the motion is heard at a time provided by the statutes and rules governing motions. (See 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §7 et seq.; *F.R. Civ. P.*, Rule 65(a)(2) [consolidation of hearing with trial on merits]; 19 Federal Procedure, L.Ed. §47:63 et seq.)

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c. Hearing.

2. Continuance.

aa. To Defendant.

6 *Witkin Cal. Proc. Prov Rem* § 373

[§ 373] To Defendant.

The opposing party is entitled to one continuance for a reasonable period of not less than 15 days, or a shorter period requested by the opposing party, to enable that party to meet the application for a preliminary injunction. If the opposing party obtains a continuance under this provision, the temporary restraining order remains in effect until the date of the continued hearing. (*C.C.P.* 527(d)(4); see *C.E.B.*, 2 Civil Proc. Before Trial 4th, §32.76.)

The effect of this section is not quite as absolute as its terms would suggest:

(1) The mandatory language has been limited, by interpretation, to the situation in which the hearing on a preliminary injunction comes after a temporary restraining order and ex parte order to show cause. The plaintiff, already protected by the restraining order, is not injured by the continuance. But if no restraining order is obtained, and the hearing on the application is set by notice of motion, the plaintiff might be prejudiced by delay. Accordingly it has been held that, in this event, the defendant does not have the absolute right to a continuance. (*Wutchumna Water Co. v. Superior Court* (1932) 215 C. 734, 739, 12 P.2d 1033.)

(2) Where the plaintiff is given a continuance because of the defendant's failure to serve papers 2 days before the hearing (*infra*, §374), and, at the hearing, the plaintiff serves rebuttal affidavits, the defendant is not entitled to a continuance. (*Los Angeles v. Superior Court (Los Angeles)* (1925) 196 C. 445, 451, 238 P. 670.)

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c. Hearing.

2. Continuance.

bb. To Plaintiff.

6 *Witkin Cal. Proc. Prov Rem* § 374

[§ 374] To Plaintiff.

If the party who obtained the temporary restraining order is not ready to proceed when the matter first comes up for hearing, the court must dissolve the temporary restraining order. (*C.C.P.* 527(d)(3).) Thus, ordinarily the court lacks power to give the plaintiff a continuance, and cannot keep the restraining order in effect after an unauthorized continuance. (*Kelsey v. Superior Court* (1919) 40 C.A. 229, 235, 180 P. 662 [no power though plaintiff's counsel was ill].)

A continuance is allowed, however, by implication from the following provision of *C.C.P.* 527(e): If the defendant's counteraffidavits are served on the plaintiff at least 2 days prior to the hearing, the plaintiff "shall not be entitled to any continuance on account thereof." If the defendant does not meet this time limit, the plaintiff is entitled to a continuance and the court may keep the restraining order in force during the interim. (*Los Angeles v. Superior Court* (Los Angeles) (1925) 196 C. 445, 448, 238 P. 670 [defendants' counteraffidavits were served on day of hearing].)

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c. Hearing.

2. Continuance.

cc. On Court's Own Motion.

6 *Witkin Cal. Proc. Prov Rem* § 375

[§ 375] On Court's Own Motion.

In *River Farms Co. of Calif. v. Superior Court* (1933) 131 C.A. 365, 21 P.2d 643, both parties were ready on December 19, the day set for hearing, but the court, over objection of defendants, continued the matter to December 21, kept the restraining order in force without bond, and subsequently granted a preliminary injunction. In denying defendant's petition for prohibition the court held: (a) if the reason for setting the hearing ahead was congestion of the calendar (prior injunction matters or other causes with statutory precedence), the continuance was authorized; (b) if no such justification existed, the continuance was unauthorized, but the court could not, by such an erroneous step, divest itself of its jurisdiction to the detriment of plaintiff. (See *Adler v. Vaicius* (1993) 21 C.A.4th 1770, 1776, 27 C.R.2d 32 [court did not lose jurisdiction by continuing hearing on petition for injunction prohibiting harassment under C.C.P. 527.6 beyond expiration date of temporary restraining order where no judge was available on original hearing date].)

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3. Showing by Plaintiff.

aa. Necessity for Showing.

6 *Witkin Cal. Proc. Prov Rem* § 376

[§ 376] Necessity for Showing.

An injunction may be granted on a verified complaint (see *infra*, §377), or on affidavits (see *infra*, §378) showing sufficient grounds. (*C.C.P.* 527(a); see *Cooke v. Superior Court* (1989) 213 C.A.3d 401, 407, 261 C.R. 706 [preliminary injunction is warranted only if there is complaint on file stating sufficient cause of action for injunctive relief]; *supra*, §289 et seq.) Thus, the burden is on the plaintiff to show harm if the preliminary injunction is not granted. (See *Pearson v. Baldwin* (1954) 125 C.A.2d 670, 673, 270 P.2d 866; *Casmalia Resources, Ltd. v. Santa Barbara* (1987) 195 C.A.3d 827, 838, 240 C.R. 903; *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 246, 256 C.R. 194, *supra*, §318, citing the text.) In the absence of a verified showing, the trial court acts in excess of jurisdiction in granting a preliminary injunction. (*Harlan v. Superior Court* (1949) 94 C.A.2d 902, 904, 211 P.2d 942; *Ancora-Citronelle Corp. v. Green* (1974) 41 C.A.3d 146, 150, 115 C.R. 879 ["It is the clear policy of the law that the drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing, by someone having knowledge thereof, made under oath or by declaration under penalty of perjury"].)

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3. Showing by Plaintiff.

bb. Showing by Verified Complaint.

6 *Witkin Cal. Proc. Prov Rem* § 377

[§ 377] Showing by Verified Complaint.

The plaintiff's showing may be by verified complaint alone, if the complaint contains the necessary factual allegations. (*Los Angeles v. Superior Court (Los Angeles)* (1925) 196 C. 445, 448, 238 P. 670; *Metropolitan Laundry Co. v. Greenfield* (1937) 20 C.A.2d 246, 247, 66 P.2d 722; *Riviello v. Journeymen Barbers, Hairdressers & Cosmetologists' Int. Union of America, Local No. 148* (1948) 88 C.A.2d 499, 501, 199 P.2d 400 [appeal by plaintiffs from denial; verified complaint was considered, though at time of order demurrer had been sustained]; *French Art Cleaners v. State Bd. of Dry Cleaners* (1949) 91 C.A.2d 890, 893, 898, 206 P.2d 25; *Ramos v. United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Assn. Local No. 40* (1952) 113 C.A.2d 31, 35, 247 P.2d 714; but see *San Francisco v. Market Street Ry. Co.* (1950) 95 C.A.2d 648, 655, 213 P.2d 780 [complaint lacking factual allegations was insufficient]; see 5 *Cal. Proc.* (5th), *Pleading*, §824.)

Where the verification of a complaint is made by an attorney on information and belief, the pleading may not be considered as an affidavit or declaration establishing the facts alleged in the complaint. However, the attorney may also verify a pleading where the facts are within his or her knowledge. (*C.C.P.* 446; 4 *Cal. Proc.* (5th), *Pleading*, §461.) In the latter case, the verified complaint may be used to support the application. (*Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 532, 67 C.R. 761, 439 P.2d 889.)

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3. Showing by Plaintiff.

cc. Showing by Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 378

[§ 378] Showing by Affidavit.

Although the plaintiff's showing may be by verified complaint (see *supra*, §377), it is difficult to frame a complaint to meet the evidentiary requirements of an affidavit (see 5 *Cal. Proc.* (5th), *Pleading*, §824), and the showing by complaint alone may usually be effectively controverted by a verified answer (*infra*, §379). Accordingly, the use of affidavits, either alone or as supplementary to the verified complaint, is desirable. These must be served at least 2 days before the hearing (*supra*, §370), and they should conform to the usual standards, e.g., they should be specific and should contain allegations of fact and not hearsay. (See 14A *Am.Jur.* P.P. Forms (2002 ed.), *Injunctions*, §§44, 45; 19 *Federal Procedure*, L.Ed. §47:58.) (For illustrations of sufficient showing, see *People v. Pacific Land Research Co.* (1977) 20 *C.3d* 10, 21, 141 *C.R.* 20, 569 *P.2d* 125; *San Francisco v. Evankovich* (1977) 69 *C.A.3d* 41, 54, 55, 137 *C.R.* 883, citing the text [complaint and declaration, two counterdeclarations, substantial evidence supported trial judge's order]; *People v. Columbia Research Corp.* (1977) 71 *C.A.3d* 607, 610, 139 *C.R.* 517 [detailed review of evidence, most of which was in declaration form].)

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4. Opposition by Defendant.

aa. Showing by Verified Answer.

6 *Witkin Cal. Proc. Prov Rem* § 379

[§ 379] Showing by Verified Answer.

If the plaintiff's application is based solely on a verified complaint, the defendant's countershowing may be simply a verified answer denying the essential allegations of the complaint concerning the need for an injunction. (For form, see Cal. Civil Practice, 2A Procedure, §16:143.) Ordinarily this will result in a refusal to grant the preliminary injunction; or, if the answer is filed after the injunction issues, a motion to dissolve will be granted. The reason is that when the allegations of the complaint are denied, the pleadings merely disclose issues, and there is no proof of the necessity of injunctive relief. (See *Real Del Monte Consolidated Gold & Silver Mining Co. v. The Pond Gold & Silver Mining Co.* (1863) 23 C. 82, 84; *San Francisco v. Market Street Ry. Co.* (1950) 95 C.A.2d 648, 658, 213 P.2d 780; *Jessen v. Keystone Savings & Loan Assn.* (1983) 142 C.A.3d 454, 460, 191 C.R. 104 [citing the text]; C.E.B., 2 Civil Proc. Before Trial 4th, §32.70.)

But this rule is not invariable. In a number of cases it has been held that, where the averments of the complaint make out a strong case for equitable relief, the defendant cannot deprive the court of its power and discretion to issue the injunction by the routine process of filing an answer with denials. (*Porter v. Jennings* (1891) 89 C. 440, 444, 26 P. 965, *supra* §356 [reversing order refusing injunction]; *Kendall v. Foulks* (1919) 180 C. 171, 174, 179 P. 886 [dictum; plaintiff also filed counteraffidavit]; *Lutz v. Western Iron & Metal Co.* (1923) 190 C. 554, 560, 213 P. 962 [affirming order granting injunction]; *Metropolitan Laundry Co. v. Greenfield* (1937) 20 C.A.2d 246, 247, 66 P.2d 722 [affirming order granting injunction]; *Garner v. Journeyman Barbers' etc. Union* (1963) 223 C.A.2d 101, 104, 35 C.R. 693.)

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4. Opposition by Defendant.

bb. Showing by Affidavit.

6 *Witkin Cal. Proc. Prov Rem* § 380

[§ 380] Showing by Affidavit.

The defendant may present counteraffidavits in response to the order to show cause. (*C.C.P.* 527(e).) As the court said in *Schwartz v. Arata* (1920) 45 C.A. 596, 188 P. 313: "[S]o far as proof of facts relating to the question is concerned, affidavits would be more satisfactory than the averments and denials of the pleadings, inasmuch as the facts stated in a complaint are the ultimate and not the probative facts and the answer merely is a denial of those facts, whereas the facts stated in an affidavit are required to be probative." (45 C.A. 603.) (For illustrations of counteraffidavits, see *Schwartz v. Arata*, *supra*, 45 C.A. 600 [showing plaintiff's laches and probable irreparable injury to defendant if injunction were granted]; *Monterey Club v. Superior Court* (1941) 48 C.A.2d 131, 139, 119 P.2d 349; but see *Riviello v. Journeymen Barbers, Hairdressers & Cosmetologists' Int. Union of America, Local No. 148* (1948) 88 C.A.2d 499, 503, 199 P.2d 400 [averments on information and belief were hearsay and were disregarded]; *San Francisco v. Evankovich* (1977) 69 C.A.3d 41, 54, 137 C.R. 883 [counteraffidavits were insufficient to show abuse of discretion in granting preliminary injunction].)

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c. Hearing.

5. Testimony.

6 *Witkin Cal. Proc. Prov Rem* § 381

[§ 381] Testimony.

There is no express statement in the code that the plaintiff or the defendant may offer evidence other than by the pleadings and affidavits, and this omission has sometimes been regarded as precluding other evidence. There seems no basis, however, for implying this restriction. Both parties ought to be allowed to offer additional evidence, by testimony or deposition, subject to reasonable limitations necessary to conserve the time of the department handling these matters. And several opinions indicate that this is a recognized and unobjectionable practice. (See *E.H. Renzel Co. v. Warehousemen's Union I.L.A.* 38-44 (1940) 16 C.2d 369, 370, 106 P.2d 1 [testimony was offered and received from both sides: "This procedure was apparently by agreement that the facts determinative of the right to an injunction *pendente lite* should be presented in this way rather than by affidavit"]; *Wilms v. Hand* (1951) 101 C.A.2d 811, 813, 226 P.2d 728 [plaintiffs and defendants both used affidavits and testimony of witnesses]; *People v. Gordon* (1951) 105 C.A.2d 711, 723, 234 P.2d 287 [testimony of several witnesses for plaintiff]; C.E.B., 2 Civil Proc. Before Trial 4th, §§32.80, 32.84.)

The practice of permitting additional evidence received express approval in *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 67 C.R. 761, 439 P.2d 889, citing and quoting the text: "Drawing analogy from hearings on motions generally ... , we recognize that 'subject to reasonable limitations necessary to conserve the time of the department handling these matters', ... it is within the sound discretion of the court hearing the matter to allow the introduction of additional testimony at the hearing." (68 C.2d 525, footnote 7.)

However, a full evidentiary hearing with testimony from all sides is not required. (*San Francisco v. Evankovich* (1977) 69 C.A.3d 41, 55, 137 C.R. 883, citing the text [refusal to permit cross-examination of city attorney who filed declaration in support of injunction was not abuse of discretion].)

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d. Undertaking.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 382

[§ 382] In General.

On granting an injunction, the court must require an undertaking of the applicant. (*C.C.P.* 529(a); see *C.C.P.* 529.1 [undertaking as security for delay, caused by grant of injunction, in construction projects in specified circumstances]; *C.C.P.* 529.2 [undertaking as security for delay, caused by grant of injunction or other relief by court, in construction of certain housing projects in specified circumstances]; *Greenly v. Cooper* (1978) 77 C.A.3d 382, 388, 389, 143 C.R. 514 [separate bond is not required for series of orders with common purpose of restraining defendants from misusing trade secrets]; *Mangini v. J.G. Durand Int.* (1994) 31 C.A.4th 214, 216, 37 C.R.2d 153 [bond is required where specific exception to bond requirement under state or federal law cannot be established]; On Bond and Undertaking Law, see *supra*, §8 et seq.; on federal law, see *F.R. Civ. P.*, Rule 65(c) [security required under federal law in amount court deems proper]; 19 Federal Procedure, L.Ed. §47:81 et seq.; 11A Federal Practice & Procedure (Wright, Miller & Kane) §2954; 99 *Harv. L. Rev.* 828 [recovery for wrongful interlocutory injunctions under *F.R. Civ. P.*, Rule 65(c)]; 46 *Hastings L. J.* 1863, 1865 ["inconsistent application and inappropriate extensions" of exceptions to *F.R. Civ. P.*, Rule 65(c) bond requirement].)

The term "applicant" as used in *C.C.P.* 529(a) includes only the applicant who contracted for the surety bond, and does not extend to those plaintiffs who did not apply for the undertaking. (*Top Cat Productions v. Michael's Los Feliz* (2002) 102 C.A.4th 474, 477, 125 C.R.2d 553 [two plaintiffs brought action against their lessor and obtained injunctive relief, but ultimately lost case, and only one applied for preliminary injunction bond; other could not be held liable to surety on bond].)

The purpose of the bond is to protect the defendant in the event that a final judgment against the plaintiff determines that the restraint was wrongly imposed. As has been seen, a bond is considered desirable even when an *ex parte* temporary restraining order is requested. (See *supra*, §366.) But, regardless whether a restraining order is obtained, with or without bond, a preliminary injunction cannot be granted (except in certain enumerated cases; see *infra*, §383) without a bond. (*C.C.P.* 529(a) [providing also for objection to undertaking, and for dissolution of injunction if sufficient undertaking is not filed within time prescribed by statute]; *Neumann v. Moretti* (1905) 146 C. 31, 33, 79 P. 512; *Maier v. Luce* (1923) 61 C.A. 552, 557, 215 P. 399 [bond given on issuance of temporary restraining order and

limited in terms to it was not sufficient to support preliminary injunction without new bond]; *Casitas Inv. Co. v. Charles L. Harney* (1962) 203 C.A.2d 811, 816, 21 C.R. 821; *Federal Automotive Services v. Lane Buick Co.* (1962) 204 C.A.2d 689, 695, 22 C.R. 603; *Oksner v. Superior Court* (1964) 229 C.A.2d 672, 686, 40 C.R. 621; *Condor Enterprises, Ltd. v. Valley View State Bank* (1994) 25 C.A.4th 734, 741, 30 C.R.2d 613 [sanctions could not be imposed for violation of preliminary injunction issued without requirement of bond; injunction was in excess of court's jurisdiction and therefore void from its inception].)

A bond may also be required where a purported protective order is in effect an injunction. In *Northpoint Homeowners Assn. v. Superior Court* (1979) 95 C.A.3d 241, 157 C.R. 42, defendant D contracted to design, construct, and maintain a townhouse for plaintiff, and plaintiff later sued, alleging faulty design and construction, and negligent landscaping. D cross-complained for indemnity against A, the landscaping contractor. Plaintiff then decided to remove 200 trees from the grounds to prevent further damage from roots allegedly damaging the underground utility conduits. A obtained a temporary restraining order to prevent the tree removal, and moved for continued restraint in the nature of a protective order to preserve evidence until trial of the action was completed. The court made the order. *Held*, mandamus issued to compel the court to vacate the order. (a) The order could not be justified under former C.C.P. 2019(b)(1) (now C.C.P. 2025.420; see 2 Cal. Evidence (4th), Discovery, Supp., §59 et seq.), which deals only with discovery. (95 C.A.3d 244.) (b) The order could not be justified as an exercise of the trial court's inherent power to preserve evidence, for it went much further: It prohibited plaintiff from altering the landscaping at the site, and hence was, in effect, an injunction. As such, it could not be effective without a bond. (95 C.A.3d 245.)

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2. Exemptions.

6 *Witkin Cal. Proc. Prov Rem* § 383

[§ 383] Exemptions.

The following are exempt from the mandatory bond requirement:

(1) Either spouse in a proceeding for legal separation or dissolution of marriage. (*C.C.P.* 529(b)(1); *In re Marriage of Van Hook* (1983) 147 C.A.3d 970, 989, 195 C.R. 541 [exemption was not applicable where spouses sought to enjoin third-party creditor].)

(2) An applicant for an order under the Domestic Violence Prevention Act (*Family C.* 6200 et seq.; 11 *Summary* (10th), *Husband and Wife*, §373 et seq.). (*C.C.P.* 529(b)(2); see *supra*, §315.)

(3) Poor litigants, in the trial court's discretion. (*Conover v. Hall* (1974) 11 C.3d 842, 851, 114 C.R. 642, 523 P.2d 682, 3 *Cal. Proc.* (5th), *Actions*, §421.)

(4) Federal, state, and local entities and officers of these entities in their official or representative capacity, as provided by *C.C.P.* 995.220 (see *supra*, §13). (*C.C.P.* 529(b)(3).)

In *South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 C.A.4th 916, 14 C.R.2d 323, plaintiff city was granted a temporary restraining order, conditioned on an undertaking, against defendant cemetery association to stop the construction of a mausoleum that plaintiff claimed would have adverse environmental consequences. Some months after plaintiff voluntarily dismissed its action, the trial court, on defendant's motion, entered a judgment of liability on the bond. *Held*, plaintiff was not liable on the undertaking, which the trial court was without authority to require.

(a) Under *C.C.P.* 995.220, governmental entities are exempt from the undertaking requirement. This exemption is not limited to situations in which an undertaking is required by statute. (11 C.A.4th 921.) The public policy embodied in the exemption is sufficient to override the trial court's inherent power to require an undertaking. (11 C.A.4th 923.)

(b) The doctrines of equitable estoppel, invited error, or waiver did not prevent plaintiff from asserting its exemption, even though plaintiff did not raise the exemption until after the undertaking had been posted. The benefits to

the public of the exemption statute may not be surrendered by "an official's errors or omissions." Moreover, a governmental entity may not be allowed to waste public funds by incurring the cost of an undertaking it cannot be required to provide. (*11 C.A.4th 924.*)

(c) The undertaking was given to secure a statutory privilege that plaintiff was entitled to enjoy without the burden of an undertaking. Thus, the undertaking was void, and could not be valid as a common law undertaking. (*11 C.A.4th 925.*)

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3. Amount and Form.

6 *Witkin Cal. Proc. Prov Rem* § 384

[§ 384] Amount and Form.

The amount of the bond is fixed by the judge. (*C.C.P.* 529(a); *C.R.C.*, Rule 3.1150(f).) (On discretion in fixing amount, see *Greenly v. Cooper* (1978) 77 *C.A.3d* 382, 390, 143 *C.R.* 514 [no abuse of discretion was shown]; on insufficient undertaking, see *infra*, §386.)

The promise and condition may be in the language of *C.C.P.* 529, that the applicant "will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." Or the simplified statutory form of *C.C.P.* 995.330 (*supra*, §16) may be used, merely stating that the sureties are bound by the obligations of the designated statute (here *C.C.P.* 529(a)) requiring the undertaking. (See *Yellen v. Fidelity & Cas. Co. of New York* (1931) 115 *C.A.* 434, 437, 1 *P.2d* 1019; 19 *Federal Procedure*, L.Ed. §47:87 et seq.; 11A *Federal Practice & Procedure* (Wright, Miller & Kane) §2954; 14A *Am.Jur.* P.P. Forms (2002 ed.), Injunctions, §88 et seq.)

At the hearing of an application for appointment of a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amount of the undertaking required from the applicant by *C.C.P.* 529 for an injunction that is ordered in or with the order appointing the receiver. (*C.R.C.*, Rule 3.1178.)

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4. Time of Filing.

6 *Witkin Cal. Proc. Prov Rem* § 385

[§ 385] Time of Filing.

(1) *Premature Filing*. In *Taylor v. Superior Court* (1942) 20 C.2d 244, 246, 125 P.2d 1, a bond filed after entry of a minute order granting the injunction, but before the signing of the formal written order, was held sufficient, i.e., the slightly premature filing was not a serious defect.

(2) *Late Filing*. This presents a different problem. The statute, in requiring the bond in the amount fixed by the court "on granting an injunction," obviously contemplates that it will be filed after the court grants the application. Thereafter, the bond and the injunction are presented to the judge for signature, but there is no indication as to what happens to a temporary restraining order in the meantime. In *Houser v. Superior Court* (1932) 121 C.A. 31, 33, 8 P.2d 483, the court held that the restraining order remained in effect for a reasonable time required for filing the undertaking, even though the order thereby was extended beyond the normal period. (See *supra*, §367.)

The theory of *Houser* is now set forth in C.R.C., Rule 3.1150(f) as follows: Notwithstanding C.R.C., Rule 3.1312 (preparation of orders), "whenever an application for a preliminary injunction is granted, a proposed order must be presented to the judge for signature, with an undertaking in the amount ordered, within one court day after the granting of the application or within the time ordered. Unless otherwise ordered, any restraining order previously granted remains in effect during the time allowed for presentation for signature of the order of injunction and undertaking. If the proposed order and the undertaking required are not presented within the time allowed, the TRO may be vacated without notice. All bonds and undertakings must comply with rule 3.1130" (bonds and undertakings generally).

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5. Insufficient Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 386

[§ 386] Insufficient Undertaking.

In *ABBA Rubber Co. v. Seaquist* (1991) 235 C.A.3d 1, 286 C.R. 518, plaintiff sued defendants for misappropriation of trade secrets, unfair competition, and related torts, and sought injunctive relief and damages. The trial judge announced his decision to grant a preliminary injunction, but neither party raised the issues of an undertaking or its amount, and the judge's minute order was silent on these matters. Plaintiff's form of a proposed preliminary injunction had no provision for an undertaking, and defendant submitted written objections, proposing the sum of \$ 315,000. The judge added a \$ 1,000 undertaking, and signed the injunction. *Held*, judgment reversed.

