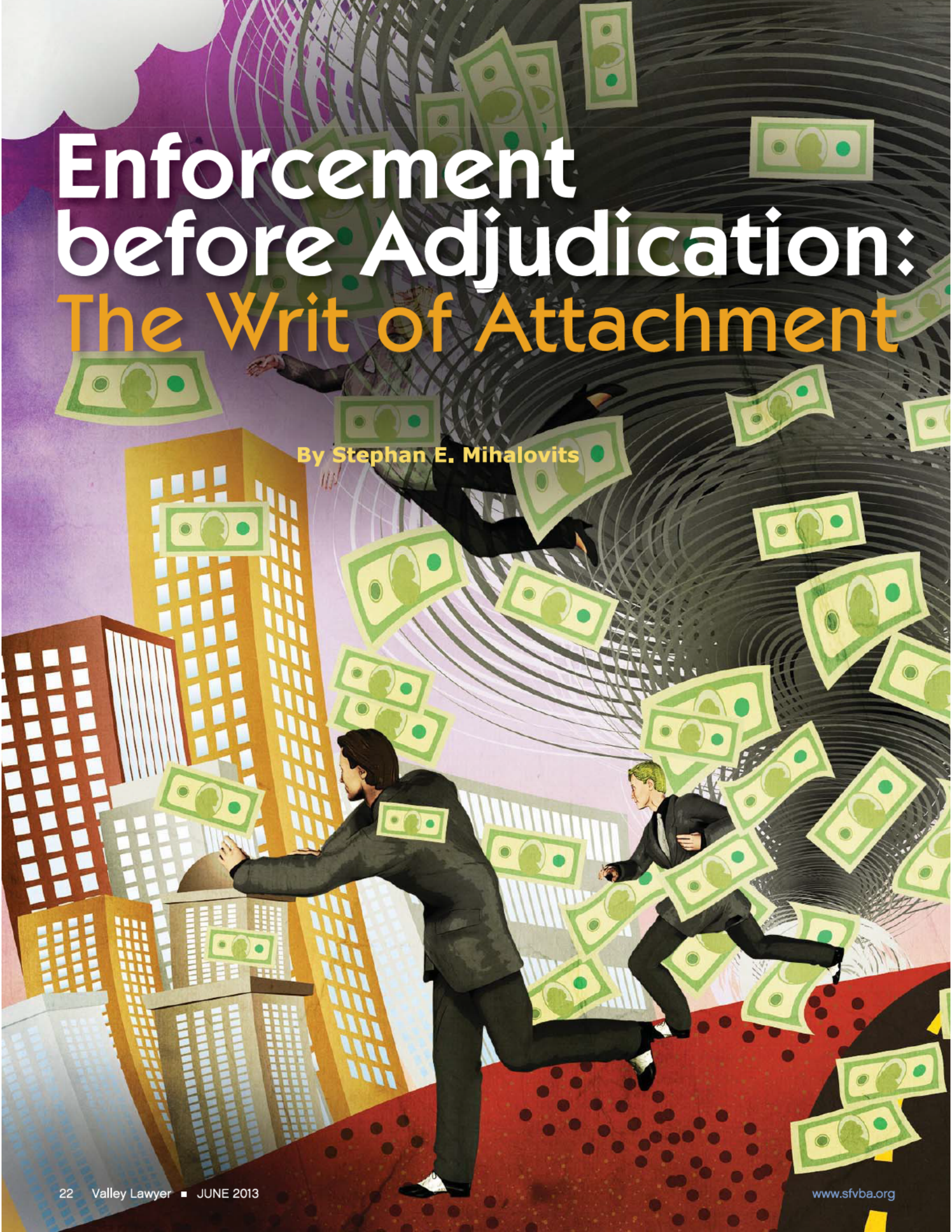
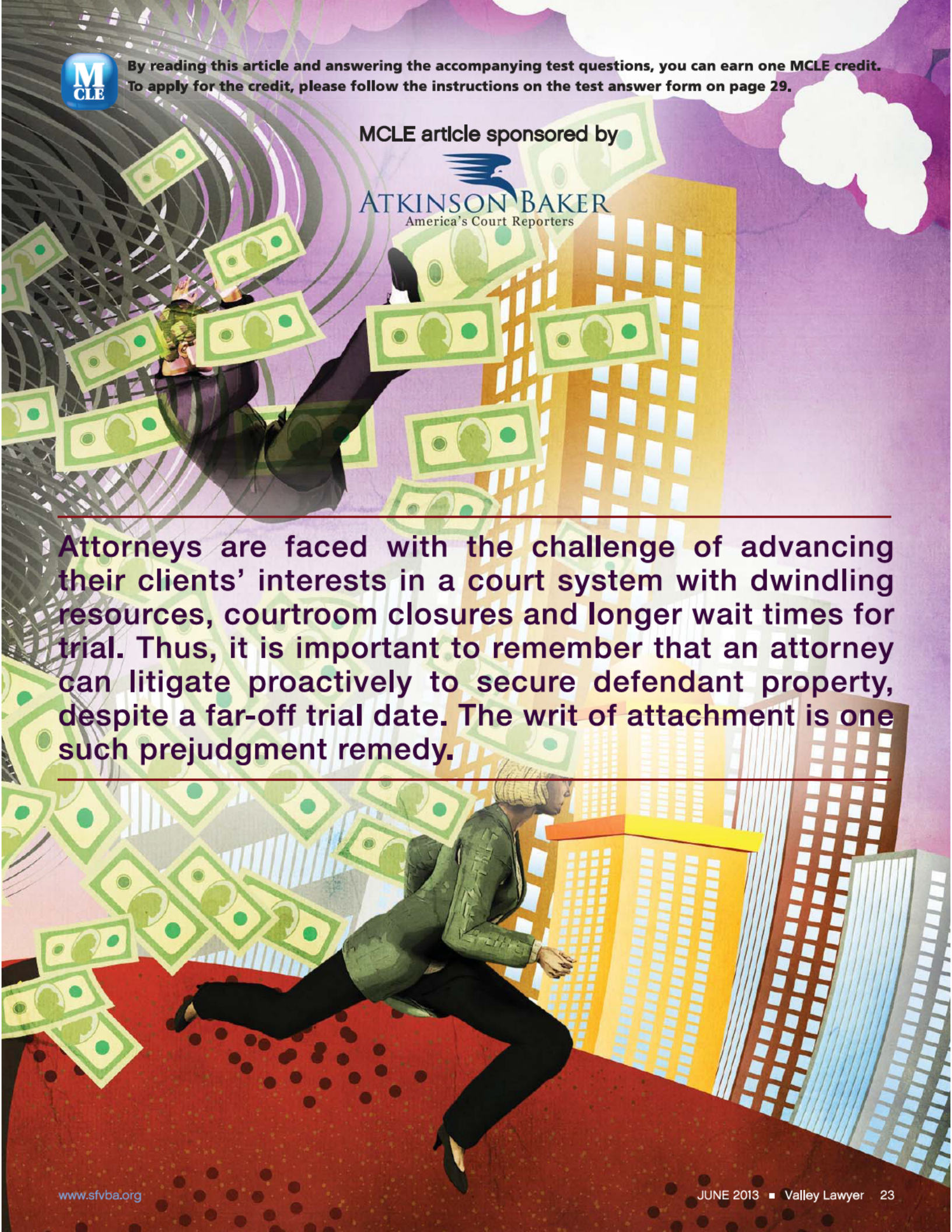
Enforcement before Adjudication: The Writ of Attachment