(a) *Defendants did not waive their objection.*

(1) Defendants' failure to request an undertaking in advance was not a waiver of the right; the judge must require an undertaking. (235 C.A.3d 10; see *supra*, §382.) And defendants are entitled to an undertaking sufficient to pay the damages they may sustain by reason of the injunction. (235 C.A.3d 11; see *supra*, §384.) Therefore, the fact that defendants did not expressly demand a sufficient undertaking before submission of plaintiff's application did not result in a waiver of their right to challenge the amount. (235 C.A.3d 11.)

(2) Defendants did not waive their objection by failure to comply with the objections procedure of the Bond and Undertaking Law (see *supra*, §§27, 28). The statute calls for a noticed motion; defendants made an *ex parte* objection. (235 C.A.3d 11, 12.) Nevertheless, the failure to comply with the letter of the statute did not result in a waiver.

(a) The objection procedure of C.C.P. 995.930 is designed to reduce the likelihood that the trial court will persist in an erroneous failure to comply with its duty to require a sufficient bond, and to provide notice sufficient to allow the opposing side to respond meaningfully. (235 C.A.3d 12.)

(b) In determining whether defendants' incomplete compliance with the statute is sufficient to prevent an unintentional waiver, their performance must be measured against these statutory purposes. Here their written objection alerted both the court and counsel to the specific issue, set out an estimate of an adequate bond, and explained how the

figure was calculated. Also, it was made promptly on the judge's initial ruling, and before the entry of a formal order. (235 C.A.3d 13.)

(c) Under these facts, defendant's ex parte objection substantially complied with the statutory procedure for contesting the sufficiency of the bond. Because neither the trial court nor the plaintiff insisted on strict compliance with C.C.P. 995.930, that substantial compliance is sufficient to prevent the waiver provided by C.C.P. 995.930(c). (235 C.A.3d 13.)

(b) *The undertaking was insufficient.*

(1) When an injunction restrains the operation of a business, foreseeable damages include the profits that the operator would have made had the operator not been prevented from carrying on the business; here it was undisputed that defendant would suffer substantial lost profits. (235 C.A.3d 14.) Moreover, reasonable attorneys' fees and expenses incurred in successfully procuring a final decision dissolving the injunction are recoverable as "damages" within the meaning of the language of the undertaking. (235 C.A.3d 15.) In calculating the amount of the undertaking, the trial judge should have considered at least these two classes of damages. By setting the undertaking at \$ 1,000, the trial judge impliedly estimated that these two classes of damages would total no more than \$ 1,000. "That estimation is not within the bounds of reason. Even ignoring the lost profits, there is no reasonable possibility that the attorney's fees and expenses necessary to dissolve the injunction, either through appeal or trial, would not exceed \$ 1,000." (235 C.A.3d 16.)

(2) In granting the preliminary injunction, the trial court necessarily found that plaintiff was likely to prevail on the merits. Thus, the trial court may have reasoned that a nominal undertaking was sufficient because defendants were not likely to collect damages for harm caused by issuance of the preliminary injunction. If so, the trial court's reasoning was fallacious. The undertaking is designed to compensate the defendant if the injunction is ultimately determined to have been unjustified, even though that determination is unlikely. (235 C.A.3d 16, footnote 8.)

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2. Preliminary Injunction.

e. Order.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 387

[§ 387] In General.

Whether the injunction is preliminary or a final equitable decree, there is a strong preference for a formal written order, signed by the judge, and filed. The reason is stated in *Wheeler v. Superior Court* (1927) 82 C.A. 202, 255 P. 275, holding that a minute entry was a mere preliminary memorandum and that the subsequent signed order was controlling: "It is true that in some instances orders may rest upon the clerk's minutes, but it is also true that others require some formulation by the judge. This is particularly so in the case of injunctions. An injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing. In ordinary actions at law it is the rule that the signature of the judge is not necessary to the validity of the judgment, but it has been the almost invariable rule in this state for decrees in equity to be so signed." (82 C.A. 209.) (On form of order, see Cal. Civil Practice, 2A Procedure, §§16:144, 16.145; C.E.B., 2 Civil Proc. Before Trial 4th, §32.156 et seq.; 14A Am.Jur. P.P. Forms (2002 ed.), Injunctions, §68 et seq.; on federal practice, see *F.R. Civ. P.*, Rule 65(d)(1) [order granting injunction and restraining order must (1) set forth reasons for its issuance; (2) state its terms specifically; and (3) describe in reasonable detail, and not by reference to complaint or other document, acts sought to be restrained or required]; 19 Federal Procedure, L.Ed. §47:32 et seq.; 11A Federal Practice & Procedure (Wright, Miller & Kane) §2955; on order reserving power to modify, see *infra*, §399 et seq.)

However, in *Wutchumna Water Co. v. Superior Court* (1932) 215 C. 734, 12 P.2d 1033, the judge merely said: "The injunction will issue. Bond in the sum of \$ 75,000. Usual conditions of course." The clerk made a detailed minute entry in the form suggested by the notice of motion. *Held*, the minute entry was a valid order for a preliminary injunction, intended by the judge and so understood by the parties. The *Wheeler* case was distinguished on the ground that the oral statements of the judge there were preliminary, and that the intention of the court, understood by the parties, was to make a signed decree as the effective order. (215 C. 739.) "But where the judge is satisfied that relief upon an application for a preliminary injunction may be granted in the language of the prayer or motion, there is no rule, statutory or otherwise, which requires that he make and sign a decision in writing. The entry of his order, announced orally in open court, in the clerk's minute-book makes the decision a matter of record." (215 C. 737.)

Wheeler and *Wutchumna Water Co.* were reviewed and a definitive rule laid down in *People v. Gordon* (1951) 105

C.A.2d 711, 234 P.2d 287, an action to enjoin violation of the Unfair Trade Practices Act: "We conclude from those authorities that an order for a preliminary injunction can be validly made by minute order if said order by reference provides all required details of formulation but that otherwise a formal written order is essential. Comparison of the minute order and the formal written order in this case shows that the minute order neither by reference nor otherwise contains detailed formulation of the acts prohibited. There is therefore here not present a situation in which the minute order can be considered a final and appealable disposition of the application for a preliminary injunction." (*105 C.A.2d 716.*)

In *McManus v. KPAL Broadcasting Corp. (1960) 182 C.A.2d 558, 6 C.R. 441*, a memorandum decision on March 3 ordered a preliminary injunction to issue and directed counsel for plaintiffs to prepare a formal order. It did not mention a bond. *Held*, the memorandum decision did not become operative until a written order was presented and signed on March 31. (*182 C.A.2d 562.*)

A statement of decision is not required on grant or denial of an application for a preliminary injunction. Under *C.C.P. 632*, a statement of decision is required on request when the court tries a question of fact, but a preliminary injunction hearing is not a trial. (*People v. Landlords Professional Services (1986) 178 C.A.3d 68, 72, 223 C.R. 483, 7 Cal. Proc. (5th), Trial, §392* [suggesting that Legislature may wish to repair this "seemingly anomalous loophole in the law"].)

West's Key Number Digest, Injunction 156 et seq., 201 et seq.

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e. Order.

2. Definite Order Is Required.

6 *Witkin Cal. Proc. Prov Rem* § 388

[§ 388] Definite Order Is Required.

An order must be sufficiently definite to provide a standard of conduct for those whose activities are proscribed. It must also provide a standard by which the court applying the injunction can determine whether the order has been violated. (*Pitchess v. Superior Court* (1969) 2 C.A.3d 644, 651, 83 C.R. 35; *California Satellite Systems v. Nichols* (1985) 170 C.A.3d 56, 71, 216 C.R. 180; *Chico Feminist Women's Health Center v. Scully* (1989) 208 C.A.3d 230, 250, 256 C.R. 194, *supra*, §318.) An injunction that forbids an act in terms so vague that people of common intelligence must guess at its meaning is beyond the court's power. (*Pitchess v. Superior Court*, *supra*; *Westside Sane/Freeze v. Ernest W. Hahn* (1990) 224 C.A.3d 546, 558, 274 C.R. 51 [order enjoining shopping center from barring "any other form of protected political expression" was impermissibly vague, and phrase was required to be struck from preliminary injunction]; *San Marcos v. Coast Waste Management* (1996) 47 C.A.4th 320, 327, 54 C.R.2d 588 [injunction prohibiting waste management corporation from collecting recyclable solid wastes for fee within city limits, but not defining "solid waste," was not impermissibly vague where term was defined in detail by statute and by California Supreme Court case]; 7 *Summary* (10th), *Constitutional Law*, §408 et seq.)

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D. Enforcement of Injunction.

1. Service of Writ.

6 *Witkin Cal. Proc. Prov Rem* § 389

[§ 389] Service of Writ.

There is no express statutory requirement that the writ (i.e., the injunctive order or decree) must be served, and there is no provision on the method of service. If the court has jurisdiction of the defendant, its injunction, like any other order or decree, is binding on the defendant without service of process. But a temporary restraining order may be obtained ex parte, and a preliminary injunction may sometimes be sought against a class of persons not all of whom are named as parties defendant in the main action. Hence, though the court has jurisdiction to render the judgment, the general rule is settled that no person is liable for violation of an injunction unless that person has notice of the injunction. (See *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court* (1884) 65 C. 187, 190, 3 P. 628 ["The Code of Civil Procedure does not provide how or by whom an injunction shall be served, but the important matter is that the party enjoined shall have notice"]; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §350.)

The best method of establishing the necessary notice is by service of the writ or order on the person enjoined, in the manner of service of a summons. (See *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court*, supra, 65 C. 190 ["the statute being silent, it is at the most sufficient if service is made in conformity with the mode prescribed with reference to service of summons"]; *Sorrell v. Superior Court* (1946) 73 C.A.2d 194, 201, 166 P.2d 80 [order restraining picketing was read by deputy sheriff over loudspeaker and then personally handed to petitioner]; C.E.B., 2 Civil Proc. Before Trial 4th, §32.87.) An injunction may be served on any day. (*C.C.P.* 134(b).)

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2. Notice Without Service.

6 *Witkin Cal. Proc. Prov Rem* § 390

[§ 390] Notice Without Service.

Even though no service is made, a party against whom the writ is directed is bound by it if the party has actual notice. "It is not necessary to actually serve an injunction upon an accused person in order to hold him guilty of contempt for the violation of its terms. When the accused person appears personally in court or is represented by an attorney at the time the injunction is heard and granted, he is deemed to have actual notice thereof." (*Mattos v. Superior Court* (1939) 30 C.A.2d 641, 647, 86 P.2d 1056.) (See *Vernon v. Superior Court* (1952) 38 C.2d 509, 517, 241 P.2d 243 [city councilmembers learned of judgment from report of their attorney]; *People v. Saffell* (1946) 74 C.A.2d Supp. 967, 979, 168 P.2d 497; C.E.B., 2 Civil Proc. Before Trial 4th, §32.88.)

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D. Enforcement of Injunction.

3. Persons Subject to Decree.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 391

[§ 391] In General.

The court must have personal jurisdiction over the defendant (*Rothschild v. Erda* (1968) 258 C.A.2d 750, 753, 66 C.R. 209), and the defendant must be given notice by service or otherwise (supra, §§389, 390). But personal jurisdiction and notice are not enough to subject a person to the restraint of an injunction. The order must be directed against that person, either by naming that person as an individual or by designating a class of persons to which that person belongs. (See *Ross v. Superior Court* (1977) 19 C.3d 899, 905, 141 C.R. 133, 569 P.2d 727, *infra*, §393; C.E.B., 2 Civil Proc. Before Trial 4th, §32.88.)

An injunction, merely by including a provision stating that it applies to all persons with actual notice of the injunction, cannot become effective against persons not named as individuals or as part of a class designated by the injunction or acting in concert with those named. Actual notice "is a requirement but cannot be an independent ground upon which to apply an injunction to a nonparty." (*Planned Parenthood Golden Gate v. Garibaldi* (2003) 107 C.A.4th 345, 352, 358, 132 C.R.2d 46, *supra*, §352, citing the text.) And if the person charged with violation was neither named in the injunction individually or as a member of a class, nor identified as aiding or abetting a person so included, he or she cannot be brought within the prohibition merely by being served with a copy of the writ. (*Berger v. Superior Court* (1917) 175 C. 719, 720, 722, 167 P. 143 [affidavit for contempt showed no relation of accused to the proceedings, and was based solely on notice from service].)

A number of decisions are illustrative. (See *People v. Acuna* (1997) 14 C.4th 1090, 1101, 1107, 60 C.R.2d 277, 929 P.2d 596 [individualized proof that gang members named in injunction had committed acts comprising specific elements of public nuisance was not required for entry of preliminary injunction against those members where evidence showed that gang was responsible for nuisance and court could have named gang instead]; *Planned Parenthood Assn. v. Operation Rescue* (1996) 50 C.A.4th 290, 305, 57 C.R.2d 736, citing the text [permanent injunction establishing place and manner restrictions on demonstrations by antiabortion group bound individual who had contributed money, received mailings, attended rallies, and testified that he had been involved with group for "a few weeks"]; *People v. Conrad* (1997) 55 C.A.4th 896, 903, 64 C.R.2d 248 [knowledge of injunction and some actual relationship with enjoined party is necessary to bring a nonparty within scope of injunction]; *Freeman v. San Diego Assn. of Realtors* (1999) 77 C.A.4th 171, 204, 91 C.R.2d 534, *infra*, §395 [action claiming violation of injunction must plead and prove

that party had ability to comply with it]; *People v. Kothari* (2000) 83 C.A.4th 759, 765, 100 C.R.2d 29, *infra*, §394 [injunction restraining owners of hotel from permitting prostitution and drug use on premises was not binding on future bona fide purchasers].)

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b. Corporations and Associations.

6 *Witkin Cal. Proc. Prov Rem* § 392

[§ 392] Corporations and Associations.

An injunction is often granted against a corporation or association that acts through officers, agents, or members. And, though the decree or order names only the organization and a few individuals, it is binding on others not named who have notice of it. (See *Kirby v. San Francisco Savings & Loan Soc.* (1928) 95 C.A. 757, 760, 273 P. 609 [bank, served with writ, nevertheless paid money over to party enjoined from withdrawing deposit]; *In re Morford* (1934) 137 C.A. 662, 664, 31 P.2d 406; *Mattos v. Superior Court* (1939) 30 C.A.2d 641, 647, 86 P.2d 1056 ["The general rule is that one may be guilty of contempt who violates an injunction, although he is not a party to the original action, provided he is included in the injunction as an officer, employee or agent of a party defendant, when he has either actual or constructive notice thereof"]; *People v. Broderick Boys* (2007) 149 C.A.4th 1506, 1520, 59 C.R.3d 64 [criminal street gang with no lawful purpose was not unincorporated association for purpose of service of notice of injunction; even if it were, service on gang member whose rank was unknown, and who disavowed intention to appear, did not meet federal due process standard for service on unincorporated association]; 18 *Am.Jur.2d* (2004 ed.), *Corporations* §8.) Thus, an injunction restraining a corporation and anyone acting on its behalf binds directors who perform the corporate acts. (*Signal Oil & Gas Co. v. Ashland Oil & Refining Co.* (1958) 49 C.2d 764, 779, 322 P.2d 1 [injunction against corporation holding directors' meeting enjoins directors with knowledge of the decree].) (On federal practice, see *F.R. Civ. P.*, *Rule 65(d)(2)*; 19 Federal Procedure, L.Ed. §§47:39, 47:42, 47:43; 11A Federal Practice & Procedure (Wright, Miller & Kane) §2956; 97 *A.L.R.2d* 490 [who, under *F.R. Civ P.*, *Rule 65(d)* and state counterparts, are persons "in active concert or participation" with parties].)

"In matters of injunction, however, it has been a common practice to make the injunction run also to classes of persons through whom the enjoined party may act, such as agents, servants, employees, aiders, abettors, etc., though not parties to the action, and this practice has always been upheld by the courts, and any of such parties violating its terms with notice thereof are held guilty of contempt for disobedience of the judgment. But the whole effect of this is simply to make the injunction effectual against all through whom the *enjoined party* may act, and to prevent the prohibited action by persons acting in concert with or in support of the claim of the *enjoined party*, who are in fact *his* aiders and abettors." (*Berger v. Superior Court* (1917) 175 C. 719, 721, 167 P. 143.)

In re Berry (1968) 68 C.2d 137, 65 C.R. 273, 436 P.2d 273, *infra*, §412, a labor injunction, makes this distinction:

The order was directed against "all persons in active concert or participation with them [union and representatives] or *in concert among themselves*." The first part, referring to participation with specifically named defendants, was proper; the additional italicized language, however, introduced fatal uncertainty in its application to persons unaffiliated with the union or other named persons. (68 C.2d 155.)

SUPPLEMENT: [This section is current through the latest supplement]

Enjoining nonparties: See *People v. Colonia Chiques* (2007) 156 C.A.4th 31, 42, 67 C.R.3d 70 [nonparty active members of criminal street gang or persons who acted in concert with gang and who were properly served with injunction were bound by permanent injunction to abate public nuisance issued against gang as unincorporated association, its active members, and persons acting in concert with it in more than nominal way].



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3. Persons Subject to Decree.

c. Local Board of Supervisors.

6 *Witkin Cal. Proc. Prov Rem* § 393

[§ 393] Local Board of Supervisors.

In *Ross v. Superior Court* (1977) 19 C.3d 899, 141 C.R. 133, 569 P.2d 727, certain welfare regulations were held invalid in two prior appeals. The Sacramento Superior Court thereafter ordered the Secretary of the Health and Welfare Agency, the Director of the Department of Benefit Payments, and "their successors in office, agents and employees" to pay retroactive benefits denied by county welfare departments under the former regulations. The board of supervisors of Plumas County refused to comply with instructions issued under the order. The trial judge found that the board's members had notice of the order and sufficient funds to comply, and fined each member \$ 500 for wilful contempt. *Held*, judgment affirmed.

(a) Petitioners contended that they were denied due process of law because they were not parties to the underlying action. But in *Berger v. Superior Court* (1917) 175 C. 719, 167 P. 143, it was held proper to make an injunctive order effective by directing it also to those through whom the enjoined party may act. (19 C.3d 906.) The present order was directed to the "agents" of the named state officers, and, under California's statutory scheme "the county boards of supervisors, acting through the county welfare departments, function as agents of the Department of Benefit Payments in administering" welfare benefits. (19 C.3d 907.)

(b) Petitioners also contended that a county, as a "special" rather than a "general" agent of the state welfare agency, was not bound by the injunction against state officers. This is unsound. (1) The board has ongoing statutory responsibility for local administration of welfare benefits; hence, acts as a general agent. (19 C.3d 908.) (2) A special agent would also be bound; otherwise, "a principal could avoid the force of any injunction simply by acting through special agents rather than general agents." (19 C.3d 909.)

(c) Petitioners are not immune from the sanction of contempt by reason of their status as local elected officials. Under *Glendale City Employees' Assn. v. Glendale* (1975) 15 C.3d 328, 124 C.R. 513, 540 P.2d 609, 8 Cal. Proc. (5th), *Extraordinary Writs*, §91, "administrative functions of a board of supervisors are not immune from judicial process and may be mandated or enjoined." (19 C.3d 909, footnote 6.)

Three justices joined in a dissent, reiterating the view stated by the dissenting justice in *Glendale* that citing a

legislative body--local or state--for contempt is a violation of the constitutional separation of powers doctrine (*19 C.3d 917*), and that other remedies were available (*19 C.3d 919*). (See *66 Cal. L. Rev. 462*.)

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D. Enforcement of Injunction.

3. Persons Subject to Decree.

d. Successors in Interest.

6 Witkin Cal. Proc. Prov Rem § 394

[§ 394] Successors in Interest.

A successor in interest of the party enjoined, with notice, is liable for violation. (*Gale v. Tuolumne County Water Co.* (1914) 169 C. 46, 51, 145 P. 532; *Katenkamp v. Superior Court* (1940) 16 C.2d 696, 700, 108 P.2d 1; see 42 Am.Jur.2d (2000 ed.), *Injunctions* §§298, 301.)

In *Katenkamp*, the injunction was against a corporation that later transferred all its property to its sole stockholder. *Held*, the stockholder was bound by the injunction. "The fact that the injunction is issued against the corporation alone rather than against it, its officers, agents and employees, cannot change the application of this rule. An injunction issued against a corporation is in effect an injunction against the officers, agents, and employees." (16 C.2d 700.)

Gale was distinguished in *People v. Kothari* (2000) 83 C.A.4th 759, 100 C.R.2d 29. A stipulated injunction was issued under the Red Light Abatement Law (P.C. 11225 et seq.) to restrain the owners of a hotel from permitting drug sales and prostitution on the premises. The trial court ruled that the stipulated judgment was binding on all future owners. *Held*, reversed; the injunction was not binding on future bona fide purchasers. Generally, an injunction is an in personam remedy that requires a person to refrain from or do a particular act. The injunction binds the defendant and the defendant's agents and those who act in concert with the defendant and have notice. On the other hand, "[i]t is well established that injunctions are not effective against the world at large." *Gale*, a riparian rights case, was entirely in rem, and thus a stipulated injunction, like all other rights and obligations, ran with the land. But the obligations of the owners under the stipulated injunction here were not of an in rem character. (83 C.A.4th 765.)

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e. Persons Able To Comply.

6 *Witkin Cal. Proc. Prov Rem* § 395

[§ 395] Persons Able To Comply.

An action for violation of an injunction must plead and prove that the defendant had the ability to comply with the injunction. (*Freeman v. San Diego Assn. of Realtors* (1999) 77 C.A.4th 171, 204, 91 C.R.2d 534.) *Freeman* involved a number of regional real estate associations that joined together to create a corporation to provide a county-wide multiple listing service (MLS). One of the associations had earlier been required by an injunction to provide its residential and investment MLS's to all licensed real estate agents without regard to association membership, and was allowed to impose reasonable charges, provided that charges for members and nonmembers were made on the same basis. Plaintiff sued the association for damages for violation of the injunction (see *infra*, §397), alleging that the association's monthly charge was unreasonable. The trial court dismissed. *Held*, dismissal affirmed. Plaintiff alleged that the corporation was setting and collecting the allegedly excessive fee. However, the complaint did not allege that the corporation was restrained by the injunction against the association, but only that the association violated the injunction. Assuming the injunction was intended to place an upper limit on MLS fees, the complaint failed to allege that the party setting the fees (the corporation) was bound by the injunction, or that the party bound by the injunction (the association) had the ability to comply with the injunction by charging fees lower than those set by the corporation. (77 C.A.4th 204.)

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4. Punishment of Violation as Contempt.

6 *Witkin Cal. Proc. Prov Rem* § 396

[§ 396] Punishment of Violation as Contempt.

The chief sanction for injunctive orders, provisional and final, is a contempt proceeding, which is the remedy for violation of various kinds of orders in addition to injunctions. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §340 et seq.; on enforcement of injunction by contempt proceedings, see Rutter Group, *Civil Proc. Before Trial* §9:711 et seq.; on right to jury trial in criminal contempt proceeding for violation of injunction, see *Mitchell v. Superior Court* (1989) 49 *C.3d* 1230, 1241, 265 *C.R.* 144, 783 *P.2d* 731, 7 *Cal. Proc.* (5th), *Trial*, §186.)

The foundation of the contempt proceeding is the affidavit showing violation of the terms of the injunction. (See 7 *Am.Jur.* P.P. Forms (2002 ed.), *Contempt*, §47 et seq.; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §343 et seq.; on review of contempt order, see *infra*, §409 et seq.)

Separate acts of disobedience of the same injunction may constitute separate contempts. Thus, a defendant continuously engaged in prohibited activity may be held guilty of a separate contempt for each separate contemptuous act. (*Solano Aquatic Club v. Superior Court* (1913) 165 *C.* 278, 131 *P.* 874 [separate contempt for each day defendant operated ferry service after notice of temporary restraining order prohibiting it from doing so]; see *Donovan v. Superior Court* (1952) 39 *C.2d* 848, 855, 250 *P.2d* 246 [multiple fines for separate acts by two defendants, totaling \$ 2,000 and \$ 4,500, respectively]; *In re Stafford* (1958) 160 *C.A.2d* 110, 113, 324 *P.2d* 967, 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §361; *Reliable Enterprises v. Superior Court* (1984) 158 *C.A.3d* 604, 625, 204 *C.R.* 786, 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §361 [multiple fines for several lewd acts occurring on same day].) However, persons who violate an injunction to abate a nuisance may not be charged with more than one count of contempt for each separate day they permit the enjoined nuisance to continue. (*Mitchell v. Superior Court* (1989) 49 *C.3d* 1230, 1345, 265 *C.R.* 144, 783 *P.2d* 731 [citing *P.C.* 373a; only four counts of contempt could be charged where 62 lewd acts were performed over 4 days].)