By Stephan E. Mihalovits





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Attorneys are faced with the challenge of advancing their clients' interests in a court system with dwindling resources, courtroom closures and longer wait times for trial. Thus, it is important to remember that an attorney can litigate proactively to secure defendant property, despite a far-off trial date. The writ of attachment is one such prejudgment remedy.

ALTHOUGH IT MAY SEEM LIKE A burdensome statutory framework used only by high-stakes collection attorneys, any commercial creditor can learn to use the writ of attachment to attach and levy defendant property before trial.

Attachment Law Basics

Attachment is a prejudgment remedy that allows creditors holding unsecured commercial claims (or claims secured only by personal property) to levy on property and create a judicial lien. The plaintiff must first obtain a Right to Attach Order (RTAO or Order), which authorizes the clerk to issue a Writ of Attachment. The purpose of the writ of attachment is to secure property before final adjudication of a claim and to secure plaintiff's position vis-à-vis other creditors.

A writ of attachment levied on property creates a judicial lien that protects plaintiff's priority, allowing for the plaintiff to levy on the property attached, usually by the sheriff. The statutory framework, beginning at C.C.P. §481.010, provides the rules of engagement. The statutes are construed strictly, so attorneys must take care to diligently follow the law's procedures.

Attachment may only issue if there is a lawsuit on file or arbitration proceedings have begun. The claim must be for money based on an express or implied contract; of a fixed amount more than $500, excluding costs, interest and attorney's fees; either unsecured or secured by personal property; and a commercial claim.[1]

The claim can either be on a written or oral contract, or an implied contract, which could include a quasi-contract action like fraud or conversion. The most common underlying claims are common counts such as open book account and account stated. Attachment may issue on a contract claim even if the plaintiff is also separately seeking equitable relief. The claim (or aggregated claims) has to be for money of at least $500, excluding any fees and costs.

Recoverable costs include attorney's fees where authorized, costs of service and expenses of attachment such as keeper fees or bank levy fees. Prejudgment interest may also be attached. If the contract specifies a legal interest rate, that rate may be used for calculating the attachment until a judgment supersedes the previous rate. To obtain allowable attorney's fees and court costs, the writ application should specifically include an estimate for both.

The amount sought to be attached must be measurable from the contract itself, meaning the debt should have resulted from the conduct that was the basis of the contract. For instance, in the case of a common count, a claim may lie after a debtor breaks a contractual promise to pay for goods or services previously received. The amount claimed must be fixed or readily attainable; it cannot be for an unliquidated amount.

Limitations

The claim must be unsecured or secured by personal property, and attachment cannot issue on claims secured by real property, except for some limited exceptions. For example, attachment may issue even if the claim is secured by real property, if through no fault of the creditor, the real property security has either become valueless or decreased in value to less than the amount owed.

These restrictions on securing real property stem from the fact that property will not be available for attachment and/or seizure if another creditor already has a pre-existing interest. Thus, attachment is most likely not available if the property is already subject to judicial or tax liens. Attachment is not available in small claims court.

Before obtaining a writ of attachment, plaintiff must post an undertaking (bond). The bond secures an amount for potential damages defendant may obtain if the attachment is later found to be wrongful. The statutory minimum amount for the bond is $10,000 but may be increased by a court upon a showing by the defendant that $10,000 is inadequate.

A writ of attachment has an effective life for levying purposes of 60 days. If the plaintiff wishes to continue levying on the defendant's property, the plaintiff must obtain an additional writ. Multiple writs may be issued by the court to affect property in different counties or different types of property. Separate from the levying aspect of the writ, the lien aspect of the writ lasts three years after issuance of the writ, and this term can be tolled by a defendant's bankruptcy.

A number of exemptions apply that may prevent a plaintiff from attaching property belonging to individual defendants. These stem from the inherent conflict between due process concerns (attaching or seizing someone's property without sufficient due process) and the writ as an effective tool to secure a plaintiff's future recovery. Notably, business defendants do not enjoy these exemptions. Nearly all business property is subject to attachment as long as a method of levy exists as to that type of property.

Commercial Claims and Protections for Individual Debtors

A writ of attachment is an effective litigation tool by professionals against commercial clients. The claim must be either against a business, or if the claim is against a natural person, the claim must have arisen out of the person's conduct of a "trade, business or profession."[2] For example, a lawyer who represented a business against a competitor can most likely seek a writ of attachment against that business. However, family law attorneys are often precluded from seeking writs of attachment against former clients for unpaid fees because dissolution of marriage is usually not a matter an individual undertakes as part of his or her trade, business or profession.

Most significantly for claims against an individual, a personal use exception applies. Attachment may not issue on a claim against an individual for the furnishing of services or a money loan, if the money, goods or services were used primarily for personal, family or household purposes. This personal use exception applies to individuals and not to corporations or partnerships.

Before obtaining the writ, the plaintiff must first post an undertaking to cover damages in the event of a wrongful attachment. The flat amount for undertakings to obtain

a writ of attachment or temporary protective order (see below) is $10,000 per C.C.P. §489.220(a). Within 10 days of receiving service of a copy of the bond, a defendant may move the court for an order increasing the bond if the defendant can show its damages would be larger than the amount posted.

Practice Tip: For attorneys who plan ahead, the initial engagement agreement can provide evidence to substantiate a later writ of attachment application should a fee dispute arise. Where an attorney engages to represent both an individual and the individual's business, the attorney should have the client sign both on behalf of himself and the business. If a collection action is later necessary, the signature on behalf of the company may help show attachment should issue, because the company engaged an attorney for a commercial matter. The individual's signature and personal liability may not be helpful during attachment procedure if the services were for personal use, but during judgment collection, any property still owing could be levied and seized by enforcement against the individual's assets.