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5. Civil Damages for Violation.

6 *Witkin Cal. Proc. Prov Rem* § 397

[§ 397] Civil Damages for Violation.

A civil action for damages is available for violation of an injunction. (*H.J. Heinz Co. v. Superior Court* (1954) 42 C.2d 164, 266 P.2d 5 [dicta]; see *Kirby v. San Francisco Savings & Loan Soc.* (1928) 95 C.A. 757, 759, 273 P. 609; *Guttinger v. Calaveras Cement Co.* (1958) 160 C.A.2d 460, 462, 325 P.2d 145; *Freeman v. San Diego Assn. of Realtors* (1999) 77 C.A.4th 171, 203, footnote 36, 91 C.R.2d 534, *supra*, §395, citing *H.J. Heinz Co.*)

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6. Sister State Injunction.

6 *Witkin Cal. Proc. Prov Rem* § 398

[§ 398] Sister State Injunction.

Under U.S. Const., Art. IV, §1, full faith and credit must be given in each state to the judicial proceedings of every other state. (See 7 *Summary* (10th), *Constitutional Law*, §31.) In rare instances, a sister state judgment need not be enforced if it would involve an improper interference with important interests of the enforcing state. Although this "public policy" exception does not apply to a money judgment (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §447), it may be applied to prevent enforcement of a sister state injunction. "[T]he difference arises from the fact that the underlying cause of action is merged into a money judgment but not merged into an equitable decree. And when an equitable decree is at issue, the very act or forbearance ordered by the decree may itself violate local laws or public policy in a way that a monetary judgment cannot." (*Smith v. Superior Court* (1996) 41 *C.A.4th* 1014, 1025, 49 *C.R.2d* 20, 7 *Summary* (10th), *Constitutional Law*, §36 [sister state injunction barring former employee from testifying against defendant employer was not entitled to full faith and credit; it effectively destroyed plaintiffs' ability to prove case and conflicted with California's public policy against suppression of evidence].)

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E. Modification by Trial Court.

1. Statutory Authority and Inherent Power.

6 *Witkin Cal. Proc. Prov Rem* § 399

[§ 399] Statutory Authority and Inherent Power.

(1) *Statutory Authority*. The trial court may modify an injunction that was granted without notice. (*C.C.P.* 532.) It may also, on notice, modify an injunction or restraining order on a showing that: (a) there has been a material change in the facts on which the injunction or restraining order was granted; (b) the law on which the injunction or restraining order was based has changed; or (c) modification would serve the ends of justice. (*C.C.* 3424; *C.C.P.* 533) *C.C.* 3424 does not apply to a final injunction issued under the Family Code. (*C.C.* 3424(c).)

A court sometimes expressly reserves the power to modify an injunction. (See *Wheeler v. Superior Court* (1927) 82 *C.A.* 202, 206, 255 *P.* 275.)

(2) *Inherent Power*. The power to modify does not depend on statute or a reservation of jurisdiction. It is an inherent power, exercisable with a permanent injunction, and therefore necessarily exercisable with a preliminary injunction. (See *Sontag Chain Stores Co., Ltd. v. Superior Court* (1941) 18 *C.2d* 92, 95, 113 *P.2d* 689 [permanent injunction]; *Union Interchange v. Savage* (1959) 52 *C.2d* 601, 606, 342 *P.2d* 249 [preliminary injunction]; *Branker v. Superior Court* (1958) 165 *C.A.2d* 816, 818, 332 *P.2d* 711 [preliminary injunction]; *Little v. Schwartz* (1960) 182 *C.A.2d* 594, 598, 6 *C.R.* 40, 7 *Cal. Proc.* (5th), *Judgment*, §82 [permanent injunction]; *West Coast Const. Co. v. Oceano Sanitary Dist.* (1971) 17 *C.A.3d* 693, 699, 95 *C.R.* 169, quoting the text [preliminary injunction]; *Greenly v. Cooper* (1978) 77 *C.A.3d* 382, 389, 390, 143 *C.R.* 514, citing the text [preliminary injunction]; *Oakland v. Superior Court* (1982) 136 *C.A.3d* 565, 569, 186 *C.R.* 326 [preliminary injunction]; *New Tech Dev. v. Bank of Nova Scotia* (1987) 191 *C.A.3d* 1065, 1071, 236 *C.R.* 746 [preliminary injunction]; *Mendly v. Los Angeles* (1994) 23 *C.A.4th* 1193, 1207, 28 *C.R.2d* 822 [permanent injunction]; *San Marcos v. Coast Waste Management* (1996) 47 *C.A.4th* 320, 328, 54 *C.R.2d* 588 [trial court has inherent power to modify its preliminary injunction, "which is of a continuing or executory nature"]; *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 *C.A.4th* 1228, 1248, 29 *C.R.3d* 521, citing the text; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §302 et seq.; 7 *Cal. Proc.* (5th), *Judgment*, §§81, 82.) Similarly, the court has power to grant an injunction that was previously denied on a showing of changed conditions. (See *Brunzell Const. Co. of Nevada v. Harrah's Club* (1967) 253 *C.A.2d* 764, 772, 62 *C.R.* 505.)

A permanent injunction arising out of contractual arbitration may be modified by the arbitrator, who need not reserve jurisdiction. (See *Swan Magnetics v. Superior Court* (1997) 56 *C.A.4th* 1504, 1512, 66 *C.R.2d* 541.)

(3) *Governing Law*. Because an injunction operates in the future, it may be scrutinized in light of legislation that arises after its issuance. (*United Food & Commercial Workers Union, Local No. 324, AFL-CIO, CLC v. Superior Court* (2000) 83 C.A.4th 566, 575, 99 C.R.2d 849 [in employer's action to enjoin picketing of its store, unions were entitled to invoke law stating criteria for issuance of injunction in case involving labor dispute, even though law became operative after preliminary injunction was issued]; *People v. Broderick Boys* (2007) 149 C.A.4th 1506, 1520, 59 C.R.3d 64 [because injunction governs future conduct, court applies law existing at time decree issues, if law has changed since filing of complaint].)

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E. Modification by Trial Court.

2. Who May Seek Modification.

6 *Witkin Cal. Proc. Prov Rem* § 400

[§ 400] Who May Seek Modification.

The plaintiff, as well as the defendant, may seek a modification. (See *Green Trees Enterprises v. Palm Springs Alpine Estates* (1967) 66 C.2d 782, 787, 59 C.R. 141, 427 P.2d 805 [extension of injunction against foreclosing deeds of trust, on showing that defendants had interfered with efforts to sell or refinance]; *Jeneski v. Myers* (1984) 163 C.A.3d 18, 29, 30, 209 C.R. 178 [refusal to extend preliminary injunction preventing state from removing certain drugs from Medi-Cal reimbursement list through time of trial was reversed]; but see *Salazar v. Eastin* (1995) 9 C.4th 836, 840, 39 C.R.2d 21, 890 P.2d 43 [there was no basis for modification of injunction to address application of statute by local school districts, where challenge was to facial constitutionality of statute and not to statute as applied, and no court had found any local district misapplying statute].)

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E. Modification by Trial Court.

3. Service of Motion To Modify Permanent Injunction.

6 Witkin Cal. Proc. Prov Rem § 401

[§ 401] Service of Motion To Modify Permanent Injunction.

Service of the motion to modify a permanent injunction must be made on the nonmoving party under the following circumstances:

(1) If the party has not appeared in the action, in the same manner as a summons under *C.C.P. 415.10* et seq. (3 *Cal. Proc.* (5th), *Actions*, §1008 et seq.). (C.C. 3424(b)(1).)

(2) If the party has appeared, either on the party or his or her attorney, or on the party if not represented, either in the same manner as a summons under *C.C.P. 415.10* et seq., or in the manner provided in *C.C.P. 1010* et seq. (6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §12 et seq.). (C.C. 3424(b)(2).)

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F. Appeal.

1. In General.

6 *Witkin Cal. Proc. Prov Rem* § 402

[§ 402] In General.

All orders granting or refusing to grant, or dissolving or refusing to dissolve, either a temporary restraining order or a provisional injunction are directly appealable. (*C.C.P.* 904.1(a)(6), 904.2(g); see *Art Movers v. Ni West* (1992) 3 C.A.4th 640, 646, 4 C.R.2d 689, 9 Cal. Proc. (5th), *Appeal*, §176 [*C.C.P.* 904.1(f) (now *C.C.P.* 904.1(a)(6)) applies only to order involving provisional injunctions; order dismissing cause of action for permanent injunctive relief is not appealable, except from final judgment]; 9 Cal. Proc. (5th), *Appeal*, §174 et seq.) But appeals from these orders are not particularly effective remedies.

Because the proceeding on the provisional remedy is distinct from the main action (see *supra*, §285), a plaintiff's appeal from an order of denial does not divest the trial court of jurisdiction over the action, and it may proceed to trial and judgment on the merits. (See *Gray v. Bybee* (1943) 60 C.A.2d 564, 571, 141 P.2d 32; *Allstate Ins. Co. v. Orlando* (1968) 262 C.A.2d 858, 868, 69 C.R. 702, citing the text; 9 Cal. Proc. (5th), *Appeal*, §21.) And if the court can try a case on the merits, a fortiori it can determine that the case is without merit by sustaining a demurrer without leave to amend. (*MaJor v. Miraverde Homeowners Assn.* (1992) 7 C.A.4th 618, 623, 9 C.R.2d 237 [appeal from denial of preliminary injunction was moot; reviewing court sustained demurrer without leave to amend to only cause of action that might have supported injunction].)

Similarly, where the provisional remedy is granted, and the defendant appeals, the action may be tried and decided while the appeal is pending. The preliminary injunction will then be merged in the permanent injunction or will terminate on denial of a permanent injunction. In either case, the appeal from the order granting the preliminary injunction is rendered moot and may be dismissed. (See *Doudell v. Shoo* (1911) 159 C. 448, 455, 114 P. 579; *Peoples Ditch Co. v. Foothill Irr. Dist.* (1930) 103 C.A. 321, 325, 284 P. 514; 9 Cal. Proc. (5th), *Appeal*, §753.)

Because relief by injunction operates in the future, appeals of injunctions are governed by the law in effect at the time the appellate court gives its decision. (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 C.2d 489, 528, 45 P.2d 972; *Marine Forests Soc. v. California Coastal Com.* (2005) 36 C.4th 1, 23, 30 C.R.3d 30, 113 P.3d 1062, citing the text; *California Satellite Systems v. Nichols* (1985) 170 C.A.3d 56, 66, 216 C.R. 180; *Oberlander v. Contra Costa* (1992) 11 C.A.4th 535, 538, 15 C.R.2d 182; *Broadmoor San Clemente Homeowners Assn. v. Nelson* (1994) 25 C.A.4th 1, 4, 30 C.R.2d 316; *Watsonville v. State Dept. of Health Services* (2005) 133 C.A.4th 875, 884, 35 C.R.3d 216, citing

the text [it does not matter whether new law was intended to be retroactive; reviewing court is interested in law's prospective effect because decree under review will operate in future]; see 9 *Cal. Proc.* (5th), *Appeal*, §339.)

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F. Appeal.

2. Stay of Injunction Pending Appeal.

6 Witkin Cal. Proc. Prov Rem § 403

[§ 403] Stay of Injunction Pending Appeal.

(1) *What Orders Are Stayed.* An appeal stays a mandatory injunction. (See supra, §280; 9 Cal. Proc. (5th), *Appeal*, §270.) A prohibitory injunction is not automatically stayed (see supra, §§278, 279; 9 Cal. Proc. (5th), *Appeal*, §276), and its operation may be stayed only on order.

(2) *Stay by Trial Court.* The trial court has inherent power to preserve the status quo by staying its injunction pending appeal. (*Tulare Irr. Dist. v. Superior Court* (1925) 197 C. 649, 665, 242 P. 725; *San Diego v. Southern Calif. Tel. Corp.* (1954) 42 C.2d 110, 120, 266 P.2d 14 ["under conditions that protect the appellant by preserving the subject matter of the appeal pending outcome thereof and at the same time protect the respondent by saving to it the benefits of the judgment in the event of an affirmance"].)

(3) *Stay of Contempt Order.* A contempt order for violation of the injunctive decree may be stayed or suspended pending the appeal, for if the decree is reversed, the contempt order will lack any foundation. (*Associated Lumber & Box Co. v. Superior Court* (1947) 79 C.A.2d 577, 581, 180 P.2d 389.)

(4) *Stay by Appellate Court.* In rare cases, the appellate court may stay the order by writ of supersedeas. (See *Wind v. Hite* (1962) 58 C.2d 415, 416, 24 C.R. 683, 374 P.2d 643; *Rubin v. American Sportsmen Television Equity Soc.* (1951) 102 C.A.2d 288, 290, 227 P.2d 303 [dicta]; 9 Cal. Proc. (5th), *Appeal*, §297.)

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F. Appeal.

3. Preliminary Injunction Pending Appeal.

6 Witkin Cal. Proc. Prov Rem § 404

[§ 404] Preliminary Injunction Pending Appeal.

On denying an injunction, the trial court may grant a restraining order or continue a preliminary injunction in force pending the appeal. (*Pasadena v. Superior Court* (1910) 157 C. 781, 794, 109 P. 620; *American Trading Co. v. Superior Court* (1923) 192 C. 770, 772, 222 P. 142.)

Thus, in *General Elec. Co. v. Federal Employees' Distr. Co.* (1955) 132 C.A.2d 649, 282 P.2d 941, plaintiff sued defendant corporation for an injunction forbidding it to sell plaintiff's products for less than fair trade prices. A preliminary injunction was issued, then dissolved by judgment of nonsuit, and later a new trial was granted. Defendant appealed from the order granting a new trial and plaintiff cross-appealed from the judgment of nonsuit. Then a preliminary injunction pending new trial and final determination of the action was granted, and defendant appealed from this order. *Held*, the superior court had jurisdiction to grant the preliminary injunction to preserve the subject of the litigation until final determination of the appeal. (132 C.A.2d 650.)

An unusual case extended the reviewing court's power in this area by recognizing an appellate injunction, to preserve the status quo after the trial court had first enjoined defendant town's fill operations for lack of a permit, and then had dissolved its injunction. "[W]here, as here, difficult questions of law are involved and the fruits of a reversal would be irrevocably lost unless the status quo is maintained, justice requires that an appellate court issue a stay order to preserve its own jurisdiction. While this power should be sparingly employed and reserved for the exceptional situation, the propriety of its exercise in this case cannot be seriously disputed: had Emeryville been permitted to resume its fill activities, it would have been able, as a practical matter, to render this appeal moot." (*People v. Emeryville* (1968) 69 C.2d 533, 537, 72 C.R. 790, 446 P.2d 790; see 9 Cal. Proc. (5th), Appeal, §299.)

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F. Appeal.

4. Effect of Reversal on Appeal.

6 *Witkin Cal. Proc. Prov Rem* § 405

[§ 405] Effect of Reversal on Appeal.

Where a preliminary injunction is granted to the plaintiff and judgment is thereafter entered in favor of the defendant, the preliminary injunction is dissolved without the necessity of a formal motion. (*Warfield v. Peninsula Golf & Country Club* (1989) 214 C.A.3d 646, 661, footnote 14, 262 C.R. 890 [defendant's demurrer was sustained without leave to amend]; *Oakland v. Superior Court* (1982) 136 C.A.3d 565, 569, 186 C.R. 326.) But if the judgment is subsequently reversed, the plaintiff is entitled to the protection earlier obtained by the injunction. (See *Oakland v. Superior Court*, *supra*, 136 C.A.3d 569.)

However, the preliminary injunction is not automatically reinstated, for automatic reinstatement--regardless of the passage of time and changes of circumstances--would be contrary to the basic purpose of a preliminary injunction. Hence, the lower court may be required to hold an evidentiary hearing to determine whether changed circumstances call for modification or dissolution of the injunction. (*Oakland v. Superior Court*, *supra*, 136 C.A.3d 569, 570; see *Warfield v. Peninsula Golf & Country Club*, *supra* [whether and to what extent injunction should be reinstated on remand was matter for trial court's discretion after evidentiary hearing].)

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G. Remedies of Defendant.

1. Dissolution of Injunction.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 406

[§ 406] In General.

Although a void injunction may be ignored and its disobedience is not contempt (see *infra*, §410), the defendant need not make the hazardous determination of invalidity. "Orderly procedure suggests that where the party served believes the order is invalid he should take the proper steps to have it dissolved rather than resort to self help." (*Mason v. United States Fidelity & Guaranty Co.* (1943) 60 C.A.2d 587, 591, 141 P.2d 475; see C.E.B., 2 Civil Proc. Before Trial 4th, §32.123 et seq.; 42 Am.Jur.2d (2000 ed.), *Injunctions* §302 et seq.)

The proper remedy is a noticed motion, attacking either of two fundamental defects:

(1) *Lack of notice to person enjoined.* The trial court may dissolve an injunction that was granted without notice. (C.C.P. 532.) The application may be made on the plaintiff's complaint or affidavits, or on the defendant's affidavits, with or without the answer; and if made on affidavits, the plaintiff may oppose it with counteraffidavits or other evidence in addition to that on which the injunction was granted. (C.C.P. 532; see *Falkinburg v. Lucy* (1868) 35 C. 52, 59; *Marks v. Weinstock, Lubin & Co.* (1898) 121 C. 53, 54, 53 P. 362 [defendant's affidavit was insufficient]; *People v. Broderick Boys* (2007) 149 C.A.4th 1506, 1516, 59 C.R.3d 64 [four men not named in complaint and who did not admit gang membership, but who were served with permanent injunction against street gang, had standing to bring motion to set aside injunction for lack of notice].)

C.C.P. 532 has been interpreted as requiring a noticed motion; the trial court cannot dissolve without notice to the plaintiff. (*Page v. Vaughn* (1901) 133 C. 335, 337, 65 P. 740; *Cherry Hill Gold Mining Co. v. Baker* (1905) 147 C. 724, 82 P. 370; for form, see Cal. Civil Practice, 2A Procedure, §16:133; 14A Am.Jur. P.P. Forms (2002 ed.), *Injunctions*, §118 et seq.)

(2) *Injunction improper under current circumstances.* Under C.C. 3424 and C.C.P. 533, the trial court may, on notice, dissolve an injunction or restraining order on a showing of any of the following:

(a) There has been a material change in the facts on which the injunction or restraining order was granted.

(b) The law on which the injunction or restraining order was based has changed.

(c) Dissolution would serve the ends of justice. (See, e.g., *Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.* (1940) 37 C.A.2d 642, 644, 100 P.2d 346 [restraining order was dissolved after demurrer to complaint was sustained with leave to amend; opinion emphasizes discretion of trial court]; *Engle v. Oroville* (1965) 238 C.A.2d 266, 270, 47 C.R. 630 [alleged nuisance had wholly ceased at time of trial]; *New Tech Dev. v. Bank of Nova Scotia* (1987) 191 C.A.3d 1065, 1073, 236 C.R. 746 [former U.C.C. 5114 (see now U.C.C. 5108 et seq.) construed to prohibit injunction against payment on letter of credit]; *Salazar v. Eastin* (1995) 9 C.4th 836, 840, 39 C.R.2d 21, 890 P.2d 43 [trial court did not abuse discretion by vacating injunction prohibiting local school districts from charging transportation fees under Ed.C. 39807.5 after California Supreme Court held, contrary to earlier Court of Appeal decision, that statute is constitutional on its face]; *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 C.A.4th 762, 776, 54 C.R.3d 644 [motion judge did not abuse his discretion in denying post-judgment motion to dissolve permanent injunction; assuming that dissolution may be based on ground that judge who issued injunction was disqualified for mental incapacity, defendant failed to establish that disqualifying condition existed during trial].)

C.C. 3424 does not apply to a final injunction issued under the Family Code. (C.C. 3424(c).)

Where an injunction is granted to prevent diversion of water used for irrigation or domestic purposes, a special procedure for dissolution, on giving bond, is provided by C.C.P. 532(b).

West's Key Number Digest, Injunction 160 et seq.

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1. Dissolution of Injunction.

b. Service of Motion To Dissolve Permanent Injunction.

6 *Witkin Cal. Proc. Prov Rem* § 407

[§ 407] Service of Motion To Dissolve Permanent Injunction.

Service of a motion to dissolve a permanent injunction must be made on the nonmoving party under the following circumstances:

(1) If the party has not appeared in the action, in the same manner as a summons under *C.C.P. 415.10* et seq. (3 *Cal. Proc.* (5th), *Actions*, §1008 et seq.) (C.C. 3424(b)(1).)

(2) If the party has appeared, either on the party or his or her attorney, or on the party if not represented, either in the same manner as a summons under *C.C.P. 415.10* et seq., or in the manner provided in *C.C.P. 1010* et seq. (6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §12 et seq.). (C.C. 3424(b)(2).)

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2. Review of Injunction Order.

6 *Witkin Cal. Proc. Prov Rem* § 408

[§ 408] Review of Injunction Order.

(1) *Common Remedies*. The common remedies against a void or erroneous injunctive order are (a) a motion to modify or dissolve, and (b) appeal, either from the injunctive order or from the denial of the motion to modify or dissolve. (See *New Tech Dev. v. Bank of Nova Scotia* (1987) 191 C.A.3d 1065, 1071, 236 C.R. 746, citing the text; *supra*, §399 et seq. [motion to modify], §402 et seq. [appeal], §406 et seq. [motion to dissolve].)

(2) *No Certiorari*. Certiorari will not lie, even if the decree is in excess of the court's jurisdiction, because an appeal is possible. (*Luitwieler v. Superior Court* (1921) 54 C.A. 528, 529, 202 P. 165; *Stewart v. Superior Court* (1941) 46 C.A.2d 843, 844, 117 P.2d 17; see 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §42.)

(3) *Prohibition*. Prohibition, however, may be granted despite the existence of a remedy by appeal if that remedy is deemed inadequate. (See *Green v. Superior Court* (1924) 65 C.A. 237, 239, 223 P. 582; *Northcutt v. Superior Court* (1924) 66 C.A. 350, 356, 226 P. 25; *Board of Police Commrs. v. Superior Court* (1985) 168 C.A.3d 420, 434, 214 C.R. 493 [appeal was inadequate to review injunction restraining municipality from enforcing ordinance, validity of which has not been determined]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §320; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §61 et seq.)

(4) *Mandamus*. Mandamus may also lie where the remedy by appeal is not speedy and adequate. (*San Francisco Newspaper Printing Co. v. Superior Court* (1985) 170 C.A.3d 438, 441, 216 C.R. 462 [case was 3 years old when writ petition was brought; Court of Appeal had discretion, in interest of judicial economy, to grant relief by writ].)

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3. Review of Contempt Order.

a. Extraordinary Writ.

6 *Witkin Cal. Proc. Prov Rem* § 409

[§ 409] Extraordinary Writ.

(1) *In General*. The defendant may take the risk of contempt by violating the injunction (see *infra*, §410 et seq.) and may then collaterally attack the injunction by a review of the contempt order. This order is nonappealable, but is reviewable by habeas corpus or certiorari. And the scope of review is exceedingly broad: the defendant may raise defects in the injunction or in the contempt proceedings. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §362; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §199.)

(2) *Habeas Corpus*. If the punishment of imprisonment for contempt is imposed, habeas corpus gives both the immediate release of the defendant from custody and a review of the contempt order. (See *In re De Silva* (1948) 33 *C.2d* 76, 79, 199 *P.2d* 6; *In re Circosta* (1963) 219 *C.A.2d* 777, 784, 33 *C.R.* 514 [burden on petitioner, not met]; *In re Berry* (1968) 68 *C.2d* 137, 146, 65 *C.R.* 273, 436 *P.2d* 273, *infra*, §412 [review of unconstitutional court order]; *In re Coleman* (1974) 12 *C.3d* 568, 572, 116 *C.R.* 381, 526 *P.2d* 533 [union officer held in contempt and jail sentence imposed].)

(3) *Certiorari*. No appeal being possible, certiorari will lie to review the contempt order. The scope of review on certiorari and habeas corpus is the same, and certiorari may be used when the punishment is a fine. (See *Fortenbury v. Superior Court* (1940) 16 *C.2d* 405, 407, 106 *P.2d* 411; *Oil Workers Int. Union, CIO v. Superior Court* (1951) 103 *C.A.2d* 512, 526, 230 *P.2d* 71; *Brady v. Superior Court* (1962) 200 *C.A.2d* 69, 73, 19 *C.R.* 242, 2 *Cal. Proc.* (5th), *Jurisdiction*, §296, quoting the text; *In re Coleman*, *supra*, 12 *C.3d* 572, footnote 2, citing the text [union and officers punished by fine only were not entitled to habeas corpus, but petition for habeas corpus was treated as one for certiorari]; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §199.)

(4) *Prohibition*. Because habeas corpus and certiorari are available to review the adjudication of contempt, some of the older cases took the position that prohibition would not lie; i.e., the defendant's remedy by hearing on the contempt charge and review of the contempt order was deemed adequate. But in *Harlan v. Superior Court* (1949) 94 *C.A.2d* 902, 904, 211 *P.2d* 942, prohibition was granted to prevent enforcement of a contempt order that sentenced petitioner to jail. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §320; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §§244, 245.)

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3. Review of Contempt Order.

b. Deliberate Violation as Basis for Review.

1. Effect of Violation of Void Injunction.

6 *Witkin Cal. Proc. Prov Rem* § 410

[§ 410] Effect of Violation of Void Injunction.

There is some authority for the proposition that, where an injunction is not void on its face, and its validity is a matter of dispute, it must be obeyed until it is dissolved on motion or reversed on appeal. It would follow that deliberate violation of such an injunctive order is a punishable contempt even though the order is ultimately found to be in excess of jurisdiction. But the California law is to the contrary: the contempt adjudication falls if it is determined that the injunction was void. (See *In re De Silva* (1948) 33 C.2d 76, 79, 199 P.2d 6; *In re Berry* (1968) 68 C.2d 137, 147, 65 C.R. 273, 436 P.2d 273, *infra*, §412; *Harlan v. Superior Court* (1949) 94 C.A.2d 902, 905, 211 P.2d 942; *Brady v. Superior Court* (1962) 200 C.A.2d 69, 73, 19 C.R. 242, 2 Cal. Proc. (5th), *Jurisdiction*, §296, quoting the text; *People v. Gonzalez* (1996) 12 C.4th 804, 816, 820, 822, 50 C.R.2d 74, 910 P.2d 1366, 4 Cal. Crim. Law (3d), *Jurisdiction and Venue*, §2 [where defendant, charged with misdemeanor contempt for violation of preliminary injunction, claimed that the injunction was facially invalid on constitutional grounds, municipal court and appellate department of superior court had jurisdiction to resolve constitutionality of injunction].) (For further discussion of right to violate void order, see 2 Cal. Proc. (5th), *Jurisdiction*, §343.)

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2. Advantages of Deliberate Violation.

6 *Witkin Cal. Proc. Prov Rem* § 411

[§ 411] Advantages of Deliberate Violation.

Deliberate violation, followed by a review of the resulting contempt order on certiorari or habeas corpus, may be a better, if less respectable, remedy than appeal for the following reasons:

(1) It gives the same review more expeditiously. Theoretically, an appeal has a broader scope of review; but, because discretion in granting an injunction is rarely overturned and most successful attacks are based on "jurisdictional" defects, the broader review on appeal is of no particular advantage.

(2) Review of the contempt order avoids the effect of a prohibitory injunction that is not stayed by appeal or supersedeas. An appeal would require obedience during the long period until decision; review of the contempt order makes that obedience unnecessary.

(3) There is not too much danger in the disobedience remedy. The view that this is an appropriate method of testing the jurisdiction to grant the injunction carries with it the practical corollary that if the defendant, in reliance on advice of counsel, guesses wrong, and the contempt order is upheld, the defendant may show his or her good faith in mitigation. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §§353, 355.)

(4) The chances of temporary success are much greater. The defendant who appeals from an injunctive decree has the burden of making the strong affirmative showing of error or abuse of discretion by the trial court. But contempt is a "quasi-criminal" proceeding, regarded with strictness and disfavor by reviewing courts, and the defendant may not only attack the basis of the injunction, but may successfully raise technical defects in the contempt proceeding. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §362. 363.)

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b. Deliberate Violation as Basis for Review.

3. Illustration: Injunction Is Void.

6 *Witkin Cal. Proc. Prov Rem* § 412

[§ 412] Illustration: Injunction Is Void.

In re Berry (1968) 68 C.2d 137, 65 C.R. 273, 436 P.2d 273, involved a labor dispute in which a public employees' union acted in defiance of an overbroad injunction that prohibited all picketing and demonstrations before county buildings. The court rejected the rule in *United States v. United Mine Workers of America* (1947) 330 U.S. 258, 67 S.Ct. 667, 91 L.Ed. 884, 2 Cal. Proc. (5th), *Jurisdiction*, §342, and distinguished *Walker v. Birmingham* (1967) 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210, 2 Cal. Proc. (5th), *Jurisdiction*, §342.

(a) The *United Mine Workers* theory was that, where a court has jurisdiction of the subject matter and person, an injunction must be obeyed regardless of its ultimately determined constitutional invalidity. This is not the law in *California*. (68 C.2d 147, citing the text.) "It is therefore clear that a temporary restraining order constitutionally void on its face is issued in excess of jurisdiction and cannot sustain a contempt judgment based upon its violation." (68 C.2d 147.)

(b) *Walker v. Birmingham* held that Alabama could constitutionally require a motion to vacate or modify the injunction prior to disobedience, and emphasized the point that the order violated was not unconstitutional on its face or transparently invalid. In the present case, petitioners contended that the order was void on its face for overbreadth and vagueness, and California does not require a motion as a prerequisite to disobedience. (68 C.2d 150.)

(c) "In this state a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity. ... On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong." (68 C.2d 148, citing the text.)

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b. Deliberate Violation as Basis for Review.

4. Distinction: Injunction Is Not Wholly Unenforceable.

6 *Witkin Cal. Proc. Prov Rem* § 413

[§ 413] Distinction: Injunction Is Not Wholly Unenforceable.

In *Watsonville Canning & Frozen Food Co. v. Superior Court* (1986) 178 C.A.3d 1242, 224 C.R. 303, plaintiff employer and defendant union were engaged in a labor dispute. In a contempt proceeding for violation of a preliminary injunction, defendant's demurrer was sustained on the ground that the injunction against threatening physical violence and committing acts of intimidation applied on its face to "other persons," including those not involved in the dispute, and thus was unconstitutionally overbroad. *Held*, mandamus issued directing the trial court to overrule the demurrer.

(a) The apparent overbreadth does not render the injunction wholly unenforceable. The injunction enjoins only "threatening physical violence" and "acts of intimidation relating to physical violence," activities neither privileged nor protected. Defendant "cannot be heard to assert that it has a constitutional right to express itself by physical violence or by threats or intimidation based on physical violence; it follows that it cannot claim constitutionally significant overbreadth on the basis of language which enjoins such forms of expression simply because the injunction might apply to persons unrelated to the labor dispute." (178 C.A.3d 1247.)

(b) *In re Berry* (1968) 68 C.2d 137, 65 C.R. 273, 436 P.2d 273, *supra*, §412, is distinguishable. The injunction there applied broadly to vocal advocacy, demonstrations, and concerted activity, as well as coercive acts. Here, the injunction expressly enjoins only activities directly related to physical violence. (178 C.A.3d 1248.)

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4. Proceeding Against Surety on Undertaking.

a. Nature of Liability.

6 *Witkin Cal. Proc. Prov Rem* § 414

[§ 414] Nature of Liability.

Under *C.C.P.* 529 and the Bond and Undertaking Law, the sureties agree to pay to the party enjoined damages sustained by reason of the injunction, not exceeding the amount of the bond, if the court finally decides that the plaintiff was not entitled to the injunction. The claim against the sureties is on this contract and involves no element of wrongful act or bad motive in procuring the injunction. (See *Lambert v. Haskell* (1889) 80 C. 611, 614, 22 P. 327 [pleading]; *Curtiss v. Bachman* (1890) 84 C. 216, 217, 24 P. 379 [must allege nonpayment]; *Moore v. Maryland Cas. Co.* (1929) 100 C.A. 658, 662, 280 P. 1008; *Edwards v. Container Kraft Carton & Paper Supply Co.* (1958) 161 C.A.2d 752, 761, 327 P.2d 622, citing the text; 82 A.L.R.2d 1064 [court's lack of jurisdiction of subject matter in granting injunction as defense in action on bond]; *Russell v. United Pac. Ins. Co.* (1963) 214 C.A.2d 78, 87, 29 C.R. 346, citing the text; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §337 et seq.; 14A *Am.Jur.* P.P. Forms (2002 ed.), *Injunctions*, §129 et seq.; on Bond and Undertaking Law, see *supra*, §8 et seq.)

In *Nuclear Electronic Laboratories v. William C. Cornell Co.* (1965) 239 C.A.2d 8, 11, 48 C.R. 416, citing the text, the lower court found, in a hearing on motion, that the temporary restraining order was properly issued, and exonerated the bond. This took place before final determination of the action. *Held*, this was error. Because it takes a final judgment to give a remedy on the bond, it takes a final judgment to abolish the claim by exoneration. The order was an attempt to relieve the obligor of contractual obligations before plaintiff's cause of action arose. (239 C.A.2d 12, 13.)

The tort remedy against the plaintiff for abuse of process in wrongfully obtaining an injunction is entirely distinct from the remedy on the bond. (See *Asevado v. Orr* (1893) 100 C. 293, 298, 34 P. 777; 5 *Summary* (10th), *Torts*, §517 et seq.; 5 *Cal. Proc.* (5th), *Pleading*, §§759, 760.)

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4. Proceeding Against Surety on Undertaking.

b. Final Termination of Main Action.

6 *Witkin Cal. Proc. Prov Rem* § 415

[§ 415] Final Termination of Main Action.

The liability of the sureties arises only when it is finally determined that the plaintiff is not entitled to the injunction. In the brief opinion in *Clark v. Clayton* (1882) 61 C. 634, the court held that, under the language of *C.C.P.* 529, dissolution of the injunction was not enough; the main action itself had to be terminated before the action against the sureties could be brought. And in *Dougherty v. Dore* (1883) 63 C. 170, the *Clark* case was approved and the logical conclusion reached that the statute of limitations did not begin to run until the final determination of the main action. (See *Marsh Bros. & Gardenier v. United States Fidelity & Guaranty Co.* (1929) 97 C.A. 474, 479, 275 P. 886 [where appeal was taken, there was no final determination until decision on appeal]; *supra*, §414.)

The main action is finally decided against the plaintiff, for the purpose of action against the sureties, by dismissal, regardless whether it is involuntary, for want of prosecution, or voluntary, by the plaintiff. (*Frahm v. Walton* (1900) 130 C. 396, 398, 62 P. 618; *Moore v. Maryland Cas. Co.* (1929) 100 C.A. 658, 663, 280 P. 1008; *Adams v. National Auto. Ins. Co.* (1943) 56 C.A.2d 905, 910, 133 P.2d 657; *Special Editions v. Kellison* (1982) 129 C.A.3d 803, 808, 181 C.R. 351, citing the text; see 91 A.L.R.2d 1312 [effect of dismissal of main action without prejudice].)

A distinction occurs, however, where the dismissal is by mutual agreement of both parties. It is clearly a final termination of the action, but not a final decision against the plaintiff, and the defendant's acquiescence in the dismissal is treated as a waiver of the defendant's right to hold the sureties. (*Wilshire Mortg. Corp. v. O.A. Graybeal Co.* (1940) 41 C.A.2d 1, 7, 105 P.2d 996; but see *Adams v. National Auto. Ins. Co.*, *supra* [approving rule but upholding trial court's ruling that dismissal was sole act of plaintiff].)

The liability of sureties may be enforced in an independent action (*C.C.P.* 996.430) or by motion after final judgment in the action (*C.C.P.* 996.440). (See *supra*, §§37 et seq.)

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c. Measure of Damages.

6 *Witkin Cal. Proc. Prov Rem* § 416

[§ 416] Measure of Damages.

Damages recoverable are those that appear with reasonable certainty to be the necessary and proximate result of the injunction, not exceeding the penal sum of the bond. (*Rice v. Cook* (1891) 92 C. 144, 148, 28 P. 219; *Handy v. Samaha* (1931) 117 C.A. 286, 290, 3 P.2d 602; see 95 A.L.R.2d 1190 [period for which damages are recoverable]; 30 A.L.R.4th 273 [limitation of damages to amount of bond]; 42 Am.Jur.2d (2000 ed.), *Injunctions* §351 et seq.)

In *Moore v. Maryland Cas. Co.* (1929) 100 C.A. 658, 280 P. 1008, the receiver of a chattel mortgagee sued to foreclose, and obtained a restraining order preventing the mortgagor from harvesting and marketing his crop. After dissolution of the restraining order and dismissal of the foreclosure action, the mortgagor brought this action against the sureties. *Held*, he was entitled to recover the value of the lost crop. (100 C.A. 663.) (See *Rice v. Cook*, *supra*, 92 C. 149 [deprivation of possession of land]; *Draffen v. United States Fidelity & Guaranty Co.* (1932) 217 C. 43, 45, 17 P.2d 121 [same]; *Yellen v. Fidelity & Cas. Co. of New York* (1931) 115 C.A. 434, 441, 1 P.2d 1019 [findings were insufficient to show amount of damages]; *Handy v. Samaha*, *supra*, 117 C.A. 289 [no recovery for expense and effort in defending against action to enjoin payment of judgment]; *Adams v. National Auto. Ins. Co.* (1943) 56 C.A.2d 905, 912, 133 P.2d 657 [loss of business and equipment].)

The statutory limitation of liability to the amount specified in the bond (see *supra*, §414), even though the defendant suffered damages in a greater amount, was upheld against a due process challenge in *Dickey v. Rosso* (1972) 23 C.A.3d 493, 498, 100 C.R. 358. "The state has established an entirely reasonable scheme for the use of injunctive relief, in that plaintiff is told in advance what his maximum summary liability will be for making use of the court's injunctive powers pending a determination of the merits of his cause, and defendant is provided an opportunity to make a showing what the amount of his damages is likely to be as a consequence of plaintiff's use of the remedy of injunctive relief. Thereafter the court fixes the amount of the undertaking in connection with the use of injunctive relief. If at a later time defendant discovers further possibilities of damages arising during the pendency of the litigation and makes a proper showing of the possibility of such damages, the court may require plaintiff to increase the amount of his undertaking as a condition of the continuance of injunctive relief. ... The possibility that damages might be inestimable, a possibility not apparent here, is outweighed by the need to provide honest plaintiffs with recourse to the courts." (23 C.A.3d 498.)

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4. Proceeding Against Surety on Undertaking.

d. Attorneys' Fees.

1. Services in Attacking Injunction.

6 *Witkin Cal. Proc. Prov Rem* § 417

[§ 417] Services in Attacking Injunction.

The defendant may attempt to procure the dissolution of the temporary restraining order or preliminary injunction, and in this event is entitled to the reasonable value of legal services necessary for this purpose. (*Moore v. Maryland Cas. Co.* (1929) 100 C.A. 658, 666, 280 P. 1008; *Handy v. Samaha* (1931) 117 C.A. 286, 288, 3 P.2d 602; *Allen v. Pitchess* (1973) 36 C.A.3d 321, 327, 111 C.R. 658, citing the text; *ABBA Rubber Co. v. Seaquist* (1991) 235 C.A.3d 1, 15, 16, 286 C.R. 518; see 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §354.)

In *Mason v. United States Fidelity & Guaranty Co.* (1943) 60 C.A.2d 587, 141 P.2d 475, the surety argued that, because the restraining order was void (duration over statutory period), it could have been ignored and therefore the motion to dissolve was unnecessary. The court held that a party should take legal steps rather than resort to self-help, and added: "This is a strange argument to be advanced by a defendant who, by issuing the bond, made the issuance of the allegedly void restraining order possible. If this theory were sound it would require each person served with a restraining order to make a quasi judicial determination as to the validity of the order." (60 C.A.2d 590.)

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d. Attorneys' Fees.

2. Services in Defending Main Action.

6 *Witkin Cal. Proc. Prov Rem* § 418

[§ 418] Services in Defending Main Action.

The bond is given to protect against damage resulting from the provisional remedy (restraining order if bond is given, or preliminary injunction). If the main action seeks a permanent injunction, the efforts of the attorney may be directed to both eliminating the restraining order or preliminary injunction and defeating the main action. On the other hand, the attorney may allow the provisional remedy to remain unchallenged, and restrict his or her efforts to the trial of the main action. In this event, the earlier cases denied recovery of fees.

As the court said in *Curtiss v. Bachman* (1895) 110 C. 433, 42 P. 910: "If the defendant, instead of attempting to remove the temporary injunction, seeks rather to prevent the issuance of a permanent injunction, or directs his efforts to defeating the action of the plaintiff, the expense of counsel fees thus incurred is an incident of the action, and is not recoverable as damages sustained by reason of the injunction." (110 C. 437.) (See *San Diego Water Co. v. Pacific Coast Steamship Co.* (1894) 101 C. 216, 219, 35 P. 651; *Warden v. Choate* (1917) 33 C.A. 354, 356, 165 P. 36; but see *Mason v. United States Fidelity & Guaranty Co.* (1943) 60 C.A.2d 587, 593, 141 P.2d 475 [where services are rendered for both purposes, reasonable amount recoverable is question of fact].)

This rule applies, however, only where the restraining order or preliminary injunction is open to successful challenge. In *Reachi v. National Auto. & Cas. Ins. Co. of Los Angeles* (1951) 37 C.2d 808, 236 P.2d 151, an attachment case, the court pointed out that sometimes the provisional remedy is valid and regular on its face and not subject to a motion to vacate or dissolve. In this situation, it is necessary to defend the main action to defeat the provisional remedy, and attorneys' fees are allowed. (37 C.2d 812; see *supra*, §230.)

In *Russell v. United Pac. Ins. Co.* (1963) 214 C.A.2d 78, 29 C.R. 346, the *Reachi* rule was applied to injunctions. The preliminary injunction, granted after a contested hearing, was valid and regular on its face; an appeal would have been futile, and a trial on the merits was the only practical method of lifting the restraint. The court held that, with respect to damages, the same principles apply to wrongful issuance of an injunction as to wrongful levy of an attachment, and that cases on injunction and attachment bonds may be cited interchangeably. (214 C.A.2d 86.) "We paraphrase the *Reachi* rule: Where it is necessary to defend on the merits in order to defeat a preliminary injunction,

judgment after full trial against the party who obtained the preliminary injunction is, in effect, tantamount to an adjudication that he was not entitled to any injunctive relief at any time, and that thereupon a right of action upon the injunction bond accrues in favor of the party enjoined." (214 C.A.2d 86.) (See *ABBA Rubber Co. v. Seaquist* (1991) 235 C.A.3d 1, 16, 286 C.R. 518 [following *Russell*].)

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CHAPTER VI - Provisional Remedies

Witkin Summary of California Law

V. RECEIVERS

A. In General.

1. Nature of Receivership.

6 Witkin Cal. Proc. Prov Rem § 419

[§ 419] Nature of Receivership.

(1) *In General.* A receiver is a court officer or representative appointed to take over the control and management of property that is the subject of litigation before the court, to preserve the property, and ultimately to dispose of it according to the final judgment. (*Kreling v. Kreling* (1897) 118 C. 421, 422, 50 P. 549; *Highland Sec. Co. v. Superior Court* (1931) 119 C.A. 107, 112, 6 P.2d 116.) Because the receiver is an agent of the court, and not of any party, he or she (a) is neutral; (b) acts for the benefit of all those who may have an interest in the receivership property; and (c) holds receivership assets for the court rather than for the plaintiff or the defendant. (C.R.C., Rule 3.1179(a).) (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.137 et seq.; C.E.B., 2 Civil Proc. Before Trial 4th, §§33.3, 33.4; Rutter Group, Civil Proc. Before Trial §9:733 et seq. [practical problems in receivership]; Cal. Civil Practice, 1 Business Litigation, §12:1 et seq., 2A Procedure, §16:153 et seq.; 15 U.C.L.A. L. Rev. 896 [real property litigation]; 8 Federal Procedure, L. Ed. §21:31 et seq.; 12 Federal Practice & Procedure (Wright & Miller) §2981 et seq.; 65 Am.Jur.2d (2001 ed.), *Receivers* §1 et seq.; 21 Am.Jur. P.P. Forms (2000 ed.), *Receivers*, §5 et seq.)

(2) *Jurisdiction To Appoint Receiver.* A receiver may be appointed by the court in which an action or proceeding is pending, in any case in which the court is empowered by law to appoint a receiver. (C.C.P. 564(a).) Although C.C.P. 564 governs the appointment of receivers in all cases, some types of actions listed in the statute may only be brought as unlimited civil cases. For example, the appointment of a receiver requested by the Public Utilities Commission under Pub.Util.C. 855 (see *infra*, §434) or Pub.Util.C. 5259.5 (see *infra*, §435) may only be made in an unlimited civil case. (Cal. Law Rev. Com. Comment.) A proceeding to appoint a receiver under C.C.P. 564 in a limited civil case is a limited civil case. (C.C.P. 86(a)(8).)

(3) *Ancillary Remedy.* A receiver may be appointed by the court in which an action or proceeding is pending. Thus, unlike an injunction, which may be either provisional or permanent, a receivership is only a provisional remedy in an action that seeks some other relief by final judgment. There is no substantive right to a receiver and no action for a receiver. As the court said in *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. District Court* (1879) 53 C. 495: "These subdivisions do not assume to create a substantive right of action where none existed before. Their aim is to provide a more efficacious remedy in the conduct of actions, the right to bring which already exists, and are elsewhere provided for. ... There is, of course, no such thing as an action brought distinctively for the mere appointment of a Receiver--such an appointment, when made, is ancillary to or in aid of the action brought. Its purpose is to preserve the

property pending the litigation so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the Court to make the appointment necessarily pre-supposes that an action is pending before it, instituted by some one authorized by law to commence it." (53 C. 552.) (See *Frick v. Calmin Mortg. Corp.* (1934) 220 C. 746, 748, 32 P.2d 619 [no jurisdiction to appoint receiver where complaint failed to state cause of action for other relief]; *In re Stein* (1936) 14 C.A.2d 303, 305, 58 P.2d 175.)

(4) *Restrictions on Agreement Between Party and Receiver.* The party seeking appointment of a receiver may not require a contract, agreement, arrangement, or understanding with the receiver it intends to nominate or recommend, and the receiver may not enter into any such contract, etc., concerning any of the following:

(a) What the role of the receiver will be with respect to the property after a trustee's sale or termination of the receivership, without specific court permission. (C.R.C., Rule 3.1179(b)(1).)

(b) How the receivership will be administered, or what the receiver will charge for services, or what the payment will be to approved third parties hired to provide services. (C.R.C., Rule 3.1179(b)(2).)

(c) Whom the receiver will hire, or seek approval to hire, to perform necessary services. (C.R.C., Rule 3.1179(b)(3).)

(d) What capital expenditures will be made on the receivership property. (C.R.C., Rule 3.1179(b)(4).)

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V. RECEIVERS

A. In General.

2. Discretion To Deny Receiver.

6 *Witkin Cal. Proc. Prov Rem* § 420

[§ 420] Discretion To Deny Receiver.

Decisions upholding the denial of a receiver tend to emphasize the extraordinary nature of the remedy. It is said to be "harsh" and "drastic," to be granted only in cases of extreme necessity, when no other legal or equitable remedy is available and the need is great. Hence, while it is a discretionary remedy, the discretion to deny is much more likely to be upheld than the discretion to grant. (See C.E.B. 2 Civil Proc. Before Trial 4th, §33.7; Rutter Group, Civil Proc. Before Trial §9:743 et seq.; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §18, 19.)

The pointed remarks in *Elson v. Nyhan* (1941) 45 C.A.2d 1, 113 P.2d 474, are worth noting: "Receivers are often legal luxuries, frequently representing an extravagant cost to a losing litigant. When it appears that no reasonably certain benefit will result to one litigant, and a distinct disadvantage will result to another, courts should weigh carefully the propriety of appointing a receiver." (45 C.A.2d 5.) (But see *Barnes v. Morrison* (1929) 102 C.A. 152, 159, 282 P. 986 [defaulting purchaser of land (trespasser) threatening to harvest crops; order revoking appointment was reversed].)

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3. Discretion To Grant Receiver.

a. Appointment Upheld.

6 *Witkin Cal. Proc. Prov Rem* § 421

[§ 421] Appointment Upheld.