Ex Parte Writ of Attachment and Temporary Protective Order

If the plaintiff can show "great or irreparable injury" would result if issuance of the RTAO and writ of attachment was postponed until a noticed hearing, the writ can issue on an ex parte basis. A showing of great or irreparable injury means the plaintiff has shown "there is a danger that the property sought to be attached would be concealed, substantively impaired in value or otherwise made unavailable to levy" if attachment and/or levy was delayed until after a noticed hearing.[3] Evidence could be deemed sufficient by showing proof of past concealment, dishonesty or failure to meet previous obligations. A plaintiff could also succeed by showing the defendant is insolvent and generally has failed to pay his undisputed debts as they become due.[4] To provide notice, the plaintiff must notify the defendant at least before 10:00 a.m. the day preceding the *ex parte* hearing date.

When filing *ex parte*, consider also applying for a temporary protective order (TPO) at the same time. A TPO is an immediate means of relief, similar to a temporary restraining order. Where the writ of attachment seeks to attach property so it can be seized by the sheriff or encumbered by a judicial lien, the TPO commands the defendant not to dispose of or alter the property until there is a noticed hearing on the writ application. An *ex parte* writ is preferable, because a sheriff holding property is more preferable than the defendant promising not to get rid of it. But a TPO has a higher chance of success.

Practice Tip: Applying for a TPO at the same time as any writ of attachment application is a good idea, whether noticed or *ex parte*. The TPO commands the defendant not to dispose of property that the plaintiff will likely seek to attach. Due to the judicial preference of prohibitory versus mandatory injunctions, a court will more likely grant a TPO than an *ex parte* writ of attachment. The TPO commands the defendant not to dispose of property before the writ hearing.

Support the Application with Detailed Declarations

To succeed on the writ application, the plaintiff has the burden to show the "probable validity" of its underlying claim, i.e., the plaintiff must show it is more likely than not that the plaintiff will obtain judgment against the defendant.[5] It is imperative for the plaintiff's attorney to act promptly, beginning with marshaling documents and witness statements.

The most effective way for a plaintiff to prove his or her case is to support the writ application with detailed declarations from all individuals with personal knowledge. For professionals seeking writs against former clients, this means having the responsible accountant or attorney declare in detail the circumstances and formation of the underlying agreement; the conduct underlying the breach by the debtor; and subsequent damages suffered by the plaintiff creditor.

Detailed declarations will not only satisfy the statute by showing probable validity of the claim, but will also show the court the justice of the plaintiff's claim. A declaration gives the plaintiff a chance to show the court he or she worked hard to deserve the amounts sued upon.

Although professionals often bristle at having to explain the legitimacy of their bills, the information in

the declaration can be the linchpin for a successful writ application.

For example, if an accountant sues for $200,000+ in unpaid bills, the court will want to see detailed descriptions of the work. The declaration(s) should display personal knowledge showing a familiarity with any background information or small problems that arose and were addressed. The declaration should be well-supported with non-privileged documents. The court will not be satisfied with conclusory statements without supporting facts.

Privilege Alert: Where an attorney brings a claim against a former client for unpaid fees, the attorney must remember not to unnecessarily divulge confidential attorney-client communications when describing the detailed work performed. No matter the fee dispute, the attorney still has an ongoing duty not to violate the privilege, unless waived by the client or unless the communications directly concern the attorney's claim for fees. To fall within the exception, the attorney should only divulge the communications necessary to prove its case, e.g., it may be appropriate to divulge an email from the client where the only communication is an acknowledgment of the debt and promise to pay.

The application need not specify the exact property the plaintiff will seek to attach. Rather, it is sufficient to seek to attach "all property that is subject to attachment, where a method of levy is available." The following methods of levy are explicitly allowed by the Code of Civil Procedure: levying against real property, personal property, money, personal property in the possession of third parties, business equipment, vehicles and vessels, title documents, deposit accounts and accounts receivable (referred to as general intangibles).[6]

Beneficial For Professionals

The attachment law is a benefit for attorneys, accountants and other professionals who service businesses. A claim for unpaid fees against a commercial client is a claim upon which a writ of attachment may issue. However, the filing of a complaint is a prerequisite to seeking attachment. If an attorney litigates a fee dispute in arbitration, attachment is not available.[7]

The case of *Loeb and Loeb v. Beverly Glen Music, Inc.* is instructive.[8] An attorney sought a writ of attachment against a former client who failed to pay legal bills. The court found the application provided sufficient evidence for the writ because it included a declaration by the responsible attorney about the legal services performed and copies of the bills.[9] The attorney declared sending monthly bills per their agreement, with each bill containing detailed descriptions of the services. The client did not dispute the bills. The court affirmed that the attorney was entitled to a writ of attachment against the former client.[10]

Weighing the Risks

Before embarking on a potentially costly writ application, a creditor should first carefully weigh the risks. First, consider whether the defendant has any attachable assets. Corporate

property is the most simple to attach. If the defendant is a corporation, virtually all its property is subject to attachment and not exempt.