Despite the disparaging statements to the effect that the remedy is harsh and disfavored (see *supra*, §420 and *infra*, §422), a number of opinions declare the ordinary "sound" discretion of the trial court to make the appointment. (See *Whitley v. Bradley* (1910) 13 C.A. 720, 724, 110 P. 596; *Neider v. Dardi* (1955) 130 C.A.2d 646, 649, 279 P.2d 598; *Alderson v. Alderson* (1986) 180 C.A.3d 450, 467, 225 C.R. 610, *infra*, §439; *San Francisco v. Daley* (1993) 16 C.A.4th 734, 744, 745, 746, 20 C.R.2d 256; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §18 et seq.)

Moore v. Oberg (1943) 61 C.A.2d 216, 221, 142 P.2d 443, strongly asserts this view: "[W]here the evidence is conflicting or where the propriety of an appointment based upon the uncontradicted evidence is doubtful, the question of the appointment of a receiver is addressed to the sound discretion of the court. ... So broad is the discretion of the trial judge that his order based upon facts concerning which reasonable minds might differ with respect to the necessity for the receivership will not be reversed. We cannot substitute our conclusion for that of the trial court made upon sufficient evidence even if we should be of the opinion that there was no danger of the loss or removal of, or other irreparable injury to, the assets of the joint venture. To justify our interference with the order confirming the appointment herein, it must be made clearly to appear that the order was an arbitrary exercise of power." (61 C.A.2d 221.)

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3. Discretion To Grant Receiver.

b. Appointment Reversed.

6 *Witkin Cal. Proc. Prov Rem* § 422

[§ 422] Appointment Reversed.

The cases reversing appointment almost invariably stress the drastic character of the remedy and the availability of some less drastic remedy such as injunction (see *supra*, §274 et seq.), attachment (see *supra*, §46 et seq.), or *lis pendens* (see 3 *Cal. Proc.* (5th), *Actions*, §371 et seq.). (See *Ryan v. Murphy* (1919) 39 C.A. 640, 642, 179 P. 517 [receiver was not warranted where *lis pendens* would be sufficient protection]; *Alhambra-Shumway Mines v. Alhambra Gold Mine Corp.* (1953) 116 C.A.2d 869, 873, 254 P.2d 599; *Cohen v. Herbert* (1960) 186 C.A.2d 488, 495, 8 C.R. 922 [refusal of defendants' request for continuance to prepare for hearing was reversible error]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §§18, 19; on alternative remedies, see Rutter Group, *Civil Proc. Before Trial* §9:747 et seq.; C.E.B., 2 *Civil Proc. Before Trial* 4th, §§3.5, 33.7.)

In the leading case of *A.G. Col Co. v. Superior Court* (1925) 196 C. 604, 238 P. 926, an *ex parte* order of receivership for a corporation was made on a controverted showing of danger of insolvency. The order was reversed on the ground that any rights of the plaintiff could be fully protected by injunction or other remedies, and that there was no emergency justifying the ouster of the corporate management. (196 C. 613, 614.)

Golden State Glass Corp. v. Superior Court (1939) 13 C.2d 384, 90 P.2d 75, is to the same effect: "Ordinarily, if there is any other remedy, less severe in its results, which will adequately protect the rights of the parties, a court should not take property out of the hands of its owners." (13 C.2d 393.)

In *Dabney Oil Co. v. Providence Oil Co. of Arizona* (1913) 22 C.A. 233, 133 P. 1155, an action to recover money derived from oil wells, a receiver was appointed and defendants were ordered to pay over the income of operations. *Held*, the order was improper. The object of the litigation could have been achieved by an injunction against paying out proceeds, and the injunction bond would have protected defendant in the event of its final success in the main action. (22 C.A. 237.)

In *Rogers v. Smith* (1946) 76 C.A.2d 16, 172 P.2d 365, the complaint, to recover money, set forth allegations of insolvency and fraudulent conveyances, and plaintiff obtained the appointment of a receiver. *Held*, the showing was inadequate. Plaintiff's main reason for seeking a receivership was that only a nominal bond was required to enable the

receiver to take possession of all the property of defendants, while a very large bond would have been required if all that property had been attached. "Receivership is an extraordinary remedy, to be applied with caution and only in cases of apparent necessity, and where other remedies would be inadequate. ... The saving of expense is a poor excuse for the oppressive measures which were taken for the ostensible purpose of obtaining security." (76 C.A.2d 21.)

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V. RECEIVERS

B. When Receivers May Be Appointed.

1. In General.

a. Specific Statutory Enumeration.

6 Witkin Cal. Proc. Prov Rem § 423

[§ 423] Specific Statutory Enumeration.

(1) *General Rule.* A receiver may not be appointed except in the classes of cases expressly set forth in the statutes. (*Miller v. Oliver* (1917) 174 C. 407, 410, 163 P. 355; *Takeba v. Superior Court* (1919) 43 C.A. 469, 475, 185 P. 406; *Turner v. Superior Court* (1977) 72 C.A.3d 804, 811, 140 C.R. 475, *infra*, §456, citing and quoting the text; see 65 *Am.Jur.2d* (2001 ed.), *Receivers* §25 et seq.) Thus, a receiver cannot be appointed by an arbitrator, even though the parties agree to the appointment, there being no statutory provision for the appointment. (*Marsch v. Williams* (1994) 23 C.A.4th 238, 245, 28 C.R.2d 402 [parties may, however, apply to superior court for appointment of receiver under C.C.P.1281.8(b)]; see *Baron v. Fire Ins. Exchange* (2007) 154 C.A.4th 1184, 1191, 65 C.R.3d 502 [insurer's challenge to appointment of receiver by arbitrator was precluded by failure to attack appointment in trial court].)

(2) *Illustrative Statutes.* The chief source of statutory authorization is C.C.P. 564(b) (*infra*, §§424, 425, 427 et seq.). This statutory provision is supplemented by a number of additional code sections. The following are illustrative:

(a) Action by secured lender. (C.C.P. 564(c), (d); see *infra*, §426.)

(b) Dissolution of corporation. (C.C.P. 565; see *infra*, §438.)

(c) Escheat proceeding. (C.C.P. 1422; see *infra*, §440.)

(d) Credit's attack on fraudulent conveyance. (C.C. 3439.07; see *infra*, §425.)

(e) Domestic relations cases. (*Family C.* 290; see *infra*, §439.)

(f) Forfeiture and dissolution proceedings involving corporations. (*Corp.C.* 1801(c), 1803; see *infra*, §438.)

(g) Application by judgment creditor for charging order and receiver against debtor partner. (*Corp.C.* 16504; see 9 *Summary* (10th), *Partnership*, §40.)

(h) Delinquency proceedings for an insurer domiciled in California under the Uniform Liquidation Act (*Ins.C.*

1064.1 et seq. [appointment of Insurance Commissioner as receiver].) (*Ins.C. 1064.2.*) (See 44 A.L.R.5th 683 [Uniform Insurers Liquidation Act].)

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B. When Receivers May Be Appointed.

1. In General.

b. Other Bases.

6 Witkin Cal. Proc. Prov Rem § 424

[§ 424] Other Bases.

(1) *Necessity*. Receivers may be appointed "[i]n all other cases where necessary to preserve the property or rights of any party." (C.C.P. 564(b)(9).) This provision replaced former C.C.P. 564(b)(8), which provided that receivers may be appointed "[i]n all other cases where receivers have *heretofore been appointed by the usages of courts of equity*." This change was intended to substitute more readily understandable language without making a substantive change. Like the deleted language, the current language confers broad authority to appoint a receiver, but only where other remedies are found to be inadequate. (See, e.g., *Golden State Glass Corp. v. Superior Court* (1939) 13 C.2d 384, 393, 90 P.2d 75, supra, §422; *Alhambra-Shumway Mines v. Alhambra Gold Mine Corp.* (1953) 116 C.A.2d 869, 873, 254 P.2d 599.) Thus, C.C.P. 564(b)(9) authorizes appointment of a receiver only "where necessary to preserve property or rights of a party." As before, the general language of C.C.P. 564(b)(9) does not override specific requirements set forth elsewhere in the statute. (Law Rev. Com. Comment.) (See *Dabney Oil Co. v. Providence Oil Co. of Arizona* (1913) 22 C.A. 233, 237, 133 P. 1155 [broad language of former C.C.P. 564(b)(8) has been sharply restricted; if case is within one of specific classes listed in other subdivisions of C.C.P. 564, general usage theory cannot be invoked, and plaintiff must make sufficient showing under specific section]; on effect of clause in mortgage or trust deed authorizing appointment under former C.C.P. 564(b)(8), see infra, §430.)

(2) *Quasi In Rem Jurisdiction*. A receiver may be appointed to create quasi in rem jurisdiction. (See *Nichols v. Superior Court* (1934) 1 C.2d 589, 598, 36 P.2d 380; 2 Cal. Proc. (5th), *Jurisdiction*, §249.)

(3) *Receiver After Judgment*. C.C.P. 564(b)(3) and (b)(4) authorize the appointment of a receiver after judgment, under the Enforcement of Judgments Law (C.C.P. 680.010 et seq.; see 8 Cal. Proc. (5th), *Enforcement of Judgment*, §§310, 311) or for the following purposes: (a) to carry the judgment into effect; (b) to dispose of property according to the judgment or preserve it pending appeal; or (c) to collect and disburse rents during the redemption period following a foreclosure sale of real property. (See *First Nat. Trust & Savings Bank of San Diego v. Cerveny* (1949) 93 C.A.2d 255, 258, 208 P.2d 1018; *Sibert v. Shaver* (1952) 113 C.A.2d 19, 22, 247 P.2d 609; *San Francisco v. Daley* (1993) 16 C.A.4th 734, 743, 20 C.R.2d 256 [C.C.P. 563(b)(3) authorizes appointment of receiver after judgment in abatement to carry that judgment into effect].)

In *Gold v. Gold* (2003) 114 C.A.4th 791, 8 C.R.3d 118, a judgment ordering the dissolution of real estate corporations and the sale of property by a three-member board of directors was not completed on schedule due to the inability of the parties to agree on the appointment of an independent director. The court had initially declined to appoint a receiver "at this time," but had expressly retained jurisdiction until the dissolution was complete. *Held*, the court had authority to appoint a receiver under C.C.P. 564(b)(3) and (b)(4). (114 C.A.4th 804.)

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B. When Receivers May Be Appointed.

2. Action by Vendor or Creditor.

6 *Witkin Cal. Proc. Prov Rem* § 425

[§ 425] Action by Vendor or Creditor.

A receiver is authorized in an action (1) "by a vendor to vacate a fraudulent purchase of property," or (2) "by a creditor to subject any property or fund to the creditor's claim," where the property or fund is in danger of being lost, removed, or materially injured. (*C.C.P.* 564(b)(1); see *Barnes v. Morrison* (1929) 102 C.A. 152, 159, 282 P. 986 [insolvent defaulting purchaser threatening to harvest crop]; *Republic of China v. Chang* (1955) 134 C.A.2d 124, 131, 285 P.2d 351 [action by Chinese Government to recover money advanced to M as its agent, and fraudulently delivered by M to defendant who used money to purchase art objects, intending to remove them from country]; *Burrows v. Jorgensen* (1958) 158 C.A.2d 644, 648, 323 P.2d 150 [transfers with intent to defeat creditors]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §31.)

In this type of action, the court often invokes the general protection provision (see *supra*, §424) as an additional reason for the order. In *Snidow v. Hill* (1948) 84 C.A.2d 702, 191 P.2d 513, plaintiff vendor sold a fruit ranch on an installment contract to defendants, reserving a right to the proceeds from the sale of fruit. The complaint was to quiet title, and the affidavit showed default in payments, a \$ 30,000 balance due, depreciation in the value of the property below that sum, and failure to care for the grove, seriously endangering the crop and trees. *Held*, a receiver to care for and harvest the crop was properly appointed. Ordinarily a quiet title action does not warrant a receivership, but the case is within the terms of *C.C.P.* 564 and represents a common type of action in which equity courts have appointed receivers (see *supra*, §424). Plaintiff showed the essential elements: a probable interest in the property, and danger of its loss or material injury. And defendants could not be injured by the limited authority given to the receiver, who was not placed in possession of the residence, but merely given the care of the crop. (84 C.A.2d 704.)

However, a vendor who has no lien or other interest in the property, and who cannot show fraud on the part of the defendant, is a mere general creditor and is not entitled to a receiver. (*California Delta Farms v. Chinese Amer. Farms* (1928) 204 C. 524, 526, 269 P. 443 [action to forfeit rights of purchaser under contract].)

A receiver may also be appointed to take charge of fraudulently transferred assets under the Uniform Fraudulent Transfer Act. (*C.C.* 3439.07(a)(3)(B); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §498.)

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B. When Receivers May Be Appointed.

3. Action by Secured Lender.

6 *Witkin Cal. Proc. Prov Rem* § 426

[§ 426] Action by Secured Lender.

In an action by a secured lender to enforce the rights provided in C.C. 2929.5 (4 *Summary* (10th), *Security Transactions in Real Property*, §209), a receiver may be appointed by the superior court "to enable the secured lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security." The secured lender may not abuse this right of entry and inspection or use it to harass the borrower or tenant of the property. The secured lender must, except in cases of emergency, abandonment of the premises, or impracticability, give reasonable notice of the intent to enter and may enter only during the borrower's or tenant's normal business hours. Twenty-four hours' notice is presumed reasonable absent evidence to the contrary. (*C.C.P.* 564(c); for definitions of "borrower," "hazardous substance," "real property security," "release," and "secured lender," see *C.C.P.* 564(e); and see 4 *Summary* (10th), *Security Transactions in Real Property*, §208.) An action under *C.C.P.* 564(c) does not constitute an action to foreclose a mortgage within the meaning of *C.C.P.* 726(a). (*C.C.P.* 564(d).)

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4. Action by Office of Statewide Health Planning and Development.

6 *Witkin Cal. Proc. Prov Rem* § 427

[§ 427] Action by Office of Statewide Health Planning and Development.

The California Health Facility Construction Loan Insurance Law (*Health & Saf.C. 129000* et seq.) provides an insurance program for health facility construction, improvement, and expansion loans. On determining that the financial status of a borrower under this program may jeopardize its ability to fulfill its obligations under an insured loan transaction, the Office of Statewide Health Planning and Development may seek the appointment of a receiver for the borrower or the borrower's assets, or may ask the Attorney General to do so. (*C.C.P. 564(b)(10)*; *Health & Saf.C. 129173(a)(4)*.)

Indications that the office's economic interest in the borrower or the borrower's ability to provide needed health care services in the community is threatened, include, but are not limited to, (1) a declaration of default under a contract related to the transaction; (2) the borrower missing a payment to its lender; or (3) the borrower's accounts payable exceeding 3 months' duration. (*Health & Saf.C. 129173(a)*.)

The action or proceeding for the appointment of a receiver must be brought in the superior court in the county in which the borrower's assets, or a substantial portion of them, are located. No receiver may be appointed unless approved by the office. (*Health & Saf.C. 129173(a)(4)*.)

The receiver may, with the court's approval, exercise all the powers of the officers and directors of the borrower, including filing a bankruptcy petition. No action at law or in equity may be maintained against the office, the Attorney General, or the receiver based on their exercise of the powers of the borrower's officers and directors under the order of the superior court or with its approval. (*Health & Saf.C. 129173(a)(4)*.)

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B. When Receivers May Be Appointed.

5. Action Between Partners or Joint Owners.

6 *Witkin Cal. Proc. Prov Rem* § 428

[§ 428] Action Between Partners or Joint Owners.

A receiver may be appointed on a showing of danger of loss or injury in an action between partners, or "others jointly owning or interested in any property or fund." (*C.C.P. 564(b)(1)*.) An order appointing a receiver is void where there is no showing of a property interest, or of danger to a property interest. (*Rondos v. Superior Court* (1957) 151 C.A.2d 190, 195, 311 P.2d 113; see *McCaslin v. Kenney* (1950) 100 C.A.2d 87, 95, 223 P.2d 94 [order granting receiver was reversed where no showing was made of danger of loss or injury to property].)

Actions between partners are normally confined to an action for accounting and dissolution. The interest of the plaintiff partner in the property is clear, and the danger of removal or loss at the hands of the defendant partner in possession is great. Accordingly, this situation presents a typical case for receivership, and the appointment is frequently made. (See *Whitley v. Bradley* (1910) 13 C.A. 720, 726, 110 P. 596 [denial of plaintiff's interest and deprivation of share of profits]; *Breedlove v. J.W. & E.M. Breedlove Excavating Co.* (1942) 56 C.A.2d 141, 143, 132 P.2d 239 [same]; *Moore v. Oberg* (1943) 61 C.A.2d 216, 220, 142 P.2d 443 [removal of assets]; *Galich v. Brkich* (1951) 103 C.A.2d 187, 190, 229 P.2d 89 [partnership or joint adventure, defendant's commingling of business and personal funds]; *Sibert v. Shaver* (1952) 113 C.A.2d 19, 21, 247 P.2d 609 [deliberate refusal to account, receiver after judgment]; *Neider v. Dardi* (1955) 130 C.A.2d 646, 649, 279 P.2d 598 [joint venture; deprivation of plaintiff's share of profits, dissipation of receipts, and placing sole asset in jeopardy]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §34; 21 *Am.Jur. P.P. Forms* (2000 ed.), *Receivers*, §§46 et seq., 67, 69; 23 *A.L.R.2d* 583 [appointment of receiver on dissolution of partnership or joint venture not due to death of partner or at instance of creditor].)

The representative of a deceased partner may have a receiver appointed where the surviving partner refuses to wind up the business. (*Jay v. Clark* (1948) 85 C.A.2d 88, 94, 192 P.2d 462.)

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6. Foreclosure of Deed of Trust or Mortgage.

a. Statutory Authorization.

6 *Witkin Cal. Proc. Prov Rem* § 429

[§ 429] Statutory Authorization.

A receiver may be appointed in an action by a secured lender to foreclose the deed of trust or mortgage and sell the property on which there is a lien under a deed of trust or mortgage, where it appears that the property may be "lost, removed, or materially injured, or that the condition of the deed of trust or mortgage has not been performed, and that the property is probably insufficient to discharge the deed of trust or mortgage debt." (*C.C.P.* 564(b)(2); see *Bank of Woodland v. Heron* (1898) 120 C. 614, 618, 52 P. 1006; *Title Ins. & Trust Co. v. California Dev. Co.* (1912) 164 C. 58, 61, 127 P. 502; *Brush v. Apartment & Hotel Financing Corp.* (1927) 82 C.A. 723, 725, 256 P. 285; 55 A.L.R.3d 1041 [what constitutes waste justifying appointment of receiver of mortgaged property]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §31; on problems of priority where receiver collects rents and profits, see 4 *Summary* (10th), *Security Transactions in Real Property*, §102.)

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6. Foreclosure of Deed of Trust or Mortgage.

b. Clause Authorizing Appointment.

6 *Witkin Cal. Proc. Prov Rem* § 430

[§ 430] Clause Authorizing Appointment.

In *Bank of Woodland v. Stephens* (1904) 144 C. 659, 79 P. 379, the mortgage contained a provision that, on filing a complaint to foreclose, plaintiff would be entitled to have a receiver to take possession, lease the premises, collect rents, and hold the same as security for the debt. The complaint for foreclosure alleged this covenant, but the only averment as to the security was that "the mortgaged premises are insufficient to pay and discharge the mortgage debt." *Held*, the order of appointment was erroneous. Jurisdiction to appoint a receiver in foreclosure actions is statutory; it cannot be given by advance consent, but must be based on a showing of facts bringing the case within *C.C.P. 564(2)* (now *C.C.P. 564(b)(2)*). The bare conclusion quoted above is as ineffectual as the general allegation in a complaint for injunction that "the plaintiff will suffer irreparable injury which cannot be compensated in damages." The complaint must contain a "statement of fact, showing that the actual value of the mortgaged premises is less than the debt secured, with interest and costs, and that resort to the rents and profits is necessary." (144 C. 660.)

Nevertheless, an appointment under former *C.C.P. 564(b)(8)* (see now *C.C.P. 564(b)(9)*; *supra*, §424) has been allowed where a mortgage or deed of trust authorizes the appointment of a receiver without regard to the adequacy of the security. (See *Barclays Bank of Calif. v. Superior Court* (1977) 69 C.A.3d 593, 600, 602, 137 C.R. 743, 4 Summary (10th), *Security Transactions in Real Property*, §101 [decided under former law]; *Turner v. Superior Court* (1977) 72 C.A.3d 804, 811, 812, 140 C.R. 475, *infra*, §456 [decided under former law].) (On enforcement of mortgage covenant providing for appointment of receiver in event of default, see *infra*, §440.)

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7. Specific Performance of Assignment of Rents.

6 Witkin Cal. Proc. Prov Rem § 431

[§ 431] Specific Performance of Assignment of Rents.

A receiver may be appointed in an action by a secured lender for specified performance of an assignment of rents contained in a deed of trust, mortgage, or separate assignment document. This appointment may be continued after entry of a specific performance judgment in the action where appropriate to protect, operate, or maintain real property encumbered by the mortgage or deed of trust or to collect the rents from the property during the completion of a pending nonjudicial foreclosure under a power of sale in the deed of trust or mortgage. (*C.C.P. 564(b)(11).*)

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8. Action by Assignee Under Assignment of Rents, Issues, or Profits.

6 *Witkin Cal. Proc. Prov Rem* § 432

[§ 432] Action by Assignee Under Assignment of Rents, Issues, or Profits.

A receiver may be appointed in a case brought by an assignee under an assignment of leases, rents, issues, or profits under C.C. 2938(g). (*C.C.P. 564(b)(12)*.) C.C. 2938(g) provides that, on demand by the assignor or another assignee, an assignee who seeks to enforce the assignment under C.C. 2938(c) by means other than the appointment of a receiver must pay the reasonable costs of protecting and preserving the property until a receiver is appointed or the assignee ceases to enforce the assignment. (See 4 *Summary* (10th), *Security Transactions in Real Property*, §98.)

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9. Unlawful Detainer.

6 *Witkin Cal. Proc. Prov Rem* § 433

[§ 433] Unlawful Detainer.

(1) *Statutory Authorization.* A receiver may be appointed in an unlawful detainer action. (*C.C.P. 564(b)(7)*.) (On the nature of the action, see 5 *Cal. Proc.* (5th), *Pleading*, §638.)

(2) *Action by Landlord.* A receiver may be appointed in an unlawful detainer action against a tenant. (See *Stich v. Gordon* (1932) 126 C.A. 434, 439, 14 P.2d 835; C.E.B., 2 Civil Proc. Before Trial 4th, §33.24 et seq.; 12 *Summary* (10th), *Real Property*, §703 et seq.)

(3) *Action by Purchaser.* The statute applies to unlawful detainer actions under *C.C.P. 1161a*; accordingly, a receiver may be obtained by a purchaser at a sale under execution or foreclosure. (See *Pacific States Savings & Loan Co. v. Hoffman* (1933) 134 C.A. 601, 603, 25 P.2d 1006 [sale under trust deed]; 4 *Summary* (10th), *Security Transactions in Real Property*, §171 et seq.)

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10. Operation of Water or Sewer System.

6 *Witkin Cal. Proc. Prov Rem* § 434

[§ 434] Operation of Water or Sewer System.

A receiver may be appointed at the request of the Public Utilities Commission under *Pub.Util.C. 855*, which provides for the appointment of a receiver to operate a water or sewer system corporation that (1) is unable or unwilling to adequately serve its rate payers, (2) has been actually or effectively abandoned by its owners, or (3) is unresponsive to the commission's rules or orders. (*C.C.P. 564(b)(8).*)

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11. Abandonment of Stored Household Property.

6 *Witkin Cal. Proc. Prov Rem* § 435

[§ 435] Abandonment of Stored Household Property.

Under *Pub.Util.C.* 5259.5, when the Public Utilities Commission determines that a household goods carrier or the carrier's officer, director, or agent has abandoned or is abandoning stored household goods or property of a shipper under contract with the carrier, it may request appointment of a receiver by the superior court to identify and take possession of the property and arrange the return of the property to its owners in accordance with the orders of the court. Under *C.C.P.* 564(b)(8), a receiver may be appointed at the request of the Commission under this statute.

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B. When Receivers May Be Appointed.

12. Action Involving Corporation.

a. Insolvency.

6 *Witkin Cal. Proc. Prov Rem* § 436

[§ 436] Insolvency.