Once the writ is obtained, a plaintiff can use civil discovery procedures to search for defendant's assets. Attaching property will show the defendant the plaintiff has the power to literally take away his personal property. A plaintiff can attach ubiquitous business property, such as computers, furniture, artwork, even office supplies and plants.

Still, attaching personal property can also have the drawback of incurring fees and costs for levy and storage. Plaintiff's attorney's fees will likely be larger due to the writ litigation. The levying officer must be compensated in order to seize and hold property. Depending on how long the attachment occurs before trial, holding fees can be significant.

Liability Considerations

Due to narrow statutory requirements, a writ of attachment is only suitable for some causes of action. A plaintiff may be liable to the defending party for wrongful attachment where the plaintiff actually levies on defendant's property under a writ of attachment, and attachment is not authorized in the situation.[11]

For example, although the defendant may be a commercial entity, attachment is not authorized if the defendant used the goods or services for personal or family use. This is a potentially devastating exception that could chill plaintiffs from proceeding for fear of liability. Where a defendant uses goods for personal use, and the plaintiff attaches defendant's property, plaintiff would be liable for wrongful attachment.

One can imagine the potentially silencing effect of this possible liability. Wherever a plaintiff sues a defendant as an individual and alter ego of a business, a plaintiff may be hesitant to proceed for fear the defendant was actually purchasing the goods or services for personal or family use. However, the law also provides a necessary exception. Plaintiffs who reasonably believe the goods were provided for a commercial purpose will not be liable for wrongful attachment.[12]

For example, suppose an attorney has a potential client business owner who is faced with defending a lawsuit. A competitor sues the client and the corporation. Allegations are against both the corporation and the individual. The business owner enters into a retainer agreement with an attorney to represent her company and herself. The attorney represents both and provides good service. Later on, there is a fee dispute. The attorney should argue services were provided in a commercial context to qualify for a writ of attachment.

Similarly, it is wrongful to attach pursuant to an *ex parte* writ of attachment property that is exempt from attachment. However, the attachment is not wrongful if the plaintiff reasonably believed the property was not exempt. One protection from liability is to emphasize the direct connection between the goods provided and the defendant's business. Since virtually none of a business' property is exempt, a plaintiff acts reasonably when she seeks to attach any business property.

Wrongful attachment may cause a plaintiff to be liable for all damages proximately caused by the wrongful attachment (including loss of credit and business losses), and all costs and expenses (including attorney's fees) reasonably expended in defeating the attachment.[13] No separate lawsuit is necessary; rather, defendant can proceed by a Motion to Enforce Liability. But if the defendant proceeds by motion, the defendant will be limited only to the amount of the undertaking plaintiff has posted, likely $10,000. A successful defendant could recover an amount up to and including this bond.

Potential plaintiffs should also consider that a defendant who files for bankruptcy or makes a general assignment for the benefit of creditors may be immune from attachment. If the attachment lien was obtained within 90 days of the bankruptcy filing or assignment, the attachment is automatically terminated.[14] Still, the extinguishing is not automatic. The trustee must take steps to quash the lien by filing a motion. Thus, if a plaintiff believes a bankruptcy filing is imminent, the plaintiff should act promptly to attach property and oppose any motion to extinguish the writ.

For all the risks and concerns, the writ of attachment is an effective prejudgment remedy, because it allows a creditor a prompt way to seize property or create liens long before final adjudication of the merits. Where appropriate, the writ can provide an avenue by which a litigating plaintiff can start enforcing its future judgment immediately. This can provide leverage to break litigation cases wide open and settle on advantageous terms for the plaintiff.