A receiver may be appointed where a corporation is insolvent, or is in imminent danger of insolvency. (*C.C.P.* 564(b)(6).) But the power of a creditor under this provision has been sharply limited by the judicially imposed requirement of exhaustion of the legal remedies of judgment and unsuccessful attempt at execution. (*Delaney Producing & Refining Co. v. Crystal Petroleum Products Co.* (1928) 88 C.A. 784, 790, 264 P. 521; *Stock & Bond Guarantee Co. v. Superior Court* (1930) 108 C.A. 360, 362, 291 P. 589; see Cal. Civil Practice, 1 Business Litigation, §12:7; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §43; but see *Sunset Farms v. Superior Court* (1935) 9 C.A.2d 389, 401, 50 P.2d 106 [exception recognized; corporate entity was fraudulently used by individual debtor].) Nor does consent of the corporation defendant justify the appointment in an action by a simple contract creditor. (*A.G. Col Co. v. Superior Court* (1925) 196 C. 604, 621, 238 P. 926.)

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12. Action Involving Corporation.

b. Fraud or Mismanagement.

6 Witkin Cal. Proc. Prov Rem § 437

[§ 437] Fraud or Mismanagement.

The appointment of a receiver at the instance of a minority shareholder or director, where the corporation is being injured by fraud or mismanagement, has been based on former C.C.P. 564(b)(8), the "usages of equity" provision (see now C.C.P. 564(b)(9), *supra*, §424). (See *Boyle v. Superior Court* (1917) 176 C. 671, 674, 170 P. 1140; *Misita v. Distillers Corp.* (1942) 54 C.A.2d 244, 251, 128 P.2d 888; *People v. Christ's Church of the Golden Rule* (1947) 79 C.A.2d 858, 861, 181 P.2d 49 [receiver granted on application of Attorney General in action to remove president and trustee of church corporation and for accounting of charitable trust]; 65 Am.Jur.2d (2001 ed.), *Receivers* §§40, 41.)

But the reluctance of the court to interfere with corporate management except on a strong showing is emphasized in a leading case reversing an order of appointment. (See *Golden State Glass Corp. v. Superior Court* (1939) 13 C.2d 384, 395, 90 P.2d 75, *supra*, §422.) (See *In re Jamison Steel Corp.* (1958) 158 C.A.2d 27, 35, 322 P.2d 246, 9 Summary (10th), *Corporations*, §89 [distinguishing drastic remedy of appointment of receiver from appointment of provisional director under Corporations Code].)

In *People v. Riverside University* (1973) 35 C.A.3d 572, 111 C.R. 68, the Attorney General brought an action under former Corp.C. 9505 (now Corp.C. 5250) against defendant nonprofit educational corporation and three of its officers, alleging fraud, unfair business practices, and misappropriation of federal funds. A receiver was appointed, and, to obtain essential operating funds, he sold some of the school's surplus property without a prior court order under C.C.P. 568.5 (*infra*, §455). *Held*, the broad order of appointment impliedly authorized the sale, and the lower court could subsequently ratify and confirm it.

The court emphasized the special character of the receivership in this kind of action: "This was not an ordinary receivership ancillary to proceedings for the dissolution or liquidation of a private corporation or a receivership in aid of execution on a judgment. The present action was one brought by the Attorney General in the exercise of his historical right and duty, recognized by statute, to supervise and enforce charitable trusts and to maintain such actions as may be appropriate to protect the public interest ... In an ordinary receivership over private business concerns, a receiver, in the absence of specific authority, has only very limited powers and in doubtful or important matters must apply to the court for instruction and advice. ... However, when a receiver is appointed to take possession of and operate a quasi-public

corporation obligated to render continued service to the public (such as a public utility), he may in the first instance be vested with broad authority to 'do anything the corporation might have done to make the most out of the assets in his hands.' " (35 C.A.3d 580.)

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c. Dissolution or Forfeiture.

6 *Witkin Cal. Proc. Prov Rem* § 438

[§ 438] Dissolution or Forfeiture.

(1) *After Dissolution or Forfeiture.* A receiver may be appointed when a corporation has been dissolved as provided in *C.C.P.* 565 or when it has forfeited its corporate rights. (*C.C.P.* 564(b)(6).) On dissolution a receiver may be appointed to take over the corporate property and wind up the business. (*C.C.P.* 565; see *Corp.C.* 1801(c) [appointment of receiver is authorized to wind up affairs of corporation where Attorney General has brought quo warranto proceedings].)

(2) *Pending Dissolution Proceedings.* If the court, on reasonable grounds, believes that a receiver is necessary pending the hearing on a petition for involuntary dissolution, it may make the appointment. (*Corp.C.* 1803.) (See *Gold v. Gold* (2003) 114 *C.A.4th* 791, 804, 8 *C.R.3d* 118 [judgment ordering dissolution of real estate corporations and sale of property by three-member board of directors was not completed on schedule due to inability of parties to agree on appointment of independent director; court had authority to appoint receiver under *Corp.C.* 1803 and 1804 (court may make orders and decrees required by justice and equity)]; *C.E.B.*, 2 Civil Proc. Before Trial 4th, §33.23; 9 *Summary* (10th), *Corporations*, §217.) Receivership may be prevented, however, if the corporation or the holders of 50% or more of the corporation's voting power have purchased the petitioners' shares for cash at their fair value. (*Corp.C.* 2000(a).) (See *Merlino v. Fresno Macaroni Mfg. Co.* (1944) 64 *C.A.2d* 462, 464, 466, 148 *P.2d* 884; 9 *Summary* (10th), *Corporations*, §218.)

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13. Family Law Action.

6 Witkin Cal. Proc. Prov Rem § 439

[§ 439] Family Law Action.

A judgment or order made or entered under the Family Code may be enforced by the court by the appointment of a receiver. (*Family C.* 290.) For example, where a father quit work to avoid paying child support through wage assignment, the trial judge was authorized to appoint a receiver to collect rental income from him. (*Alderson v. Alderson* (1986) 180 C.A.3d 450, 467, 225 C.R. 610.) (On appointment under predecessor statutes, see *McAneny v. Superior Court* (1906) 150 C. 6, 8, 87 P. 1020; *First Nat. Housing Trust, Ltd. v. Superior Court* (1928) 88 C.A. 292, 294, 263 P. 343; *Patents Process v. Superior Court* (1929) 101 C.A. 541, 544, 282 P. 21.)

A receiver may also be appointed in a domestic relations case when authorized by C.C.P. 564 (*supra*, §423 et seq.). (See *Nichols v. Superior Court* (1934) 1 C.2d 589, 596, 36 P.2d 380, 11 Summary (10th), *Husband and Wife*, §75 [former general usage provision (see *supra*, §424); husband sought to defraud wife of her share of community property]; *In re Carroll* (1933) 135 C.A. 672, 676, 28 P.2d 84 [receiver may be appointed in divorce action only as provided by statutes relating to property distribution, "or when required by principles of equity to undo fraud, to protect from oppression, or for a similar purpose"]; *Rosenthal v. Rosenthal* (1966) 240 C.A.2d 927, 933, 50 C.R. 385 [jointly owned property provision; community property was in danger of being dissipated by husband's speculative investments].)

A receiver may be appointed in a filiation action to preserve the defendant's property for the protection of the plaintiff's unborn child. (*Guay v. Superior Court* (1957) 147 C.A.2d 764, 767, 305 P.2d 990; see *Family C.* 4000 [power to enforce obligation to support child].)

A receiver may be appointed in an action for child support even though the order itself has not yet been made. (*Quaglino v. Quaglino* (1979) 88 C.A.3d 542, 546, 152 C.R. 47 ["The record here demonstrates the great probability that the court would soon make an order of support and that the defendant's property was in fact needed as a source to provide payment"].)

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14. Other Actions or Proceedings.

6 *Witkin Cal. Proc. Prov Rem* § 440

[§ 440] Other Actions or Proceedings.

(1) *Escheat*. A receiver may be appointed in escheat proceedings to take charge of an estate, or to receive the rents, income, and profits, until title is finally settled, on application of the Attorney General and notice to the person claiming the estate, if known. (*C.C.P.* 1422.)

(2) *Partition*. A receiver may be appointed in an action by a cotenant for partition. (See *Goodale v. Fifteenth District Court* (1880) 56 C. 26, 33; *Lent v. H.C. Morris Co.* (1938) 25 C.A.2d 305, 307, 77 P.2d 301; *Blodgett v. Haddock* (1949) 95 C.A.2d 17, 18, 212 P.2d 26.)

(3) *Specific Performance of Mortgage Covenant*. A mortgage or deed of trust sometimes provides that, on default of the debtor, the mortgagee or beneficiary may take possession and collect rents and profits in person, by an agent, or by a court-appointed receiver. If the debtor defaults, the mortgagee or beneficiary may bring an action for specific performance of the covenant, and have a receiver appointed in that action. (See *Santacrose Bros. v. Edgewater-Santa Clara* (1966) 242 C.A.2d 584, 588, 51 C.R. 613; *Rutter Group*, Civil Proc. Before Trial §9:777 et seq.)

(4) *Management of Long-Term Health Care Facility*. A receiver may be appointed to manage a long-term health care facility where (a) continued operation by the licensee endangers patients or substantially violates applicable regulations; or (b) the facility will terminate operation as a long-term health care facility and adequate relocation arrangements for residents have not been made at least 30 days prior to this termination. (*Health & Saf.C.* 1327.)

(5) *Restitution*. In actions in which appointment of a receiver is otherwise authorized, the Attorney General may apply for the appointment of a receiver to facilitate the preservation and recovery of property for restitution. (*Govt.C.* 12527.)

(6) *Rehabilitation of Substandard Building*. State and local enforcement agencies, tenants, or tenant associations or organizations may obtain a court order appointing a receiver for a substandard building to remedy the conditions cited in the notice of violation. (*Health & Saf.C.* 17980.7; see 22 *Pacific L. J.* 687.)

(7) *Arbitration*. The parties to an arbitration agreement may apply to the superior court for the appointment of a

receiver. (*C.C.P. 1281.8*.) The parties may not, however, agree to the appointment of a receiver by the arbitration panel; the receiver must be appointed by the court. (*Marsch v. Williams* (1994) 23 C.A.4th 238, 245, 28 C.R.2d 402, *supra*, §423.)

(8) *Miscellaneous Proceedings*. (See *McCarthy v. Poulsen* (1985) 173 C.A.3d 1212, 1219, 219 C.R. 375 [where no person will consent to act as trustee of charitable trust, court may appoint a receiver in place of trustee]; 77 *Harv. L. Rev.* 1153 [Pennsylvania case; receiver cannot be appointed to operate strikebound transit system]; 10 *Stanf. L. Rev.* 361 [availability of receiver in federal court in diversity case]; 4 *A.L.R.2d* 1278 [appointment at insistence of plaintiffs in tort action]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §25 et seq.)

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(6) *Rehabilitation of Substandard Building*. In *Santa Monica v. Gonzalez* (2008) 43 C.4th 905, 76 C.R.3d 483, 182 P.3d 1027, defendant landlord had been the subject of a civil action culminating in the demolition of a structure on his property, two criminal prosecutions resulting in various contempt orders, and jailing for over 9 months based on serious building code violations. After the property had been in an extremely unsafe and unsanitary condition dangerous to its occupants and neighbors for over 15 years, the city appointed a receiver for the property under *Health & Saf.C. 17980.6* and *17980.7*, and authorized the receiver to contract for demolition of the structure on the property. *Held*, failure to comply with the notice requirements of *Health & Saf.C. 17980.6* did not invalidate the receivership orders; and the trial court did not abuse its discretion in authorizing the receiver to contract for demolition.

(a) *Effect of failure to give notice*. The city failed to comply with statutory requirements that notice to the owner to bring the property into code compliance within a reasonable time be posted on the property or mailed and that the notice must state that the lessor cannot retaliate against the lessee. However, these failures did not invalidate the appointment of the receiver where the landlord had notice that he was required to abate serious health and safety risks on the property. Although the notice requirements were obligatory (i.e., an obligation that the city was required to follow rather than a permissive procedure that the city could follow or not), because the requirements were not for the landlord's benefit, they were directory only, and failure to follow them did not invalidate the receivership orders. (43 C.4th 923.)

(b) *Trial court's discretion to authorize demolition*. The receiver's authorization to demolish the structure on defendant's property was within the trial court's sound discretion once it had found that the property was uninhabitable and rehabilitation was "not economically feasible." The evidence established many serious safety and health risks on the property. Demolition was significantly less expensive and more profitable than repair. The landlord was unemployed and had no income or assets apart from the illegal rental units on the property and had persistently failed to rehabilitate the property over many years despite numerous legal actions requiring him to do so. (43 C.4th 932.)



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C. Appointment Procedure.

1. Application on Notice.

a. Motion.

6 *Witkin Cal. Proc. Prov Rem* § 441

[§ 441] Motion.

(1) *In General.* C.C.P. 564 does not set forth any procedure, but merely states that the court in which an action or proceeding is pending may make the appointment in certain classes of cases where "it is shown" or "it appears" that certain conditions exist. The usual procedure in these cases is an application for an order to show cause, or a motion on notice. (See C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §§14.152, 14.153; C.E.B., Civil Lit. Forms §22.1; C.E.B., 2 Civil Proc. Before Trial 4th, §§33.36 et seq., 33.75 [form]; Cal. Civil Practice, 1 Business Litigation, §12:11, 2A Procedure, §§16:155, 16:170 [form]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §54; 21 *Am.Jur.* P.P. Forms (2000 ed.), *Receivers*, §5 et seq.) The defendant should be given a reasonable time to prepare for a hearing on the application. (*Cohen v. Herbert* (1960) 186 C.A.2d 488, 495, 8 C.R. 922 [refusal of 1-week continuance was reversible error under circumstances].) (On opposition to appointment of receiver, see Cal. Civil Practice, 2A Procedure, §16:163; C.E.B., 2 Civil Proc. Before Trial 4th, §33.56.)

(2) *Application by Defendant.* The applicant need not be the plaintiff; a defendant may obtain a receiver in a proper case. (See *McCaslin v. Kenney* (1950) 100 C.A.2d 87, 88, 223 P.2d 94; *Armbrust v. Armbrust* (1946) 75 C.A.2d 272, 274, 171 P.2d 75 [cross-complainant].) (On application by party who has probable interest in disputed property or fund, see C.C.P. 564(b)(1).)

(3) *Action by Court.* The court may also act on its own motion. In *Venza v. Venza* (1949) 94 C.A.2d 878, 211 P.2d 913, plaintiff wife, suing to set aside a property settlement agreement, obtained a temporary restraining order. At the hearing of a motion to dissolve it, the judge suggested that a receiver would be appropriate, and appointed one on its own motion. No objection was made at the time by counsel for either party. The court approved the broad proposition that the order "may be made without notice and without any previous request by either party." (94 C.A.2d 883.) But the opinion places great emphasis on the fact of consent. (94 C.A.2d 882.) (See 65 *Am.Jur.2d* (2001 ed.), *Receivers* §57.)

(4) *Judicial Council Form.* Judicial Council Form No. RC-300 [Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits] has been approved for optional use.

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1. Application on Notice.

b. Showing of Grounds.

6 *Witkin Cal. Proc. Prov Rem* § 442

[§ 442] Showing of Grounds.

(1) *In General.* The showing may be made by verified complaint or affidavits, and may, on prior indication in the notice of motion, be supplemented by testimony and documentary evidence. (See *Armbrust v. Armbrust* (1946) 75 C.A.2d 272, 274, 171 P.2d 75 [complaint alone, treated as affidavit, may support order]; *McNeil v. Graner* (1949) 92 C.A.2d 371, 373, 206 P.2d 1120 [complaint, affidavit, and file of prior proceeding]; C.E.B., 2 Civil Proc. Before Trial 4th, §33.46 [recommending use of declaration or affidavit]; 21 Am.Jur. P.P. Forms (2000 ed.), Receivers, §§22 et seq., 43 et seq.; on declaration in lieu of affidavit, see *supra*, §3.)

(2) *Insufficient Showing.* The showing, whether by complaint or affidavit, must be factual and direct; averments of legal conclusions or hearsay will not support the order. In the following cases the showing was held insufficient:

Bank of Woodland v. Stephens (1904) 144 C. 659, 660, 79 P. 379, *supra*, §430 [complaint; mere conclusions].

Mason v. San-Val Oil & Water Co. (1934) 1 C.2d 670, 672, 36 P.2d 616 [complaint and affidavits; averments on information and belief, generalities, and conclusions].

McCaslin v. Kenney (1950) 100 C.A.2d 87, 94, 223 P.2d 94 [complaint, affidavits and testimony; affidavits in form of conclusions].

Alhambra-Shumway Mines v. Alhambra Gold Mine Corp. (1953) 116 C.A.2d 869, 874, 254 P.2d 599 [affidavits and testimony; burden of showing danger of loss or injury to property was not met].

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2. Appointment and Qualification of Receiver.

a. Appointment.

6 *Witkin Cal. Proc. Prov Rem* § 443

[§ 443] Appointment.

(1) *Written Consent.* Under C.C.P. 566(a), the following persons may not be appointed as a receiver in an action without the written consent of the parties, filed with the clerk:

(a) A party.

(b) The attorney of a party.

(c) A person interested in the action.

(d) A person related to a judge of the court by consanguinity or affinity within the third degree. (See 65 *Am.Jur.2d* (2001 ed.), *Receivers* §§75, 77.)

Despite this condition of written consent, it has been held that the error in appointment of an unqualified person may be waived by failure to object. In *Weygandt v. Larson* (1933) 130 C.A. 304, 19 P.2d 852, an attorney for a party was appointed in open court in the presence of appellants and their counsel. No objection was made and no appeal was taken from the order. *Held*, the validity of the appointment could not be raised on appeal from the final judgment some 2 years later. (130 C.A. 309.)

(2) *Nomination.* C.R.C., Rule 3.1177 provides for the nomination of a receiver, either at the hearing on notice (supra, §442) or at the hearing on confirmation (infra, §448). Each appearing party may "suggest in writing one or more persons for appointment or substitution as receiver, stating the reasons." The suggestion is without prejudice to objections to the appointment or confirmation. (See Cal. Civil Practice, 2A Procedure, §16:157; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §74.)

(3) *Specification of Powers.* Because the receiver has only limited statutory powers, the order should specify any additional powers desired. (See Rutter Group, Civil Proc. Before Trial §9:762; C.E.B., 2 Civil Proc. Before Trial 4th, §33.61; for forms of order, see Cal. Civil Practice, 2A Procedure, §16:158; C.E.B., Civil Lit. Forms §§22.2, 22.5; C.E.B., 2 Civil Proc. Before Trial 4th, §§33.76, 33.79; 21A *Am.Jur. P.P. Forms* (2001 ed.), *Receivers*, §144 et seq.;

infra, §451.)

(4) *Judicial Council Form*. Judicial Council Form No. RC-310 [Order Appointing Receiver after Hearing and Preliminary Injunction--Rents, Issues, and Profits] has been approved for optional use. (For form for ex parte order appointing receiver, see infra, §448.)

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b. Qualification and Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 444

[§ 444] Qualification and Undertaking.

The receiver must take an oath that he or she will perform the duties of a receiver faithfully. (*C.C.P.* 567(a).) The receiver must also give an undertaking to the state, in a sum fixed by the court, that the receiver will faithfully discharge his or her duties and obey the orders of the court. The receiver will be allowed the cost of the undertaking. (*C.C.P.* 567(b).) (See *C.E.B.*, 2 Civil Proc. Before Trial 4th, §§33.49, 33.50, 33.80 [form]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §§102 et seq., 107; 21A *Am.Jur.* P.P. Forms (2001 ed.), *Receivers*, §159 et seq.; on affirmation in lieu of oath, see *C.C.P.* 2015.6; on liability of sureties, see *Miller v. Fidelity & Deposit Co. of Maryland* (1935) 3 *C.A.2d* 580, 585, 40 *P.2d* 951; *Olson v. Maryland Cas. Co.* (1935) 6 *C.A.2d* 421, 424, 44 *P.2d* 412; 23 *Cal. L. Rev.* 447; on additional undertaking in ex parte appointment, see *infra*, §447; on undertakings generally, see *supra*, §8 et seq.)

At the hearing of an application for appointment of a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amount of the undertaking required from the receiver by *C.C.P.* 567(b) for an injunction that is ordered in or with the order appointing the receiver. (*C.R.C.*, Rule 3.1178.)

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3. Ex Parte Order and Confirmation.

a. Nature of Power.

6 *Witkin Cal. Proc. Prov Rem* § 445

[§ 445] Nature of Power.

It has been pointed out that the remedy of receivership is available only on a strong showing of necessity and lack of other adequate remedy. (See *supra*, §420.) An ex parte order is still more harsh and should be issued only in an emergency that makes immediate action imperative. Several cases have held the showing insufficient. (See *A.G. Col Co. v. Superior Court* (1925) 196 C. 604, 613, 238 P. 926, *supra*, §422; *McCall v. McCall Bros. Co.* (1933) 135 C.A. 558, 559, 27 P.2d 648; *Rogers v. Smith* (1946) 76 C.A.2d 16, 21, 172 P.2d 365, *supra*, §422; *Turner v. Superior Court* (1977) 72 C.A.3d 804, 810, footnote 2, 140 C.R. 475, *infra*, §456, quoting the text.) (On preservation of status quo where court does not grant ex parte order, see *Rutter Group*, Civil Proc. Before Trial §9:756.)

But, subject to this qualification and to certain procedural conditions, the power to order a receiver on an ex parte application is well established. (See *Lent v. H.C. Morris Co.* (1938) 25 C.A.2d 305, 308, 77 P.2d 301; *Misita v. Distillers Corp.* (1942) 54 C.A.2d 244, 247, 250, 128 P.2d 888; *Moore v. Oberg* (1943) 61 C.A.2d 216, 220, 142 P.2d 443; *People v. Christ's Church of the Golden Rule* (1947) 79 C.A.2d 858, 861, 181 P.2d 49; *Maggiora v. Palo Alto Inn* (1967) 249 C.A.2d 706, 712, 57 C.R. 787 [plaintiffs were lessors of hotel property with interest in percentage rentals, and with financing loans subordinated to construction loans; defendant lessee was insolvent]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.148 et seq.; C.E.B., Civil Lit. Forms §22.3 et seq.; C.E.B., 2 Civil Proc. Before Trial 4th, §§33.41 et seq., 33.77 et seq. [forms]; Cal. Civil Practice, 1 Business Litigation, §12:10, 2A Procedure, §§16:156, 16:168 et seq. [forms]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §54; on ex parte applications generally, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §58 et seq.)

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b. Showing Required.

6 *Witkin Cal. Proc. Prov Rem* § 446

[§ 446] Showing Required.

The required showing (*supra*, §445) is amplified by C.R.C., Rule 3.1175. In addition to any other matters, the applicant "must show in detail by verified complaint or declaration" the following:

(1) The type of emergency and why the applicant would suffer irreparable injury during the time needed for a noticed hearing. (C.R.C., Rule 3.1175(a)(1).)

(2) The names, addresses, and telephone numbers of the individuals in actual possession of the property for which a receiver is requested, or of the president, manager, or principal agent of a corporation in possession. (C.R.C., Rule 3.1175(a)(2).)

(3) The manner in which the persons in possession are using the property. (C.R.C., Rule 3.1175(a)(3).)

(4) If the property is part of the plant, equipment, or stock in trade of a business, the nature and approximate size or extent of the business, and facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business. (C.R.C., Rule 3.1175(a)(4).)

If any of these matters is unknown and cannot be ascertained by due diligence, the applicant must specify what information is unknown, and the steps that have been taken to acquire that information. (C.R.C., Rule 3.1175.)

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c. Undertaking.

6 *Witkin Cal. Proc. Prov Rem* § 447

[§ 447] Undertaking.

If a receiver is appointed on an ex parte application, the court, before making the order, must require an undertaking from the applicant in an amount determined by the court. This undertaking must provide that the applicant will pay the defendant all damages sustained by the defendant due to the appointment and service of the receiver, if the applicant has procured the appointment "wrongfully, maliciously, or without sufficient cause." (*C.C.P. 566(b)*.) (See *C.E.B.*, 2 Civil Proc. Before Trial 4th, §33.48; *65 Am.Jur.2d* (2001 ed.), *Receivers* §59; on undertakings generally, see *supra*, §8 et seq.; on undertaking to secure faithful performance of receiver's duty, see *supra*, §444.)

This mandatory language has been strictly applied by decisions holding appointments void for lack of a bond. (See *Westphal v. Superior Court* (1932) 120 C.A. 263, 264, 7 P.2d 711.)

At the hearing of an application for appointment of a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amount of the undertaking required from the applicant by *C.C.P. 566(b)* for an injunction that is ordered in or with the order appointing the receiver. (*C.R.C.*, Rule 3.1178.)

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3. Ex Parte Order and Confirmation.

d. Confirmation of Appointment.

6 Witkin Cal. Proc. Prov Rem § 448

[§ 448] Confirmation of Appointment.

(1) *Early Development.* Under the statutes governing the provisional remedy of injunction, an ex parte temporary restraining order is valid only until the time for hearing on a preliminary injunction (not exceeding 15 days, or 22 days for good cause shown). (See *C.C.P. 527(d)(1)* and *527(e)*, supra, §365 and §372, respectively.) The same procedure of ex parte temporary receivership, order to show cause, and hearing was formerly established by local rules and tacitly approved by decisions. (See *Moore v. Oberg* (1943) 61 C.A.2d 216, 220, 142 P.2d 443; *Rogers v. Smith* (1946) 76 C.A.2d 16, 19, 172 P.2d 365, supra, §422; *People v. Christ's Church of the Golden Rule* (1947) 79 C.A.2d 858, 861, 181 P.2d 49.) And even if the order was not temporary, the adverse party could obtain a prompt hearing by motion to vacate the appointment. (See *infra*, §449.)

(2) *Requirement.* Confirmation of the appointment is now required. If a receiver is appointed without notice, the matter must be made returnable on an order to show cause why the appointment should not be confirmed. This order must be made returnable on the earliest date that the court can accommodate, but not more than 15 days, or if good cause appears to the court, 22 days from the date of the order. (C.R.C., Rule 3.1176(a).) (See Cal. Civil Practice, 2A Procedure, §16:156; C.E.B., 2 Civil Proc. Before Trial 4th, §§33.45, 33.78, 33.79; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §54.)

(3) *Procedure.* C.R.C., Rule 3.1176 sets forth a procedure similar to that in *C.C.P. 527(d)* (see supra, §§370, 373):

(a) Each of the adverse parties must be served with all of the following documents as soon as reasonably practical, but not later than 5 days after the date on which the order to show cause is issued, unless the court orders another time: (1) a copy of the complaint, if not previously served; (2) the order to show cause stating the date, time, and place of the hearing; (3) any declarations supporting the application; and (4) a memorandum supporting the application. (C.R.C., Rule 3.1176(b).)

(b) The receiver is discharged for failure of the party who obtained appointment to exercise diligence to make this service, or for failure to proceed on the hearing day. (C.R.C., Rule 3.1176(c).)

(c) Adverse parties are entitled to one continuance. If a continuance is granted, the order to show cause remains in effect until the date of the continued hearing. (C.R.C., Rule 3.1176(d).)

(4) *Judicial Council Forms*. The following Judicial Council forms have been approved for optional use:

Form No. RC-200 [Ex Parte Order Appointing Receiver and Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits].

Form No. RC-210 [Order Confirming Appointment of Receiver and Preliminary Injunction--Rents, Issues, and Profits].

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4. Review of Order.

a. Motion, Appeal, and Prohibition.

6 *Witkin Cal. Proc. Prov Rem* § 449

[§ 449] Motion, Appeal, and Prohibition.

(1) *Motion To Vacate*. The adverse party may attack the order of appointment as void or unwarranted by a motion to vacate. (See *Haines v. Commercial Mortg. Co.* (1928) 206 C. 10, 12, 273 P. 35; *Bibby v. Dieter* (1910) 15 C.A. 45, 47, 113 P. 874; *Lewis v. Shaw* (1926) 77 C.A. 99, 101, 246 P. 86 [trial court must vacate order in excess of jurisdiction]; *Lent v. H.C. Morris Co.* (1938) 25 C.A.2d 305, 308, 77 P.2d 301; C.E.B., 2 Civil Proc. Before Trial 4th, §33.59; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §66; 21A *Am.Jur. P.P. Forms* (2001 ed.), *Receivers*, §133 et seq.)

(2) *Appeal*. The order appointing a receiver is appealable by the adverse party. (C.C.P. 904.1(a)(7) [appeal other than in limited civil case]; C.C.P. 904.2(h) [appeal in limited civil case]; see *Brown v. Memorial Nat. Home Foundation* (1958) 158 C.A.2d 448, 456, 322 P.2d 600; C.E.B., 2 Civil Proc. Before Trial 4th, §§33.57, 33.58; 72 *A.L.R.2d* 1009 [appealability of order appointing receiver]; 9 *Cal. Proc.* (5th), *Appeal*, §177.)

However, where a temporary ex parte order has been superseded at the hearing by the granting of a permanent order, the adverse party should appeal from the latter. If the only appeal is taken from the original superseded order, the appellate court cannot reverse the appointment. (See *People v. Christ's Church of the Golden Rule* (1947) 79 C.A.2d 858, 862, 181 P.2d 49.) And the propriety of the appointment becomes moot and not subject to review after the discharge of the receiver (*Kato v. Busick* (1916) 174 C. 118, 121, 162 P. 108) or after rendition of judgment, for the provisional remedy spends its force when the trial terminates (*Davies v. Ramsdell* (1919) 40 C.A. 432, 433, 183 P. 702; *Scoville v. De Bretteville* (1942) 50 C.A.2d 633, 123 P.2d 622).

(3) *Prohibition*. Prohibition is ordinarily not available because appeal is an adequate remedy. (*Pacific Broadcasting Co. v. Superior Court* (1929) 100 C.A. 649, 651, 280 P. 991; *Santa Ynez Mercury Corp. v. Superior Court* (1938) 26 C.A.2d 279, 281, 79 P.2d 185.) But, on a sufficient showing of special circumstances that make the appellate remedy inadequate, prohibition will lie. (*A.G. Col Co. v. Superior Court* (1925) 196 C. 604, 621, 238 P. 926; *Golden State Glass Corp. v. Superior Court* (1939) 13 C.2d 384, 389, 90 P.2d 75, supra, §422; *Rondos v. Superior Court* (1957) 151 C.A.2d 190, 193, 311 P.2d 113 [receiver placed in charge of business with on-sale liquor license, and petitioner unable to furnish stay bond on appeal]; see 65 *Am.Jur.2d* (2001 ed.), *Receivers* §68; 8 *Cal. Proc.* (5th), *Extraordinary Writs*, §58 et seq.)

There is no provision in *C.C.P. 904.1*, as there is for injunction and attachment, that an appeal may be taken from an order vacating the order of appointment. Hence, if a receiver is properly appointed, and the order becomes final on lapse of the time to appeal, an attempt by the trial court to vacate it may be prevented by prohibition. (*Mines v. Superior Court* (1932) 216 C. 776, 780, 16 P.2d 732.)

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4. Review of Order.

b. Collateral Attack.

6 *Witkin Cal. Proc. Prov Rem* § 450

[§ 450] Collateral Attack.

If the case is not within the statutory classes for which a receiver may be appointed, or the appointment is otherwise in excess of the court's jurisdiction, the order of appointment is void and subject to collateral attack in various ways. Thus, where petitioner was committed for contempt for interfering with a receiver, he was allowed, on habeas corpus, to show the invalidity of the order of appointment, because disobedience of a void order cannot constitute contempt. (*In re Carroll* (1933) 135 C.A. 672, 677, 28 P.2d 84; for same rule in injunction proceedings, see *supra*, §410.) (See *Baker v. Varney* (1900) 129 C. 564, 565, 62 P. 100 [void appointment was attacked in action by plaintiff receiver to foreclose mortgage]; *In re Stein* (1936) 14 C.A.2d 303, 306, 58 P.2d 175 [void appointment not available as defense in subsequent criminal proceeding]; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §67.)

On principle it would seem that, if the court has jurisdiction of the subject matter, a party who consents to the appointment may be estopped afterwards to attack the order as one in excess of jurisdiction. (See *Hise v. Superior Court* (1943) 21 C.2d 614, 622, 134 P.2d 748 [acquiescence in appointment and subsequent acts in recognition of appointment]; *First Nat. Bank of Auburn v. Superior Court* (1909) 12 C.A. 335, 344, 107 P. 322 [plaintiff who knew of appointment and made no objection for nearly a year was estopped to attack it in controversy over compensation]; *John H. Spohn Co. v. Bender* (1937) 18 C.A.2d 447, 452, 64 P.2d 152 [same]; but see *Lewis v. Shaw* (1926) 77 C.A. 99, 102, 246 P. 86, 2 *Cal. Proc.* (5th), *Jurisdiction*, §286 [consent alone cannot confer jurisdiction to appoint]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §333.)

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D. Administration of Receivership.

1. Powers and Duties of Receiver.

a. In General.

6 *Witkin Cal. Proc. Prov Rem* § 451

[§ 451] In General.

The powers of the receiver are those specified by *C.C.P.* 568 et seq. and those granted by the order of appointment or by further order of the court. (See *C.C.P.* 568 ["generally to do such acts respecting the property as the Court may authorize"]; *Cal-Amer. Income Property Fund VII v. Brown Dev. Corp.* (1982) 138 C.A.3d 268, 273, 187 C.R. 703, citing the text; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial §14.157 et seq.; C.E.B., 2 Civil Proc. Before Trial 4th, §33.61 et seq.; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §128 et seq.)

The receiver is an officer of the court, subject to its continuing control and instructions. (*Free Gold Mining Co. v. Spiers* (1901) 135 C. 130, 132, 67 P. 61 ["The receiver is but the hand of the court, to aid it in preserving and managing the property involved in the suit for the benefit of those to whom it may ultimately be determined to belong"]; see *Lesser & Son v. Seymour* (1950) 35 C.2d 494, 499, 218 P.2d 536; *Highland Sec. Co. v. Superior Court* (1931) 119 C.A. 107, 112, 6 P.2d 116; *Steinberg v. Goldstein* (1954) 129 C.A.2d 682, 685, 278 P.2d 22; *Turner v. Superior Court* (1977) 72 C.A.3d 804, 813, 140 C.R. 475, *infra*, §456 ["a receiver is the agent of the court, not of the parties"]; *supra*, §419.)

West's Key Number Digest, Receivers 81 et seq.

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1. Powers and Duties of Receiver.

b. Right To Sue and Be Sued.

6 *Witkin Cal. Proc. Prov Rem* § 452

[§ 452] Right To Sue and Be Sued.

A receiver may sue or be sued only by permission of the court. (*C.C.P.* 568; *Ostrowski v. Miller* (1964) 226 C.A.2d 79, 84, 37 C.R. 790; *Baron v. Fire Ins. Exchange* (2007) 154 C.A.4th 1184, 65 C.R.3d 502 [receiver had authority to seek punitive damages; arbitrator entered order nunc pro tunc specifically authorizing receiver to pursue contract or tort actions against insurer and to recover any and all damages, including punitive damages, which order was confirmed by trial court]; see 4 *Cal. Proc.* (5th), *Pleading*, §148; 21A Am.Jur. P.P. Forms (2001 ed.), Receivers, §331 et seq.; on federal practice, see 8 Federal Procedure, L.Ed. §§21:58 et seq., 21:63 et seq.; 12 Federal Practice & Procedure (Wright & Miller) §2984.) This is a rule of judicial economy, because a claimant can usually obtain appropriate relief in the receivership action; where he or she cannot, the court may not refuse to give its permission where to do so would cut off the plaintiff's rights. (*Vitug v. Griffin* (1989) 214 C.A.3d 488, 493, 262 C.R. 588.)

Thus, in *Jun v. Myers* (2001) 88 C.A.4th 117, 105 C.R.2d 537, the trial court had discretion to allow the purchaser of receivership assets either to intervene in the underlying action or to bring a separate action alleging misrepresentation despite dismissal of the action, where the receiver had not made a final accounting or been discharged. (88 C.A.4th 124.) However, the court did not have discretion to deny both the motion to sue and the motion to intervene by summarily determining that the purchaser's claim lacked merit. "To prevent a party from filing a separate suit against a receiver as well as from intervening in the receivership action is to deprive him of access to the courts to pursue his claim. Denial of access to the courts implicates due process." (88 C.A.4th 125.)

The permission requirement is not jurisdictional; failure to obtain permission is merely an irregularity that may be cured at any stage of the proceedings. And while the objection that permission has not been obtained may justify a plea in abatement, it must be raised at the earliest opportunity or it is waived. (*Vitug v. Griffin*, *supra* [right to object to plaintiffs' failure to obtain permission to sue was waived by former receiver's continued participation in action].)

In *O'Flaherty v. Belgum* (2004) 115 C.A.4th 1044, 9 C.R.3d 286, an attorney, over the objection of the receiver for a dissolving partnership and without the approval of the receivership court, represented the partnership in arbitration, even though the trial court's orders compelling arbitration were limited to the individual partners and did not encompass the partnership. *Held*, this was error, and where it could not be determined that the portion of the arbitration award

related to the partnership did not affect the remaining portion, reversal of the entire award was required. Absent an order to the contrary, a receiver appointed for a dissolving partnership has sole authority to commence an action on behalf of the partnership. (115 C.A.4th 1061, citing *Vitug v. Griffin*.) And because individual partners cannot sue for damage to the partnership or their interests in it, only the receiver can maintain such an action. (115 C.A.4th 1061.) Moreover, an arbitrator may not encroach on the receivership court's jurisdiction. (115 C.A.4th 1061, citing *Marsch v. Williams* (1994) 23 C.A.4th 238, 28 C.R.2d 402.) Absent the receiver's authorization and over his objection, the attorney did not have the power or right to prosecute claims on behalf of the partnership in the arbitration, and the arbitrator did not have the jurisdiction to consider the partnership's claims. (115 C.A.4th 1062.) One justice dissented. (115 C.A.4th 1064.)

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D. Administration of Receivership.

1. Powers and Duties of Receiver.

c. Liability.

6 *Witkin Cal. Proc. Prov Rem* § 453

[§ 453] Liability.

(1) *Receiver Is Not Personally Liable.* The receiver is not personally liable for torts committed in the performance of receivership duties; liability is in the receiver's official capacity only, to be satisfied from receivership funds. (*Chiesur v. Superior Court* (1946) 76 C.A.2d 198, 202, 172 P.2d 763, 5 Summary (10th), *Torts*, §31.) The receiver may be an employer for purposes of workers' compensation liability. (*Pacific Indem. Co. v. Work. Comp. App. Bd.* (1968) 258 C.A.2d 35, 42, 65 C.R. 429, 2 Summary (10th), *Workers' Compensation*, §159 [foreclosure receivership dispossessed former employer and terminated old employer-employee relationship].)

In *Stewart v. California* (1969) 272 C.A.2d 345, 77 C.R. 418, defendant was appointed the receiver of a business. The order stated that any obligation should be that of the receivership and not personal. He collected sales taxes and made unemployment insurance deductions from employees' pay checks, but did not pay them over to the state. He was discharged, his account was approved, and his bond was exonerated. The state, having objected to settlement of the account, appealed. *Held*, reversed.

(a) A receiver, like an administrator or other fiduciary, may be surcharged for failure to pay taxes incurred in running the business of an estate. (272 C.A.2d 348.)

(b) The order of appointment expressly relieved him of any personal liability, but the state did not seek to impose any: its object was merely to establish priority over other creditors and to hold the receiver's surety liable for failure of the receiver to perform his duties. Hence, it was proper to surcharge the receiver in the amount of taxes reported in his account. (272 C.A.2d 351.)

Ordinarily, a receiver who has been discharged is not a proper party to an action, and the discharge order is res judicata as to any claims of liability against the receiver. However, res judicata will not bar the claim of a person who was not a party to the receivership proceeding. (*Vitug v. Griffin* (1989) 214 C.A.3d 488, 494, 262 C.R. 588, 5 Summary (10th), *Torts*, §31 [receiver failed to inform receivership court of action against her or to inform plaintiffs of discharge proceedings; order discharging receiver was void as to plaintiffs in wrongful death action against receiver, among others].)

(2) *Exception to Nonliability of Receiver.* *Credit Managers Assn. of Southern Calif. v. Kennesaw Life & Acc. Ins. Co.* (9th Cir. 1994) 25 F.3d 743, recognizes an exception to a receiver's exemption from personal liability where the receiver engages in misconduct or mismanagement of the receivership estate. It cites three California cases that suggest, without holding, that such liability exists: *Aviation Brake Systems, Ltd. v. Voorhis* (1982) 133 C.A.3d 230, 183 C.R. 766 [resolved on issue of res judicata]; *Macmorris Sales Corp. v. Kozak* (1967) 249 C.A.2d 998, 58 C.R. 92 [finding no evidence of receiver mismanagement]; and *Rochat v. Gee* (1891) 91 C. 355, 27 P. 670 [mentioning, in connection with evidentiary objection, that when account was settled receiver had been charged with certain property that was allegedly attached by creditors].

Vitug v. Griffin, supra, 214 C.A.3d 497, suggested, without deciding, that a receiver may have incurred personal responsibility for disbursing all receivership assets without notice to plaintiffs who had filed a tort action against the receiver albeit without obtaining the required permission to sue (see *supra*, §452).

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D. Administration of Receivership.

1. Powers and Duties of Receiver.

d. Possession and Control of Property.

6 Witkin Cal. Proc. Prov Rem § 454

[§ 454] Possession and Control of Property.

(1) *In General.* The receiver has power "to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the Court may authorize." (C.C.P. 568; see C.C.P. 568.1 [authorizing receiver to deposit securities in securities depository]; 65 Am.Jur.2d (2001 ed.), Receivers §146 et seq.; 21A Am.Jur. P.P. Forms (2001 ed.), Receivers, §221 et seq.) A receiver is also obligated to pay real property taxes that fall due during the receivership. (*Schreiber v. Ditch Road Investors* (1980) 105 C.A.3d 675, 680, 164 C.R. 633.) Interference with the receiver's possession is punishable as a contempt. (*Strain v. Superior Court* (1914) 168 C. 216, 220, 142 P. 62; *In re Morello* (1932) 121 C.A. 480, 485, 9 P.2d 565.)

(2) *Inventory.* Within 30 days after the receiver's appointment (unless the time is extended by the court), the receiver must file an inventory "containing a complete and detailed list of all property of which the receiver has taken possession." If other property is later obtained, the receiver must promptly file a supplementary inventory. (C.R.C., Rule 3.1181(a).)

(3) *Title to Property.* The receiver has possession only; title remains in those who had it at the time of appointment. (*North v. Cecil B. De Mille Productions* (1934) 2 C.2d 55, 57, 39 P.2d 199.) The receiver takes the property subject to all existing liens and equities of others in the property. (*H.D. Roosen Co. v. Pacific Radio Publishing Co.* (1932) 123 C.A. 525, 534, 11 P.2d 873.) Like a trustee in bankruptcy, the receiver may be authorized to abandon worthless property. (*Helvey v. United States Bldg. & Loan Assn. of Los Angeles* (1947) 81 C.A.2d 647, 650, 184 P.2d 919.)

(4) *Deposit of Money.* Funds held by a receiver may be deposited in interest-bearing accounts in financial institutions in the name and for the benefit of the receivership estate, provided that all the following conditions are met:

(a) Deposits are fully guaranteed or insured under federal law. (C.C.P. 569(a).)

(b) A financial institution in which receivership funds are deposited is not a party to the action in which the receiver was appointed. (C.C.P. 569(b).)

(c) The receiver does not own one percent or more in value of the outstanding stock of a financial institution in which receivership funds are deposited; is not an officer, director, or employee of the institution; and is not a whole or half sibling, spouse, aunt, uncle, nephew, niece, ancestor or lineal descendant of an owner, officer, employee, or director. (C.C.P. 569(c).) (See *Miller v. Fidelity & Deposit Co. of Maryland* (1935) 3 C.A.2d 580, 585, 40 P.2d 951 [receiver and surety were liable for deposit without court order].)

(5) *Disposal of Unclaimed Funds.* A receiver having funds belonging to a person whose whereabouts are unknown must publish notice and, if the funds are still unclaimed, pay them into the state treasury on court order. The costs and expenses of publication must be paid out of those funds. (C.C.P. 570.)

(6) *Substandard Rental Housing.* A receiver of real property that includes rental housing must notify the court of any order or notice to correct a substandard or unsafe condition with which the receiver cannot comply within the time provided by the order or notice. (C.C.P. 568.2(a).) The notice must be filed within 30 days after the appointment of the receiver, or within 15 days of the occurrence of a substandard condition. (C.C.P. 568.2(b).) The notice must inform the court of the following: (a) the substandard conditions that exist; (b) the danger that the conditions pose to an occupant or the public; (c) the approximate cost and time involved in abating the conditions (or, if additional time is required to approximate the cost, the date on which the approximate cost will be filed, which must be within 10 days of the filing of the notice); and (d) whether the receivership is likely to contain sufficient funds to abate the conditions. (C.C.P. 568.2(c).)

If the receivership funds are insufficient, the receiver must request further instructions or orders from the court. (C.C.P. 568.2(d).) On receipt of a notice of insufficient funds, the court must consider appropriate orders or instructions to enable the receiver to correct the conditions or terminate or limit the period of receivership. (C.C.P. 568.2(e).) A tenant of real property that is subject to receivership, a tenant association or organization, or a federal, state, or local enforcement agency may file a motion in a receivership action to seek further instructions or orders from the court if either substandard conditions exist, or a dispute exists concerning the powers or duties of the receiver affecting a tenant or the public. (C.C.P. 568.3.)

West's Key Number Digest, Receivers 65 et seq.

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1. Powers and Duties of Receiver.

e. Sale of Property.

6 *Witkin Cal. Proc. Prov Rem* § 455

[§ 455] Sale of Property.

By court order, a receiver may sell property in his or her possession on the notice and in the manner prescribed by *C.C.P. 701.510* et seq. (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §144 et seq.). (*C.C.P. 568.5*; see *Lesser & Son v. Seymour* (1950) 35 *C.2d* 494, 499, 218 *P.2d* 536 [court may make change in manner of sale previously ordered]; 21 *Am.Jur.* P.P. Forms (2001 ed.), Receivers, §267 et seq.; on restrictions on sales by rents and profits receiver, see *infra*, §456.) The sale is not final until confirmed by the court. (*C.C.P. 568.5*.) The court abuses its discretion if it confirms a fraudulent, unfair, or oppressive sale. (*Cal-Amer. Income Property Fund VII v. Brown Dev. Corp.* (1982) 138 *C.A.3d* 268, 274, 275, 187 *C.R. 703* [sale of property in receivership pending trial of action between buyer and seller of property was unfair to buyer].)

Although *C.C.P. 568.5* prescribes the manner of sale, it is not a restriction on the inherent equitable power of the court, particularly where a charitable corporation is involved. Hence, the court may, in a proper case, authorize the receiver to sell in a different manner, e.g., at a private sale, "at the best price attainable under the circumstances." (*People v. Riverside University* (1973) 35 *C.A.3d* 572, 585, 111 *C.R. 68*, *supra*, §437.)

A receiver's sale should be confirmed unless there is misconduct, a grossly inadequate sales price, or some other good reason for refusing to confirm. (*People v. Stark* (2005) 131 *C.A.4th* 184, 205, 207, 31 *C.R.3d* 669, citing *Riverside University*; [court did not abuse its discretion in confirming sale at second auction; original buyer's bid-matching right substantially suppressed bidding at first auction, original buyer participated in second auction, and ultimate buyer's highest bid resulted in over \$ 1 million more to receivership estate than was offered at first auction].)

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1. Powers and Duties of Receiver.

f. Distinction: Rents and Profits Receiver.

6 *Witkin Cal. Proc. Prov Rem* § 456

[§ 456] Distinction: Rents and Profits Receiver.

Where the mortgagor conducts a business on the mortgaged premises, a question arises whether the business is subject to the mortgage, either as a product of the land or by an express inclusion under the terms of the mortgage. Unless the business is covered, a mortgage foreclosure receiver cannot take it into possession. (*Turner v. Superior Court* (1977) 72 C.A.3d 804, 814, 140 C.R. 475.)

In *Turner*, the predecessors of T and C gave a promissory note to Great Western secured by a deed of trust on the Bakersfield Inn. The deed of trust provided for appointment of a receiver on default, to take possession of the property and collect the rents and profits. In litigation between T and C, it was determined that C owned the major part of the real and personal property, and that T owned the liquor license and other personal property. In the present case, Great Western sought judicial foreclosure of the deed of trust, and obtained an order appointing a receiver to take possession of the property and collect rents and profits. On the theory that possession and use of the liquor license passed to the receiver, the trial judge ordered T to surrender it to the receiver so that he might operate the cocktail lounge business, and later ordered the receiver to sell all of the property except the liquor license. T petitioned for prohibition to prevent the sale, and C petitioned for mandamus seeking to include the liquor license in the property to be sold. *Held*, prohibition issued and mandamus denied.