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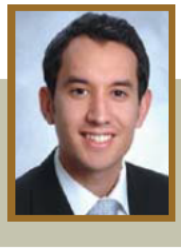
[1] Cal. Civ. Proc. sec. 483.010.
[2] C.C.P. 483.010(c).
[3] C.C.P. sec 485.010(b).
[4] Idem.
[5] C.C.P. sec. 481.090.
[6] See sections 481.225 – 488.470. To learn more about methods of levy and fee deposits required for each in Los Angeles County, visit the L.A. County Sheriff's Department website at civil.lasd.org and click "Civil Process."
[7] C.C.P. §484.010.
[8] *Loeb and Loeb v. Beverly Glen Music, Inc.* (1985) 166 C.A.3d 1110.
[9] Idem at 1118-1119.
[10] Idem.
[11] C.C.P. sec. 490.010(a).
[12] C.C.P. sec. 490.010(a)(1)-(2).
[13] C.C.P. sec. 490.020(a).
[14] C.C.P. sec. 493.030(a)(b).



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Test No. 57

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. A writ of attachment is used to recover property after a judgment has been entered.
   ❑ True ❑ False

2. Attachment is a prejudgment remedy that allows creditors holding unsecured commercial claims or claims secured only by personal property to levy on defendant debtor property.
   ❑ True ❑ False

3. A plaintiff can seek a writ of attachment even before filing a lawsuit or commencing arbitration.
   ❑ True ❑ False

4. A writ of attachment may issue if the claim is for exactly $500, excluding fees and costs.
   ❑ True ❑ False

5. A plaintiff can typically attach any property belonging to an individual.
   ❑ True ❑ False

6. If the plaintiff can show "great or irreparable injury" would result if issuance of the writ of attachment was postponed until a noticed hearing, the writ can issue on an *ex parte* basis.
   ❑ True ❑ False

7. A writ of attachment has an effective life for levying purposes of 90 days.
   ❑ True ❑ False

8. Evidence in support of an *ex parte* writ application could be deemed sufficient by showing proof of past concealment, dishonesty or failure to meet previous obligations.
   ❑ True ❑ False

9. A plaintiff may only seek a temporary protective order on a noticed hearing.
   ❑ True ❑ False

10. "Probable validity" means the plaintiff must show it is *more likely than not* that the plaintiff will obtain judgment against the defendant.
    ❑ True ❑ False

11. If the claim is against a natural person, in order to qualify for a writ of attachment, the claim must have arisen out of the defendant person's conduct of a "trade, business or profession."
    ❑ True ❑ False

12. A former client waives the attorney-client privilege once the client breaches his or her agreement to pay the attorney's unpaid bills.
    ❑ True ❑ False

13. The writ application need not specify the exact property the plaintiff will seek to attach.
    ❑ True ❑ False

14. After seizing property pursuant to a writ of attachment, the sheriff will deliver the property to the plaintiff.
    ❑ True ❑ False

15. A plaintiff who reasonably believes he provided goods to the defendant for a commercial purpose will not be liable for wrongful attachment.
    ❑ True ❑ False

16. A plaintiff may be liable to the defendant for wrongful attachment where the plaintiff actually levies on defendant's property under a writ of attachment and attachment is not authorized in the situation.
    ❑ True ❑ False

17. Wrongful attachment may cause a plaintiff to be liable for all damages proximately caused by the wrongful attachment (including loss of credit and business losses), and all costs and expenses (including attorney's fees) reasonably expended in defeating the attachment.
    ❑ True ❑ False

18. If an attachment lien was obtained within 30 days of a defendant's bankruptcy filing or assignment for the benefit of creditors, the attachment is automatically terminated.
    ❑ True ❑ False

19. A claim by an accountant against a business client for unpaid fees would be a claim for which a writ of attachment is likely available.
    ❑ True ❑ False

20. It may be appropriate for an attorney to divulge an email from the defendant client where the only communication is an acknowledgment of the debt and promise to pay.
    ❑ True ❑ False

MCLE Answer Sheet No. 57

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1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

San Fernando Valley Bar Association
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Dear SFVBA Members,

The theme of the June issue of *Valley Lawyer* magazine is our chaotic financial environment, with articles on bankruptcy, attachments, assignments for benefit of creditors, abstracts of judgment and credit harm. Several weeks ago our cover art was designed -- dramatic imagery of a metaphoric money-storm in a metropolitan area.

It is only a sad coincidence that our cover evokes imagery of the recent tragic tornado near Oklahoma City. I want to let you know before you view the magazine that our Bar Association and editorial staff were in no way making light of the tragedy. The June *Valley Lawyer* was conceived, designed and printed before this recent devastation.

Speaking for all members of the Valley legal community, and the professional staff of our Bar Association, our heartfelt sympathies and prayers are with the people of Oklahoma and especially the victims and their families.

Sincerely,

David Gurnick
President
San Fernando Valley Bar Association