(a) *Limited possession of rents and profits receiver.* An equity or general receiver takes possession of all of the debtor's assets to satisfy creditors out of those assets. But a "rents and profits receiver" appointed on a mortgage foreclosure has no right to possession of all of the debtor's property; the receiver's possession is limited to the property standing as security. (72 C.A.3d 813.) Hence, the trial judge's order authorizing the receiver to take possession and use of property not covered by the deed of trust was an act in excess of jurisdiction, and prohibition was an appropriate remedy. (72 C.A.3d 816.)

(b) *Limited power to sell property.* The trial judge authorized the sale of the entire property (except the liquor license) on the finding that the business was losing money and that the equity of the debtors was threatened by foreclosure proceedings. Authorities supporting the inherent equitable power of the court to take such action deal with general receivers (72 C.A.3d 817); as to a rents and profits receiver, the same reasons for denying possession of

property not covered by the mortgage call for denial of the right to sell that property. (72 C.A.3d 818.)

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1. Powers and Duties of Receiver.

g. Contracts.

6 *Witkin Cal. Proc. Prov Rem* § 457

[§ 457] Contracts.

(1) *Contract Binding Property.* A receiver has no implied power to make a contract binding the property or fund in his or her custody without prior court approval. (*Nulaid Farmers Assn. v. La Torre* (1967) 252 C.A.2d 788, 793, 60 C.R. 821 [H, receiver appointed on foreclosure of chattel mortgages given by defendant poultry farmers, contracted with C, without court approval, to devote entire property of one ranch for substantial period to raising fryers; H was not liable as receiver to C for breach]; see 65 *Am.Jur.2d* (2001 ed.), *Receivers* §173 et seq.)

(2) *Employment of Attorney.* A receiver may not employ an attorney without court approval. The application for approval must be in writing and must state the reason the employment is needed, the name of the proposed attorney, and that the attorney is not an attorney for, associated with, or employed by an attorney for a party. (C.R.C., Rule 3.1180(b); see *Macmorris Sales Corp. v. Kozak* (1967) 249 C.A.2d 998, 1005, 58 C.R. 92 [substantial challenge to receiver's account and 3-day trial of issue was contemplated; employment was proper]; *Shannon v. Superior Court* (1990) 217 C.A.3d 986, 994, 266 C.R. 242 [where court had approved employment of attorney by receiver, attorney-client privilege applied]; C.E.B., Civil Lit. Forms §§22.7, 22.8; C.E.B., 2 Civil Proc. Before Trial 4th, §33.66; 65 *Am.Jur.2d* (2001 ed.), *Receivers* §133; 21A *Am.Jur. P.P. Forms* (2001 ed.), *Receivers*, §211 et seq.)

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D. Administration of Receivership.

2. Accounts.

6 *Witkin Cal. Proc. Prov Rem* § 458

[§ 458] Accounts.

(1) *Monthly Reports.* The receiver is required to provide monthly reports to the parties and, on request, to nonparty client lienholders. The reports must include: (a) a narrative report of events, (b) a financial report, and (c) a statement of all fees paid to the receiver, employees, and professionals, which must show (1) itemized services; (2) a breakdown of services by 1/10-hour intervals; and (3) the fees on the basis billed, whether hourly or otherwise. (C.R.C., Rule 3.1182(a).) These reports are not to be filed with the court unless the court so orders. (C.R.C., Rule 3.1182(b).)

(2) *Interim Fees, Report, and Accounting.* Interim fees are subject to final review and approval by the court, which retains jurisdiction to award a greater or lesser amount as the full, fair, and final value of services received. (C.R.C., Rule 3.1183(a).) In the absence of a showing of good cause, objections to the receiver's interim report and accounting must be made within 10 days of the notice of the report and accounting. Objections must be specific, and must be delivered to the receiver and to all parties entitled to service of the interim report and accounting. (C.R.C., Rule 3.1183(b).)

(3) *Records Required.* The receiver must keep proper records of the receipts and disbursements, and the account must be approved before the receiver may be discharged. (See *Seccombe v. Dionne* (1935) 3 C.A.2d 731, 735, 40 P.2d 299; 65 Am.Jur.2d (2001 ed.), *Receivers* §278 et seq.; 21A Am.Jur. P.P. Forms (2001 ed.), *Receivers*, §292 et seq.) Termination of the main action may terminate the receivership, but the court retains jurisdiction thereafter to settle the accounts. (*Hanno v. Superior Court* (1939) 30 C.A.2d 639, 640, 87 P.2d 50.)

(4) *Final Account.* A receiver is required to present a final account and report by noticed motion or by stipulation of all parties. Unless the court orders otherwise, no memorandum in support of the motion or stipulation is required. Notice must be given to any person or entity known to the receiver to have a substantial, unsatisfied claim that will be affected by the order or stipulation, whether or not the person or entity is a party to or has appeared in the action. (C.R.C., Rule 3.1184.)

West's Key Number Digest, Receivers 190 et seq., 201 et seq.

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D. Administration of Receivership.

3. Compensation.

6 *Witkin Cal. Proc. Prov Rem* § 459

[§ 459] Compensation.

The amount of compensation allowed to a receiver or the receiver's attorney is within the trial court's discretion. (*Kan v. Tsang* (1949) 90 C.A.2d 538, 541, 203 P.2d 86; *Venza v. Venza* (1951) 101 C.A.2d 678, 680, 226 P.2d 60; *People v. Riverside University* (1973) 35 C.A.3d 572, 587, 111 C.R. 68, supra, §437, citing the text; *Melikian v. Aquila, Ltd.* (1998) 63 C.A.4th 1364, 1367, 74 C.R.2d 739 [court did not abuse its discretion by allowing receiver's fee of \$ 125 per hour, plus 4% of purchase price on receivership property, where parties had agreed on this method of calculating receiver's fee, and receiver had earned fee by efforts to sell property, which would otherwise have been lost to foreclosure]; see 65 *Am.Jur.2d* (2001 ed.), *Receivers* §219 et seq.; 21A *Am.Jur.* P.P. Forms (2001 ed.), *Receivers*, §323 et seq.)

If compensation is claimed, the account must detail the services performed by the receiver or the receiver's attorney, and must set forth the amount of any previous allowances made to either of them. (C.R.C., Rule 3.1184(d).) Normally the compensation is payable out of the estate or funds of the receivership. But if the appointment was void, or erroneously ordered on a false or unsubstantiated showing, the party who procured the appointment may be held personally liable. (*Ephraim v. Pacific Bank* (1900) 129 C. 589, 592, 62 P. 177; *Andrade v. Andrade* (1932) 216 C. 108, 110, 13 P.2d 676; *Baldwin v. Baldwin* (1947) 82 C.A.2d 851, 856, 187 P.2d 429.) (On payment of interim fees to receiver, see supra, §458.)

West's Key Number Digest, *Receivers* 195 et seq.

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D. Administration of Receivership.

4. Discharge.

6 *Witkin Cal. Proc. Prov Rem* § 460

[§ 460] Discharge.

Unless previously removed (see *Hozz v. Varga* (1958) 166 C.A.2d 539, 544, 333 P.2d 113), a receiver is discharged when the final account is approved. (See C.E.B., 2 Civil Proc. Before Trial 4th, §33.73 et seq.; Cal. Civil Practice, 2A Procedure, §16:162; 21A Am.Jur. P.P. Forms (2001 ed.), Receivers, §398 et seq.; supra, §458.)

After discharge, a receiver has no official duties and is not a proper party to any action. (*Brockway Land & Water Co. v. Placer* (1954) 124 C.A.2d 371, 375, 268 P.2d 524; see 65 Am.Jur.2d (2001 ed.), Receivers §404 et seq.; on liability of receiver after discharge, see supra, §453.)

The final report and account required by C.R.C., Rule 3.1184 (supra, §458) must contain a request for discharge and for exoneration of the receiver's surety.

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VI. DEPOSIT IN COURT

A. Nature of Remedy.

6 *Witkin Cal. Proc. Prov Rem* § 461

[§ 461] Nature of Remedy.

(1) *In General.* The provisional remedy of deposit is governed by *C.C.P.* 572. (On limitations, see *infra*, §462; on procedure, see *infra*, §463.) The remedy is narrow in scope: it is exclusively a prejudgment remedy. Hence, it may not be used to enforce a final division of community property. (*In re Marriage of Fithian* (1977) 74 C.A.3d 397, 401, 141 C.R. 506.)

(2) *Other Deposit Procedures Distinguished.* A number of statutes contain provisions for deposit of money in court for particular purposes. The following are illustrative:

(a) Deposit pursuant to offer to compromise. (*C.C.P.* 1025; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §81 et seq.)

(b) Deposit by State Controller of money due judgment debtor. (*C.C.P.* 708.740(c); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §314.)

(c) Deposit by auditor of public entity or similar official of money due judgment debtor. (*C.C.P.* 708.750; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §315.)

(d) Deposit by controller, auditor, or other public disbursing officer of money due contractor on public work. (*C.C.P.* 708.760(b); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §319.)

(e) Unlawful detainer; deposit to prevent forfeiture of lease. (*C.C.P.* 1174(c); see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §332.)

(f) Condemnation proceeding; deposit to obtain possession pending appeal. (*C.C.P.* 1268.110 et seq.; see 8 *Summary* (10th), *Constitutional Law*, §1255.)

(g) Deposit in lieu of bond. (*C.C.P.* 995.710 et seq.; see *supra*, §§44, 45.)

(h) Interpleader. (*C.C.P.* 386 et seq.; see 4 *Cal. Proc.* (5th), *Pleading*, §237 et seq.)

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VI. DEPOSIT IN COURT

B. Limitations.

6 *Witkin Cal. Proc. Prov Rem* § 462

[§ 462] Limitations.

Where the pleadings admit or an examination of a party shows that the party possesses or controls property (1) that is capable of delivery; (2) that is the subject of litigation; and (3) that the party holds as trustee for another party, or that belongs or is due to another party, or that should, under the circumstances of the case, be held by the court pending final disposition of the action, the court may, on motion, order property to be deposited in court or delivered to that party, on just conditions and subject to the court's further direction. (*C.C.P.* 572.) (See *C.E.B.*, 2 Civil Proc. Before Trial 4th, §34.1 et seq.; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Before Trial 2d, §14.184 et seq.; *Cal. Civil Practice*, 2A Procedure, §16:183 et seq.; 23 *Am.Jur.2d* (2002 ed.), *Deposits in Court* §1 et seq.; 8B *Am.Jur.* P.P. Forms (2006 ed.), *Deposits in Court*, §1 et seq.; on deposits in federal court, see *F.R. Civ. P.*, *Rule* 67; 10 *Federal Procedure*, L.Ed. §24:1 et seq.; 12 *Federal Practice & Procedure* (Wright & Miller) §§2991, 2992.)

The limiting language of *C.C.P.* 572 is necessary to avoid the arbitrary taking of money or property during a trial before the issues are determined. The remedy is available only where the money or property is admittedly and unconditionally due, and where the moving party is immediately entitled to it, and not where its payment is dependent on the judgment to be rendered in the action. (*Green v. Duvergey* (1905) 146 C. 379, 386, 80 P. 234; *Burke v. Superior Court* (1907) 7 C.A. 178, 181, 93 P. 1058 ["To justify the making of the order, the admission in the pleadings of having money in possession belonging to another must be free from any claim thereto"]; *In re Elias* (1962) 209 C.A.2d 262, 272, 25 C.R. 739 [there was neither admission nor proof that money was held as trustee, etc.; order was void and defendant, held in contempt, was released on habeas corpus]; see *C.E.B.*, 2 Civil Proc. Before Trial 4th, §34.9.)

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C. Procedure.

6 *Witkin Cal. Proc. Prov Rem* § 463

[§ 463] Procedure.

The procedure is as follows:

(1) *Notice of motion, stating a statutory ground.* (*C.C.P.* 572; see Cal. Civil Practice, 2A Procedure, §16:184; C.E.B., Civil Lit. Forms §§23.1, 23.2; C.E.B., 2 Civil Proc. Before Trial 4th, §§34.11 et seq., 34.24, 34.25; 8B Am.Jur. P.P. Forms (2006 ed.), Deposits in Court, §4 et seq.)

(2) *Order of court directing deposit.* (*C.C.P.* 572; see C.E.B., 2 Civil Proc. Before Trial 4th, §§34.19, 34.26; C.E.B., Civil Lit. Forms §23.3; 8B Am.Jur. P.P. Forms (2006 ed.), Deposits in Court, §12 et seq.) Disobedience of the order is a contempt, and the court may require the sheriff or marshal to take and deposit the money or property. (*C.C.P.* 574; see Cal. Civil Practice, 2A Procedure, §16:185; C.E.B., 2 Civil Proc. Before Trial 4th, §34.21, 34.27, 34.28; 8B Am.Jur. P.P. Forms (2006 ed.), Deposits in Court, §§20, 21.)

(3) *Deposit in court.* Money is delivered to the clerk, who then deposits it with the court's treasury, as provided in *Govt.C.* 68084. (*C.C.P.* 573; see C.E.B., 2 Civil Proc. Before Trial 4th, §34.20; 8B Am.Jur. P.P. Forms (2006 ed.), Deposits in Court, §24 et seq.) The owner of cash deposited in a civil action is entitled to the interest earned while the money is on deposit. (*Fresno Fire Fighters v. Jernagan* (1986) 177 C.A.3d 403, 409, 222 C.R. 886.)

(4) *Payment to successful party.* When the right to the deposit is established, the court will order payment. (See C.E.B., 2 Civil Proc. Before Trial 4th, §§34.22, 34.26; C.E.B., Civil Lit. Forms §23.3; 8B Am.Jur. P.P. Forms (2006 ed.), Deposits in Court, §27 et seq.)

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IV. INJUNCTION

B. Right to Injunction.

2. Right in Particular Situations.

i-1. (New) Abuse of Elder or Dependent Adult.

6 *Witkin Cal. Proc. Prov Rem* § 315A

[§ 315A] (New) Abuse of Elder or Dependent Adult.

Welf.C. 15657.03 allows an elder or dependent adult who has suffered abuse to obtain a protective order. Under Welf.C. 15657.03(c), a restraining order may be issued based on an affidavit showing reasonable proof of one or more past acts of abuse of the petitioning elder or dependent adult. Thus, a protective order under the act may issue based on evidence of past abuse, without a particularized showing that the wrongful acts are likely to be continued or repeated. (*Gdowski v. Gdowski* (2009) 175 C.A.4th 128, 136, 138, 95 C.R.3d 799 [issuance of protective order based on harsh cross-examination of father by daughter's trial counsel and her failure to intervene was reversible error; manner of cross-examination is within control of counsel, not client, and statements and arguments of counsel are not evidence].) (On abuse of elderly or dependent adults generally, see 6 *Summary* (10th), *Torts*, §1686 et seq.; 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §168 et seq.; for forms used to restrain elder or dependent adult abuse, see Judicial Council Form No. EA-100 et seq.; for list of these forms, see 2 *Cal. Proc.* (5th), *Courts*, §413.)

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CHAPTER VI - Provisional Remedies

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IV. INJUNCTION

B. Right to Injunction.

2. Right in Particular Situations.

l-1. (New) Private Postsecondary Educational Institution Violence and Threats.

1. (New) Nature and Scope of Statute.

6 *Witkin Cal. Proc. Prov Rem § 330A*

[§ 330A] (New) Nature and Scope of Statute.

(1) *In General. C.C.P. 527.85*, added in 2009, authorizes a chief administrative officer (or an officer or employee designated by the chief administrative officer to maintain order on the school campus or facility) to seek a temporary restraining order and injunction on behalf of a student who has suffered "a credible threat of violence" made off the school campus or facility and "which can reasonably be construed to be carried out or to have been carried out at the school campus or facility." In addition, the restraining order and injunction may be sought on behalf of any number of other students at the campus or facility who are similarly situated. The written consent of the student is required. (*C.C.P. 527.85(a)*.) However, *C.C.P. 527.85* does not permit a court to issue a temporary restraining order or injunction prohibiting speech or other activities that are constitutionally protected or protected by *C.C.P. 527.3* (labor disputes; see text, §313) or other provisions of law. (*C.C.P. 527.85(c)*.) Moreover, the statute may not be construed to expand, diminish, alter, or modify a postsecondary educational institution's duty, if any, to provide a safe environment for students and other persons. (*C.C.P. 527.85(k)*.)

(2) *Restriction on Ownership, etc. of Firearms.* A person subject to a protective order under *C.C.P. 527.85* may not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the order is in effect, and a person who does so is punishable under P.C. 12021(g) (2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §180). The court must order the person to relinquish any firearms he or she owns or possesses. (*C.C.P. 527.85(i)*.)

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l-1. (New) Private Postsecondary Educational Institution Violence and Threats.

2. (New) Definitions.

6 Witkin Cal. Proc. Prov Rem § 330B

[§ 330B] (New) Definitions.

(1) *Chief Administrative Officer*. The "chief administrative officer" is the principal, president, or highest ranking official of the institution. (C.C.P. 527.85(b)(1).)

(2) *Course of Conduct*. "Course of conduct" means a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." It may include (a) following or stalking a student to or from school; (b) entering a school campus or facility; (c) following a student during school hours; (d) making telephone calls or sending correspondence to a student by any means including public or private mail, interoffice mail, fax, or e-mail. (C.C.P. 527.85(b)(2).)

(3) *Credible Threat of Violence*. "Credible threat of violence" is a knowing and wilful statement or course of conduct that would put a reasonable person in fear for his or her safety, or that of his or her immediate family, and that serves no legitimate purpose. (C.C.P. 527.85(b)(3).)

(4) *Postsecondary Educational Institution*. A "postsecondary educational institution" is a private institution of vocational, professional, or postsecondary education. (C.C.P. 527.85(b)(4).)

(5) *Student*. A "student" is an adult who is currently enrolled in or applying for admission to a postsecondary educational institution. (C.C.P. 527.85(b)(5).)

(6) *Unlawful Violence*. "Unlawful violence" means an assault or battery, or stalking in violation of P.C. 646.9 (see 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §294 et seq.), but does not include lawful acts of self-defense or defense of others. (C.C.P. 527.85(b)(6).)

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3. (New) Judicial Council Forms.

6 *Witkin Cal. Proc. Prov Rem § 330C*

[§ 330C] (New) Judicial Council Forms.

The Judicial Council must develop forms, instructions, and rules for scheduling hearings and other procedures under the statute. The petition and response forms must be simple and concise, and their use is mandatory. (*C.C.P. 527.85(l).*)

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4. (New) Petition, Service, and Response.

6 *Witkin Cal. Proc. Prov Rem § 330D*

[§ 330D] (New) Petition, Service, and Response.

(1) *Temporary Restraining Order*. On filing a petition for an injunction under *C.C.P. 527.85*, the plaintiff may obtain a temporary restraining order in accordance with *C.C.P. 527(a)* if the plaintiff also files an affidavit that shows, to the court's satisfaction, reasonable proof that a student has suffered "a credible threat of violence made off the school campus or facility by the defendant, and that great or irreparable harm would result to the student." The order remains in effect for up to 15 days, at the court's discretion, unless modified or terminated by the court. In the court's discretion, and on a showing of good cause, a temporary restraining order or injunction issued under *C.C.P. 527.85* may include other named family or household members residing with the student, or other students at the campus or facility. (*C.C.P. 527.85(d).*)

A temporary restraining order or injunction relating to harassment or domestic violence issued under *C.C.P. 527.85* must be issued on forms adopted by the Judicial Council and approved by the Department of Justice under *Family C. 6380(i)*, although orders not issued on those forms are not unenforceable for that reason alone. (*C.C.P. 527.85(m).*) Information on a temporary restraining order or injunction relating to harassment or domestic violence issued by a court under *C.C.P. 527.85* must be transmitted to the Department of Justice in accordance with *Family C. 6380(b)*. (*C.C.P. 527.85(n).*)

(2) *No Filing Fee*. There is no filing fee for a petition alleging that a person has threatened violence against a student of the petitioner, or stalked the student, or acted or spoken in any other manner that has placed the student in reasonable fear of violence, and that seeks a protective or restraining order or injunction restraining stalking or future threats of violence, in an action under *C.C.P. 527.85*. No fee is required for a subpoena filed in connection with a petition alleging these acts, or for filing a response to the petition. (*C.C.P. 527.85(o).*)

(3) *Service on Defendant*. The defendant must be personally served with a copy of the petition for an injunction, the temporary restraining order, if any, and a notice of hearing of the petition. Service must be made at least 5 days before the hearing. The time for service on the defendant may be shortened for good cause on motion of the plaintiff or on the court's own motion. (*C.C.P. 527.85(g).*)

(4) *Response by Defendant.* The defendant may file a response that "explains, excuses, justifies, or denies" the alleged credible threats of violence or may file a cross-complaint. (*C.C.P.* 527.85(e).)

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5. (New) Hearing, Determination, and Enforcement.

6 *Witkin Cal. Proc. Prov Rem § 330E*

[§ 330E] (New) Hearing, Determination, and Enforcement.

(1) *Hearing and Determination.* Within 15 days after the petition is filed, a hearing must be held. The judge must receive relevant testimony and may make an independent inquiry. If the defendant is a current student of the entity seeking the injunction, the judge must receive evidence of the postsecondary educational institution's retention, termination, or other discipline of the defendant. If the judge finds that there is clear and convincing evidence that the defendant made a credible threat of violence off the school campus or facility, the judge must issue the injunction. (*C.C.P. 527.85(e).*) (On clear and convincing evidence, see *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §38.*)

Neither party is precluded from being represented by private counsel or from self-representation. (*C.C.P. 527.85(f).*)

(2) *Duration of Injunction.* An injunction may be granted for not more than 3 years. The plaintiff may apply to renew the injunction by filing a new petition within 3 months before the injunction expires. (*C.C.P. 527.85(e).*)

(3) *Enforcement.* The court must order the plaintiff or the plaintiff's attorney to deliver a copy of a temporary restraining order or injunction, or a modification or termination of these orders, by the close of the business day on which it is granted, "to the law enforcement agencies within the court's discretion" requested by the plaintiff. Each agency must make available information to law enforcement officers responding to the scene of reported unlawful violence or a credible threat of violence about the existence and current status of these orders. (*C.C.P. 527.85(h)(1).*)

At the request of the plaintiff, an order issued under *C.C.P. 527.85* must be served on the defendant, whether or not he or she has been taken into custody, by a law enforcement officer who is present at the scene of reported unlawful violence or a credible threat of violence involving the parties. The plaintiff must provide the officer with an endorsed copy of the order and proof of service, which the officer must complete and send to the issuing court. (*C.C.P. 527.85(h)(2).*) On receiving information at the scene that a protective order has been issued under *C.C.P. 527.85*, or that a person who has been taken into custody is the subject of an order, a law enforcement officer, if the plaintiff or the

protected person cannot produce an endorsed copy of the order, must immediately attempt to verify its existence. (*C.C.P. 527.85(h)(3).*)

If the officer determines that a protective order has been issued, but not served, the officer must immediately notify the defendant of its terms, which notification constitutes service of the order, and obtain the defendant's address. The officer must at that time also enforce the order, but may not arrest or take the defendant into custody for acts in violation of the order that were committed before the verbal notice of the terms and conditions of the order. The officer's verbal notice also constitutes sufficient notice for purposes of *C.C.P. 527.85*, *P.C. 273.6* (violation of order to prevent harassment, disturbing peace, or violence; *1 Cal. Crim. Law (3d), Crimes Against the Person*, §63), and *P.C. 12021(g)* (acquisition of firearm by subject of restraining order or injunction; *2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare*, §180). The plaintiff must mail an endorsed copy of the order to the defendant's mailing address provided to the law enforcement officer within 1 business day of the reported incident at which verbal notice was provided. (*C.C.P. 527.85(h)(4).*)

Intentional disobedience of a temporary restraining order or injunction is punishable under *P.C. 273.6*. (*C.C.P. 527.85(j).*) (On punishment of violation of injunction as contempt, see text, §396.)

(4) *No Fee*. Subject to *Govt.C. 6103.2(b)(4)* (payment of fees for official services of sheriff or marshal), no fee may be charged for the service of a temporary restraining order or injunction to be issued pursuant to *C.C.P. 527.85*, if the order or injunction is (a) based on stalking under *P.C. 646.9* (see *1 Cal. Crim. Law (3d), Crimes Against the Person*, §294 et seq.), or (b) based on a credible threat of violence. (*C.C.P. 527.85(p)(1).*)

The Judicial Council must prepare and develop forms for applicants who wish to avail themselves of the services described in *C.C.P. 527.85(p)*. (*C.C.P. 527.85(p)(2).*)

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